



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1281

Case No. 1364

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Ms. Jacqueline R. Scott; Mr. Goh Joon Seng;

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 15 January 2004 and twice thereafter until 30 June;

Whereas, on 30 June 2004, the Applicant filed an Application requesting the Tribunal:

“8. ... *to find:*

(a) that the decision of the Respondent to reabsorb the Applicant against a P-4 post without recognizing the Applicant's promotion to the P-4 level received while on secondment, was contrary to the spirit, if not the letter, of the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff Among the Organizations Applying the United Nations Common System of Salaries and Allowances [(IOA)];

(b) that the decision of the Respondent to reabsorb the Applicant against a P-4 post, without recognizing the Applicant's promotion to the P-4 level, was inherently contradictory, as it required the Applicant to perform at the P-4 level while, at the same time, not recognizing the Applicant's official status at that level and was therefore arbitrary, tainted by prejudice and procedurally flawed.

9. ... [and] *to order*:

(a) the Respondent to rescind [his] decision and recognize the Applicant's promotion to the P-4 level by [the United Nations Industrial Development Organization (UNIDO)], effective 1 January 1999;

Alternatively, *to order*:

(b) that the Applicant be awarded damages in the amount of three (3) years' net base salary in recognition of the wrong done to her by the Respondent."

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 January 2005 and once thereafter until 28 February;

Whereas the Respondent filed his Answer on 28 February 2005;

Whereas the Applicant filed Written Observations on 2 May 2005;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

"Employment History

... [The Applicant] was recruited in January 1963 as a Bilingual Clerk-Steno[grapher] at the G-3 level in the then Centre for Industrial Development (CID) in New York. Her contract was converted to probationary in October 1963, and to permanent in January 1965. In November 1967, she was reassigned to the UNIDO [(successor agency to CID)] Liaison Office ... [Thereafter, she was promoted a series of times.] ...

[On 9 November 1985, an agreement was concluded between the United Nations and UNIDO, which had become a specialized agency, regarding the transfer, secondment and loan of staff, whereby UNIDO undertook to offer UNIDO appointments to staff members of the United Nations who were assigned to the agency. The agreement provided, however, that certain staff members who were assigned to UNIDO but who wished to maintain their contractual relationship with the United Nations 'for a limited period of time', could receive 'special secondment' from the United Nations to UNIDO, subject to certain conditions. The total period of service on secondment was not normally to exceed five years.]

... Effective 1 January 1986, [the Applicant] was seconded to UNIDO for two years. Her fixed-term appointment with UNIDO and her secondment ... were extended [a series of times] ... Effective 1 April 1989, she was promoted to P-3, Industrial Development Officer; effective 1 November 1998, she was promoted to P-4[, step 8 level,] as a result of the UNIDO one-time promotion review. (...)

... [The Applicant's] secondment to UNIDO ended on 31 December 1998. Effective 8 April 1999, she was temporarily assigned to a post in the

[Non-Governmental Organizations (NGO) Section, Department of Economic and Social Affairs (DESA)]; the assignment was subsequently extended ...

Summary of the facts

... On 26 June 1997, ... UNIDO [requested approval from the Office of Human Resources Management (OHRM) of an] ... 'extension of [the Applicant's] secondment to UNIDO through December 1998'. ...

... On 14 August 1997, ... [in an internal OHRM memorandum, the following was noted:]

'...

2. Every time OHRM was asked to agree to a further extension of [the Applicant's] secondment, OHRM made its agreement conditional upon UNIDO's absorption of the staff member at the end of the secondment period. In practice, OHRM's condition has never been met. One main reason for this is the fact that UNIDO does not grant permanent contracts and the staff members concerned are understandably reluctant to relinquish their permanent status with the United Nations. ...

3. Normally, our recommendation would be to insist again that UNIDO should absorb [the Applicant] either now or at the end of the currently proposed extension of her secondment. UNIDO may not, however, be in a position to comply with either request. Nor can we expect [the Applicant] to give up her permanent appointment for the sake of an assignment with an organization which appears to be in dire financial straits. The problem is that there is no post at the United Nations against which [the Applicant], who has served with UNIDO for so many years, could be placed if she were to return to the United Nations.

