



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1352

Case No. 1429

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, Vice-President; Mr. Goh
Joon Seng;

Whereas, on 26 July 2005, a staff member of the United Nations, filed an Application requesting
the Tribunal, inter alia:

“to order:

- (a) [that] the Applicant be paid compensation for:
 - (i) the serious irregularities in the *two* selection exercises, which resulted in her not being properly considered for the promotion to P-4;
 - (ii) the serious irregularities in the subsequent filling of the subject Codification Division P-4 post on a temporary basis, which directly harmed the Applicant;
 - (iii) ... acts of bad faith committed by management towards the Applicant;
 - (iv) ... unfairness to the Applicant, resulting from ... management decisions, which harmed the Applicant's ... career development and lessened her contribution to the Organization; and
 - (v) ... no efforts being made to mitigate the particularly serious conflicts of interest within the appeals process in the Applicant's case; ... the long delays in the appeals process, which directly harmed the Applicant; and for [the Respondent's] unhelpful decision in the case, particularly as regards not placing the Applicant on a P-4 post.

- (b) for compensation awarded, that ... staff rule 112.3 be implemented as regards any staff member found to have been grossly negligent, or having violated any regulation, rule or administrative instruction in this case; and
- (c) that the Applicant not be retaliated against, particularly as regards her timely receipt of retirement benefits and any derogatory comments to prospective employers.”

Whereas on 20 December 2005, the Applicant submitted additional documentation;

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 2 January 2006 and once thereafter until 2 February;

Whereas the Respondent filed his Answer on 31 January 2006;

Whereas the Applicant filed Written Observations on 15 February 2006;

Whereas on 16 March 2006, the Respondent filed additional material and, on 10 April, the Applicant commented thereon;

Whereas on 17 and 31 October 2006, and 20 March and 15 June 2007, the Applicant filed additional documents;

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 initially appointed on 16 August 1977 [on] a General Assembly short-term appointment (...) as an English Language Clerk-Typist (G-2) in the Office of Public Information. [Thereafter, her appointment was extended and converted to fixed-term. In August 1979, she was granted a permanent appointment. She received a series of promotions.] ... Having successfully sat the 1992 “G to P” exam, [the Applicant] was promoted to P-2 (Associate Legal Officer) and transferred to [the Codification Division, Office of Legal Affairs (OLA),] in July 1993. Effective 1 July 1999, she was promoted to P-3 (Legal Officer). From 6 October 2000, she was on detail to the United Nations Transitional Administration in East Timor (...), returning to OLA ... on 6 September 2001.

Summary of the facts

... Responding to vacancy announcement 02-L-DOM-002494-E-NY, [the Applicant] applied in a timely fashion for a P-4 post, Legal Officer, in the Administrative Law Unit [(ALU), Office of Human Resources Management (OHRM)]. The selection process was carried out under the terms of ST/AI/1999/9 [of 21 September 1999, entitled ‘Special measures for the achievement of gender equality’].

... According to [the] Respondent, 203 applications were received. From these, 17 - including [the Applicant’s] - were selected by the Staffing Support Section, OHRM. These were forwarded to [the] Director of the then Specialist Services Division, OHRM, on 24 July 2002. [She], in her memorandum of 22 November ..., reported that, after an initial review, seven candidates were given a written test, following which three candidates - a woman non-staff member, a male staff member of ALU, and [the Applicant] - were interviewed by a panel of four staff members ... The panel was unanimous in the view that the male candidate was the strongest. She agreed and recommended him for the post, and he was ultimately promoted.

... Responding to vacancy announcement 02-LEG-OLA-002636-R-NEW YORK (G), [the Applicant] submitted her application for a P-4 post of Legal Officer in OLA ... The selection process was carried out under the terms of the then recently issued ST/AI/2002/4 [of 23 April 2002, entitled ‘Staff selection system’]. The vacancy announcement was issued on 26 July 2002 and stated, “Deadline for Applications: 24 September ...” [The Applicant’s] application was dated 4 September ...

