



Administrative Tribunal

Distr.: Limited
29 September 2006

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1286

Case No. 1367

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 30 July 2004, a former staff member of the United Nations filed an Application requesting the Tribunal, inter alia:

“(a) TO FIND that ... [the] staff member in the Office of Human Resources Management (OHRM) abused her position and violated the Applicant’s rights by sending [offending] e-mails ... and on that basis TO ORDER the United Nations to pay the Applicant compensation equal to two years’ salary;

(b) TO FIND that [the OHRM staff member] abused her position ... acted in contravention of administrative instruction ST/AI/292 [entitled ‘Filing of Adverse Material in Personnel Records’, dated 15 July 1982,] and violated the Applicant’s rights by placing the e-mails ... in the Applicant’s personnel file, and on that basis TO ORDER the United Nations to pay the Applicant compensation equal to two years’ salary;

(c) TO ORDER that the e-mails ... shall be removed from all the personnel files that the United Nations may have on the Applicant, and that the United Nations authorities shall confirm that fact to the Applicant and shall give him access to all his personnel files so that he can confirm that fact for himself;

- (d) TO BAR [the OHRM staff member] from having access ever again to the Applicant's personnel files;
- (e) TO ORDER that a copy of the complaint submitted by the Applicant to the Secretary-General, a copy of the appeal submitted by the Applicant to the Joint Appeals Board [(JAB)], a copy of the report of the [JAB], a copy of the application submitted by the Applicant to the Administrative Tribunal and a copy of the Judgement of the Administrative Tribunal in the case shall be placed [on the OHRM staff member's] personnel file in accordance with administrative instruction ST/AI/292;
- (f) TO FIND that the United Nations is liable for the injury suffered by the Applicant through the conduct of one of its staff members ... in particular the damage to his reputation, and TO ORDER the United Nations to pay the Applicant compensation equal to two years' salary;
- (g) TO FIND that the ... Administration acted contrary to administrative instruction ST/AI/371 [of 2 August 1991, entitled 'Revised Disciplinary Measures and Procedures'] and violated the Applicant's rights in not undertaking a preliminary investigation ... and, for that violation, TO ORDER the United Nations to pay the Applicant compensation equal to two years' salary;
- (h) TO FIND that the ... Administration violated the Applicant's rights by instructing [the OHRM staff member] to 'clear out' of the Applicant's personnel file the documents that she had placed there irregularly, thereby making her judge and party in her own case, and for that violation, TO ORDER the United Nations to pay the Applicant compensation equal to two years' salary;
- (i) TO FIND that the [JAB] acted contrary to the relevant rules and violated the Applicant's rights by allowing the Respondent to take 26 months to submit his reply, and for that violation TO ORDER the United Nations to pay the Applicant compensation equal to two years' salary;
- (j) TO FIND that the Presiding Officer of the [JAB] acted contrary to the relevant rules and violated the Applicant's rights by irregularly removing [one of the members] from the panel constituted to hear the appeal, and for that violation TO ORDER the United Nations to pay the Applicant compensation equal to two years' salary;
- (k) TO FIND that the Presiding Officer of the [JAB] acted contrary to the relevant rules and violated the Applicant's rights by appointing the Treasurer of the United Nations ... to the panel constituted to hear the appeal, and for that violation TO ORDER the United Nations to pay the Applicant compensation equal to two years' salary;
- (l) TO FIND that the refusal or failure of the [JAB] to consider an important part of the appeal constitutes a denial of justice and a violation of the Applicant's rights entitling him to compensation, and for that violation TO ORDER the United Nations to pay the Applicant compensation equal to two years' salary;
- (m) TO DECLARE that the circumstances should be considered exceptional and TO ORDER the payment of a higher level of compensation in view of the fact that the [OHRM] staff member in question showed extreme bad faith, that it

was not a matter of mere negligence but of deliberate actions and flagrant abuse of position by the staff member, and that the actions were part of a pattern intended to cause harm to the Applicant; and in view of the bad faith shown by the ... Administration, which, rather than disciplining [the OHRM staff member] and preventing her from doing further harm to the Applicant, condoned her actions and allowed her to do further harm to the Applicant by permitting her to continue to meddle with the Applicant's personnel files and allowing her to be both judge and party in a complaint brought against her;

(n) All with legal interest calculated from the date of occurrence of the events in question, at a rate equal to the rate applied by the courts of the State of New York for the same period."

