



# Administrative Tribunal

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## ADMINISTRATIVE TRIBUNAL

Judgement No. 1298

Case No. 1380

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, First Vice-President, presiding; Mr. Dayendra Sena Wijewardane, Second Vice-President; Mr. Goh Joon Seng;

Whereas, on 14 September 2004, a former staff member of the United Nations filed an Application containing pleas which read as follows:

**“II. PLEAS**

The ... Administrative Tribunal is, respectfully, requested to order:

1. The Secretary-General to make a decision on the recommendations of the Nairobi [Joint Appeals Board (JAB)] Report No. 2/04 (...).
2. The expunging of all the adverse materials [in] the Official Status file of the Applicant.
3. Compensation to the Applicant in the amount equivalent to three months' net base salary as of the date of ... separation from service for the violation of staff rule 111.2 (p) in making a decision on the JAB Report No. 2/04.

4. Compensation to the Applicant in the amount equivalent to twenty-four months' net base salary as of the date of ... separation from service for the violation of staff regulations 1.1 (c); 1.2 (a); 1.2 (b) and 1.2 (g); 4.2 and 4.3 and Administrative Instruction ST/AI/292 [of 15 July 1982, entitled 'Filing of adverse material in personnel records'], Sections 1, 2 and 7.

5. The [Respondent] *NOT* to conduct an investigation into the conduct of the Applicant, taking cognizance of the conduct of the Respondent in this case and the time that has lapsed since the Applicant brought the case to the attention of the Respondent."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 May 2005 and once thereafter until 30 June;

Whereas the Respondent filed his Answer on 30 June 2005;

Whereas the Applicant filed Written Observations on 15 August 2005;

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] entered the services of the United Nations in December 1987 with [the United Nations Environment Programme (UNEP)] on a short-term appointment for 2 months and 8 days as a Keypunch Operator with UNEP at the G-5 level. She was separated from the Organization at the expiry of the contract in February 1988.

[Thereafter, she served under various forms of appointment as a Keypunch Operator with the United Nations Center for Human Settlements (UNCHS) and UNEP, with several breaks in service. From May 1992, she was employed by UNEP as a Personnel Clerk and then Personnel Assistant until January 1996, when she was temporarily assigned to the United Nations Office at Nairobi (UNON). Her fixed-term contract with UNON was consecutively extended until December 1997 when she separated from service.]

...

... ***Facts of the Case:***

...

[In July 1999, the Applicant was interviewed for a position at UNON, following which, by memorandum dated 28 July, the Chief of the relevant Section requested that she be recruited for a three-month fixed-term contract. According to the Applicant, however, she was verbally advised that her recruitment could not proceed, due to allegedly irregular overtime claims she had submitted in 1997.]

In May 2000, the [Applicant] was interviewed for [a] short-term temporary assignment in UNON. [On 7 June, the unit in question advised Human Resources Management Services (HRMS) that she was ‘the most suitable candidate’ for the position, and requested her recruitment ‘at [their] earliest convenience’. However, her recruitment was not effected.] ... In July ..., the [Applicant] went to see [the Acting Chief, HRMS,] and was informed that she could not be recruited due to an incident of alleged overtime claims fraud which dated back to the year 1997.

On 1 August 2000, the [Applicant] requested permission ... to peruse her Official Status file. On reviewing the file, [she] found that a note for the file dated 19 June ..., written by [the Acting Chief, HRMS,] had been placed [therein. The note for the file sets out the purported reasons for the non-extension of the Applicant’s prior appointment, specifically referring to shortcomings in her performance and falsified overtime claims.]

By letter of 24 November 2000 to the Chief of Administrative Services, UNON, the [Applicant] requested ... the removal of the note for the file[, characterizing it as adverse material which had not been brought to her attention].

...

By letter dated 7 June 2001, the [Applicant reiterated] ... the need for action on the adverse note for [the] file.

...

