



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1323

Case No. 1397

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Mr. Julio Barboza; Mr. Goh Joon Seng;

Whereas at the request of a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal extended to 31 December 2004 the time limit for the filing of an application with the Tribunal;

Whereas, on 3 December 2004 and on 1 February 2005, the Applicant filed applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 4 March 2005, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read as follows:

“II PLEAS

... [The Applicant] requests the following measures to be taken ...

(a) For the embarrassment and humiliation caused by the improper and unwarranted acts of gender harassment by one of ... UNICEF's senior managers, resulting in a hostile working environment that caused mental distress and embarrassment to [the Applicant], an amount of US\$ 35,000. ...

(b) For failure to follow its own rules concerning the placement of staff from abolished posts on new or available unencumbered posts without precondition ... a monetary award of 75% of [her] then salary for three years. ...

(c) Compensation, in the form of punitive damages because [UNICEF] caused further damages to the [Applicant] by failing to follow general administrative rules applicable to timely replies both to [her request for administrative review] and for its extremely late reply to ... the [Joint Appeals Board (JAB)]. Such compensation should be ... equivalent to 25% of [her] last salary for ... two years.

(d) Reimbursement for legal costs amounting to US\$ 10,000 ...”

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 August 2005 and periodically thereafter until 21 November;

Whereas the Respondent filed his Answer on 8 November 2005;

Whereas the Applicant filed Written Observations on 4 March 2005 and, on 27 January 2006, the Respondent commented thereon;

Whereas, on 21 November 2006, the Tribunal decided to postpone consideration of this case until its next session;

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] joined UNICEF, Rabat, Morocco, in October 1988 on a series of short-term temporary appointments with respective breaks in service until 31 January 1991. [The Applicant was granted further extensions of her fixed-term appointment and on] 1 April 1992, she was promoted to Project Assistant, Community Development, at the GS-4 level. On 1 December 1996, she was promoted to Operations Assistant, at the GS-5 level. She continued to receive extensions of her fixed-term appointment until 31 December 2001, when she was separated upon the abolition of her post.

Summary of the facts

... On 11 April 2001, ... [the] Operations Officer, UNICEF, Rabat, e-mailed the Country Programme Management Plan (CPMP) to all staff at the UNICEF Rabat Office, as required by UNICEF Executive Directive, ‘Budget Guidelines for 1998-1999’, CF/EXC/1997-003, dated 2 October 1997, along with job descriptions for posts recommended within the CPMP.

... In May 2001, the Programme Budget Review Committee (PBR) met. The Report ‘Technical Review Team (TRT) Comments for Regional Programme Budget Review Meeting, Amman’ dated May 2001, noted that during the PBR meeting, as recommended by the TRT, [a number of posts, including that of the Applicant, were abolished].

... At the same meeting, the PBR created and reclassified 12 posts. Three of the posts relevant to this case were as follows: (1) GS-4 Administrative Assistant; (2) GS-5 Project Assistant; and (3) GS-6 Administrative/Human Resources Assistant. Of these three posts, the [Applicant] chose to apply only for the GS-6.

...

... On 28 May 2001, the Representative sent a letter to the [Applicant] informing her that her post would be abolished effective 31 December ..., along with a copy of Chapter 18 of the [UNICEF] Human Resources Policy and Procedure Manual. The letter informed the [Applicant] that the Rabat Office would assist her in finding a new position as required by Chapter 18 of the ... Manual. The letter also advised the [Applicant] that, in accordance with [the relevant] administrative instruction ... she was eligible to receive an additional 50% termination indemnity.

... On 29 May 2001, the posts created from the PBR meeting were advertised with an application deadline of 15 June ...

...

... The Selection Advisory Panel (SAP) met on 18 June 2001 to discuss the applicants for the advertised posts.

... On 28 June 2001, [a] Regional Human Resources Officer arrived at the Rabat Office and held interviews and tests for the GS-6 post. On 29 June ..., [he] prepared a memorandum to the Representative and to the Appointment and Placement Committee (APC) regarding the interviews conducted the previous day. He recommended an internal candidate for the GS-6 post other than the [Applicant].

... On 9 July 2001 the APC meeting was held. The APC agreed with ... the recommendation [of the Human Resources Officer]. The [Applicant] was informed on 9 August that she was not selected for the GS-6 post.

... In a letter dated 3 September 2001, the [Applicant] wrote to the Executive Director alleging irregularities in the selection of the final candidates for the posts created by the PBR in May 2001. Among her allegations she claimed that the interview process was deficient and that the 'Representative amply met the established criteria of exercising gender discrimination against [her]'.

... On 24 September 2001, ... [the] Director, Division of Human Resources (DHR), initiated an investigation, in accordance with [the] administrative instruction on 'Sexual Harassment in the UNICEF workplace', CF/AI/1994-005, dated 11 March 1994.

... On 26 September 2001, the Representative sent the [Applicant] a letter informing her that she would be separated from service due to the abolition of her post. The letter included an option [whereby] the [Applicant] would receive an additional 50% termination indemnity if she did not contest the separation.

... By a letter dated 25 October 2001, [the Applicant was advised that an initial investigation would be conducted into her allegations] ...

... The investigation was conducted by [a female Regional Human Resources Officer, Abidjan, Côte d'Ivoire, who had been had been appointed as the Investigator] from 8 to 11 November 2001. In the report dated 7 December ..., [the Investigator] found that the Representative's 'behaviour would not constitute sexual harassment within the context of ... CF/AI/1994-005'. [She] also found that the [Applicant] was 'fully and fairly considered for [the] post but was not found to be the best candidate'. In the report[, she] also discussed the [Applicant]'s reasons for not applying for any post other than the GS-6 post ...

... On 11 December 2001, ... UNICEF, sent the [Applicant] a letter with [the investigation] report. ... [The Applicant was informed] that '[b]ased on the Investigator's report and conclusion, with which we concur, we have decided to take no further action in this matter'.

... On 19 December 2001, ... [UNICEF], sent the [Applicant] an e-mail informing her that she must take a decision as to what kind of termination indemnity she would like to receive. If the [Applicant] wanted the additional 50% termination indemnity, she would have to accept that she would not contest the separation.

... On 31 December 2001, the [Applicant] replied to [this] e-mail informing UNICEF that: 'I decline to sign under duress any document which touches the subject of my future rights under any legal action that I may wish to lodge'.

...”

On 10 February 2002, the Applicant sent a request for administrative review to the Executive Director, UNICEF, claiming, inter alia, that the recruitment process for placement of staff whose posts have been abolished had not been followed.

On 13 May 2002, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 19 May 2004. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

...

44. The Panel noted that the Appellant ‘is not contesting the separation from service per se’, but rather bases her appeal ‘upon a pre-condition of sexual harassment which had not been properly adjudicated’.

45. The Panel then considered the contention made by the Appellant, that she was subjected to sexual harassment in the form of improper advances which created for her a hostile working environment. The Panel noted ... that the Appellant raised this issue only on 3 September 2001, five months after she received notice that her post would be abolished and after she received the letter informing her that she was not selected for the GS-6 post for which she had applied. The Panel did not find from the records evidence to overrule the findings of the Investigator and noted that UNICEF Administration acted with diligence when it took immediate action to investigate the alleged sexual advances raised by the Appellant.

46. The Panel noted that the Investigator indeed found some of the actions of the Representative to fall under the ‘Caution’ category. The Panel found that the Investigator gave proper weight to the evidence presented to her. The Panel agreed with the Investigator’s findings that, while these actions are not tantamount to sexual harassment, they nevertheless reflected poor judgement on the part of the Representative, were inappropriate and should have been avoided. The Panel noted that such incidents would surely warrant counseling and disciplinary measures, if repeated. [The] UNICEF Administration, if it has not done so, should take appropriate action in this regard.

47. The Panel turned to consider the contention made by the Appellant that, once the decision was taken to abolish her post and to separate her from service, [the] UNICEF Administration failed to follow the provisions and rules relating to placement of persons whose posts had been abolished. ...

48. From the records, the Panel recognized that the Appellant was asked by the Regional Human Resources Officer ‘[i]f she was not successful in obtaining the GS-6 for which she applied, whether or not she would accept to be considered for the GS-5 or GS-4’. Her response was unequivocally ‘no’ as she felt that GS-4 would be like ‘going-back’ in terms of career

development and the GS-5 was very similar to what she did before. She was more interested in career development, which meant for her 'growing and learning more'. ...

