

**Administrative Tribunal**

Distr.: Limited  
31 January 2006

Original: English

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**ADMINISTRATIVE TRIBUNAL**

Judgement No. 1258

Case No. 1309

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Dayendra Sena Wijewardane; Mr. Goh Joon Seng;

Whereas at the request of a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 30 September 2002 and periodically thereafter until 31 July 2003;

Whereas, on 17 July 2003, the Applicant filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 17 September 2003, the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal, *inter alia*:

“7. ...

...

(c) to decide to hold oral proceedings on the present application ...

8. On the merits ...

(a) to rescind the decision of the Secretary-General to make no recommendation in respect of the Applicant's appeal;

- (b) to order that the Respondent promote the Applicant to the GS-7 level with retroactive effect from August 1997;
- ...
- (d) to award the Applicant appropriate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;
- (e) to fix pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' *net base pay* in view of the special circumstances of the case;
- (f) to award the Applicant as cost[s], the sum of \$7,500.00 in legal fees and \$500.00 in expenses and disbursements."

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 27 January 2004;

Whereas the Respondent filed his Answer on 14 January 2004;

Whereas the Applicant filed Written Observations on 10 December 2004;

Whereas, on 28 October 2005, the Tribunal decided not to hold oral proceedings in the case;

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

***"Employment History***

.... [The Applicant] was first employed under special service agreements from 26 June 1988 as a Secretary in the UNICEF [Egypt Country Office (ECO)]. Effective 1 April 1991, she was employed on a four-month short-term appointment as a Secretary at the GS-3 level in the same office; her contract was several times extended until 29 February 1992. On 1 March 1992, she was granted an 11 month [fixed-term] appointment as a Secretary, GS-4. ... The [fixed-term appointment] was several times extended until 31 December 1999, always as a Secretary at the GS-4 level. Effective 1 January 2000, she was granted a two-year [fixed-term appointment] and promoted to the post of Programme Assistant (Health) at the GS-5 level.

***Summary of the facts***

... On 16 May 1997, a post of Senior Programme Assistant (Health Section) in [ECO] was advertised; the vacancy notice stated the post would probably be approved at the ... GS-7 [level]. ... [The Applicant applied for the post]. The Cairo [Appointment and Placement Committee (APC)] ... unanimously agreed that [the Applicant] was 'the most suitable candidate for the post ... however the APC noted the comments made by her supervisor ...

concerning lack of concentration and punctuality. The APC unanimously recommended that [the Applicant] be given 'an initial fixed-term appointment of 6 months ... as a trial period ...' ... [The] UNICEF Representative did not approve this recommendation.

... [On 24 September 1997, the Regional Office approved the classification of the post at GS-7 level and a new] vacancy notice was issued on 8 October 1997. [The new announcement specified different educational requirements, to include a university degree in finance/accounting. The Applicant applied for the post.] ... [The Applicant] was informed [on] 3 November 1998 ... that she had not been chosen.

... On 30 June 1999 [the Applicant] addressed a memorandum to [the] Ombudsperson, [ECO]. In her subsequent report of 10 August 1999 to [the], UNICEF Regional Director, [the Ombudsperson stated], *inter alia*:

'[The Applicant] presents a grievance against her direct supervisor [the] Chief of Health and Nutrition Section and [the] Representative of UNICEF [ECO]. Her case relates to not being selected to the advertised post of Senior Program Assistant ([Health and Nutrition section]) at GS-7 level due to discrimination ...

...

... [T]he [R]epresentative has mentioned that the irregularities in the procedures to fill the post were unintentional ... Unfortunately the [Applicant] informed me later that she has the intention of pursuing the case formally.

...

As Ombudsperson, I would like to recommend the following:

In view of the several irregularities that took place in filling the above mentioned post, and in view of the fact that the [Applicant's] present post will be abolished as of January 2000 and also in view of the different skills that the [Applicant possesses] in both finance and in programming, I recommend that she takes priority in getting one of the new posts that will be opened at ECO as of January 2000.'

... On 21 October 1999, having received a reply dated 29 September 1999 from [the Regional Director, the Ombudsperson] informed [the Applicant, *inter alia*]:

'After reviewing the case, [the Regional Director] mentioned that although the process contained some procedural irregularities, none of these irregularities could be interpreted as having contaminated the integrity of the process. There was no evidence at all that you were personally discriminated against in any fashion.

[The Regional Director] also [explained] that UNICEF totally [endorsed] the Representative's decision to not approve the 1997 APC recommendation. As the post [had] not yet been classified, the recruitment process should not have been initiated at all.

[The Regional Director] further mention[ed] that your case ... is legally time-barred ...

[The Regional Director] also concurred with [the] recommendation ... that you should be given consideration for any post that [is] commensurate with your qualifications and experience. ...'