By letter dated 8 January 2002, the [Applicant again] requested ... to peruse her Official Status file. While doing so, she found the existence of a further memorandum dated 16 December 2000 by [the Acting Chief, HRMS,] to the Chief of Administrative Services, UNON, in which the former justified the placing of the official note [for the] file in the [Applicant’s] Official Status file. This correspondence [had also not been] brought to the attention of the [Applicant].

The aforementioned memorandum contains a decision by the Chief of Administrative Services, UNON, in [the] form of a handwritten [annotation], to keep the note [for the] file in the [Applicant’s] Official Status file and to instruct the Recruitment Section of [HRMS] not to consider [her] for employment.”

On 26 March 2002, the Applicant wrote to the Chief of Administrative Services, UNON, requesting that the administrative decision to bar her from employment within the United Nations be withdrawn.

On 4 September 2002, the Applicant lodged an appeal with the JAB in Nairobi. The JAB adopted its report on 25 May 2004. Its considerations and recommendations read, in part, as follows:

“... **Considerations:**

The Panel firstly noted that it is [not contentious] that the note for [the] file was placed in the Appellant's Official Status file without her being notified of this administrative action. This also applies to the memorandum of 16 December 2000 ...

The mere fact that the Appellant was not informed of the placement of such documentation ... in her Official Status file is in itself a violation of her right to defence, which the JAB considers applies well beyond her time of employment with the United Nations, particularly when actions such as these have the potential to affect future employment both within the Organization as well as outside of it.

...

Both the note [for the] file from the Acting Chief, [HRMS,] as well as her memorandum of 16 December 2000 are drafted in ... language that can be described as subjective, judgmental and prejudicial.

The aforementioned documents contain criticisms of the Appellant's performance as well as allegations of misconduct during her employment with UNON three years earlier in 1997.

Issues of performance are dealt with in a different procedure, which is the Performance Appraisal process and it is disconcerting that the Acting Chief, [HRMS,] inserted evaluations on a former staff member in a document that is in no way connected with the appraisal process, three years after her employment.

Where the integrity of a staff member is concerned or questioned, the proper procedure would be to institute disciplinary proceedings. The JAB recognizes that in the present case this should have happened at the time the Appellant was still working with UNON.

Since this was not done at the time, the Panel finds that the Organization is obliged to conduct a proper investigation into allegations of misconduct regarding staff members who have left the Organization, if it wants to place adverse material in their Official Status files. Such an investigation, while not a full-scale disciplinary process with the involvement of the [Joint Disciplinary Committee] etc, should end with a proper report, which contains all the relevant evidence and comes to a proper conclusion. That report [would] have to be transmitted to the former staff member, to allow him/her to submit a defence/rebuttal. The fact that this was not done constitutes a violation of the Appellant's rights for which she deserves compensation.

...

... ***Recommendations:***

In the light of the foregoing ..., the Panel recommends to the Secretary-General:

1. To remove the note [for the] file ... dated 19 June 2000 and [the] memorandum of 16 December 2000 as well as any other adverse material in connection with the aforementioned note [for the] file from the Official Status file of the Appellant.

2. To advise UNON to conduct an investigation into the alleged misconduct of the Appellant ... Otherwise to exonerate the Appellant from any misconduct.

3. To pay to the Appellant 3 months' net base salary [as] compensation for the violation of her rights."

On 14 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 12 January 2005, the Under-Secretary-General for Management informed the Applicant as follows:

"The Secretary-General has examined your case in light of the JAB report and all the circumstances of the case, and is in substantial agreement with the JAB findings. He accordingly accepts the recommendation concerning the removal of adverse material from your [Official Status file]. However, he is not able to accept the JAB recommendation that UNON conduct an investigation into events that took place in 1997, given the time that has elapsed. Furthermore, the JAB's recommendation for three months' salary as compensation is excessive, given that you only ever held short-term appointments with the Organization and the JAB could not find evidence that you suffered financial damage. He has accordingly decided to compensate you in the amount of one month's net base salary."

Whereas the Applicant's principal contentions are:

1. The placement of adverse material in her Official Status file without informing her violated her rights.

2. Senior officials of the Organization connived to prevent her from re-employed by the United Nations, or elsewhere.

3. The Respondent's actions had a direct effect on the Applicant's employment prospects and she should be compensated for the fact that she has been unable to secure employment.

