
ADMINISTRATIVE TRIBUNAL

Judgement No. 675

Case No. 750: ARAIM

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Samar Sen, President; Mr. Jerome Ackerman,
First Vice-President; Mr. Luis de Posadas Montero, Second Vice-
President;

Whereas, on 17 August 1993, Amer Araim, a staff member of the
United Nations, filed an application requesting the Tribunal, inter
alia, to find that:

"...

4. The Administration violated the right of the Applicant to receive the full and fair consideration for [a] vacant relocated D-1 post ... as well as other vacant D-1 posts in the Secretariat ...

And, consequently,

5. ... to give full and fair consideration for the Applicant's candidature for the relocated D-1 post of Secretary of the Special Committee against Apartheid as well as other D-1 posts in the Secretariat in which he is interested and for which he is qualified.
6. To award the Applicant compensation equal to two years net base salary for the injury sustained by him as a result of the ongoing discrimination against him, including the refusal to consider his candidature for [the above] D-1 post ... as well as other D-1 positions in the Secretariat ..."

Whereas the Respondent filed his answer on 5 October 1993;

Whereas the Applicant filed written observations on 12 October 1994;

Whereas, on 24 October 1994, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 8 August 1978, on secondment from the Government of Iraq, on a three year fixed-term appointment, as a Political Affairs Officer at the P-4 level. On 1 June 1981, he was reassigned to the Committee Services and Research Branch of the Centre Against Apartheid. On 8 August 1981, after the Applicant's resignation from the service of his government, his appointment was extended for three years. On 1 April 1982, he was promoted to the P-5 level, as Senior Political Affairs Officer, and became Secretary of the ad hoc Committee on the Drafting of the International Convention against Apartheid in Sports and Deputy Secretary of the Special Committee against Apartheid. On 1 May 1984, he received a probationary appointment, which was converted to a permanent appointment on 1 January 1985.

In a report dated 3 July 1990, the Joint Appeals Board (JAB), having considered an appeal from the Applicant against the Administration's decision to fill, through replacement by an outside candidate, the post of Chief, Committee Services and Research Branch, concluded that this decision was "flawed". It recommended "that the post be filled through vacancy management and that [the Applicant] be considered fully and fairly along with other candidates." Following the Secretary-General's subsequent decision not to accept the JAB recommendation, the Applicant filed a complaint with the Panel on Discrimination and Other Grievances, as well as an application with the Tribunal. On 1 July 1991, the Interim Coordinator of the Panel transmitted the Panel's recommendations to the Administration, including a recommendation that "the Administration should investigate and properly deal with

the very subtle form of discrimination which seems to have prevailed in the Department." The Tribunal, in its Judgement No. 533, directed that "the Applicant receive full and fair consideration" for any vacant D-1 post for which he might be qualified.

In June 1991, when the Secretary of the Special Committee against Apartheid died, the Applicant was appointed Acting Secretary. In a letter dated 14 August 1991 to the Assistant Secretary General, Office of Human Resources Management (OHRM), the Applicant expressed his interest in the post. On 3 September 1991, the Assistant Secretary-General, Centre Against Apartheid, announced that the former Permanent Representative of Ethiopia to the United Nations had been appointed temporarily to the post for seven months.

The Applicant lodged an appeal against this decision with the JAB and then with the Tribunal. In its Judgement No. 622, the Tribunal held that he was entitled to compensation because of the unjustified failure to advertise the post, which deprived him of an opportunity to be considered for it. (Cf. Judgement No. 622, Araim (1993)).

In a letter dated 15 September 1992, the Applicant reminded the Assistant Secretary-General, OHRM, of his letter of 16 June 1992, informing the Applicant that the Secretary-General had decided to constitute a panel to investigate his claims of discrimination. The Applicant noted that three months had elapsed and asked that the panel be set up promptly, and that it "investigate not only my case but also the cases of other Arab staff members in the former Department of Political and Security Council Affairs, as suggested by the Panel on Discrimination and Other Grievances."

On 14 October 1992, the Applicant requested the Secretary-General to review the administrative decision to transfer the D-1 post from the Centre Against Apartheid to the Department of Political Affairs. On 19 November 1992, the Applicant filed an appeal with the JAB, requesting inter alia a suspension of action on the transfer of this post.

On 10 December 1992, the Director of Personnel wrote to the Applicant and informed him that the advertisement for the vacant D-1

post had to be withdrawn in the light of the restructuring of the Department of Political Affairs. He assured the Applicant that he would receive full and fair consideration for any D-1 vacancy in the Department for which he was qualified. He also informed him that an ad hoc panel had been appointed to investigate his allegations of discrimination.

In a letter dated 14 January 1993, the Director of Personnel informed the Applicant that the Secretary-General had requested the JAB to complete consideration of his appeal and submit its report by 21 March 1993. The decision on which suspension of action had been requested would not, in any event, take effect before 21 April 1993.

On 18 March 1993, the JAB, noting the Applicant's contention that he had not been considered for the redeployed vacant D-1 post, or for three other vacant D-1 posts in the Department of Political Affairs, requested from the Secretary-General information on the results of the ad hoc panel which had been appointed to investigate his allegations of discrimination, as well as information on the Applicant's candidature for the vacant D-1 posts in the Department.

The JAB also requested an extension of the date on which its report was due, to allow more time for the consideration of the appeal.

On 28 April 1993, the report of the ad hoc panel was finalized. In a letter dated 24 May 1993, the Under Secretary-General for Administration and Management informed the Applicant of its conclusion that "your allegation that your non-selection for the posts in question was due to discrimination was totally unsubstantiated." The letter also stated, "I hereby reject on behalf of the Secretary-General your allegations that you have been and continue to be victim of discrimination in the Organization. No action in this regard will therefore be taken." With the letter, a copy of the ad hoc panel's report was transmitted to the Applicant "on condition of strict confidentiality". The report was not transmitted to the JAB.

On 25 May 1993, the JAB adopted its report, noting that it had received "no information on the conclusion of the ad hoc

Investigation Panel, which, in its opinion, could have considerable bearing on its findings and conclusion." The report's conclusions and recommendation were:

"Conclusions and recommendation

83. The Panel unanimously:

Finds that it was not provided with the information it had requested so as to be able to give the appeal all due consideration;

Finds that, without that information, it is unable to examine the validity of the claims of the Appellant and/or the contentions of the Administration;

Finds that it is not in a position to make an honest recommendation regarding the present case.

84. The Panel therefore unanimously decided to make no recommendation in connection with the appeal."

On 24 June 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him, in part, as follows:

"The Secretary-General notes the conclusion of the Joint Appeals Board and its inability to make [a] recommendation on the case, for reasons stated. The Panel has alluded, ..., to the fact that you have been considered by the Department's promotion review panel together with other eligible staff members to the various vacant D-1 posts in the sector of the Department where you are located. In effect, the Secretary-General believes that you have received full and fair consideration in the promotion process of the Department.

On 24 May 1993, I have already conveyed to your the decision of the Secretary-General which I made on his behalf, that your allegation of discrimination was unsubstantiated. That decision is final."

On 17 August 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JAB was prevented from fulfilling its mandate due to the Administration's refusal to provide information requested by it.
2. The Panel on Discrimination and Other Grievances adopted two separate reports on 1 July 1991 and on 1 October 1992, confirming that the Applicant was subjected to discrimination, and that the Administration failed to act.
3. The Applicant has not received full and fair consideration in the promotion process of the Department, contrary to the assertions of the Respondent.

Whereas the Respondent's principal contentions are:

1. No staff member may appeal the restructuring of his or her department. The Applicant adduces no credible evidence that prejudice led to his department's reorganization. The onus of proof is upon him to establish improper motivation.
2. A comprehensive investigation of the Applicant's allegations of generalized racial prejudice, directed against him in the Administration's refusal to promote him, was conducted by a panel appointed by the Secretary-General. Its report of 28 April 1993, which did not accept these allegations, was the basis for a decision taken by the Administration on 24 May 1993. If the Applicant is dissatisfied, he should appeal that decision of 24 May 1993.

The Tribunal, having deliberated from 20 October to 4 November 1994, now pronounces the following judgement:

- I. In the course of its deliberations, the Tribunal found defects in procedure which, in accordance with the terms of article 9, paragraph 2 of the Tribunal's Statute and article 18 of

the Rules of the Tribunal, warrant the remand of the case for their correction. The defects in procedure are indicated below.

(A) In response to its request for information regarding the consideration of the Applicant for promotion to the D-1 level, inadequate information was provided to the Joint Appeals Board (JAB) by the Respondent, in the form of a summary memorandum. The Tribunal considers that the JAB should have been provided with underlying and supporting documentation, such as the minutes, notes, or other records of the Appointment and Promotion Board, with appropriate deletion of names (other than the Applicant's) in the interests of confidentiality.

(B) In its report, dated 25 May 1993, the JAB found "that it was not provided with the information it had requested so as to be able to give the appeal all due consideration" and that "without that information, it [was] unable to examine the validity of the claims of the Appellant and/or the contentions of the Administration." In spite of the fact that the JAB's request for the ad hoc panel's report was not met and notwithstanding the JAB's statement that it was not "in a position to make an honest recommendation regarding the ... case," the Secretary-General took a decision on 24 June 1993, based in part, on the ad hoc panel's report.

II. On 20 October 1994, the Executive Secretary of the Tribunal informed the parties, pursuant to article 18 of the Rules of the Tribunal, that it would decide on the substance of the case if, on the expiry of the time limit of two days, no request for a remand had been made by the Secretary-General.

III. On 21 October 1994, the Representative of the Secretary-General requested the Tribunal, in accordance with article 18 of the Rules of the Tribunal, prior to the determination of the merits, to remand the case to the JAB for correction of the above-mentioned defects in the procedure.

IV. The Tribunal, without pronouncing on the merits of the case, decides (1) that the case be remanded for correction of procedure in accordance with article 9, paragraph 2 of the Statute of the Tribunal; (2) that no harm has been caused to the Applicant by the procedural delay and hence does not award him any compensation.

(Signatures)

Samar SEN
President

Jerome ACKERMAN
First Vice-President

Luis de POSADAS MONTERO
Second Vice-President

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary