
ADMINISTRATIVE TRIBUNAL

Judgement No. 852

Case No. 960: BALOGUN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay;
Mr. Julio Barboza;

Whereas, on 12 February 1997, Murtala Jimoh Balogun, a staff member of the United Nations Economic Commission for Africa, (hereinafter referred to as ECA), filed an application requesting the Tribunal, inter alia:

- "(a) To find that the Respondent's decision to place restrictions on his candidature for internal vacancies directly violates Article 8 of the United Nations Charter;
- (b) To find that these restrictions on his candidature are inconsistent with the letter and spirit of article 101(3) of the UN Charter, with staff regulations 4.2 and 4.4, and staff rule 104.14(a)(ii);
- ...
- (d) To find that by relying on the provisions of the 'Manual for Appointment and Promotion Committees for Offices Away from Headquarters' (a procedure manual which limits the definition of 'internal' candidates to 100-Series staff members) the Respondent has exercised powers not conferred by

regulation 4.4, and has through this excès de pouvoir violated the rights of other persons who 'are already in the service of the United Nations';

- (e) To find that the Applicant is in fact, in deed, and in law, 'already in the service of the United Nations' and is therefore covered by the provisions of regulation 4.4;
- (f) To find that even the 'Manual for Appointment and Promotion Committees for Offices Away from Headquarters' acknowledged the need to accord 200-Series staff members the full consideration required by regulation 4.4 when filling internal vacancies, and invoked the 'internality' rule only when qualifications are equal [vide para. 2-6.5(5) of the said Manual];

...

4. ...

- (a) To order the Respondent to lift all restrictions on the Applicant's eligibility for internal vacancies;
- (b) To order the Respondent to pay the Applicant moral damages equal to three months' net base salary (or higher at the Tribunal's discretion) as partial redress for the injuries suffered by the Applicant as a result of the Respondent's decision to bar him (the Applicant) from competing for the post of Chief, Public Administration and Management Section, ECA, and for the delay in resolving the case;
- (c) To further order the Respondent to take the Applicant's length of service and excellent performance into account in considering him (the Applicant) for a career appointment that matches his qualifications and experience (as provided for in the General Assembly resolution 37/126, IV, paragraph 5, and UNAT [United Nations Administrative Tribunal] Judgement 712, and with particular reference to the recommendation submitted by the Applicant's supervisor on 4 November 1994 that he be considered for career

appointment, a recommendation which was endorsed by the then Executive Secretary of ECA, ... on 13 November 1994)."

Whereas the Respondent filed his answer on 9 April 1997;

Whereas, on 23 May 1997, the Respondent requested the Tribunal for an expedited hearing on the case;

Whereas, on 4 June 1997, the Applicant filed written observations;

Whereas, on 3 July 1997, the Tribunal informed the parties that the case would be heard at its current session;

Whereas, on 4 August 1997, the Tribunal informed the parties that it had decided to adjourn adjudication on the case until its next session;

Whereas, on 25 August 1997, the Applicant submitted additional statements on the Respondent's answer;

Whereas, on 6 November 1997, the Tribunal requested the Respondent to provide it with answers to certain questions, which the Respondent did, on 10 November 1997;

Whereas, on 14 November 1997, the Tribunal requested the Respondent to provide it with the answers to further questions;

Whereas, on 14 November 1997, the Applicant submitted observations on the Respondent's answers of 10 November 1997;

Whereas, on 17 November 1997, the Respondent provided answers to the Tribunal's questions of 14 November 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 26 August 1983, as a Regional Adviser, with the Public Administration and Management Section, at the Economic Commission for Africa (ECA), on a one-year intermediate term appointment at the L-5, step I level, under the 200 Series of the Staff Regulations and Rules. He then served on a series of extensions until 31 December 1985, when he separated from service.

On 23 May 1987, he re-entered the service of the Organization

as a Regional Adviser, Public Administration and Management Section, ECA, at the L-5, step V level, on an intermediate term appointment, which was subsequently extended. On 1 May 1991, his appointment was converted to a fixed-term intermediate appointment. Since then, the Applicant has continued to serve in the same capacity on a series of fixed-term intermediate term appointments under the 200 Series of the Staff Rules.