49. With regard to the selection process of the GS-6 post, the Panel found that the recruitment procedures were adhered to. ...

50. Then the Panel considered the contention made by the Appellant that she was denied the payment of an additional 50% indemnity that she had been informed she would receive in accordance with the provisions of the applicable UNICEF regulations. ... It noted that in paragraph 3 of Annex 'C' of [CF/AI/1999-007] it is clearly provided that: '[i]n order to receive the additional 50%, the staff member must agree in writing not to contest the action of the separation'. The Panel ... noted that the Appellant ... chose not to do so. Therefore, the UNICEF Administration was correct when it did not pay the Appellant the additional 50% termination indemnity.

Conclusion and recommendation

51. In the light of the foregoing, the majority of the Panel *concluded* that: a) the alleged sexual advances as sustained by the Representative did not amount to sexual harassment ...; b) the Appellant was fully and fairly considered for the post to which she had applied ...; and c) it was within UNICEF's authority to withhold the additional 50% termination indemnity.

1. 52. Accordingly, the majority of the Panel *decided* to make no recommendation in favour of this appeal."

In a dissenting opinion, the third member of the Panel concluded as follows:

“Conclusion[s] ...

38. ...

(a) [T]he alleged sexual advances by the Representative did amount to sexual harassment within the provisions of administrative instruction CF/AI/1994-005 and the Investigator did not give proper weight to certain conduct of the Representative. ...

(b) [W]ith regard to the GS-6 post, ... I conclude that the Appellant could not have been and/or may not have been fairly considered for the post ...

(c) The Administration failed to make good faith efforts to assist the staff member and did not consider [her] for all available suitable vacant posts ...

...”

On 11 January 2005, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General accepted the majority JAB Panel's findings and conclusion and had, accordingly, decided to take no further action on her case.

On 4 March 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The conclusion of the Investigator that the conduct in question of the Representative was not sexual harassment was incorrect and he should have been admonished.

2. UNICEF failed to follow its own rules and did not make concerted good faith efforts to assist the Applicant in finding another suitable position.

3. The JAB erred in its conclusion concerning the Organization's responsibility to assist staff members whose posts have been abolished to locate other posts commensurate with their experience and capabilities. The burden of proof is on the Respondent to show that such good faith efforts have been made.

4. The Applicant was not fairly considered for the GS-6 post.

Whereas the Respondent's principal contentions are:

1. The Applicant's allegation that she was subjected to sexual harassment is unfounded. The Applicant is not entitled to the payment of damages.

2. The Respondent complied with established policies governing the placement of staff on abolished posts.

3. The decision to abolish the Applicant's post complied with established rules and procedures.

4. The Respondent complied with the procedures set forth in Chapter 18 of UNICEF's Human Resources Policy and Procedure Manual.

5. The Applicant was fully and fairly considered for the post to which she applied. The Respondent fully respected her due process rights. The decision not to select her was not tainted by improper motivation, prejudice, undue influence or by other extraneous factors.

6. The Applicant is not entitled to be awarded compensation as a result of administrative delays.

The Tribunal, having deliberated from 26 October to 21 November 2006, in New York, and from 6 to 27 July 2007, in Geneva, now pronounces the following Judgement:

I. There are two basic issues in this case, as alleged by the Applicant, namely: (1) that she was subjected to sexual harassment by the Representative; and, (2) that the Administration failed to comply with established procedures governing the placement of staff on abolished posts, and failed to fully and fairly consider her for the GS-6 post to which she had applied.

II. Both issues seem to be closely connected. The Tribunal takes note of the fact that the Applicant did not complain of harassment until 3 September 2001, that is, five months after she received notice that her post would be abolished and well after she had been notified - on 9 August of the same year - that she had not been selected for the GS-6 post. The Tribunal wonders whether the allegations of sexual harassment were made only to strengthen her position with regard to her other allegations.

III. The Tribunal first turns its attention to the alleged failure on the part of the Administration to fully and fairly consider her for the GS-6 position and, generally, its failure to follow the provisions and rules

relating to placement of persons whose posts have been abolished, that is, to put her forward as a candidate to be reviewed, along with other candidates, for suitable core and non-core posts.

IV. On 28 May 2001, the Representative notified the Applicant that her post would be abolished, effective 31 December, and informed her that the Rabat Office would assist her in finding a new position, as required by the UNICEF Human Resources Policy and Procedures Manual. The following day, three newly created posts (a GS-4, a GS-5 and a GS-6) were advertised, with an application deadline of 15 June.

This is a crucial moment for the judgement of the case. The Applicant competed only for the GS-6 position, having made it publicly known that she was not interested in either of the two other posts for which she could apply. She was approached by UNICEF's management on various occasions, namely, by the Regional Human Resources Officer, Amman, the Operations Officer and the Representative, who suggested that she apply for the other positions as well. Clearly, the Applicant refused to do so, on the grounds that only the GS-6 post would satisfy her.

V. The Tribunal notes the position taken by the dissenting member of the JAB and wishes to highlight one aspect of his opinion, namely that a staff member on an abolished post must *automatically* be considered by the Administration for all available suitable posts. In the present case, as stated above, the Applicant was asked, several times, whether she was interested in applying for the GS-4 and GS-5 posts, but she clearly manifested her total lack of interest in those positions, apparently deeming one of them, the GS-4, as "going-back" in terms of career development and the GS-5 as "very similar to what she did before". The Tribunal cannot accept such a narrow and rigid interpretation of the rule in question as was advanced in the dissenting opinion: moreover, the Tribunal fails to see how the Administration could be held accountable for not respecting the wishes of a staff member. Should a staff member be made to apply for a position against his or her own will? The Tribunal is of the opinion that, in the present case, the word "automatically" must be construed as something like "invariably" or "in all cases", as meaning that it is the duty of the Administration to make good faith efforts to find a suitable, alternative position for a staff member whose post is being abolished, which the Applicant admits the Administration did. (See Judgement No. 679, *Fagan* (1994).)

VI. Unfortunately for the Applicant, she was not selected for the GS-6 post. The Tribunal observes that the skills, the qualifications, the strengths and the weaknesses of both candidates were evaluated in a careful, thorough, detailed and meticulous manner, and that the selected candidate was deemed to possess the qualifications that were decisive for the successful performance of the functions of the post in question. Furthermore, her position was not so much different from that of the Applicant, in that her post had also been abolished, but she had higher priority: she had a permanent position, regarding which staff rule 109.1 (c) provides that "in connection with the abolition of posts and reduction of staff ... staff members with permanent appointments shall be retained in preference to those on all other types of appointments". Moreover, the selected candidate had considerably more seniority (21 years against 13 of the Applicant).

The Tribunal is satisfied that the objective elements of priority in this case had been completely and satisfactorily taken into account by the APC, so that any suspicion of extraneous motivation or undue process of law may be alleviated.

As for the remaining issues, i.e. the comparison of the merits of different candidates or the evaluation of the standard of performance or relative efficiency of staff members, the Tribunal has repeatedly decided that it will not substitute its own judgement for that of the Administration. In Judgement No. 470, *Kumar* (1989), para. IV, the Tribunal stated that:

“... it cannot substitute its judgement for that of the Administration concerning the standard of performance or efficiency of a staff member. However, the Tribunal is competent to pass judgement upon applications alleging non-observance of pertinent regulations and rules or alleging prejudice or improper motivation”,

and, in Judgement No. 1108, *Asombang* (2003), it recalled that

“[t]he Tribunal has consistently held that it will not substitute its judgement for that of the relevant bodies with regard to the performance or relative efficiency of candidates for selection to a post. Indeed, all choices are invariably subjective to some extent (see ... *Fagan (ibid.)* para. XI). The Tribunal has consistently held that ‘qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy’ (see Judgement No. 1056, *Katz* (2000), para. IV).”

VII. In order to complete its review of the legality of the selection, the Tribunal must now consider the Applicant’s allegation that she was a victim of “gender discrimination”. This allegation was somehow changed into that of “sexual harassment” when the Administration ordered an investigation of that matter and the Applicant did not object to it, thus transforming the nature of the accusation. It may be argued that somebody who is subjected to sexual harassment suffers, at the same time, from discrimination, but the Tribunal wishes to make the point that, at the pertinent time, the Applicant went from invoking “gender discrimination” to claiming that she was sexually harassed. Perhaps that was a deliberate decision, since the Tribunal fails to see how there could be gender discrimination between two persons of the same sex, or gender, as were the Applicant and the person selected for the GS-6 post.

