United Nations AT/DEC/1282

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1282

Case No. 1258 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

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

Whereas, on 1 September 2004, the Tribunal received an application from a former staff member of the United Nations that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 9 November 2004, the Applicant, after making the necessary corrections, again filed an Application in which she requested the interpretation and implementation of Judgement No. 1159, *Lacoste*, rendered by the Tribunal on 21 November 2003;

Whereas the Application contained pleas which read as follows:

"'The Applicant requests the Tribunal to declare:

- That in paragraph 5 of the order in Judgement No. 1159, the word 'salary' refers to gross, not net salary, and the Administration should not have deducted $56,322.00 in staff assessment from the compensation due;

- That in paragraph 5 of the order in Judgement No. 1159, the expression 'all allowances' includes the medical subsidy and the employer's contribution to the [United Nations Joint Staff] Pension Fund, and that the Administration should not have deducted the sums relating to those items;

[and to order:]

- … [T]hat, unless [the Respondent] fully implements Judgement No. 1159 and reinstates in the Applicant's file all of the favourable documents that were removed from it, the damage to the Applicant's reputation and career as a result of the deliberate and hostile removal and/or destruction of the documents that were favourable to her be remedied, and that [the Respondent] be ordered to pay to the Applicant compensation equal to two years' salary;

- … [The Respondent] to pay to her, for the delay in the enforcement of the Judgement and for the extreme dishonesty which the Administration continues to display, compensation equal to two years' salary, and to order that this amount be paid to her immediately and/or, if not paid immediately, that the Administration pay to the Applicant an allowance of $500 per day for the delay in enforcement."

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 March 2005 and twice thereafter until 31 May;

Whereas the Respondent filed his Answer on 31 May 2005;

Whereas, on 17 November 2005, the Tribunal decided to postpone consideration of this case until its summer session;

Whereas, on 1 December 2005, the Tribunal posed a question to the Respondent, who responded on 5 May 2006;

Whereas the facts in the case were set forth in Judgement No. 1159.

Whereas the Applicant's principal contentions are:

1. Judgement No. 1159 has not been correctly implemented.

2. The Respondent erred in deducting staff assessment from the Applicant's award.

3. The United Nations' contributions to health insurance and pension should have been taken into account in calculating the compensation awarded by the Tribunal.

4. The Respondent failed to comply with the order that a new performance evaluation report (PER) be prepared for the Applicant.

5. The Applicant requests clarification as to the steps taken with respect to removing defamatory material from her Official Status file, and compensation in lieu of enforcing the Tribunal's order that favourable material be restored thereto.

6. The Applicant is entitled to compensation for the Respondent's bad faith and delay in implementing Judgement No. 1159.

Whereas the Respondent's principal contentions are:

1. The compensation awarded to the Applicant did not include the staff assessment deducted by the Respondent.

2. The Applicant was not entitled to receive post adjustment as part of the compensation under the Judgement; such payment was made in error and is subject to recovery.

3. The Judgement has been implemented; the Applicant's claims to additional payments and to interest and penalties are without merit.

The Tribunal, having deliberated from 28 October to 17 November 2005 in New York, and from 27 June to 28 July 2006 in Geneva, now pronounces the following judgement:

I. The Applicant submitted an application to the Tribunal in which she requested implementation of Judgement No. 1159. In fact, this Application comprises two separate matters, respectively entitled "I. Problems of interpretation" and "II. Other problems of implementation".

II. It is worth recalling here the terms of the operative part of Judgement No. 1159, as originally worded, which is the subject of the present Application:

> "For the foregoing reasons, the Tribunal:
>
> 1. Declares that the decision to reassign the Applicant from the post of Chief of the Press and Information Office to the editing of the [International Criminal Tribunal for Rwanda (ICTR)] Yearbook was based on improper motives;
>
> 2. Orders that a new [PER] should be prepared for the period from May 1996 to February 1997 and that the Applicant should be given the opportunity effectively to rebut her [PER];
>
> 3. Declares that the decision not to renew the Applicant's contract should be considered as null and void, having been adopted by an authority that was not competent to do so and was acting in violation of the Applicant's due process rights;
>
> 4. Notes that reinstatement of the Applicant would be meaningless in view of the circumstances;
>
> 5. Orders payment to the Applicant, as compensation for all the irregularities committed in the treatment of her situation, of one and a half years' salary with all allowances at the rate in force on the date of the Judgement, in addition to the compensation already paid to the Applicant following the Joint Appeals Board decision;
>
> 6. Orders the Administration to verify that any unfavourable documents that may be in the Applicant's personnel file unbeknown to her have indeed been removed and that the favourable documents are indeed put in the file, in particular the [PER] revised by a rebuttal panel, and orders the Administration to send the Applicant written confirmation that it has indeed performed this task, with the exact list of the documents concerned, within a period of six months;
>
> 7. Rejects all other pleas." (Para. XXXV.)

