



# Administrative Tribunal

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## ADMINISTRATIVE TRIBUNAL

Judgement No. 1284

Case No. 1365

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Dayendra Sena Wijewardane, Vice-President, presiding; Mr. Kevin Haugh; Mr. Goh Joon Seng;

Whereas, on 22 December 2003, a former staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR) filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, the President of the Tribunal extended to 2 July 2004, the time limit for the filing of an application with the Tribunal;

Whereas, on 4 June 2004, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read, in part, as follows:

***“Pleas***

(a) **Preliminary or provisional measures:**

(1) *Order for production of additional documents. ...*

...

(2) *Order for production of witnesses. ...*

...

- (b) **The decision which the Applicant is contesting and whose rescission she is requesting ...**

Primary decision:

The decision to terminate her contract, dated 25 September 2001 ...

Consequential decisions:

(i) The decision, [the] date of which is unknown, not to advertise the GL 5 [Senior Public Information (PI) Clerk] position until early January 2002, thus depriving the Applicant of [the] advantage of an internal candidacy ...

(ii) The decision, [the] date of which is unknown, to reject the Applicant's application for the GL 5 post (Senior Secretary) ...

...

- (d) **The amount of compensation claimed by the Applicant in the event that the Secretary-General decides, in the interest of the United Nations, to pay compensation for the injury sustained**

...

(i) In the event that the [United Nations Administrative Tribunal (UNAT)] (...) order[s] the rescission of the decision to terminate the Applicant's contract, and the Secretary-General decides that ... compensation should be granted, the Applicant claims the equivalent of two years' net base salary ...

The Applicant submits, the foregoing notwithstanding, that there are exceptional elements to the present case [and] ... claims that the equivalent of *three years' net base salary* would be appropriate.

(ii) Should ... UNAT (...) find a breach of staff rule 109.1 (c) but dismiss the remaining claims, and the Secretary-General decide, in the interests of the Organization, that no remedy beyond compensation should be granted, the Applicant claims the payment of an amount equivalent to the Lump Sum Termination Indemnity (that the Applicant would have received, had she accepted the Voluntary Separation Programme) plus six months' net base salary as compensation for moral damage. ...

- (e) **Any other relief ...**

In addition ... the Applicant requests ... UNAT to order ... reinstatement of the Applicant to her previous post or any other post commensurate with her qualifications and experience. ...”

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 30 November 2004 and once thereafter until 28 February 2005;

Whereas the Respondent filed his Answer on 28 February 2005;

Whereas the Applicant filed Written Observations on 29 March 2005;

Whereas, on 11 July 2006, the Tribunal decided not to hold oral proceedings in the case;

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

**“[The Applicant’s] Professional Record**

... The [Applicant] entered the service of UNHCR, Athens Branch Office, under a short-term contract on 1 April 1989, as a Clerk in the General Service category at the GL 3 level. She received a one-year fixed-term appointment on 1 May ... [and] ... she became [a] GL 4 on 1 September ... She separated from service on 30 April 1990.

... She was rehired under a [three-month] short-term contract on 1 April 1993 as a Clerk Typist at the GL 3, step 5 level. [The Applicant was subsequently granted a series of fixed-term appointments and was promoted to Senior Secretary at the GL 4 level on 1 July 1995. On 1 July 1996, she was promoted to GL 5.]

... The [Applicant’s] contract was converted to an indefinite appointment on 1 July 1998. On 1 January 2000, she became a Protection Assistant (change of functional title) and was promoted to GL 6 on 1 July ... [On 31 December 2001, she separated from UNHCR.]

[The Applicant’s performance was consistently rated as ‘very good’ or ‘excellent’.]

**Summary of facts**

... On 1 February 2001, the High Commissioner informed all staff of UNHCR that ... measures ... [to be] taken to reduce costs ... [would result] in numerous post discontinuations.

... During the month of April 2001, the [Applicant] informally found out that her post was one of the posts to be discontinued ...

...

... By memorandum dated 6 July 2001, the Chief, Budget Section, UNHCR, forwarded to the Director, Bureau for Europe, [UNHCR] the ‘[Operations Review Board (ORB)] 2002 post decisions for Europe’. Regarding the Athens Branch Office, two posts were to be abolished, one of which [was] the [Applicant’s] ...

...

... By letter dated 11 July 2001, the Representative of the Athens Branch Office wrote to the Minister of Public Order in Greece, [proposing] ... the possibility of creating a new body that would serve as an operational support unit for the Asylum

Department of the Ministry of Public Order and transferring the UNHCR staff whose posts had been discontinued to that unit. Alternatively ... those staff members [could be seconded] to ... the Ministry.

...

[On 16 July 2001, the Applicant requested the Athens Branch Office to provide her with information on the Voluntary Separation Programme (VSP), however, she subsequently advised the Branch Office that she was not interested in the Separation Programme.]

... [On 25 September 2001], the ... Representative ... wrote to the [Applicant] and confirmed that 'the effective date of [her] separation from service upon abolition of post [would] be 31 December ...'

... On 21 November 2001, the [Applicant] wrote to the Secretary-General requesting the review of the decision to terminate her appointment for abolition of post.

... On 28 November 2001, the [Applicant] wrote to the Secretary of the Geneva ... JAB to request a suspension of action of the decision to terminate her appointment. ... She also requested the suspension of the decision in order to have the opportunity to apply as internal candidate for a forthcoming GL 5 vacancy in the Athens Branch Office.

... On 30 November 2001, a Senior Public Information Clerk (GL 5) of the Athens Branch Office handed her written resignation to the Representative, asking it to be effective as of 31 December 2001. [On 13 December, in a written affidavit, the Senior PI Clerk] stated that the Representative had asked her 'to keep this information confidential until January 2002, when the two staff members being discontinued have left the Office for good'.

...

... By letter dated 14 December 2001, the ... Representative ... wrote to the Director, Bureau for Europe, UNHCR, explaining ... that '[she had] exerted efforts to find all possible solutions for the affected colleagues to find employment with the government or other institutions' and that [the Applicant had] 'received some offers with an implementing partner and other [non-governmental organizations (NGO's)], but until now she is resisting because she believes that she cannot leave the Organization on the basis that she is indispensable'.

... [Also on] 14 December 2001, ... the Geneva JAB met in order to examine the [Applicant's] request for suspension of action. In its report, adopted on 21 December ..., the Panel found insufficient evidence of irreparable injury to warrant a decision in [her] favour [but noted that the termination might be avoided as a GL 5 post might become available on 31 December. On 26 December, the Officer-in-Charge, Department of Management, informed the Applicant that the Secretary-General had accepted the JAB's recommendation that her request for suspension of action be rejected.]

... On 9 January 2002, the Senior PI Clerk post was internally advertised ...

... By letter dated 3 March 2002 to the Secretary of the Geneva JAB, the [Applicant] filed her appeal against 'the decision of 25 September 2001 to terminate [her] appointment with effect from 1 January 2002'.

...”

The JAB submitted its report on the merits on 1 July 2003. Its considerations, conclusions and recommendations read, in part, as follows:

**Considerations**

...

*Merits of the case*

...

47. In the first instance, the Panel had to establish whether the decision to abolish the Appellant’s post was a valid exercise of administrative discretion ...

...

50. ... [T]he Panel found that the Appellant did not bring enough evidence in support of her claim that her difficult relationship with the Representative had motivated the decision to terminate her appointment.

51. The Panel then examined the Appellant’s argument following which the [abolition] of the post of Protection Assistant would not be required by the necessities of service ...

...

53. ... [T]he Panel stressed that the Appellant challenges the modalities of the restructuring (...). The Panel found that decisions of this nature, i.e. related to policy orientations of the UNHCR, were within the discretionary authority of the High Commissioner and that it was not within the scope of the JAB mandate to question those managerial decisions. ... [T]he Panel considered that the Appellant did not prove that the Administration exercised its discretion in an improper way.

...

