



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1353

Case No. 1430

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 at the request of a staff member of the United Nations, the President of the Tribunal extended to 14 August 2005 the time limit for the filing of an application with the Tribunal;

Whereas, on 5 August 2005, the Applicant filed an Application requesting the Tribunal, inter alia,

“to order:

... that the Respondent pay the full compensation of three (3) years' net base pay, rather than the six (6) months' agreed to by him, in recognition that there is solid evidence of the absence of both full and fair consideration and good faith in the selection process and the contested decision. In addition, this had been part of a pattern of prejudicial and discriminatory treatment of the Applicant by the Administration in matters of both assignment and promotion over a period of some eight (8) years. This time period, at the end of the Applicant's career, not only affected remuneration at the time, but will be determining in the calculation of the Applicant's pension. The Applicant further suffered injury to her reputation, unwarranted by her qualifications and performance record; she was also caused pain and suffering by the arbitrary and discriminatory treatment in questions of assignment meted out by the Administration in assigning her to serve as Deputy Director of four divisions of the Department over a period of eight years, and to have been moved whenever a promotion possibility existed.”

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 8 January 2006;

Whereas the Respondent filed his Answer on 20 December 2005;

Whereas on 23 February 2006, the Applicant filed Written Observations;

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] joined the Organization on 16 September 1970 at the P-1 level as Assistant Political Affairs Officer on a short-term and, subsequently, a fixed-term appointment with the Department of Political and Security Council Affairs. ... [She was granted] a permanent appointment on 1 August 1975. After a series of promotions, [the Applicant], while at the P-5 level, was temporarily reassigned from 12 April ... - 30 November 1989 to the International Security and Regional Affairs Section as Officer-In-Charge (OiC) and served from 1992 to early 1995 as OiC and/or Deputy Director of the East Asia and Pacific Division, [Department of Political Affairs (DPA)]. She was promoted to D-1 on 1 February 1995 as Deputy Director of the West Asia Division, DPA. At the time of the contested decision, she served as Deputy Director, Americas and Europe Division, DPA, at the D-1 level. ...

Summary of Facts

... On 25 November 2002, [the] Director, Americas and Europe Division, DPA, informed her staff, including [the Applicant], that she would go on mission effective 15 January 2003.

... According to [the Applicant]’s submission, [the Applicant], then the Deputy Director of the Division since 1998, requested that she be considered for assignment to the D-2 post and functions. According to [the Applicant]’s submission, on 13 January 2003, [she] was advised by the Under-Secretary-General of DPA (...) that she could apply, but he was considering bringing in an outside candidate.

... On 14 January 2003, [the Applicant] was told that the [Under-Secretary-General of DPA] had decided to reassign [the] Director, Asia and the Pacific Division, to the post of Director, Americas and Europe Division, and to reassign [the Director, Americas and Europe Division,] to the post of Director, Asia and the Pacific Division.

... On 15 January 2003, [the] Administrative Officer, DPA, advised D-1 and D-2 staff members in DPA that a temporary D-2 vacancy of Director, Asia and Pacific Division, had become available. She listed the duties and requirements of the temporary post.

... By ... email dated 16 January 2003 ..., [the Applicant] submitted her curriculum vitae for consideration to fill the temporary post.

... By email dated 23 January 2003, [the Under-Secretary-General of DPA responded], stating [that he had decided the division needed someone with ‘direct and extensive experience’ of the Middle East and was, accordingly, considering external candidates.]

... On 3 February 2003, ... the temporary post [was offered] to an external candidate.

... On 25 February 2003, [the Applicant] filed a request for a suspension of action with the JAB [in New York] on the decision to reject her candidacy for the D-2 post.

... On 26 February 2003, [the Applicant] submitted a request to the Secretary-General for an administrative review of the decision.

... On 28 February 2003, a JAB Panel examined [the Applicant's] request for a suspension of action. The Panel found that the decision contested had been implemented and thus made no recommendation on the request.

... According to [the Applicant]'s submission, on 14 April 2003, [she was transferred] laterally to the post of Chief, Repertoire Branch, Security Council Affairs Division, DPA.”