In December 1993, Vacancy Announcement Number 93-A-ECA-219-AA, was circulated for the P-5 post of Chief, Public Administration and Management Section, ECA. Interested UN staff members at the P-5 or P-4 level were invited to submit their applications for the position before 27 December 1993.

On 16 December 1993, the Applicant applied for the post, noting that he "underst[oo]d that the post of Chief of Public Administration Section ha[d] been advertised externally [...]".

On 19 January 1994, the vacancy announcement was recirculated as "Internal Vacancy List" Vacancy Announcement No. 93-D-ECA-219-AA/Recirc., giving candidates three weeks to apply for the post.

On 6 April 1994, the Senior Recruitment and Placement Officer, Office of Human Resources Management (OHRM), acknowledged receipt of the Applicant's application, stating that his "qualifications will be considered in accordance with existing United Nations policies, eligibility criteria and the other requirements of the post, along with the qualifications of other candidates."

On 19 April 1994, the Applicant wrote to the Chair and Members of the Appointment and Promotion Board (APB), requesting that the APB consider his application for the post. He stated, inter alia, that he applied as an external candidate because the Personnel Section of ECA had informed him that the post was externally advertised. The Applicant also stated that the vacancy announcement did not specifically refer to "internal" or "external" applicants but merely requested that "interested UN staff members" submit their applications.

In a reply dated 28 April 1994, the Secretary of the APB/Appointment and Promotion Committee (APC), OHRM, informed the Applicant that "[he was] not eligible for consideration for this vacancy, as it was advertised internally only and as such [was] open only to staff members who [had] been recruited either through a competitive examination or through a review by the United Nations Appointment and Promotions bodies."

On 5 May 1994, the Applicant wrote to the Senior Recruitment and Placement Officer, OHRM, stating, inter alia, that:

"I cannot thank you enough for the positive response to my plea for justice, and for making it possible for my qualifications to be assessed along with those of other candidates."

In a reply dated 25 May 1994, the Senior Recruitment and Placement Officer, OHRM, informed the Applicant that she was sorry that he had been misled by her letter of 6 April 1994. She added that "the screening of the candidates usually takes place after the acknowledgement letter has been sent. It is only at that time that we ascertain whether or not each person is eligible for consideration for the particular vacancy ...". She also confirmed that the Applicant was not eligible for the vacant post.

On 27 May 1994, the Applicant wrote to the Secretary of APB/APC, reiterating his request that the APB consider his application for the post.

On 16 June 1994, the Executive Secretary, ECA, after a review by the Departmental Panel of internal candidates, forwarded to the APB his recommendation to appoint an internal candidate to the post.

On 20 June 1994, the Applicant wrote to the Secretary-General, requesting an administrative review of the decision not to

consider him for the post of Chief, Administration and Management Section, ECA.

In a communication dated 1 July 1994, the Secretary of APB/APC explained to the Applicant that he was not eligible for consideration for certain types of vacancies as different recruitment criteria and procedures applied to staff members under the 100 Series and 200 Series of the Staff Rules.

On 24 August 1994, the Applicant lodged an appeal with the Joint Appeals Board (JAB) and also requested a suspension of the decision to "bar [him] from competing for the ... post ..."

On 27 October 1994, the JAB adopted its report on the Applicant's request for suspension of action. It recommended "that the suspension of action be granted and that the Secretary-General suspend all action underway in connection with the selection process for filling the post in question until after the substance of the current appeal has been dealt with [...]".

On 18 November 1994, the Secretary-General informed the Applicant that he had decided not to grant the request on the grounds that the contested decision had already been fully implemented.

On 14 December 1994, the Applicant requested the Secretary-General's agreement to submit his case directly to the Tribunal. In a reply dated 23 January 1994, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General agreed, "provided the [R]espondent and the [A]pplicant agree on a statement of facts which would be presented to the Tribunal and would constitute the entire factual record before the Tribunal."

On 10 March 1995, the Applicant informed the JAB that, because of his disagreement with the conditions outlined by the Under-Secretary-General for Administration and Management in his letter of 23 January 1995, he had decided to proceed with an appeal before the JAB.

