United Nations AT/DEC/1329

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1329

Case No. 1405 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Mr. Julio Barboza; Ms. Brigitte Stern;

Whereas, on 11, 14 and 29 November 2003 and on 29 January, 27 February, 21 March and 4 and 5 April 2004, a former staff member of the United Nations, filed applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal extended to 31 July 2004 the time limit for the filing of an application with the Tribunal;

Whereas, on 23 June 2004 and on 21 January 2005, the Applicant filed applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 29 March 2005, the Applicant filed an Application, requesting the Tribunal, inter alia, to:

> "2. Request and provide to [the] Applicant [the] requested documents;
>
> 3. Grant two years' compensation for the delay in resolution of these issues related to the [Joint Appeals Board (JAB)] Panel's recommendations, not based in policy, documentation, jurisprudence or interpretation."

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 21 October 2005;

Whereas the Respondent filed his Answer on 21 October 2005;

Whereas the Applicant filed Written Observations on 10 January 2006;

Whereas, on 21 November 2006, the Tribunal decided to postpone consideration of this case until its next session;

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

"[**Employment history**]

... [The Applicant], a national of the United States of America, joined the [United Nations Security and Safety Service, United Nations Office at Vienna (UNSSS/UNOV)] on 1 July 1984 as Security Officer (G-3), initially on a three-month short-term appointment through 30 September. On 1 October, his short-term appointment was converted to a fixed-term appointment and, [thereafter, he was promoted and granted a permanent appointment] ... Effective 1 January 1991, the [Applicant] was promoted to G-5 level. … As per the available official performance records, [the Applicant]'s service through all these years was entirely satisfactory.

[**Summary of facts**]

… On 10 June 2001, [the Applicant's Counsel] (…), wrote to the Under-Secretary-General for Management … on behalf of [the Applicant and the Applicants in Judgements No. 1319 and No. 1330, rendered at this session, hereinafter referred to as Mr. E. and Mr. M., respectively], … requesting administrative review of[, inter alia, the Respondent's alleged failure to transmit the report of the UNOV Panel on Discrimination of 2 June 2000 to the Director General, UNOV, and to the Assistant Secretary-General [for] … Human Resources Management enabling the continued, on-going, documented manifestations of prejudice, discrimination, mismanagement and misconduct towards staff; failure to take appropriate steps about breaches of policy; and, failure to grant them access to documents that could have contained other breaches of policy]. …

… On 4 September 2001, [Mr. E.] submitted an appeal to the JAB in Vienna. … [Subsequently,] Counsel requested 'that all three cases be joined because of identical or almost identical issues, common breaches of policy and common personalities'. On 8 September …, [the Applicant and Mr. M.] also submitted signed copies of their statement of appeal. …

…

[On 11 February 2002, the Applicant requested administrative review of the 17 January decision to reprimand him and, on 15 May, he lodged an appeal on this matter with the JAB.]

… On 10 May 2002, [the Applicant's] Counsel submitted, via e-mail, three identical appeals on behalf of [the Applicant, Mr. E. and Mr. M.] contesting the [alleged failure by the Office of Internal Oversight Services (OIOS)] to re-open the 'UNSSS case', and to offer [them] 'whistleblower' protection.]

… These appeals were forwarded to the Respondent on 16 May 2002 and the Respondent submitted a single reply to the JAB on 19 July …

…

… On 16 July 2002, … the Presiding Officer [of the JAB] … requested a change of venue to the New York [JAB, which request was rejected on] 20 September …"

The JAB in Vienna met in February 2003 and considered the preliminary issues, including the issue of receivability, arising in the eleven appeals filed by the Applicant, Mr. E. and Mr. M.. During the proceedings, the JAB raised a number of concerns in regard to procedural shortcomings in the appeals. In particular, the JAB found that Counsel had breached the Rules of Conduct of the Panel of Counsel, as adopted in New York on 28 June 1985, which state that "[a Counsel] shall in all situations and circumstances of a case, refrain from unsubstantiated or irrelevant allegations of bad faith or other impropriety" in respect of his clients and the Organization. The JAB issued its report on 29 July 2003. Its conclusions and recommendations read as follows:

> "*CONCLUSIONS AND RECOMMENDATIONS*
>
> 128. The Panel noted that, had it elected to take a strict view, most of the 11 appeals could have been found irreceivable on procedural grounds alone. The Panel is aware, however, that the Appellants have experienced protracted delays in connection with these appeals. The Panel considered that these delays were caused partly by the swamping of the JAB secretariat with their own Counsel's demands for attention, but also by factors entirely outside the [Applicants]' control. For this reason, the Panel sought in this process to take a generous view of issues related to receivability, in particular to the observance of time limits.
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> 129. However, it remained dismayed at the way in which these appeals were filed, in particular the ambiguity generated by the drafting, and the fact that several key documents were dated some considerable time before they were received by the JAB. With regard to the first point, the three Appellants' chances of having an appeal found receivable are considerably improved by a clear statement of the contested administrative decision. To oblige any Panel to search through a statement of appeal to try to identify its purpose, or to construe the administrative decision being contested, may jeopardize unnecessarily an appeal that might well deserve a hearing on its merits. With regard to the second point, the Panel recommends that, in all future dealings with the JAB, the Appellants strictly observe relevant time limits and exercise the greatest care with regard to the dating and submission of key documents, as other Panels might not be so generous in their recommendations.
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> 130. The Panel also noted that the Vienna JAB Secretariat - comprising a Secretary, acting on a voluntary basis in addition to his/her normal work duties, and a temporary assistant - had shouldered a heavy burden in the administration of the many appeals and the exceptional amount of correspondence and communication generated by Counsel in connection with the appeals. It seemed to the Panel that the JAB Secretariat's modest capacity had been stretched beyond its limits in attempting to respond to Counsel's many verbal and written queries. The Panel commended the Secretariat (…) on its diligence in attempting to maintain this correspondence, and in exploring alternative ways of exposing the Appellants to the internal justice system more expeditiously (…). It also acknowledged Counsel's persistence in repeatedly posing questions that had not been answered to his satisfaction. However, it agreed that the maintenance of such a correspondence was not a satisfactory use of JAB resources and that, by absorbing limited capacity, it risked damage to the interests, not just of the three staff members mentioned in this report, but also to those of other appellants to the JAB, whose appeals were equally deserving of the JAB's attention.
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> ...
>
> [Of the three appeals filed by the Applicant, the Panel decided that only one was receivable and recommended that it be considered on its merits by a separate Panel.]"

With respect to the instant case, on 27 August 2003, the Under-Secretary-General for Management transmitted a copy of the report of the JAB to the Applicant and informed him that the Secretary-General agreed with the JAB that two appeals were not receivable and that he had decided to take no further action thereon.

On 29 March 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB erred when it decided that it could not establish the administrative decisions being appealed.

2. The appeals were receivable.

3. The JAB proceedings were marred with irregularities.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeals were not receivable, as neither constituted an appeal against an administrative decision.

2. There is no substantiated evidence that the JAB proceedings were marred with irregularities, or that the actions of the JAB were based on prejudice or improper motives.

The Tribunal, having deliberated from 31 October to 21 November 2006, in New York, and from 26 June to 27 July 2007, in Geneva, now pronounces the following Judgement:

I. The Applicant, a United States national, joined the UNSSS/UNOV on 1 July 1984 as Security Officer (G-3). Effective 1 June 1990, he was granted a permanent appointment and, on 1 January 1991, he was promoted to the G-5 level: through all his years of service, the Applicant's performance was entirely satisfactory.

On 10 June 2001, the Applicant's Counsel, wrote to the Under-Secretary-General for Management, on behalf of the Applicant and two other staff members, Mr. E. and Mr. M., requesting administrative review of "the cases of [the three staff members concerning prejudice and discrimination]". On 4 September, Mr. E. submitted an appeal to the JAB. On 8 September, the Applicant and Mr. M. also submitted signed copies of their statement of appeal and Counsel requested that the cases be joined.

On 11 February 2002, the Applicant request administrative review of the decision "to reprimand [him] as announced in the letter to [him] of 17 January 2002 ..." and, on 15 May, lodged an appeal with the JAB on this issue (which appeal was, however, dated 12 March).

Meanwhile, on 10 May 2002, Counsel again submitted three identical appeals to the JAB contesting the "alleged failure by OIOS to re-open the UNSSS case", and to offer them "whistleblower" protection.

