



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1360

Case No. 1438

Against: The Commissioner-General
of the United Nations
Relief and Works Agency
for Palestine Refugees in
the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Ms. Jacqueline R. Scott, Vice-President, presiding; Mr. Julio Barboza; Sir Bob
Hepple;

Whereas, on 11 January and 19 May 2005, a staff member of the United Nations Relief and Works
Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed
Applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 6 September 2005, the Applicant, after making the necessary corrections, again filed
an Application containing pleas which read as follows:

“Section II: **PLEAS**

1. I request that the Tribunal revoke the appointment of [another staff member] in the
position of ‘Senior Instructor - Machinist and Welder’ at [Wadi-Seer Training Center (WSTC)]
and consider me for the position. This request is based on the ground that my qualifications,
experience and knowledge of the work are better than his and the interview panel was not fair in
selecting him and not me.

2. I request to be compensated for the losses and punitive damage to me and my family ...
consequent to his appointment ...”

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 31 March 2006;

Whereas the Respondent filed his Answer on 27 March 2006;

Whereas the Applicant filed Written Observations on 24 June 2006, and the Respondent commented thereon on 12 July;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

“Summary of facts

... Effective 17 September 1988, the [Applicant] was offered and accepted the post of Technical Instructor at [WSTC, on a] temporary indefinite ... appointment, Grade 10, step 1. The [Applicant] continued in this post until 1 October 1999.

... On 1 October 1999, the [Applicant’s] post was declared ‘surplus to the Agency’s requirement’ and as an alternative to provisional redundancy, the [Applicant] was offered and accepted a transfer to the post of Assistant Head Teacher, Amman New Camp Preparatory Boys School No. 1, effective 9 October ..., with full grade protection at Grade 12.

... Effective 1 September 2000, the [Applicant] was offered and accepted a transfer to the post of Trade Instructor (Mechanist Welder) at WSTC, Grade 12 ...

... On 1 July 2002, the [Applicant] applied for the post of Senior Vocational Training Instructor (General) at WSTC.

... On 19 August 2002, the [Applicant] was interviewed by the Interview Panel at Jordan Field Office ...

... On 21 December 2002, the [Applicant], apparently already aware he had not been selected for the post (even though he was formally notified of that fact only [on] 30 December ...), sent a letter to [the Director of UNRWA Operations, Jordan (DUO/J)] requesting that he be reconsidered for the post.

... On 30 December 2002, the [Applicant] received a letter from the [DUO/J] which stated that it was within the discretion of the interview panel to recommend the most suitable candidate for his subsequent approval. The DUO/J also stated that he received the results of the interview for the post and came to the conclusion that the decision regarding the selection for the post should not be changed.”

On 6 February 2003, the Applicant lodged an appeal with the UNRWA Area Staff JAB in Gaza. The JAB adopted its report on 9 May 2004. Its evaluation and judgement, and recommendation, read as follows:

“Evaluation and Judgement

12. On its deliberations the Board examined all documents cited before it including the Appellant’s personal file and came out with the following:

- a) The Board believes that the Administration has acted within the framework Rules and Regulations without any prejudice or bias to the Appellant.

...

- c) The Board strongly recommends that the Board's members assigned to look at any case should come from fields other than that of the Appellant. This is necessary to avoid pressures of colleagues and others and to provide more objectivity in the Board's judgements.

Recommendation

13. In view of the foregoing and without any further oral or written submissions, the Appellant may deem pertinent, the Board unanimously makes its recommendations to uphold the Administration's decision appealed against and that the Appeal be dismissed."

On 22 June 2004, the Applicant wrote to the JAB, requesting that the Secretary "follow up" on his appeal. The Secretary of the JAB replied on 5 July that his appeal had been considered. Thereafter, the Applicant asked for a copy of the Commissioner-General's decision on the JAB report and was advised, on 28 August, that the Commissioner-General had not made a final decision but that he could proceed directly to the Tribunal. Nonetheless, on 17 October, the Applicant again requested an update as per his letter dated 22 June. The same day, the Secretary of the JAB provided the Applicant with a copy of the JAB report.

On 6 September 2005, the Applicant, having not received any decision from the Commissioner-General regarding his appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 6 June 2006, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him that he agreed with the JAB's findings and conclusions and had decided to accept its unanimous recommendation and to take no further action on the appeal.

Whereas the Applicant's principal contentions are:

1. He was more qualified than the selected candidate.
2. The members of the interview panel were biased towards him, and favoured the selected candidate.

Whereas the Respondent's principal contentions are:

1. The Application in its entirety is not receivable by the Tribunal.
2. The procedure followed in the appointment of the Senior Vocational Training Officer (General Mechanic) was in accordance with the Agency's practice and was free from extraneous motivation.

The Tribunal, having deliberated from 23 October to 21 November 2007, now pronounces the following Judgement:

- I. The Applicant, a staff member of UNRWA, applied for the Grade 12 post of Senior Vocational Training Instructor on 1 July 2002. He sat a written test for the position and, subsequently, was one of

three people interviewed. It appears from the file that he ranked third in both the written exam and the interview. The successful candidate was appointed to the position on 9 October.