... In his memorandum of 24 March 2003 ..., [the] Executive Officer, OLA, states:

‘As far as this case is concerned, at the 15th day deadline, OHRM informed OLA that there were no applicants. At the expiration of the 30th day deadline, OHRM released three applications, namely those of Mr. [X], Mr. [Y], and Mr. [Z]. In order to ensure that no administrative error occurred in connection with the release of the applications, [the Director, Codification Division,] requested confirmation that **ALL 30-DAY** applications [had] been released. He received an affirmative answer from OHRM. He then proceeded to review all three applications, interviewed all three candidates and forwarded his recommendations to the Legal Counsel. Since all of them met all the requirements of the post as contained in the vacancy announcement, he recommended all three candidates. When the procedure was approved by the Central Review Committee, the Legal Counsel selected Mr. [Z] as the candidate to be promoted.’

....”

On 23 February 2003, the Applicant requested the Secretary-General to review the administrative decision not to promote her in either promotion exercise.

On 5 April 2003, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 17 March 2005. Its considerations and recommendations read, in part, as follows:

“Considerations

15. The Chairman, in summarizing the pleadings in the case, noted that the Panel had to address itself to three issues: whether [the] Appellant had been accorded full and fair consideration in two separate promotion procedures and to what extent she had suffered by the delays in dealing with her appeal.

16. The Panel first reviewed the material presented concerning the promotion exercise for the P-4 post in ALU. The Panel found convincing [the] Respondent’s argument, as fleshed out by supporting documents, that under the promotion procedure in effect at the time, [the] Appellant was accorded full and fair consideration for the post.

17. The Panel took note of [the] Appellant’s allegations of prejudice with respect to two of the staff members who evaluated her for the ALU post. While aware that the onus of proof lay on [the] Appellant, the Panel was also aware of the difficulties of providing sufficient evidence to establish proof. The Panel finally agreed that [she] had failed to prove her allegations, but found them, nevertheless, disturbing.

18. The Panel also found disturbing elements in [the] Appellant’s account of her treatment in the Codification Division, even if the Panel concluded that her allegations here were also unproven. [She] has had an exemplary record over 27 years of service, and has, by her own efforts, acquired a law degree, passed the New York State Bar and successfully passed the rigorous competitive examination for promotion from G to P. That such a staff member should

have such strongly held negative views of her colleagues and of [United Nations] institutions should be a matter of concern to the Administration ...

19. The Panel, however, did not feel that, in considering the promotion exercise for the P-4 post in OLA, it need enter further into consideration of these allegations, because it found that the promotion review was procedurally flawed. It came to that conclusion on the basis of a careful reading of ST/AI/2002/4, in particular of paragraph 6.2.

20. That paragraph reads:

‘6.2 Applications of candidates eligible to be considered at the 15-day mark but received before the 30-day mark shall nevertheless be transmitted for consideration to the department/office, provided that the head of department/office has not submitted to the central review body a proposal for one or more candidates eligible to be considered at the 15-day mark. Applications for a vacancy posted with a 60-day deadline from candidates eligible to be considered at the 30-day mark but received afterwards shall be transmitted with all the other applications received before the deadline.’

The Panel was aware that the procedure in this case has been as described in [the] Respondent’s reply. The Panel was also prepared to believe that the procedure as described was what was intended when the [administrative instruction (AI)] was drafted. However, in the Panel’s view, it is not what the AI says. What the AI says, when applied to [the] Appellant’s case, is:

Appellant’s application for P-4 vacancy 02-LEG-OLA-002636-R-New York (G), posted with a 60-day deadline, from a candidate eligible to be considered at the 30-day mark but received afterwards should have been transmitted for consideration by the department with the three other applications received.

Or, it is obviously and clearly possible for it to be so interpreted.

21. The Panel concluded that by a reasonable interpretation of the terms of ST/AI/2004/2, [the] Appellant was entitled to have her application considered and she was, therefore, deprived of full and fair consideration for promotion.

...

23. ... [T]he Panel did not consider awarding [the] Appellant damages for delay. The delay in this case was not inordinate, it was normal - [a] situation which the Panel can only deplore. ...

Recommendations

24. The Panel unanimously recommends to the Secretary-General that:

- (a) [the] Appellant be paid the equivalent of 18 months’ net base pay for the denial of full and fair consideration for the P-4 post in OLA; and
- (b) paragraph 6.2 of ST/AI/2002/4 be redrafted to eliminate its ambiguity.

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

On 11 July 2005, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her as follows:

“The Secretary-General ... accepts the JAB’s recommendation that paragraph 6.2 of ST/AI/2002/4 be redrafted to eliminate its ambiguity. With regard to the JAB’s recommendation that you be compensated in the amount of 18 months’ net base salary for the denial to you of full and fair consideration for the P-4 post in OLA, the Secretary-General notes that there is no certainty you would have been selected for the post even had you been considered. He is therefore of the view that the appropriate compensation for the particular ambiguity which in this case operated to your detriment is nine months’ net base salary.”

On 26 July 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. Both selection processes were tainted by serious irregularities and bad faith.
2. The temporary filling of the Codification Division post by a countryman of the Deputy Director of the Division was a serious irregularity and directly harmed the Applicant.
3. Her marginalization by the Codification Division management after her return from a hardship mission in East Timor constituted mismanagement and bad faith.
4. There are serious conflicts of interest within the internal justice system that cast doubt on the objectivity of the appeals process, particularly in the Applicant’s case.
5. The delay in the appeals process caused harm to the Applicant, who is near mandatory retirement.
6. The decision to arbitrarily reduce the recommended compensation and to ignore the suggestion to place her on a P-4 post was unfair.

Whereas the Respondent’s principal contentions are:

1. The selection of a candidate other than the Applicant for the ALU post was a valid exercise of the Secretary-General’s discretion concerning staff appointments, and she was given full and fair consideration.
2. The Applicant failed to prove bias, arbitrariness or other improper motivation in the decision not to select her for the ALU post.
3. The selection process for the Codification Division post was in accordance with ST/AI/2002/4, and the promotion decision was a valid exercise of the Secretary-General’s discretion.
4. The Applicant failed to adduce evidence of bad faith or other improper motive as the reason for her non-selection for the Codification Division post.
5. There were no inordinate delays in the case.
6. The Applicant has failed to substantiate her allegations that there were conflicts of interest in her case.
7. The Applicant has been generously compensated: her request for further compensation is groundless.

The Tribunal, having deliberated from 25 October to 21 November 2007, now pronounces the following Judgement:

I. The Applicant entered the service of the Organization on 16 August 1977, as an English Language Clerk-Typist at the G-2 level on a short-term appointment. Thereafter, her contract was extended and converted to a fixed-term appointment and, in August 1979, she was granted a permanent appointment. She received a series of promotions at the General Service level. After completing a law degree, the Applicant was successful in the 1992 “G to P” exam and was promoted to the P-2 level position of Associate Legal Officer, Codification Division, OLA, in July 1993. Effective 1 July 1999, she was promoted to the P-3 position of Legal Officer.

On 24 May 2002, the Applicant applied for the P-4 post of Legal Officer, ALU, OHRM. The Applicant was one of three candidates interviewed for the position, but was not successful.

On 26 July 2002, the P-4 post of Legal Officer, Codification Division, OLA, was advertised. The deadline for applications was 24 September. At the 30-day mark, OHRM released three applications to OLA. The Applicant applied for the position on 4 September, *after* the 30-day mark. The Director, Codification Division, reviewed the applications and interviewed the three candidates and, on 17 September, advised The Legal Counsel that they all met the requirements of the post. The applications were then forwarded to the Central Review Committee, and the successful candidate was selected for the position.

The JAB found that, with respect to the OHRM post, the Applicant had been “accorded full and fair consideration for the post”. It determined that she had failed to discharge the burden of proving her allegations of prejudice in the exercise, but “found them, nevertheless, disturbing”. The JAB also found “disturbing elements” in the Applicant’s claims concerning the Codification Division. Whilst it concluded that her general allegations were not proven, with respect to the promotion exercise it “did not feel that ... it need enter further into consideration of these allegations, because it found that the promotion review was procedurally flawed”. The JAB noted that paragraph 6.2 of ST/AI/2002/4 provided that “[a]pplications for a vacancy posted with a 60-day deadline from candidates eligible to be considered at the 30-day mark but received afterwards shall be transmitted with all the other applications received before the deadline”, and concluded that “by a reasonable interpretation of the terms of ST/AI/2002/4, [the Applicant] was entitled to have her application considered and she was, therefore, deprived of full and fair consideration for promotion”. Accordingly, it recommended that she be paid compensation equivalent to 18 months’ net base salary for the denial of full and fair consideration. The Secretary-General agreed with the JAB’s recommendation, however decided to award nine months’ net base salary. On 26 July 2005, the Applicant submitted her Application to the Tribunal. She retired from service on 30 November.

II. The Tribunal notes that the Applicant challenges two promotion exercises in her Application, both of which were addressed in the above-referenced JAB report and the decision of the Secretary-General.

Ultimately, what she is alleging is that the fact that she was unsuccessful in these promotion exercises indicates that she suffered discrimination in her career with the Organization, despite the fact that she demonstrated how dedicated she was to becoming a lawyer and having a professional legal career.

The Tribunal further notes that the Applicant deserves commendation, as she has indeed proven an outstanding determination to change her life, pursuing her legal studies whilst working full-time as a General Service employee of the Organization. The latter encourages its employees in such pursuits and has in place a system for promotion from the General Service to the Professional category, via the “G to P” examination. However, the Tribunal has to emphasize that the academic and professional qualifications the Applicant received were no guarantee of a legal career in the Organization. It feels that it need not enter into that point in the present case, which, however, it finds lacking on other grounds.

III. In personnel matters, the Tribunal has consistently respected the broad degree of discretion afforded to the Secretary-General, albeit preserving its own role in assessing the administrative processes underpinning his decision-making. In Judgement No. 828, *Shamapande* (1997), the Tribunal recalled that

“[it] has held repeatedly that ... it is indispensable that ‘full and fair consideration’ should be given to all applicants for a post. The Respondent bears the burden of proof with respect to this issue. In Judgement No. 362, *Williamson* (1986), the Tribunal held that

‘since the staff member has a statutory right to have “the fullest regard” given to his candidature, the burden of establishing the Administration’s failure to consider that candidacy does not fall upon him. If once called seriously into question, the Administration must be able to make at least a minimal showing that the staff member’s statutory right was honoured in good faith in that the Administration gave its “fullest regard” to it.’”

In Judgement No. 834, *Kumar* (1997), the Tribunal found itself

“sympathetic to the fact that the Applicant sincerely believes himself deserving of this post. It has noted that the Applicant’s performance evaluation reports have consistently assessed his performance as ‘very good’ or ‘good’ and that he has received a number of complimentary letters for a job well done. Nonetheless, the Tribunal may not substitute its judgement for that of the Secretary-General, in the absence of evidence showing bias, prejudice, improper motivation or extraneous factors, which the Tribunal has not found in this case.”

Finally, in its Judgement No. 1112, *Suresh* (2003), the Tribunal concluded that,

“In the instant case - as in any case where arbitrariness, discrimination or other such improper motivation is alleged - the *onus probandi*, or burden of proof, rests upon the Applicant. (See Judgements No. 639, *Leung-Ki* (1994); *Knowles*, *ibid.*; and, No. 870, *Choudhury and Ramchandani*(1998).)”

IV. In the present case, the Tribunal finds that there is no evidence that the Applicant was not given full and fair consideration when she applied for the ALU post. Despite the fact that the JAB recognized “disturbing elements”, it appears that it was disconcerted by the fact that a career international civil servant

held such opinions, rather than by proven facts, as neither the Applicant nor the JAB delineated those disturbing elements, let alone substantiated them. Indeed, the JAB's actual wording was:

“[The Applicant] has had an exemplary record over 27 years of service, and has, by her own efforts, acquired a law degree, passed the New York State Bar and successfully passed the rigorous competitive examination for promotion from G to P. That such a staff member should have such strongly held negative views of her colleagues and of [United Nations] institutions should be a matter of concern to the Administration ...”

With respect to the OLA post, the JAB found - and the Secretary-General agreed - that the Applicant was deprived of full and fair consideration for promotion because of the ambiguity of the pertinent rules of the Organization. However, the Secretary-General relied upon the fact that there was no certainty the Applicant would have been promoted, even had she understood the rules and applied within the 30-day mark. For that reason, the Secretary-General determined that nine months' net base salary was sufficient compensation. Under the circumstances of this case, the Tribunal cannot but accept the conclusions of the Secretary-General and finds that the compensation paid was entirely adequate to the harm suffered. (See, generally, Judgement No. 1105, *Kingham* (2003).)

V. In view of the foregoing, the Application is rejected in its entirety.

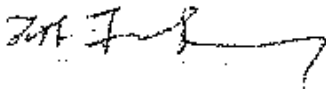
(Signatures)



Spyridon **Flogaitis**
President



Jacqueline R. **Scott**
Vice-President



Goh Joon Seng
Member

New York, 21 November 2007



Maritza **Struyvenberg**
Executive Secretary