



Administrative Tribunal

Distr. Limited
30 January 2004

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1152

Case No. 1261: VAN AGGELEN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Ms Brigitte Stern; Ms Jacqueline Scott;

Whereas at the request of Johannes van Aggelen, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing an application with the Tribunal until 30 June 2002 and once thereafter until 31 July 2002;

Whereas, on 22 July 2002, the Applicant filed an Application, requesting the Tribunal:

“On the merits, ... :

A. To find that the Board was competent to duly consider the contentions of discrimination c.q. unfair treatment in the light of the administrative decision in question and draw the pertinent consequences;

B. To find that the substantial error to omit the Applicant's name from the short list did in fact vitiate his right to be duly considered;

C. To find that the Respondent did not adequately address the consequences for career development of a prolonged absence of performance evaluation reports for which he is solely responsible and consequently to order him to complete all outstanding [performance] evaluation reports (PER's) for inclusion in the Applicant's personal status file;

D. To order the Respondent to justify why the Applicant has not yet been selected for an internally vacant post, despite his numerous applications and to provide him forthwith with a P-5 level post for which he has all the required qualifications;

...

G. To determine that the amount of compensation proposed by the [Joint Appeals Board (JAB)] and endorsed by the Secretary-General was grossly disproportionate to the gravity and seriousness of the irregularities, including human rights violations of a staff member belonging to a vulnerable group, committed by the Office of the High Commissioner for Human Rights;

H. To order the Respondent to pay compensation for sustained mental harm, lost opportunities and harm to reputation over an extended period of time as a handicapped staff member amounting to six years of net base salary.

I. To provide an oral hearing ... including the examination of witnesses and/or experts.”

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 December 2002 and thereafter until 31 January 2003;

Whereas the Respondent filed his Answer on 10 January 2003;

Whereas the Applicant filed Written Observations on 16 May 2003.

Whereas, on 29 October 2003, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined the Office of the High Commissioner for Human Rights (OHCHR) on a temporary assistance basis on 14 February 1980, as Assistant Human Rights Officer, at the P-1 level. He was subsequently promoted to the P-2 and P-3 level, and effective 1 January 1993, to the P-4 level.

His performance appraisal report (PAS) covering the period 1 April-31 December 1999, states that he “fully meets performance expectations”. He received the identical rating for the period 1 January-31 December 2000.

On 27 September 1999, the Applicant submitted an application for a P-5 position of Senior Human Rights Officer. His two most recent PAS reports were attached.

By letter dated 6 October 1999, the Office of Human Resources Management (OHRM), acknowledged receipt of the application, but admittedly

inadvertently failed to include his name in the short list of candidates to be considered by OHCHR.

On 23 December 1999, it was announced in an information circular that another staff member had been selected for that post. By letter dated 21 February 2000, the Applicant requested the Secretary-General to review the administrative decision to promote another staff member to the P-5 post.

Subsequently, in March 2000, the same P-5 post was re-advertised, due to the transfer of the incumbent. The Applicant applied again for that post, was short-listed and interviewed by an interview panel but was not selected. The Applicant did not appeal this decision.

On 26 May 2000, the Applicant lodged an appeal with the JAB. The JAB submitted its report on 5 November 2001. Its conclusions and recommendations read, in part, as follows:

“Conclusions and Recommendations

59. The Panel reaffirmed that a JAB Panel should limit the consideration of a case to the subject matter of the appeal and that the proper venue for cases dealing with discrimination is not the JAB but the Panel on Discrimination and other Grievances. The Panel also recalled that it cannot substitute itself to the appointment and promotion bodies. In the present case, the Panel defined the scope of its mandate to the examination of the procedure followed concerning the Applicant’s candidature to vacancy announcement 99-L-CHR-00X192-E-GE.

60. The Panel established that, in accordance with the UNAT Jurisprudence, the Applicant had a right to due consideration of his candidature ... Having carefully reviewed the usual appointment and promotion processes, and the procedure followed in the present case, the Panel **concluded** that there has been a regrettable and unintentional omission which hindered consideration of the Applicant for the post. As a result of the omission of the Administration, the Appellant was deprived of his right to due consideration. The Panel recalled the Secretary-General’s discretionary power in promotion matters and noted that even if the Appellant had been given full consideration, nothing indicated that he would have been selected for the post, and promoted to the P-5 level.