56. The Panel [next] examined whether reasonable and good faith efforts [had] been made by ... UNHCR to find alternative placement for the Appellant, commensurate with her grade and qualifications.

57. In this respect, the Panel took note of the fact that a GL5 post of Senior Public Information Clerk had unexpectedly become vacant in the Athens Branch Office, following the resignation of its incumbent ... on 30 November 2001. ...

58. The Panel ... noted that the post of Senior Public Information Clerk had remained vacant during the first half of 2002, and that a Senior Secretary already working for the Office at the GL5 level was then transferred to that post. A third person was thus engaged by the Office on a fixed term appointment to fill the [newly vacant] post of Senior Secretary ...

59. The Panel acknowledged that it was beyond its scope of authority to determine whether a staff member is suited for a particular post. However, without substituting its opinion [for] that of the competent selection committee, the Panel

found, on the basis of the Appellant's qualifications and professional background, that she could have been at least considered either for the post of Senior Public Information Clerk or for the post of Senior Secretary. The Panel was of the view that the Representative had voluntarily withheld the announcement of the vacancy, whereas she could have expedited the recruitment process in order to allow the Appellant to apply as an internal candidate.

60. In view of the above, the Panel considered that the Representative had shown bad faith ... and did not make any effort to utilize the Appellant's services in another post. The Panel thus found that the Representative did not respect [her] obligations under staff rule 109.1 (c) ...

...

62. The Panel added that the letter [dated 11 July 2001] ... sent to the Minister of Public Order in Greece, envisaging the possibility of their hiring UNHCR staff within the Ministry could not be considered as a concrete attempt to find alternative placement for the Appellant, given the fact that no follow-up was ever given to this letter. The Panel found that the Respondent did not bring evidence that any other action had been attempted to secure alternative employment for the Appellant and was unconvinced by the Respondent's claim that efforts were made to find posts for the Appellant outside UNHCR.

...

#### **Conclusions and Recommendations**

64. With respect to the Appellant's claim that the decision to abolish her post was motivated by prejudice and extraneous factors, the Panel **concludes** that the reorganization of ... UNHCR and the discontinuation of the Appellant's post was a legitimate exercise of a discretionary power of the Administration and that the Appellant did not satisfy the burden of proving that the decision was improper or based on anything other than organizational considerations. The Panel thus **recommends** that this point of the appeal be rejected.

65. With respect to the Appellant's claim that ... UNHCR did not make genuine efforts to find her a suitable alternative post, in conformity with staff rule 109.1 (c), the Panel **concludes** that the UNHCR Administration indeed did not meet its obligation.

The Panel therefore **recommends** to the Secretary-General:

- a) to order the reinstatement of the Appellant to her previous post or any other post commensurate with her qualifications and experience, or alternatively;
- b) to order as remedy the payment of an amount equivalent to the Lump Sum Termination Indemnity [that the Appellant would have received, had she accepted the VSP] plus six months' net base salary as compensation for moral damage."

On 30 September 2003, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"The Secretary-General agrees with the first conclusion of the Board that the abolition of your post was a legitimate exercise of the discretionary power of the Administration. The Secretary-General does not, however, share the Board's conclusion with respect to

the alleged bad faith of the then Representative. ... [T]he Representative had attempted to find you alternative positions both within and outside the United Nations system, and indeed, forwarded to you a vacancy announcement for a GS post, in which you were not, apparently, interested.

In light of the above, the Secretary-General does not agree with the Board's conclusions that the Administration did not make good faith efforts to find alternative placement for you, or that the Representative had acted in bad faith, as the facts do not support it. He has accordingly decided not to accept the Board's recommendations and to take no further action on your appeal."

On 4 June 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to abolish her post was not required by the necessities of service but was motivated by unjustifiable personal reasons, namely, the desire of the Representative of the Athens Branch Office to see her leave. The Representative used the restructuring opportunity to remove the Applicant from the Office.

2. The Representative prevented the Applicant from applying for the GL 5 post of Senior PI Clerk which was to be vacated before the Applicant's separation from service on 31 December 2001, by asking the incumbent to postpone her departure. Furthermore, by not posting the vacancy before the Applicant's departure, the Representative prevented her from applying as an internal candidate.

