



Administrative Tribunal

Distr.: Limited
29 September 2006

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1294

Case No. 1376

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 23 July 2004, a staff member of the International Trade Centre (hereinafter ITC) filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 29 September 2004, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read as follows:

“PLEAS ...

May it please the presiding member to grant an oral proceeding in the present case.

May it further please the Tribunal to:

...

3. Rescind the implicit decision to definitively reject the internal appeal of the Applicant against the decision of the Chief of Personnel of the [ITC], as communicated by the latter's memorandum of 14 December 2001, to place in the [Applicant's] Official Status file a memorandum ... dated 16 November 2001, together with the [Applicant's] comments thereon and to take all appropriate action, including to:

3.1 Order that the contested memorandum ... should not be placed in the [Applicant's] Official Status file and should be quite simply destroyed and no copies kept in the files;

3.2 Award payment of the equivalent of one year's net salary to the [Applicant] as compensation for the serious moral injury which she suffered;

4. Award to the [Applicant] expenses, payable by the Respondent, in an amount to be determined at the conclusion of the proceeding."

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;

Whereas the Respondent filed his Answer on 28 February 2005;

Whereas the Applicant filed Written Observations on 25 April 2005;

Whereas, on 4 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:

"[Applicant's] Professional Record

... The [Applicant] entered the service of the International Telecommunication Union (ITU) on 1 January 1972. As of 4 July 1977, she was seconded to the [ITC] as a Clerk-Stenographer at the G-3 level under a fixed-term appointment of one year ... Her secondment and fixed-term appointment were regularly extended until 1 January 1987, [on] which date she was transferred from ITU to ITC and her appointment converted to a permanent appointment.

[At the time of the events which gave rise to this Application, the Applicant was serving at the G-4 level position of Secretary.]

...

Summary of Facts

... On 9 September 2000, [Mr. B.] joined the ITC as Chief, [Human Resource Development Service (HRDS),] Division of Technical Services Section, and became the [Applicant's] supervisor.

... In mid 2001, [Mr. B.] requested [that the Applicant] partly fill out and send to him a [Performance Appraisal System (PAS)] form. The [Applicant] completed

Section A ('What is to be accomplished') of a PAS form and sent it to her supervisor (...).

... Between 15 August and 5 September 2001, [the Chief, Personnel Service, Division of Administration, (DA/PS)] sent several e-mails to all ITC staff reminding [them] to complete the 2001 PAS.

... [Mr. B.] separated from service on 31 October 2001.

... On 12 November 2001, a meeting took place between the [Applicant] and her former supervisor ([Mr. B.]) in order to discuss the PAS for the period January to October 2001, in the presence of the Chief, DA/PS. The [Applicant] brought with her a PAS form she had prepared for the meeting (signed by her on 12 November ...). At this meeting it became obvious that a PAS could not be carried out, as the parties concerned could not agree on which PAS form the discussion should be based, nor agree on the signing of either of the PAS forms.

... On 16 November 2001, [Mr. B.] wrote a memorandum addressed to the Chief, DA/PS, [entitled 'Exit PAS of [the Applicant]',] in which he comment[ed] on the poor performance of the [Applicant]. ...

... By memorandum dated 14 December 2001, the Chief, DA/PS, wrote to the [Applicant,] transmitting to her a copy of the above mentioned memorandum, asking for her review and comments and informing her that the memorandum, together with her comments, would be placed in her Official Status file. She referred to administrative instruction ST/AI/292 of 15 July 1982[, entitled 'Filing of adverse material in personnel records',] stating that 'any material that is adverse to a staff member may not be filed until it has been shown to the staff member concerned'.

... By memorandum dated 19 December 2001, the [Applicant] wrote to the Chief, DA/PS, requesting clarification concerning the specific paragraph of ST/AI/292, 'under which the referred memorandum from [Mr. B. was] regarded ... as falling'. [The Chief, DA/PS, subsequently responded that 'communication pertaining to the performance of a staff member ... would logically fall into the category of material covered in paragraph 5 of ST/AI/292' and that 'the memorandum [would] not be filed in [the Applicant's] Official Status file until [she had] been given an opportunity to comment on its content'.]

...”

On 28 December 2001, the Applicant requested the Secretary-General to review the administrative decision dated 14 December to place the memorandum of 16 November in her Official Status file.

Also on 28 December 2001, the Applicant submitted an appeal to the JAB in Geneva requesting suspension of action. On 11 February 2002, a summary hearing was held on this request and, on 12 February, the JAB produced its report. It noted that the decision of the Secretary-General had yet to be implemented and concluded that the filing of the memorandum in the Applicant's Official Status file would cause serious injury to her career, resulting in

irreparable damage to the Applicant. Accordingly, the JAB recommended that the request for suspension of action be accepted, until the case could be considered on its merits. On 25 February, the Under-Secretary-General for Management advised the Applicant that the Secretary-General had accepted the JAB's recommendation and had decided to "suspend the implementation of the contested decision until the merits of [her] appeal [had] been ... decided upon".