The JAB adopted its report on the merits of the case by

majority on 10 October 1996. Its considerations, conclusions and recommendations read as follows:

"Considerations

29. The Panel noted that the issue in this case is the interpretation given by the Respondent to the term 'internal candidates' for the purpose of defining who may apply to fill a vacancy limited to such candidates only.

30. The Panel examined the contentions of the parties. It noted that the Appellant argues that internal means any staff member as distinguished from non-staff members. The Respondent argues that 'internal' means only those staff members serving under the 100 Series of the Staff Rules, that it therefore excludes the Appellant. It considered the Appellant's contention that the distinction drawn by the Respondent between different categories of staff members for the purpose of allowing them to apply for vacancies is discriminatory and hence in violation of the Charter.

31. The Panel noted that the Respondent maintained that the distinction is justified because only those serving under [the] 100 Series had undergone the rigorous selective process determining their suitability, unlike other staff members who have been recruited without the need to meet the same stringent criteria.

32. The Panel was not able to find an authoritative definition in the record before it of the terms 'internal' or 'external' candidates. The Panel faced difficulties in finding in the Judgements of the Administrative Tribunal or in the Secretary-General's Administrative Instructions any reference to that issue. On the other hand, the Panel was aware of the fact that there was a long-standing understanding among the majority of staff members serving in the organization as to who may apply to fill a vacancy limited to an internal candidate only.

33. In this context, the majority of the Panel took note that [there existed] a long standing practice of the Administration, which was applied for many years, that only staff members under the 100 Series were entitled to apply for posts categorized as 'internal' vacancies. Such practice has been recognized by [the] UN Administrative Tribunal, the ILO Tribunal and the International Court of Justice as relevant in determining the meaning of what might be considered ambiguous provisions in the rules. The majority of the Panel felt that the situation should be clarified and the Administration would do better by specifying the meaning of

the term 'internal' and 'external' as limited to staff members serving under the 100 Series.

34. As to the Appellant's contention that the above-mentioned distinction drawn by the Respondent is discriminatory and hence in violation of the Charter, the majority of the Panel noted that although the definition of 'staff member' is wide, the service itself at the organization is categorized by several types of appointments.

The majority of the Panel was aware of the fact that staff members are serving under various types of contracts, series of staff rules and in different categories. Part of the staff members are career appointees (the 100 Series) and some, whose contract depends on voluntary funds (the 200 Series). Therefore the Panel found it difficult to state that the terms of appointments of staff members serving in the Organization are equal to each other and that the distinction based on the type of contract is discriminatory.

In this connection, the majority of the Panel noted staff rule 109.1(c) dealing with abolition of posts and reduction of staff, which stated that;

- '(ii) (b) Staff members specifically recruited for service with any programme, fund or subsidiary organ of the United Nations which enjoy a special status in matters of appointments under resolution of the General Assembly or as a result of an agreement entered by the Secretary-General, have no entitlement under this rule for consideration for posts outside the organ for which they were recruited.'

35. The majority of the Panel considered the Appellant's contention that the decision not to consider his candidacy violated Article 8 of the Charter, as women regardless of whether they are on 100 or 200 Series, are eligible for consideration for internal vacancies. Therefore the exclusion of male staff members in the 200 Series from similar opportunities is discriminatory. The majority of the Panel was aware of the fact that ST/AI/382, Special Measures to improve the status of women in the Secretariat, which was the subject of the above-mentioned Appellant's contention, was circulated in line with the need to redress the gender imbalance in the organization with which the General Assembly and the Secretary-General have been concerned. The majority of the Panel, however, found that by issuing the above-mentioned Administrative Instruction, the Secretary-General acknowledged the well-known fact that there were differences between the 100 and the 200 Series, and therefore he made an exception for women.

Conclusions and Recommendations

36. The majority of the Panel also concluded that the decision not to consider his application for the P-5 post of Chief, Public Administration and Management Section, ECA., (Vacancy Announcement No. 93-A-EA.-219-AA), did not violate his rights including his right for due process.

