



ADMINISTRATIVE TRIBUNAL

Judgement No. 1313

Case No. 1415

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Ms. Jacqueline R. Scott, Vice-President, presiding; Mr. Julio Barboza; Mr. Kevin Haugh;

Whereas at the request of a staff member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 31 March 2005 and once thereafter until 30 April;

Whereas, on 19 April 2005, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 2 May 2005, the Applicant, after making the necessary corrections, again filed an Application, requesting the Tribunal, *inter alia*, to find:

- “(a) that [she] was a victim of a *de facto* suspension from duty with full pay;
- (b) that [she] suffered unnecessary humiliation, as well as grave damage to her reputation;
- (c) that mobility was utilized as a pretext to conceal improper motive;
- (d) that there was violation of due process;
- (e) that the Secretary-General misused the special powers granted to him by the General Assembly to outpost staff from his Executive Office”.

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 October 2005 and twice thereafter until 17 November;

Whereas the Respondent filed his Answer on 17 November 2005;

Whereas the Applicant filed Written Observations on 14 December 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] joined the United Nations on 24 August 1970 on a fixed-term appointment at the G-3 level as a Bilingual Clerk (English/French) [in the Executive Office of the Secretary-General (EOSG)]. She was given a probationary appointment on 24 August 1971 and granted a permanent appointment at the G-3 level on 1 August 1972. [At the time of the events that gave rise to these proceedings, the Applicant was serving as a Telephone Operator at the G-5 level in EOSG.] ...

Summary of the facts

... On 24 August 2001, the Chef de Cabinet of the Secretary-General wrote a memorandum to the Assistant Secretary-General for Human Resources Management stating:

‘[The Applicant] has been a staff member of the EOSG since August 1970. This is a very long time for a staff member to remain in one office, and it is strongly felt that a change would be both desirable and in keeping with the direction in which the Organization is moving with regard to staff mobility. To this end, your assistance is requested to facilitate [her] move to a new assignment effective 1 September 2001.’

This is the contested decision.

[On 1 September 2001, the Applicant left EOSG.]

... On 6 September 2001, the [Applicant] met with the Director of [the Operational Services Division (OSD), Office for Human Resources Management (OHRM),] who advised her that the most appropriate placement for her was probably either in the [Department for General Assembly and Conference Management (DGACM)] or the Department of Public Information (DPI). The [Applicant] stated it was not her intention to file an appeal ‘if a happier solution could be found that would benefit her and the Organization’.

... On 17 September 2001, the Director of OSD suggested a possible position with the United Nations Yearbook, but, after enquiry, no post was available.

... On 4 October 2001, the [Applicant, at] the request of the Director of OSD, had a meeting with the Chief of the Terminology and Reference Section[, DGACM].

[On 11 October 2001, the Applicant requested administrative review of the Chef de Cabinet's decision, as contained in his memorandum dated 24 August.]

... On 1 November 2001, the [Applicant] reported to the Terminology and Reference Section.

... On 2 November 2001, a Personnel Action was approved that placed her on a six-month assignment to DGACM. [Her assignment was subsequently extended until 31 December 2002; as from 1 January 2003, she was assigned to OSD, OHRM.]”

On 28 December 2001, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 24 August 2004. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

...

20. The Panel noted that ... the Appellant ... was not placed on Special Leave with Full Pay ... The Appellant was requested first to report to the Director of OSD and then, as from 1 November 2001, the Appellant was assigned to work with the [Terminology] and Reference [Section] of DGACM. The Panel further noted that the Appellant did not suffer any pecuniary loss, as she received her full pay and is still a staff member of the Organization. The Panel also noted that the reassignment of the Appellant was made in the same duty station and none of her entitlements have been affected. Thus, there was no reduction in salary involved in the reassignment of the Appellant.

21. From the records of this case, the Panel was not able to find any medical report or any certificate from the medical service attesting that the Appellant was under mental or emotional distress as a consequence of the reassignment.

22. The Panel also noted that, contrary to the Appellant’s belief, the decision to move her from ... EOSG was not a disciplinary measure. The Panel noted that in accordance with staff rule 1.2 (c): ‘[s]taff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations’. The Panel believed that in the present case, the Secretary-General exercised his authority within his discretionary power and did not violate any of the Appellant’s rights as [a] staff member and that the Secretary-General sought mobility of the Appellant by requesting OHRM to facilitate her move.