On 2 May 2002, the Applicant lodged an appeal on the merits of her case with the JAB.

On 30 May 2002, the Applicant lodged a complaint for defamation with the Geneva Public Prosecutor against Mr. B.. On 31 July, the United Nations informed the Permanent Mission of Switzerland that the United Nations considered the memorandum in question to be an internal document protected by the "Agreement on Privileges and Immunities of the United Nations" of 19 April 1946. As the United Nations deemed the memorandum to have been produced in the course of official functions, it was of the opinion that Mr. B. was thus protected by immunity. This information was communicated to the Deputy Public Prosecutor on 6 August.

The JAB adopted its report on 24 March 2004. Its conclusions and recommendations read, in part, as follows:

"Conclusions and Recommendations

...

58. The Panel concluded that in the file, there is no evidence that the staff member's former supervisor complied with his obligations under the PAS system. The argument that the staff member did not cooperate and tried to avoid the PAS procedure remains unpersuasive and the Respondent does not provide evidence that the staff member's former supervisor undertook to resolve such problems, which was his obligation.

...

60. As far as *adverse material* is concerned, the Panel stressed that all adverse material cannot be treated in the same manner and reiterated that adverse material concerning the staff member's performance and written by a supervisor cannot be analysed in isolation from the PAS. Otherwise, particularly if the PAS is not established at all, there would be a risk to bypass the PAS procedure which provides more procedural safeguards to the staff member than does ST/AI/292.

61. The Panel stressed its opinion that, in the present case, the memorandum of 16 November 2001 is different from any other adverse material and that therefore ST/AI/292 cannot be applied in isolation from subsequent administrative instructions. ... As the staff member's former supervisor had neglected his obligations related to the PAS procedure, he could not bypass the PAS system by writing a memorandum

which in fact constitutes a *substitute to the PAS*. Thus, and even though the memorandum had been shown to the staff member for comment, the Panel considered that it would be contrary to the framework established under the applicable rules to place the memorandum [in her Official Status file].

62. The Panel stressed that, as the memorandum ... had never been placed [in her Official Status file], no damage had occurred to the Appellant and there is therefore no need for compensation. As an internal document that has remained confidential, the memorandum was not likely to affect her reputation. The fact that the staff member herself made the memorandum 'public' by bringing the issue to a national jurisdiction is her own responsibility. Therefore, the Panel concluded that by not putting the memorandum in the Official Status file and by destroying it, the staff member will obtain the requisite satisfaction.

63. The Panel therefore **recommends** that the memorandum not be placed [in] the staff member's Official Status file and thus be destroyed.

Special remark

The Panel wishes to draw the attention of the Secretary-General to the fact that, for cases as the present, the existing rules create a 'grey area' of overlapping administrative regimes which needs to be clarified. The Panel is of the opinion that the system of record filing - currently regulated by ST/AI/292, which was supposed to constitute interim guidelines - should be updated and harmonised with the existing system of PAS."

On 29 September 2004, the Applicant, having not received any decision from the Secretary-General regarding her appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 1 November 2004, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to accept the JAB's findings and conclusions, and that the memorandum in question would not be placed in her Official Status file but would be destroyed.

Whereas the Applicant's principal contentions are:

1. The contested memorandum cannot lawfully be placed in the Applicant's Official Status file.
2. The Applicant's rights of due process with respect to her performance evaluation were violated.
3. The Applicant deserves compensation for the serious attack on her dignity and reputation, as well as the moral injury she suffered.

Whereas the Respondent's principal contentions are:

1. The Respondent has accepted the findings and recommendations of the JAB.
2. The Applicant's pleas for monetary compensation are unfounded.

The Tribunal, having deliberated from 4 to 28 July 2006, now pronounces the following Judgement:

I. The Applicant was employed by ITC from 1977 until 2004. At the time of the events which gave rise to her Application, she held the G-4 level position of Secretary in the Human Resource Development Service.

On 31 October 2001, the Applicant's supervisor separated from service without completing her PAS for the period January to October 2001. On 16 November, he wrote a memorandum to the Chief, Personnel Service, Division of Administration, entitled "Exit PAS of [the Applicant]". On 14 December, the memorandum was transmitted to the Applicant for her review and comments and she was informed that the memorandum, together with her comments, would be placed in her Official Status file pursuant to ST/AI/292. The Applicant requested administrative review of this decision on 28 December.

The Applicant lodged an appeal with the JAB on 2 May 2002. In its report dated 24 March 2004, the JAB found that as the contested memorandum did not fall under any of the three categories of ST/AI/292, it would be contrary to the rules to place it in the Applicant's file but that, as it had never been placed in her file, she was not entitled to compensation. Its recommendation that the memorandum not be placed in her Official Status file but be destroyed was accepted by the Secretary-General on 1 November.

