

**Administrative Tribunal**

Distr.: Limited
30 September 2005

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1239

Case No. 1323

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, Vice-President, presiding; Ms. Brigitte Stern; Mr. Goh Joon Seng;

Whereas, on 26 November 2003, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP) filed an Application requesting the Tribunal to:

- “1. Order the nullification/rescission of the ... Secretary-General’s decision ... to terminate [the Applicant’s] permanent appointment ... before a case pending [with] the UNDP [Joint Review Board (JRB)] since 1999 was concluded.
2. (i) Order the ... Secretary-General to unconditionally reinstate the Applicant effective 1 October 2001 and that the Applicant be deemed a permanent appointee with all attendant rights, privileges and benefits; and
(ii) Order that the Applicant be paid salary from 1 October 2001 at current rate up to the date of the determination of this case by the Administrative Tribunal.
3. (i) Order that the Respondent expunges all [defamatory] material from the Applicant’s files; and
(ii) Order that all down graded ratings in the Applicant’s Performance Appraisal Reports (PARs) be revised upwards ... to reflect the Applicant’s actual performance as was rated by her Supervisors; and
(iii) Order the Respondent to issue a public apology in writing to the Applicant ...

4. Order the ... Secretary-General to pay the Applicant an amount of US \$500,000 ... for Enhanced and Exemplary damages ...
...
5. (i) Order the ... Secretary-General to take punitive action [against] those UNDP Officers who subjected the Applicant to this torturous process intended to get rid of her without the Respondent following the ... Staff [Regulations and Rules].
(ii) That ... all discriminatory and unlawful acts, abuses and misuse of the Applicant by the Respondent be thoroughly investigated and reported to the General Assembly ...
6. That in the event that the Secretary-General declines to reinstate the Applicant, the Applicant be given:
 - (a) A Clean Certificate of Service; and
 - (b) Paid damages in the amount requested under section 4 above; and
 - (c) Be paid amounts she would have earned through to the date she would have retired.”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 15 March 2004 and periodically thereafter until 31 July 2004;

Whereas the Respondent filed his Answer on 6 July 2004;

Whereas the Applicant filed Written Observations on 25 October 2004 and an additional communication on 10 May 2005;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

“II. Facts of the case

...

The [Applicant] joined [UNDP], Nairobi effective 1 October 1981 on a fixed-term contract at the GS-6 level as an Accounts Clerk.

... [S]he was granted ... a permanent appointment effective 1 April 1986.

In the course of the mid 1990s, the [Applicant] whose performance up to then had been largely rated positively, started to receive negative performance ratings from the UNDP Management Review Group (MRG) which has the final say regarding performance ratings. [Her supervisor's ratings ranging from '2' to '3' were downgraded by the MRG several times, between 1994 and 1999.]

By letter dated 31 December 1999, the UNDP Resident Representative [informed] the [Applicant of his intention to present to a JRB a proposal for termination of] her permanent appointment [for] unsatisfactory service, [and

on] 7 June 2000, [he notified the Applicant] of ... the composition of the Panel.

...

By letter dated 29 January 2001, she was notified by the UNDP Resident Representative of UNDP's preliminary intent to abolish the post that she encumbered, under the UNDP Country Office cost reduction exercise.

...

[On 5 February 2001,] UNDP ... [advised the Applicant that a re-constituted JRB] was to review ... [UNDP's] proposal to terminate [her] permanent appointment.

By letter dated 6 February 2001, [the Applicant] requested the UNDP Administrator to intervene in her pending termination case before the [JRB], with a view to having it finalized [and, on 4 May 2001, she] submitted her comments on the UNDP proposal ...

...

On 25 May 2001 ... the Chairperson of the JRB [informed UNDP] that the JRB had partially reviewed the case and ... had come to the conclusion that the case was more of an attitude/behavioural issue rather than professional under-performance. Because of this, he suggested ..., if procedurally possible, to pursue an alternative to the full JRB proceedings.

[On 15 June 2001, the UNDP Resident Representative advised the Applicant of the imminent termination of her appointment within three months, as part of the UNDP Country Office cost reduction exercise. The Applicant was informed that she was expected to submit her name for any available and suitable posts and that UNDP would be helping her to identify possible opportunities.]