... [On] 23 September 1999, [the Applicant was] informed ... that she would be separated from service on 31 December 1999 due to abolition of her post unless another suitable post for her was identified. On 11 November 1999, [the Applicant requested] administrative review [of this decision].

... By letter of 16 December 1999 addressed to the JAB, [the Applicant] requested ... suspension of action ... The Secretary [of the] JAB confirmed to [the Applicant] by fax on 30 December 1999 that 'should [she] not be able to secure a post, UNICEF [agreed] to postpone action on [the Applicant's] separation until ... the [JAB] ... had an opportunity to consider [the] request ...'

... On 18 January 2000, [the Applicant] was offered and signed a letter of appointment for a two-year fixed-term appointment (effective 1 January 2000) as Programme Assistant (Health) at the GS-5 level. ..."

On 9 February 2000, the Applicant lodged an appeal with the JAB in New York.

On 31 December 2001, the Applicant separated from service on agreed termination following the abolition of her new post.

On 9 January 2002, the JAB adopted its report. Its considerations and recommendation read, in part, as follows:

***"Considerations***

15. [The] Respondent had claimed that, to the extent that the appeal was addressed to Appellant's non-selection to the GS-7 post, it [was] time-barred. The Panel did not agree. ...

16. ... [T]he Panel concluded that [the] Appellant had not met the burden of proof of discrimination nor could the Panel find any defect of procedure in the selection process that could be seen as denial to her due process.

17. Turning to the other alleged instances of harassment and discrimination, the Panel remained unconvinced. ...:

...

18. Finally, referring to [the decisions that the Applicant sought to appeal], the Panel took note that:

(a) [The] Appellant's [fixed-term] appointment was renewed beyond 31 December 1999;

...

(d) [W]hile [the Applicant] was without a contract from 1 to 18 January 2000, she was not separated from the service at the end of 1999. The Panel concluded that any harm that may have been

occasioned by the brief period [of] uncertainty experienced by [the] Appellant was not sufficient to warrant compensation.

***Recommendation***

19. The Panel makes no recommendation with respect to this appeal.”

On 12 July 2002, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General had decided to accept the conclusions of the JAB and, in accordance with its unanimous recommendation, to take no further action on her appeal.

On 17 September 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant was unfairly denied full consideration for promotion to the GS-7 level in 1997.
2. The Applicant's recourse to the Ombudsperson influenced the decision to abolish her post and not renew her fixed-term appointment or convert it to a permanent appointment. This was part of a pattern of discriminatory treatment precipitated by the strained relationship with her immediate supervisor and the UNICEF Representative.
3. The JAB erred in concluding that the Applicant suffered no harm as a result of the procedural irregularities. The JAB likewise erred in viewing each element of the Applicant's claims separately rather than recognizing that they were part of a pattern of discriminatory treatment. Finally, the JAB erred in failing to provide appropriate and adequate compensation for the harm done to the Applicant in the violation of her rights.
4. The Applicant had a legitimate expectation for continued employment with UNICEF, which included the obligation to undertake good faith efforts to reassign her to another post upon the abolition of the post she was encumbering.

Whereas the Respondent's principal contentions are:

1. The decision not to promote the Applicant did not violate her rights. While the Respondent has acknowledged that some procedural irregularities existed at the outset as regards the initial advertisement for this post, none of these irregularities could be interpreted as having undermined the integrity of the process. The corrective measures taken were not in any way connected to the Applicant and may not be considered as discriminatory against her.

2. The Applicant is not entitled to promotion.
3. The Applicant's allegations of discrimination are baseless.
4. The Applicant's request for the award of costs and alleged damages is without merit

The Tribunal, having deliberated from 28 October to 23 November 2005, now pronounces the following Judgement:

I. The Applicant worked as a secretary in ECO for nearly a decade when she was notified that she would be separated from service on 31 December 1999 due to the abolition of her post. She claims that her last two to three years of service with UNICEF were characterized by a pattern of harassment and discrimination, especially when she made known her decision to challenge, what she claimed was, a denial of fair consideration for promotion in 1997 and when she made clear her intent to use the services of the Ombudsperson in relation to her grievance. Finally, she was faced with the decision of non-renewal of her contract which, she maintains, followed directly from her decision to pursue her grievance through the Ombudsperson.

II. The Applicant joined ECO in 1988 and was initially employed under a number of special service agreements. She was subsequently employed under short-term appointments until March 1992, when she was granted a fixed-term contract as a Secretary at the G-4 level. From 1991 through 1998 she consistently received very good PERs and, indeed, the PER for her final year, covering the period from 1 January to 31 December 1999, likewise rated her performance as good. However, there are clear indications in this PER that, during this year, the relations with at least her immediate supervisor were becoming sour. Her supervisor described her work output as "not up to par" and the Applicant herself entered a caveat in the following terms: "I find it imperative to express the feeling of negligence I generally felt during [1999]. Regretfully, I agree with his comments regarding my unutilized potential this year". As an example she makes reference to what she sees as "the deliberate exclusion from tasks assigned to [her] that are related to the programming assistance activities of the Breastfeeding Promotion project".

