



Administrative Tribunal

Distr. Limited  
6 February 2008

Original: French

ADMINISTRATIVE TRIBUNAL

Judgement No. 1365

Case No. 1443

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 at the request of a former 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 31 October 2005, the Applicant filed an Application containing please which read, in part, as follows:

“II. PLEAS

...

11. Noting that the [Joint Appeals Board (JAB)] found procedural flaws and that, as a consequence, the Applicant was denied consideration and that discrimination on the basis of the Applicant’s age was a factor in denying [him] consideration, [he] respectfully requests the Tribunal *to find*:

(a) the award of US \$500 as compensation for the violation of his rights is insufficient for the injury caused.

12. Whereafter, the Applicant ... requests the Tribunal *to order*:

(a) for denial of consideration based on overt age discrimination the payment of compensation beyond \$500 to reflect the jurisprudence of the Administrative Tribunal, i.e., \$10,000.”

Whereas the Respondent filed his Answer on 31 January 2006;

Whereas the Applicant filed Written Observations on 6 April 2006;

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] first joined the United Nations Police Mission in Haiti (MIPONUH) in May 1999 under an Appointment of Limited Duration (ALD), as a Logistics Officer at the P-3 level. The [Applicant]’s ALD was subsequently extended several times. On 28 June 2000 the [Applicant]’s functional title changed to Chief Procurement Officer for the United Nations International Civilian Support Mission in Haiti (MICAH). On 25 April 2001 the [Applicant] was reappointed under a fixed-term appointment ... at the P-4 level [in the Department of Peacekeeping Operations DPKO)]. On 4 November 2003 the [Applicant] reached the mandatory retirement age of 62 years. The [Applicant]’s [appointment] was later extended beyond retirement age, on an exceptional basis, through 16 May 2004.

***Summary of the facts***

... On 3 February 2003 the [Applicant] submitted his application for the P-5 vacant post of Chief Procurement Officer [(CPO)] in MONUC as advertised under vacancy announcement VA No. NUC-02-002.

... According to the [Applicant], on 2 April 2003, [the] Chief of Supply Section, informed him that he did not make the short list because of his age. By memorandum dated 3 April 2003 the [Applicant] requested ... [the] Personnel Management and Support Service (PMSS)/DPKO to investigate his non-selection as a case of discrimination on the grounds of age and that no appointment be made to the P-5 post in MONUC until the issue was resolved.

... By memorandum dated 21 April 2003, ... DPKO informed the [Applicant], *inter alia*, as follows:

‘Kindly note that this vacancy announcement has been posted on three occasions. Given the difficulty that MONUC had in filling the post of CPO, priority consideration was given to candidates who, in addition to having qualifications and relevant experience closely matching those of the post, could also see the mission through a long-term period in order to ensure continuous leadership and guidance. Furthermore, due consideration has also been given to gender and geographical criteria.

It is in this connection that I note that, in November 2003 you will be reaching the mandatory retirement age of 62, while this was not a determining factor in the decision to short-list candidates, it was one of the various considerations PMSS took into account in assessing all candidates, in view of the need to ensure the long-term continuity within the mission.

Accordingly, I wish to assure you that your application for the post was reviewed in the same light as those of other candidates. Your experience and qualifications were noted by both PMSS and MONUC. In this context please note that following a thorough review of your application MONUC has confirmed their initial selection.’

This is the contested decision.”

On 23 June 2003, the Applicant requested the Secretary-General to review the administrative decision taken on 21 April 2003 to “reject his candidacy for the post of Chief Procurement Officer/MONUC, because of his age”.

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

***“Considerations***

...

17. The Panel ... examined the substance of this case. The Panel noted that the contested decision relates to the ‘non-inclusion of the Appellant’s name on the short-list of qualified candidates for the P-5 post of Chief Procurement Officer at MONUC’. The Appellant did not contest the decision ‘not to select him for the vacant post’. In this connection, the Panel also noted that the decision was taken in view of the need to ensure the long-term continuity within the mission. The Appellant’s application was reviewed in the same light as other candidates, but ... DPKO noted that the Appellant was reaching the mandatory retirement age of 62 in November 2003 ...

...

20. ... [T]he Panel observed that the reason why the Appellant was not short listed was because he was approaching retirement age. The Panel was of the view that there was a procedural flaw in the selection process. ... The Appellant was denied the opportunity to be short-listed as a candidate to the vacant post in MONUC because he was approaching retirement age. Thus, the Panel concluded that this denial violated the principles of equity and fairness.

21. The Panel found from the records of this case that PMSS attempted to correct the procedural flaw; however, the attempt was too late as PMSS forwarded the Appellant’s application to MONUC in mid April 2003, when MONUC refused to consider the Appellant’s application on the grounds that the selection process was completed.

22. The Panel while assessing the merits of the case also found that the existence of procedural flaw in the selection process in no way indicated that, had PMSS/DPKO observed the due procedure in a timely fashion, the Appellant would have been selected as the first ranking candidate for the vacant post. In other words, it was not certain that the Appellant would have been selected for the assignment had he in fact been short-listed.

23. The Panel further found that the Appellant was retained in service as Supply Officer until 15 May 2004, six months after the Appellant reached the mandatory retirement age, in accordance with the provisions of the administrative instruction ST/AI/1999/5 [on ‘Retention in service beyond the age of retirement and employment of retirees’]. The Panel observed that the Appellant requested unspecified financial compensation for the alleged financial loss he suffered. From the records of this case, the Panel found that the Appellant failed to prove that he did suffer financial loss as a consequence of the contested decision.

***Conclusion and Recommendation***

24. In light of the foregoing, the Panel *unanimously concluded* that the decision not to include the Appellant’s name on the short list of qualified candidates for the P-5 vacant post, Chief Procurement Officer in MONUC on the grounds that the Appellant was approaching retirement age violated the principles of equity and fairness. However, ... had the Appellant’s name been included in the short list, it was not certain that he would have been selected for the assignment in MONUC.

25. Accordingly, the Panel *unanimously decides* to recommend that the amount of 500 US dollars be paid to the Appellant as ... compensation in light of the procedural error committed by PMSS.

26. The Panel made no further recommendation in relation to the present Appeal.”

On 31 May 2005, the Department of Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had accepted the JAB's findings and recommendation and had, accordingly, decided to grant him compensation in the amount of US \$500.

On 31 October 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contention is:

The award of \$500 as compensation for the violation of his rights is insufficient for the injury caused.

Whereas the Respondent's principal contention is:

The award to the Applicant of \$500 constitutes appropriate compensation for the irregularities in the Applicant's case.

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

I. This case involves a promotion process. The facts are not in dispute: the Applicant entered United Nations service in May 1999 at the P-3 level as a Logistics Officer in the United Nations Civilian Police Mission in Haiti. Following several extensions of his fixed-term contract, he was promoted to the post of Supply Officer at the P-4 level in the Specialist Support Service, Logistics Support Division, Department of Peacekeeping Operations. On 3 February 2003, nine months prior to reaching the age of retirement, he submitted his application for the P-5 post of Chief Procurement Officer in MONUC. According to the Applicant, he was informed one month later that his candidacy had not been placed on the shortlist because of his age. Born on 4 November 1941, the Applicant was approaching the retirement age of 62, as provided by staff regulation 9.5. Convinced that he was the victim of age discrimination, the Applicant therefore requested the Officer-in-Charge of the Personnel Management and Support Service (PMSS) to suspend the selection process. However, on 21 April the Officer-in-Charge justified the non-selection of the Applicant in the following terms:

“Given the difficulty that MONUC has had in filling the post of CPO [Chief Procurement Officer], priority consideration was given to candidates who, in addition to having qualifications and relevant experience closely matching those of the post, could also see the mission through a long-term period in order to ensure continuous leadership and guidance ... *It is in this connection that I note that, in November 2003 you will be reaching the mandatory retirement age of 62, while this was not a determining factor in the decision to short-list candidates, it was one of the various considerations PMSS took into account in assessing all candidates, in view of the need to ensure long-term continuity within the mission*” (emphasis added by the Tribunal).

II. The Applicant then requested an administrative review of that decision, and brought the case before the Joint Appeals Board in September 2003. On 5 May 2005, the Board concluded unanimously that the decision of 21 April to exclude the Applicant from the list of candidates, on the grounds that he was

approaching the mandatory retirement age, constituted a “procedural flaw” and violated the principles of equity and fairness. Consequently, it recommended that the Secretary-General should pay the Applicant the sum of \$500 in compensation for the injury suffered by the Applicant. In a letter dated 31 May 2005, the Secretary-General informed the Applicant that he had accepted the findings and recommendations of the Joint Appeals Board. Not satisfied with the amount of this monetary compensation, the Applicant then appealed the decision of the Secretary-General before the Tribunal, requesting that the amount of the award be increased in proportion to the injury suffered.