On 21 December 2002, the Applicant requested administrative review of this decision. Thereafter, on 6 February 2003, he lodged an appeal with the Area Staff JAB in Gaza. In its report, submitted to the Commissioner-General on 9 May 2004, the JAB recommended that the impugned decision be upheld, concluding that “the Administration ... acted within the framework [of the] Rules and Regulations without any prejudice or bias”. The Applicant was not provided with a copy of the JAB report until 17 October. He first attempted to file an application with the Tribunal on 11 January 2005; his final, corrected Application was filed on 6 September.

II. The Tribunal will consider first whether or not this Application is receivable, *ratione temporis*. Time-limits are taken seriously by the Tribunal, which recalls its rationale in Judgement No. 1046, *Diaz de Wessely* (2002):

“In the Tribunal’s view, it is of the utmost importance that time limits should be respected because they have been established to protect the United Nations administration from tardy, unforeseeable requests that would otherwise hang like the sword of Damocles over the efficient operation of international organizations. Any other approach would endanger the mission of the international organizations, as the Tribunal has pointed out in the past: ‘Unless such staff rules [on timeliness] are observed by the Tribunal, the Organization will have been deprived of an imperative protection against stale claims that is of vital importance to its proper functioning’ (see Judgement No. 579, *Tarjouman* (1992), para. XVII)”.

The relevant time limits are those contained in article 7, paragraph 4, of the Statute of the Tribunal which reads, in relevant part, “[a]n application shall not be receivable unless it is filed ... within ninety days reckoned from the date of the communication of the joint body’s opinion containing recommendations unfavourable to the Applicant”. The parties in this case contest the date on which the ninety-day period commences to run: the Respondent seems to believe that the date in question is that of the communication to the Commissioner-General of the JAB’s report, whereas the Applicant maintains the date in question is that on which he received the report.

The Tribunal finds that the Applicant’s interpretation of the Statute is correct: in law, no period of time, at the end of which the rights of a person expire, may commence without that person having been notified. Moreover, the Tribunal recalls that this matter was addressed in its Judgement No. 1257 (2005), in which it stated

“The Statute and the Rules of the Tribunal set forth the conditions under which an application is receivable. Where the JAB’s recommendations are unfavorable to the Applicant, the Statute makes clear in article 7, paragraph 4, that an Application is not receivable unless it is filed within ninety days of the date on which *the JAB report is communicated to the Applicant.*” (Emphasis added.)

On a practical level, in the instant case, the Respondent’s position that the ninety-day period commenced on 9 May 2004 means that the said period would have expired on 9 August, i.e., more than two months

before the Applicant, despite his best efforts to obtain a copy of the JAB report, was sent his copy. Clearly, it is not possible for an applicant to draft his application without knowing the content of the JAB report and the arguments and fact-finding on which its recommendations were based. After all, the applicant must interpret those facts and refute such arguments in order to protect his rights.

III. On 9 May 2004, the JAB report was sent to the Commissioner-General, but it appears that the Applicant was not aware of this event. Pursuant to article 7 of the Statute of the Tribunal, the Applicant was entitled to request his copy of the report thirty days later. Such a request is, of course, dependent on the Applicant having been informed of the existence of the report. On 22 June, the Applicant wrote to the JAB, requesting that the Secretary “follow up” on his appeal. The Secretary of the JAB replied on 5 July that his appeal had been considered but did not send him a copy of the report. Thereafter, the Applicant asked for a copy of the Commissioner-General’s decision on the JAB report and was advised, on 28 August, that the Commissioner-General had not made a final decision but that he could proceed directly to the Tribunal. He was still not provided with a copy of the report. On 17 October, the Applicant again requested an update as per his letter dated 22 June. The same day, the Secretary of the JAB sent him a copy of the JAB report.

The Tribunal finds that it is the obligation of the JAB to communicate its report to the concerned staff member(s), and that such duty is not met by merely informing him or her that the JAB’s report has been sent to the Respondent. In this case, from 9 June 2004 onwards, the Applicant was entitled to receive his report, and his repeated enquiries to the JAB secretariat should have prompted them to provide him with a copy.

IV. The Tribunal is satisfied, then, that 17 October 2004, the date on which the JAB report was communicated to the Applicant, is the relevant date from which the ninety-day period must be reckoned.

The Applicant first attempted to file his case with the Tribunal on 11 January 2005. His submission did not meet the procedural requirements of article 7 of the Rules of the Tribunal, and was returned by the Executive Secretary of the Tribunal for correction. Thereafter, on 19 May, the Applicant again filed a document which did not meet the statutory requirements. He finally successfully filed an Application on 6 September. It is the position of the Tribunal that the time limits of its Statute are complied with if the Applicant has either requested an extension thereof, or filed an Application (or a document attempting to be such), within the ninety-day period. As the Applicant first attempted to file his Application on 11 January 2005, within the ninety-day period reckoned from 17 October 2004, his Application is, indeed, receivable, *ratione temporis*.

