



# Administrative Tribunal

Distr.: Limited  
29 September 2006

Original: English

## ADMINISTRATIVE TRIBUNAL

Judgement No. 1303

Case No. 1387

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Spyridon Flogaitis, President; Mr. Kevin Haugh; Ms. Brigitte Stern;

Whereas, on 20 December 2004, a former staff member of the United Nations filed an Application requesting the Tribunal, inter alia:

“6. ...

(b) To order the Respondent to produce all documents relating to this Application, particularly, a list of candidates who moved from the General Service to the Professional category through reclassification, without taking the competitive examination, as well as a list of all staff members that have been considered for P-3 positions as external candidates, without having to first resign their appointments in order to be eligible.

(c) To decide that the Respondent erred when it denied the Applicant consideration as an external candidate for the externally advertised P-3 Legal Officer position on the ground that the Applicant was in the General Service category.

(d) To order the Respondent to pay the Applicant compensation for the P-3 Legal Officer functions that he performed from 1995 until his separation in 2001 on [the] basis of the principle of equal pay for equal work.

(e) To order the Respondent to pay the Applicant damages for both moral and material injury.

(f) To award the Applicant costs and any other damages that the Tribunal might consider appropriate.”

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 15 June 2005 and once thereafter until 15 July;

Whereas the Respondent filed his Answer on 30 June 2005;

Whereas the Applicant filed Written Observations on 5 August 2005;

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

***“Employment History***

... [The Applicant] ... was first granted a short-term appointment as a Records Clerk (G-3) in August 1992. [His appointment was subsequently extended and then converted to fixed-term.] Effective 1 November 1995, he was assigned to the Administrative Law Unit (ALU), Office of Human Resources Management (OHRM). ... Effective 1 May 1996, he was promoted to G-4, Legal Clerk. ... [E]ffective 1 January 2000, [the Applicant] was granted a special post allowance (SPA) to P-2 as Acting Associate Legal Officer. The SPA was extended to 30 September 2001, the date upon which [the Applicant’s] resignation took effect and he separated from ... service.

***Summary of the facts***

... [The Applicant] earned a degree of Juris Doctor at the New York Law School, granted on 9 June 1997. He passed the examination for admission to the Bar of the State of New York ..., and was subsequently admitted to the Bar.

... On 26 June 2000, a Vacancy Announcement (Internal) was issued for the P-3 post of Legal Officer[, ALU] ...; [the Applicant] did not apply. On 28 October ..., an External/Internal Vacancy Announcement was issued for the same post. [The Applicant] submitted his application for the post as an external candidate.

... On 13 December 2000, [the Applicant] addressed an e-mail to [the] Chief, Staffing Support Section, Operational Services Division, OHRM, asking whether he had been short-listed for consideration for the Legal Officer post. In her reply, referring to ‘that horrible barrier between g and p’, [the Chief] said she was not allowed to short-list him, ‘qualifications notwithstanding’.”

On 18 December 2000, the Applicant requested the Secretary-General to review the administrative decision “not to consider [him] for the Legal Officer position”.

Also, on 18 December 2000, the Applicant submitted an appeal to the JAB in New York, requesting suspension of action of the decision not to short-list him for consideration for the P-3 post. On 22 December, a summary hearing was held on this request and, on 29 December, the JAB produced its report. It noted that the decision of the Secretary-General had yet to be implemented and recommended “that the contested decision be suspended so that the [Applicant] is not excluded from the process and ... could have an equal opportunity to be considered along with other candidates for the ... post”.

On 8 March 2001, the Applicant lodged an appeal on the merits of his case with the JAB.

On 30 March 2001, the Under-Secretary-General for Management advised the Applicant that the Secretary-General had decided not to accept the recommendation of the JAB in his suspension of action case.

On 2 April 2001, the Applicant wrote to the Assistant Secretary-General, OHRM, referring to their meeting of 15 March at which he had apparently been informed that, in order to be considered eligible to apply for a Professional level post, he would have to resign his General Service position, but that the ALU post would be re-advertised for three weeks in order to permit him the opportunity to resign and re-apply as an external candidate. The Applicant requested that, in view of the financial constraints which resigning his position would place upon him, the deadline for applications be extended. On 3 April, the Assistant Secretary-General, OHRM, responded that as no further delay could be permitted in the selection process, the post could not be re-advertised again but that, if he chose to resign his General Service position, he could apply for “any suitable vacancy at the Professional level”.

The JAB adopted its report on 9 March 2004. Its considerations, conclusions and recommendations read, in part, as follows:

***“Considerations***

13. Counsel for [the] Appellant states (...) that ‘the facts of this case should not be in dispute’, but in the Panel’s view Counsel and [the] Appellant seem to deny or try to argue away an indisputable fact. That is that an ‘external candidate’ is by definition *not* a staff member of the United Nations. While it may be true, as argued by Counsel, that ‘nowhere did the General Assembly expressly state that staff members in the General Service category are excluded from consideration as external candidates for P-3 posts’, it is just as true that the General Assembly never said that they could be, and Counsel and [the] Appellant never offer a convincing argument why they should be.

...

15. Counsel may well be right that the contested decision had ‘an unreasonable and unjust result’, but he is mistaken in blaming [the] Respondent’s interpretation of General Assembly resolutions. The Panel has no doubt that Respondent’s decision was clearly consistent with ‘the wording and spirit’ of the relevant General Assembly resolutions.

***Recommendation***

16. The Panel makes no recommendation with respect to this Appeal.”

On 9 November 2004, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that, in accordance with the JAB’s recommendation, the Secretary-General had decided to take no further action on his appeal.

On 20 December 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Respondent misinterpreted and misapplied the General Assembly resolutions on the recruitment procedures for posts subject to geographical distribution.
2. The decision not to consider the Applicant as an external candidate for the post was not supported by the Staff Regulations and Rules or by any administrative issuances then in effect. Moreover, the decision was contrary to the basic principles of the international civil service.
3. The Applicant was not treated fairly or justly.

Whereas the Respondent’s principal contentions are:

1. The contested decision was in strict accordance with the applicable General Assembly resolutions and the relevant rules governing the Applicant’s employment with the Organization.
2. The contested decision was in conformity with the Administrative Tribunal’s interpretation of the General Assembly resolutions and the Organization’s practice.

The Tribunal, having deliberated from 6 to 28 July 2006, now pronounces the following Judgement:

I. Under cover of a letter of 10 October 2001, the Applicant, then a Legal Clerk at the G-4 level, applied for consideration for promotion to the P-3 post of Legal Officer as an external candidate, notwithstanding the fact that he was at the time a member of staff in the General Service category, albeit on SPA to the P-2 level.

II. In due course, the Applicant was informed by the Chief, Staffing Support Section, that he could not be short-listed for consideration for appointment, his qualifications notwithstanding, as “the horrible barrier between g and p” prevented the said Chief, Staffing Support Section, from so doing. What was being referred to by the Chief, Staffing Support Section, as precluding her from short-listing the Applicant were a number of General Assembly resolutions, principal amongst them being Section 1, paragraph 1 (g) of General Assembly resolution 33/143, entitled “Personnel questions”, of 20 December 1978, which provides that

“[m]ovement of staff from the General Service category to the Professional category should be limited to the P-1 and P-2 levels and be permitted up to 30 per cent of the total posts available for appointment at those levels and such recruitment should be conducted exclusively through competitive methods of selection from General Service staff with at least five years’ experience and post secondary educational qualifications”,

and General Assembly resolution 35/210, also entitled “Personnel questions”, of 17 December 1980, which, inter alia, provides that “movement of staff from the General Service category ... is to be regulated exclusively through competitive examination ... No exception shall be authorised.”

There is issue between the parties as to what is meant by “internal” as opposed to “external” candidates within the meaning of the various resolutions. Whilst the Tribunal agrees with the JAB that in the context of this case “an external candidate is by definition *not* a staff member of the United Nations”, this distraction can to some extent be avoided by concentrating on the wording of the above-referenced General Assembly resolutions. It is beyond dispute that the Applicant was a staff member in the General Service category so that, on the understanding of the Chief, Staffing Support Section, the Applicant was ineligible for appointment to the P-3 level post other than through competitive examination.

III. The Applicant submits that the Respondent misinterpreted and misapplied the General Assembly resolutions on recruitment and promotion for posts subject to geographical distribution as well as the jurisprudence of the Tribunal on competitive examinations. He further submits that the Respondent’s decision not to consider him as an external candidate for

the P-3 post was not supported by the Staff Regulations and Rules or by any other administrative issuances in effect at the time, and that the decision not to consider him as an external candidate was unfair, unjust and contrary to the basic principles of the international civil service.

IV. The Tribunal deals in the first instance with the Applicant's submissions as to the proper construction of the General Assembly resolutions. The provisions of Section 1, paragraph 1 (g) of resolution 33/143, as set out above, have been reaffirmed in a number of subsequent resolutions, for example resolution 55/258, entitled "Human resources management", of 27 June 2001.

