



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1362

Case No. 1440

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, First Vice-President, presiding; Mr. Dayendra Sena Wijewardane,
Second Vice-President; Mr. Goh Joon Seng;

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

Whereas, on 21 October 2005, the Applicant filed an Application requesting the Tribunal:

“9. ... *to order*:

- (a) that the job description reflecting the duties and responsibilities the Applicant performed while assigned to the Panel of Counsel (...), which was duly signed by his supervisor, be classified;
- (b) that the Applicant be assigned to a regular budget post in line with his contractual status and according to the duties and responsibilities required by the Organization and commensurate with his abilities and training;
- (c) that the Applicant be compensated in the amount of one year's net [base] salary for the damage to his career placement and promotion opportunities caused by placing adverse material in his official status file;
- (d) that the Applicant receive compensatory payment of six months' net [base] salary for the undue delay at the [Joint Appeals Board (JAB)] and the Secretary-General's decision for almost three years;
- (e) that the Applicant be compensated for the amount of medical expenses still not reimbursed and

the use of 64 days annual leave in order to receive full salary in the amount of \$ 9,061.00 and 64 days; [and,]

- (f) that the Applicant receive compensatory payment of six months' net [base] salary for the extraordinary delay in reimbursing his medical expenses for more than four years."

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 25 March 2006 and once thereafter until 25 April;

Whereas the Respondent filed his Answer on 24 April 2006;

Whereas, on 22 May 2006, the Applicant filed Written Observations amending his pleas as follows:

"The Applicant requests compensation for the delay in classifying the post and reimbursement of his medical expenses which caused him suffering, anxiety and irreparable harm to his placement and career. On the basis of the above, the Applicant respectfully requests to find and decide in favour of his pleas, with the additional plea, *i.e.*, that the personnel action be issued to confirm his incumbency of the reclassified G-6 post."

Whereas on 16 January and 27 August 2007, the Applicant submitted additional documentation.

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] was recruited on a short-term ... appointment in September 1969 as a Clerk (G-2) in the Communications Archives and Records Service. [Thereafter, his appointment was converted to fixed-term and, in September 1971, he was granted a permanent contract. He was promoted to the G-6 level and served under a series of mission assignments.] ...

... [From 3 April 2000 until 13 August 2001, the Applicant was on mission detail in East Timor and the Congo.]

... There is then a hiatus in the [Official Status] file. According to [the Applicant], he was placed, on return from [the Congo], on a three-month assignment in the Safety and Security Service, and had been, at the time of his appeal ..., temporarily assigned to the Office of the Coordinator, Panel of Counsel, from March 2001. The next personnel action [form] in [his] file, dated 14 May 2003, places [the Applicant] on half-sick/half-annual [leave] effective 8 November 2002 and carries the notation: '[staff member] exhausted entitlement to sick leave on full pay on 31/07/02'. The latest [personnel action form] in the file, dated 15 December 2004 and effective 6 July 2004, shows [the Applicant] as a Records Assistant in the Facilities Management Division, [Office of Conference and Support Services (OCSS)].

Summary of the facts

... On 15 January 2002, [the Applicant], then on temporary assignment ... and having learned that a G-6 post in [the Archives and Records Management Service (ARMS)] had been vacated, sent an e-mail to [the] Executive Officer, Department of Management (...), indicating his interest in the post and asking how he might proceed. In the absence of a reply, on 14 February ..., he wrote to ... [the Office of Human

Resources Management (OHRM)], summarizing his recent employment history and requesting a lateral transfer to the vacant post (...); on 15 February ..., he applied for the vacant G-6 post ... [On 27 November, he was advised that he had not been selected for the position.]

...”

On 9 January 2003, the Applicant requested the Secretary-General to review the administrative decision to select another candidate for the G-6 position, and asked that material he considered adverse be removed from his Official Status file. He was advised on 20 February that he had been given due consideration for the position and that the material to which he had objected had been filed in his Official Status file in the context of negotiations for agreed separation, in accordance with the standard practice of the Organization.

