



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1271

Case No. 1354

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis, Vice-President; Ms. Brigitte Stern;

Whereas, on 18 August 2003, a staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an Application in which he, in particular, requested the Tribunal to find that he had suffered from obstruction and harassment in the discharge of his duties and that a post for which he applied had been filled in an irregular manner. Whereas, on 24 November 2004, the Tribunal rendered Judgement No. 1217, in which it found that the recruitment in question had been carried out in violation of applicable procedures and, in addition, was vitiated by discriminatory factors and, accordingly, ordered the Respondent to compensate the Applicant in the amount of 12 months' net base salary.

Whereas, on 18 May 2004, the Applicant again filed an Application containing pleas which read, in part, as follows:

“THE APPLICANT RESPECTFULLY REQUESTS THE TRIBUNAL:

2.1.2 With regard to the substance and the merits

A) TO DECLARE NULL AND VOID ... the Administration's ... decision to relieve the Applicant, on 27 December 2000, of his duties as prosecuting attorney of the Organization ...

B) TO DECLARE that the Administration's refusal to give effect to the Tribunal's Judgement [*Alok*, *ibid.*] calling for an investigation, and to explain the circumstances that led it to prevent the Applicant from performing his duties as prosecuting attorney ... constitute a violation of the United Nations Basic Principles on the Role of Lawyers', the 'United Nations Guidelines on the Role of Prosecutors' and the

'United Nations Basic Principles on the Independence of the Judiciary' (...) and are in contempt of court and an affront to the Tribunal;

C) TO DECLARE that the harassment and obstruction experienced by the Applicant in the performance of his duties between 1998 and 2001 were violations of his terms of employment ...;

D) TO DECLARE that the December 2001 decision of the Secretary of [the Joint Appeals Board (JAB)] imposing a joinder of cases ... constitutes ... procedural irregularity;

E) TO DECLARE that the JAB decisions ... constituted a violation of staff rule 112.2 (m);

F) TO DECLARE that the decision by the UNDP Administrator not to conduct a proper investigation into the allegations of interference, obstruction and manipulation of the internal justice system ..., on the pretext that such an investigation should be carried out in conjunction with the Applicant's [performance appraisal review (PAR)] rebuttal process ... was in violation of articles X and XI of the Staff Regulations and constituted a procedural irregularity and a conflict of interest.

2.2 Preliminary and/or provisional measures

THE APPLICANT RESPECTFULLY REQUESTS THE TRIBUNAL:

2.2.1 THAT ... the present case should be accorded priority by the Tribunal ...;

2.2.2 THAT, in view of the absence of oral proceedings in JAB, the documents produced there by the Applicant should be acted upon, to serve as irrefutable evidence in support of his allegations of harassment, obstruction and interference, and that the Tribunal should order that the Applicant's witnesses be heard in order to corroborate these incidents.

2.3 Obligations invoked whose performance the Applicant is requesting

...

2.3.6 Staff rule 101.3 requires the Administration to carry out a fair and regular evaluation of the Applicant's professional conduct, affording him the right to due process, including an expeditious, impartial and transparent process for rebuttal of the PAR and the rating.

2.4 Compensation claimed ... *for disguised disciplinary sanctions, for prolonged harassment and for intense psychological and physical trauma sustained by the Applicant*

... [T]he Applicant respectfully requests the Tribunal to order the Respondent to pay as damages, on an exemplary and exceptional basis under article 9.1 of the Statute of the Tribunal, the equivalent of three (3) years' salary with benefits ...

..."

Whereas the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 September 2004 and periodically thereafter until 31 January 2005;

Whereas the Respondent filed his Answer on 31 January 2005;

Whereas, on 28 February 2005 the Applicant filed Written Observations amending his pleas as follows;

"THE TRIBUNAL IS ALSO REQUESTED

- **TO RULE THAT, OWING TO** the adverse publicity resulting from the failure to act on Judgement No. 1123 ... and owing to the Secretary-General's subsequent decision not to act on the Tribunal's request to investigate the matter, the Respondent should make amends to the Applicant by

issuing a public apology to the media and the press, and posting it on the United Nations and UNDP websites;

...”

Whereas, on 10 October 2005, the Respondent commented on the Applicant’s Written Observations;

Whereas, on 24 October 2005, the Tribunal posed a question to the Respondent and, on 27 October, the Respondent replied thereto ;

Whereas, on 28 October 2005, the Applicant submitted observations on the Respondent’s comments of 10 October ;

Whereas, on 2 November 2005, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts additional to those contained in Judgement No. 1217, as contained in the report of the JAB read, in part, as follows:

“Summary of the facts

[In his PAR for 1998, the Applicant received a rating of ‘4: partially meet performance expectations of the work plan but needs improvement’. His supervisor justified his rating by referring to the numerous problems with the Applicant’s professional behaviour, which occurred and were recorded during the performance period. The Applicant subsequently rebutted the report.]

... On 19 May 1999, [the Applicant] wrote a memorandum to ... the Management Review Group (MRG) ... in which he allege[d] ‘that the whole [1998] PAR exercise ought to be declared null and void as a result of the lack of objectivity in the way it was conducted by the [Office of Human Resources (OHR)] Directorate in breach of due process’. [The Applicant referred to] ‘displays of hostility’ and ‘harassment’. [The Applicant] then proposed, given the alleged bias of the OHR Directorate, special arrangements for the preparation of his PAR, or the referral of ‘the whole PAR process to an ad hoc MRG’. [On] ... 28 May 1999 (...), [he was advised that UNDP did] ‘not see the necessity to alter the MRG process’.

... On 23 July 1999, [the Applicant] addressed a memorandum (...) to [the] Associate Administrator, in which he recounted his version of the dispute mentioned ... above, which, he claim[ed], ‘led to a series of recriminatory actions against me and against the Legal Section . . .’ ...

... On 23 September 1999, the Applicant wrote to ... the UNDP Administrator, to complain of unfair treatment. ... He concluded by requesting ‘a fair and independent review ...

[The Administrator] replied on 7 October 1999:

‘...’

You will need to submit a formal PAR rebuttal to the Panel to begin this independent review. ...’
(...)

... On 4 November 1999, [the Applicant] addressed a confidential note (...) to [the Administrator] to which was appended a 13-paragraph annex entitled ‘Governance and Ethical Weakness in UNDP’s Administration of Justice’ which elaborated on his complaints. In [his] reply of 6 December 1999 (...), [the Administrator] referred to ‘what you consider as interference and manipulation in the internal justice system’ and said ‘to the extent that these issues may be relevant to your performance ... the appropriate review body is the PAR Panel of Reference’. ...

...

... On 16 November 2000, [the Applicant] wrote to [the Administrator] complaining that the 'independent review' ... had still not been held, ... [and] ... again requested an 'independent review ... to investigate additional incidents of harassment, discrimination and abuses ... since 1998' ... In his reply of 4 January 2001 (...), [the Administrator] state[d] 'that the delay in having your 1998 PAR rebuttal reviewed by the PAR Panel of Reference was caused by the delay introduced by you'. He ... [rejected the Applicant's request for an independent, external review] ...

... On 31 January 2001, [the Applicant] informed [the Administrator] that he was 'unable to accept the idea of merging or joinder of the review of [his] 1998 performance with the investigation of the allegation [he] raised ...' He went on to 'request a *distinct* and separate panel covering 30 months and 59 incidents of administrative violations, abuses, harassment, interferences and intimidations against [him] and against the Legal Section'. (...)"

On 15 November 2001, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 20 October 2003. Its considerations and recommendation read, in part, as follows:

“Considerations

...

24. Having worked its way through the mass of material which 'for the enemy of time'..., the [Tribunal] had not the opportunity to consider, the Panel, nevertheless, finds itself arriving at a similar conclusion to that of the Tribunal [in Judgement No. 1123, *Alok* (2003)]. [The] Appellant's submissions are replete with allegations of two kinds: the first, of acts of harassment and intimidation by UNDP against himself; the second, of illicit interference by senior officials of UNDP (and of UNFPA) in the operations of the administration of justice in those organizations.

...

27. [The] Appellant's first plea is that the JAB recommend to the Secretary-General that a judge be designated to investigate his allegations. In the Panel's opinion, such a recommendation does not lie within the JAB's terms of reference. In fact, the Panel had reluctantly to come to the conclusion that a proper and thorough evaluation of both groups of Appellant's allegations was beyond both its terms of reference and its means. The Panel, therefore, adds its voice to the Tribunal in stating that 'such allegations deserve further [*sic*] investigation by the appropriate United Nations authorities' [*Alok, ibid.*].

...

29. In his second plea, [the] Appellant accuses ... UNDP of violating his due process rights. The Panel concluded that in the preparation of his 1998 PAR and the subsequent handling of [the] Appellant's rebuttal thereto his due process rights were indeed violated. ...

It emerges clearly from the various exchanges of correspondence that the relationship between [the] Appellant and the First and Second Reporting Officers (...) could well be characterized as 'extremely strained'. In addition, there was not, as required by PAR guidelines, a mid-year review. Further, throughout it was consistently the position of UNDP - up to and including the personal written opinion of the Administrator himself - that the way to deal with [the] Appellant's charges and complaints was by having his rebuttal to the 1998 PAR considered by the UNDP Rebuttal Panel of Reference. Yet, when the attempt at mediation proved unsuccessful, the UNDP Administration made no further effort to have the rebuttal reviewed by the Panel of Reference.

Recommendation

30. The Panel recommends to the Secretary-General that as compensation for the denial to Appellant of 'a fair and impartial assessment of performance' (...) he be granted compensation in the amount of three months' net base pay at the time of his separation.

31. The Panel makes no other recommendation with respect to this appeal."

On 18 May 2004, the Applicant, having not received any decision from the Secretary-General regarding his appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 19 November 2004, the Under-Secretary-General for Management informed the Applicant as follows:

"The Secretary-General has examined your case in the light of the JAB's report and all the circumstances of the case and finds that he is unable to accept the JAB's conclusions or its recommendation that you be paid compensation in the amount of three months salary. He notes that while it appears to be the case that a strained relationship existed between you and your supervisors, it is also the case that you did not cooperate with UNDP in connection with your performance assessments. When there was an opportunity for the matter to be reviewed by the independent UNDP Rebuttal Panel of Reference, it appears that neither you nor the UNDP Administration moved with alacrity and the review was never completed. The Secretary-General has therefore decided to take no further action on this appeal."

Whereas the Applicant's principal contentions are:

1. The Respondent's decision of 27 December 2000 to publicly dismiss him, without valid reason, from his duties as prosecuting attorney and investigator in fraud and corruption cases at UNFPA in Nepal violated his rights as a staff member.
2. The Administrator of UNDP refused to conduct an investigation into various incidents of harassment, obstruction of justice and interference which he suffered in the performance of his duties.
3. He continues to be the victim of persecution, discrimination and harassment.
4. He is still being denied PARs for 1998-1999-2000-2001, for services rendered at UNDP, and his professional career is therefore blocked.
5. A recent impromptu decision to improvise a so-called "independent review" under the auspices of the former Administrator constitutes a new denial of justice, a misuse of procedure and a violation of the rules on impartiality.

Whereas the Respondent's principal contentions are:

1. The Applicant's requests concerning the internal justice system are not receivable.
2. It is within the sole discretion of the Administration to conduct an investigation.
3. The Respondent denies all allegations of harassment and obstruction

The Tribunal, having deliberated from 2 to 23 November 2005, now pronounces the following Judgement:

I. The Applicant is again submitting to the Tribunal a series of pleas. It should be pointed out that the Tribunal has already heard several claims filed by this Applicant, which were considered in Judgement No. 1217, the operative part of which reads:

“For these reasons, the Tribunal:

1. Finds that the recruitment of the [Director of the Office of Legal and Procurement Support (OLPS)] was carried out in violation of applicable procedures and in addition was vitiated by discriminatory factors;
2. Orders that the Applicant shall be paid 12 months’ net base salary in compensation for all violations of these rights; and,
3. Rejects all other pleas.”

The Tribunal wishes to stress, and will revert to this point, that, with the exception of the recruitment of the Director of OLPS, which resulted in the Applicant’s failure to be recruited and was censured by the Tribunal as being vitiated by discriminatory factors, all the other pleas submitted to the Tribunal were rejected.

II. In its report of 20 October 2003, the JAB correctly identified, among the host of allegations made by the Applicant, two kinds of general plea and a more specific plea concerning the rebuttal procedure for his PAR. The JAB’s report reads as follows:

“The Panel, having taken note of the great volume of documentation submitted by the parties, particularly the Appellant, observed that its task would have been rendered less burdensome had the parties made an effort to submit succinct and better-organized presentations.

Finally ... [the Applicant’s] submissions are replete with allegations of two kinds: the first, of acts of harassment and intimidation by UNDP against himself; the second, of illicit interference by senior officials of UNDP (...) in the operations of the administration of justice in those organizations (...).

...

In his second plea, Appellant accuses the UNDP of violating his due process rights (...).”

With regard to the position taken by the JAB, the Board dealt separately with the general questions and the specific procedural issue. On the problems caused by the internal system for the administration of justice, the Board stated that “a proper and thorough evaluation of both groups of [the Applicant’s] allegations was beyond both its terms of reference and its means”. On the alleged procedural violations, the Board took the view that

“in the preparation of his 1998 PAR and the subsequent handling of Appellant’s rebuttal thereto his due process rights were indeed violated. In this connection, the Panel recalled Judgement No. 363 (*de Franchis*) [(1986)]:

‘VIII. It is therefore the Tribunal’s view that, given the record of this case, to have the Applicant’s performance assessed by an official with whom there existed such an extremely

strained relationship seriously affected the Applicant's right to have his performance assessed in an impartial way, and it thus entails responsibility for the Administration.

...

The Panel recommends to the Secretary-General that as compensation for the denial to [the Applicant] of a fair and impartial assessment of performance, he be granted compensation in the amount of three months' net base pay at the time of his separation."

However, the Secretary-General did not accept the JAB's conclusions and therefore refused to award the Applicant the compensation in the amount of three months' salary it recommended

III. The Tribunal will, in turn, examine the Applicant's various claims, but echoes the JAB in deploring the confusing and, above all, repetitive nature of those claims, which it has thus been called upon to consider several times, and agrees with the Respondent, who points out that the Applicant repeats several arguments and allegations set out in his Application instituting proceedings in the case already heard by the Tribunal, which gave rise to the aforementioned Judgement No. 1217. In an attempt to impose some semblance of order on the Applicant's claims, the Tribunal will not deal with the pleas in sequence, but will address them all.

IV. First, the Tribunal will examine the Applicant's plea concerning the refusal of UNDP to conduct an investigation into the allegations of interference, obstruction and manipulation of the internal justice system and the refusal of the JAB to address that issue on the ground that those particular allegations were beyond its terms of reference - which, according to the Applicant, constitutes a denial of justice. The Tribunal can deal rapidly with these pleas, insofar as it also considers them to be clearly inadmissible. Article 2 of the Statute of the Administrative Tribunal of the United Nations states that: "The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members."

In the present case, the Applicant is not invoking any administrative decision that has caused him harm, i.e. violated his rights or the terms of his appointment, which are protected by the Staff Rules and Regulations. The Tribunal recalls that it has already defined its understanding of an "administrative decision":

"There is no dispute as to what an 'administrative decision' is. It is acceptable by all administrative law systems that an 'administrative decision' is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences" (see Judgement No. 1157, *Andronov* (2003), para. V).

The Tribunal notes that the plea concerning the denial of the Applicant's request for an investigation into the UNDP justice system is obviously not an application alleging non-observance of his contract of employment or a violation of his terms of appointment, since it is not based on an administrative decision involving him.

V. Consequently, with regard to the plea to the effect that the Tribunal should declare that, by failing to take a decision on the request for an investigation into the internal system for the administration of justice on the ground that such a decision fell beyond its terms of reference, the JAB acted unlawfully and reached a decision amounting to a denial of justice, the Tribunal cannot admit such a plea, because, on the contrary, it considers that the JAB's position was perfectly justified.

VI. Moreover, the Tribunal wishes to stress that, even if it had been in the Applicant's interests to take action on this issue, the decision to conduct such an investigation is the privilege of the Organization itself. In Judgements Nos. 1086, *Fayache* (2002), and 1234 (2005), the Tribunal heard requests for the instigation of disciplinary proceedings against staff members and noted that "[i]t is not legally possible for anyone to compel the Administration to take disciplinary action against another party" (*Fayache*). This reasoning applies, by analogy, to the kind of general investigation requested by the Applicant in the present case.

VII. Furthermore, even if an administrative decision denying an investigation into the internal justice system had been taken, and even if such a decision might have constituted a direct violation of the Applicant's rights, the Tribunal must point out that an investigation is currently under way, as evidenced by a letter it received in response to a request for information. In that letter, the Administration indicates that an investigator has been appointed to conduct the investigations requested:

"[The investigator] has a mandate to carry out an independent review of the investigation conducted by UNDP into the *Alok* case. He alone will be responsible for determining how that review will be carried out and how the report will be drafted.

In accordance with his mandate, [the investigator] will not only undertake a general review of the *Alok* case, but will also establish: whether the UNDP Administration attempted to hinder the investigation of issues related to the responsibility of UNFPA Headquarters with respect to irregularities and mismanagement that took place in the Nepal office; whether a legal adviser involved in that case and linked to this one was improperly removed; and why documents relating to Headquarters' responsibilities and the *Alok* case in general have allegedly inexplicably disappeared."

VIII. To conclude on this first point, the Tribunal therefore considers that the Applicant's plea requesting an investigation into the internal justice system is inadmissible and that, even if it were admissible, it is no longer applicable.

IX. Secondly, the Tribunal will examine the section of the Application relating to the alleged acts of harassment and intimidation committed against the Applicant by UNDP. The Tribunal notes that this plea is also inadmissible, because it is contrary to the principle of *res judicata*. In its Judgement No. 1217, the Tribunal has already carefully considered the mass of incidents reported by the Applicant from 1998 onwards. While the Tribunal noted that the relationships between the Applicant and other staff members of the Organization were strained, it also concluded, as illustrated by the following passage, that there was no discriminatory treatment:

“The Applicant cites a long series of circumstances to show that improper motives vitiated the recruitment of his competitor. In particular, the Applicant suggests that he was discriminated against because of the firm legal position he took in prosecuting a number of misappropriation cases at UNDP and cites his differences with UNDP senior management over *Ragan* (Judgement No. 1066 (2002)), *Alok* (Judgement No. 1123 (2003)) and *Poudel* (Judgement No. 1153 (2003)) to show that there were ‘circumstances influencing the appointment of the Director of OLPS’. As an example, the Applicant alleges that in *Alok* senior managers at UNDP:

‘... were constantly urging the Applicant to close the Nepal disciplinary cases immediately. The aim of this pressure was to avoid any investigation that might question their own management and the lack of a system of oversight for construction projects in Nepal.’

The Applicant also refers to *Ragan* and alleges that pressure was exerted by senior management to ensure that Ms. Ragan was acquitted of the accusations against her and to sabotage his work as a lawyer and his legal analysis of the case. The Tribunal is convinced that the information submitted by the Applicant indicates that there were serious misunderstandings between the Applicant and other senior managers at UNDP. Those tensions undoubtedly had their origins in 1998 when the Applicant opposed the recruitment of the candidate for Deputy Chief, Legal Section, proposed by UNDP management, contesting the candidate’s legal qualifications, saying that he claimed to be a lawyer in Denmark but was actually only a law student/trainee. *However, this evidence in itself is not sufficient to show discriminatory treatment of the Applicant with respect to the legal cases mentioned*” (emphasis added).

The Applicant’s pleas in this case fall within the category of the pleas rejected by the Tribunal in the aforementioned Judgement. Since all the allegations of discrimination and harassment have already been rejected by the Tribunal, *res judicata* prevents the Applicant from filing a new Application in respect of the same incidents.

X. Thirdly, the Tribunal will consider the pleas concerning the alleged procedural irregularities. More specifically, the Applicant complains that his right to due process was violated because several of his appeals were joined during the proceedings before the Joint Appeals Board. On the joining of appeals, the Tribunal takes the view that, since all of the Applicant’s claims were made on the basis of the same facts, justice will be delivered most effectively if, rather than duplicating cases, an attempt is made to settle them all at once. The file contains nothing to suggest that the Applicant’s rights might have been violated by such a joinder, and the Tribunal therefore rejects this plea concerning the procedure adopted by the JAB.

XI. For these reasons, the Tribunal rejects the Application in its entirety.

(Signatures)

Julio **Barboza**
President

Spyridon **Flogaitis**
Vice-President

Brigitte **Stern**
Member

New York, 23 November 2005

Maritza **Struyvenberg**
Executive Secretary