4. We therefore see no practical option but to agree, though reluctantly, to UNIDO's request to extend [the Applicant's] secondment for another year. ...'

The memorandum is marked: 'Approved as requested.'

... On 30 October 1997, ... [UNIDO asked OHRM] ... 'to kindly consider the possibility of a further extension of [the Applicant's] special secondment to UNIDO through 31 December 1999'.

... On 28 April 1998, ... [UNIDO advised OHRM that it could not absorb the Applicant and that] '[t]herefore, ... she [would] be returning to the United Nations when her secondment expire[d] on 31 December 1998. ...'

... On 22 June 1998, [OHRM advised the Applicant of UNIDO's decision and confirmed, inter alia,] ... 'there is, unfortunately, no post reserved for you in the Secretariat for your absorption. I hope that this advance notice will enable you to apply for vacancies in the Secretariat that match your qualifications.' ...

...

... By a memorandum dated 28 December 1998 ..., UNIDO [was asked to agree] to a further six month extension of [the Applicant's secondment], as

OHRM had 'not been able to identify a post against which to place her'. (...) UNIDO did not agree.

... On 10 May 1999, [the Applicant was advised as follows:]

“... ”

Once the relevant personnel action in IMIS is done to cover your assignment to OHRM from 1 January 1999 until 7 April 1999, DESA will issue another personnel action to reflect your temporary assignment to NGO/DESA as of 8 April 1999.

As already mentioned to you earlier, you will be paid at level P-3, step XV.”

The Applicant was placed against a P-4 position in DESA, the incumbent of which was on mission. Her assignment to DESA was subsequently extended for the remainder of her career and, subsequently she was paid a special post allowance (SPA) to that level.

On 6 June 1999, the Applicant wrote to the Secretary-General requesting administrative review of the decision to re-absorb her at the P-3 level.

On 3 August and 23 September 1999, the Applicant lodged an appeal with the JAB in New York.

The JAB adopted its report on 6 June 2002. Its considerations and recommendations read, in part, as follows:

“Considerations

19. ... [T]he terms of the IOA (...) are clear; whether or not the UNIDO promotions were to be recognized was a matter that is within the discretionary authority of the Secretary-General. [The] Appellant has not alleged, nor did the Panel find, that the decision to place [her] at level P-3, step XV was tainted by prejudice or procedurally defective. The Panel could not, therefore, recommend that [the] Appellant be placed at the P-4 level.

...

Recommendations

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

(a) for the reasons enumerated in paragraph 19 above, [the] Appellant be given favourable consideration for any P-4 level post for which she may apply;

...”

On 28 July 2003, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her that the Secretary-General accepted “the reasoning behind, and the recommendation of the Board ... [and]

accordingly, agree[d] that [she] should be given a favorable consideration for any P-4 post to which [she might] apply and ... be found to be qualified”.

On 31 December 2003, the Applicant retired.

On 30 June 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Respondent had an obligation to reabsorb the Applicant against a post that was in line with her qualifications and experience.
2. The terms of the IOA should not be applied to the detriment of staff members, without proper cause and justification.
3. The decision to grant the Applicant a step increment rather than to recognize her at the level of the post she encumbered was arbitrary, tainted by prejudice and procedurally flawed.

Whereas the Respondent’s principal contentions are:

1. The United Nations has no obligation to recognize, or reciprocate, the Applicant’s promotion at UNIDO.
2. The Applicant’s request for damages is without merit.

The Tribunal, having deliberated from 26 October to 23 November 2005, now pronounces the following Judgement:

I. The Applicant brings her case to the Tribunal to determine whether the Secretary-General was required to recognize her promotion to the P-4 level, which she gained while working at UNIDO, upon her return to the United Nations at the end of her secondment. She also challenges the decision of the Secretary-General to place her against a P-4 level post without granting her the P-4 level, alleging abuse of the Secretary-General’s discretion.