The Applicant claims that the downhill slide in relations had commenced in 1997 but was accentuated in the second half of 1999, when she sought the good offices of the Ombudsperson. In 1997, the Applicant applied for and was recommended by the APC for the post of Senior Programme Assistant (Health Section), but the APC

recommendation was rejected by the UNICEF Country Representative without any explanation. The Applicant claims that this was a first instance in the violation of her rights to fair consideration and due process, following which, there were additional promotion exercises which violated her rights. She further claims that the abolition of two posts which she had encumbered, as well as several other claims that she put forward, were all part of the pattern of the discrimination and harassment she suffered.

III. The claim of discriminatory use of power rests on a cluster of issues which may be summarized as follows: that the Applicant, despite solid performance for several years, was repeatedly overlooked for promotion; that the Administration manipulated job descriptions and vacancy announcements in order to place obstacles in the path of the Applicant's career development and to keep her out of consideration for promotion; that genuine personal difficulties which the Applicant faced in keeping time, and which were strictly due to the serious illness of a dependant parent over a period of time, were seized upon to create a case against her and to disadvantage her without showing the understanding and sympathy that might have been expected in such cases; and, that the Administration retaliated to her seeking recourse from the Ombudsperson by selecting her post as one to be abolished and by failing to find her an alternative, suitable post. In this context, the Tribunal notes that the Ombudsperson herself has brought before it a separate case on the grounds of management discrimination against her for carrying out her duties as the Ombudsperson in the Applicant's case.

IV. A staff member has no right to promotion nor to any assurance that the post s/he occupies will not be abolished for reasons of good management. However, a staff member's claim to be duly considered for promotion, or to be considered for suitable alternative employment in the event a post is abolished, must be handled fairly and conscientiously at all stages. In Judgement No. 1209, *El-Ansary* (2004) the Tribunal held that

"The burden of establishing that the Administration has failed to fully and fairly consider the Applicant's candidacy ... does not fall on the Applicant. Rather, as the Tribunal held in Judgement No. 362, *Williamson* (1986), para. VII:

'If once called seriously into question, the [Respondent] must be able to make at least a minimal showing that the [Applicant's] statutory right was honoured in good faith in that the [Respondent] gave the 'fullest regard' to it'.

The determination whether the requirement for “full and fair consideration” has been complied with or whether the staff member has not been afforded the appropriate consideration and transparency of the process is a matter which often times has to be gleaned from the surrounding circumstances. There are situations where each act complained of, when viewed in isolation, is one that the Administration was entitled to take. There are, however, situations where the cumulative result of several such actions taken by the Administration could lead to a conclusion that, the “whole picture”, rather than the isolated acts, indicates the contended abuse. The Tribunal is of the view that the present case illustrates the need to look at the whole picture.

The Tribunal has consistently held that, the burden of proving discrimination rests on the applicant, and this is correctly emphasized by the Respondent. (See, for example, Judgement No. 874, *Abbas* (1998).) The standard of proof, however, is another matter and it cannot be assumed, for example, that there must be incontrovertible or documentary evidence of prejudice in the absence of which an applicant must necessarily fail. The Tribunal is fully aware that in many instances, circumstantial evidence is all that an applicant can put forward to establish the subjective element of prejudice and when facts are postulated, which call for an explanation and they do not elicit an adequate one, the Tribunal is entitled to draw its own inferences. In such situations it is not enough for the Respondent to point simply to the Applicant’s burden of proof. That is by and large the situation in this case.

V. As already stated, the Applicant’s claims go back to August 1997 when, contrary to her supervisor’s recommendation, the APC unanimously recommended the Applicant, from among 32 candidates, to fill the post of Senior Programme Assistant (Health Section). The vacancy announcement stated the post was proposed at the G-7 level; however, the APC’s recommendation referred to this post at the G-6 level, on the basis of a job classification which had received approval, albeit at the local level, as recently as 14 July 1997. The Applicant’s supervisor had made certain comments on the Applicant’s performance in connection with her attendance and concentration, which the APC took into account. In recommending the Applicant for the post, the APC nevertheless wanted these weaknesses addressed. To this end, the APC also recommended that the supervisor’s comments be conveyed in writing to the Applicant and that the Applicant be placed against the post initially on a probationary basis, “during which she should prove that there is improvement in the areas of weakness”. The Country Representative did not approve the recommendation. Whilst no reason



was given at the time, according to the Respondent the intention of the Administration was to re-advertise the post, since the previous exercise was conducted before the classification of the post at the G-7 level was completed, rendering the whole exercise flawed.

