



Administrative Tribunal

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AT/DEC/1040
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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1040

Case No. 1102: USPENSKY

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Ms. Marsha A. Echols;

Mr. Omer Yousif Bireedo;

Whereas, on 5 October 1999, Vladimir Uspensky, a staff member of the United Nations, filed an Application containing pleas which read as follows:

"7. With respect to ... procedure, the Applicant respectfully requests the Tribunal:

...

(c) *To decide* to hold oral proceedings on the present Application ...

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *To find and rule* that the failure of [the] Respondent to afford the Applicant full and fair consideration for a permanent appointment constitutes a violation of his contractual rights;

(b) *To find and rule further* that the Respondent's continuing failure to regularize his contractual status is procedural[ly] flawed and violates the principle of good faith and fair dealing between the parties;

- (c) *To find and rule further* that the procedural irregularities and evidence of improper motivation on the part of [the] Respondent's agents constitute discriminatory and prejudicial treatment;
- (d) *To find and rule further* that the Joint Appeals Board erred in failing to find that the decisions affecting the Applicant's contractual status were improperly motivated and procedurally flawed, and in failing to award damages for the harm done to the Applicant arising from the irregularities which occurred.
- (e) *To order* that the decision of the Respondent rejecting the unanimous recommendation of the Joint Appeals Board that the Applicant be afforded every reasonable consideration for a career appointment free of any limitation or restriction, be overturned;
- (f) *To award* the Applicant damages in the amount of three years' net base salary for the harm to his career and reputation as well as the for the infliction of unnecessary anxiety and stress caused by [the] Respondent's actions or lack thereof,
- (g) *To award* costs to the Applicant in the amount of \$ 10,000."

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 31 March 2000 and periodically thereafter until 31 July 2001;

Whereas the Respondent filed his Answer on 25 July 2001;

Whereas the Applicant filed Written Observations on 29 August 2001;

Whereas, on 23 October 2001, the Tribunal decided that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations as a Statistician in the Statistical Office, Department of International Economic and Social Affairs at the P-3 level, on a two-year fixed term appointment, on 21 June 1984. His letter of appointment specified that he was "on secondment from the USSR Government". The Applicant's appointment was renewed several times, and, on 22 May 1992, after a break in service, he received a one-year fixed-term appointment as an Economic Affairs Officer, Department for Economic and Social Development (DESD). The letter of appointment of the same date contains no reference to "secondment". He

then served in the same position in DESD (which was renamed Department for Development Support and Management Services (DDSMS)), until 29 January 1997, when he went on mission assignment to the United Nations Office for the Humanitarian Coordinator for Iraq (UNOHCI). On 1 February 1998, the Applicant was assigned to the Department of Administration and Management as a Computer Operations Officer at the P-3 Level. The Applicant's current appointment is due to expire on 31 August 2002.

On 28 November 1994, the Director, Staff Administration and Training Division, Office of Human Resources Management (OHRM), issued a memorandum addressed to all Executive/Administrative Officers at Headquarters regarding conversion to career appointments. The memorandum mentioned several criteria that would have to be met, including availability of an established post under the regular budget.

On 13 March 1995, the Officer-in-Charge, Division of Environment Management and Social Development, DDSMS, wrote to the Executive Officer, DDSMS, recommending the Applicant "for conversion to career appointment on the basis of his performance and achievements". On 14 March 1995, the Executive Officer, DDSMS, forwarded the request to a Personnel Officer, OHRM.

On 3 April 1995, the Under-Secretary-General for Development Support and Management Services wrote to the Under-Secretary-General for Administration and Management, referring to information he had received from OHRM that conversion to career appointment of staff on overhead account (OHA) posts could not be approved as "the Organization might not be able to maintain OHA posts the following year". He pointed out that DDSMS had never based its recommendations for such appointments "on how a post [was] funded", that the majority of his staff on OHA posts held permanent appointments, and requested agreement to proceed with the granting of career appointments to the pending cases. In his reply of 25 April 1995, the Under-Secretary-General for Administration and Management stated that the practice of DDSMS to have a large number of permanent staff on OHA posts had resulted in the termination of a number of staff members, and that, therefore, only staff on regular budget posts would be considered for conversion at this time. He also referred to the financial constraints faced by DDSMS, requiring more separations, and advised against "switching" of staff members from one post to another in order to be considered for career appointment. On 17 May 1995, the Under-Secretary-General for Development Support and Management Services

again wrote to the Under-Secretary-General for Administration and Management, stating that the Staff Rules do not allow for discrimination against staff based on the source of funding of a post, and requesting regularization for the seven staff members, including the Applicant, eligible for conversion.

On 28 June 1995, the Executive Officer, DDSMS, again wrote to OHRM, requesting that the Applicant's appointment be converted to permanent. On 17 July 1995, the Under-Secretary-General for Administration and Management, replied to the above letter of 17 May, maintaining his position, and denying the request for conversion of seven staff members in DDSMS.

On 11 July 1995, the Executive Officer, DDSMS, wrote to OHRM, requesting extension of the Applicant's appointment for two years.

On 3 and on 30 May 1996, the Under-Secretary-General for Development Support and Management Services informed the Applicant that, in view of the shortfall of overhead resources, and based on the comparative review called for by administrative instruction ST/AI/415 of 2 April 1996 entitled "Redeployment of staff", his name had been included in the list of staff members to be redeployed, and that he was responsible for applying for suitable positions.

On 23 July 1997 the Applicant wrote to the Assistant Secretary-General, OHRM, requesting consideration for conversion of his appointment to permanent, in accordance with staff regulation 4.5 and General Assembly resolutions 37/126 of 17 December 1982 and 38/232 of 20 December 1983. On 19 August 1997, the Officer-in-Charge, Operational Service Division, OHRM, replied to the Applicant, advising him that the decision to grant career appointments was still under review at the request of the General Assembly, in its resolution 51/226 of 25 April 1997 and that it would therefore not be possible to accede to his request until the proper procedures were in place.

On 15 September 1997, the Applicant wrote to the Secretary-General, requesting review of the "negative decision on [his] request that [his] appointment be converted to permanent status".

On 23 January 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 12 May 1999. Its considerations and its recommendation read as follows:

"Considerations

16. The Panel took note that on 13 March 1995, Appellant's department formally recommended that he be considered for a career appointment ... The Panel concluded that Appellant should have been considered for conversion to permanent appointment in 1995, but was not.

17. The Panel carefully reviewed Appellant's Official Status file and found ample evidence of fourteen years of satisfactory service ... The Panel found no evidence that Appellant had been reviewed for career appointment, much less given the careful consideration to which he is entitled ...

18. The Panel considered Appellant's request for damages because of the arbitrary and dilatory fashion with which the Administration dealt with his posting and contractual status from January 1997 until July 1998. It is evident that Appellant was put to some considerable inconvenience and subject to stress. Each of the Panel members were, however, familiar with and/or had been subjected to similar experiences. This is not to excuse the Administration in this case for having failed to respect its own procedures. It is, however, a reason for the Panel to conclude that Appellant's sufferings were not unique, and, therefore, not a basis for the award of damages.

Recommendation

19. The Panel recommends that Appellant be given every reasonable consideration for granting of a career appointment, free of any limitation or restriction that may currently be in effect, including considerations of geographical distribution.

20. The Panel makes no further recommendation with respect to this appeal."

On 12 August 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General is not in agreement with the Board's conclusion above. He considers that, contrary to the Board's finding, you were considered for a career appointment in 1995, when your Department recommended that you be granted such an appointment on 14 March and 28 June 1995. In its Judgement No. 712, *Alba et al.* (1995), the Administrative Tribunal decided that, while 'the general financial framework might ultimately determine whether or not career appointments can be granted', all staff must be considered for such appointments irrespective of the source of funding for an individual staff member's post. In accordance with the requirement articulated in the above Judgement, you were considered and recommended for a career

appointment by your Department in 1995. As the right to be considered for a career appointment is not tantamount to a right to conversion to such an appointment, the fact that you were not accorded such an appointment does not violate your rights. The Secretary-General has therefore decided to take no further action on your appeal.

..."

On 5 October 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant was denied every reasonable consideration for a career appointment.
2. The decision to refuse reasonable consideration for a permanent appointment was tainted by extraneous and improper motives, and constitutes bad faith.
3. The decision to redeploy the Applicant affected his career and violated his rights of due process.
4. The piecemeal extensions of the Applicant's appointment and the fact that he worked for periods of time without any contract caused the Applicant financial loss as well as humiliation, stress and uncertainty, for which he should be compensated.

Whereas the Respondent's principal contentions are:

1. The Respondent fulfilled his obligation to give the Applicant every reasonable consideration for conversion to a career appointment.
2. The right to be considered for conversion to a career appointment does not confer upon the Applicant an automatic right to a permanent appointment.
3. The decision not to convert the Applicant's appointment was not improperly motivated, the result of bias, or an abuse of discretion.

The Tribunal, having deliberated from 23 October to 30 November 2001, now pronounces the following Judgement:

I. The Applicant requests the Tribunal to award him damages and other relief on the ground that in 1994 he was not given "every reasonable consideration for a career appointment" although he had fifteen years of good service. He argues that this failure by the Respondent violated his contractual rights and was a result of discrimination. He also asserts that the Respondent failed to follow his own rules. The JAB agreed in part. It recommended that the Applicant "be given every reasonable consideration for granting of a career appointment" but declined to recommend an award of damages. The Respondent did not agree with the JAB recommendation. His position is that the Applicant was afforded reasonable consideration but was not converted to a permanent post for financial reasons. He also argues that there is insufficient evidence to support the other claims of the Applicant.

II. The right of the Applicant to be considered for a permanent post and the countervailing responsibilities of the Organization regarding staff matters are stated in several legal documents. As a starting point, Article 101.1 of the Charter of the United Nations provides that "staff shall be appointed by the Secretary-General under regulations established by the General Assembly". In making those appointments and in determining the conditions of service the "paramount consideration" must be the "highest standards of efficiency, competence, and integrity", with due regard given to recruiting staff on as wide a geographical basis as possible, according to Article 101.3.

The legal framework described below leads to two important questions of interpretation. The first question is a general one: what is the meaning of "every reasonable consideration" and was that consideration provided in response to the Applicant's request for an appointment. The second question is whether the financial situation of the Organization may be taken into account when considering such a request.

III. The Organization introduced the notion of "every reasonable consideration" in General Assembly resolution 37/126, which was in part a response to a report of the International Civil Service Commission. A history of this resolution is contained in Judgement No. 712, *Alba et al.* (1995), a judgement that post-dates the time when the Applicant requested conversion to a permanent appointment but which is nevertheless relevant. The General Assembly decided that "staff members on fixed-term contracts upon completion of five years of continuing good service

shall be given every reasonable *consideration* for a career appointment". (Emphasis added.) As a consequence, this reasonable consideration is an implicit term in contracts of employment.

IV. The record shows that, at the decision-making level, the Respondent gave at best only an illusory consideration to the determination of the Applicant's eligibility and no consideration to the request for conversion. There is no evidence of a meaningful consideration of the Applicant's performance and length of service. The Respondent denied the conversion because of the financial position of the Organization and nothing else was considered.

V. To support his assertion that the request was properly denied, the Respondent refers to General Assembly resolution 51/ 226 on human resources management. The resolution addresses the ratio between career and fixed-term appointments. In the resolution, the General Assembly decided that "five years of continuing service ... do not confer the automatic right to a permanent appointment". It also decided in the same resolution that "other considerations, *such as* outstanding performance, the *operational* realities of the organizations and the core functions of the post, should be duly taken into account". (Emphasis added.) While financial considerations are not excluded, it is noteworthy that such an important factor is not expressly stated, whereas "operational" realities are listed.

VI. The Respondent also relies on staff rule 104.13, which states that a "permanent appointment *may be granted*, in accordance with the needs of the Organization ...". (Emphasis added.) It is the Respondent's view that this staff rule permits him to take the financial situation of the Organization into account when deciding whether to offer a permanent appointment. He states that "given the financial conditions then prevailing, such conversions were not in the interests of the Organization." The Respondent cites *Alba et al.*, *ibid.* In *Alba et al.*, paragraph V, the Tribunal noted that the "financial constraints of the Organization may be one of the factors to be considered in the granting of career appointments." As stated above, the Tribunal agrees that the financial situation of the Organization may be taken into account. However, there must be serious and formal consideration of *all* the relevant factors in order to accord the reasonable consideration that is required.

VII. This case, like *Alba et al.*, includes the additional issue of discrimination, in particular discrimination against staff based on the source of funding for their posts. Again the Tribunal finds the precedent offered by *Alba et al.* to be relevant. In that case the Applicant argued that, in deciding whom to convert, there should not be distinctions made between staff members based on the underlying source of funding for their posts, since under such a practice "long-serving staff members, whose performance is satisfactory, might not even be considered for career appointments because they are serving on extra-budgetary posts, while other staff members with considerably shorter service would be considered for permanent posts after five years because their posts are funded from the regular budget." The Tribunal called that practice "unfair". In reading resolution 37/126 it found no such distinction among staff possible within the context of giving every reasonable consideration.

The Tribunal continues to believe that, as it held in *Alba et al.*, paragraph VIII, the Organization must "treat staff members equally, that is without distinctions based on sources of funding, regardless of how many, or how few, permanent appointments the Organization can afford to grant". As in *Alba et al.* the Tribunal bases its ruling on the broad reference to "[all] staff members" in General Assembly resolution 37/126.

VIII. There also appeared to be some discrimination based on nationality. In 1995 staff members from a country were transferred from overhead posts to established posts (i.e., were eligible for conversion) in disproportionate numbers, while many nationals of other nations were maintained in extra budgetary posts. Since the number of available permanent posts was limited, the nationals from the other countries - like the Applicant - were unfairly placed at a disadvantage and were denied their right to be considered for career appointment. The rationale for this policy was that it reduced the impact on the Tax Equalization Fund of having nationals of the first country paid from overhead accounts. As stated by the Under-Secretary General for Administration and Management in a 17 July 1995 memorandum, "[t]his practice is unacceptable as it creates an extremely unfair situation for staff members of other nationalities".

IX. The Tribunal finds insufficient evidence in the record to support the Applicant's other claims of discrimination.

X. The Tribunal cannot agree that the rights of the Applicant were fulfilled. The JAB correctly concluded that the Applicant was not, but should have been, given every reasonable consideration for a permanent post. Given the current age of the Applicant, the only practical relief available to the Tribunal is an award of compensation, because the provisions of staff rule 104.12 (b) (iii) only apply to staff members under the age of 53. Accordingly, the Tribunal awards the Applicant \$22,500 compensation in damages, because the Respondent failed to accord him the required reasonable consideration, leading to a protracted period of uncertainty, and because of the discrimination against him.

XI. In view of the foregoing, the Tribunal:

- (a) Orders the Respondent to pay the Applicant \$22,500 in compensation; and
- (b) Rejects all other pleas.

(Signatures)

Kevin HAUGH
Vice-President, presiding

Marsha A. ECHOLS
Member

Omer Yousif BIREEDO
Member

New York, 30 November 2001

Maritza STRUYVENBERG
Executive Secretary