37. Accordingly, the majority of the Panel makes no recommendation in support of the appeal".

In a dissenting opinion, one member of the JAB Panel concluded as follows:

"... that the Appellant was unfairly treated in that he was found not qualified for the said post simply by reason of the application of a criterion on the part of the official concerned (i.e. the requirement of being an internal candidate) not found in the Announcement therefor. If indeed that was one of the 'factors' of the eligibility criteria to be reckoned with, it should be clearly spelled out thereon. Besides, there is no authoritative definition in the Organization of what an 'internal candidate' is."

On 13 December 1996, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General has examined your case in the light of the Board's report. He has taken note of the Panel's awareness that, although the definition of 'staff member' is wide, the service itself at the Organization is categorized by several types of appointments. He has also taken note of the fact that the Panel found it difficult to state that the terms of appointment of staff members serving in the Organization are equal to each other and that the distinction based on the type of contract is discriminatory.

The Secretary-General has also noted that the Panel was aware that the issuance of the administrative instruction ST/AI/382 regarding special measures to improve the status of women in the Secretariat was in line with the need to redress the gender imbalance in the Organization, and that the Panel found that by issuing the above-mentioned instruction, the Secretary-General acknowledged the well-known fact that there were differences between the 100 and the 200 Series, and made an exception for women. Finally, the Secretary-General, taking note of the Panel's determination that the decision

not to consider your application for the P-5 post mentioned in your appeal did not violate your rights, including your right to due process, has decided to maintain the decision and to take no further action in your case."

On 12 February 1997, the Applicant filed, with the Tribunal, the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. As there is no authoritative definition of the term "external candidate", the practice of making a distinction between staff members based on their type of contract is invalid.

2. Article 8 of the Charter, which requires that men and women compete "under conditions of equality", is violated by the exception made for women with respect to their ability to apply for "internal vacancies" regardless of their type of contract.

Whereas the Respondent's principal contention is:

The consistent practice of the Organization to treat staff on 200 Series appointments as external candidates is consistent with the different nature of 100 and 200 Series appointments. This practice does not violate the rights of the Applicant

The Tribunal, having deliberated from 31 October to 25 November 1997, now pronounces the following judgement:

I. The Applicant, a staff member appointed under the 200 Series of the Staff Rules, applied for a P-5 post that was the subject of a vacancy announcement that did not specify whether it was for internal or external candidates. Subsequently, the vacancy announcement was recirculated as an "internal vacancy list" for "interested UN Secretariat staff". The Applicant was informed that his application could not be considered on the grounds that, as a 200 Series staff member, he did not qualify as an "internal"

candidate. The Joint Appeals Board (JAB) recommended that the Applicant's appeal against this decision be rejected, although it admitted that there was no "authoritative definition in the record before it of the terms 'internal' or 'external' candidates." In rejecting the Applicant's appeal, the JAB relied on the "long standing understanding among the majority of staff members" and the "long standing practice of the Administration ... that only staff members under the 100 Series were entitled to apply for posts categorized as 'internal' vacancy". However, the JAB did note that "the situation should be clarified and the Administration would do better by specifying the meaning of the term[s] 'internal' and 'external' ..."

II. The Tribunal finds that staff regulation 4.4 is the legal rule applicable in this case. The Tribunal, however, must also consider the "general understanding" and "practice" of the Administration, referred to by the JAB, that only 100 Series staff members may apply for "internal" vacancies. In the Tribunal's view, the Administration's "general understanding" and "practice" are really no more than the appointments and promotions bodies' interpretation of staff regulation 4.4, as applied to particular cases.

III. The Tribunal must decide whether this interpretation of staff regulation 4.4 is in accordance with both its letter and spirit. This determination requires that the interpretation be tested in relation to Articles 8 and 101 of the United Nations Charter, which provide the parameters within which regulations may be promulgated. Staff regulation 4.4 provides that:

"Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations. ..." (emphasis added)

The Tribunal notes that the words "internal service" or "internal candidates" cited by the Respondent are not even mentioned in the text of staff regulation 4.4; accordingly, the correct interpretation of this legal rule cannot turn on such concepts. The Tribunal finds that the important concept here is that the fullest regard should be given to the "requisite qualifications and experience" of those people "already in the service of the United Nations." (emphasis added) The Tribunal is of the view that the words "already in the service of the United Nations", when given their natural and ordinary meaning, include those persons recruited under the 200 Series, who are employed in the exclusive service of the Organization, who have taken an oath to the Organization and whose Letters of Appointment oblige them to abide by the terms and conditions of the Staff Regulations and Rules. All these staff members, who would not include those serving the Organization on consultancy agreements since they do not fulfil the conditions specified above, share the same legal obligations towards the Organization and should therefore benefit from the same rights.