II. The Applicant, who began her career at the United Nations serving with the Centre for Industrial Development, was formally seconded to UNIDO in 1986. During her 13 year tenure with UNIDO, from 1986 to 1998, the Applicant’s secondment was renewed approximately every two years. At the time of each renewal, the United Nations made as a condition to the renewal UNIDO’s agreement to absorb the Applicant at the end of the secondment. At no time during the 13 years, however, did

UNIDO absorb her, nor did the United Nations, at any time prior to the end of her secondment, refuse to extend the secondment, given UNIDO's failure to absorb. Also during this period of secondment, there was much correspondence between the United Nations and UNIDO concerning whether the Applicant wanted to be transferred to UNIDO and give up her permanent appointment with the United Nations. At all times, the Applicant made clear that she did not want to relinquish her permanent appointment, and instead, that she wanted to continue working for UNIDO, but on secondment, so as to protect her benefits earned by virtue of her permanent appointment with the United Nations. Since it appeared to be beneficial to all parties - the United Nations, UNIDO and the Applicant - this arrangement continued until December 1998.

During her secondment, UNIDO promoted the Applicant twice: first, from a P-2 to a P-3, in 1989, and then from a P-3 to a P-4, in 1998, two months before her secondment ended.

III. In October 1997, when the Applicant's secondment was up for renewal, UNIDO once again requested a continuation of the secondment for two more years, until 1999. Again, the United Nations made as a condition to its agreement to continue secondment, UNIDO's agreement to absorb the Applicant on a permanent basis at the end of that secondment, in 1999. Because of its precarious financial condition at that time, however, UNIDO indicated that it was in no position to absorb the Applicant, but requested that the Applicant be allowed to continue working for UNIDO on secondment. UNIDO was able to negotiate a continuation of the secondment for one year, until December of 1998, after which time, it was agreed, the Applicant would return to work at the United Nations.

Prior to her return to the United Nations, the Respondent notified the Applicant that there would be no post available upon her return, and encouraged her to apply for any jobs for which she was qualified. The Tribunal notes that the Applicant had effectively served her entire career with UNIDO, in its various permutations, and had, undoubtedly, developed highly specialized skills which may not have translated easily into positions outside UNIDO. At all times, however, she was free to apply for vacant positions in the United Nations system.

In January 1999, the Applicant's secondment having indeed ended, she returned to work for the United Nations. Upon her return, there still was no post suitable for her, and she temporarily worked out of the UNIDO Liaison Office at the United Nations. The Applicant was advised that her promotion to the P-4 level, which

she received within the last two months of her secondment with UNIDO, would not be recognized, but that her first promotion to P-3, which she received in 1989, would be recognized. The Applicant did receive, however, a one step increment, over and above the P-3 level and step to which she had risen immediately prior to her P-4 promotion.

In April of 1999, the Applicant was placed against a blocked post, the incumbent of which was on mission. As the incumbent's mission assignment was periodically extended, the Applicant was able to remain against the post until her retirement on 31 December 2003. The Tribunal notes that the record reflects some fluctuation in the classification of the post.

IV. The Tribunal turns its attention first to the Applicant's challenge of the Secretary-General's decision not to recognize her recent promotion by UNIDO to the P-4 level. The Tribunal first notes that paragraph 9 (3) of the IOA is unambiguous in its language, and specifically provides that

"The releasing organization will be under no obligation to recognize any change of official status of the staff member which may occur in the receiving organization, except in calculating payments under paras. 18 (b) [compensation for service-incurred illness, injury or death] and 20 [health and group life insurance] ...".