III. The Tribunal notes at the outset that since the findings of the Joint Appeals Board were accepted by the Secretary-General, there is no way to determine here whether or not the Applicant’s right to equal consideration of his candidacy was violated. The Tribunal accepts the “procedural flaw” found by the Joint Appeals Board and acknowledged by the Administration, and shall limit itself to determining whether the amount of \$500 awarded to the Applicant constitutes fair and equitable compensation for the injury suffered.

IV. In order to determine whether that amount was sufficient to compensate for the full extent of the injury suffered by the Applicant, it is reasonable to evaluate the nature and extent of that injury. The Tribunal is of the view that this injury can be divided into three distinct elements: the loss of an opportunity to be selected for the post; the economic harm; and the moral damages.

V. With regard to the first element, the Tribunal does not subscribe to the Applicant’s argument that the electronic message sent by the Managing Officer of MONUC on 26 April 2003 offered him the legitimate expectation that he would be selected. Although the Managing Officer of MONUC certainly conveyed to the Applicant the extent of his interest (“Rest assured that I tried my best to get you [on the shortlist]”), there is nothing to indicate that the Applicant would have been selected had he been included on the shortlist, in so far as there is never a *right* to be selected. The Tribunal notes that a candidate had already been selected on the day that message was sent, thus obviating any prospect of promotion for the Applicant. Consequently, the procedural flaw, far from having led directly to the non-selection of the Applicant, only deprived him of an opportunity to be selected.

VI. With regard to the second element of the injury, that is, the economic harm, it is clear that its evaluation is directly affected by the conclusion drawn by the Tribunal in the preceding paragraph. To the extent that the Applicant is unable to establish that his candidacy would have been viewed favourably had the procedural error not been committed, the sum of \$200,000, considered by the Applicant as the correct valuation of the economic harm he suffered, is unacceptable. On the contrary, it has been established that the Applicant’s fixed-term contract was extended to 16 May 2004, or six months and 12 days beyond his

age of retirement. This extension was in conformity with administrative instruction ST/AI/1999/5 of 27 May 1999, which stipulates that:

“If a staff member is retained, it shall be for the minimum time required for the replacement of the staff member concerned, and shall not normally exceed *six months* after that staff member has reached the mandatory retirement age” (emphasis added by the Tribunal).

As the Applicant received a monthly salary up to the end of his contract, the loss of a chance to be selected affected only the pay differential between the P-4 and P-5 levels for a limited time, as well as the value of his retirement benefit, since he ended his career at the P-4 level rather than the P-5 level of the position for which he had applied.

VII. The Tribunal now turns to the third and final element of the injury suffered by the Applicant, that of the moral damage arising from his non-selection for the shortlist by sole reason of age. As stressed by the Tribunal in paragraph III of this Judgement, this “procedural flaw” was established by the Joint Appeals Board and accepted by the Secretary-General. As the Joint Appeals Board declared this irregularity to be a violation of the principles of equity and fairness, the Tribunal considers that the \$500 recommended by the Board and accepted by the Secretary-General to be clearly inappropriate in light of the gravity of the flaw, which was neither more nor less than age discrimination. As difficult as it may be to calculate reparations in cases of discrimination, it seems evident to the Tribunal that the gravity of the “procedural flaw” is in blatant contrast to the paltry sum awarded to the Applicant.

VIII. In the light of all the elements of the case, the Tribunal:

1. Considers that the sum of \$500 awarded to the Applicant is clearly inadequate to fully compensate for the injury done him;
2. Accordingly establishes additional compensation equivalent to two months’ net base salary at the rate in effect on the date of this Judgement, plus interest at the rate of 8 per cent per annum beginning 90 days from the date of issuance of this Judgement until payment is effected; and
3. Rejects all other pleas.

*(Signatures)*

Spyridon **Flogaitis**  
President

**AT/DEC/1365**

**Julio Barboza**  
Member

**Brigitte Stern**  
Member

New York, 21 November 2007

**Maritza Struyvenberg**  
Executive Secretary