



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1361

Case No. 1439

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Mr. Julio Barboza; Ms. Brigitte Stern;

Whereas, on 29 March 2005, a former staff member of the United Nations, filed an Application, requesting the Tribunal, *inter alia*, to request production of a number of documents and to grant him two years' compensation for the delay in resolution of a number of issues related to recommendations made by the Joint Appeals Board (JAB) "not based in policy, documentation, jurisprudence or interpretation". Whereas, on 27 July 2007, the Tribunal rendered Judgement No. 1330, having determined that there were four sets of grievances presented by the Applicant. It rejected the Application in its entirety, finding that the vague terms in which the first claim was couched made it impossible to determine exactly what administrative decisions were being contested; that the second one, demanding re-opening of his requested investigation into the United Nations Safety and Security Service (UNSSS) in Vienna should fail, in view of the Tribunal's long-standing jurisprudence that to hold an investigation is at the discretion of the Administration; that the third one, relating to the Applicant's 2001 performance appraisal system (PAS) report, was not receivable as it did not address a specific administrative decision; and, with regard to the fourth claim, that the Applicant had failed to discharge the burden of proof that the JAB's proceedings were vitiated by irregularities and errors of fact.

Whereas, at the request of the Applicant, the President of the Tribunal granted an extension of the time limit for filing a second application with the Tribunal until 31 May 2005, and twice thereafter until 30 August;

Whereas, on 15 August 2005, the Applicant filed an Application containing pleas which read, *inter alia*, as follows:

“Section II: *PLEAS*

The ... Tribunal is respectfully requested to find that:

...

2. The actions of the Chief, UNSSS, represent ... the abuse of his own authority; the purposes and processes set out in ST/AI/1999/14 [of 17 November 1999 on the performance appraisal system], the Manual of the UNSSS by failing to follow its prescribed policy procedures, his willingness to provide false and misleading information in his [memorandum] in the [Applicant’s 2001 PAS, making unsubstantiated charges and refusing on the basis thereof to recommend renewal of appointment];

3. The Chief[, Human Resources Management Section (HRMS),] and the Director[, Division of Administrative and Common Services (DACs),] abused their authority by supporting all of the above and failed to exercise any constructive oversight regarding the policy guiding the preparation of the PAS ...

4. Although having served the [United Nations] for more than 19 years on fixed-term appointments, [the Applicant was never given reasonable consideration for a permanent appointment];

...

6. Because the Applicant’s performance varied between ‘fully meets expectations’ and ‘consistently meets expectations’; the persistent intent of the Respondent to undertake discriminatory and prejudicial actions against the Applicant; the refusal of the Respondent to meet responsibilities he proposed with respect to a ‘review’ of the Applicant’s performance in 2001, and his own responsibility to reassign the Applicant; the Applicant be reinstated.

7. The Applicant be compensated in the amount of three years’ net income, at current levels for his grade and step prior to dismissal, for the discrimination, harassment, prejudice, retaliation and retribution experienced.”

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 January 2006 and once thereafter until 28 February;

Whereas the Respondent filed his Answer on 28 February 2006;

Whereas the Applicant filed Written Observations on 28 March 2006;

Whereas the facts additional to those contained in Judgement No. 1330, as contained in the report of the JAB, are as follows:

**“SUMMARY OF THE EMPLOYMENT HISTORY OF THE [APPLICANT]**

...

... On 21 March 1998, following his application, [the Applicant] was selected and reassigned laterally at the [P-2] level to the post of Deputy Chief of UNSSS in Vienna. ... [The Applicant was granted a series of extensions of his appointment] through 31 December 2001.

... On 29 June 2001, the Chief of UNSSS recommended to HRMS that in view of [the Applicant’s] unsatisfactory performance, his appointment should not be extended beyond 31 December ... and that [he] should be reassigned to a different organizational unit through the remainder of his contract.

... From 1 July ... until 30 September 2001, [the Applicant] was on a non-reimbursable loan to the United Nations Institute for Training and Research (...). On 20 September ..., the Chief of UNSSS informed [the Applicant] that he was recommending that his appointment not be extended in view of his unsatisfactory performance, including insubordination.

... On 1 October 2001, following [the Applicant]'s return from his non-reimbursable loan, he was advised during a meeting with ... HRMS that the recommendation of the Chief of UNSSS would be reviewed in the context of his overall performance, including his 2001 ... PAS, and that in order to complete the evaluation process, his contract would be extended through 31 March 2002. [The Applicant] was further advised that a decision had been made to assign him for the rest of his contract to ... the United Nations Drug Control Programme (UNDCP). On 8 October ..., the Chief, HRMS, confirmed the above in a letter to [the Applicant].

... [Also on] 1 October 2001, [the Applicant] took ... sick leave and, therefore, implementation of the decision to assign him to UNDCP was delayed. On 23 October ..., [the Applicant] requested the Chief, HRMS, to confirm in writing the reasons and justification of the administrative decision to assign him to UNDCP. On 30 October ..., he asked the Director[, DACS,] to rescind that decision. On 8 November ..., the Director of DACS informed [the Applicant] that a decision to temporarily assign him to UNDCP was made in the best interests of the Organization, that it was in line with the existing Staff Regulations, and that he was expecting [the Applicant]'s cooperation.

... On 15 February 2002, [the Applicant] signed and returned to HRMS his 2001 PAS report and on 14 March ... he submitted a rebuttal against the same PAS. The PAS Rebuttal Panel subsequently upgraded his 2001 PAS to the rating of ["Fully meets performance expectations"].

... Following receipt from [the Applicant] of completed medical reports certifying his absence from duty, the Respondent on several occasions extended [the Applicant]'s appointment up to and including 31 January 2003 which was the date when [the Applicant] would have exhausted all his entitlements to annual leave and sick leave including half-day sick leave, as per the provisions of administrative instruction ST/AI/1999/12 [of 8 November 1999].

... On 26 June 2002, the Respondent informed [the Applicant] that for operational reasons and since the Respondent did not expect [him] to work in the UNSSS upon return from sick leave, it was decided to submit the post of Deputy Chief of UNSSS for recruitment action.

... On 7 November 2002, the Respondent wrote to [the Applicant] informing him that because of the projected exhaustion of all paid entitlements by 31 January 2003, his case was under consideration by the [United Nations] Medical Director in terms of eligibility for being awarded a ... disability pension. ...

... On 25 November 2002 the Respondent advised [the Applicant] that the ... Medical Director had agreed not to proceed with a recommendation for disability, particularly in view of the [the Applicant]'s own opinion that such a recommendation would be premature. The Respondent further clarified to [the Applicant] that upon exhaustion of [his] entitlement to all paid sick leave, the Organization would have no further administrative basis to extend his appointment. On 27 November ..., the Respondent, while advising [the Applicant] about the extension of his appointment through 31 January 2003, reminded him of the same.

... On 22 January 2003, [the Applicant] advised the Respondent that he was medically cleared to resume half day duty as of 30 January ... and that serious consideration be given to his returning to his present post of Deputy Chief in the absence of any performance shortcomings. In reply, on 28 January ... HRMS informed [the Applicant] that he should report to duty ... On the same date, the Chief, HRMS, informed [the Applicant] that his contract would be extended to 28 February ...

...

... On 24 February 2003, [the Applicant] informed the Respondent that he was fit to resume full-time duty as of that day. On the same date the Respondent received the report of the Rebuttal Panel on the 2001 PAS of [the Applicant], which recommended the upgrading of the rating of [the Applicant] from '4' to '3'.

...

... On 26 February 2003, [the Applicant was again advised that his appointment would be allowed to expire on 28 February]. ...

... On 27 February 2003, [the Applicant] reported sick and on 28 February ... he applied for a disability benefit. In view of the fact that [the Applicant] by that time had some 'revival' days of paid sick leave entitlement, the Respondent for administrative purposes extended his appointment through ... 10 March ... Effective 11 March ..., the Respondent separated [the Applicant] from service upon expiration of his appointment.

... On 14 April 2003, the Respondent forwarded [the Applicant]'s application for disability benefit to the United Nations Joint Staff Pension Fund [(UNJSPF)].

...

... On 2 May 2003, the Chief of the Geneva Office of the UNJSPF wrote to [the Applicant] advising him that the United Nations Staff Pension Committee had reviewed his case and declined awarding him the disability benefit."

Meanwhile, on 20 February 2002, the Applicant had lodged an appeal with the JAB in Vienna. The JAB adopted its report on 1 December 2003. Its findings, conclusions and recommendations read, in part, as follows:

***"FINDINGS***

...

42. The Panel noted that the [letter of 8 October 2001 from the Chief, HRMS,] ... contained two decisions:

- a) The decision to renew the contract of the Appellant until 31 March 2002;
- b) The decision to assign the Appellant for the rest of his contract to the [UNDCP].

43. The Panel found that with regard to the first decision, it had been superseded by subsequent decisions to further extend the Appellant's contract until the end of his sick leave entitlements. The Appellant did not appeal these further decisions to renew his contract nor the final decision not to renew his contract after 11 March 2003.

44. The Panel further found that a decision to renew a contract, even for a short period, is not in breach of any rules or regulations.

45. The Panel found that with regard to the second decision it had never been implemented. When the Appellant returned from sick leave on 30 January 2003, he was appointed to the Office of the Director/DACS. He did not appeal that decision. The Panel further noted that, had the decision to re-assign the Appellant been implemented, the Panel would not have viewed it as an unfavourable decision, as it would have been a legitimate exercise of discretionary authority under staff rule 1.2.

46. The Panel found that none of the decisions appealed violated any of the Appellant's terms of employment, including all relevant rights and regulations.

47. The Panel recommends that the appeal be dismissed in its entirety.”

On 13 September 2004, 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 the JAB’s unanimous recommendation and to take no further action on his appeal.

On 15 August 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The decisions contained in the letter of 8 October 2001 were part of an ongoing pattern of prejudice, discrimination, maladministration and misconduct taking place during the years 1998-2001 in UNSSS in Vienna.
2. The JAB failed to consider all the pleadings brought by the Applicant, without giving a reason.
3. The JAB was negligent and abused its authority and responsibilities.

Whereas the Respondent’s principal contentions are:

1. The two decisions contained in the letter of 8 October 2001 did not violate the Applicant’s terms of employment, and the decisions were not vitiated by extraneous factors or improper motives.
2. The Applicant’s allegations against the JAB are unsubstantiated.

The Tribunal, having deliberated from 2 to 21 November 2007, now pronounces the following Judgement:

I. Between 14 September 2001 and 16 July 2002, the Applicant and two other staff members, Mr. D. and Mr. E., lodged 11 appeals with the JAB, Vienna. On 29 July 2003, the JAB adopted its report, joining all appeals, and recommended, inter alia, that the Applicant’s appeal submitted on 20 February 2002 was receivable. It decided that this appeal should be examined as to its merits by a separate JAB Panel, which was subsequently established.

II. The Applicant, who joined the United Nations as a Security Officer in 1983, was selected and assigned, on 21 March 1998, to the P-2 post of Deputy Chief, UNSSS, in Vienna. On 29 June 2001, the Chief, UNSSS, recommended to HRMS, in view of the Applicant’s unsatisfactory performance, not to extend his fixed-term appointment beyond 31 December and to reassign him to a different organizational unit through the remainder of his contract. On 20 September, upon his return from reassignment, the Chief, UNSSS, informed the Applicant that he was recommending that his appointment not be extended in view of his unsatisfactory performance, including insubordination.