3. The Administration failed to make to make good faith efforts to find alternative placement for the Applicant.

Whereas the Respondent's principal contentions are:

1. The abolition of the Applicant's post was a valid exercise of the Secretary-General's authority.

2. The Applicant failed to establish that the decision to abolish her post was motivated by prejudice or other improper motivation.

3. The Administration fulfilled its obligations under staff rule 109.1 (c) and made good faith efforts to find the Applicant a suitable alternative post.

The Tribunal, having deliberated from 30 June to 28 July 2006, now pronounces the following Judgement:

I. The Applicant's proceedings raise two central and distinct issues:

(i) Whether her separation from UNHCR effective 31 December 2001 was a result of a bona-fide and valid “abolition of post” rather than a vindictive or improperly motivated action directed at targeting the Applicant; and

(ii) Whether the UNHCR Administration having determined to abolish her post had then complied with its obligations under staff rule 109.1 (c) which required that appropriate efforts should have been made in good faith to find for the Applicant an alternative post within the Organization.

II. The JAB identified the issues as follows:

(i) Whether the Applicant’s permanent appointment had been properly terminated for abolition of post in accordance with staff regulation 9.1 (a) and the relevant procedures; and

(ii) Whether UNHCR fully discharged its obligations under 109.1 (c) to make good faith efforts to find alternative placement for the Applicant.

III. Following a careful consideration of the issues and of what was offered by both parties, the JAB concluded on the first issue that the Applicant had failed to establish that “her difficult relationship with the Representative had motivated the decision to terminate the appointment”. The Tribunal has carefully reviewed the materials considered by the JAB and reviewed its said finding. It is satisfied that it was reached on a careful consideration of the evidence and that the proper legal principles were applied by the JAB in the course of its deliberations. The Tribunal, like the JAB, is mindful of the difficulties which a staff member will ordinarily encounter when seeking to establish discrimination and has reached its own decision bearing these difficulties in mind. In the view of the Tribunal, there was ample evidence available to indicate that the post which had been encumbered by the Applicant had been rationally and reasonably identified as one appropriate for abolition within the general scheme of cost-reduction being undertaken by UNHCR at the time and that there were no surrounding circumstances identified which would have justified the JAB in concluding that the identification of the Applicant’s post for abolition had been inspired by malice towards the Applicant or by some other unacceptable ulterior motive. In these circumstances, the Tribunal, like the JAB, must find against the Applicant on this particular issue.

IV. As to the second issue, the JAB concluded that the UNHCR Administration had not made a genuine effort to find a suitable alternative post for the Applicant and recommended to



the Respondent that she should be reinstated in her post or in a suitable alternative post commensurate with her abilities or that, in the alternative, she be compensated by the payment to her of six months' net base salary.

It is clear beyond question that the finding and conclusion of the JAB on this particular issue flowed directly from its conclusion that the Representative had decided to postpone the announcement of an imminent vacancy for a GL 5 Senior PI Clerk position until after the Applicant's separation from service had come into effect, with the intention of prejudicing the Applicant's prospects of securing alternative employment within the UNHCR Athens Branch by precluding her from eligibility to apply for appointment to this soon to be vacant position as an internal candidate. As the JAB put it in its report:

“59. ... The Panel was of the view that the Representative had voluntarily withheld the announcement of the vacancy, whereas she could have expedited the recruitment process in order to allow the Appellant to apply as an internal candidate.

60. **In view of the above**, [(emphasis added)] the Panel considered that the Representative had shown bad faith ... and did not make any effort to utilize the Appellant's services in another post. The Panel thus found that the Representative did not respect [her] obligations under staff rule 109.1 (c) which requires, according to UNAT jurisprudence that

‘such efforts [to find a new post] be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation’. [(See Judgement No. 679, *Fagan* (1994).)]”