II. When she filed her Application with the Tribunal on 23 July 2004, the Applicant had yet to receive the decision of the Secretary-General in her case. She requested the Tribunal to:

1. rescind "the implicit decision" to reject her appeal against the decision of the Chief, Personnel Service, dated 16 November 2001;
2. order that the memorandum should not be placed in her Official Status file but should be destroyed with "no copies kept in the files";
3. compensate her with one year's net base salary "as compensation for the serious moral injury which she suffered"; and,
4. award her costs.

In view of the Secretary-General's subsequent decision, the Tribunal finds that her first two pleas are now moot.

III. The Tribunal is unimpressed by any supervisor bypassing the formal evaluation process and providing an *ex post facto* evaluation of a staff member even where - as is alleged in this case - the staff member might have contributed to the fact that no formal evaluation could be concluded. The Tribunal agrees with the conclusion of the JAB that "in the file, there is no evidence that the staff member's former supervisor complied with his obligations under the PAS system". Moreover, it was surprised by the tone and content of the memorandum, and questions whether the information contained in it could have withstood the rebuttal process had the Applicant been evaluated with a PAS rather than in the unofficial medium adopted. However, whilst evaluation of staff members is a managerial responsibility which should be performed by supervisors through the procedures established by the Organization for such assessment, the Tribunal recognizes that the process requires the input and active cooperation of both supervisor and supervisee, and is not persuaded that either party was acting in good faith in this case. In any event, the Tribunal need not develop this issue further as the Applicant, presumably for her own reasons, did not contest the fact that she was not given a PAS for 2001. In this context, the Tribunal observes that there is an unusual lacuna in the Applicant's evaluations, and recalls that the JAB remarked upon the lack of performance evaluations in her file for the periods January 1990 to December 1992; September 1996 to December 1998; and, January 2000 to December 2001.

IV. Paragraph 2 of ST/AI/292 reads as follows:

"[a]dverse material shall mean any correspondence, memorandum, report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member. As a matter of principle, *such material may not be included in the personnel file* unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon." (Emphasis added.)

In the Applicant's case, as the material was never placed in her file, she can establish no violation of her rights under ST/AI/292. As the Tribunal held in Judgement No. 237, *Powell* (1979), it is not competent to render advisory opinions.

The Tribunal notes, however, the following "Special remark" of the JAB with regards to consistency between ST/AI/292 and the PAS system:

“[t]he Panel wishes to draw the attention of the Secretary-General to the fact that, for cases as the present, the existing rules create a ‘grey area’ of overlapping administrative regimes which needs to be clarified. The Panel is of the opinion that the system of record filing - currently regulated by ST/AI/292, which was supposed to constitute interim guidelines - should be updated and harmonised with the existing system of PAS.”

V. The Tribunal has considered the claim made by the Applicant for compensation for “serious moral injury”, but finds that she has no right to compensation, as she fails to demonstrate how her rights were violated or what damage she incurred. The damage the Applicant contends she suffered to her “honour, dignity and reputation entailed by the injurious content of the memorandum” is not supported by the facts of the case. As the Tribunal has already stated, the impugned decision of 14 December 2001 was never implemented and the memorandum in question was never placed in the Applicant’s Official Status file or made public by the Administration in any fashion. Any lingering doubts the Applicant might have entertained regarding the memorandum should have been laid to rest when the Secretary-General accepted the recommendation of the JAB that it be destroyed.

In consequence, the Tribunal finds that there was no reason for these proceedings to have continued once the Applicant had received the Secretary-General’s decision. The Tribunal does not appreciate being used as a forum for the perpetuation of the unpleasant relationship between the Applicant and her former supervisor, neither of whom is well-represented in this sorry affair. If the Applicant’s goal was retribution, that is not an appropriate basis for bringing a case to the Tribunal and, in the opinion of the Tribunal, would amount to an abuse of the system of administration of justice. (See Judgement No. 1200, *Fayache* (2004).)

VI. The Tribunal notes the Applicant’s request for expenses. In *Powell (ibid.)*, the Tribunal stated as follows:

“[a]s regards costs, the Tribunal has declared in its statement of policy contained in document A/CN.5/R.2 dated 18 December 1950 that, in view of the simplicity of its proceedings, the Tribunal will not, as a general rule, grant costs to Applicants whose claims have been sustained by the Tribunal. Nor does the Tribunal order costs against the Applicant in a case where he fails. In exceptional cases, the Tribunal may, however, grant costs if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the Tribunal.”

In this case, the Tribunal sees no reason to deviate from its general practise and declines to make any award under this heading.

VII. In view of the foregoing, the Application is rejected in its entirety.

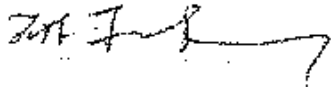
(Signatures)



Dayendra Sena Wijewardane
Vice-President, presiding



Kevin Haugh
Member



Goh Joon Seng
Member

Geneva, 28 July 2006



Maritza Struyvenberg
Executive Secretary