



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1316

Case No. 1413

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Dayendra Sena Wijewardane, Vice-President, presiding; Ms. Brigitte Stern; Mr. Goh Joon Seng;

Whereas, on 7 January 1998, a former staff member of the United Nations, filed an Application requesting the Tribunal, *inter alia*, to order “[r]einstatement of [the] Applicant to a post commensurate with her qualifications ...[; consideration of] the period between 29 April 1993 and the date of her reinstatement as special leave with full pay[; and, compensation] for the injury caused to her through the [Respondent’s] breach of commitment”. On 23 July 1999, the Tribunal rendered Judgement No. 916, finding that the Presiding Officer of the Joint Appeals Board (JAB) had erred in “improperly reject[ing] the Applicant’s papers instituting an appeal”. The Tribunal found that the JAB should have been convened to consider the Applicant’s appeal, in which she challenged the Administration’s failure to implement the decision of the Secretary-General made pursuant to an earlier JAB case, in order to determine whether the Respondent had properly implemented that decision. The Tribunal found that the Applicant had been entitled to lodge an appeal with the JAB as “[a]ny other result would tie the hands of staff who wish to challenge the Administration’s failure to implement decisions taken in their favour”. Accordingly, the Tribunal ordered that the case be remanded to the JAB for consideration on the merits.

Whereas at the request of the Applicant, the President of the Tribunal granted an extension of the time limit for filing another application with the Tribunal until 30 September 2004 and periodically thereafter until 30 April 2005;

Whereas, on 10 April 2005, the Applicant filed an Application, requesting the Tribunal to order:

- “a. extending priority [consideration] and reinstate[ment of] the Applicant to a post commensurate with her qualifications, before the Tribunal has taken a judgement.
- b. [that the] period ... between 29 April 1993 and the date of reinstatement [be considered] special leave with full pay.
- c. ... compensation for the premeditated injury caused, including unlawful termination on grounds of redundancy, premeditated delay for denial of priority of reinstatement, and efforts to block any implementation of the Respondent’s decision.”

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 September 2005 and once thereafter until 31 October;

Whereas the Respondent filed his Answer on 31 October 2005;

Whereas the Applicant filed Written Observations on 6 December 2005;

Whereas the facts in the case additional to those set forth in Judgement No. 916 read as follows:

Pursuant to the Tribunal’s order in Judgement No. 916 to remand the case to the JAB, the JAB in New York adopted its report on 18 March 2004. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

...

12. The Panel carefully reviewed the history of the present case. It felt that, had the JAB dealt with the present case in a different manner, there was a distinct possibility that the present dispute might have already been resolved.

13. The Panel regretted that the JAB Panel that reviewed the Appellant’s case in March 1993 made an open-ended recommendation, i.e., to give the Appellant ‘priority consideration for any future vacant post for which [she would be] qualified’, and that this JAB recommendation was unqualifiedly accepted ... on behalf of the Secretary-General. It was the considered view of the Panel that such a decision with no time limit had the effect of unduly tying the hands of the Administration for an undue period of time. ...

14. The Panel also regretted that in response to the Appellant’s complaint about the failure on the part of the Administration to implement the Secretary-General’s decision of 29 April 1993, the JAB Secretariat decided to reject the submission as not receivable as an appeal. A sensible approach would have been to remind the Appellant of the normal appeals procedure and advise her to write to the Secretary-General for administrative review as a first step of filing another appeal, if she wished to do so. The Panel observed that the present appeal was submitted to the JAB without the Appellant having first written to the Secretary-General for administrative review in accordance with staff rule 111.2 (a). However, it felt that, as it did not question this fundamental defect in 1997 or in 1999 after the case was remanded, the JAB should not be allowed now to raise this procedural issue as a bar to the present appeal.

15. Most regrettable was the fact that, after it was remanded to JAB in July 1999, the present appeal was not presented to a JAB panel for expeditious review as it should have been. ... [T]he JAB Secretariat allowed the case to languish for nearly five years, in disrespect of the higher authority of the Administrative Tribunal and in violation of the due process right of the Appellant, for which she was entitled to compensation. ...