II. Following repeated requests to join the appeals; several failed attempts to put together a JAB panel; and, a failed attempt to change the venue to New York, the JAB met and considered the preliminary issues, including the issue of receivability, in the eleven appeals filed by the three staff members. It adopted its report on 29 July 2003. Of the three issues appealed by the Applicant, the JAB found that two were irreceivable, inter alia, because the specific administrative decisions being appealed were unclear. It found, however, that his appeal of 15 May 2002 was receivable and recommended that a separate JAB panel be constituted to hear this appeal.

III. This Application presents a number of difficulties. These difficulties arise from the disorganized manner in which not only the Application, but the whole file has been submitted to the Tribunal. As the Tribunal understands it, the Application is one of three Applications, involving three staff members (the Applicant, Mr. E. and Mr. M.), which have been filed simultaneously. The issues presented are similar, if not identical, and, indeed, they were considered jointly by the JAB. The Tribunal, however, has decided to deal with each of these three Applications separately.

IV. The Tribunal notes that there is a preliminary issue, that is, whether or not most of the contentions presented by the Applicant to the JAB were receivable. It notes that the JAB

> "remained dismayed at the way in which these appeals were filed, in particular the ambiguity generated by the drafting, and the fact that several key documents were dated some considerable time before they were received by the JAB. With regard to the first point, the Appellants' chances of having an appeal found receivable are considerably improved by a clear statement of the contested administrative decision. To oblige any Panel to search through a statement of appeal to try to identify its purpose, or to construe the administrative decision being contested, may jeopardize unnecessarily an appeal that might well deserve a hearing on its merits. With regard to the second point, the Panel recommends that, in all future dealings with the JAB, the Appellants strictly observe relevant time limits and exercise the greatest care with regard to the dating and submission of key documents, as other Panels might not be so generous in their recommendations."

The Tribunal recalls its Judgement No. 1157, *Andronov* (2003), where held that

> "There is no dispute as to what an 'administrative decision' is. It is acceptable by all administrative law systems, that an 'administrative decision' is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as *implied* administrative decisions."

V. Article 7, paragraph 3 of the Rules of the Tribunal specifies that

> "3. The pleas shall indicate all the measures and decisions which the applicant is requesting the Tribunal to order or take. They shall specify:
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> …
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> (*b*) The decisions which the applicant is contesting and whose rescission he is requesting under article 9, paragraph 1, of the Statute",

and paragraph 4 of the same article stipulates that "[t]he explanatory statement shall set out the facts and the legal grounds on which the pleas are based".

The Tribunal recalls two Judgements in which it addressed the issue of claims that are not set out clearly. In Judgement No. 1269 (2005), it noted that: "[w]hen these proceedings were commenced before the JAB, it was unclear to the Respondent precisely what administrative decisions were intended by the Applicant to be covered by her appeal". In an earlier Judgement (No. 1248 (2005)), it noted that:

> II. … This claim is far from straightforward. It is difficult to understand it and it is difficult to understand what case she makes. This part of the claim appears to contain irreconcilable conflicts or contradictions.
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> …
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> The Tribunal has insurmountable difficulties trying to understand the factual basis said to be behind the said part of the Applicant's claim, that she was wrongfully denied opportunities for promotion, which, it is stressed, is a different claim to one alleging that she was not promoted to any one of the vacancies for which she had applied or to a claim *simpliciter* that she was not promoted. This somewhat unusual approach may have been adopted by the Applicant's counsel as a legal stratagem in the hopes of avoiding a rejection of the non-promotion aspects of the Applicant's claim on the basis that administrative review had not been sought in relation to them. Alternatively, and perhaps more likely, it might have been adopted because her counsel was aware that the Applicant lacked evidence which could establish procedural or due process violations, or establish that she had been wrongfully denied appointment to any one of those positions or that her non-promotion was as a result of any prejudice or other extraneous factor, so that any claim for compensation for her non-appointment to any one of them was doomed to failure."