[Following a request for comments on 22 June 2001], the Senior Legal Adviser, [Office of Legal and Procurement Services (OLPS),] UNDP, responded by e-mail dated 5 July 2001, giving her legal assessment of the case. She recognized that there were multiple problems with the non-finalization of the JRB review and referred to the Tribunal's jurisprudence that if a proceeding is brought against a staff member, he or she is entitled to have those proceedings brought to a conclusion and to hear the results. She suggested that it was imperative to complete the JRB process quickly and follow the procedures as set out in the [Personnel Manual] or else risk having to extend the [Applicant's] contract beyond 30 September 2001, until the matter was finalized.

[Also on] 5 July 2001, the [Applicant requested] administrative review ... of UNDP's proposal to terminate her permanent appointment for unsatisfactory services and the decision to terminate her appointment on the basis of the UNDP's Country Office cost reduction exercise.

[On 17 August 2001, the Applicant submitted an appeal to the JAB in Nairobi, requesting suspension of action on the administrative decision to terminate her services with UNDP.]

[On 13 September 2001, the Applicant] was advised that her permanent appointment would be terminated on 30 September 2001 and this action was not related to the JRB case pending since 31 December 1999, but

rather to the cost reduction exercise that was being completed by UNDP. ... The JRB deliberations, the [Applicant] was informed, were now considered overtaken by the budget reduction exercise in which her post was being abolished [and therefore, UNDP 'was considering to withdrawing the recommendation for termination for unsatisfactory services lodged with the JRB'. Thus, the Applicant could benefit] from the separation package being offered to all concerned staff in the context of the budget reduction exercise.

On 18 September 2001, the JAB held a hearing [on the Applicant's] request for suspension of action [which it rejected]."

On 3 October 2001, the Under-Secretary-General for Management advised the Applicant that the Secretary-General had decided not to grant her request for suspension of action.

On 31 October 2001, the Director, OLPS, UNDP, wrote to a law firm representing the Applicant stating, inter alia, that her contract "was terminated on 30 September for unsatisfactory services".

On 16 November 2001, the Applicant lodged an appeal with the JAB on the merits.

On 16 January 2002, the Assistant Administrator and Director, Bureau of Management, UNDP, wrote to the Applicant, inter alia, clarifying that she was not terminated for unsatisfactory services but rather due to the abolition of her post. He further stated that consideration of her case by the JRB was "overtaken by the budget reduction exercise" and that her case had been withdrawn from the JRB to enable her to benefit from greater indemnity.

The JAB adopted its report on 21 July 2003. Its considerations and recommendations read, in part, as follows:

"VII. Considerations:

... [T]he Appellant has submitted that UNDP has used the restructuring exercise as an expedient to 'get rid of her' after its attempt to do so on the basis of the JRB proceedings had failed. The Panel examined this contention but is of the opinion that the evidence in the file does not support that conclusion.

The documentation submitted by the Respondent, in particular the task force report regarding the restructuring exercise of 11 December 2000, clearly shows that the process implemented during the downsizing of UNDP Kenya, was undertaken in a fully transparent manner with the full participation of the Staff Union. The documentation also suggests ... that the Appellant's post was not arbitrarily singled out, but was only one of sixteen posts that were abolished. Furthermore, the Panel could not find any evidence that the Appellant was treated differently from the other eleven staff members whose contracts were terminated ...

The important question that the Panel also examined, was whether UNDP had respected the provisions of [staff rule] 109.1(c)(i) ...

The Panel found no evidence of the existence of a suitable position on which the Appellant could have been placed in preference to a staff member with a fixed-term contract. ... [T]he only other Programme Assistant position that was retained in UNDP ... remained occupied by another permanent staff member ... UNDP's decision to terminate the staff member's contract did not violate the Appellant's rights under [staff rule] 109.1(c)(i). Consequently, her plea to be reinstated cannot be successful.

However, the JAB takes issue with the way in which the JRB proceedings were handled. While the Panel has no doubt that the JRB proceedings have been overtaken by the events surrounding the restructuring exercise and does not agree with the Appellant that the restructuring exercise was an expedient to get rid of her by way of a different method, it is indisputable that the JRB proceedings should have been finalized expeditiously and since this did not happen, the Respondent is at fault. ... For this serious violation of her rights, the Appellant deserves adequate compensation.