23. Although performance of the Appellant is not an issue at stake in the present appeal, it was disturbing for the Panel to note that, from the records of this case, the only available performance evaluation report (PER) of the Appellant was the one covering the period 1990 - 1994. The Panel urged both the Respondent and the Appellant to act in good faith and comply with the procedures of the Organization as set forth in the relevant administrative instructions on performance appraisal system and also urged OHRM to ensure that these administrative instructions are timely and correctly implemented.

24. The Panel noted that the General Assembly (...) has recognized the special circumstances of ... EOSG. The Secretary-General, taking into account the best interests of the Organization, has the power to decide to place staff members who serve in his executive office in suitable vacancies in the Secretariat.

25. The Panel further noted that the Appellant, on whom the burden of proof lies, has failed to provide proof of prejudice, ill will or improper motive.

26. Finally, the Panel was of the view that the reassignment of the Appellant was requested in a legal manner. Since the letter of appointment of the Appellant specified that the appointment was offered subject to the provisions of the Staff Regulations and Staff Rules, her appointment fell

under staff regulation 1.2. The Panel was also of the view that the Secretary-General was not called upon to obtain the specific agreement of the Appellant before reassigning her. However, the Panel felt that OHRM could have taken into account the Appellant's career aspirations when reassignment was contemplated.

Conclusion and Recommendation

27. The Panel *unanimously concluded* that the decision to move the Appellant from ... EOSG was taken within the discretion of the Secretary-General. There was no evidence of abuse of discretion, discrimination or ill will. Furthermore, no prejudice or other extraneous factors were found to violate the Appellant's rights. The Appellant did not suffer any financial loss. Thus the Panel was not in a position to recommend any financial compensation. However, the Panel also *unanimously concluded* that OHRM could have made an additional effort to find a 'happier' solution that would also have benefited the Appellant taking into consideration her career aspirations, especially taking into account her long unblemished service to ... EOSG.

28. Accordingly, the Panel *unanimously decided to recommend* that OHRM make every effort to place the Appellant in a post that would allow her ... further career development, provided that she meets the requirements for that post and taking into consideration the remaining time of service of the Appellant within the Organization before reaching retirement age."

On 28 January 2005, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows: "[t]he Secretary-General accepts the JAB's findings and recommendation ... and has requested OHRM to continue its efforts to identify appropriate placement for you as soon as possible".

On 2 May 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant was neither assigned nor transferred, resulting in a *de facto* suspension from duty with full pay.
2. The Applicant's rights of due process were violated. Moreover, mobility was used as a pretext for expelling her from EOSG and was a veil for improper motive, and the Secretary-General misused his authority to manage EOSG.
3. The Applicant suffered unnecessary humiliation and indignity, as well as damage to her reputation. Said damage to her reputation, and personnel history, has impeded her search for a new post.
4. The Applicant has suffered a loss of potential salary increments and future pension benefits.

Whereas the Respondent's principal contentions are:

1. The Applicant underwent a reassignment which fell within the Respondent's discretionary authority under staff regulation 1.2 (c).
2. There is no evidence of improper motive or abuse of discretion.
3. The Applicant has not demonstrated that she suffered any injury as a consequence of the violation of her terms of employment manifested through the contested decision.

The Tribunal, having deliberated from 7 to 22 November 2006, now pronounces the following Judgement:

I. On 24 August 2001, the Chef de Cabinet wrote to the Assistant Secretary-General for Human Resources Management requesting assistance to facilitate the Applicant's move to a new assignment effective 1 September. The Applicant had at that time enjoyed some 31 years' experience working in EOSG and the reason offered by the Chef de Cabinet in justification of the proposed move was his assertion that "[t]his is a very long time for a staff member to remain in one office, and it is strongly felt that a change would be both desirable and in keeping with the direction in which the Organization is moving with regard to staff mobility".

II. By General Assembly resolution 55/258 adopted on 14 June 2001, the Secretary-General was asked to

“develop further criteria for mobility to maximize its benefits for the Organization and to ensure the fair and equitable treatment of all staff and to avoid its possible abuse as an instrument of coercion against staff, taking into account job security in the Organization and other relevant factors, such as an appropriate incentive scheme and assurances of onward assignment”.