V. By letter of 30 September 2003 from the Under-Secretary-General for Management to the Applicant, the Respondent advised the Applicant as to the decision arrived at on consideration of the JAB's findings and recommendations. By the said letter, the Applicant was advised that the Respondent had accepted the JAB's findings and recommendation on the first issue but that the Respondent did not share the Board's conclusions with respect to the alleged bad faith of the then Representative and its findings that UNHCR had not made genuine efforts to find her a suitable alternative post. The relevant portion of the said letter is important and merits extensive quotation. It reads as follows:

“On the second issue, however, the Board concluded that the UNHCR did not meet its obligation to make genuine efforts to find you a suitable alternative post. It based its conclusion on the fact that a GL 5 post had unexpectedly become vacant following the resignation of its incumbent on 30 November 2001; that it had remained vacant during the first half of 2002 whereupon it was filled by a Senior Secretary already working at that level in the Office, and that a third person was then engaged on a fixed-term appointment to fill the post vacated by the latter. In this context, the Board, noting the statement made by the staff member who had resigned that upon announcing her resignation the Representative asked her ‘to keep this information confidential until

January 2002, when the two staff members have left the Office for good' and considering your qualifications and professional background, concluded that you should have been at least considered for the post and that the Representative, in voluntarily withholding the announcement of the vacancy, whereas she should have expedited it in order to allow you to apply as an internal candidate, had acted in bad faith.

In light of its conclusion regarding the second issue, the Board recommended that you be reinstated to your previous post or any other post commensurate with your qualifications and experience, or, alternatively, that you be paid an amount equivalent to the Lump Sum Termination Indemnity you would have received had you accepted the Voluntary Separation Programme, plus six months net base salary as compensation for moral damage.

The Secretary-General agrees with the first conclusion of the Board that the abolition of your post was a legitimate exercise of the discretionary power of the Administration. The Secretary-General does not, however, share the Board's conclusion with respect to the alleged bad faith of the then Representative. In this context, the Secretary-General wishes, first, to refer you to the minutes of the staff meeting held on 3 December 2001, indicating that the Representative, far from withholding the information regarding the resignation of the above-mentioned staff member, in fact shared it with all staff, as is made clear from the minutes of a staff meeting. Further, while it is true that the Representative had asked the resigning staff member to defer her resignation until January, her reasons for this request display no bad faith towards you, but rather an exercise of discretion in the interests of the Organization: the post reduction exercise (Action II), wherein the Office had lost two posts, coupled with the related non-renewal of the contract of the legal and training consultant as well as with the absence, due to leave, of the Chief of that staff member's unit, which would then have remained unattended, all indicate that the Representative, as a manager, had to proceed cautiously with any potential further disturbances to the Office, which might well have augmented the already affected morale of its staff. The Secretary-General notes further that the reason for the Representative's decision not to expedite the advertising of the post that became available as a result of the above-mentioned resignation, was the absence on leave of the Chief of that unit and the Representative's wish to await for the Chief's return in order to discuss the terms of reference of the post which would then be reflected in the vacancy announcement. Moreover, the Representative had attempted to find you alternative positions both within and outside the United Nations system, and indeed, forwarded to you a vacancy announcement for a GS post, in which you were not, apparently, interested."

VI. In the opinion of the Tribunal, the JAB was driven to decide the issue as to the reasonableness or otherwise of the Administration's efforts to find suitable alternative employment for the Applicant within the Organization by reference to very limited facts and by seeking to draw reasonable inferences from such very limited information, because the Respondent has singularly failed to provide particulars as to what efforts might actually have been made. The Respondent alleges that the efforts purported to have been made to find alternative placement for the Applicant prior to the aforementioned letter of 30 September are as follows:

(a) "Contrary to the findings of the JAB and the Applicant's contentions, the UNHCR Representative in Greece intervened on behalf of the Applicant to find posts for her outside of UNHCR, as evidenced by the Applicant's own admission in her letter to the JAB Geneva, dated 21 November 2001, in which she requested review of the

decision to terminate her appointment due to the abolition of her post”. According to the Respondent, the Applicant “specifically stated: ‘[d]espite a few efforts made by current [Branch Office] Athens management to secure employment for me either at the public sector or within the NGO community, none have born fruit’”;

(b) “[T]he letter of 14 December 2001, from the Representative of the UNHCR Branch in Athens to the Director of the UNHCR Bureau for Europe, in which the Representative states that ‘[the Applicant] has received some offers with an implementing partner and other NGOs, but until now she is resisting because she believes that she cannot leave the organization on the basis that she is indispensable’”; and,

(c) “The Applicant subsequently applied and was considered for the vacant post of Senior Secretary (GL 5) at the UNHCR Athens Branch Office, but was not selected”.