VI. In addition, it is a general principle of procedural law, and indeed of administrative law, that the right to contest an administrative decision before the Courts of law and request redress for a perceived threat to one's interests is predicated upon the condition that the impugned decision is stated in precise terms. Of course, there are situations where an applicant is not aware of all administrative decisions affecting him/her, for instance, when the Administration withholds evidence, the existence of which is wholly unknown to the other party. This is the reason why the Statute and the Rules give the Tribunal investigatory powers and stipulate in article 10 of the Rules that the President can order the production of any other evidence he deems necessary or useful "from any party, witnesses or experts". However, nothing can repair the damage that vagueness and imprecision can cause to an application. Moreover, it is not the role of the Tribunal to review general patterns of behaviour absent a specific, identified, even implied, administrative decision: this is a Court, deciding on the legality of administrative decisions.

VII. The Tribunal observes, in particular, that the Applicant presents three sets of grievances relating to:

- the Respondent's alleged failure to transmit the report of the UNOV Panel on Discrimination of 2 June 2000 to the Director General, UNOV, and to the Assistant Secretary-General for Human Resources Management; the "long process of numerous administrative decisions" during, but not limited to, the years 1997-2000; and the failure to grant the Applicant access to documents related to the case;

- the decision by OIOS not to re-open the UNSSS case and not to offer him whistle-blower protection; and,

- the fact that the JAB's proceedings were vitiated by irregularities and errors of fact.

The Tribunal will deal with each of these issues separately.

VIII. With regard to the first grievance, the Tribunal notes that the vague terms in which it is couched make it impossible to determine exactly what administrative decisions are being contested. This claim must therefore fail.

IX. With regard to the request for re-opening the UNSSS case, the Tribunal recalls its long-standing jurisprudence that to hold an investigation is at the discretion of the Administration. In particular, it notes Judgement No. 1271 (2005):

> "VI. Moreover, the Tribunal wishes to stress that, even if it had been in the Applicant's interests to take action on this issue, the decision to conduct such an investigation is the privilege of the Organization itself. In Judgements Nos. 1086, *Fayache* (2002), and 1234 (2005), the Tribunal heard requests for the instigation of disciplinary proceedings against staff members and noted that '[i]t is not legally possible for anyone to compel the Administration to take disciplinary action against another party' (*Fayache*). This reasoning applies, by analogy, to the kind of general investigation requested by the Applicant in the present case."

It also notes *Fayache* (*ibid.*):

> "Furthermore, the Tribunal takes this opportunity to underline that the instigation of disciplinary charges against an employee is the privilege of the Organization itself. The Organization, responsible as it is for personnel management, has, among other rights, the right to take disciplinary action against one or more of its employees and, if it does that unlawfully, the Administrative Tribunal will be the final arbiter of the case. It is not legally possible for anyone to compel the Administration to take disciplinary action against another party."

Therefore, this claim must also fail.

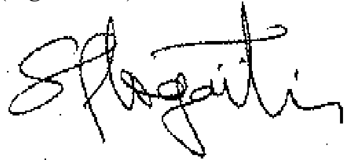
X. The Tribunal finally will deal with the allegations of the Applicant that the JAB's proceedings were vitiated by irregularities and errors of fact.

In the first place, the Tribunal wishes to state that when an applicant presents, at his own risk, a disorganized application, then he should be aware that errors of fact may occur. It would be an abuse of procedure for anyone addressing him or herself to an authority in a confused manner to claim later that the authority thus addressed did not understand the facts with clarity. The Tribunal is of the view that the instant case suffers precisely from the lack of clarity described above and not only finds that the JAB did not commit any error of fact, but strongly feels that this claim of the Applicant constitutes, under the circumstances, an abuse of procedure.

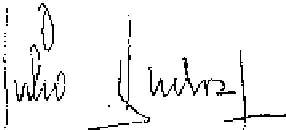
Furthermore, it is the burden of the Applicant to prove that the JAB's proceedings suffered from irregularities and the Applicant failed to do so. Therefore, the Tribunal rejects this claim.

XI. In view of the above, the Application is rejected in its entirety.

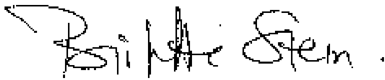
(S*ignatures)*



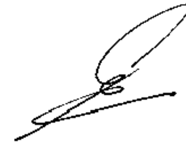
Spyridon **Flogaitis**
President



Julio **Barboza**
Member



Brigitte **Stern**
Member



Geneva, 27 July 2007

Maritza **Struyvenberg**
Executive Secretary