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 31 January 2005;

Whereas the Respondent filed his Answer on 29 December 2004;

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

"Employment History

... [The Applicant] was recruited on a one year fixed-term appointment (...), effective 25 September 1995, to the International Criminal Tribunal for Rwanda (ICTR) as a Legal Translator/Interpreter. His [appointment] was extended to 27 March 1996, when he was separated from ... service.

... He was reappointed on a short-term appointment (...), from 10 January ... to 26 March 1999, as a Translator (T III) in the Department of General Assembly Affairs and Conference Services (DGAACS) at Headquarters. [He received another short-term appointment] effective 27 March ... and [separated from service] effective 7 May ... He was again reappointed, effective 4 January 2000, on a two-year [fixed-term appointment] as Translator (P-3). [The Applicant received further extensions of his appointment until his retirement on 31 August 2004.]

Summary of the facts

... On 12 November 1996, there was an exchange of [e-mails between an OHRM staff member, and some of her colleagues] concerning [the Applicant's] salary payments. [In April 2001, having requested permission to review his personnel file, the Applicant found copies of the above-mentioned e-mails.]

... [The Applicant] requested an administrative review in a letter addressed to the Secretary-General on 20 April 2001. [He requested in particular that the recently discovered e-mails, which, according to him were 'rude and detrimental' and 'outrageous' be removed from his file, in accordance with the provisions of ST/AI/292.]"

On 18 June 2001, the Applicant lodged an appeal with the JAB in New York.

On 11 July 2001, the Director, Operational Services Division, OHRM, responded to the Applicant's letter of 20 April, expressing his sincere apologies for this occurrence, and also conveying the apologies from the staff member in question. He assured the Applicant that the offending e-mails had been removed from his file and that his file had been reviewed to ensure that all "documentation included in it correspond[ed] to existing personnel guidelines".

The JAB adopted its report on 30 March 2004. Its considerations and recommendation read, in part, as follows:

“Considerations

11. ... [T]he Panel decided to deal *seriatim* with [the] Appellant's pleas[:

'(a) Find that the OHRM staff member acted in contravention of administrative instruction ST/AI/292 when she put the e-mails in the personnel file of the Appellant;

(b) [Find that she] ... abused her functions as a staff member when she put in the personnel file of the Appellant the messages referred to;

(c) Recommend to the Secretary-General that the messages be removed from all the personnel files that the United Nations may have on the Appellant, that [United Nations] authorities confirm to the Appellant that these documents have been removed and that these authorities give him access to all the personnel files in order for him to confirm that fact;

(d) [Recommend] that the OHRM staff member be forbidden from having access ever again to the personnel file of the Appellant;

(e) [Recommend] that a copy of the complaint to the Secretary-General by the Appellant, copy of the complaint to the JAB and a copy of the JAB report of the Panel be deposited in the personnel file of the OHRM staff member;

(f) [Recommend] that, for the injury sustained, particularly for the damage to the Appellant's professional reputation and for the difficulties it caused him for several years in being rehired by the United Nations, he be paid damages equivalent to two years salary; and

(g) [Find] that this case be considered an exceptional case justifying the payment of a higher indemnity, with legal interests calculated from the date of the occurrence of the said events, starting in 1996, at a rate of equivalent to the rate applied by the courts of the State of New York for the same period.']

...

12. [With regard to plea (a), the] Panel agreed that the action taken by [the OHRM staff member] was in violation of the terms of ST/AI/292.

[With regard to plea (b), the] Panel was of the view that the [question whether the OHRM staff member had abused her functions as a staff member when she inserted the e-mail exchange in the Appellant's file] was not one for its consideration, but rather for [the staff member's] supervisors in OHRM. Moreover, if this [was] intended as a plea requesting the initiation of disciplinary proceedings against her, the Panel noted

that [in accordance with UNAT jurisprudence, the Appellant did not have the standing to make such a request].

[With regard to plea (c), the] Panel noted that the Appellant [had] already been informed that the offending document had been removed from the Official Status file ... The Appellant may wish to consult his Official Status file - as is his right - to confirm that no prejudicial matter remains therein.

[With regard to plea (d), the Panel was of the view that the issue whether the OHRM staff member be forbidden from having access ever again to the personnel file of the Appellant was not one for its consideration, but rather for her supervisors in OHRM.]

[With regard to plea (e), the] Panel did not feel called upon to make a recommendation with respect to [the plea that all relevant documentation concerning these proceedings be placed in the OHRM staff member's file]. It did remark, however, that, should the Secretary-General agree to it, in accordance with the terms of ST/AI/292, [she] would be entitled to see and make comments on the material before it was placed in her file.

[With regard to plea (f), the] Panel noted that [the] Appellant had twice been rehired while the offending material was on his Official Status file. It was the Panel's view that the burden of proof of damage to his professional reputation was on [the] Appellant and that [he] had failed to provide such proof.

[With regard to plea (g), it] was the unanimous opinion of the Panel that this case did not meet the criteria of exceptional circumstances in the usage of the Administrative Tribunal.

Recommendation

13. While acknowledging that the placing of the offending e-mails in [the] Appellant's Official Status file was in violation of the provisions of ST/AI/292, the Panel was of the unanimous opinion that the awarding of compensation would not be appropriate in this case. The Panel, therefore, makes no recommendation with respect to this appeal."

On 30 July 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 August 2004, the Under-Secretary-General for Management informed the Applicant that the Secretary-General accepted the JAB's findings and conclusions and had accordingly decided to take no further action on his appeal.

Whereas the Applicant's principal contentions are:

1. The OHRM staff member abused her functions as a staff member by including the offending e-mails in the Applicant's personnel file in breach of ST/AI/292, thereby violating his rights.

2. The Applicant's professional reputation suffered as a consequence of the insertion of the said e-mails in his personnel file, thereby causing him damage.
3. The Respondent breached the Applicant's rights in assigning the OHRM staff member to "clean" the Applicant's personnel file.
4. This case is an exceptional case which warrants the granting of a higher indemnity.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeal is limited to the administrative decision detailed in his 20 April 2001 letter to the Secretary-General for which he received satisfaction.
2. The only official personnel file is the Official Status file, which constitutes the whole of the official records of the Organization *vis-à-vis* a staff member.
3. The Applicant's request that a series of administrative actions be taken against a staff member is not receivable.
4. The JAB proceedings were not flawed with delays, arbitrary interpretation of the rules of procedure or conflicts of interest.
5. The Applicant is not entitled to any compensation.
6. The Applicant's appeal is frivolous and without merit, and the Respondent should, therefore, be awarded costs.

The Tribunal, having deliberated from 26 June to 28 July 2006, now pronounces the following Judgement:

I. Basically, the present case revolves around a rather simple fact: a female staff member in OHRM placed in the file of the Applicant three e-mail messages containing rather impertinent remarks about him. The Applicant complained in a letter of 20 April 2001 to the Secretary-General of such behaviour. He asked for the immediate removal of the unfortunate e-mails from "any file the [United Nations] may have" on him; a letter of apology; and, that a copy of his letter of complaint be placed in the file of the delinquent staff member. He also added a petition to amend his entry on duty date (EOD) and pay him the overdue gross salary accordingly, however, he subsequently dropped this petition from his appeal to the JAB.

