



ADMINISTRATIVE TRIBUNAL

Judgement No. 1334

Case No. 1411

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Jacqueline R. Scott, First Vice-President; Mr. Dayendra Sena Wijewardane, Second Vice-President;

Whereas, on 16 December 2004, a staff member of the United Nations, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 29 March 2005, the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal, inter alia, to:

“a. [Suspend] the time limit ... [for the filing of his appeal], owing to [a] new jurisdiction that [he has] just identified which is extremely relevant ...

...

c. ... [O]verrule [the] Geneva [Joint Appeals Board (JAB)]’s decision ... and rule that (i) a lapse of almost two years without action for filling the vacancy, (ii) cancelling the vacancy after almost two years from the date it was advertised ..., [and,] (iii) disregarding the unanimous recommendation by the Departmental Panel that [he] be appointed to the post, constitute undue delay and unfair treatment leading to personal and moral injury.

d. ... [Ensure that the Applicant’s] promotion to [another] D-1 level ... [post in] ... UNCTAD, which became effective on 1 May 2005, [is] retroactively implemented as from 1 January 2001 with full back pay and pension ... [and compensate the Applicant in the amount of] ... seven months’ net base pay at the D-1 level ... [for] personal and moral injury ... undue delay and unfair 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 30 September 2005 and periodically thereafter until 14 November 2005;

Whereas the Respondent filed his Answer on 14 November 2005;

Whereas the Applicant filed Written Observations on 19 February 2006;

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:

“[Applicant]’s Professional Record

... The [Applicant] entered the service of the United Nations Conference on Trade and Development (UNCTAD), Geneva, on 14 May 1980, as a Statistical Adviser, in the Division of Commodities, at the L-2 level. ... [He separated from service on 17 October 1980.]

... As of 14 March 1982, he was rehired on a two-year fixed-term appointment as Economic Affairs Officer at the P-3 level (step 1), in the Agricultural, Raw Materials Live Stock Section, Commodities Division, UNCTAD. His contract was renewed twice ... until 14 May 1984, when he was offered a probationary appointment ...

... On 1 March 1985, he received a permanent appointment as Economic Affairs Officer, P-3 level (step 4), in the same Division ... and on 1 October 1986, he was promoted to the P-4 level ...

... Effective 1 July 1988, the [Applicant]’s functional title changed to Officer-in-Charge [(OIC)], General Studies Section, Commodities Division, UNCTAD. He was promoted ... [to] the P-5 level [on 1 July 1992.]

... On 7 February 2002, he was granted a special post allowance (SPA) to D-1 level ... for the period from 7 February 2002 to 31 May 2002. ...

Summary of Facts

... On 20 December 1999, the vacancy announcement ... for the post of Chief, Trade Analysis Branch, Division on International Trade in Goods and Services and Commodities (DITC), ... was issued, with a deadline [for] application of 21 February 2000.

...

... By memorandum dated 12 June 2001 to the Secretary-General of UNCTAD, the [Applicant] inquired about the selection process related to the post ... In addition he ‘communicate[d his] views on substantive aspects of the post in question’ and transmitted ‘some factual information on the background of [his] application to the post’. ...

...

... By memorandum dated 10 September 2001, the [Applicant] reiterated his inquiry with regard to the selection process. While stressing the injurious and damaging character of the indecision on the matter, he pleaded with the Secretary-General for finalizing a decision on the appointment ...

... In response, by memorandum of 25 October 2001, the Head, Resources Management Services, UNCTAD, informed him that the concerned vacancy announcement ‘[had] been withdrawn upon the decision of the Secretary-General of UNCTAD in the exercise of his discretionary power’.

... On 19 December 2001, the [Applicant] wrote to the Secretary-General requesting him to review ‘the decision by the Secretary-General of UNCTAD to withdraw the vacancy announcement ...’

...

... By memorandum dated 8 April 2002, the [Applicant lodged an appeal with] the JAB ... [in Geneva] ...

...”

The JAB adopted its report on 3 June 2003. Its considerations, conclusions and recommendations read in part as follows:

“Considerations

...

31. [The Panel] did not find that the decision of the Secretary-General of UNCTAD to withdraw the vacancy announcement denoted any arbitrariness in the motive or any discriminatory behaviour, which would be contrary to the Staff Rules and Regulations.

...

35. [T]he Panel laid emphasis on the unduly long waiting period of almost two years which past between the issue of vacancy announcement [...] and its withdrawal [...]. In its view, this delay, was contrary to good management standards, and could and should have been avoided.

Conclusions and Recommendations

36. ... [The Panel] **concludes** that the Appellant has no grounds for contesting this decision.

37. The Panel therefore **recommends** to the Secretary-General that this Appeal be rejected.

38. However, the Panel also **recommends** that in case of such excessively long delays, the Administration should be obliged to inform short-listed candidates about the state of the selection in due time.”

On 11 August 2003, the OiC, Department of Management, transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the JAB’s findings and conclusions and had decided to accept the JAB’s unanimous recommendation and to take no further action on his appeal.

On 29 March 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Secretary-General of UNCTAD did not exercise his discretionary authority with regard to filling vacant posts in UNCTAD with objectivity, and failed to give due regard to procedural details or staff members’ legitimate expectations. This inaction has caused him significant anxiety and moral injury.

2. The very long and undue delay between the publication of the vacancy announcement and its withdrawal indicates that the Secretary-General of UNCTAD was reluctant to implement the unanimous decision of

the Placement and Promotion Panel, and denotes that the decision has not been taken according to objective considerations.

Whereas the Respondent's principal contention is:

The appeal is time-barred.