Whilst the Applicant contends that the requirement should be construed as only extending to P-1 and P-2 levels, arguing that promotion from the General Service category to the P-3 level should somehow be treated differently, the Tribunal must reject this submission. In the opinion of the Tribunal, based on the General Assembly resolutions, it logically follows that promotion to a P-3 post for a staff member of the General Service category through means other than competitive examination is not possible whilst the staff member remains in the service of the Organization. Should the staff member no longer be serving in the General Service category and wish to apply for a Professional level post as an external candidate, then the language of resolution 35/210 could apply in that an appointment to the P-3 level would not necessarily require competitive examination. In such circumstances, the applicant for the P-3 post would actually have become an external candidate. However, for applicants currently serving as staff members in the General Service category, the General Assembly has mandated another avenue of application and appointment: movement of such candidates is limited to the P-1 and P-2 levels and is to be exclusively through competitive examination.

In the opinion of the Tribunal, the Applicant's submission that he should have been considered as an external candidate for the P-3 post without having to resign his post within the Organization is but an argument designed to circumvent the clear requirement of the General Assembly relating to the movement of staff from the General Service category to the Professional level. He appears to have recognised his predicament at the time when he applied for promotion to the post for, in his letter of application for the P-3 post, he offered to resign his post if necessary in order that he might be considered as an external candidate. The Administration made efforts to assist him in this regard, re-advertising the position in order to give him an opportunity to resign his post but, ultimately, the Applicant chose not to do so. The Tribunal finds, then, that the Respondent's decision not to have considered the Applicant's

application for the P-3 post whilst he remained employed in the General Service category was in accordance with the applicable General Assembly resolutions and the rules governing the Applicant's employment within the Organization and, thus, dismisses this aspect of his claim.

V. The Tribunal now moves to the issue arising from the Applicant's contention that such an interpretation of the resolutions of the General Assembly as has been reached by the Tribunal in this case would lead to a finding contrary to the basic principles of the international civil service and would be unfair and unjust. The Tribunal should at the outset on this issue emphasize that it is a body created by the General Assembly and that it derives its jurisdiction solely from the terms of its Statute as adopted by the General Assembly. In these circumstances, where a resolution of the General Assembly or an Administrative Instruction or any other issuance of a legally binding nature is capable of two reasonable interpretations, the Tribunal, in its interpretation, will favour the one most consistent with the provisions of the Charter of the United Nations and the interpretation consonant with the principles of fundamental freedoms and of due process. This being said, in the opinion of the Tribunal, the language of the relevant General Assembly resolutions is clear and unambiguous in its intention to restrict movement of staff from the General Service category to the Professional category in the manner described, so that the Tribunal has no entitlement or jurisdiction to interpret the language in the manner urged by the Applicant herein.

VI. The Tribunal will next address the Applicant's claim that he should be compensated, by payment of appropriate SPA or its equivalent, for having exercised the functions of "Acting Associate Legal Officer" in the Administrative Law Unit from 1995 until his separation. It should be noted that the Applicant received an SPA for the period from 1 January 2000 until 30 September 2001 so that the claim now advanced is, in effect, for a period which ended approximately a year before he commenced proceedings for suspension of action in relation to the filling of the P-3 post and in excess of a year prior to commencing his substantive proceedings on the same issue.

Having reviewed the Applicant's request for administrative review, the Tribunal finds that his request was limited to the decision not to consider him for the P-3 position. The matter of SPA was only briefly touched upon in the narrative of his employment history. Even if the letter was to be so generously construed as to amount to a request for SPA for the period in question, it would have been well and truly time-barred. SPA is, by definition, a discretionary payment which under staff rule 103.11 is not an entitlement but rather payable only "in

exceptional cases". Staff rule 103.11 is further developed by administrative instructions, providing a mechanism for the claiming of payment of SPA. It is further noted that no claim for SPA or equivalent compensation was advanced by the Applicant in his appeal to the JAB and, as a consequence, the JAB understandably made no recommendation on this issue. The Applicant has not seen fit at any stage to enter into the merits of his case for SPA, nor to indicate if any claim was ever made in respect thereof or whether any such claim was rejected.

Moreover, the Tribunal notes that the Applicant has not adduced any evidence that he was improperly denied SPA for the period 1995 until 31 December 1999 or that he was ever denied payment as a result of some extraneous factor or improper consideration and, in any event, such claim would now be time-barred. Since the matter was not by itself ever the subject matter of a request for administrative review and has not received consideration by a joint body prior to coming to this Tribunal as is required by the Statute of the Tribunal, this claim is likewise rejected.

Finally, the Tribunal notes its surprise that the Respondent did not raise any issue of admissibility on this heading, either in relation to its timeliness or its receivability *ratione materiae*. The Tribunal, however, cannot ignore these important factors just because they were not raised by the Respondent.

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

(Signatures)

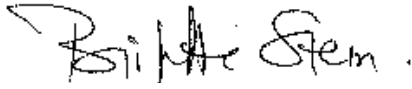


Spyridon **Flogaitis**  
President



Kevin **Haugh**  
Member





**Brigitte Stern**  
Member

Geneva, 28 July 2006



**Maritza Struyvenberg**  
Executive Secretary