IV. The Tribunal notes that Article 101, paragraph 3 of the Charter, which provides 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 ..." (emphasis added)

is limited to a certain extent by the preference given in staff regulation 4.4 to those already serving the Organization as staff members. In interpreting staff regulation 4.4, the Tribunal believes that, in order to secure the "highest standards" in personnel, it is necessary that the appointment and promotion bodies be given the widest possibility of choice among staff members.

V. Another rule that bears on the interpretation of staff regulation 4.4 is Article 8 of the UN Charter, which provides that:

"The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs." (emphasis added)

The Tribunal considers that, the more restrictive the interpretation given by the appointment and promotions bodies to what they term "internal service", the more likely there is to be an infringement of staff regulation 4.4, in the light of Articles 8 and 101 of the UN Charter.

VI. The Respondent advances several arguments to support his contention that "internal" candidates should be restricted to those employed under the 100 Series of the Staff Rules. Among them is his claim that the conditions for employment under the 200 Series are less stringent than for 100 Series employment. The Tribunal is of the view that the paramount consideration in the process of selecting candidates for posts is their capacity to perform the tasks at issue. The appointment and promotions bodies should be perfectly capable, by reviewing an applicant's performance history and evaluations as well as administering any tests they consider appropriate, of determining which candidate possesses the best qualifications for the post in question, notwithstanding the series of the Staff Rules under which the candidate was appointed. The text of staff regulation 4.4 supports this interpretation, as it speaks of the regard that must be given to the "requisite qualifications and experience" of those serving the Organization. For the Administration to give the "fullest regard" to candidates "in the service of the United Nations", the appointment and promotions bodies must admit all the candidates in the service of the United Nations to the competition and must recognize that the determining factor is the "qualifications and experience" of the

staff member, not the Series of the Staff Rules under which he or she was appointed. It is clear that admitting 200 Series staff to competition for "internal" vacancies does not assure their selection for the post, but barring them from competition is inconsistent with Articles 8 and 101 of the Charter.

VII. The Respondent also contends that the posts of 200 Series staff are funded from different sources than those of 100 Series staff. Furthermore, he submits that the "core functions" of the Secretariat are exercised by 100 Series staff, who should therefore be selected for "internal" posts in order to promote their careers within the Organization. The Tribunal considers it irrelevant that funding for 200 Series posts is obtained from different sources than for 100 Series posts. The source of a post's funding has no bearing on the "qualifications and experience" of a candidate applying for a different post. With respect to the argument that 100 Series staff perform "core functions" and should therefore be privileged in the development of their careers within the Organization, the Tribunal finds that, as the concept of "core function" is not defined, it is not an appropriate benchmark by which to determine who should enjoy a career in the United Nations. Further, the Tribunal notes that 100 Series appointments are, for posts above the P-3 level, open to external candidates who have not passed any kind of competitive examination. If these 100 Series staff have not passed a competitive examination, they are, by the Respondent's own logic, no different from 200 Series staff applying for the same posts.

VIII. The Tribunal is of the view that limiting recruitment for "internal" vacancies to staff holding 100 Series appointments, thereby excluding from consideration staff serving under the 200 Series, may not be in the best interests of the United Nations, as this would limit the Organization's ability to fill vacancies with the most qualified personnel. The fact that 200 Series staff members do not, when they enter the service of the UN, have an expectation of a career within their own branch of service does not necessarily deprive them of the legitimate expectation, under

Articles 8 and 101 of the Charter, of a career serving the UN on the strength of their "qualifications and experience", as mandated by staff regulation 4.4.

IX. For the foregoing reasons, the Tribunal orders the Respondent to allow the Applicant, who has been recruited under the 200 Series, to submit his candidacy for any internal vacancy for which he is qualified and for which he applies. The Tribunal rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Member

Julio BARBOZA
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary