



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1062

Case No. 1159: BALZO

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

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

Whereas, on 9 October 2000, Jorge Balzo, a staff member of the United Nations, filed an
Application containing pleas which read as follows:

"II: PLEAS

...

13. *Regarding merits*, the Applicant respectfully requests [the United Nations
Administrative Tribunal]:

a) *To find* that the Applicant's redeployment should be considered a lateral move
...;

b) *To find* that the Applicant had an acquired right to maintain his personal
category at his former [G-7] level ...

c) *To find* that the Respondent handled the Applicant's appeal in the most casual
way, adversely affecting the administration of justice, and inflicting unnecessary
anxiety, moral damage, loss of reputation and economic loss.

- d) *To find* that the downgrading action caused a loss of the Applicant's professional reputation.
- e) *To order* the Respondent that the Applicant's personal category level be restored to [G-7] retroactive to the downgraded date ...
- f) *To order* that the Applicant be paid retroactively the difference between the salary at the [G-6] level and his personal grade, which is [G-7], together with the respective interest.
- g) *To order* that the Respondent pay the Applicant ... additional compensation equivalent to five months [net base] salary for the casual way [he handled] the case.
- h) *To order* that the Respondent pay the Applicant ... additional compensation equivalent to four [months net base] salary for ... moral damages and loss of professional reputation ..."

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 30 April 2001 and periodically thereafter until 31 October 2001;

Whereas the Respondent filed his Answer on 29 October 2001;

Whereas the Applicant filed Written Observations on 10 December 2001;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) on 1 December 1975, as a Programmer at the Latin American Demographic Centre (CELADE) in Santiago, Chile, on a three-month fixed-term appointment at the G-6 level. At the material time, the Applicant held the G-7 level position of Computer Systems Assistant.

On 8 March 1996, the Applicant was informed that, since the funds which financed his appointment were exhausted, his fixed-term appointment with CELADE had expired on 29 February 1996, however, on an exceptional basis, the Executive Secretary, ECLAC, had agreed to a four-month assignment to the post of Computer Systems Assistant, Computer Services Section, ECLAC. The Applicant was advised that the post offered was at the G-6 level, which was the only available option, but that the classification of the post was under appeal.

On 15 March 1996, the Applicant accepted the offer "subject to the appropriate reservations regarding the rights [he had] acquired in 20 years of employment with ECLAC". Accordingly, on 22 March 1996, the Applicant signed a letter of appointment for a four-month fixed-term appointment at the G-6 level. The Applicant accepted subsequent renewals of this appointment.

On 23 June 1996, the Applicant wrote to the Chief, Division of Administration, ECLAC, recounting his career. In his letter, the Applicant mentioned several instances in which he had been promised a promotion to the Professional category, including once after he had passed the written part of the G to P examination; promises which had never materialized. The Applicant added that he had served the Organization for 20 years in what was virtually a career appointment, and was now requesting that his case be reviewed. On 13 August, the Chief replied that it was not possible to revise the situation of the Applicant's temporary appointment. On 2 September, the Applicant wrote to the Executive Secretary, ECLAC, requesting "a review of the Administrative decision to downgrade his personal category level". The Executive Secretary replied on 27 September, denying the Applicant's request while adding that the Applicant had been informed that "this was the only possible way to avoid [his] separation from service".

On 9 October 1996, the Applicant wrote to the Secretary-General requesting administrative review of the decision to downgrade his personal level.

On 6 December 1996, the Chief, Division of Administration, ECLAC, provided the Chief, Administrative Law Unit, OHRM, with information regarding the Applicant's case.

On 14 January 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 24 March 2000. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

...

16. The Panel was of the view that the [Applicant's] transfer within the Organization from one Commission to another could not possibly be construed as an external appointment, especially since there was no break in service. ... It was the Panel's considered view that the [Applicant] should not be penalized for having been transferred out of CELADE.

Conclusions and Recommendations

17. ... [T]he Panel concluded that the [Applicant], who had satisfactorily serviced the Organization for some 20 uninterrupted years, should have been kept at his level (G-7) when he was transferred to ECLAC to occupy temporarily the post of Computer Systems Assistant. The panel further concluded that since there was no break in service, the [Applicant's] movement from CELADE to ECLAC constituted an internal transfer, and that his personal level should not have been negatively affected. The Panel therefore unanimously recommends that the [Applicant] be kept at his current temporary post at ECLAC at the G-7 level, until a suitable G-7 post could be identified for him. The Panel further recommends that the [Applicant] be granted a retroactive payment (from 1 March 1996) of the difference in salary between the G-6 and G-7 levels."