However, on 1 October 2001, the Applicant was advised that his contract would be extended through 31 March 2002 and that a decision had been made to assign him for the rest of his contract to UNDCP. On 8 October, the Chief, HRMS, confirmed the above in a letter to the Applicant. Subsequently, the Applicant took extended sick leave.

On 14 March 2002, he submitted a rebuttal against his 2001 PAS report, which was subsequently upgraded to the rating of “3” (“Fully meets performance expectations”).

The Applicant returned to the office from his sick leave on 30 January 2003, when he was advised that his contract would not be extended beyond 28 February. On 27 February, the Applicant again reported sick. Effective 11 March, he was separated from service.

III. In the meantime, on 20 February 2002, the Applicant had lodged an appeal with the JAB against the two decisions contained in the 8 October 2001 letter. In its report dated 1 December 2003, the JAB found that the first decision, not to renew the Applicant's contract beyond 31 March 2002, had been superseded by subsequent decisions to further extend his contract until he had exhausted his sick-leave entitlements; and that the second decision, to reassign the Applicant to UNDCP, was never implemented. It recommended that the appeal be dismissed and, on 13 September 2004, the Secretary-General accepted the JAB's recommendation.

IV. In the instant case, the Tribunal concurs with the JAB that the decisions not to renew the Applicant's contract beyond 31 March 2002 and his reassignment to UNDCP are moot in view of subsequent events which led to their non-implementation, and, thus, need not consider the question whether unsatisfactory performance, including insubordination, was the reason not to recommend the renewal of his contract and to reassign him. The only remaining issue before it is, therefore, whether these decisions were part of on-going "prejudice, discrimination, maladministration and misconduct" which allegedly took place during the years 1998-2001 in UNSSS in Vienna.

The Tribunal recalls its jurisprudence on such issues. In Judgement No. 1122, *Lopes Braga* (2003), it held that:

"VIII. With respect to whether a discretionary decision, such as the decision not to promote the Applicant, has been tainted by prejudice, discrimination or improper motive the burden of proving such prejudice or improper motive is on the Applicant (see Judgment No. 834, *Kumar* (1997)). The Tribunal finds that the Applicant has failed to provide sufficient evidence to support his claims that the Respondent's decisions were motivated by prejudice, discrimination or improper motive."

Similarly, in Judgement No. 1118, *Khuzam* (2003), paragraph VIII, it held that

"where the Applicant alleges prejudice or discrimination, the burden of proof in such matters rests upon the Applicant. (See Judgements No. 312, *Roberts* (1983), and, No. 428, *Kumar* (1988).) In the instant case, the Applicant merely raises speculation as to whether discrimination or prejudice entered into the Respondent's decision not to promote him; he provides, however, no factual basis for such assertions. The Applicant has failed to sustain his burden of proof with respect to prejudice or discrimination."

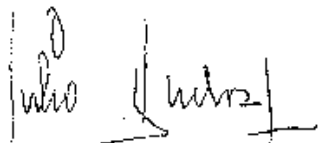
The Tribunal notes not only that the Applicant does not refer to any specific instance of such prejudice or discrimination, but also that he already brought similar complaints in an earlier Application which were considered by the Tribunal in Judgement No. 1330 (2007). Moreover, in that Judgement, the Tribunal noted that "the vague terms in which [the Applicant's grievance] is couched make it impossible to determine exactly what administrative decisions are being contested. This claim must therefore fail." As in that Judgement, in the instant case, the Tribunal concludes that the Applicant has failed to discharge his burden of proving discrimination or prejudice.

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

*(Signatures)*



**Spyridon Flogaitis**  
President



**Julio Barboza**  
Member



**Brigitte Stern**  
Member

New York, 21 November 2007



**Maritza Struyvenberg**  
Executive Secretary