II. As a result of the Applicant's complaint, the offending e-mails were removed from his Official Status file and he received a letter of apology from the Director, Operational Services Division, OHRM, dated 11 July 2001. The letter in question also conveyed the apologies of the staff member who had committed the offence. Thus, the only outstanding issues warranting action on the part of the Administration were:

(a) the Applicant's request that the e-mails in question, "and all others of the same nature" be removed from "any file the [United Nations] may have" on him: the letter from the Director, Operational Services Division, OHRM, announced that the e-mails had been removed from the Applicant's "Official Status file". Thus, the e-mails were to be removed from any other files on the Applicant other than the "Official Status file", and

(b) the Applicant's petition that a copy of his complaint be put in the OHRM staff member's file, in accordance - as claimed by the Applicant - with ST/AI/292.

III. Regarding petition (a) above, the Respondent submits that there is at present only one file on any staff member, and that, therefore, the Applicant's Official Status file was the only file from whence to remove the e-mails. In his letter of apology, the Director, Operational Services Division, OHRM, indicated "[a]dditionally, I have conducted a complete review of your file to ensure that all documentation included in it correspond[s] to existing personnel guidelines". As to petition (b), the Respondent argues that this is a policy decision regarding the administration of staff "which is entirely at the Respondent's discretion, and [is] his sole prerogative as chief administrative officer of the United Nations pursuant to Article 97 of the Charter". The Tribunal notes that the JAB concurred with the Respondent.

IV. These were about all the grievances the Applicant had, strictly considered, for the presentation of an appeal to the JAB and afterwards to the Tribunal, because the Tribunal is competent only to decide on the petitions which were denied by administrative decision, or which were decided in a manner which did not satisfy the Applicant. The Tribunal may, also, decide on matters of damages originating from the administrative decision or on the JAB's decisions on appeals.

V. In his appeal to the JAB, the Applicant presented seven claims, and in his Application to the Tribunal he managed to formulate 19 pleas, numbered (a) to (n), which the Tribunal will analyze below. He asks the Tribunal to compensate him in the amount of 18 years' net base salary.

VI. After a careful reading of the case, the Tribunal doubts the seriousness of the Applicant and comes to the conclusion that he committed a real abuse of process for which the Tribunal cannot but express its strong disapproval. Moreover, the Tribunal expresses its aversion for the techniques employed by the Applicant who, instead of presenting distinct and orderly pleas before the Administration, the JAB and the Tribunal, mixes elements of one plea with another plea and takes pleas presented to the JAB and develops them into several other pleas with

different elements to the Tribunal. Such ways of presenting the Applicant's claims considerably complicate the task of the Tribunal.

VII. There are three classes of issues in this case, deriving from the pleas of the Applicant to the Tribunal. The Tribunal will consider them *seriatim*.

VIII. The first class is composed of issues that are not receivable by the Tribunal, since they were never before the JAB. The Statute of the Tribunal states in this regard in article 7, paragraph 1:

“An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the Staff Regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal”.

This includes plea (a) (the *sending* of the offending e-mails by the OHRM staff member, as opposite to the *placing* of them), and pleas (g), (h), and (n).

IX. The second class includes issues dealt with, and discarded, by the JAB. The Tribunal agrees with the considerations on which the JAB founded its rejection of such pleas. They are identified with the following letters in the Application: (b), (c), (d), (e), (f) and (m).

X. Plea (b) was not a remedy requested in the Applicant's letter requesting administrative review of 20 April 2001. He only asked for a letter of apology; that the e-mails were removed from any file the Administration might have on him; and, that a copy of his complaint be put in the OHRM staff member's file. In other words, this latter action was - together with the letter of apology and removal of the e-mails from his file - the only remedy asked by the Applicant. The JAB considered that that was within the discretion of the Secretary-General and the Tribunal agrees with the JAB. Possibly, the Administration considered that apologies and removal of the e-mails were enough to repair the wrong suffered by the Applicant.

XI. Plea (c): the Tribunal accepts the Respondent's statement that there is only one official personnel file.

XII. With regard to pleas (d) and (e), the Tribunal has nothing to add to the considerations and recommendation of the JAB, with which it concurs.