On 22 April 2003, the Applicant lodged an appeal on the merits of her case with the JAB. The JAB adopted its report on 10 December 2004. Its considerations, conclusions and recommendation read, in part, as follows:

“Considerations

...

26. ... [T]he Panel ... considered whether [the] Administration acted in good faith and accorded [the] Appellant her due process right to full and fair consideration. The Panel found that it did not.

27. The Panel, in examining the background of the case, considered the anomalous procedure of an ‘indirect mission replacement’. The vacancy arose in the Americas and Europe Division - where [the] Appellant was serving as Deputy Director - in the D-2 post of Director of the Division, to which [the] Appellant requested she be assigned upon the mission appointment of that post’s occupant This ‘direct’ mission replacement was filled when ... [the Director, Asia and the Pacific Division, was reassigned] to occupy the post. This was a permanent rather than temporary replacement. The need for what the Administration calls an ‘indirect mission replacement’ only arose by the fact that, in placing [him] to her post, [the Director of Americas and Europe Division, DPA,] was reassigned to his post as Director, Asia and the Pacific Division. ... The Panel considered the procedure to fill an ‘indirect mission replacement’ to be disingenuous. ...

28. The Panel examined [the] Respondent’s argument that [the] Appellant was given full and fair consideration for the post. ...

29. ...

... [T]he Panel finds that reference to ‘direct, extensive experience’ in the Middle East was not an emphasis implied within the spirit of the VA but an omitted requirement of the post that was essential given the priorities and challenges of that post, and, in terms of ensuring transparency and fair consideration in selecting a candidate, equally apposite. In the absence of such transparency, the Panel could not find that this supported either Respondent’s argument in support of fair consideration or, more generally, the argument that ‘the temporary vacancy could not be filled from within since neither of the two [internal] candidates met all the requirements for the post.’

....

31. ... [T]he emerging impression is one of a ‘back-door’ recruitment manoeuvre to give priority to and regularize an external candidate. ...

...

Conclusions and recommendation

33. In light of the foregoing, the Panel *unanimously concluded* that, in the absence of fair consideration and good faith in the selection process, the Administration violated [the] Appellant's right to due process. It therefore *unanimously recommended* that she be awarded three years' net base salary. It made no other recommendations regarding the present appeal."

On 2 May 2005, the OiC, Department of Management, transmitted a copy of the JAB report to the Applicant and informed her as follows:

"The Secretary-General ... notes that the totality of the circumstances points to a number of procedural irregularities in the selection process for the post in question, though he does not share the JAB's conclusion that there was bad faith towards you. Having regard to the foregoing, as well as the quantum of compensation usually awarded by the Administrative Tribunal for procedural irregularities in promotion cases, the Secretary-General has decided to compensate you in the amount of six (6) months net base salary for those irregularities."

On 5 August 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Administration violated the administrative rules and procedures of the staff selection system, to her detriment.
2. The Respondent violated her right to due process when he failed to accord her full and fair consideration.
3. The pattern of treatment to which she was subjected, of which this was but one part, was prejudicial to her personally and caused serious damage to her career and long-term livelihood.

Whereas the Respondent's principal contentions are:

1. The irregularities which occurred in the course of the selection process were neither founded in prejudice or discrimination, nor were they indicative of bad faith on the part of the Administration.
2. The Applicant has not suffered irreparable harm to her professional reputation, her career or her future earning potential. The Applicant has been adequately compensated for the irregularities which occurred in the course of the selection process.

The Tribunal, having deliberated from 1 to 21 November 2007, now pronounces the following Judgement:

- I. This case is founded upon a personnel exercise which the Applicant claims was manipulated, thus violating her right to full and fair consideration for the position. She alleges that the impugned decision was part of a pattern of prejudice she experienced.