The link between the alleged “sexual harassment” and the Applicant’s non-selection for the G-6 post is that the Applicant considers it “difficult to believe that, subjectively, in the interviewer’s mind, he was not aware of the harassment rumours and that local management clearly did not wish [the Applicant] to remain in the organization”. The simple reading of this allegation is sufficient to show what a fragile piece of evidence this is: it is a mere supposition, not based on any proven fact. Moreover, the Respondent affirms that he deliberately selected an external Human Resources Officer - not based in UNICEF’s Morocco Office – to interview the Applicant for the GS-6 post.

VIII. The Tribunal notes that the Administration took proper and rapid action to look into the Applicant's allegations of harassment, immediately ordering an investigation in the matter, to be conducted by a female Human Resources Officer from Abidjan, Côte d'Ivoire.

The Investigator concluded that, even if some actions of the Representative were in bad taste, or expressed unwanted humour, they could be interpreted as being more in the category of "caution" than sexual harassment within the context of administrative instruction CF/AI/1994-005. In this regard, the Tribunal notes that the JAB

"agreed with the Investigator's findings that, while these actions are not tantamount to sexual harassment, they nevertheless reflected poor judgement on the part of the Representative, were inappropriate and should have been avoided. The Panel noted that such incidents would surely warrant counselling and disciplinary measures, if repeated. [The] UNICEF Administration, if it has not done so, should take appropriate action in this regard."

The Tribunal also notes that the Investigator found contradictory interpretations of behaviours and words on the part of the interviewees, the Representative and the Applicant; that some of the statements made by the Applicant were found not to be accurate by the witnesses; and, that for some of the episodes cited by the Applicant there were no witnesses at all.

The Tribunal is satisfied that the investigation was properly conducted, and that the Investigator was a good observer of people's psychological motivations and reactions. The Tribunal has no cause to doubt the soundness of the Investigator's conclusions, and concurs with them.

IX. The Tribunal would now like to consider the remainder of the Applicant's pleas, namely that she be compensated for undue administrative delays and that she be awarded US\$ 10,000 in legal costs.

As for the delays, the time elapsed between the Applicant's presentation to the JAB and the Respondent's notification to the Applicant of his decision was considerable, but not really unusual in the present state of administrative justice in the United Nations. In fact, the Tribunal notes the recent initiative in the Organization to bring about important reform of the structure and functioning of the administration of justice system, which will, undoubtedly, endeavour to correct such flaws, so that justice may be rendered in shorter periods of time. To date, the Tribunal has only criticized the Administration when the delays could be considered extraordinary, or inordinate, or some such qualification. The Tribunal recalls its jurisprudence in Judgement No. 1275 (2005):

"XIV. Finally, the Tribunal turns its attention to the allegation that there was undue delay by the JAB in deciding the case. The Applicant alleges that the three-year period during which this matter was before the JAB was excessive and therefore violated his rights of due process. The Tribunal agrees and finds that the Applicant is entitled to compensation in this regard."

The Tribunal is satisfied such an inordinate delay has not occurred in the present case.

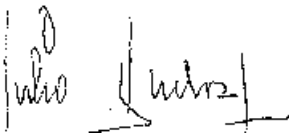
X. As to the request for legal costs, the Tribunal will follow its already well-established jurisprudence of denying costs unless some extraordinary circumstance intervenes, which is not the case here. As the Tribunal held in Judgement No. 953, *Ya'coub* (2003), "the question of awarding costs, which it is the Tribunal's practice hitherto to do only in exceptional circumstances, does not arise". The claim for costs is, therefore, rejected.

XI. For the foregoing reasons, the Application is rejected in its entirety.

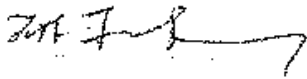
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Spyridon Flogaitis
President

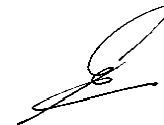


Julio Barboza
Member



Goh Joon Seng
Member

Geneva, 27 July 2007



Maritza Struyvenberg
Executive Secretary