III. The Applicant claims that the Administration misinterpreted several of the provisions of the Judgement made in her favour. More specifically, the Applicant contests the Administration's interpretation of paragraph 5 of the order, which refers to the payment to the Applicant of one and a half years' salary with all allowances". She claims that the Administration misinterpreted the extent of the compensation: firstly, by deducting staff assessment, whereas compensation awarded by the Tribunal is not subject to such assessment; and secondly, by deducting from the allowances payable with the salary the medical insurance subsidy and the "employer's contribution to the Pension Fund". Regarding the question of the extent of the compensation, even though the Administration included post adjustment in the amount paid to the Applicant in implementation of the Judgement, the Respondent contends, in his arguments, that the Applicant was not entitled to inclusion of the post adjustment in the compensation payable to her in implementation of the Judgement, and the Administration therefore requests recovery of that amount.

To these claims concerning the interpretation of paragraph 5 of the order, the Applicant adds a plea for implementation in respect of operative paragraph 2 ordering ICTR to prepare a new PER for the Applicant. According to the Applicant, "more than 11 months after the Judgement, ICTR still has not transmitted such a report".

The Applicant also requests implementation of paragraph 6 of the order, ordering the reinstatement of favourable documents that had been removed from her file and the removal of documents that had been falsified or were unfavourable. She claims, in fact, that the note from the Chief of the ICTR Division of Administrative Support Services is unclear as to the extent of enforcement of this part of the Judgement. The Applicant requests that in the event that the Judgement has not been fully enforced and her file corrected, she should be paid additional compensation equal to two years' salary.

The Tribunal also notes that the Applicant requests an allowance of $500 per day for delay, based on the fact that article 10 of the Tribunal's Statute implicitly limits delay in implementation to 30 days, whereas the agreed measures had yet to be implemented after 11 months.

IV. The Tribunal wishes to point out that most of these questions were addressed and resolved in its Judgements Nos. 1225 (2005) and 1255 (2005). With a view to clarifying the situation and resolving the questions of interpretation raised, the Tribunal will first cite and apply the reasoning used in the above-mentioned cases, before proceeding to examine questions of implementation.

V. The Tribunal will thus first address problems concerning the interpretation of the order in its Judgement relating to the extent of the compensation to be awarded to the Applicant. The Tribunal recalls first and foremost that even if its Statute is silent on the Tribunal's competence to interpret, the Tribunal has always recognized itself to be competent to interpret one of its own Judgements if either party considered it unclear. It is well known that in its advisory opinion of 13 July 1954, the International Court of Justice recognized that the Tribunal is a judicial body. Moreover, the competence to interpret is inherent in its judicial function, as the Tribunal recognized in Judgement No. 61, *Crawford et al.* (1955), paragraph 1. This inherent competence to interpret was also recently recalled in Judgement No. 1164, *Al Ansari et al.* (2004), paragraph III, handed down by this Tribunal:

> "in accordance with both the advisory opinion of the International Court of Justice of 13 July 1954 and its own jurisprudence, the Tribunal will consider application for interpretation of judgement, where there is dispute as to the meaning or scope of the Judgement".

VI. The Tribunal shall thus first examine the request in respect of interpretation by analysing divergences of interpretation between the Applicant and the Administration. It is worth recalling that these divergences centre on the meaning of the words "salary with all allowances", and that the Applicant and the Administration disagree on three points: whether or not (1) staff assessment, (2) medical insurance subsidy and (3) post adjustment should be included.