61. In view of the foregoing, the Panel unanimously considers that the Appellant should be compensated for the procedural irregularity which occurred in the selection process and **recommends** that the amount of the compensation should be equal to two months’ net base salary at the time the post in issue was filled. In addition, the Panel trusts that the Appellant will receive full and fair consideration for foreseeable vacancies at the P-5 level for which he will apply and will be found to be qualified.”

On 25 February 2002, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and advised him of the Secretary-General's decision as follows:

“The Secretary-General accepts the findings and conclusions of the Board and, in accordance with its unanimous recommendations, he has decided to compensate you in the amount of two months net base salary at the time the post in question was filled. ...”

On 22 July 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB refused to exercise its competence regarding discrimination.
2. The JAB committed substantial error by overlooking the evidence and law.
3. In approving the report of the JAB, Respondent failed to adequately address the consequences of the prolonged absence of performance evaluation reports.
4. The failure to promote the Applicant was based on prejudice and discrimination relating to his physical handicap;
5. The failure to promote the Applicant seriously affected his health;
6. The compensation awarded is grossly disproportionate to the gravity of the irregularities committed.

Whereas the Respondent's principal contentions are:

1. Staff members have no automatic right to promotion, and the Administration has no obligation to promote any particular staff member, regardless of good performance evaluation and time in service;
2. Failure to shortlist the Applicant for the subject position in 1999 was not prompted by discrimination;
3. The Applicant has already been adequately compensated for the Administration's oversight in failing to add his name to the short-list for proper consideration of his application for in 1999.

The Tribunal, having deliberated from 29 October to 17 November 2003, now pronounces the following Judgement:

I. The Applicant appeals the Respondent's decision of 25 February 2002, claiming that the Respondent violated his due process rights, that he did not receive full and fair consideration in the promotion process, and that he was a victim of discrimination, all of which resulted in his failure to achieve a promotion.

II. The Respondent's power to promote and appoint United Nations Staff and the limitations imposed upon that power is at issue in this case. The broad discretion vested in the Administration to promote its qualified staff is well-recognized by the Tribunal (see Judgements No. 1118: *Khuzam* (2003); and, No. 1122, *Lopes Braga* (2003)). The exercise of this discretionary power however, has been limited in cases of abuse of authority, procedural or substantive errors or deficiencies, or violations of due process. (See Judgments No. 870, *Choudhury and Ramchandani* (1998); and, No. 1056, *Katz* (2002).)

III. The Applicant began his United Nations career on 14 February 1980, on a temporary assistance basis with OHCHR, as an Assistant Human Rights Officer at the P-1 level. He was subsequently promoted and effective 1 January 1993, reached the P-4 level. From 1 April to 31 December 1999, and again from, 1 January to 31 December 2000, his PAS stated that he "fully meets performance expectations".

On 27 September 1999, the Applicant submitted his application for vacancy announcement 99-L-CHR-00X192-GE for a P-5 position, Senior Human Rights Officer. By a letter dated 6 October 1999, the Staffing Support Section, OHRM, acknowledged receipt of the Applicant's application. OHRM failed to include the Applicant's name in the short list of candidates to be considered by OHCHR. Another staff member was chosen to fill the position.

By a letter dated 21 February 2000, the Applicant requested the Secretary-General to review the administrative decision to promote another staff member to the P-5 level post. Due to the transfer of its incumbent, in March 2000, the same P-5 post was re-advertised under vacancy announcement N 00-P-CHR-00X049-E-GE. The Applicant applied for the post again but although short-listed and interviewed by a panel, he was not selected.

The Applicant submitted his appeal to the JAB on 26 May 2000. On 5 November 2001, the JAB submitted its report to the Secretary-General concluding that, "[t]here has been a regrettable and unintentional omission which hindered consideration of the Applicant for the post. As a result of the omission of the

Administration, the [Applicant] was deprived of his right to due consideration.” The JAB recommended, “[t]hat the amount of the compensation should be equal to two months’ net base salary at the time the post in issue was filled”. On February 25 2002, the Under-Secretary-General for Management advised the Applicant that the Secretary-General had accepted the JAB’s recommendation.

IV. The Applicant alleges that despite repeated applications for the P-5 post in question, and having been short-listed and interviewed, he had not been promoted. In essence, he charges that the failure to promote him was motivated by discrimination.

