



Administrative Tribunal

Distr. Limited  
28 September 2007

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1326

Case No. 1402

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. Goh Joon Seng;

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 30 June 2004 and twice thereafter until 31 October;

Whereas, on 21 October 2004, the Applicant filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 22 March 2005, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read as follows:

**“II. PLEAS**

... [T]he Tribunal is respectfully requested:

- (a) To order that the appropriate compensation be paid [to] the Applicant for the damage resulting from having unjustly been denied proper consideration for the P-4 post.

This damage includes:

1. A loss in salary and in retirement pension which would cumulate to over 100,000 dollars over his lifetime;
2. The moral injury caused by the loss to his professional reputation;
3. The emotional frustration and aggravation of being the victim of unfair treatment.

- (b) To rescind administrative instruction ST/AI/412, of 5 January 1996, and other similar instructions that legitimate sex discrimination instead of promoting equal treatment.”

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 once thereafter until 30 September;

Whereas the Respondent filed his Answer on 16 September 2005;

Whereas the Applicant filed Written Observations on 11 November 2005;

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

Whereas, on 21 December 2006, the Tribunal put a question to the Respondent and, on 11 January 2007, the Respondent provided its answer thereto;

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

**“Employment history**

... [The Applicant] was recruited in October 1984 on a two-year fixed-term appointment ... as a Population Affairs Officer (P-3) in the Estimates and Projection Section of the Population Division (PD). [His contract was subsequently extended and he was granted a permanent appointment.] ...

**Summary of the facts**

... On 7 July 2000, the [Applicant] submitted his application for the [P-4 level] post of Social Affairs Officer ..., Division of Social Policy and Development (DSPD), which - like the PD - was in the Department of Economic and Social Affairs (DESA).

... The Departmental Panel convened to consider candidates for the post met on 15 November 2000 and reported its recommendation to [the] Under-Secretary-General, DESA, on 24 November ... The Panel reported that the Programme Manager ... had recommended [a female candidate] for the post and had had the opportunity to explain to the Panel why he considered [her] qualifications superior to the [Applicant]'s. The Departmental Panel, however, recommended that the [Applicant] be promoted to the post. The Departmental Panel considered that [he] met all the qualifications for the post and that he should be recommended for promotion in view of his long seniority and qualifications. The Departmental Panel noted the lack of seniority of [the female candidate] and considered that 'she would have plenty of time for promotion in the future'.

... DESA nevertheless recommended [the female candidate]'s promotion to the Appointment and Promotion Committee (APC), and, on 11 January 2001, the APC endorsed the departmental recommendation. Information Circular ST/IC/2000/17, issued on 15 February 2001, announced [her] promotion.”

On 2 March 2001, the Applicant requested the Secretary-General to review “the administrative decision process, which resulted in my being deprived of a promotion to the post of Social Affairs Officer”.

On 7 May 2001, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 9 December 2003. Its considerations and recommendation read, in part, as follows:

**“Considerations**

...

13. ... The Panel found that the Appellant had failed to provide sufficient and compelling evidence to substantiate his claims that extraneous factors and misinformation affected the promotion process or that he was denied due process.

**Recommendation**

14. The Panel makes no recommendation with respect to this appeal.”

On 14 January 2004, the Officer-in-Charge, Department of Management, transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General agreed with the JAB’s findings and conclusions and had decided to accept its unanimous recommendation and to take no further action on his appeal.

On 22 March 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. His rights for due process were violated because the entire promotion exercise was pre-arranged and the facts were distorted so that the female applicant would be promoted, irrespective of the qualifications of the other candidates and her own lack of qualifications.
2. Article 101 (3) of the United Nations Charter and staff regulations 1.1 (d) and 4.2 were violated because competence was not used as a basis for promotion.
3. General Assembly resolutions 2480 (XXIII) B, of 21 December 1968, and 50/11 (para. 3), of 15 November 1995, regarding the use of official languages were violated.
4. Article 8 of the United Nations Charter and staff regulation 4.3 were violated because there was discrimination based on sex in the selection of a staff member for promotion.
5. Paragraph 15 of administrative instruction ST/AI/413 of 25 March 1996, entitled “Placement and Promotion”, which stipulates that special attention should be paid by the appointment and promotion bodies to staff members who have repeatedly applied for vacant posts for which they are qualified and have not been selected, was violated.

Whereas the Respondent’s principal contentions are:

1. The Applicant was not entitled to promotion to the P-4 level.
2. The decision to promote another candidate did not violate the Applicant’s due process rights and was devoid of any extraneous motives.
3. The special measures for the achievement of gender equality are in conformity with the General Assembly resolutions and article 8 of the Charter.

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

I. The Applicant seeks review of a decision not to promote him from a P-3 position as Population Affairs Officer to a P-4 position as Social Affairs Officer. He alleges that the promotion exercise was pre-arranged and contrived and that facts were misrepresented by the Administration in order to ensure the selection of the successful candidate, and that the choice of the Secretary-General to promote this successful candidate violated his due process rights and his right to be fully and fairly considered for the P-4 position. Specifically, the Applicant alleges that the successful candidate did not possess the requisite number of years of experience as required by the vacancy announcement for the position, that the experience she did have was overstated and misrepresented in order to portray her as the most qualified candidate, and, that she lacked proficiency in other official languages as required by General Assembly resolutions 2480 (XXIII) B and 50/11 in the context of promotions. He further alleges that the choice of the successful candidate, a woman, was reverse discrimination, because it was made based on gender, rather than on merit, and that the appointment and promotion bodies failed to pay special attention to his candidacy, in accordance with ST/AI/413, which is allegedly applicable in the case of candidates like himself, who had repeatedly applied for posts for which they were qualified and for which they have not been chosen. All of these allegations support the Applicant's contention that he was not fully and fairly considered.