VII. Firstly, with regard to staff assessment, the Tribunal wishes to cite paragraph XV of its Judgement No. 1225:

> "With respect to the deduction of staff assessment, the Applicant challenges the Administration's decision, contending that the Tribunal's unqualified use of the term 'salary' instead of 'net salary' indicates that its intended meaning was 'gross salary'. Obviously, however, one could also, with as much - or as little! - conviction, reverse this inference and say that the Tribunal's unqualified use of the term 'salary' instead of 'gross salary' indicates that its intended meaning was 'net salary'! It is abundantly clear that since the Tribunal intended to give the Applicant what he would have received if he had been employed for an additional two years, it could not have been referring to gross salary because this amount is never received by any staff member, as is clear from regulations 3.1 and 3.3 of the Staff Regulations:
>
> > 'Article III …
> >
> > *Regulation 3.1*
> > Salaries of staff members shall be fixed by the Secretary-General in accordance with the provisions of annex I to the present Regulations.

> ...
>
> *Regulation 3.3*
> (a) An assessment at the rates and under the conditions specified below shall be applied to the salaries and such other emoluments of staff members as are computed on the basis of salary, excluding post adjustments …'.
>
> The Administration therefore acted correctly in paying the Applicant his net salary; i.e., gross salary minus staff assessment."

VIII. Since the same reasoning applies here, the Tribunal concludes that the Applicant's claim that the staff assessment should be added to the compensation payable to her is without merit.

IX. Secondly, with regard to the medical insurance subsidy payments, the Tribunal cannot accept the Applicant's reasoning that the "medical subsidy" and "employer's contributions to the Pension Fund" are an integral part of the compensation paid to staff members together with their salary and that these should therefore not have been deducted from the calculated amount. These payments, which are indeed paid out by the Administration, are contributions to special funds and are not defined as part of the allowances received by international civil servants. This is clearly apparent from the pay statements issued to staff members, which include three headings: "Earnings", "Deductions" and "Organization's Contributions". It is under this third heading that "Medical Insurance Subsidy" and "Pension Fund" are mentioned.

X. The Tribunal thus concludes that the Administration's interpretation of paragraph 5 of the order of the Judgement was perfectly correct and that the request for interpretation was motivated solely by the Applicant's desire to obtain more than had been awarded to her.

XI. Thirdly, regarding post adjustment, the Tribunal has already stated in Judgement No. 1225 that post adjustment is part of a staff member's remuneration; it was therefore included in the compensation awarded by the Tribunal, as explained very clearly in paragraphs XI and XII of that Judgement:

> "XI. The salary received by United Nations staff is made up of two main elements: the net base salary and the post adjustment. The Tribunal's use of the term 'salary' was intended to refer to both of these two elements. The International Civil Service Commission has indicated that:
>
> > 'Post adjustment is an amount *paid in addition to net base salary*, which is designed to ensure that no matter where United Nations

> common system staff work, their *net remuneration* has a purchasing power equivalent to that at the base of the system, New York' (emphasis added by the Tribunal).
>
> The Tribunal cannot accept the interpretation which the Administration applies to this text in its answer - '[a]ccordingly, post adjustment constitutes neither salary nor an allowance, but rather is an amount paid in addition to salary to equalize standards of living among staff members' - and which it uses as a pretext for claiming that the post adjustment should not have been included in the calculation of the compensation payable to the Applicant and that this alleged overpayment is subject to recovery. While it is true that the post adjustment, unlike gross salary, is not subject to the deduction of staff assessment, it is also clear that the post adjustment, though not a component of base salary, is nonetheless an element of remuneration that enables the staff members receiving it to maintain a certain standard of living.
>
> XII. … There are thus no grounds for granting the Administration's counterclaim for the recovery of part of this amount."

XII. Applying the same reasoning to this case, the Tribunal concludes that the Administration is not entitled to recover the amount in question and confirms, therefore, that the Administration's interpretation of paragraph 5 of the order in Judgement No. 1159 in calculating the compensation awarded to the Applicant was in line with the Tribunal's findings in this Judgement, and that the Applicant is not entitled to a higher amount, nor is she obliged to repay any portion of the payments made to her.

XIII. Secondly, the Tribunal will examine the issues raised by the Applicant under the heading "Other problems of implementation". Having closely studied the substance of the Applicant's various claims, the Tribunal concludes that the Administration has correctly implemented and interpreted the Judgement and will approach the entire matter as one of interpretation.

