



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1031

Case No. 1129: KLEIN

Against: The Secretary-General
of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Mayer Gabay, President; Mr. Julio Barboza, Vice-President;

Mr. Spyridon Flogaitis;

Whereas, on 21 March 2000, Helga Klein, a staff member of the United Nations filed an Application requesting the Tribunal to decide that:

"(a) The recommendation by the Appointment and Promotion Board [APB] of 31 July 1997 for the Applicant's promotion against the post of Chief, Support Services Branch, [Office of the High Commissioner for Human Rights (CHR)] which had been occupied by the Applicant for 14 months was reached through the due process of a fair review of candidates and that the [new] High Commissioner [for Human Rights] refusal to implement that recommendation was highly improper and was influenced by prejudice and/or by extraneous and arbitrary factors.

(b) The decision by the ... High Commissioner ... in September 1997, the same month in which she assumed the functions of High Commissioner, to seek additional candidates for the aforesaid post was in clear and unequivocal violation of due process and of the established policies of the General Assembly as reflected in Staff Regulations, Rules, Administrative Instructions and General Assembly Resolutions.

(c) The recommendation by the High Commissioner of an outside male candidate to the [APB] in March 1998 was also totally arbitrary and in grave violation of due process and of the established policies of the United Nations.

(d) The second recommendation of the [APB] in April 1998 for promotion of the Applicant to the post [the] functions [of which] she had been fulfilling, was a solid testimony for the integrity of the [APB], and the High Commissioner's refusal to accept it, as well as the rejection by the [APB] of the male candidate she had proposed provides further evidence of her determination to ignore ... established United Nations policy and ... due process.

(e) The further pressure by the High Commissioner on the [APB] in June 1998 to reopen its review and to personally hear her views of support for her male candidate ..., amounted to an unprecedented manifestation of prejudice, arbitrariness and was a clear and unequivocal violation of all principles of due process.

(f) The proposal by the [APB] to the Under-Secretary-General [for] Management to re-advertise the post was a clear indication of the [APB's] frustration with the High Commissioner's continuing pressure and an implicit assertion of its disagreement with the prejudiced and persistent recommendation of the High Commissioner.

(g) The decision by the Secretary-General in June 1998 to appoint the male candidate chosen by the High Commissioner against the repeated recommendations of the [APB] points to a complete surrender to the High Commissioner's pressure and her unprecedented arbitrary violation of the Applicant's conditions of service and the provisions of relevant Staff Regulations, Rules and Administrative Instructions.

(h) That the Secretary-General be ordered to rescind the decision to appoint a person other than the Applicant in the aforesaid post at the D-1 level and to rectify that situation by awarding her an appointment at the D-1 level effective 1 September 1997. Alternatively, should the Secretary-General, within thirty days decide that the Applicant be compensated without further action being taken in her case, the Applicant prays that the Administrative Tribunal fix an amount of compensation commensurate with the degree of injury and severe humiliation suffered by her as a result of the harsh and arbitrary decisions taken by the High Commissioner and condoned by the Secretary-General."

Whereas on 11 April 2000, the Applicant amended her pleas as follows:

(h) That the Secretary-General be ordered to rescind the decision to appoint a person other than the Applicant in the aforesaid post at the D-1 level and to rectify that situation by awarding her an appointment at the D-1 level effective 1 September 1997. Alternatively, should the Secretary-General, within thirty days decide that the Applicant be compensated without further action being taken in her case, the Applicant prays that the Administrative Tribunal fix an amount of compensation equal to two years net salary bearing in mind her loss of pensionable remuneration for the period 1 September 1997 to 31 December 1999, and bearing in mind the degree of injustice inflicted on her and the extent of the injuries to her morale, image and professional

reputation as a result of the highly arbitrary and hurtful decision taken by the new High Commissioner ..."

Whereas the Respondent filed his Answer on 23 April 2001;

Whereas the Applicant filed Written Observations on 20 May 2001;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 17 February 1975, as an Associate Officer at the P-2 level in the Division of Human Rights, United Nations Office at Geneva (UNOG). Following a series of promotions, on 5 March 1984, the Applicant was reassigned to the P-4 level post of Human Rights Officer, International Instruments Unit, Centre for Human Rights. Following a restructuring exercise, on 1 April 1991, the Applicant was promoted to the P-5 level position of Chief, International Instruments Section, Centre for Human Rights. In 1993, the International Instruments Section was given Branch status, with the Applicant retaining her position as Chief. On 3 May 1996, following another restructuring exercise, the Applicant assumed the functions of Chief, *ad interim*, Management Unit 2, CHR, a D-1 level position. The Unit was renamed Support Services Branch on 30 September 1996, with the Applicant continuing as Chief, *a.i.*.