II. In 2002, the Applicant's supervisor, the Director, Americas and Europe Division, announced she would be departing on mission. Her post was not advertised, however, as another staff member (the Director, Asia and the Pacific Division,) was laterally transferred to the position. As a result, it was his position for which a temporary D-2 indirect mission replacement was advertised and for which the Applicant applied. Soon afterwards, the Under-Secretary-General sent an e-mail to the Applicant, notifying her that due to the "pressing nature of the challenges faced by the division especially in the Middle East", he felt the need to find "someone with direct and extensive experience of the area", and was considering external candidates. Thereafter, an external candidate was offered the position.

The Applicant proceeded to appeal this decision. In its report dated 10 December 2004, the JAB noted that the vacancy announcement had not indicated that "direct and extensive" experience of the Middle East was a requirement of the position and that the "emerging impression [was] one of a 'back-door' recruitment manoeuvre to give priority to and regularize an external candidate". The JAB concluded that, "in the absence of fair consideration and good faith in the selection process, the Administration violated the [Applicant's] right to due process" and recommended that she be awarded compensation of three years' net base salary. Thereafter, the Applicant was advised that the Secretary-General "note[d] that the totality of the circumstances point[ed] to a number of procedural irregularities in the selection process for the post in question, though he [did] not share the JAB's conclusion that there was bad faith towards [her]", and had decided to compensate her with six months' net base salary.

III. The Applicant concedes, correctly, that she has no inherent right to promotion, however dedicated and worthy her performance might have been in the long years of her service and right up to the time the impugned decision was made, and that the assignment of staff members to different functions in an office is the prerogative of the Secretary General. She has, however, vigorously argued before both the JAB and the Tribunal that the personnel exercise in question was wholly flawed. She argues, furthermore, that the conduct of the Administration revealed a larger pattern of discrimination and prejudice towards her.

The Applicant rejects the Respondent's contentions that she was given full and fair consideration and that the Administration acted with good faith, asserting that,

"all the facts demonstrate that precisely the opposite is true: a job description that omits the crucial 'qualification', the *deliberate* obfuscation or lack of transparency regarding the location, nature and duration of the vacancy; the lack of any interview or even discussion of the Applicant's qualifications as compared with the requirements of the post; and the lack of recourse to the procedures prescribed for filling a post in the actual situation, which the Administration had actively manipulated and of which it most certainly should have been aware". (Emphasis added.)

She goes on to state:

"The decision in this case represented not only various violations of the letter and spirit of the rules of the new system; it is also reflective of an *intentional* abuse of authority by that head of department for the purpose of ensuring an outcome reflective of his personal preference rather

than the stated priorities and goals of the Organization. It was indicative of an abnegation of the responsibility for serving staff not recruited by the Under-Secretary-General. The decision and process leading up to it, were disingenuous, arbitrary, and reflected a lack of transparency as well as concern for equal treatment of serving female staff.” (Emphasis added.)

The allegations the Applicant makes are serious, but it appears to the Tribunal that the level at which she pitches her case is not established by the evidence on record. As the Tribunal “has consistently held ...[,] the *onus probandi* is on the Applicant where ... allegations of bias or extraneous motivation are made. (See Judgements No. 639, *Leung-Ki* (1994); No. 784, *Knowles* (1996); No. 870, *Choudhury et al* (1998); and, No. 1069, *Madarshahi* (2002).)” (See Judgement No. 1180, *Kazeze* (2004).)

IV. The JAB unanimously concluded that “in the absence of fair consideration and good faith *in the selection process*, the Administration violated the [Applicant’s] right of due process”. (Emphasis added.)

The Tribunal has had cause to consider other cases in which there was an apparent disconnect between the requirements as set out in a vacancy announcement and those actually applied in the promotion exercise. In Judgement No. 1122, *Lopes Braga* (2003), the Tribunal held:

“By advertising the post ... as one that required an undergraduate degree, the Respondent made the degree a pre-requisite to selection for the post and cannot now be heard to argue that the possession of the degree was but one factor in its determination. To allow otherwise harms not only the Applicant, who was misled and not fairly considered by objective criteria for the position, but also harms all those putative applicants who did not apply because they did not possess an undergraduate degree.”

