



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1345

Case No. 1428

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 a former staff member of the United Nations Development Programme (hereinafter UNDP), filed an undated Application which was received by the Tribunal on 5 July 2005, containing pleas which read, in part, as follows:

“II PLEAS

...

8. On the merits, the Applicant respectfully requests the Tribunal to find:

(a) that [it] agrees with the ... unanimous conclusion of the [Joint Appeals Board (JAB)] that the Respondent's actions violated the Applicant's rights ...

(b) that in addition to the annual leave credits recommended by the JAB the Applicant is to be reinstated and awarded full compensation (consisting of emoluments, social security benefits and all other entitlements) for the period of separation (...) or;

(c) alternatively, considering that the Applicant attained eligibility for early retirement on 30 April 2005, award ... compensatory damages (i) in an amount equal to the remuneration [she] would have earned between the dates of her termination and the settlement of this case, (ii) in the Organization's payment of its portion of the contribution to the Applicant's account in the United Nations Joint Staff Pension Fund and Van Breda Medical Insurance for the same period and (iii) the reinstatement of her Group Life Insurance;

(d) [and] to award two years' net wages in punitive damages for the stress ... endured ... and the loss of social security at an age when the opportunities for reemployment are limited."

Whereas, on 17 August 2005, the Applicant submitted additional comments;

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 29 December 2005;

Whereas the Respondent filed his Answer on 20 December 2005;

Whereas, on 29 May 2007, the Applicant submitted additional comments;

Whereas, on 29 June 2007, the Applicant submitted additional documentation and, on 9 July, the Respondent commented thereon;

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 the service of the Organization in 1970 at the G-3 level with UNDP New York and later received a permanent appointment. She was promoted several times and eventually moved to the Professional level. Her last promotion was to the P-4 level. ... Her last duty station was Bonn, Germany, where she served as Head, Headquarters Administration, at the United Nations Volunteer Programme (UNV). She served in this position until 18 October 2002 when she was informed that her services were no longer required. The [Applicant] separated from service effective 31 August 2003.

Summary of the facts

... According to the [Applicant], during her 32 years of service her performance was rated 1 (An unusual contribution) in one or two cases, and either 2 (Exceptional) or 3 (Fully satisfactory) in the rest of the cases. It had never been rated 4 (Needs improvement in some important areas) until 1999, 2000 and 2001. During these three years, she worked under the same supervisor. The [Applicant] did not agree with her supervisor's evaluation and on 17 July 2002 filed a rebuttal to the Performance Appraisal Reports (PARs)/Results and Competency Assessment (RCAs) for the years 1999, 2000 and 2001. The duration of the [Applicant]'s assignment with UNV was initially expected to last at least until February 2004, as per the six-year rotational policy of UNDP. However, due to the negative PARs/RCAs of the [Applicant], UNV management recommended that she be included in the 2002/03 reassignment exercise. Accordingly, the [Applicant]'s name was included in the Succession Management Exercise (SME) held in June 2002.

... On 8 July 2002, the [Applicant] received a letter from the Officer-in-Charge (OIC) of the Office of Human Resources (OHR), UNV, informing her that she had not been selected for any post in the SME. She was told that she would be given a minimum of three months to undertake an active search for alternative placement in UNDP and elsewhere in the ... system.

... On 25 September 2002, the Deputy Director, OHR/UNDP ... informed the [Applicant] that UNV was willing to fund a two-week extension of her tenure until 15 October ... to allow her to continue her job search. ... [However, she remained in service as her appointment was further extended.]

...
... On 1 November 2002 the [Applicant] asked to remain on payroll, but not on annual leave, until her rebuttal process was completed. On the same date, ... [the Deputy Director, OHR/UNDP] replied ...

that: 'I conclude that you wish to be placed on annual leave'. On 22 November ..., [he] informed the [Applicant] that she could remain on payroll only if she were on annual leave ...

... On 3 December 2002 ... [the] Director, OHR/UNDP, wrote a letter to the [Applicant] providing formal notice of termination [and reiterating the two options previously offered to her: annual leave plus up to one year's Special Leave Without Pay 'SLWOP' or agreed separation with enhanced termination indemnity.]

... On 16 December 2002, [the Director, OHR/UNDP] wrote again to the [Applicant] informing her, inter alia, that [as she had not availed herself of either of the options outlined in the 3 December letter, she was on three-month notice from 5 December 2002.] This notice period ... [permitted her] to remain on full pay status until 4 March 2003.

... On 20 January 2003, ... the [Applicant] sought an administrative review of the decision to separate her as of 4 March ... By the same letter she filed a request for suspension of action ... on that decision.

...