VIII. *Recommendations:*

Majority Recommendation:

The majority of the Panel recommends to the Secretary-General that:

- 1. The Appellant be paid nine months net base salary compensation.**
- 2. All other pleas be rejected.**

Minority Recommendation of the member elected by the Staff Union:

- 1. The Appellant be paid at least nine months net base salary compensation.**
- 2. All other pleas be rejected."**

On 10 September 2003, the Officer-in-Charge, Department of Management, transmitted a copy of the report to the Applicant and informed her that the Secretary-General accepted the reasoning behind and the conclusions of the JAB and, accordingly, had decided to accept the recommendation of the majority of the JAB and to award her nine months' net base salary at the rate at the time of her separation.

On 26 November 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB erred in not looking at the entire dispute but rather, treating the JRB proceedings as if they had nothing to do with the abolition of the Applicant's post. The Applicant did not contest the cost reduction exercise per se but only as far as it was used to "illegally overturn" the pending JRB case.
2. The Respondent did not present a legal basis for conducting the two parallel exercises, intended to accomplish the same objective of getting rid of the Applicant. This is illegal and in violation of the Staff Regulations and Rules. The JAB

erred in concluding that the Respondent did not use abolition of the Applicant's post as an expedient way of getting rid of her.

3. The decision is tainted by arbitrariness, prejudice and improper motive and amounts to capriciousness. The Applicant's rights of due process were violated, particularly in the non-conclusion of the JRB proceedings, and additionally, the delays in the case were inordinate.

4. Due to the abolition of her post and as a holder of a permanent appointment, the Applicant was entitled to a comparative appointment within the Organization. However, in view of the "hanging" JRB proceedings, no effort was made to locate such a post for her and the Respondent has not demonstrated that good faith efforts were made to find the Applicant another post. Moreover, prior to the abolition of her post, the Applicant was prevented from accepting jobs outside UNDP, due to the pending JRB case.

5. The compensation recommended by the JAB and awarded by the Respondent is totally inadequate.

Whereas the Respondent's principal contentions are:

1. The abolition of the Applicant's post was a valid exercise of the Secretary-General's authority.

2. There was no prejudice or improper motive behind the decision to abolish the Applicant's post.

3. The issue of the JRB proceedings is moot as the Applicant has been duly compensated for violation of her rights.

The Tribunal, having deliberated from 22 June to 22 July 2005, now pronounces the following Judgement:

I. The Applicant joined UNDP, Nairobi, effective 1 October 1981 on a fixed-term contract at the GS-6 level as an Accounts Clerk. On 1 April 1986, she was granted a permanent appointment.

The Applicant's performance was generally rated positive, however, in the mid-1990s, she started to receive negative performance ratings from the MRG which has the final say regarding performance ratings. The Applicant successfully rebutted the lower ratings several times, however, in December 1999, the UNDP Resident Representative informed the Applicant of his intention to present to a JRB a proposal for termination of her permanent appointment due to unsatisfactory service. In June 2000, the JRB Panel was constituted.

By letter dated 29 January 2001, she was notified by the UNDP Resident Representative of UNDP's preliminary intent to abolish the post that she encumbered, under the UNDP Country Office cost reduction exercise.

In February 2001, the Applicant requested the UNDP Administrator to intervene in her pending termination case before the JRB, with a view to having it finalized. In May 2001, she was advised that the JRB was having difficulties convening due to lack of quorum. On 25 May 2001, however, the Chairperson of the JRB advised UNDP that the JRB had come to the conclusion that the case was more of an attitude/behavioural issue rather than professional under-performance and suggested that an alternative to the full JRB proceedings be pursued.

In June 2001, the UNDP Resident Representative advised the Applicant of the imminent termination of her appointment, as part of the reduction exercise. The Applicant was informed that she was expected to submit her name for any available and suitable posts and that UNDP would be helping her to identify possible opportunities.

On 22 June 2001, comments were sought from OLPS, UNDP, concerning the suggestion of the Chairman of the JRB, that in light of "the perceived weakness of the case and the upcoming separation of [the Applicant], the case be suspended or closed *sine die*". The Senior Legal Adviser, UNDP, responded on 5 July 2001, giving her legal assessment of the case. In sum, she suggested that it was imperative to complete the JRB process quickly and follow the appropriate procedures or else risk having to extend the Applicant's contract beyond 30 September 2001, until the matter was finalized.

On 13 September 2001, the Applicant was advised that her permanent appointment would be terminated on 30 September 2001 and that this action was not related to the JRB case, but rather to the cost reduction exercise. The JRB deliberations were now considered overtaken by the budget reduction exercise and therefore, UNDP "was considering" to withdraw the recommendation for termination for unsatisfactory services lodged with the JRB. The Applicant separated from service on 30 September.

During the JAB proceedings, the Respondent produced documentation showing that the cost reduction exercise was due to serious financial shortfall coinciding with a severe downsizing of staff. The Kenya Country Office was expected to cut costs by 17 per cent, resulting, inter alia, in the abolition of 16 posts, including that of the Applicant. The staff were offered an enhanced separation package, but the Applicant did not apply for same.

II. Essentially, the Applicant's case rests on two main grounds. The first is the Applicant's claim that UNDP used the restructuring exercise as an expedient to "get rid of her" after its attempt to do so on the basis of the JRB proceedings had failed. The second, that UNDP's decision not to conclude the JRB review (because in its view, the JRB proceedings had been overtaken by the events surrounding the cost reduction exercise), violated her rights and left a "black cloud" hanging over her head affecting her future employment.

III. The Tribunal notes that the Respondent has argued that the reduction exercise resulting in the downsizing of the UNDP Kenya Office was undertaken in a fully transparent manner. The Applicant's post was not arbitrarily singled out, but was only one of sixteen posts that were abolished, and, the Applicant was not treated any different than the other eleven staff members whose contracts were terminated. The Applicant was informed of the impending abolition of her post, and asked to put her name forward for suitable available openings and to inquire about separation packages. She was also advised that the intended termination under the cost reduction exercise was not related to the JRB review, the deliberations of which were in any case considered overtaken by said exercise.

IV. The Tribunal finds that the Applicant has not produced evidence that the decision to terminate her services for abolition of post as a result of the restructuring exercise was motivated by prejudice, discrimination or improper motive. It recalls in this regard its jurisprudence that the burden of proving such prejudice or improper motive is on the Applicant (see Judgments No. 834, *Kumar* (1997) and No. 1122, *Lopes Braga* (2003)).

She also does not show that the cost reduction exercise itself was motivated by improper or collateral motives, as the Applicant was not singled out, but one of sixteen staff members whose posts were affected. Finally, the Tribunal agrees with the JAB that the Respondent fulfilled his obligations under staff rule 109.1(c)(i), which stipulates that, if the necessities of the service require abolition of a post or reduction of the staff, staff members with permanent appointments shall be retained in preference to those on other types of appointments, subject to the availability of suitable posts in which their services can be effectively utilized. The contracts of another eleven staff members, nine of whom were permanent like the Applicant, were also terminated. This makes it very unlikely that there were available suitable posts for which the Applicant could be considered. Moreover, the record does not show that she applied for any such

posts. The argument that she could not do so because of the circumstances of the unfinished JRB review must be rejected.

V. At the same time, however, the Tribunal notes the legal assessment of the case given by the Senior Legal Adviser, OLPS, UNDP, in her e-mail of 5 July 2001 addressed to the Deputy Resident Representative, Kenya Office. She recognized that there were multiple problems with the non-finalization of the JRB review, referring to the Tribunal's jurisprudence which states that if a proceeding is brought against a staff member, he or she is entitled to have those proceedings brought to a conclusion and to hear the results. If not, proceedings for, for example, termination for unsatisfactory services would "loom as a black cloud over the staff member's record, a cloud that the staff member is powerless to diffuse because there is no finality". The Tribunal cannot but agree, as did the JAB, which awarded the Applicant nine months' net base salary for this serious violation of her rights. The Tribunal finds that the amount awarded by the JAB, and accepted by the Secretary-General, is sufficient compensation. However, in addition thereto, the Tribunal orders that the adverse reports placed before the JRB be expunged from her personal file.

VI. In view of the foregoing, the Tribunal:

1. Orders the Respondent to expunge the adverse reports placed before the JRB from the Applicant's files; and,
2. Rejects all other pleas.

(Signatures)

Spyridon Flogaitis
Vice-President, presiding

Brigitte Stern
Member

Goh Joon Seng
Member

Geneva, 22 July 2005

Maritza Struyvenberg
Executive Secretary