



Administrative Tribunal

Distr.: Limited
29 September 2006

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1304

Case No. 1388

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 23 December 2004, a staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter UNHCR) filed an Application containing pleas which read as follows:

“Section II. Pleas

Request for additional documentation

7. The Applicant respectfully requests the United Nations Administrative Tribunal (...) to order [UNHCR] to provide the Tribunal with the following documentation necessary for a full appreciation of the Applicant’s submission to the Tribunal ...

...

Request for non-financial redress measures

8. The Applicant further respectfully requests the Tribunal to take appropriate action against staff members found to have wilfully committed the irregularities and other reprehensible action listed below, or alternatively order the referral of all or part of these issues to an independent and ad hoc investigative and disciplinary committee, with a view to establishing the responsibilities and taking, where necessary, appropriate disciplinary action:

(a) The non-respect by the UNHCR administration of the rules and regulations of its own Appointments Promotions and Postings Committee [(APPC)] ...

(b) The following irregular actions undertaken by various UNHCR staff members in order to facilitate the placement of Mrs. [H.] on post 241016, to the detriment of other, more qualified applicants including the Applicant ...

...

(c) The ... lies, threats and attempts at intimidation made by UNHCR officials to the Applicant, with a view to preventing her from exercising her right to due process:

...

Request for financial compensation

9. Finally, the Applicant respectfully requests the Tribunal to award her proper compensation for the costs and damages, moral and financial, she sustained from the repeated denial of due process, procedural and substantive irregularities, lies, intimidation, humiliation and harassment as further detailed in the following sections, i.e.:

(a) The award of six months' salary as compensation for the actual and consequential damages the Applicant has suffered as a result of the foregoing actions of the Administration;

(b) The award of one year's salary as compensation for the severe moral injury, stress and damage to her reputation that the Applicant suffered as a result of the above referenced actions of the Administration;

(c) The award of six months' salary as punitive damages against the UNHCR for its foregoing egregious actions;

(d) The award of one month's salary in respect of costs, expenses, expert and legal fees incurred by the Applicant through the present date;

(e) Interest at the compounded rate of eight per cent on any and all of the above amounts so recommended to be awarded by the [Joint Appeals Board (JAB)], from the date of Applicant's request for administrative review through the date any amounts awarded hereunder are finally and fully paid ...; and

(f) Such other relief as the Tribunal feels just, fair and equitable."

Whereas on 31 March 2005, the Applicant submitted additional documentation to the Tribunal;

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 June 2005 and once thereafter until 31 August;

Whereas the Respondent filed his Answer on 29 August 2005;

Whereas the Applicant filed Written Observations on 15 October 2005;

Whereas the Tribunal posed questions to the Respondent on 6 and 13 July 2006 and the Respondent replied on 10 and 17 July, respectively.

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

“[The Applicant’s] Professional Record

... The [Applicant] entered the service of the United Nations in January 1978 on a three-month short-term contract, working as a Typist for the International Trade Center (ITC), at the G-2 level. In April 1978, she was offered a three-month short-term contract at [UNHCR] as a junior Clerk/Typist in the Personnel Section at the same level. [Her appointment was subsequently renewed and she received a series of promotions. At the time of the events material to her case, she was employed as a Human Resources Assistant, UNHCR, at the G-6 level.]

...

... [The Applicant] was promoted to G-7 on 1 August 2002 as Senior Human Resources Assistant, Policy and Administration Section.

Summary of Facts

... On 31 October 2001, the [Applicant] applied to the post of Senior Human Resources Assistant, Policy and Administration Section (...).

... Between 26 and 28 November 2001, a panel interviewed [the Applicant and two other] candidates for the post.

... On 28 January 2002, following the selection process, which took place in accordance with the Rules of Procedure and Procedural Regulations of the [APPC] (...), the [Applicant] was informed ... that she had not been recommended for the post.

... By e-mail dated 30 January 2002, the selected candidate was informed about her appointment to the post ... The corresponding [Personnel Action] was issued on 14 March ... with retroactive effect to 1 February ...”

On 13 February 2002, the Applicant wrote to the High Commissioner, UNHCR, requesting review of the decision to nominate another candidate to the post.

Also on 13 February 2002, the Applicant submitted an appeal to the JAB in Geneva, requesting suspension of action. On 27 February, the Secretary of the JAB advised her that, in accordance with staff rule 111.2, her request for administrative review should be addressed to the Secretary-General of the United Nations, not the High Commissioner, and, as a result, the JAB could not proceed with her request for suspension of action until she had written to the Secretary-General.

On 28 February 2002, the Appellant wrote to the High Commissioner asking for her grievances be redressed through conciliation in order to avoid administrative proceedings.

Accordingly, on 8 March 2002, the Applicant wrote to the Secretary-General requesting administrative review. The same day, she submitted a second appeal to the JAB, again requesting suspension of action. On 22 March, the JAB produced its report, rejecting the request for suspension of action on the basis that the administrative decision in question had already been implemented. By letter dated 26 March, the Under-Secretary-General for Management advised the Applicant that the Secretary-General had accepted the JAB's recommendation.

On 21 May 2002, the Applicant lodged an appeal on the merits of her case with the JAB. The JAB adopted its report on 23 August 2004. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

...

47. ... [T]he Panel noted that the [APPC] itself had admitted that the quorum requirement was not met to review [G-7] cases. A committee member, who had been provided with the relevant documentation, was therefore contacted by telephone and requested to provide his views.

48. In this regard, the Panel referred to paragraph 23 of the APPC Rules of Procedure, which provides ... that the quorum necessary for Committee meetings should be 6 voting members or alternates at Headquarters, and to paragraph 24 of the same Rules that specifies that ‘it shall be ensured that the grade level of all Committee members or alternates participating in a meeting is equal or higher than the level of the posts under consideration’.

49. The Panel did not deem it necessary to discuss the APPC decision to recommend a candidate who, by [the] APPC's own admission, was less experienced than the Appellant in one of the post requirements because, for lack of quorum, the APPC was in any case not entitled to make any decision on [G-7] posts.

50. The Panel noted that in spite of the clear and precise rules mentioned ... above, the APPC made nonetheless a recommendation on the concerned ... post to the Deputy High Commissioner. The Panel found that the APPC recommendation was null and void for having been adopted without the necessary quorum, thus in breach of the APPC Rules of Procedure.

...

52. The Panel found that [the] ... APPC violated its own Rules of Procedure and therefore committed procedural irregularities. It also found that the Respondent knowingly decided to fill the concerned post without a valid recommendation from the APPC, thus committing another procedural irregularity.

Conclusions and Recommendations

53. In view of the foregoing, the Panel **concludes** that the Respondent failed to adhere to the relevant procedural rules. This represents an irregularity and amounts to a violation of the Appellant's right to due process. The Appellant should therefore be compensated.

54. Hence, the Panel **recommends** to the Secretary-General that the Appellant be granted six months' net base salary at the level she had when the contested decision was made, in compensation for the violation of her rights caused by procedural irregularities on the part of the Respondent."

On 23 December 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 17 February 2005, the Under-Secretary-General for Management informed the Applicant as follows:

"[t]he Secretary-General has examined your case in light of the JAB's report and all circumstances of the case. He is unable to agree with the JAB's finding that there was a violation of your due process rights arising from the APPC's alleged lack of quorum, or with the JAB's recommendation to pay you six months' salary as compensation therefore. He notes that indeed there was a quorum in this case because a qualified member of the APPC, who had already been given the relevant documents, participated in the APPC meeting by teleconference. Teleconferencing is an accepted practice in various APPCs for purposes of meeting quorum requirements. The Secretary-General has accordingly decided to take no further action on your case."

Whereas the Applicant's principal contentions are:

1. UNHCR's decision to recommend and nominate another candidate to the post was illegal and irregular and caused the Applicant moral injury.
2. In failing to address her request for investigation into, and punishment of, the responsible officials, the Administration deprived the Applicant of her rights of due process. Such rights were further violated by UNHCR's untruthfulness regarding the impugned decision.
3. The United Nations and UNHCR repeatedly failed to respond to the Applicant's inquiries in a timely or substantive way, violating the law and insulting the dignity and respect to which the Applicant was entitled.
4. The Applicant should be compensated for lost opportunity as well as for the inequitable treatment to which she was subjected.

Whereas the Respondent's principal contentions are:

1. The Applicant was given full and fair consideration for her candidacy to the post.
2. There is no evidence of prejudice or other extraneous considerations in the Administration's decision not to promote the Applicant.
3. The Applicant is not entitled to any of the documentation requested.
4. The Applicant is not entitled to any compensation.

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

I. The Applicant entered the service of the Organization in January 1978, on a short-term contract as a Typist, ITC, at the G-2 level. In April 1978, she joined UNHCR where she was subsequently granted an indefinite appointment. At the time of the events which gave rise to her Application, she held the G-6 position of Human Resources Assistant, Policy and Staff Administration Section.

On 31 October 2001, the Applicant applied for the G-7 position of Senior Human Resources Assistant. On 28 January 2002, she was informed that she had not been recommended for the post. By e-mail dated 30 January, the selected candidate was informed about her appointment to the post; her appointment was effective 1 February, although the corresponding Personnel Action was not issued until 14 March. Meanwhile, on 13 February, the Applicant wrote to the High Commissioner, UNHCR, requesting administrative review of the decision to promote another candidate and, on 28 February, requested conciliation. On 8 March, the Applicant wrote to the Secretary-General requesting administrative review and, on 21 May, she lodged an appeal on the merits of her case with the JAB.

In its report of 23 August 2004, the JAB found that the APPC had breached its rules of procedure by not having the required quorum of six members when it reviewed the G-7 post at its meeting of 18 January 2002. As a result, the JAB found its recommendation was null and void. The JAB concluded that the Applicant's rights of due process had been violated and recommended that she be compensated in the amount of six months' net base salary. On 17 February 2005, the Secretary-General rejected the JAB's finding regarding quorum, and its recommendation to pay compensation, on the basis that quorum had been achieved, as a sixth member of the APPC had participated by teleconference.

II. The Tribunal recalls the pertinent provision of the APPC Rules of Procedure regarding quorum, which states that "[t]he quorum necessary for Committee meetings will be ... at Headquarters, 6 voting members or alternates". In order to be able to interpret that rule and apply it to the facts of the present case, the Tribunal asked the Administration to produce the minutes of the relevant meeting(s) of the APPC and the summary of recommendations made by the APPC. The Administration produced an extract of the summary of recommendations, indicating that transmission was "on the strict condition that they are not released to the Applicant".

In this regard, the Tribunal is in agreement with the views expressed in the statement appended to Judgement No. 1245 (2005):

"... The Tribunal recalls the provisions of article 17 of the Rules of the Tribunal,

contained in Chapter V, entitled 'Additional documentation during the proceedings', which states as follows: '[t]he Tribunal may at any stage of the proceedings call for the production of documents or of such other evidence as may be required'.

... The Tribunal understands, and is sensitive to, the duty of the Administration to protect third party interests or interests of the Organization in judicial proceedings. However, at the same time, it finds unacceptable the fact that the Respondent provides requested documentation on the condition of confidentiality. The Tribunal is duty-bound to render justice and nothing can prevent it from doing so.

... Moreover, it is a well-established rule of administrative law, deriving directly from the Rule of Law, that when the Tribunal requests the Respondent to produce documents, he should comply. Naturally, the Respondent may express his preference that such documents are not released to an applicant, because of concerns with regard to confidentiality, or because a document is classified. However, it is for the Tribunal, after careful consideration of such a document, to decide whether or not to release it to the other party. This is the reason for the inclusion of article 17 in the Rules, that is, to grant the Tribunal the power to search anywhere the truth might be hidden.

... In the instant case, the Tribunal does not accept and will not abide by the condition imposed. However, the Tribunal is aware of and will respect and balance any need for confidentiality against the need for disclosure to ensure justice to parties before it. In this, the Tribunal is, and will always remain, the sole judge. The Tribunal requested the production of the documentation in question as a necessary step in establishing the facts, pursuant to the provisions of article 17.

... Moreover, the Tribunal finds that it is impossible for anyone competing for a post to establish discrimination and request judicial review, unless he or she has full access to the file. Being prevented from having full access may jeopardize the person's rights and interests. The Respondent may argue that disclosure of a file would not respect confidentiality, but this must be balanced with the right of an applicant to defend him or herself. Otherwise, a violation of due process rights may occur."

III. The Tribunal wishes to underline the importance of quorum for any collegial organ. Unless quorum is reached, no collegial organ has the prerequisite number of people for its decision-making. It is a recognized and well-established general principle of administrative law that, unless otherwise provided by law, the physical presence of the members of a collegial body is required. Physical presence is always important because in forming a collective opinion, the influence that members exercise upon one another is different if they are together in person as opposed to being physically separate.

