

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1268

Case No. 1351

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, First Vice-President, presiding; Mr. Spyridon Flogaitis, Second Vice-President; Mr. Dayendra Sena Wijewardane;

Whereas at the request of a former 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 31 December 2002 and periodically thereafter until 30 April 2004;

Whereas, on 28 April 2004, the Applicant filed an Application requesting the Tribunal *inter alia*:

“12. ... *to order*:

- (a) That, the findings in the Interim and Final report of the [Joint Appeals Board (JAB)] be accepted as fact and;
- (b) That, the recommendations of the JAB be approved in their totality ...
- (c) That, the US\$ 3000 paid as compensation for the delays stand as authorized by the Secretary-General;
- (d) That, a further US\$ 5000 compensation be paid for the time, costs and stress incurred by the Applicant in preparing and submitting the submissions for the [JAB] and the Administrative Tribunal;
- (e) That, the administrative action to terminate the Applicant's [fixed-term appointment] be declared null and void, and that all other

subsequent documents related to that action be expunged from his personnel record of employment;

(f) And that, the Applicant be reinstated with the United Nations for a term of not less than [three] years in a position commensurate with his liking and qualifications ... Should the Secretary-General decide that the Applicant cannot be reinstated, and then in lieu of employment, the Secretary-General should be instructed to pay the Applicant three years' net salary as of the date of separation from service."

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 August 2004 and once thereafter until 30 October;

Whereas the Respondent filed his Answer on 30 October 2004;

Whereas the Applicant filed Written Observations on 27 January 2005, and, on 7 March, the Respondent submitted comments thereon;

Whereas the statement of facts, including the summary of the Applicant's employment history, contained in the Interim report of the JAB reads, in part, as follows:

"Employment History

... From June to August 1999 while the [Applicant] was in the service of the Royal Canadian Mounted Police (RCMP), he was the leader of the Canadian Forensic Team which participated in the [International Criminal Tribunal for the former Yugoslavia (ICTY)] 1999 Kosovo Exhumation Program. He was appointed to ... ICTY on 1 May 2000, having been nominated by the Government of Canada as Forensic Project Officer for Bosnia and Croatia at the P-4 level. His one-year [fixed-term appointment] was subsequently extended until 1 November 2001 when he separated from ... service.

Summary of the facts

[The Applicant's letter of appointment dated 3 May 2001 specified that his appointment 'may be terminated prior to its expiration date in accordance with the relevant provisions of the Staff Regulations and Rules, in which case the Secretary-General will give thirty days' written notice'.]

... On 16 May 2001, while in the Hague, [the Applicant] was given by his supervisor, ... [the] Investigations Commander, a memorandum of that date signed by ... [the] Chief, Human Resources Section, ICTY stating that [his] 'contract is terminated thirty days' (*sic*) from today, 16 May 2001'.

... [The Applicant] requested an administrative review of the decision to terminate his appointment in a memorandum of 17 May 2001. In a letter addressed to the Secretary [of the] JAB dated 5 June 2001, [the Applicant] filed a request for suspension of action ...

... The Panel ... met on 11 and 12 June 2001 and unanimously recommended 'that the request for suspension be approved'. [In a letter of 13 June 2001, the Applicant was informed that the Secretary-General had decided to accept the Board's recommendation and suspend the implementation of the contested decision until the appeal had been determined on its merits, which was to be completed prior to the date of expiration of his appointment, 1 November 2001. Thus, the Applicant was paid his salary for the entire period of his appointment.]”

The Applicant lodged an appeal on the merits with the JAB in New York on 4 September and on 11 October 2001. The JAB issued an Interim report on 14 May 2002. Its proceedings, considerations and recommendation read, in part, as follows:

“Proceedings

11. The Panel first met in executive session on 22 January 2002. The Panel noted the paucity of documentation submitted by both parties and decided it needed more information. ... The Panel met again on 18 April 2002 and decided to submit an interim report (...).

Considerations

12. The Panel decided that [the] Respondent's contention that the appeal is not receivable due to late submission was ill founded. ...

13. ... [T]he Panel was acutely aware that an investigation into what transpired in the ICTY Bosnia and Kosovo exhumation projects leading up to the abrupt dismissal of the Appellant was beyond its means and its mandate. The Panel, nevertheless, felt it had the responsibility to deal ... with the substance of the appeal. It believed that it had to take prompt action ...

14. [The] Respondent argues that because the administrative decision to terminate the Appellant's appointment was suspended he suffered no injury. The Panel found that argument unacceptable. The Panel noted that that suspension came only after the Appellant had appealed and a Panel had recommended suspension of action, and that it came one month after the termination memorandum. The termination was known to the ICTY administration; it became known to ICTY staff and, soon, to the world of forensic specialists ... It would be naive to believe ... that the Appellant's professional reputation and opportunities for employment had not been harmed ...

15. Having concluded that the Appellant had suffered injury from the ICTY decision to terminate his appointment, the Panel turned to a consideration of how that decision was arrived at. ...

(a) On 2 May 2001, under cover of a memorandum signed by [the Chief of Administration, ICTY,] ... and [the] Chief Human Resources Section, ICTY, ... the Appellant was sent a letter of appointment extending that appointment from 2 May 2001 to 1 November 2001; ... On 16 May 2001, the ... [Appellant was given] notice of termination of that same appointment.

(b) On 8 February 2001 ... [the] Chief of Investigations, [ICTY] rated the Appellant's [performance as] 'a very good performance'. The [performance evaluation report (PER)] was signed the following day by ... [the] Deputy Prosecutor. On 28 June 2001, i.e. six weeks after the delivery of the notice of termination, ...[the] Acting Chief of Investigations, [ICTY] in a four page memorandum ... gives what purports to be a detailed account of [the] Appellant's sins of omission and commission and of 'Senior Management's' efforts 'to guide [the Appellant] in becoming a better manager'. To summarize this memorandum, [the Appellant] 'was discovered to be unreliable, not trustworthy, not a team player and ... was found to be causing problems for the scientific work of the team ...'

16. [The Appellant] denies ... these allegations and argues that if any of them were true, he should have been put on notice so that he could correct his faults. However, neither 'Senior Management', or anyone else had called any of them to his attention. To which [the] Respondent replies: 'The assertion that [the Appellant] was not notified of a potential poor performance nor given guidance or an opportunity to improve, is therefore not factually correct'.

17. In reply to the Panel's request that ICTY 'provide any and all documents contemporaneous with the incidents alleged by [the Acting Chief of Investigations, ICTY,] ... to have occurred', [the Chief of Administration, ICTY,] stated in her fax of 18 February 2002: 'We have checked our records and regret to inform you that no additional documentation has been identified'. An inspection of [the Appellant's] file forwarded from the Hague reveals, aside from, the PER, *no* evaluation of [the Appellant's] actions or performance, and *no* copies of complaints or guidance from 'Senior Management'.

18. ...

The Panel concludes ... [that the Appellant] was denied due process and is entitled to compensation on that score.

19. On the basis of the material submitted to it by [the Appellant] and some of his former colleagues of the ICTY forensics team, the Panel could not exclude the possibility of a more reprehensible action by the ICTY Administration, that is, that the termination of [the Appellant's] appointment and ... [the] memorandum [of the Acting Chief of Investigations, ICTY,] were intended to silence [him] or sully his reputation as part of an attempt to cover up an embarrassing situation - or, perhaps, scandal - in the exhumation projects. The Panel, therefore, recommends that the case file and this report be sent to the Under-Secretary-General for Internal Oversight Services for

appropriate action. The members of the Panel ... wish this to be considered an interim report; they believe they should revisit the question of the damage to [the Applicant's] reputation, the extent, if any, of ICTY's culpability and the amount, if any, of compensation. ...

20. The Panel decided also that action could be taken even at this late stage to mitigate the damage to [the] Appellant's reputation. The Panel believes that a certificate of the type described in staff rule 109.11 be issued to him ...

Recommendation

21. The Panel recommends to the Secretary-General that:

- (a) [A] Certificate of Service be issued to [the Appellant] ... and copied to the Canadian authorities;
- (b) [The Applicant] be paid three months' net base salary as at the date of his separation for the denial to him of due process;
- (c) [T]he case file and this report be sent to the Under-Secretary-General, [Office] for Internal Oversight Services [(OIOS)] for appropriate action, and that a copy of any eventual OIOS report be sent to the Secretary, JAB;
- (d) [U]pon receipt of the OIOS report or six months from the date of signature of this report, whichever is earlier, the Panel be reconvened so that it can make [further] informed recommendations on [a number of additional] ... issues raised ...'

In a memorandum to the Secretary of the JAB dated 2 December 2002, a copy of which was sent to the Applicant, the Under-Secretary-General for Management stated as follows:

"Since the Secretary-General takes decisions based on final reports by the JAB, no decision is taken at this time regarding the recommendations for the issuance of a Certificate of Service and the payment of compensation, set out in paragraph 21 (a) and (b) of the report. While the same considerations apply to the recommendation for an OIOS investigation, contained in paragraph 21 (c) of the report, it is further noted that the OIOS, under its mandate, ultimately decides for itself whether to investigate a matter, including in circumstances where the particular project has finished since November 2001 and the project personnel are no longer in the service of [ICTY]. The Board may wish to bear these issues in mind when considering its final report in this case."

The JAB issued its Final report in this matter on 13 May 2003. Its considerations and recommendations read, in part, as follows:

“Considerations

...

4. The Panel had no doubt that ... ICTY's treatment of the Appellant was reprehensible; ...

5. The Panel considers that ... [the] memorandum [of the Under-Secretary-General for Management], coming after six months and 16 days and repeated requests from the JAB Secretariat, is totally unacceptable. The most charitable view that can be taken of it is that no one in his office had read the report until then and that the 'interim' nature of the report was seized upon as an excuse for inaction. 'Justice delayed is justice denied'.

...

7. The Panel reviewed its prior report and recalled some of the more troubling elements of the case:

(a) [T]he disingenuousness of the Administration's contention that, because the administrative decision to terminate [the] Appellant's appointment was suspended, he suffered no injury;

(b) [T]he total lack of documentation - acknowledged by the ICTY Chief of Administration - to substantiate the list of misdeeds of [the] Appellant given by ... ICTY in its *ex post facto* justification of the decision to terminate his appointment; and

(c) [C]lear evidence that [the] Appellant's professional credentials had been tarnished by the [United Nations'] actions.

Having noted that the further delay in a decision by the Secretary-General has accentuated the harm to [the] Appellant's reputation, the Panel endorses its prior recommendations and proposes an adequate compensation to [the] Appellant.

Recommendations

8. The Panel recommends to the Secretary-General that:

(a) a Certificate of Service be issued to [the] Appellant, as described in paragraph 20 of its earlier report, and that copies be sent to the Mission of Canada to the [United Nations] for onward transmission to the appropriate government offices;

(b) [The] Appellant be paid three months' net base salary as at the date of his separation for the denial to him of due process."

On 21 July 2003, the Under Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

“The Secretary-General ... wishes to draw your attention to staff rule 109.11 *Certification of Service* ... It follows that such a Certification of Service is your entitlement, to which you could have availed yourself upon your separation from service, and requires neither a recommendation of the Board, nor a subsequent decision of the Secretary-General. Should you decide to request such a Certificate of Service, it will be issued. Should you further indicate that you wish that a copy thereof be sent to the Canadian Mission to the United Nations, the Secretary-General accepts the Board’s recommendation in this regard.

The Secretary-General has taken note of the Board’s conclusion that your due process rights were violated by the contested decision, based on the lack of documentation substantiating ICTY’s “*ex post facto* justification of the decision to terminate your appointment”. The Secretary-General has decided to accept the Board’s recommendation in this respect and, accordingly, to pay you three months’ net base salary as at the date of your separation from service.

The Secretary-General does not accept the Board’s recommendation to pay you three years’ net base salary for damage to your professional reputation exacerbated by delays in dealing with your case. Bearing in mind that the decision to separate you was suspended and that, consequently, your appointment was extended until its scheduled expiration, and noting further both the above-mentioned entitlement to a Certification of Service of which you could have availed yourself and the lack of evidence of damage to your reputation resulting from the actions of the United Nations, the Secretary-General considers that this recommendation is unsubstantiated. The Secretary-General, noting that he is to take decisions on final, as distinct from interim, reports and recommendations of the Board, nevertheless regrets the delays in dealing with your case, and has accordingly decided to pay you US\$ 3000 as compensation for said delays.”

On 28 April 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The ICTY Administration failed to protect the Applicant’s legal rights
by:

- Denying the Applicant a fair expectancy of employment;
- Attempting to terminate his fixed-term contract without just cause;

- Failing to notify the Applicant of his alleged poor performance;
- Failing to provide the Applicant with appropriate guidance;
- Denying the Applicant the right to continue working with the Forensic Teams pending the outcome of the Applicant's appeal after the contested decision was suspended; and,
- Causing irreparable damage to his professional reputation.

Whereas the Respondent's principal contentions are:

1. The only substantive issue in this case is the Applicant's claim for compensation for damage allegedly done to his professional reputation; the Applicant's pleas in relation to other matters covered by JAB recommendations that have been accepted and implemented by the Respondent should be rejected.

2. The Applicant is not entitled to compensation for alleged damage to his professional reputation.

3. The Respondent had the discretion to terminate the Applicant's fixed-term appointment. The Applicant was fully compensated for the violation of due process found by the JAB.

4. The Applicant's request for additional costs should be denied.

The Tribunal, having deliberated from 27 October to 23 November 2005, now pronounces the following Judgement:

I. The facts in this case are simple and not disputed. The Applicant was employed on 2 May 2000 in order to serve with ICTY as a Forensic Project Officer at the P-4 level on a one-year fixed-term contract. On 8 February 2001, the Applicant's supervisors signed his PER for the period May through December 2000, giving him an overall rating of a "very good performance".

Effective 3 May 2001, the Applicant's contract was extended for another six months up to 1 November 2001, when the project at which he was working was due to be completed. However, only a few days later, on 16 May 2001, a memorandum was signed by the Chief, Human Resources Section, ICTY, informing him that his contract was terminated under the rules governing fixed-term contracts and as specifically mentioned in the Applicant's letter of appointment.

On 5 June 2001, the Applicant requested a suspension of action on the decision and on 12 June of the same year the JAB unanimously made a recommendation in favour of his request. The following day, the Under-Secretary-General for Management endorsed the JAB's recommendation and the Applicant remained in office until the original expiration date of his contract, 1 November.

Six weeks after the termination of the Applicant's contract and while he was serving under the suspension of action order, the Administration produced, for the first time, reasons why that termination took place. In fact, the then acting Chief of Investigations wrote a four page memorandum in which it was stated, inter alia, that the Applicant "*was discovered to be unreliable, not trustworthy, not a team player and ... was found to be causing problems for the scientific work of the team ...*"; "*Senior Management*" had made all kinds of efforts "*to guide [the Applicant] in becoming a better manager*". (Emphasis added by the Tribunal.) When, however, the JAB requested additional information contemporaneous with the incidents, the answer given on 18 February 2002 was: "*We have checked our records and regret to inform you that no additional documentation has been identified*". (Emphasis added by the Tribunal.)

As a result of the premature separation of the Applicant from service, it seems that rumours spread around the world in the forensic environment, about what happened and why it happened. The Applicant feels that those rumours severely harmed his career.

The JAB found that there was lack of due process in this case and that the Applicant was entitled to (i) be given a Certificate of Service, including specific information outlined in its report, which should be copied to the Applicant's home authorities; (ii) compensation equivalent to three months' net base salary as at the date of his separation from service for denial of due process; and, (iii) compensation equivalent to three years' net base salary as at the date of his separation from service for the damage done to his professional reputation exacerbated by the delays in dealing with the case.