XIII. Plea (f). The Tribunal agrees with the JAB in that there was no damage to the Applicant's reputation. The Applicant could not prove any material damage since he was rehired by the Organization twice on short-term contracts and once on a longer one which was renewed. The Applicant cites Judgement No. 1098, *Chérif* (2002), to maintain that "the placement of an injurious document in a staff member's file in itself constitutes an injury". The Tribunal is satisfied that such assertion must be interpreted in the context of the case in which it was pronounced, which is different from the present. In that case, there was an administrative decision which seems to be absent here, since the uncontrolled act of a staff member cannot be taken as an act of the Administration, particularly when the Director of the Office in question removed them as soon as he had notice of the existence of the e-mails and apologized for the fact. This case is unlike Judgement No. 1157, *Andronov* (2004), and Judgement No. 1298, rendered at this session, where the decision to place the adverse material was made by the Administration. In the latter Judgement, the Tribunal noted that the decision to place adverse material in the Applicant's file had been taken with the full knowledge of the Chief of Administrative Services, United Nations Office at Nairobi, who refused to remove it: the adverse material was only taken out after the Applicant appealed to the JAB and the Secretary-General accepted its recommendation to do so.

XIV. Plea (m): the Tribunal is entirely in agreement with the JAB in that there is absolutely nothing in this case to indicate that it is exceptional, at least, not in the sense that the Applicant intended.

XV. The pleas included in the third class refer to alleged breaches of the Applicant's procedural rights by the JAB. They are pleas (i), (j), (k) and (l).

XVI. Plea (i) refers to the delay of 26 months incurred by the Respondent in presenting his reply. The Respondent explained the delay by stating that it was due to the considerable backlog of cases accumulated. The Tribunal cannot but deplore such delays, which have become routine, but finds that they are due to the systemic problems that plague the process of administrative justice prior to the Tribunal, which the Organization is now making its best efforts to modify. Besides, in view of the frivolous character of the Application, the Tribunal will order no action in this respect.

XVII. Pleas (j) and (k) may be dealt with together. The Tribunal is satisfied that neither the withdrawal of Ms. Y. from the JAB panel, nor her replacement by Ms. B. violated the rights of the Applicant: the former because it seems to be a practice of the JAB to have an entirely new panel when two of its members have recused themselves, and Ms. Y. was not disqualified, but

stepped aside; and, the latter because the mere fact that Ms. B. was the Treasurer of the United Nations does not bring about a conflict of interest with the Applicant. That was already decided by the Tribunal in its Judgement 1190 (2004), where the present Applicant - who was also the Applicant in that case - requested disqualification from the JAB panel of the same person whose removal he sought in the instant case:

“[t]he Tribunal is not convinced that the Applicant had valid reasons for seeking to disqualify the various members of the JAB panel. Without analyzing the matter in detail, the fact that an individual is the Treasurer of the United Nations does not appear in itself to be sufficient grounds for disqualification. The Applicant’s argument is that such a person ‘cannot at the same [time] protect and defend the funds of the United Nations and easily consider to give them away to Appellants whatever their claims’. This reasoning does not convince the Tribunal.”

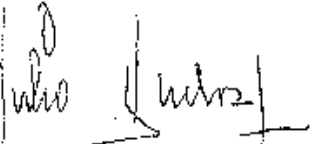
XVIII. Finally, regarding plea (l), the Tribunal finds that the JAB did not fail to “consider an important part of the appeal”, but that it dealt with all the issues that were receivable.

XIX. For the foregoing reasons, the Application is rejected in its entirety.

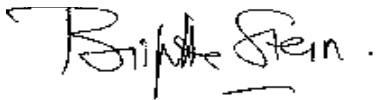
(Signatures)



Spyridon Flogaitis
President



Julio Barboza
Member



Brigitte Stern
Member

Geneva, 28 July 2006



Maritza Struyvenberg
Executive Secretary