The Tribunal, having deliberated from 26 October to 22 November 2006, in New York, and from 2 July to 27 July 2007, in Geneva, now pronounces the following Judgement:

I. The Applicant entered the service of UNCTAD, Geneva, on 14 May 1980, as a Statistical Adviser, in the Division of Commodities, at the L-2 level. His five-month fixed-term appointment was renewed on a daily basis until 17 October 1980, the date of his separation. As of 14 March 1982, he was rehired on a two-year, fixed-term appointment as Economic Affairs Officer at the P-3 level, in the Agricultural, Raw Materials and Livestock Section, Commodities Division, UNCTAD. His contract was renewed twice, until 14 May 1984, when he was offered a probationary appointment at the same post and level. On 1 March 1985, he received a permanent appointment as Economics Affairs Officer at the P-3, step 4 level and, effective 1 October 1986, he was promoted to the P-5 level to fulfil the functions of an Economic Affairs Officer in the Commodities Division of a different Unit.

II. On 20 December 1999, a vacancy announcement was issued at the D-1 level for the post of Chief, Trade Analysis Branch, DITC, for which vacancy the Applicant applied. On 25 October 2001, he was informed that the vacancy announcement in question had been withdrawn. On 19 December, the Applicant wrote to the Secretary-General requesting review of "the decision by the Secretary-General of UNCTAD to withdraw the vacancy announcement".

III. The JAB which dealt with his case adopted its report on 3 June 2003. The Board recommended that the appeal be rejected, considering that the rights of the Applicant had not been violated by the exercise of the discretionary power of the Secretary-General and that, therefore, the Applicant had no grounds for contesting this decision. By a letter dated 11 August 2003, the OiC, Department of Management, informed the Applicant that the Secretary-General agreed with the reasoning and the conclusions of the Board.

IV. The Tribunal notes that on 7 February 2002, the Applicant was granted an SPA to the D-1 Level as OiC of the Commodities Branch, DITC, which was paid until 1 May 2005. Effective 1 May 2005, he was appointed as Head of the Commodities Branch at the D-1 Level.

V. On 29 March 2005, the Applicant filed this Application claiming retroactive implementation of his promotion, effective to 1 January 2001. The Applicant does not explain why he has chosen this particular date.

VI. The relevant parts of paragraphs 4 and 5 of article 7 of the Statute of the Tribunal provide as follows:

“4. An application shall not be receivable unless it is filed within ninety days reckoned from the respective dates and periods referred to in paragraph 2 ..., or within ninety days reckoned from the date of the communication of the joint body’s opinion containing recommendations unfavourable to the applicant.
...

5. In any particular case, the Tribunal may decide to suspend the provision regarding time limits.”

VII. The Applicant admits that he has “missed by a considerable margin” the time limit specified in the Statute and the Rules. He is, however, explaining his delay between August 2003 and March 2005 by reference to the fact that, at the time of the decision, there was no precedent in the jurisprudence of the Tribunal that would have been useful for his argument that undue delay in the withdrawal of a vacancy notice might constitute unfair treatment. He claims that he has now found such a precedent in Judgement No. 1156, *Fedorchenko* (2003), which supports the case he wished to make. The Applicant is also referring to various personal problems that would have deterred him from taking the necessary steps at that time but reference to these factors without any dates appears to the Tribunal to come more or less after he reviewed the answer of the Respondent. As he has aptly put it, the “simple reason” for reviving his case is that he came across a decision of the Tribunal which, as he claims, “reflects his situation” and supports the case he had made before the JAB some two years earlier.

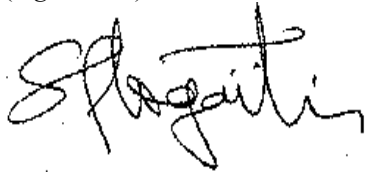
VIII. Even assuming that the *Fedorchenko* Judgement, which dealt with a totally different set of facts, is conclusive of the Applicant’s claim in this case, the Tribunal is far from being sympathetic to this argument which militates against the closure of issues and of disputes. It is an established principle that Applicants have to educate themselves on their legal rights and pursue them diligently without unreasonable delay, within prescribed time frames and according to set procedures. They do not have the luxury of awaiting the outcome of endeavours of their more enterprising colleagues instead of pursuing their own particular claim within prescribed time limits by which they are bound. The Tribunal has noted that, at a relatively late stage of these proceedings, the Applicant has sought to request the Tribunal to waive the time limits prescribed in the Statute by reference to personal difficulties which he regrettably encountered. But even at that point, the Applicant fails to provide dates or sufficient specific details which prevented him from complying with the prescribed time limits which might have justified the Tribunal exercising its power under article 7, paragraph 5, of the Statute. In seeking some special dispensation, it is incumbent on an applicant to demonstrate that he was conscious of and wished diligently to pursue his legal claim but was unable to do so in the particular circumstances. The Applicant has failed to discharge this burden.

IX. In its Judgement No. 596, *Douville* (1993), the Tribunal quoted with approval Judgment No. 549 *Reninger* (1992) which in the relevant part states the applicable general principle as follows:

“[O]rdinarily, when timely efforts to vindicate a claim are of importance because of potential prejudice resulting from delay, logic suggests that the starting point for measurement of the delay is the point at which one knows, or should have known, of the existence of the claim, not the time when a potentially favourable decision in another case is rendered. One acts at one’s own peril after a claim arises by unreasonably delaying appropriate steps for vindication of the alleged right”.

X. Accordingly, the Tribunal rejects the Application in its entirety.

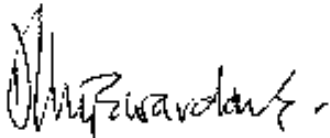
(Signatures)



Spyridon **Flogaitis**
President




Jacqueline R. **Scott**
First Vice-President



Dayendra Sena **Wijewardane**
Second Vice-President

Geneva, 27 July 2007



Maritza **Struyvenberg**
Executive Secretary