The Secretary-General decided in the first place that the issuance of a Certificate of Service was the Applicant's entitlement under staff rule 109.11, if he so requested. However, the Secretary-General gave no indication what the exact content of that document would be. Furthermore, he decided to accept the JAB's conclusion

that by providing *ex post facto* reasons for the Applicant's separation from service, the Administration violated his due process rights and, on that ground, agreed to pay him the compensation suggested by the Panel. Finally, the Secretary-General decided that, given the fact that he accepted to give the Certificate of Service as well as to pay the above-mentioned damages, no other compensation was due, especially because the Applicant was given interim relief and continued to serve up to the end of his contract. For the delays in dealing with the case, and only for them, the Secretary-General accepted to pay an additional sum of US\$ 3,000.

II. The Tribunal finds that, in the present case, the facts are clear and well elaborated upon by the JAB. It is also satisfied that the Secretary-General accepted them as true and that he accepted to comply with the recommendations of the Panel. Therefore, the Tribunal does not intend to further elaborate on them.

The Tribunal, furthermore, reaffirms that there is a general principle of administrative law according to which any administrative decision must be judged upon its legality on the basis of evidence and documentation pre-existing its issuance, and therefore, any *ex post facto* elements cannot offer a basis for legalizing the impugned act.

III. As for the point made by the Respondent, according to which the Applicant suffered no damage from the premature separation from service because he was given interim relief - accepted by same Respondent - and that therefore no compensation was due, the Tribunal makes the following finding. In the present case, the Administration accepted that there was a violation of the due process rights of the Applicant, concurred with the interim relief recommendation of the JAB, and then again accepted to pay US\$ 3,000 for the delays caused in completing the proceedings. For the Administration to be liable to pay further compensation, that is for having damaged the Applicant's reputation by ending his contract prematurely, it needs to be proven that the Applicant suffered damage, that this is the responsibility of the Administration, and what the value of the reparation of that damage would be.

The Applicant submits that his reputation was harmed because his separation from service was immediately circulated world-wide, as proven by exchanges of private e-mails that he produced. However, the Applicant fails to prove that the

Administration did anything to divulge that information to the general public, or that it participated in any public debate about those facts. The only thing that the Administration did was to separate him from office, a fact which however, objectively, could harm the scientific and professional reputation of the Applicant. As a matter of fact, the Administration accepted that the Applicant was denied due process in dealing with his separation from service.

The Tribunal finds that what is important in the present case for the Applicant is that a Certificate of Service be issued to him, as recommended by the JAB, and that any adverse material inserted after the decision to terminate his appointment be expunged from his Official Status file. The Tribunal finds, furthermore, that the only truly harmful action taken by the Administration lies in the delays in dealing with this case, as for a period of more than four years the Applicant's scientific reputation was "imprisoned" in the late proceedings.

The Tribunal has repeatedly condemned the Administration for delays causing damage to staff members fighting for justice and feels that this is another case of this kind. However, the Tribunal has no evidence that the Administration deliberately harmed the interests of the Applicant. Therefore, although it finds that the sum accorded by the Administration for delays is not sufficient because of the linkage of those delays with the professional reputation of the Applicant, it also feels that the compensation proposed by the JAB is not proportionate. If accorded to him, it would more or less be as if his fixed-term contract were extended for periods never intended by the Administration. After all, the Applicant produced no material evidence of his damage suffered on the basis of which compensation could be calculated. The Tribunal believes that US\$ 10,000 should be, under the circumstances, a sufficient compensation for damages caused by delays.

IV. Accordingly, the Tribunal:

1. Orders the Respondent to provide the Applicant with a Certificate of Service to which he is entitled, under the terms proposed by the JAB;
2. Orders the Respondent to remove all adverse material inserted *ex post facto* from the Applicant's Official Status file;
3. Orders the Respondent to pay the Applicant US\$ 10,000 for the damage objectively caused to his scientific reputation by the undue

delays of the Organization in dealing with his case, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,

4. Rejects all other pleas.

(Signatures)

Kevin Haugh
First Vice-President, presiding

Spyridon Flogaitis
Second Vice-President

Dayendra Sena Wijewardane
Member

Geneva, 23 November 2005

Maritza Struyvenberg
Executive Secretary