On 29 January 1997, the Applicant applied for the D-1 level position of Chief, Support Services Branch, CHR. The then High Commissioner included the Applicant in his short list of candidates. In March and April 1997, the High Commissioner, as well as the incoming Officer-in-Charge and the Director of the Division of Administration, UNOG, conducted interviews of the four short-listed candidates, as a result of which, on 14 May 1997, the Officer-in-Charge advised the Chairperson of the APB that the interview panel had unanimously concluded that "the most qualified candidates ... in their ranking order" were the Applicant and another internal candidate. On 31 July 1997, the APB recommended the Applicant for promotion to the post.

On 12 September 1997, a new High Commissioner took office. On 16 September 1997, the Applicant was informed that the new High Commissioner had decided to re-advertise the post "in order to be able to consider qualified applicants from a broader range of countries than was possible in the first round". On 27 October 1997, the Applicant reapplied for the post.

On 10 March 1998, the Chief, Recruitment and Placement Section, UNOG, informed the Applicant that another candidate had been recommended by the Department, but invited her to submit any additional relevant information. On 18 March 1998, the Applicant wrote to the APB, describing, *inter alia*, her experience as Chief, *a.i.*, Support Services Branch, for almost two years.

On 3 April 1998, the APB wrote to the High Commissioner, expressing concern that the post had been re-advertised at the "final review" stage. They advised her, *inter alia*, that the APB was "not convinced that a case had been made for the superiority of [the candidate recommended by the High Commissioner] over [the Applicant]", and was inclined to maintain its earlier recommendation of the Applicant.

On 21 April 1998, the High Commissioner replied that "[the Applicant], in my considered opinion, does not at this time possess the skills needed to manage the Branch, nor to take a lead role in the change initiatives that I envisage". The High Commissioner provided justifications for her preference, an external male candidate, and noted that she "[felt] compelled to pay due regard to the importance of achieving geographical balance in [CHR]". Nonetheless, on 30 April 1998, the APB affirmed its original findings and again recommended the Applicant for the post in light of her qualifications, experience and performance.

On 4 June 1998, the APB acceded to a request from the Under-Secretary-General for Management and agreed to reopen its review of the case in order to hear the High Commissioner in person. Thereafter, the Chairperson of the APB wrote to the Under-Secretary-General for Management, recalling the selection process and final recommendation of the APB, and recommending that the post be re-advertised a second time. The Chairperson stated that the High Commissioner had expressed "very firm views that [the Applicant] would not be suitable for the post" but that the APB "was not convinced [the High Commissioner's preferred candidate met] the requirements for the post".

On 23 June 1998, the Under-Secretary-General for Management advised the Chairperson of the APB that he did not agree with the recommendation of the APB to readvertise the post a second time and that, on behalf of the Secretary-General, he had decided to appoint the High Commissioner's preferred candidate to the post. The Applicant was advised of the appointment on 30 June 1998.

On 8 July 1998, the Applicant requested administrative review of the decision not to appoint her.

On 6 October 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 18 November 1999. Its conclusion, recommendations and special remarks read as follows:

"Conclusion and Recommendations

60. [T]he Panel **concludes** that, *prima facie*, the Appellant appears to have grounds to claim that at the final stage of the selection process, *i.e.* subsequent to the final recommendation of the APB, she was not afforded the fair consideration to which she is entitled under Article 101.3. The Panel therefore **recommends** that the Secretary-General examine whether this was indeed the case and, if so, that he consider granting ... appropriate compensation to the Appellant.

61. [T]he Panel further **recommends** that in the event of the Appellant applying for another D-1 post for which she is qualified, every step be undertaken, as a matter of priority and at the earliest date, to ensure that she is given the full and fair treatment to which she is entitled under Article 101.3, and the Staff Rules and Regulations.

Special Remarks

62. [T]he Panel would like to suggest that vacancies for Senior Management posts not be filled in haste in the months prior to a new Head of Department being appointed."

On 1 January 2000, the Applicant was transferred to the L-6 position of Principal Advisor for Regional Strategies, CHR.

On 21 March 2000, the Applicant, not having received a decision from the Secretary-General regarding her appeal to the JAB, filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision of the High Commissioner in September 1997 to readvertise the post was entirely arbitrary; constituted an unequivocal violation of the Applicant's inherent right to a full, fair and just consideration and evaluation of her qualifications for the post; subordinated

the provisions of Article 101.3 of the Charter; and, contravened General Assembly resolution 51/226 of 25 April 1997.

2. The considerable pressure the High Commissioner exerted on the APB was unprecedented and in clear violation of the conditions of service established in the Charter and in the Staff Regulations and Rules.

3. The arbitrary decision to appoint the external male candidate was in clear and unequivocal violation of the provisions of administrative instructions ST/AI/412, entitled "Special measures for the achievement of gender equality" of 5 January 1996 and ST/AI/413, entitled "Placement and promotion" of 25 March 1996.

4. The belated transfer of the Applicant to an L-6 post did not compensate for the severe injustice inflicted on her or the humiliation she suffered.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion, but only a right to consideration for promotion. The Applicant was properly considered for promotion, and her rights were not violated by her non-selection to the post in question.

2. The selection process leading to the decision not to select the Applicant for the post in question was not vitiated by extraneous factors.

The Tribunal, having deliberated from 1 to 21 November 2001, now pronounces the following Judgement:

I. The Applicant appeals the Respondent's decision of 29 June 1998, which led to her non-selection for, and non-promotion to, a contested post. The Applicant claims that the Respondent violated administrative rules and regulations, abused his authority and demonstrated gross arbitrariness, which affected her non-promotion to the D-1 level. The Applicant further claims that she did not receive full and fair consideration and that her rights of due process were violated throughout the administrative process. The Applicant seeks to rescind the Respondent's decision to appoint a person other than herself to the disputed post.

II. This case concerns the Respondent's discretionary powers to promote and appoint United Nations staff. It has long been established in the Tribunal's jurisprudence that the Secretary-General has broad discretionary powers to promote qualified staff. (See Judgement No. 134, *Furst* (1969).) This power is guided by procedural rules and has been limited in cases where the Secretary-General abused his authority, made procedural or substantive errors, or violated the rights of due process of a staff member. The Applicant alleges that the Respondent's administrative decision not to promote her is in violation of Article 101.3 of the UN Charter, staff regulations 4.2 and 4.3, and administrative instructions ST/AI/412 and ST/AI/413.

III. The Applicant began her career at the United Nations on 17 February 1975, as an Associate Human Rights Officer at the P-2 level in the Division of Human Rights, UNOG. After a series of promotions, on 5 March 1984, she was reassigned to a post within the International Instruments Unit, Centre for Human Rights. As a result of a restructuring exercise, on 1 April 1991, the Applicant was promoted to the P-5 level position of Chief, International Instruments Section, Centre for Human Rights.

In 1993, another restructuring exercise took place at the Centre for Human Rights and the International Instruments Section was given Branch status. In May 1996, the Applicant was informed that she was to be appointed to head one of three Management Units which had resulted from the latest restructuring exercise within CHR. On 30 September 1996, the Applicant's functional title changed to Chief, *a.i.*, Support Services Branch.

IV. The D-1 level vacancy for the position of Chief, Support Services Branch was announced and, on 29 January 1997, the Applicant applied. She was one of two internal and five external candidates reviewed for the post by the Administration. Between 12 March and 4 April 1997, the then High Commissioner, the Officer-in-Charge and the Director, Division of Administration, UNOG, interviewed the three candidates and one additional external candidate. On 14 May 1997, the Chairperson of the APB was informed that the interview panel had unanimously concluded that "the most qualified candidates ... in their ranking order" for the post

were the Applicant and another internal candidate. On 31 July 1997, the APB recommended that the Applicant be promoted to the post of Chief, Support Services Branch.

V. A new High Commissioner was appointed in September 1997. On 16 September 1997, the Acting Deputy High Commissioner for Human Rights informed the Applicant that the High Commissioner had decided to re-advertise the post in order to consider qualified applicants from a broader range of countries than was possible in the first round of review. On 27 October 1997, the Applicant reapplied for the post.

On 10 March 1998, the Chief, Recruitment and Placement Section, UNOG, informed the Applicant that the Department had recommended another candidate for the post and requested that the Applicant submit any additional information, relevant to her suitability for the vacancy, which may not have been available to the review bodies, to the APB. The Applicant complied on 18 March 1998. On 21 April 1998, the High Commissioner provided justifications for recommending a candidate other than the Applicant for the post. On 30 April 1998, while taking the High Commissioner's recommendation into consideration, the APB announced that it stood firm behind its original findings and again recommended the Applicant for the post.

On 4 June 1998, the APB reopened the case for further review. The same day, the Chairperson of the APB addressed a letter to the Under-Secretary-General for Management, recalling the process of selection and the final recommendation of the APB, and recommending that the post be re-advertised a second time because the APB did not find the High Commissioner's candidate qualified for the post. On 29 June 1998, however, the Respondent appointed the candidate recommended by the High Commissioner.

On 6 October 1998, the Applicant lodged an appeal with the JAB.

The Applicant was transferred to the newly-created position of Principal Advisor for Regional Strategies, CHR, at the L-6 level, on 1 January 2000.

On 21 March 2000, the Applicant filed an Application with the Tribunal.

VI. The Respondent contends that he maintains wide discretionary powers when promoting staff. The Tribunal affirms that appointments and promotions are within the broad discretion of

the Secretary-General. (See Judgement No. 134, *Furst* (1969).) However, this power is neither absolute nor unfettered: the Respondent's discretion shall be reviewed when there are allegations of abuse of discretion. (See Judgement No. 870, *Choudhury and Ramchandani* (1998).)

The JAB report does not question the Respondent's prerogative to accept or reject the recommendation of the APB, but rather questions the Respondent's decision-making process. The JAB stated that,

"[T]he APB articulated its serious concern that the candidate recommended by the High Commissioner did not meet the requirements of the post, and there are no elements indicating how this concern was taken into account by the Secretary-General. The Panel was thus unable to follow the process by which the final decision as to the appointment was made."

Furthermore the JAB report states,

"In these circumstances, the Panel is particularly disturbed that a candidate judged by the APB not to fully meet the requirements of the post was appointed, while the candidate judged to meet the requirements of the post was rejected. The Panel further notes the lack of transparency at the final stage of the decision-making process, which leaves it unable to judge whether Article 101.3 was observed. As a result, the Panel considered that there appear to be *prima facie* grounds to question whether there was a proper exercise of discretion by the Secretary-General."

The Applicant alleges that the High Commissioner's decision to disregard the recommendation of the APB was entirely arbitrary and constituted an unequivocal violation of her right to full, fair and just consideration as well as evaluation of her qualifications for the post which she had actually occupied for well over a year.

VII. The Respondent claims that the Applicant was properly considered for promotion and that her rights were not violated by her non-selection to the post in question. The Respondent states that the Applicant received full and fair consideration and that the non-implementation of the APB's recommendation was neither highly improper nor influenced by arbitrary factors.

Further, the Respondent claims that the Secretary-General is under no obligation to implement the APB's advisory recommendations.

The Secretary-General instituted an administrative structure, which includes the APB, with the mandate to make recommendations for the appointment and promotion of candidates who satisfy the vacancy requirements under Article 101.3. The JAB correctly observed that the Secretary-General's intention in creating such a structure was two-fold: it maintains a system of checks and balances to assure both the Organization and staff members that the appropriate procedures were followed by the Department concerned and the various review panels, and that the recommendation of the APB to the Secretary-General was not tainted by bias or prejudice; and, it includes an assessment of whether the discretionary power of the Secretary-General was properly exercised within the limits of Article 101.3.

The Tribunal finds the decision-making process in the second round of re-examination questionable. The Tribunal affirms the JAB's conclusions that, as an advisory body created to make non-binding recommendations with respect to promotions and appointments, the APB upheld Article 101.3 while acting consistently and responsibly during both the first, second and third reviews of the candidates.

After the post was re-advertised at the request of the High Commissioner, the APB did not find that the candidate she recommended met the requirements of the post. Having reviewed the High Commissioner's comments defending her selection, the APB remained unconvinced of the superiority of the candidate she recommended and again proposed that the Applicant be promoted to the post. The APB re-examined the case for a third time and was still not persuaded that the High Commissioner's recommended candidate met the requirements of the post. Although the powers of the APB are advisory and non-binding, the Respondent failed to address the APB's consistent rejection of the High Commissioner's candidate and its recommendation that he was not qualified. In the view of the Tribunal, in light of this impasse, the APB was correct in recommending that the post be re-advertised.

The JAB concluded that "the Appellant appears to have grounds to claim that at the final stage of the selection process, i.e. subsequent to the final recommendation of the APB, she

was not afforded the fair consideration to which she is entitled under Article 101.3". The JAB recommended that the Respondent examine whether the Applicant received fair treatment and, if he determined that she had not, that she be compensated.

Notwithstanding the Respondent's contentions that the letter dated 23 March 2000, addressed to the Applicant, states that she received full and fair consideration at every stage of the process including the final stage and that, therefore, her non-selection did not violate her rights, the JAB found nothing to indicate how the Respondent's final decision was reached. The Tribunal finds that the Respondent asserted no valid grounds or line of reasoning when ultimately he made his decision not to re-advertise the post and to appoint the other candidate. Accordingly, the Respondent's decision-making process and final decision went against the principles of due process and violated the Applicant's right to full and fair consideration.

VIII. In addition, the Tribunal has consistently held that the Respondent's discretionary powers with respect to promotion are subject to staff regulation 4.2 and Article 101 of the Charter which states "the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity". (See Judgement No. 828, *Shamapande* (1997).) In order to achieve this purpose, "it is indispensable that 'full and fair consideration' should be given to all applicants for a post" and that "the Respondent bears the burden of proof with respect to this issue." (*Ibid.*, para. VI.) In the instant case, the Tribunal finds that the Respondent did not fully meet this burden.

IX. The Applicant contends that the High Commissioner's decision to appoint an external male candidate was in clear and unequivocal violation of the Regulations and Rules, specifically the provisions of ST/AI/412 which attempts to promote gender balance in the Secretariat by having 35 per cent of all Professional posts encumbered by women by 1995; 25 per cent of posts at the D-1 level and above by June 1997; and 50-50 parity between men and women (both overall and for positions at the D-1 level and above) by the year 2000.

On 1 May 1998, the APB recommendation highlighted the Applicant's superior qualifications juxtaposed to the male candidate stating, "the Applicant is the best candidate for

the post ... given her superior qualifications, considerably greater practical and more diverse experience, as well as her consistently excellent performance record". The APB pointed out that the Applicant had a higher Law degree than the male candidate, was a skillful negotiator, possessed the relevant management skills, and had performed very well as Chief, *a.i.*, of the Branch for over 18 months. The APB stated "[w]hile [the male candidate] possesses excellent credentials, the Board feels that the [Applicant] is the stronger candidate, also due to her longer practical experience in the functions of the post and the office".

X. The Tribunal recalls that on 3 May 1996, the Applicant was appointed Chief, *a.i.*, Management Unit 2. Having served in that capacity for over one year, and in view of her "excellent" performance, she was recommended by the then High Commissioner for appointment to the post and for promotion to the D-1 level. Subsequently, the APB recommended the Applicant. Notwithstanding the above, in a memorandum addressed to the Chairperson of the APB, dated 21 April 1998, the High Commissioner stated, *inter alia*, "[the Applicant], in my considered opinion, does not at this time possess the skills needed to manage the Branch, nor to take a lead role in the change initiatives that I envisage". The Applicant had, at that time, served as Chief, *a.i.*, for almost 19 months. In her memorandum, the High Commissioner evaluated both the Applicant's performance and her potential. It is not clear to the Tribunal that the High Commissioner was in a position to make such a conclusive determination. In particular, the Tribunal notes that the evaluation was completely contrary to that of the former High Commissioner.

The Tribunal agrees with the JAB that there was a lack of transparency in the final stages of the decision-making procedure. Also it was improper for the High Commissioner to intervene with the APB and such intervention amounted to a violation of due process. (See Judgement No. 988, *Mezoui* (2000).) Accordingly, the Tribunal finds that the Applicant is entitled to compensation.

XI. In view of the foregoing, the Tribunal:

(i) Orders the Respondent to pay the Applicant compensation equivalent to one year net base salary at the D-1, step 7 level; and

(ii) Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Julio BARBOZA
Vice-President

Spyridon FLOGAITIS
Member

New York, 21 November 2001

Maritza STRUYVENBERG
Executive Secretary