The Tribunal wishes to take this opportunity to remark upon the Respondent’s somewhat contradictory approach to procedural requirements in this case. Whilst he sought to enforce the technical requirements of the Statute insofar as the Applicant is concerned, it is noteworthy that the Commissioner-General omitted to observe his own elementary duty of making a decision pursuant to the JAB’s recommendations. The Tribunal was disappointed to be presented with another case in which an Applicant

was denied this decision (see also Judgement No. 1328 (2007)) and is not impressed by the Respondent's letter of 6 June 2006, provided as a belated response to repeated requests from the Applicant for such a decision, which he had mistakenly understood to be "a necessary prerequisite ... to lodge an Application with the Tribunal". Recalling that the JAB had submitted its report on 9 May 2004, the Commissioner-General continued "[i]t is regrettable that the volume of other work, combined with two lengthy relocations of UNRWA Headquarters staff in 2004 and 2005-2006 have prevented the Agency from timely communicating to you its position on the Board's report". However, the Commissioner-General then stated that as the Applicant had already filed his Application with UNAT, "and the Agency has already responded, indicating its agreement with the report of the Board ... under the circumstances, I believe no further action is necessary". The Tribunal takes this opportunity to remind the Respondent that a timely decision on the JAB's recommendations is imperative.

V. Having declared the case receivable, the Tribunal will address the substance of the Applicant's case. He is basically protesting a series of aspects of the decision made by the Respondent to appoint another candidate to the Grade 12 post of Senior Vocational Training Instructor.

The Tribunal recalls that, in personnel matters, the discretion of the Commissioner-General is broad, and that it is not for the Tribunal to assess the relative merits of the candidates for the position in question. This is so even in cases where an Applicant presents a compelling case for his own superiority over the successful candidate. In Judgement No. 834, *Kumar* (1997), the Tribunal held:

"The Tribunal is 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."

The discretion of the Respondent is not, of course, absolute. He is obliged to give all candidates full and fair consideration for appointment. In Judgement No. 828, *Shamapande* (1997), the Tribunal recalled that it "has held repeatedly that, in order to effect the foregoing purpose, it is indispensable that 'full and fair consideration' should be given to all applicants for a post". Moreover,

"[t]he 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.'" (See *Shamapande (ibid.)*.)

The Applicant has made a number of allegations which are unacceptable, or unsupported by the evidence, but the Tribunal need not proceed to their examination. This is so, because he has one good point which is, in fact, admitted by the UNRWA Administration.

VI. It is the longstanding position of the Tribunal that transparency and due process in appointment and promotion decisions demand that the decision be premised upon the criteria set out in the vacancy announcement. In Judgement No. 1122, *Lopes Braga* (2003), the Tribunal held that

“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.”

The vacancy announcement for the position of Senior Vocational Training Instructor specified that the position required the following “Minimum Qualifications”:

- A. *Academic & Professional*
 - i. A University Degree ... plus one year Instructor Training Course *OR*
 - ii. Two years post secondary technical course plus two years Instructional Training Course.
- B. *Experience*

A minimum of one year experience as Technical Instructor ‘A’ *or* four years experience as a fully qualified Trades Instructor ‘A’.
- C. *Language*

Good knowledge of spoken and written English and Arabic.”

It is apparent that the successful candidate did not have such qualifications or experience as a Note for the Record prepared by the Deputy Field Personnel Officer, Jordan, on 20 August 2002, concerning the filling of the vacancy, notes that the appointment of the successful candidate would require prior approval from the Department of Administration and Human Resources “as he lacks the required one year instructor training course and years of experience as instructor”.

Thus, by his own admission, “the Respondent did not apply his own objective criteria of evaluation, as required by the rules and regulations governing the promotion exercise”. (See Judgement No. 1326 (2007), citing *Lopes Braga (ibid.)*.) This amounted to “a violation of the Applicant’s right to be fully and fairly considered for the post and irreparably harmed the Applicant”. (See *Lopes Braga (ibid.)*.) Accordingly, the Tribunal finds that the Applicant did not receive “full and fair consideration” and that his rights were violated. He is, thus, entitled to compensation. In view of the circumstances of this case, and having regard for the Applicant’s own admission that the other candidate interviewed, who ranked second,

had “credentials and qualifications ... far beyond mine or [the successful candidate] and ... well proven” vocational experience, the Tribunal fixes this compensation at four months’ net base salary.

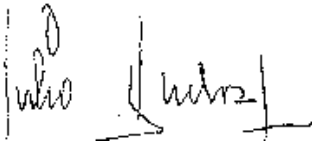
VII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant, by way of reparation, compensation of four months’ net base salary at the rate applicable on the date of this Judgement, 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.

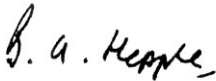
(Signatures)




Jacqueline R. Scott
Vice-President



Julio Barboza
Member



Bob Hepple
Member



New York, 21 November 2007

Maritza Struyvenberg
Executive Secretary