4. The Respondent's failure to observe the statutory deadlines following the report of the JAB violated her rights of due process.

Whereas the Respondent's principal contention is:

The Applicant has been adequately compensated for the wrongful inclusion of adverse material in her Official Status file.

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

I. The Applicant was employed by the Organization between December 1987 and December 1997 on a series of short appointments with UNEP, UNCHS and UNON

In July 1999, the Applicant was interviewed for short-term temporary employment with UNON. At the end of August, however, she was verbally informed by the Acting Head of Staff Development that she was not to be considered for further employment with the Organization because of an incident of allegedly fraudulent overtime claims in 1997. In May 2000, she was again interviewed by UNON and, on 7 June, she was identified as the most suitable candidate for a mission replacement and HRMS was asked to initiate her recruitment. When she did not hear from UNON following her interview, however, the Applicant met with the Acting Chief, HRMS, who reiterated in effect what she had been told in 1999 and provided her with details of how the Organization had viewed her prior performance and conduct. The net result was that the Applicant was clearly not considered a suitable candidate for re-employment.

On 1 August 2000, the Applicant requested permission to review her Official Status file and discovered a note for the file dated 19 June 2000, which purported to set out the reasons why her previous contract had not been renewed. The document had apparently been written with a view to ensuring that the Applicant would not be re-employed and had been placed in her file without being brought to her attention. On 24 November 2000 and 7 June 2001, the Applicant requested that the note for the file be removed. On 8 January 2002, she again requested to view her Official Status file. She then discovered a memorandum dated 16 December 2000, addressed to the Chief of Administrative Services, UNON, justifying the 19 June note, which had been annotated by him to the effect that the Applicant should not be considered for future employment. On 26 March, the Applicant requested that the Chief of Administrative Services withdraw his decision to bar her from future employment. On 4 September, she lodged an appeal with the JAB which, in its report dated 25 May 2004, recommended that both documents, "as well as any other adverse material in connection with the aforementioned note [for] the file", be removed from the Applicant's Official Status file and that UNON either properly investigate her alleged misconduct or exonerate her. For the violation of her rights, the JAB recommended compensation of three months' net base salary. On 12 January 2005, the Applicant was advised that the Secretary-General was "in substantial agreement with the JAB findings"; had accepted the recommendation that the adverse material

be removed from her Official Status file; had decided *not* to conduct an investigation in view of the time that had elapsed since the alleged events occurred; and, having found the recommended compensation excessive, had decided to award her compensation in the amount of one month's net base salary.

II. On 14 September 2004, when she filed her Application with the Tribunal, the Applicant had yet to receive the decision of the Secretary-General in her case. She requested the Tribunal to:

1. order the Secretary-General to make a decision on the recommendations of the JAB;
2. order that "all the adverse materials" in her Official Status file be expunged;
3. compensate her with three months' net base salary for the violation of staff rule 111.2 (p) resulting from the Secretary-General's delay in making a decision on the JAB report;
4. compensate her with twenty-four months' net base salary for the violation of her rights connected with the placement of the adverse material in her file; and,
5. order the Respondent "NOT to conduct an investigation into [her] conduct ... taking cognizance of the conduct of the Respondent in [the] case and the time that [had] lapsed since the Applicant brought the case to [his] attention".

In view of the Secretary-General's subsequent decision, which provided partial satisfaction to the Applicant, certain of her pleas have been rendered moot. The issue before the Tribunal, then, is the adequacy of compensation awarded to the Applicant for the violation of her rights.

III. In response to the Applicant's claim for higher compensation than that recommended by the JAB, and, indeed, in support of the reduced compensation paid by the Secretary-General, the Respondent argues that the note for the file was made some 12 days after the 7 June 2000 request that the Applicant be recruited and that the JAB found no evidence of direct adverse effect on any specific employment opportunities. The Respondent argues that the Applicant's claim is about the insertion of adverse material into her Official Status file and not about her failure to obtain a position with the Organization. As such, he argues that it is incumbent upon the Applicant to show damage from the wrongful insertion of the adverse material and that she

has not proved that she suffered any direct damage as a result of the wrongful act of the Respondent.