... On 29 January 2003, the ... JAB ... unanimously recommended that the request [for suspension of action] be granted until the appeal was considered on its merits, and a final decision taken by the Secretary-General.

... On 31 January 2003, the [Applicant] was notified [that] ...

'[t]he Secretary-General ha[d] decided to partially accept the recommendation of the JAB and grant [her] request for suspension of action only until the completion of the rebuttal process. The Secretary-General ha[d] further decided that if, as a result of the rebuttal process, one or more of [her] evaluations [would be] upgraded, to extend the period of suspending [her] separation from service for another two months so that [she would] be able to apply to vacancies with the benefit of the upgraded evaluations.'

... ... Counsel for the [Applicant] lodged an appeal with the JAB in New York on 7 March 2003. ...

... On 27 June 2003, [the Director, OHR/UNDP] wrote a letter to the [Applicant] informing her, inter alia, that ... '[a]lthough none of [the] evaluation reports were upgraded, [she was] nonetheless prepared to extend the period of suspending ... separation from service for another two months ...

... On 25 August 2003, ... the [Applicant], wrote to the Secretary-General requesting an administrative review of the contested decision to terminate [her] permanent appointment ... On the same date, ... the [Applicant] also submitted to the JAB a request for suspension of action of the contested decision.

... On 27 August 2003, the ... JAB unanimously recommended that the request be granted ...

... On 29 August 2003, the [Applicant] was notified ... that ... the Secretary-General ha[d] decided not to accept the recommendation of the JAB ...

[On 31 August 2003, the Applicant separated from service.]”

The JAB adopted its report on the merits on 28 February 2005. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

...

37. ... The Panel noted that the Appellant contested two administrative decisions: a) the termination of her permanent appointment due to reduction of staff/abolition of posts under the terms of staff rule 109.1 (c); and b) the decision to place her on annual leave during the period from 1 November ... to 4 December 2002.

...

39. Regarding the first contested decision, the Panel noted that the Secretary-General in accordance with staff regulation 9.1 (a) may terminate the appointment of a staff member who holds a permanent appointment if the necessities of service require abolition of the post or reduction of staff. In this particular case, the Appellant was informed in the contested letters that it was the intention of UNDP to terminate her appointment for reduction of staff/abolition of posts under the terms of staff rule 109.1 (c). The Panel noted that UNV Management immediately hired a staff member under a temporary assistance contract to perform the Appellant’s functions. Her post was therefore not abolished and in fact it was reclassified to P-5 as acknowledged by the Representative of the Respondent ...

...

45. The Panel considered the contention made by the Appellant that, in accordance with staff rule 109.1 (c), staff members holding a permanent contract should be retained in preference to those on all other types of appointments when the administration decides to reduce staff. The Panel noted that UNDP management placed the Appellant in the 2002/03 SME exercise so as to try to find a suitable post for her. However the Panel felt that UNDP management did not make sufficient efforts to comply with the provision of staff rule 109.1 (c). The UNDP Administration should have actively assisted the Appellant by providing her with options for other posts that would match her strength and competencies and thus enable her to improve her performance.

46. ... The Panel was not convinced by the evidence provided by the Respondent that all *bona fide* efforts had been made to adequately consider the Appellant for all relevant posts.

47. The Panel ... considered the second contested decision: that of placing the Appellant on annual leave from 1 November to 4 December 2002. The Panel recalled staff rule 105.1 (b) (iii) which provides in part:

‘All arrangements as to leave shall be subject to the exigencies of service, which may require that leave be taken by a staff member during a period designated by the Secretary-General. The personal circumstances and preferences of the individual staff member shall, as far as possible, be considered’.

The Panel was unsure why the Respondent did not use the clear wording of this staff rule to require the staff member to take annual leave during the period 1 November to 4 December 2002, and instead ‘concluded’ that the Appellant ‘wished’ to be on annual leave as stated in [the] e-mail to the Appellant dated 1 November 2002.

48. In connection with this issue, the Panel also noted that the Appellant’s rebuttal process was pending since 17 July 2002 and it was only on 22 January 2003 that the Organization acknowledged the delay in considering it. The Panel was of the view that, since at the time when the Appellant was placed on annual leave (November 2002) the establishment and composition of the Rebuttal Panel of Reference was still pending, the Appellant had the right not to be penalized by having to use her annual leave balance. She should either have been requested, as provided in staff rule 105. 1 (b) (iii), to take annual leave during the period designated by the Secretary-General or have been placed on [SLWFP], instead of ‘concluding that the Appellant wished to take her annual leave’. Regarding this issue, the Panel also noted that the

Secretary-General partially accepted the recommendation of a previous JAB panel and granted the Appellant in January 2003 her request for suspension of action until the completion of the rebuttal process.