It is clear to the Tribunal that the United Nations, as the releasing organization, was under no duty to recognize the Applicant's promotion granted while in UNIDO, the receiving organization. In support of her position, the Applicant alleges that the Secretary-General's decision not to recognize her promotion was "arbitrary, tainted by prejudice and procedurally flawed". Where allegations of extraneous motivation such as these are made, "the Tribunal has consistently held ... that the *onus probandi*, or burden of proof, is on the Applicant". (Judgement No. 1069, *Madarshahi* (2002).) The Applicant has failed to adduce any evidence that the decision was vitiated by prejudice, discrimination or that it was an abuse of discretion. Her unsupported allegations cannot be said to discharge the onus of proof required. While the Tribunal can surely empathize with the Applicant in her frustration at not having her most recent promotion recognized, the Tribunal also recognizes the broad latitude of discretion enjoyed by the Respondent in matters of personnel. As the Applicant has failed to meet the burden of proving that the exercise of this discretion was improper, the Tribunal is satisfied that the Secretary-General was well within his discretion to recognize one promotion and not the other, having no obligation to recognize either. In fact, the Secretary-General

just as properly could have decided to reabsorb the Applicant at the P-2 level, because this was the Applicant's level at the time she was first seconded. Under such circumstances, the Applicant could hardly be heard to complain, as the Secretary-General would have been in compliance with the terms of the IOA.

V. The Tribunal next addresses whether the Secretary-General's decision "to grant the Applicant a step increment instead of recognizing her grade at the level of the post she encumbered" was proper. In reaching its decision with regard to this issue, the Tribunal first feels compelled to clarify the course of events that understandably leads the Applicant to assume that the decision of the Secretary-General not to recognize her P-4 promotion and the placing of the Applicant against a P-4 post, as well as all attendant and resulting compensation decisions, are inextricably intertwined. In this regard, the Applicant's position is that since the Secretary-General refused to recognize her promotion, brought her back as a P-3 and then promptly placed her against a P-4 post, where she remained for the duration of her employment and for which she received an SPA, it was intended from the start that she would provide P-4 services, while being forced to remain a P-3, and that this course of events was improper. The Tribunal sees the same events in a different light. Specifically, the Tribunal notes that the first event, i.e., the decision to reabsorb her at the P-3 level, was an independent event, which, as set forth above, was entirely a proper exercise of the Secretary-General's discretion. Subsequently, upon her return to the Organization, because no suitable posts were available, the Applicant was not placed against any specific post for several months. Thereafter, four months after her return, a suitable blocked post which happened to be at the P-4 level rather than the P-3 level, was finally identified, and the Applicant was temporarily placed against it, pending the return of the incumbent from mission. While the Applicant seems to take offense at being called upon to perform P-4 duties while serving as a P-3 staff member, the Tribunal notes that it has previously recognized that staff members are often called upon to perform services "of a character and at a level superior to those for which they have been appointed". (See Judgement No. 336, *Maqueda Sanchez* (1984).) This is true particularly in circumstances such as these, where there was a dearth of suitable positions for the Applicant upon her return.

VI. The Applicant argues that the fact that she received an SPA for much of her tenure against the P-4 post and the fact that she remained against that post until her retirement is evidence that she was improperly classified and compensated and that the

Secretary-General's decisions were arbitrary, tainted by prejudice and procedurally flawed. The Tribunal does not agree. While the Tribunal recognizes that the assumption of higher level posts by staff members and the payments of SPA as compensation for doing so are intended to be a temporary arrangement, the temporary availability of the post against which the Applicant was placed necessitated this continuing arrangement. The Applicant could not be placed permanently on the post, as the availability was only for as long as the incumbent remained on mission. The fact that the post continued to be available for the Applicant to be placed against for several years, until her retirement, was the result of the incumbent's continuing mission assignment; a result that could not have been foreseen in 1999 when the Applicant returned from UNIDO, when she was initially placed against the post, or frankly, at any time, because it hinged on whether the incumbent was offered the opportunity to remain on mission and whether the incumbent decided to do so. Again, the burden of proof that the Respondent's actions were tainted by prejudice, bias or extraneous motivation falls on the Applicant, and again, she has failed in this regard.

VII. For the foregoing reasons, the Applicant's claims are denied, and the Application is rejected in its entirety.

(Signatures)

Kevin Haugh
Vice-President, presiding

Jacqueline R. Scott
Member

Goh Joon Seng
Member

New York, 23 November 2005

Maritza Struyvenberg
Executive Secretary