The Tribunal cannot find any evidence to support the Applicant’s contention that his failure to obtain the promotion in question was the result of a pattern of discrimination directed against him due to his physical handicap. The Tribunal does, however, take issue with the JAB’s position that the question of discrimination was not properly within its jurisdiction and should have been presented to the Panel on Discrimination. The JAB’s attempt to avoid the issue and divest itself of jurisdiction is without foundation or precedent. The Tribunal has received many cases from the JAB in which charges of discrimination were accepted and heard initially by the JAB. (See Judgements No. 618, *Narula* (1992); and, No. 622, *Araim* (1993).) The Grievance Panel was established pursuant to administrative instruction ST/AI/308 of 25 November 1983 to enable aggrieved staff members to seek investigation and informal resolution of discrimination complaints. It also provided the Secretary-General with an avenue on which to gather statistics on a particularly sensitive subject. It was clearly not created to supplant the JAB.

The Respondent’s position is that staff members have no automatic right to promotion, and the Administration has no obligation to promote any particular staff member, regardless of good performance evaluation and time in service, claiming wide discretionary powers over staff promotions.

The Respondent further claims that the Administration had already conceded that the Applicant’s name was inadvertently omitted from the short-list and he was compensated for the procedural irregularity. The fact that the Applicant’s name was omitted, according to the Respondent, was not prompted by discrimination, but an oversight rectified several months later in March 2000, when the same post was re-advertised and the Applicant’s candidacy fully considered.

The Tribunal has consistently held that while the Organization is empowered to exercise wide discretion in promotion of qualified staff, no staff member possesses an automatic right to promotion. This power as stated earlier is not without limitation.

Qualifications, experience, performance reports, seniority and the like, may be measured and appraised freely by the Secretary-General, but the results of such appraisal, even if glowingly favorable, cannot be construed by staff members as giving rise to an expectancy of promotion. The promotion process itself, however, must nevertheless remain subject to compliance with strict, well-defined procedural rules of conduct, which may not be abridged or ignored.

V. The Applicant asserts that both the Respondent's decision-making process as well as his final decision were flawed, violated the principles of due process and deprived the Applicant of his right to full and fair consideration. The Respondent counters with the argument that the Applicant had already been adequately compensated for the Administration's oversight in failing to add his name to the short-list for proper consideration of his application, the award of two-months net salary recommended by the JAB and approved by the Secretary-General being more than reasonable under the circumstances. Staff Regulation 4.2 and Article 101 of the Charter provide that "[t]he 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". In order to achieve this purpose, "it is indispensable that 'full and fair consideration' should be given to all applicants for a post. The Respondent bears the burden of proof with respect to this issue." (See Judgment No. 828, *Shamapande* (1997), para. VI). In the present case, the Tribunal finds that the Respondent did not fully comply with its required procedural burden.

VI. Notwithstanding that the Applicant was owed no automatic right to promotion, the Organization's failure to short-list the Applicant for the 1999 vacancy was a serious omission. The Tribunal must conclude that the Applicant did sustain injury as a result of procedural deficiencies and failures and was not adequately compensated therefor. In this connection, the Tribunal notes that the Respondent submits that, when the Secretary-General has accepted a JAB recommendation to pay compensation, the Tribunal should intervene only in cases of error of law or improper motive by the JAB. The Tribunal does not agree with the Respondent's submission and maintains that it is competent to consider allegations that compensation awarded by the JAB and accepted by the Secretary-General is not commensurate to the injury sustained.

Finally, the Tribunal is concerned with the lack of PER's prepared for the Applicant for an extended period of time. The Applicant is clearly entitled to have his PER's prepared in a timely manner, as performance evaluation provides an

important procedural protection in the promotion process. The Applicant deserves to be compensated for this omission as well.

VIII. In conclusion, the Tribunal finds that the Respondent's decision not to promote the Applicant was not arbitrary, discriminatory or based on the Applicant's physical disability, and that the non-promotion of the Applicant was properly based on the Organization's discretionary powers, and that these powers were not abused. The Tribunal does, however, find procedural irregularities present in the promotion process.

IX. For the foregoing reasons, the Tribunal:

1. Orders that the Applicant be compensated in the amount of six months net base salary at the rate in effect at the date of the Judgement, over and above the amount already paid, for these procedural irregularities.
2. Rejects all other pleas in their entirety.

(Signatures)

Mayer **Gabay**
Vice-President, presiding

Brigitte **Stern**
Member

Jacqueline R. **Scott**
Member

New York, 17 November 2003

Maritza **Struyvenberg**
Executive Secretary