16. The Panel must now grapple with the status of the Secretary-General's decision of 29 April 1993. It saw evidence tending to show that the [United Nations Disengagement Observer Force (UNDOF)] Administration had made efforts to find the Appellant a job within UNDOF in implementation of that decision. Whether the UNDOF Administration had given the Appellant the 'priority consideration' or made 'every effort to afford her fair consideration' remained a question. In any event, despite its concerns about the open-ended nature of the said decision, the Panel believed that the decision was still a valid one binding on the Administration. In view of its consideration that there should be a clearly defined time frame within which to implement the Secretary-General's said decision, and given that the requirements of the UNDOF Mission have changed over time and that the qualifications of the Appellant have undoubtedly evolved, the Panel agreed to recommend that priority consideration be given to the Appellant for appointment with UNDOF to any vacancy for which she is found to be suitable and qualified, within six months from the date ... this recommendation is accepted, beyond which the Administration's obligation in this regard should be considered as fully discharged. The Administration should be instructed to maintain well-documented evidence to prove its efforts of 'priority consideration'.

Conclusions and recommendations

17. In light of the foregoing, the Panel agreed that the JAB Secretariat had unduly delayed the consideration of the present appeal for almost five years, in disregard of the directive of the Administrative Tribunal and the due process right of the Appellant, causing her anxiety and perhaps even distress. ... [T]he Panel *unanimously recommends* that the Appellant be paid five months' net base salary at the rate in effect on the date of her separation from service.

18. The Panel also agreed that the Secretary-General's decision of 29 April 1993 is still valid despite the lapse of more than 10 years, though there is a need for a clear time frame within which to implement it. It therefore *unanimously recommends* that priority consideration be given to the Appellant for appointment to any future vacancy in UNDOF for which she is found to be suitable and qualified, within six months, beyond which the Administration's obligation set forth in the Secretary-General's decision of 29 April 1993 should be considered as fully discharged. It also *unanimously recommends* that the Administration be directed to show to the Secretary-General its efforts of 'priority consideration' with well-documented evidence."

On 14 June 2004, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

"The Secretary-General, having carefully considered the totality of the circumstances in your case, has decided to accept the Board's recommendations. Accordingly, you will be paid five months' net base salary at the rate in effect at the time of your separation from service. In addition, for a period of six months, starting from the time you will receive this letter of decision, UNDOF Administration will give you priority consideration for appointment to any future vacancy in UNDOF for which you are found to be suitable and qualified."

On 10 April 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent did not give her priority consideration, despite the fact that there were a number of vacancies for which she was suitable.
2. The Respondent is not willing to re-employ her.
3. She is entitled to compensation for the fact that she has had to fight for re-employment for more than 12 years.

Whereas the Respondent's principal contention is:

The Application is not receivable as the Applicant did not request administrative review of the Administration's alleged failure to take appropriate measures to implement the Secretary-General's decision, as required by staff rule 111.2 (a), nor was the issue submitted to the JAB, as required by article 7 of the Statute of the Tribunal.

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

I. The case before the Tribunal dates back to 1992, when the Applicant was separated from service following the abolition of her post.

II. The Applicant joined the United Nations on 7 September 1981 as a staff member of UNDOF. She then received several contract extensions and was promoted to GS-4 in 1987. UNDOF was relocated but the Applicant refused to leave the headquarters in Damascus and accept the new post offered to her. She later changed her mind and sought to accept the post on 22 June 1992. However, she was informed that it had already been filled. She was separated from service on 13 July 1992.

III. The Applicant contested her separation from service before the JAB, which submitted its report on 22 April 1993. The report recommended that the Applicant's name should be retained on the UNDOF roster and that she should be given priority consideration for appointment to any future vacant post for which she was qualified. The Secretary-General accepted these recommendations on 29 April. Over the next few years, the Applicant made every effort to obtain fulfilment of these commitments by the Administration. For example, she wrote to the Secretary-General on 24 August 1993 to request him to implement his own decision. In its reply of 14 December, the Administration simply stated that she was duly considered but that an interview had not been considered necessary because she was sufficiently known:

"In the recruitment process, [the Applicant's] name was always among the candidates for the above-mentioned clerical positions. The Chiefs of Sections concerned were consistently requested to interview and as necessary test the candidates for the respective positions with due consideration given to the case of [the Applicant]. Since the Section Chiefs concerned are well familiar with [the Applicant], they did not find it necessary to call her in for the interview. On the

basis of her personal qualities, as compared to the other candidates for the positions, [the Applicant] regrettably was considered to be less qualified.”

The letters exchanged between the Applicant and the Administration seem to indicate that many posts for which she was qualified were filled between 1993 and 1996: 30 posts, according to the Applicant; 12 posts, according to the Administration.

IV. Following further correspondence, the Applicant eventually filed another appeal with the JAB on 22 April 1997 against the failure to implement the Secretary-General’s decision of 29 April 1993. The JAB did not meet and its Presiding Officer informed the Applicant on 24 July that the Secretary-General’s 1993 decision could not be considered an administrative decision under Chapter XI of the Staff Rules and therefore could not be challenged. The Applicant therefore filed an Application with the Tribunal in respect of the JAB’s refusal to consider her case.

V. On 23 July 1999, the Tribunal rendered Judgement No. 916 in which it found that the JAB had made incorrect assumptions in respect of the Applicant’s case and that what she was challenging was in fact the Administration’s inaction in relation to the implementation of the Secretary-General’s 1993 decision. The Tribunal therefore remanded the case to the JAB for consideration on the merits.

VI. The JAB submitted a second report on 18 March 2004, five years after the Tribunal’s decision ordering the Board to consider the case. Three months later, on 14 June, the Secretary-General accepted the Board’s finding that the Applicant should be granted priority consideration for re-employment for a period of six months as well as five months’ salary to compensate for the unacceptable delay in dealing with her case. The Secretary-General’s letter to the Applicant states that “any recourse in respect of [this decision] should be addressed to the Administrative Tribunal”.

VII. Accordingly, considering that the Administration did not comply with the obligation to give her priority consideration for re-employment during the six-month period, the Applicant filed an Application with the Tribunal on 10 April 2005.

VIII. The Administration claims that the Application is not receivable on the ground, firstly, that the Applicant did not comply with staff rule 111.2, which provides that a case must be submitted first to the Secretary-General and then to the JAB. The Respondent holds that the Applicant failed to take these two preliminary steps and therefore is not entitled to file an Application with the Tribunal. The Administration also claims that the Application is not receivable on the ground that it was submitted after the two-month time limit. The Administration’s obligation to retain the Applicant on the priority list was valid only until 18 December 2004; however, the Applicant did not file her Application until 10 April 2005.

IX. The Tribunal will initially consider whether the Application is receivable by reviewing the various steps taken by the Applicant.

First, it will consider whether the Applicant completed the first stage in any appeals process, namely whether she requested administrative review in accordance with staff rule 111.2 (a) or whether, as contended by the Administration, she did not take that step at any time during the appeals process. To paraphrase the observation of the Tribunal that heard the Applicant's first Application, "[t]he Tribunal notes that the Applicant tried, on more than one occasion, to request the Secretary-General to review the alleged failure to implement his decision". (Judgement No. 916, *ibid.*, para. VI.) The Tribunal is satisfied that the documents in the file show that the Applicant did meet the requirements of the first stage in any appeals process, namely that she sent numerous letters to the Secretary-General requesting a review.

X. On the other hand, it is not contested that the Applicant failed to go back for a third time to the JAB and thus failed to comply with the requirements of article 7 of the Statute of the Tribunal, according to which:

"An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the Staff Regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal".

Although direct recourse to the Administrative Tribunal is not justified in this case, the Tribunal feels bound to emphasize, however, that the Applicant may have been misled by the complexity and multiplicity of the steps she had already taken - recourse to the JAB, recourse to the Tribunal and further recourse to the JAB - and, especially, by the Administration's letter of 14 June 2004, informing her that any recourse "in respect of" this decision should be addressed directly to the Tribunal. It is not illogical to think that recourse relating to failure to implement a decision might be seen as recourse "in respect of" that decision. The Tribunal is therefore of the opinion that, while it is indisputable that the Applicant did not complete the second stage in the recourse procedure, namely submission of her application to the JAB, and incorrectly submitted her dispute directly to the Tribunal, she must be considered to have been misled by the 14 June letter.