Indeed, a new vacancy announcement was issued in October, with the additional requirement of a university degree in finance and accounting, which the Applicant did not have. A year later, on 3 September 1998, the APC recommended the appointment of another candidate, who had the required qualifications. The Applicant was “rightly” excluded from consideration for lack of the required qualifications. The introduction, however, of a “university degree qualification” for a General Service post was, indeed, unwarranted, as General Service staff are not required to hold a university degree for employment with UNICEF. The Administration later admitted as much. In fact, contemporaneously, other General Service posts, at the same level, were being advertised in the same office with only secondary education as a requirement. The Respondent’s explanation is that these were “glitches”. Be that as it may, the Tribunal is satisfied that it caused the Applicant definite prejudice, particularly when considering that prior to the inclusion of this requirement the Applicant was the unanimously recommended candidate for that same post. In the context of the interpersonal conflict and staff relation difficulties that manifestly existed in this relatively small office, it is questionable whether these matters had no greater significance. The Tribunal notes that, when considering the Applicant among the candidates for a G-5 post in the Health Section in December 1999, the members of the APC considered the interpersonal conflicts with her supervisor to be a good enough reason not to consider the Applicant for this post. And when she was recommended as the APC’s first preference for another vacancy, at G-6 level, in the Communications section, the Country Representative chose the candidate who was the APC’s second preference.

VI. By this time, the Applicant had already initiated action for the administrative review of her grievances and embarked on the appeal process. She had been informed in September 1999 that her post would be abolished and that she would be separated from service on that ground on 31 December 1999. The Tribunal has not been presented with any evidence to indicate that good-faith efforts were made to find the Applicant an alternative post. To this end, the Tribunal would have expected the Respondent to demonstrate the efforts made by, for example, indicating what other

vacancies, if any, existed or became available and the consideration which the Administration had given to the Applicant in judging whether she was suitable or unsuitable for any specific openings. The Administration's failure to submit any such evidence leads the Tribunal to conclude that no such efforts were made. (See Judgement No. 1173, *Guerrero* (2004).) In mid-December, at the last moment before her separation from service, the Applicant requested suspension of action on her separation from service. The Applicant did so while her request for administrative review was pending and prior to completion of the appeal process. When it became clear that action was best delayed to enable the administrative procedure to proceed instead of immediately separating the Applicant from service, the Country Representative intervened promptly to reverse the above-mentioned recommendation of the APC, which had considered it pointless to recommend the Applicant for the G-5 post in the Health Section on account of the inter-personal conflicts which prevailed in that section. The Tribunal views this intervention as defensive in nature rather than a proactive effort to assist staff members, in this case the Applicant, whose post was being abolished. The Tribunal also finds it a strange coincidence that one year later, this post was also abolished, leading to the Applicant's agreed separation.

VII. The Applicant's punctuality problem during the latter stage of her service with UNICEF has acquired a profile which warrants comment. The Applicant had a dependent parent who was paralyzed and bed-ridden, clearly presenting the Applicant with a problem. The first indication of this on record is that of her supervisor sending her a stern e-mail on 19 August 1999, reminding her of her duties and, *inter alia*, forbidding her from staying in the office after normal working hours unless she had obtained prior approval. Whilst it is undoubtedly necessary that proper office routines be maintained, the record is somewhat at variance with how such an issue would normally be dealt with in a small office, which should be aware of the difficulties of a staff member who is faced with a situation deserving sympathetic treatment. The e-mail in question drew a sharp response from the Applicant, who explained the reasons for her staying late in the office, clarifying also that she was not requesting over-time payment. The issue seems to have been finally settled by the Applicant making the correct request for flexible time keeping two weeks later, to which an official response was made six months after that. The JAB's comment on this was "regardless of the reasons therefore, lack of punctuality is a legitimate concern of the management". The

Applicant's claim is that this episode further illustrates her feeling of being targeted by the management. The Tribunal is inclined to seeing it in the same light.

VIII. The circumstances of this case taken cumulatively lead the Tribunal to take the view that the ECO Administration did not treat the Applicant in a fair and transparent manner and that she fell victim to harassment and discrimination during the latter part of her career with UNICEF, for which she should be compensated.

IX. In view of the foregoing, the Tribunal

1. Orders that the Applicant be paid compensation equivalent to six months' net base salary at the rate in effect on the date of this Judgement, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and
2. Rejects all other pleas.

*(Signatures)*

**Kevin Haugh**  
Vice-President, presiding

**Dayendra Sena Wijewardane**  
Member

**Goh Joon Seng**  
Member

New York, 23 November 2005

**Maritza Struyvenberg**  
Executive Secretary