



ADMINISTRATIVE TRIBUNAL

Judgement No. 1336

Case No. 1417

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, Vice-President, presiding; Ms. Brigitte Stern; Mr. Goh Joon Seng;

Whereas, on 10 February 2005, 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 April 2005, the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal, inter alia, to order:

- “a) That [he] be retroactively appointed on P-4 level, as of October 2000, or if time-barred, as of August 2002 with all benefits and entitlements including ... seniority in ... grade;
- (b) That [he] ... be financially compensated for the professional, material and psychological harm that was caused by this discrimination ...”

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 21 October 2005 and once thereafter until 31 October;

Whereas the Respondent filed his Answer on 31 October 2005;

Whereas the Applicant filed Written Observations on 1 December 2005;

Whereas the Respondent filed additional Comments on 2 March 2006;

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] entered the service of the International [Criminal] Tribunal for the former Yugoslavia (ICTY) as an Investigator at the P-3 level on 18 April 1995.

***Summary of Facts***

... In June 2002, ICTY Human Resources Section issued an internal vacancy announcement for the post of Team Leader (P-4) in Group 4 of the Office of the Prosecutor (OTP).

... On 24 June 2002, [the Applicant] submitted his application to the post. [The Applicant] had [unsuccessfully] applied, in 2000, for the same post ...

... On 6 August 2002, the Selection Panel (...) held an interview with [the Applicant]. ...

... [The Applicant] was included in a list of four candidates for a second interview, which took place on 24 August 2002.

... By a memorandum of 27 August 2002, [the] Chief of Investigations informed the Chief of Human Resources of the [Selection Panel’s] selection among the four candidates, and the details of the process leading up to the selection. With regard to [the Applicant], the [Panel], after the first interview, noted that:

‘[The Applicant] has 20 years’ experience in criminal investigations including 6 years’ experience working as an Investigator with the OTP. A very senior Investigator by way of service who has had exposure to diverse roles within his experience with the OTP. [The Applicant] has taken a leading role in many different facets of the OTP work in theatre.

[The Applicant] is qualified academically and by way of experience. During the interview he impressed the Panel with his knowledge, enthusiasm and dedication towards his work. [The Applicant] appeared very intense during the interview process and at times tended to be wordy, theoretical and lacking in focus. The Panel considered that he demonstrated sufficient experience and skill to be considered as qualified for the position of Team Leader.’

With regard to the second interview, the [Selection Panel] noted that:

‘[The selected candidate] clearly demonstrated his management skills and also displayed his knowledge and experience of working within the OTP legal and trial process. He was selected as the most suitably qualified candidate. [Another candidate] though similarly qualified with significant management and did not have exposure to working with the trial process [(sic)]. He was also identified as a qualified candidate. [The Applicant] and [a fourth candidate] though considered as having shown sufficient ability to be considered qualified will benefit from greater exposure to working in support of the trial process prior to taking up the role of Team Leader.’

[The Applicant] and the fourth candidate were considered qualified but not recommended.

... The recommendation of the [Selection Panel] was endorsed by the Prosecutor ... and transmitted for approval to the Appointment and Promotion Board (APB) on 27 August 2002.

... On 30 August 2002, the APB recommended the candidate indicated by the Prosecutor. On the same date, the recommendation was endorsed by the Chief of Administration and subsequently approved by the Registrar.

... By a memorandum dated 2 September 2002 ..., [the Applicant] was informed that another candidate had been selected for the post.

... By a letter dated 22 October 2002, [the Applicant] submitted a request for an administrative review of the decision.”

On 3 February 2003, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 18 October 2004. Its considerations, conclusions and recommendation read, in part, as follows:

**“Considerations**

25. The Panel first examined the issue of receivability ... [It] noted that, with respect to the claim arising out of the Appellant’s 2002 candidacy for the post of Team Leader, his submission was receivable. However, it found that, to the extent the Appellant sought to appeal the decision arising out of the Team Leader appointment in 2000, the Appellant’s submission was time-barred, coming some two years from the date of the decision. The Panel nevertheless considered that the Appellant’s contentions in that regard could be considered as part of his submission relevant to his claim from the 2002 case.

26. Examining the merits of the case, the Panel noted that the Appellant has no right to a promotion ... Evaluating the Appellant’s submission, the Panel considered that the facts presented to support his contentions of discrimination and improper motive, taken either individually or as a whole, were insufficient to conclude that his candidacy was not given such consideration. At the same time, [the] Respondent’s submission shows that the Appellant was given full and fair consideration in his candidacy for the P-4 post.

27. The Appellant’s allegations of cronyism (and therefore, of discrimination) centre on a) the makeup of the [Selection Panel], b) the concentration of nationalities at ICTY favouring a few countries, and c) statements made in the media by former Deputy Prosecutor ... wherein he claims at the inception of the Tribunal to have focused his 1995 recruitment efforts for prosecutors and investigators from those same few countries. Inherent in these claims is the necessary collusion of a number of ICTY staff members to bring about the result from which the Appellant claims damages. However, the evidence before the Panel, while perhaps hinting at collusion, failed to point to any actual acts of collusion that might have taken place.

28. With regard to claim a), nothing in either the procedural posture of the SP or its written record of its deliberations shows prejudice against the Appellant. The Panel considered that, for the purpose of fulfilling the procedural requirements, the decision to have a staff member from outside the Office of Human Resources ... serve on the [Selection Panel] as a representative of that Office was irregular; however, there was no evidence showing that that irregularity actually prejudiced the Appellant’s candidacy. It was not apparent to the Panel that the presence on the [Selection Panel] of a supervisor of the selected candidate indicated improper motive of the [Selection Panel]; in the absence of more specific evidence showing bias in favour or against one candidate or another, the Panel noted that such arrangements are often a necessary part of the conduct of business within offices throughout the Organization. Nor was it apparent to the Panel that the [Selection Panel] had either disregarded or misrepresented the Appellant’s credentials: the record of the [Selection Panel’s] deliberations and evaluation of the candidates shows that it considered the Appellant to be qualified, knowledgeable, enthusiastic and dedicated. ...

29. With regard to the Appellant’s claims b) and c) of a wider pattern of discrimination in favour of a few nationalities, the Panel considered that any such concentration of nationalities within the Tribunal did not point to specific discriminatory motive or conduct that operated against [him] in this particular case.

30. Finally, in terms of the recommendation of the Deputy Chief of Investigations to consider a qualified candidate from outside the Team, the Panel noted that the evidence indicating strong differences within the Team formed the basis of a legitimate managerial concern for the future viability of that Team. As such, the Deputy Chief’s recommendation constituted a valid exercise of discretion.

...

***Conclusions and recommendation***

32. On the issue of receivability, the Panel noted that the decision regarding the 2002 selection of the P-4 Team leader post was receivable, although the decision regarding the 2000 selection for the same post was time-barred.

33. On the merits, the Panel concluded that the Appellant had not adduced sufficient evidence of discrimination, while Respondent did demonstrate that [he] was given full and fair consideration. As such, [his] due process rights were not violated in the selection process for the post.

34. In light of the foregoing, the Panel decided to make no recommendation regarding the present appeal.”

On 28 February 2005, the Under-Secretary-General for 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 its unanimous recommendation and to take no further action on his appeal.

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

Whereas the Applicant’s principal contentions are:

1. The selection of the successful candidates for the Investigation Team Leader post in both 2000 and 2002 was based on incorrect facts, favouritism, prejudice and other extraneous motives.
2. The Applicant was denied full and fair consideration for promotion.

Whereas the Respondent’s principal contentions are:

1. The appeal against the decision not to promote the Applicant in 2000 is time-barred.
2. The Applicant had no right for promotion but only to consideration for promotion. The Applicant was properly considered and his rights were not violated by the decision not to promote him to the P-4 post he sought in 2002.
3. There is no evidence of prejudice or other extraneous considerations in the Administration’s decision not to promote the Applicant.

The Tribunal, having deliberated from 25 June to 27 July 2007, now pronounces the following Judgement:

I. On 18 April 1995, the Applicant, a national of the Czech Republic, entered the service of ICTY as an Investigator, at the P-3 level. On 24 June 2002, he applied for the P-4 post of Investigation Team Leader for Team 4 of the Investigations Division, Office of the Prosecutor, a post for which he had unsuccessfully applied in 2000. On 6 August, the Applicant and 17 other internal candidates were interviewed by a Selection Panel, comprising two members from the Investigation Division, a Deputy Chief of Investigations and an Investigation Team Leader; one member from outside the section/unit, a trial attorney from the Prosecution Division; and, one member representing

the Human Resources Section. The Applicant was included in the list of the four most qualified candidates to be interviewed in a second round of interviews on 26 August. Thereafter, another candidate was recommended as the “most suitably qualified candidate”, whereas the Applicant and the other candidates were considered qualified but not recommended for the post. On 27 August, the Chief of Investigations and the Prosecutor reviewed and endorsed the Selection Panel’s recommendation and submitted it to the Chief of Human Resources for submission to the APB. On 30 August, the APB reviewed and endorsed this recommendation. On the same date, the recommendation was endorsed by the Chief of Administration and subsequently approved by the Registrar. On 2 September, the Applicant was informed by the Human Resources Section that another candidate had been selected for the post.