XI. The Tribunal must next consider the Administration's claim that the Application is time-barred:

"In addition, the Respondent notes that, not only did the Applicant fail to follow the normal appeals process set forth in the relevant rules of the Organization, but she also ignored the time-limits in which she had to do so. Indeed, pursuant to the decision, UNDOF was to afford to the Applicant 'priority consideration for the appointment to any future vacancy in UNDOF for which [she was] found to be suitable and qualified' for a period of six months, starting from the time she received the decision ... The Applicant received the decision on or about 18 June 2004 ... Therefore, the obligation of UNDOF to give the Applicant such priority consideration lapsed on or about 18 December 2004. The Applicant waited until 10 April 2005, some 4 months later, to

lodge her appeal. Pursuant to staff rule 111.2 (a) cited above ... the Applicant should have submitted her request for review within 2 months of the Administration's alleged failure to implement the decision, that is, on or about 18 February 2005. She failed to do so. Accordingly, her Application must fail on this ground too."

The Tribunal cannot accept this reasoning, for several reasons. First, it should be noted that the Administration sent a letter to the Applicant on 10 December 2004, in response to a request she had addressed to it for information on progress in the implementation of the 14 June decision, confirming that she would be included in the short list of candidates "in future, when UNDOF has any openings for [an] administrative post". Without necessarily interpreting this, as the Applicant did, as a formal extension of the time limits within which the Applicant should receive priority consideration, clearly the wording used implies that on 10 December the Administration considered that it had obligations extending beyond the following eight days, in other words beyond 18 December. The Tribunal also notes that it appears from elements in the file that the first action to implement the Secretary-General's decision of 14 June was a letter dated 27 October 2004, when two-thirds of the period of time for priority consideration of the Applicant had elapsed. Last, but not least, in order to consider a possible time-bar, account should be taken not of the two-month time limit for submission to the JAB (invoked by the Respondent) but of the time limit for submission of an application to the Tribunal, which is three months, since that was the procedure on which the Applicant had embarked, albeit in error. However that may be, the Tribunal finds that, in view of the mind-boggling amount of time taken by the Administration to deal with this case, it is appropriate in this connection to invoke article 7, paragraph 5, of its Statute, according to which "(i)n any particular case, the Tribunal may decide to suspend the provisions regarding time limits" and to consider that the Application should not be deemed to be time-barred. (See Judgement No. 715, *Thiam* (1995).)

XII. The Tribunal therefore considers that this case should be submitted to the JAB in order for it to examine, in light of all the facts contained in the file, whether the Applicant was given priority consideration for the posts for which she was qualified, in accordance with the commitment made by the Administration in 2004. The Tribunal therefore remands the case to the JAB, pursuant to article 10, paragraph 2, of its Statute:

"Should the Tribunal find that the procedure prescribed in the Staff Regulations or Staff Rules has not been observed, it may, at the request of the Secretary-General and prior to the determination of the merits of the case, order the case remanded for institution or correction of the required procedure. Where a case is remanded, the Tribunal may order the payment of compensation, which is not to exceed the equivalent of three months' net base salary, to the applicant for such loss as may have been caused by the procedural delay."

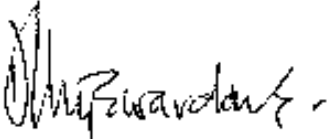
The Tribunal, finding as previously stated, that the Applicant may have been misled by the letter of 14 June 2004 addressed to her by the Administration and that the further delay in this excessively long procedure is not wholly ascribable to her, decides to award her compensation equal to three months' net

base salary. (See generally Judgements No. 98, *Gillman* (1966); No. 157, *Nelson* (1972); and No. 184, *Mila* (1974).)

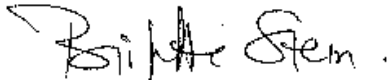
XIII. Accordingly, without entering into the substance of the case, the Tribunal orders:

1. That the case be remanded for institution of the correct procedure; and,
2. The Respondent to pay the Applicant compensation of three months' net base salary at the rate in effect at the date of Judgement for loss resulting from the procedural delay, 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.

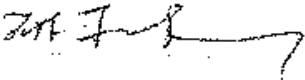
(Signatures)



Dayendra Sena Wijewardane
Vice-President

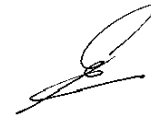


Brigitte Stern
Member



Goh Joon Seng
Member

New York, 22 November 2006



Maritza Struyvenberg
Executive Secretary