II. The Respondent contends that the promotion exercise was conducted in accordance with all relevant rules and regulations, in good faith and without extraneous motives. He also contends that the Applicant was fully and fairly considered but that the candidate ultimately chosen for the position was more qualified.

III. In the face of allegations that an Applicant has not been fully and fairly considered in the context of a promotion exercise,

“[t]he Tribunal's task is to determine whether the Respondent's decisions not to promote the Applicant were a proper exercise of its discretion or whether these decisions were vitiated by prejudice or other extraneous factors, including procedural irregularities, that denied the Applicant full and fair consideration for the [post] for which he was rejected.

The Tribunal has consistently recognized the considerable latitude of discretion that the Secretary-General has in promoting and in filling vacancies. (See Judgement No. 362, *Williamson* (1986).) Thus, 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 of promotion. (See Judgement No. 958, *Draz* (2000), citing Judgement No. 411, *Al-Ali* (1988).)

This discretionary power of the Secretary-General to evaluate and promote candidates, however, is not without boundaries - the Administration's discretion shall be reviewed when there are allegations of abuse of discretion, procedural irregularities, bias, prejudice or discrimination. (See Judgement 1056, *Katz* (2002).) (Judgement No. 1122, *Lopes Braga* (2003).)

The Tribunal has emphasized, though,

“that it is not the Tribunal's role to substitute its judgement for that of the Secretary-General, but merely to ascertain whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfilled. (See Judgement No. 447, *Abbas* (1989).) Once called seriously into question, however, the Respondent must be able to make at least a minimal showing that the Applicant's statutory

right was honoured in good faith, in that the Respondent gave it's 'fullest regard' to it'. (See *Williamson*, (*ibid.*) and, generally, Judgements No. 447, *Abbas* (1989); No. 490, *Murphy* (1990); and, No. 1209 (2005).)

IV. The Tribunal turns first to the allegation by the Applicant that the successful candidate failed, in the first instance, to meet the minimum requirements of the position, as set forth in the vacancy announcement. The Tribunal notes that the relevant vacancy announcement required, in addition to an advanced degree in a field of relevant study, "eight to twelve years of national and/or international experience in ageing in research/policy development areas". At the time the vacancy announcement was issued, the successful candidate had been in the professional service of the United Nations for only six years, and there is no evidence in the record of any relevant experience beyond her tenure with the Organization. Despite this, however, the Programme Manager, who endorsed her candidacy, made several inconsistent representations about her experience, indicating first to the Departmental Panel that she had seven years of experience and then to the APC that she had eight years of experience. In light of the inconsistent evidence as to whether the successful candidate did indeed possess the requisite number of years of experience, the Tribunal requested confirmation from the Administration as to the accurate years of experience possessed by the successful candidate. The Administration confirmed that, notwithstanding various representations to the contrary, she only had seven years of experience, not the eight that was required to be eligible for the post.

V. As the vacancy announcement clearly and unequivocally required "eight to twelve years of ... experience", and as the successful candidate did not possess the requisite qualifications but was promoted nonetheless, the Tribunal finds that the Respondent did not apply his own objective criteria of evaluation, as required by the rules and regulations governing the promotion exercise. In failing to do so, the Applicant's right to be fully and fairly considered was violated, and the Applicant was harmed. The Tribunal refrains, however, from opining on whether the misrepresentation of the successful candidate's experience was intentional, in order to ensure her promotion and to deny full and fair consideration to the other candidates, or merely the result of negligence on the part of the Programme Manager in assessing the eligibility of potential applicants. The violation of the Respondent's procedures itself is sufficient to sustain our finding of lack of full and fair consideration as to the Applicant. Moreover, as the Tribunal similarly noted in *Lopes Braga* (*ibid.*), the Tribunal asserts no independent opinion as to whether or not eight years, rather than seven or fewer years, was the appropriate number of years of experience necessary for the post. Rather, the Tribunal holds that the Administration, by requiring eight, was then bound to only consider applicants who satisfied that requirement. To do otherwise, as the Tribunal noted in *Lopes Braga*, harmed not only the Applicant, who was not fully and fairly considered, but also all those other potential applicants who did not apply because they possessed seven and a half or six or some other number of years of experience fewer than eight. Thus, as the Tribunal held in Judgement No. 1047, *Helke* (2002), "the failure of the Respondent to adhere to its own rules, the adherence to which is strictly and solely within the power of the Respondent, represents an irregularity which amounts to a violation of the Applicant's right to due process, for which the Applicant should be compensated".

VI. As the Tribunal concludes that the Applicant was not fully and fairly considered for promotion, it need not address the other alleged irregularities in the promotion process, all of which, the Applicant alleges, denied him full and fair consideration.

VII. For the foregoing reasons, the Tribunal:

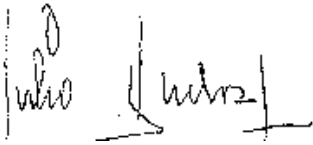
1. Orders the Respondent to pay to the Applicant six months' net base salary at the rate in effect at the date of the Judgement, for the failure of the Administration to fully and fairly consider him in the promotion process, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,

2. Rejects all other pleas.

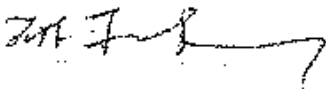
*(Signatures)*



Jacqueline R. **Scott**  
Vice-President



Julio **Barboza**  
Member



Goh Joon **Seng**  
Member

Geneva, 27 July 2007



Maritza **Struyvenberg**  
Executive Secretary