This same peculiar attitude has continued throughout the aforementioned letter of 30 September 2003 and the submissions filed by the Respondent to this Tribunal. Here again the Respondent has attempted to answer the claim by assertions that the Applicant has failed to discharge the onus of proof that the Respondent had not made reasonable efforts and by allegations of contradictions in the Applicant’s assertions and by unsubstantiated allegations (which are denied by the Applicant) that she had declined to accept offers of alternative employment with an implementing partner and other NGOs. The Tribunal is unclear as to what vacancy announcement, referred to in the aforementioned letter, had allegedly been forwarded to the Applicant and allegedly was not of interest to her. The Tribunal knows not when it was forwarded or what post was identified therein or even whether the Applicant was qualified or eligible to receive consideration. All the Tribunal can say is that the Applicant denies that she was ever offered a suitable post for she claims that she ultimately ended up working in a position where she earned considerably less than she had earned when employed by the Organization and claims that, had she been offered or invited to apply for a suitable vacancy, such an invitation would have been accepted. Should what is set out above be the totality of the efforts alleged to have been made by the Administration to have found alternative placement for the Applicant within the Organization, the Tribunal is satisfied that the Respondent failed to establish that such efforts were “reasonable” or that compliance with the Administration’s obligations under 109.1 (c) has been established.

VII. The Tribunal described this attitude as being peculiar because as a matter of first principle, if the Respondent is maintaining that good faith efforts had in fact been made by the Administration to discharge its obligations under staff rule 109.1 (c), to find alternative placement for the Applicant within the Organization, one would have expected the Administration to disclose the efforts allegedly made rather than to resort to the making of unsubstantiated allegations against the Applicant. Where issues of this sort arise and where the

factual matrix on which the decision should be arrived at is known only to the Administration, it is for the Administration to provide the relevant information, rather than for an applicant to seek to undertake the impossible task of establishing a negative where the information is beyond that applicant's reach.

VIII. Since the information provided by the Respondent has failed to establish that reasonable efforts were made by the Administration to find alternative placement for the Applicant within the Organization and, in particular, when it has even failed to establish why she was not accommodated in the GL 5 Senior PI Clerk position, the Tribunal must find that the Administration failed to discharge its said obligation and that the Applicant is entitled to be compensated for this breach.

IX. It appears from the record that the Applicant remained unemployed for a period of approximately eight months after her separation until she secured new employment. However, the Tribunal considers that it would be inappropriate for it to order that the Respondent should pay to her the sum of eight months' net base salary by way of compensation, for such measure would only be appropriate if one could say that, had reasonable efforts been made to find suitable alternative placement, they would have been successful. Since this cannot be said in the instant case, the Tribunal considers that six months' net base salary by way of compensation would be the appropriate measure.

X. For the foregoing reasons, the Tribunal orders:

1. The Respondent to pay the Applicant compensation in the amount of six months' net base salary payable at the rate in effect at the date of separation from service, 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,
2. Rejects all other pleas.

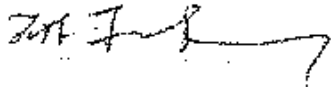
*(Signatures)*



Dayendra Sena **Wijewardane**  
Vice-President, presiding

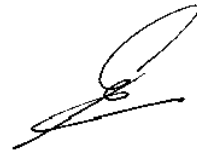


**Kevin Haugh**  
Member



**Goh Joon Seng**  
Member

Geneva, 28 July 2006



**Maritza Struyvenberg**  
Executive Secretary