Conclusion and Recommendation

49. In light of the foregoing, the Panel *unanimously agreed* that there was evidence that the delay by the Respondent to have the Appellant's PAR's/RCA's properly reviewed in reasonable time violated the Appellant's rights. The Panel *unanimously concluded* that the Respondent failed to fulfil its obligation to undertake every *bona fide* search effort to find within UNDP a suitable post for the Appellant. By reason of these serious violations of the Appellant's rights, the Panel *unanimously concluded* that the Appellant merited compensation for the wrongs she had suffered.

50. The Panel also *unanimously agreed* that the decision based on the assumption that the Appellant wished to take her annual leave from 1 November 2002 to 4 December 2002 violated the Appellant's rights, as elaborated in paragraphs 47 and 48 above.

51. The Panel therefore *unanimously recommends* that the Appellant be awarded the monetary compensation equivalent to six months' net base salary at the rate in effect for her level on the date of her separation from service. The Panel *also unanimously recommends* that her annual leave from 1 November 2002 to 4 December 2002 be credited in the amount of leave improperly charged against her leave balance.

...”

On 3 August 2005, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her as follows:

“The Secretary-General has examined your case in the light of the JAB' report and all the circumstances of the case. While he notes that UNDP had very legitimate concerns about your performance over several years and that you did not take action yourself to redress these concerns, there were deficiencies in the manner in which your case was dealt with by UNDP, as found by the JAB. The Secretary-General has thus decided to accept the JAB's recommendations to credit you with your annual leave for the period 1 November to 4 December 2002 and to pay you compensation, although he considers the amount of six months' net base salary as recommended by the JAB to be excessive, especially having regard to the outcome of the rebuttal process. He considers the appropriate amount to be three months' net base salary.”

On 5 July 2005, the Tribunal received the above-referenced Application.

Whereas the Applicant's principal contentions are:

1. The Respondent continuously failed to enforce the performance appraisal system, i.e., to conduct timely performance reviews and to ensure timely PAR/RCA appraisals pursuant to the relevant administrative issuances.
2. She was prematurely placed in the SME rotation system.
3. The termination of her appointment resulted from the improperly reviewed poor performance appraisals.
4. The action of separating her for abolition of post was *fraus legis* as, in reality, she was replaced by another staff member and her post was not abolished.

Whereas the Respondent's principal contentions are:

1. The Applicant has been adequately compensated for the delay in the completion of her PAR/RCA review and rebuttal process, and for any other deficiencies in the manner in which UNDP dealt with her case.
2. The Applicant was not separated for abolition of post, but for the absence of a post to accommodate her after the SME rotation process and the UNDP staff reduction exercise. The Respondent acted properly in considering the Applicant's record when determining her suitability for posts.
3. The Applicant's placement in the SME rotation programme one year before she had expected such consideration was not improper.
4. The Rebuttal Panel's review of the Applicant's rebuttals is not properly before the Tribunal.

The Tribunal, having deliberated from 11 to 27 July 2007, now pronounces the following Judgement:

I. At the time of the events that gave rise to the present Application, the Applicant was serving as Head, Headquarters Administration, UNV, in Bonn, Germany, at the P-4 level. Until 1999, the Applicant's performance had consistently been rated fully satisfactory or above. However, in that year, and in 2000 and 2001, she received PARs with a rating of "4" (Needs improvement in some important areas), all from the same supervisor. On 17 July 2002, the Applicant filed a rebuttal. Due to the negative PARs, her name was included in the SME rotation programme in June 2002.

On 8 July 2002, the Applicant received a letter from OHR, UNV, informing her that she had not been selected for any post in the SME. She was told that she would be given a minimum of three months to undertake an active search for alternative placement in UNDP and elsewhere in the United Nations system. On 25 September, she received a two-week extension of her tenure until 15 October to allow her to continue her job search. She was advised that, if unsuccessful, she would be notified of the termination of her appointment unless she chose between two options, that is, annual leave plus up to one year's SLWOP or agreed separation with enhanced termination indemnity. Having received further extensions, the Applicant was advised, on 22 November, that she could remain on payroll only if she were on annual leave, and given until 27 November to advise OHR which of the above two options she chose.

On 3 December 2002, a formal notice of termination was sent to the Applicant. On 16 December, she was advised that, since she had not availed herself of any of the options provided, UNDP regarded her as being on three months' notice from 5 December, permitting her to "remain on full pay status until 4 March 2003".

II. On 20 January 2003, the Applicant requested administrative review of the decision to separate her as of 4 March, and at the same time, requested a suspension of action. On 29 January, the JAB unanimously recommended that the request be granted until the appeal was considered on its merits, and a final decision taken by the Secretary-General. On 31 January, the Applicant was notified that the Secretary-General had decided to grant her request only until the completion of the rebuttal process but that, if one or more of her evaluations was upgraded, her separation from service would be suspended by two months. On 27 June, OHR informed the Applicant that, even though none of her evaluation reports had been upgraded, her separation from service had been suspended for two months, in

order to facilitate her situation. Should she remain unplaced, formal separation action would be carried out on 31 August, with payment of a termination indemnity.

III. On 25 August 2003, the Applicant requested administrative review of the decision to terminate her permanent appointment. On the same date, she submitted another request for suspension of action. On 27 August, the JAB unanimously recommended that the latter request be granted, however, on 29 August, the Secretary-General rejected the recommendation.

It its report of 28 February 2005, the JAB recommended that the Applicant be compensated in the amount of six months' net base salary for (a) the delay in the rebuttal process and (b) the failure on the part of the Respondent to make a reasonable effort to find a suitable alternative post for her. It also recommended that annual leave wrongfully charged for the period 1 November to 4 December 2002 be credited to her leave balance. On 3 August, the Secretary-General accepted the JAB's recommendations, deciding, however, to pay her three months' net base salary instead of the six months' recommended.

IV. The Tribunal notes that the Applicant's request relating to the annual leave recommended by the JAB has already been addressed by the Respondent, as he has accepted the JAB's recommendation in this regard. Therefore, this issue is moot.

V. The remaining reliefs applied for are grounded on:

- 1) the delay in the rebuttal process (Issue 1); and,
- 2) the failure on the part of the Respondent to make reasonable efforts to find a suitable alternative post for the Applicant (Issue 2).

VI. On Issue 1, as set out in the JAB report, the Applicant's rebuttal was filed on 17 July 2002. Rebuttal proceedings only commenced on 22 January 2003 and only after the Applicant submitted her request for suspension of action to the JAB on 20 January. The report of the Rebuttal Panel of Reference was issued on 10 June. The whole process took eleven months. This is unacceptable, as the Respondent has acknowledged.

VII. On Issue 2, the Tribunal notes that the JAB faulted UNDP as follows:

“The Panel noted that UNDP management placed the [Applicant] in the 2002/03 SME so as to try to find a suitable post for her. However, the Panel felt that UNDP management did not make sufficient efforts to comply with the provision of staff rule 109.1 (c). The UNDP Administration should have actively assisted the [Applicant] by providing her with options for other posts that would match her strength and competencies and thus enable her to improve her performance.”

VIII. According to the Respondent, UNDP management had made several efforts as required of it by staff rule 109.1 (c), and he argues that it is uncertain whether, with only 31 posts available to absorb 50 displaced staff members and with rating of “4” confirmed by the Rebuttal Panel of Reference for three consecutive PARs, the Applicant would have found alternative placement within UNDP even with sufficient efforts having been made. The Respondent also contends that the Applicant had been invited to apply for posts circulated at five of the SME exercises, however, did not apply.

The Tribunal recalls Judgement No. 769, *Fagan* (1994), where it held that:

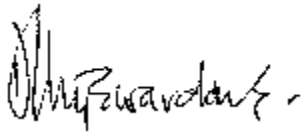
“It is not contested that, as the holder of a permanent appointment, the Applicant was entitled to benefit from the provisions of staff rule 109.1 (c). That paragraph provides that staff members whose posts have been abolished should be given preference in being retained within the Organization, subject to the availability of suitable posts in which their services can be effectively used. ... In this connection ... staff rule 109.1 (c) requires that such efforts be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation.”

In the instant case, the Tribunal concurs with the JAB and finds that “where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given”. (See Judgement No. 447, *Abbas* (1989).) The UNDP Administration should have actively assisted the Applicant by providing her with options for other posts that would match her strength and competencies and thus enable her to improve her performance. However, it was unable to document sufficiently to the JAB that every *bona fide* effort had been made to secure a new post for the Applicant.

IX. Accordingly, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation in the amount of three months’ net base salary at the rate in effect at the time of her separation from service in addition to the three months’ she already received, 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.

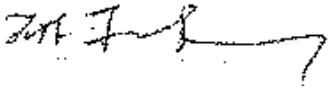
(Signatures)



Dayendra Sena **Wijewardane**
Vice-President

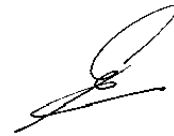


Brigitte **Stern**
Member



Goh Joon Seng
Member

Geneva, 27 July 2007



Maritza **Struyvenberg**
Executive Secretary