III. The Applicant contends that from 1 September 2001, the time of her removal from EOSG, until she commenced her proceedings before this Tribunal, she has not been assigned any meaningful or useful work; for nearly all of this period she has not been assigned any duties whatsoever; she has effectively languished in the doldrums, leading a soul-destroying, demoralizing and depressing existence insofar as her career is concerned; and, she claims, her future career and promotion prospects have been seriously impaired. She claims to have been exposed to humiliation and embarrassment as her colleagues are aware of her situation and most probably believe that she is being punished for some unidentified wrongdoing and she asserts that her transfer from EOSG is, in effect, a suspension with pay or a disguised disciplinary measure or otherwise an abuse of power.

The Respondent denies that the Applicant's transfer constituted either a suspension from duty or a disciplinary measure or an abuse of power, claiming that it was a move within the wide discretion of the Secretary-General under staff regulation 1.2 (c) and was done “in the interests of mobility”. However, he does not advance any evidence tending to establish that actual or useful duties were assigned to the Applicant for any substantial period since her said transfer occurred. He merely asserts that, whilst she was not assigned to any office or any work from 1 September until 2 November 2001, when a Personnel Action was approved that placed her on a six-month assignment to DGACM, thereafter she was assigned to work with the Terms and Reference Unit of DGACM where she worked for 14 months before she was assigned to OHRM. Rather than seek to identify the nature of the duties alleged to have been assigned to the Applicant, he has asserted that the “Director of OSD/OHRM and the Administrative Officer are on record

for the numerous attempts they have made to place the Applicant in a suitable position taking into account her work interests and career prospects”.

The Applicant asserted that she was sent to sit at an empty desk with no functions for the better part of three and a half years. In such circumstances, the Tribunal finds it surprising that the Respondent did not seek to offer any evidence to the JAB which would have meaningfully contradicted this assertion, adduce evidence as to what work was allegedly assigned to her or even explain why the Director, OSD, or the Administrative Officer of DGACM were allegedly required to make numerous attempts to place her in a position suitable to her “work interests and career prospects”. That numerous efforts were allegedly required would support the suggestion that no appropriate duties were being assigned to the Applicant and that such efforts as were being made had resulted in failure.

On a reading of the JAB report, it is difficult to determine what conclusion the JAB may have reached on the central issue as to whether the Applicant was ever assigned useful or suitable duties following her transfer. In fact, the JAB appears to have avoided this issue by rejecting her claim on a finding that her transfer was within the permissible discretion of the Respondent and by a finding that the Applicant had proved neither identifiable psychiatric or psychological injury requiring medical treatment or that she had suffered identifiable or measurable financial loss. In those circumstances, it would appear that the JAB considered it unnecessary to determine what work, if any, had been assigned to the Applicant; whether it had been useful work or work appropriate to her skills and training; or, whether her complaint that she had been left idle for almost three and a half years was well-founded. It would have been difficult for the JAB to have rejected the Applicant’s assertion on this aspect as, in reality, no countervailing evidence had been offered on behalf of the Respondent. Accordingly, the Tribunal feels constrained to find that the Applicant’s evidence must be accepted on this issue and must likewise accept her evidence that she found this to be a deeply unhappy, embarrassing and soul-destroying experience.

IV. The Applicant has not offered any evidence which would have entitled the JAB to have found that her transfer out of EOSG was a disguised disciplinary measure or that it was done with a malign motive. The Applicant would have borne the onus of establishing such motivation and she has not adduced any evidence in support thereof or justifying the drawing of a reasonable inference that this is what is likely to have occurred. (See, generally, Judgements No. 639, *Leung-Ki* (1994); No. 784, *Knowles* (1996); No. 870, *Choudhury et al* (1998); No. 1069, *Madarshahi* (2002); and, No. 1180, *Kazeze* (2004).)

V. Since the Tribunal is satisfied that the Applicant has been assigned little or no suitable or useful work since she was transferred out of EOSG, this raises an issue as to the legitimacy of the Respondent’s contention that the Applicant’s transfer was a *bona fide* exercise of the Secretary-General’s wide discretion in relation to assignment of staff members to any of the activities or offices of the Organization, and to the *bona fides* of the assertion that the transfer was effected in the interests of mobility. In the opinion of the Tribunal, when justification for a transfer such as occurred in the Applicant’s case involves an assertion

that it was made in the interests of mobility, there should be some surrounding circumstances which would tend to establish that the move was being made for the ultimate benefit of the Organization. The benefit which would ordinarily be seen from such a transfer would be that the staff member's skills or experience would be improved or enhanced to the ultimate benefit of the Organization or that it was done to provide similar beneficial experience for the staff member selected to be moved into the position vacated by reason of the said transfer. The circumstances of this case are peculiar as it is clear and self-evident that the motive was not to transfer the Applicant into a post which would enhance her skill base or her experience, as no position had been earmarked for her when the decision was made to transfer her out of EOSG. Similarly, no justification can arise to support a theory or hypothesis that the Applicant was moved out so that some other staff member could enjoy wider or better experience being placed in the position formerly occupied by the Applicant, for such a proposition would be irreconcilable with the reasons stated in the Chef de Cabinet's memorandum of 24 August 2001. When the reason advanced was that she had been a very long time in the said Office, it should be read as implying that it was the Applicant's skills and experience which were to be improved by the transfer; there is no mention that it was intended to improve the skills and experience of the person who may have been earmarked to replace her.

VI. In these circumstances, the Tribunal must conclude that the Applicant's transfer out of EOSG cannot be viewed as a legitimate exercise of the Respondent's powers to re-assign staff to different offices within the Organization based on the interests of mobility. Since there is no evidence offering any other justification, and as the Tribunal has expressly rejected the justification which has been offered, it must conclude that what occurred constituted an abuse of power. This conclusion is further reinforced by the circumstances surrounding the transfer, being that it was done at such extraordinarily short notice, quite without any consultation with the Applicant and that it was carried out when no new post had been earmarked for her.

The question now remains as to whether such an abuse of power should entitle the Applicant to compensation. The Tribunal should say at the outset that it cannot accept the JAB's reasoning that such a claim must be rejected where no identifiable financial loss has been said to have arisen and where allegations of psychological injury are not backed up with evidence that medical treatment was required. Such an approach on the latter issue would not only, in the opinion of the Tribunal, be profoundly illogical but might serve to encourage persons contemplating bringing proceedings for moral damage to unnecessarily seek medical treatment. In answer to the JAB's approach to this issue, the Applicant asserts that she is, by nature, self-reliant and slow to seek medical intervention and instances an occasion of deep personal tragedy which she went through without recourse to medical advice. The Tribunal acknowledges that very many persons enjoy a similar personality and take a similar approach. In the opinion of the Tribunal, it would be illogical and unfair to deny persons claiming to have suffered emotional stress or psychological injury compensation for moral damage due to the absence of medical evidence, and the JAB's approach is rejected in this case. The Tribunal can readily accept that many persons would suffer

deep unhappiness and upset at being required to daily attend an office for no useful purpose; for being denied the dignity and satisfaction of doing one's work; and, for the humiliation attendant on such a pointless way of passing time. The Tribunal accepts that the Applicant has suffered in the manner described by her in her Application and that she is, in the circumstances, entitled to compensation for moral injury. (See Judgements No. 997, *van der Graaf* (2001); No. 1008, *Loh* (2001); No. 1009, *Makil* (2001); and, No. 1290 (2006).)

VII. As to the Applicant's claim arising from the non-completion of her PERs, this claim is non-receivable in that it fails to comply with the provisions of staff rule 111.2 (a) as no letter was furnished to the Respondent seeking review of this matter within the prescribed time limits. Staff rule 111.2 (a) states:

"A staff member wishing to appeal an administrative decision ... shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing".

In Judgement No. 571, *Noble* (1992), the Tribunal held that "the failure by the Applicant to follow the procedure required by staff rule 111.2 after the administrative decision ... renders any further consideration of that decision by the Tribunal beyond its competence". (See also Judgement No. 1235 (2005).)

No reasons have been advanced as to why the requirements of staff rule 111.2 (a) should be waived in the instant case and, accordingly, the claim is rejected as not receivable, *ratione materiae*.

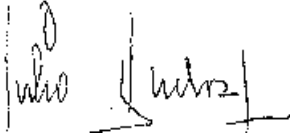
VIII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of six 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
Vice-President

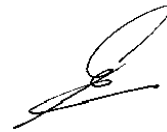


Julio Barboza
Member



Kevin Haugh
Member

New York, 22 November 2006



Maritza Struyvenberg
Executive Secretary