On 22 October 2002, the Applicant requested the Secretary-General to review the decision not to select him. On 3 February 2003, he filed an appeal with the JAB. In its report of 18 October 2004, the JAB noted that the decision regarding the 2002 selection of the P-4 Team Leader post was receivable, although the Applicant’s attempt to challenge the earlier administrative decision regarding the 2000 selection for the same post was time-barred. It concluded that whilst the Applicant had not adduced sufficient evidence of discrimination, the Respondent had demonstrated that the Applicant had been given full and fair consideration. Thus the JAB decided to make no recommendation. On 28 February 2005, the Applicant was advised that the Secretary-General had accepted the JAB’s findings and had decided to take no further action in his case.

II. It is axiomatic that the selection of a staff member for any post within the Organization is within the discretionary power vested in the Secretary-General. The Tribunal will not substitute its own judgement for that of the Secretary-General. The same principle applies to promotion. (See Judgements No. 554, *Fagan* (1992); No. 592, *Sue-Ting-Lin* (1993); and No. 613, *Besosa* (1993).)

Staff members are, however, entitled to full and fair consideration either for selection or promotion. In this regard, the Applicant was assessed over two rounds of interviews with three other candidates by the Selection Panel. He and the fourth candidate were considered to be qualified but would “benefit from greater exposure to working in support of the trial process prior to taking up the role of Team Leader”. The Selection Panel’s recommendation was endorsed by the Prosecutor of the ICTY, approved by the APB, supported by the Chief of Administration and, finally, approved by the Registrar. The question is whether the process resulting in the selection of the successful candidate was based on incorrect facts, favouritism, prejudice or other extraneous motives.

III. It is to be noted that the Applicant has not impugned the review process of the APB. However, he contends that the decision to promote him was based on cronyism or favouritism perpetrated through the constitution of the Selection Panel as all its members were connected to the successful candidate’s prior team. Additionally, contrary to ICTY policy, there was no proper representative of the Human Resources Section on the Selection Panel. Paragraph 18 of Information Circular ICTY/IC/01/38 of 19 April 2001, entitled “Guidelines for Placement and promotion of staff in the professional category”, (the Guidelines) provides as follows:

“A panel of at least three staff members shall constitute the interview panel. The panel shall comprise:

- (a) One or more officials representing the Division/Section/Unit concerned;
- (b) One official representing the Human Resources Section; and
- (c) One official from outside the immediate Section/unit concerned.

The final composition of the interview panel should include at least one female staff member.”

In the instant case, the Selection Panel comprised two officials from the Investigation Division, being the Deputy Chief of Investigations and an Investigation Team Leader. It therefore complied with the Guidelines, paragraph 18 (a). Although, there was a trial attorney from the Prosecution Division representing the Human Resources Section, in the view of the Tribunal this complied with the Guidelines, paragraph 18 (b), as he was authorized to represent the Human Resources Section. The fourth member was “from outside” the Section/unit. This complied with the Guidelines, paragraph 18 (c) and the requirement for the inclusion of a female staff member. In any case, the Tribunal agrees with the JAB that even if the inclusion of the trial attorney from the Prosecution Division rather than from the Human Resources Section was irregular, there is no evidence that this, by itself, was prejudicial to the Applicant’s candidacy.

IV. The Applicant also complained that the Administration failed to take into account the fundamental United Nations principle of geographic diversity by favouring candidate nationals from countries that were already over-represented in the Investigation Division. These countries were the United Kingdom, Australia and New Zealand. The successful candidate was Australian. The Applicant is of Czech nationality, which country, he claimed, was under-represented in the Investigation Division.

In this connection, the table on “Member States Representation as of 30 November 2002” shows Australia was over-represented based on membership, population and contribution factors. It also showed that the Czech Republic was not under-represented. In any event, this selection exercise was confined to internal candidates and whoever was selected would not alter the existing geographical distribution of posts among the member states at ICTY.

V. What is of more serious implication is the Applicant’s allegation of “improper interference”. The Deputy Chief of Team 4 recommended the appointment of a strong candidate from outside Team 4, in order to alleviate major differences between the Applicant and the other Senior Investigator of Team 4. There is no evidence as to what impact this had on the outcome of the selection process, but this recommendation and the basis on which it was made, were not made known to the Applicant who thus had no opportunities to rebut the same. While the Tribunal is unable to and should not second guess what the outcome would have been but for this interference, the Tribunal is of the view that the interference was a serious breach of the Applicant’s due process rights to full and fair consideration for the post.

VI. For the foregoing reasons, the Tribunal:

- 1. Orders the Respondent to pay to the Applicant US\$ 8,000.00 for the violation of his due process rights stemming from procedural irregularities referred to in paragraph V, *supra*, 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.

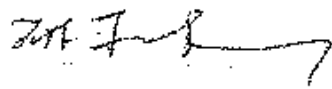
*(Signatures)*



**Jacqueline R. Scott**  
Vice-President



**Brigitte Stern**  
Member



**Goh Joon Seng**  
Member

Geneva, 27 July 2007



**Maritza Struyvenberg**  
Executive Secretary