XIV. The Applicant complains, firstly, of non-implementation of paragraph 2 of the order ordering a new PER to be prepared for the period from 29 May 1996 to 31 February 1997. In an e-mail dated 17 May 2005, a copy of which was addressed to the Applicant, ICTR outlined the difficulties in meeting that requirement. The e-mail also refers to two other e-mails sent to the President of ICTR requesting revision of the Applicant's PER, which never received a reply. However, despite the Administration's good faith efforts, the length of time that has elapsed makes the drafting of a new report impossible. The Tribunal therefore reaffirms, subject to the clarifications in paragraph XVI below, the requirement - established in paragraphs XVIII and XXXV of Judgement No. 1159 - that the Applicant should be given an opportunity to rebut the first contentious PER using all resources at her disposal, including the means she tried to use

unsuccessfully - since they were marred by procedural irregularities - after her first rebuttal was filed on 18 June 1997.

XV. The Tribunal concludes that the full interpretation of paragraph 2 of the order in Judgement No. 1159 implies that the Administration is obliged to guarantee the Applicant free access to the means for effective rebuttal, given that implementation of the first alternative envisaged in paragraph 2 turns out to be impossible, since all means of achieving it have been exhausted. In other words, the rebuttal process that appears to have ended in 1999 should be resumed.

XVI. However, taking account of what has transpired throughout this case, in particular the difficulties encountered by the Respondent as highlighted in paragraph XIV above, the Tribunal concedes that the options initially provided for in Judgement No. 1159 are now difficult to envisage, if the same logic is applied. The Tribunal has thus decided to draft a *Corrigendum* to paragraph XXXV of Judgement No. 1159, pursuant to article 12 *in fine* of the Tribunal's Statute, which stipulates: "Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties".

The *Corrigendum* was adopted on 25 July 2006, and paragraph XXXV (2) of Judgement No. 1159 now reads as follows:

> "Orders that a new performance evaluation report be prepared for the period from May 1996 to February 1997 or that the Applicant be given the opportunity to effectively rebut her performance evaluation report or, if the Secretary-General decides in the interests of the Administration not to perform this obligation, that the Applicant be paid compensation equal to three months' net salary at the rate in force on the date of the Judgement;"

The Tribunal thus decides to reaffirm here the provisions of paragraph XXXV of Judgement No. 1159, as corrected.

XVII. The Applicant also argued that ICTR never clearly and expressly confirmed, on the one hand, that unfavourable and falsified documents had indeed been removed from her personal file nor did it confirm, on the other hand, that favourable documents that had been removed had indeed been reinstated. In a letter to the Applicant dated 20 October 2004, ICTR informed her that the above-mentioned unfavourable documents had indeed been removed. A list of the specific documents removed from her file was included and a copy of the file in question was attached. Similarly, a letter from ICTR dated 17 May 2005 confirmed that the file did indeed contain all the favourable

documents that the Applicant claims were absent from her file. The message specified, moreover, that these documents "were never removed from [the] file" and provided a specific list.

XVIII. The Tribunal thus concludes that the Administration correctly interpreted paragraph 6 of its order in Judgement No. 1159 and met its requirements, and declares that the Applicant's request for two years' salary by way of additional compensation is inadmissible and without merit.

XIX. For the foregoing reasons, the Tribunal:

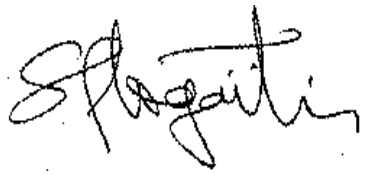
1. Declares that the Administration correctly interpreted paragraph 5 of the order in Judgement No. 1159 when calculating the compensation payable to the Applicant and that there are no grounds for reassessment of that compensation;

2. Considers that the Administration correctly performed its obligations under paragraph 6 of the order in that same Judgement;

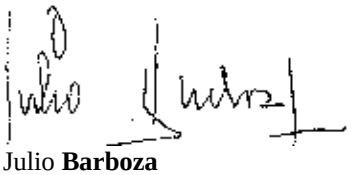
3. Confirms that the Administration should perform without delay the obligations laid down by the Tribunal in paragraph 2 of the order in that same Judgement; and,

4. Rejects all other claims.

(*Signatures*)



Spyridon **Flogaitis**
President



Julio **Barboza**
Member

Brigitte **Stern**
Member

Geneva, 28 July 2006

Maritza **Struyvenberg**
Executive Secretary