On 3 April 2003, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 15 April 2005. Its considerations and recommendations read, in part, as follows:

“Considerations

13. ... [T]he Panel agreed that it would have to address five issues raised by [the] Appellant:

- (a) the abolition of his post in ARMS;
- (b) the failure to place him on the subsequent G-6 vacancy;
- (c) the alleged pattern of discrimination and harassment;
- (d) the inclusion of adverse material in his [Official Status] file; and
- (e) the delay in classifying the post to which he was ‘temporarily assigned’.

14. With respect to (a), the Panel first noted the large degree of discretion of the Secretary-General in administering the resources of the Organization. [The] Appellant complained, appropriately in the Panel’s view, that the decision to abolish his post was made while he was on mission and that he was not informed of it until he returned to headquarters at the end of his mission. It would have been in keeping with the Organization’s approved policy of transparency to have kept him informed as to when the decision was made. Though the Panel deplored this defect in management practice, the Panel did not find that there was a defect in procedure, nor that [the] Appellant had proved his allegation of discrimination.

...

16. [The] Appellant cites his assignment to the ARMS facility on Park Avenue South as evidence of the pattern of discrimination and harassment to which he was subjected. Having recalled that the Park Avenue premises were to be vacated, and the terms of staff regulation 1.2, the Panel concluded that [the] Appellant had failed to prove his allegation. Having come to the same conclusion as regards the abolition of his post and the decision not to place him on the subsequent G-6 vacancy, the Panel decided that [the] Appellant had failed to prove that he had been subjected to a campaign of discrimination and harassment.

17. The Panel found on [the] Appellant’s [Official Status] file an e-mail of 11 March 2001 from [the Executive Officer, Department of Management,] to [OHRM,] which says, inter alia, ‘We really do not have any post for him and nobody wants him’. The Panel also found an undated Department of Management recommendation for proposed agreed termination which states:

‘Changes in contemporary records information management skills caused by evolving information technologies and the electronic record environment have effected a realignment of functions within [ARMS]. During the biennium 2000-2001, two General Service posts were abolished as a

result of the introduction of archival processing activities utilizing new digital technology. In light of the need for familiarity with digital systems, business processes and knowledge of substantive areas, instead of what was formerly required for traditional paper based records management activities, and since [the Applicant] does not possess the requisite skills for meaningful assignments within ARMS, the granting of an agreed termination is recommended.’

... [T]he Panel considered this to be adverse material. ...

...

18. Finally, the Panel took note of the lengthy period during which [the] Appellant has been on ‘temporary’ assignment without the benefit of a job description, [performance evaluation] and post classification, and views the Administration’s delays in dealing with these as unreasonable and unjustifiable. ...

... [T]here is no need to establish that [the] Appellant had suffered actual harm, it is enough to observe that the Organization failed to observe its own procedures, and staff regulation 2.1.

Recommendations

19. The Panel recommends to the Secretary-General that:

- (a) [the] Appellant be given priority consideration for budgetary posts commensurate with his training and experience, as and when they become available;
- (b) his current post be classified without further delay;
- (c) all adverse material be removed from his [Official Status] file; and
- (d) [the] Appellant be paid compensation in the amount of \$5,000 for the inclusion of adverse material in his ... file without having given him the opportunity to comment, and a further sum of \$5,000 for the inordinate delay in classifying his post.

20. The Panel makes no further recommendation with respect to this case.”

On 25 July 2005, the Officer-in-Charge, Department of Management, transmitted a copy of the JAB report to the Applicant and informed him as follows:

“The Secretary-General accepts the JAB’s findings and conclusions, and has decided to accept its recommendations that all adverse material be removed from your Official Status file, that your post be classified without delay, and that you be paid compensation in the amount of \$10,000. Unfortunately, the JAB’s recommendation that you be given priority consideration for posts as and when they become available is not implementable under the selection system currently in place, which requires that staff members apply for positions. You will, of course, receive full and fair consideration for all posts to which you apply.”

On 21 October 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. He was harassed and discriminated against since his return from mission in 1998. He was assigned to a low-level job in the Park Avenue South warehouse where, despite repeated requests, he was never given a job description, nor was his post classified. No performance assessment was completed for this period.

2. As a result of this treatment, he applied for peace-keeping assignments, only returning to Headquarters from the Congo due to illness. He was not reabsorbed in ARMS, but given temporary assignments, including a period of over three years in an unclassified post.

3. The abolition of his post was tainted by discrimination, harassment and extraneous factors.

4. Having requested consideration for an agreed termination, he was made an unacceptable offer. In the correspondence related to the consideration, adverse material was placed in his Official Status file.

5. He was denied full and fair consideration for the vacant G-6 post in ARMS.

6. The extensive delays at the JAB level violated his right to due process.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeal is limited to the administrative decision detailed in his letter to the Secretary-General.

2. The Applicant has already been duly compensated for any damage caused by his temporary assignments to different functions, and for the non-classification of his post.

3. The Applicant has already been adequately compensated for the placing of adverse material in his file.

4. The Applicant has failed to show any pattern of discrimination or harassment against him.

5. The JAB proceedings were not flawed.

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

I. The Applicant entered the service of the Organization in September 1969, on a short-term contract as a G-2 level Clerk. Thereafter, his contract was converted to fixed-term and, in September 1971, he was granted a permanent appointment. Following a series of promotions and assignments, effective 1 January 1985 he was appointed to the G-6 level position of Records Assistant, Current Records Section.

From 1989 onwards, the Applicant served on a series of mission assignments, culminating, in 2001, with an assignment to the Congo. Upon his return to New York, he was advised that the G-6 post he had encumbered in the Department of Management had been abolished effective 1 January 2000. He continued to serve the Organization, working on a three-month assignment in the Safety and Security Service and, thereafter, on a "temporary" assignment with the Office of the Coordinator, Panel of Counsel.

On 15 February 2002, the Applicant applied for a G-6 position with ARMS. After learning that his application had been unsuccessful, on 9 January 2003 he requested administrative review of the decision not to select him for the post, and also requested that certain material which he considered adverse be removed from his Official Status file. On 20 February, he was advised that he had been given due consideration for the post in question, and that the material in his file was there in the context of negotiations for agreed separation, in

accordance with standard practice.

On 3 April 2003, the Applicant lodged an appeal with the JAB, seeking assignment to the next available post at his grade in his field of competence; compensation of two years' net base salary for discrimination and harassment; and, classification of the post to which he had been "temporarily" assigned for more than three years. In its report of 15 April 2005, the JAB found no evidence of a campaign of discrimination and harassment, but recommended, inter alia, that all adverse material be removed from his Official Status file and that he be paid compensation. Certain medical claims belatedly included by the Applicant in his observations were not addressed by the JAB.

On 25 July 2005, the Applicant was provided with a copy of the JAB report and advised that the Secretary-General had decided to accept the JAB's findings and conclusions, as well as its recommendations that all adverse material be removed from his file; that his post be classified without delay; and, that he be paid US\$ 10,000 in compensation.

II. On 21 October 2005, the Applicant filed his Application with the Tribunal, setting out the following six requests:

- (a) that the job description reflecting the duties and responsibilities he performed while assigned to the Panel of Counsel be classified;
- (b) that he be assigned to a regular budget post commensurate with his abilities;
- (c) compensation for damage to his career caused by the placing of adverse material in his Official Status file;
- (d) compensation for delays in the JAB process;
- (e) compensation for medical expenses incurred but not reimbursed, as well as for 64 days annual leave he had to take upon the exhaustion of his sick leave; and,
- (f) compensation for delays in the reimbursement of his medical expenses.

III. On request (a), the JAB's recommendation that the Applicant's post be classified was accepted. The Applicant was made an Inventory and Supply Assistant at the GS-6 level with the applicable Generic Job Profile. The JAB also recommended compensation in the amount of US\$ 5,000 for the delay in classifying his post. This too has been accepted. In the view of the Tribunal, the Applicant has thus received satisfaction under this heading.

IV. With respect to request (b), assignment to a post is at the discretion of the Secretary-General. No employee of the Organization has the right to choose when and to where he/she should be assigned. The Tribunal therefore makes no order with respect to this request.

V. On request (c), the placing of adverse material in a staff member's file without giving him an opportunity to make comments thereon is a breach of administrative instruction ST/AI/292 of 15 July 1982, entitled "Filing of

adverse material in personnel records”, paragraph 2 of which states:

“Adverse material shall mean any correspondence, memorandum, report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member. As a matter of principle, such material may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon.”

For this breach on the part of the Administration, the JAB recommended removal of the adverse material from the Applicant’s file and compensation of US\$ 5,000. This recommendation was accepted by the Secretary-General. The Applicant now seeks higher compensation for damage to his career caused by the presence of the adverse material.

The burden of proof of such an allegation rests on the person relying thereon. (See Judgement No. 672, *Burtis* (1994).) The Applicant has not discharged his burden and the Tribunal is not prepared to speculate on the consequences of the Administration’s breach of its obligations. It finds that the compensation paid by the Secretary-General pursuant to the recommendation of the JAB was adequate under the circumstances and, therefore, makes no order.

VI. Insofar as request (d) is concerned, the process before the JAB commenced on 3 April 2003. The JAB adopted its report on 15 April 2005. Under current conditions, two years cannot constitute undue delay, especially in view of the fact that the members of the JAB are volunteers, with other duties to attend to. As stated in Judgement No. 1370, rendered by the Tribunal at this session,

“the Tribunal cannot but regret that such delays are, unfortunately, the rule and not the exception at the United Nations. Whilst the Tribunal has sanctioned cases of inordinate delay, which may be attributed to negligence in some particular instances (see Judgement No. 1275 (2005), in which the Tribunal awarded compensation for a three-year delay at the JAB), this is not the case here; the delays were not imputable to any person or persons in particular, and were not specifically directed at the Applicant. Rather, they are the consequence of an over-burdened, under-resourced system. The United Nations is currently in the process of revising its system of administrative justice and, the Tribunal hopes, such delays as that suffered by the Applicant will not occur in the future. In the meantime, however, as these delays are not considered abnormal, the Tribunal will not award compensation under this heading. (See Judgements No. 1323 (2007) and No. 1344 (2007).)”

VII. With respect to requests (e) and (f), it is to be noted that the Applicant sought administrative review only of the decision not to select him for the ARMS post and the inclusion of adverse material in his Official Status file, albeit also making reference to the abolition of his post whilst he was on a peace-keeping mission and complaining of being posted on temporary assignments whilst holding a regular budget post. Before the JAB, he included the issue of a campaign of discrimination (requests (a) to (d)). All these were addressed by the JAB.

Before the Tribunal, the Applicant is raising for the first time requests (e) and (f). Staff rule 111.2 (a) states that “a staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed”. This

procedural requirement has not been complied with. As the Tribunal has repeatedly held, “the failure by the Applicant to follow the procedure required by staff rule 111.2 after the administrative decision ... renders any further consideration of that decision by the Tribunal beyond its competence”. (Judgement No. 571, *Noble* (1992).) Accordingly, these requests are not receivable, *ratione materiae*.

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

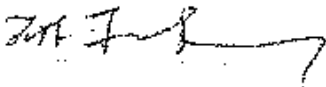
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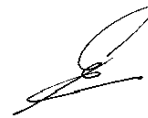
Jacqueline R. Scott
First Vice-President



Dayendra Sena Wijewardane
Second Vice-President



Goh Joon Seng
Member



Maritza Struyvenberg
Executive Secretary

New York, 21 November 2007