It concluded that “the Respondent’s failure to follow [his] own procedures; *i.e.*, to apply objective criteria of evaluation in a consistent manner, was a violation of the Applicant’s right to be fully and fairly considered for the post and irreparably harmed the Applicant”. Likewise, in Judgement No. 1326 (2007), the Tribunal found that the Respondent had failed to “apply his own objective criteria of evaluation, as required by the rules and regulations governing the promotion exercise”. (See also Judgements No. 1360, No. 1369 and No. 1370, rendered by the Tribunal at this session.)

V. The Tribunal notes in this connection that deeply flawed as the process was procedurally, there is no indication of any *animus* or prejudice directed towards the Applicant, personally. Her rights were violated by the general lack of due process in the exercise as, indeed, were those of the other candidates for the position. While the Respondent’s actions point to a lack of respect for, and good faith towards, his own procedural requirements, the Tribunal is not persuaded that there existed bad faith towards the Applicant. This is so not only because she has failed to discharge her burden of proof, but because the evidence indicates that the decision to promote the external candidate was made transparently. The Under-Secretary-General directly and forthrightly informed her of the reasons for wanting to act as he did: he thought the Department needed someone with “direct and extensive experience in the Middle East”. There is no doubt that this new requirement was not included in the vacancy announcement but, at the same time, he would

hardly have expressed himself in such a way towards the Applicant, particularly by e-mail, if there was a concerted effort to victimize her. Rather, the Tribunal sees it as an effort to explain the decision-making, presumably in the hopes of mollifying an understandably disappointed staff member and of maintaining or fostering good working relationships.

VI. Thus, while the Tribunal accepts the conclusion of the JAB that there was a lack of good faith in the selection process, it cannot find a pattern of discrimination and prejudice targeted against the Applicant in the broader terms she alleges. The Tribunal does not believe that the JAB itself came to such a conclusion, in the absence of any such findings in its report. In this light, the Tribunal finds it difficult to understand the rationale for the exceptional level of damages which the JAB thought fit to recommend, and believes that the Secretary-General's assessment of compensation is more in tune with the jurisprudence of this Tribunal in similar cases. The Tribunal will admit to finding the Secretary-General's decision rather confusing, in that he specified that he did "not share the JAB's conclusion that there was bad faith towards [the Applicant]" whereas, in fact, the JAB clearly concluded that there was a "lack of good faith" as regards "the selection process", but did not find that there had been bad faith exercised towards the Applicant.

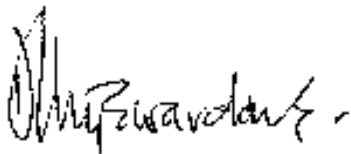
VII. The only remaining question for the Tribunal to consider is whether the compensation paid to the Applicant was adequate for the violation of her rights in the selection process.

The Tribunal awarded each of the Applicants in the above-referenced Judgements No. 1122 and No. 1326 compensation in the amount of six months' net base salary for the violation of their rights. Similarly, in Judgement No. 1331 (2007), the Tribunal awarded six months' net base salary pursuant to a finding that "there was a pattern of violations of the Applicant's right to be given equitable consideration for promotion which extended over a period of several years". The circumstances of that case indicated ongoing prejudice towards the Applicant and a systematic violation of her rights.

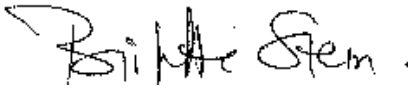
In the instant case, the Secretary-General has already paid the Applicant six months' net base salary, which the Tribunal finds sufficient compensation for the violation of her rights, as found by the JAB and accepted by the Respondent.

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

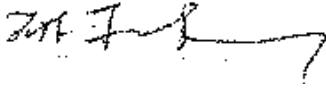
(Signatures)



Dayendra Sena **Wijewardane**
Vice-President

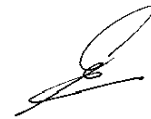


Brigitte Stern
Member



Goh Joon Seng
Member

New York, 21 November 2007



Maritza Struyvenberg
Executive Secretary