IV. The specific wrong of which the Applicant is complaining is the insertion into her file of adverse material in violation of her rights under ST/AI/292. The relevant provisions of ST/AI/292 are quite clear:

“[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.”

In Judgement No. 733, *De Garis* (1995), the Tribunal held that

“[i]t is a fundamental principle of law that a person has the right to be heard and given an opportunity to respond to allegations against him or her. In failing to provide for this right, the Respondent did not provide the due process of law to which the Applicant was entitled.”

In the instant case, the Applicant was not made aware of the adverse material placed in her file, let alone offered an opportunity to comment upon it. Her performance was characterized as poor; disparaging remarks were made about her character and conduct; and, allegations of fraud were made against her. It is intolerable that such documentation was placed in her file without affording her the opportunity of viewing and commenting thereon, and it is irrefutable that this amounted to a serious violation of her rights under ST/AI/292; “a major procedural irregularity” as the Tribunal stated in Judgement No. 1132, *Goddard* (2003).

The Tribunal notes that an applicant for employment has no right to employment and that the employing organization has very broad discretion to take into account a wide spectrum of factors in making its decision. (See generally Judgements No. 1031, *Klein* (2001) and No. 1117, *Kirudja* (2003).) The Applicant has not established that the direct consequence of the wrongful act was that she did not obtain employment which she would otherwise have been offered. In the opinion of the Tribunal, however, it is not necessary for the Applicant to prove that she would have obtained a position but for the offending material. The Tribunal recalls in this regard Judgement No. 1168, *Tankov* (2004), in which, albeit in different factual circumstances, it held:

“[t]he Tribunal cannot say what the outcome would have been, or even what it probably would have been, had the Applicant been given reasonable consideration. However, from the facts available, ... the Tribunal must consider that there was a



reasonable prospect of a favourable result, had he been properly considered. In any event, the violation of his rights as a staff member is such that he is entitled to restitution ...”

In the instant case, the Tribunal is satisfied that the adverse material was deliberately placed in the Applicant’s file with the intention of preventing her re-employment and finds that it is reasonable to assume that it did impact the recruitment process. It finds the Respondent’s contention that the material was unrelated to the recruitment decision simply not credible. Moreover, the Tribunal notes that the Applicant wrote repeatedly to the Administration from November 2000 onwards asking for the removal of the offending material, but that she received no satisfaction until January 2005, well after the JAB report of May 2004.

V. In Judgement No. 1237 (2005), the Tribunal found that the Applicant’s performance evaluation and the decision regarding renewal of his contract were “inextricably linked” and that, in determining compensation, an assessment should be made of “the harm that may have realistically ensued to [him] as a result of the failure to have what he was entitled to”. The Tribunal held in that case that “[t]he remedial action must be proportionate to the harm which the Respondent himself has acknowledged”. In the instant case, in determining the appropriate level of damages, the Tribunal finds compensation in the amount of six months’ net base salary appropriate to the harm suffered. Accordingly, it awards the Applicant an additional five months’ net base salary in addition to the one month she has already received. In reaching its decision, the Tribunal considered the violation of the Applicant’s rights by officials who should have been aware of the illegality of their acts; the intended - and likely - consequences on her future employment prospects; and, the undue efforts she had to make in order to have the adverse material removed from her file.

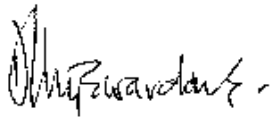
VI. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of five months’ net base salary at the rate in effect at the date of Judgement, 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.

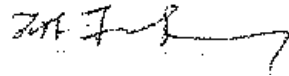
*(Signatures)*



**Jacqueline R. Scott**  
First Vice-President, presiding




**Dayendra Sena Wijewardane**  
Second Vice-President



**Goh Joon Seng**  
Member

Geneva, 28 July 2006



**Maritza Struyvenberg**  
Executive Secretary