Effective 1 May 2000, the Applicant was promoted to a G-7 level post.

On 25 September 2000, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"... The Secretary-General has been advised that you have been selected for, and encumbering, a G-7 post as of 1 May 2000, and therefore considers that the first part of the Board's recommendation has been met. The Secretary-General further observes that, following CELADE's decision not to extend your appointment due to lack of funds, ECLAC offered to place you, as an exception to the freeze on the filling of vacancies, on a G-6 post that had just been vacated through retirement. As no other suitable G-7 posts were available, you would have been separated from service on 29 February 1996, and ECLAC succeeded in avoiding this by placing you on the G-6 post. It is for this reason that the Secretary-General has decided not to accept the Board's recommendation for payment of the difference in salary between the 2 levels from 1 March 1996 until 30 April 2000. ..."

On 9 October 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Administration did not give the Applicant every reasonable consideration for a career appointment, as ordered by the Tribunal in Judgement No. 712 *Alba et al* (1995).
2. The Applicant suffered discrimination and his rights were violated.
3. The Applicant had an acquired right to maintain his personal level of G-7.
4. The Respondent handled the case in a "casual way".

Whereas the Respondent's principal contentions are:

1. The Applicant's placement in ECLAC was an extraordinary arrangement necessary to avoid his separation from service. The Applicant did not have a right to be redeployed, nor did the Organization have the obligation to offer him a new appointment.
2. To compensate the Applicant at the G-7 level for functions performed at the G-6 level would constitute unjust enrichment and would violate the concept of equal pay for equal work.
3. The Judgement of the Tribunal in *Alba et al* is not relevant to the present case.
4. The Applicant did not have a right to maintain his G-7 level after he voluntarily moved to a G-6 post.
5. The delay in the present case was not unreasonable in view of the circumstances.

The Tribunal, having deliberated from 27 June to 26 July 2002, now pronounces the following Judgement:

I. The Applicant appeals the Respondent's decision of 25 September 2000, rejecting the JAB's unanimous recommendation that the Applicant be paid a difference in salary grades, and also requests other amounts of compensation for procedural delays. The Applicant's main contention is that his placement in ECLAC at the G-6 level after his fixed-term appointment at the G-7 level with CELADE had expired and could not be renewed because the funds that financed his post had been exhausted, violated his rights. He further argues that his redeployment should be considered a lateral move, and that he had an acquired right to maintain his personal G-7 level.

II. The Applicant joined CELADE as a Programme Officer at the G-6 level on 1 December 1975 on a fixed-term appointment. The Applicant was promoted to the G-7 level in April 1979, and to the G-8 level in April 1983 as a Senior Programmer-Technician. In 1995, his title was changed to Computer Systems Assistant and his G-8 level was reclassified at the G-7 level, which had become the highest level in the local salary scale.

By letter dated 8 March 1996, the Chief, Personnel Section, ECLAC, either informed or confirmed to the Applicant that his fixed-term appointment with CELADE expired on 29

February 1996, since all funds had been exhausted. In light of the Applicant's long-term service and the need to enhance the ECLAC Computer Service Section, the Executive Secretary, ECLAC, had "exceptionally" agreed to the Applicant's "temporary assignment" to that Section from 1 March through 30 June 1996. There were no other posts against which the Applicant could be placed.

On 15 March 1996, the Applicant accepted or confirmed his acceptance in writing to the ECLAC post offered to him at the G-6 level in the Computer Services Section, subject to "the appropriate reservations regarding the rights I have acquired in 20 years of employment with ECLAC". Thereafter, the Applicant accepted numerous renewals of his appointment at the G-6 level.

On 23 June 1996, the Applicant requested the Chief, Division of Administration, ECLAC, to revise and evaluate his case in a manner appropriate to his past employment. On 13 August 1996, the Applicant received a reply that it would not be possible to revise his case at that time. Following two requests for administrative review of the contested decision, one to the Executive Secretary, ECLAC, and one to the Secretary-General, the Applicant lodged an appeal with the JAB on 14 January 1997, which found in his favour on 24 March 2000. Effective 1 May 2000, the Applicant was promoted to a different post, at the G-7 level.

On 9 October 2000, following receipt of the decision by the Secretary-General "not to accept the [JAB's] recommendation for payment of the difference in salary between the two levels from 1 March 1996 until 30 April 2000", the Applicant submitted this Application.