On the other hand, it is true that modern legislation around the world has tried to introduce attenuations to this traditional principle, taking advantage of modern systems of communication such as teleconferencing and videoconferencing. One could say that such procedures are more than adequate - and even necessary - to international organizations, especially to those like the United Nations, whose services, offices and officials are spread all over the globe. Unfortunately for the Administration, there is currently no provision for attaining quorum through such technological means in the APPC Rules of Procedure and,

therefore, the requirement that the APPC reach quorum can only be fulfilled through physical presence.

IV. The present case, however, presents some peculiarities which the Tribunal feels bound to address. In fact, this is a case in which it would appear from the file that, at the commencement of the APPC deliberations, an absent member was consulted via teleconference and expressed his views to his colleagues. As the sixth participating member, his presence would have guaranteed a quorum. The quorum concern was discussed by the APPC which decided that, under the circumstances, it should accept the virtual presence of the absent member. The Tribunal recalls that it appears from the file that the same member had already verbally authorized the president of the collegial body to vote on his behalf. In view of the teleconference, that authority was never exercised and, therefore, the Tribunal need not address the issue of its legality.

According to the APPC Rules of Procedure, the collegial body should “make every effort to reach their recommendations by consensus”, failing which it resorts to the use of a secret ballot. As the extract of the summary of the APPC recommendations makes no indication of a ballot having been taken, the Tribunal concludes that it reached its decision unanimously through consensus. This is important given that one of the members had expressed his opinion openly over the telephone.

The Tribunal finds that, despite the findings made above about the law and quorum in collegial bodies and the United Nations, should it conclude that presence through teleconference does not satisfy quorum for the APPC and should it rescind the contested decision, given the precise circumstances of this case, the only result would be to place undue burden on the Administration. (See generally Judgement No. 1238 (2005).) In fact, the decision was unanimous, reached by consensus and with the participation of the required sixth member, albeit via teleconference. It is obvious that, were the proceedings to be quashed, the body would meet again and produce exactly the same decision.

V. The Tribunal notes the importance of formalities and procedures in administrative decision-making. As a matter of principle, if the Administration is to produce legal administrative decisions, all necessary formalities and procedures must be respected. However, lack of observance of formalities and procedures, or *vice de forme*, is substantively different from other grounds for review of administrative action, as it should not necessarily lead to the illegality of the decision. The Tribunal takes judicial notice of the legal tradition which transcends administrative law systems and has become a general principle of administrative law that, in reviewing the observance of formalities and procedures, account must be taken, *inter alia*, of

- a) the fact that there are formalities which are substantive and others that are accessory;
- b) the objective pursued by the formality or procedure;
- c) the factual circumstances of the particular case;
- d) the behaviour of the applicant and eventually its influence on the lack of observance; and,
- e) the practical effect that annulment of the administrative decision would have on the material outcome.

Following that general principle of administrative law, the Tribunal concludes that there is no element in the file of the impugned decision which gives the slightest indication that the decision was taken in disregard of the *substantive* rules of administrative law; that there would be no practical effect on the substance of the decision taken should the APPC exercise be repeated; and, that the factual circumstances of the method by which quorum and the decision were reached support these findings. Thus, the Tribunal recognizes that, despite the fact that a formality was not observed, it was not, under the circumstances of the given case, crucial.

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

(Signatures)




Spyridon Flogaitis
Président



Kevin Haugh
Member

Geneva, 28 July 2006

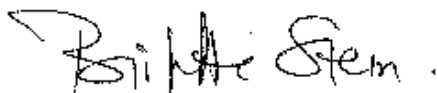


Maritza Struyvenberg
Executive Secretary

DISSENTING OPINION BY BRIGITTE STERN

In my opinion, in personnel matters, like disciplinary questions or nominations and promotions, the quorum provided for in the applicable rules is a substantive procedural requirement and the Tribunal should not have entered into conjecture of what would have happened had quorum been respected. Consequently, in my opinion the Tribunal should have confirmed the JAB's decision to the effect that the decision taken by the Administration was null and void, that the Applicant's rights of due process were violated, and that compensation should be awarded for that violation.

(Signature)

Handwritten signature of Brigitte Stern in black ink.

Brigitte Stern
Member

Geneva, 28 July 2006

Handwritten signature of Maritza Struyvenberg in black ink.

Maritza Struyvenberg
Executive Secretary