III. The Applicant claims that his placement with ECLAC should be considered a lateral move; that he had an acquired right to his G-7 level; and, that he should be paid the difference in salary between the two grades for the period 1 March 1996 to 1 May 2000. The Respondent claims that the Administration made an offer to the Applicant in good faith who then agreed in writing to the G-6 level placement. Furthermore, the Respondent claims that, "this was an extraordinary arrangement of a temporary nature in order to prevent the Applicant's separation from service after his fixed-term appointment with CELADE had expired and the funds that financed his extra-budgetary post had been exhausted".

The JAB's conclusions and recommendations read as follows:

"... the [Applicant] who had satisfactorily served the Organization for some 20 uninterrupted years, should have been kept at his level (G-7) when he was transferred to ECLAC to occupy temporarily the post of Computer Systems Assistant. The Panel further concluded that since there was no break in service, the [Applicant]'s movement from CELADE to ECLAC constituted an internal transfer, and that his personal level should not have been negatively affected. The Panel therefore *unanimously recommends* that the [Applicant] be kept at his current temporary post at ECLAC at the G-7 level, until a suitable G-7 post could be identified for him. The Panel further recommends that the [Applicant] be granted a retroactive payment (from 1 March 1996) of the difference in salary between the G-6 and G-7 levels."

IV. The Respondent claims that, as of 1 May 2000, the Applicant had been placed against a G-7 post, and considers the first part of the JAB's recommendation met. Further, the Respondent claims that the Applicant should not be paid the difference in salary from 1 March 1996 to 30 April 2000, because the Organization lacked funds to pay the Applicant and assisted him during a hiring freeze by placing him against a G-6 post.

The Applicant claims that his downgrade was unjustifiably based on financial constraints. In a memorandum dated 6 December 1996 to the Office of Human Resources Management (OHRM), New York, the Chief, Division of Administration, ECLAC, stated that, "we would comment that, had [the Applicant] been able to remain in CELADE beyond 29 February 1996, and had his post there been classified at the G-6 level, he would indeed have retained his personal grade (G-7) in accordance with the provisions of [administrative instruction] ST/AI/410 [on General Service classification in Santiago, Chile, of 14 September 1995]".

The Tribunal finds that, under the circumstances described above, the Applicant's rights were not violated when he was placed in ECLAC at the G-6 level after his fixed-term appointment at the G-7 level with CELADE had expired. However, the Applicant's assertion of undue delay by the Respondent and by the JAB has merit: the Tribunal particularly notes the delay of three years between the lodging of the appeal with the JAB and the issuance of its report, and finds that the Applicant was materially injured by this delay, for which he deserves compensation.

Furthermore, this is an Applicant who, in the opinion of the Tribunal, is particularly deserving of the utmost sympathy by reason of his personal employment history with the Organization. His circumstances were truly exceptional, therefore warranting exceptional relief by the Tribunal. The Applicant has had more than 20 uninterrupted years of service with the

Organization, without ever having enjoyed proper or meaningful consideration for a permanent post. In previous proceedings before this Tribunal, in which he succeeded, the Applicant received an order entitling him to proper consideration for a career appointment. (Judgement No. 712, *Alba et al* (1995).) The Applicant was subsequently deprived of the fruits of his victory since, shortly thereafter, the Secretary-General ordered the suspension of the granting of permanent appointments. Additionally, when the Applicant was offered the G-6 post in ECLAC in 1996, he was informed that the classification level of that post was "currently under appeal and the result of the appeal will be known later this year". Any expectation which may have arisen by virtue of this information was likewise thwarted, as the review was not completed until April 2001, by which time the Applicant had been promoted, and was about to begin in a new, G-7 post.

In all of the circumstances the Tribunal is loath to reduce the Applicant's award much below that which was recommended by the JAB, as he has already been subjected to so many disappointments due to events for which he was not responsible. In the circumstances, the Tribunal considers that the Applicant is entitled to compensation in the amount of four months' net base salary.

V. The Tribunal feels compelled to respond to the Applicant's contention that the Executive Secretary of the Tribunal exceeded her authority in not "filing the Application" submitted on 12 June 2000, when she informed him on 21 July 2000 that "it is advisable to wait to file your application until you have received the Secretary-General's decision on the JAB report; without that decision, the Tribunal may not find your application receivable". The Tribunal finds that the Executive Secretary did not refuse the Application and only offered advice to the Applicant. As a result, the Applicant was not harmed by the information the Executive Secretary offered in the memorandum.

VI. For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of four months' net base salary at the G-7 level, at the rate in effect on the date of this Judgement; and,

2. Rejects all other pleas.

(Signatures)

Mayer GABAY
President

Kevin HAUGH
Vice-President

Marsha ECHOLS
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary