



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1370

Case No. 1448

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Dayendra Sena Wijewardane, Vice-President, presiding; Mr. Julio Barboza; Sir  
Bob Hepple;

Whereas, on 7 October 2005, a former staff member of the United Nations Conference on Trade  
and Development (hereinafter referred to as UNCTAD), filed an Application requesting the Tribunal, inter  
alia:

- “(1) To hold oral proceedings ...
- (2) To find that there was a valid promise, from the Secretary-General and the Deputy  
Secretary-General of UNCTAD, to confirm the Applicant to the post of Director of the  
Division on International Trade in Goods and Services, and Commodities (DITC), i.e., a  
promise that, albeit verbally made, came from a competent authority and from a party  
who could act on it ...
- ...
- (5) To find that, as a result of ... flagrant violations of the rules and procedures governing the  
appointment and promotion of staff, the selected candidate was not the best qualified  
candidate ...
- (6) To recognize that the Applicant ... suffered discriminatory and humiliating treatment ...
- (7) To direct the Secretary-General of the United Nations, to pay to the Applicant two years’  
[net] base salary at the D-2 level ... as ... compensation ...

- (8) To direct the Secretary-General of the United Nations to pay [the] Applicant three months' [net] base salary at the D-2 level ... as ... compensation for ... the excessive delay in the consideration of his case ... before the [JAB] ...”

Whereas, on 28 February 2006, after receiving the letter of the Secretary-General, the Applicant filed additional documentation amending his pleas, inter alia:

“Plea (7) to be amended as follows:

To redress the insufficient and inappropriate compensation of six months' salary at the D-1 level that the JAB has recommended and that the Secretary-General has accepted ...

Plea (8) to be amended as follows:

... [T]o find that [the] excessive delays hindered the proper administration of justice and inflicted upon the Applicant additional direct and indirect material and moral prejudice for which adequate compensation should be paid.

Additional plea:

- (9) ... [T]o direct the Secretary-General to invoke ... financial rule 114.1 and ... staff rule 112.3 in order to recover from those responsible [for] these irregular actions the amount of compensation that the Tribunal might direct the Secretary-General to pay to the Applicant.”

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 30 April 2006 and once thereafter until 30 May;

Whereas the Respondent filed his Answer on 17 May 2006;

Whereas the Applicant filed Written Observations on 5 June 2006;

Whereas, on 29 October 2007, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

***“[The Applicant's] Professional Record***

... [The Applicant] entered service at the United Nations on 26 May 1967, as a Professional Trainee in the Offices of the Secretary-General, Office of Personnel, Economic and Social Organization in Beirut (UNESOB, now [Economic and Social Commission for Western Asia (ESCWA)]), on the basis of a two-year fixed-term appointment at the P-1 level. [His fixed-term appointment was subsequently renewed and, on 1 May 1970, he was granted a permanent appointment. At the time of the events that gave rise to his Application, the Applicant held the D-1 level position of Chief, Commodities Branch, DITC, UNCTAD.]

...

***Summary of Facts***

... [The Applicant was appointed] Officer-in-Charge of [DITC] on 16 August 2001. ...

... [A] [v]acancy announcement ... for the position of Director, D-2, [DITC] was issued on 19 October 2001. The deadline for applications was 19 December ...

... [The Applicant] applied for the above-mentioned position on 4 December 2001, along with 50 other candidates. ...

... On 12 December 2001, [the Applicant] was granted [a] special post allowance (SPA) at the D-2 level, starting from 16 November ...

... On 8 January 2002, after a summary screening, [the Office of Human Resources Management (OHRM)] submitted a list of 5 internal candidates (including [the Applicant]) and 6 external candidates to the Chief, Personnel Service, [United Nations Office at Geneva (UNOG)], which in turn forwarded it to UNCTAD. ... [O]f 50 applications, these 11 candidates [appeared] 'to meet most or all of the requirements' of the post.

... By memorandum dated 1 February 2002, OHRM submitted two additional external candidates, one of them being the successful candidate, to the Chief, Personnel Service, UNOG, for consideration. Hence, it appears that a total of 13 candidates (5 internal and 8 external, two of [whom] were women) were finally submitted for departmental review to UNCTAD.

... On the same day, ... [the Applicant]'s incumbency against the post of 'Officer-in-Charge' of DITC was extended.

... After a preliminary screening of the 13 candidates 'on the basis of a comparative review', the Secretary-General of UNCTAD decided to focus on 9 candidates who met 'as closely as possible at least a partial combination of the necessary skills called for in the job description'. This 'short-list' included [the Applicant] as well as the two women candidates. At that point, no interviews had been conducted by UNCTAD.

... The Secretary-General of UNCTAD appointed then an 'ad hoc' Panel, composed of the UNCTAD Deputy Secretary-General, three senior [United Nations or] UNCTAD officials and one former senior UNCTAD staff member, in order to review the list of candidates and to advise him on the selection process.

... By memorandum dated 24 May 2002, ... UNCTAD [advised OHRM that] the Secretary-General of UNCTAD [was recommending] the appointment of an external woman candidate, as being the only candidate meeting 'all of the requirements of the post'. The remaining candidates were classified in two groups, namely 'candidates meeting most of the requirements of the post' (in which [the Applicant] was included, along with 7 other candidates), and 'candidates meeting some or none of the requirements of the post' (4 candidates).

... By memorandum dated 18 June 2002, ... OHRM transmitted [this recommendation] to the Chairperson of the Senior Review Group ...

... At its meeting on 5 July 2002, the Senior Review Group decided to defer the case for further consideration. ...[I]t noted that 'no formal interviews were carried [out] by UNCTAD in relation to the short-listed candidates', and thus required a 'detailed comparative analysis of the skills and qualifications' of what it judged to be the 'top two candidates (both women)'. ...

... On 22 July 2002, following the request of the Senior Review Group, interviews of the two women candidates were carried out at UNCTAD ... The interviewing panel ... was composed of the Deputy Secretary-General of UNCTAD (Chairperson), as well as of two other members of the original UNCTAD 'ad hoc' Panel.

... On 23 July 2002, ... UNCTAD transmitted to ... OHRM a comparative evaluation table of the two candidates, stating that the result of the interviews was ... to confirm the original recommendation ... On the same day, ... OHRM forwarded this information to the Senior Review Group.

... By memorandum dated 31 July 2002[, the Secretary-General was advised that the Senior Review Group endorsed the recommended candidate] ...

... By memorandum dated 22 August 2002, ... the Secretary-General approved the appointment of the recommended candidate ...

... By memorandum dated 21 October 2002, the Secretary-General of UNCTAD informed staff members of UNCTAD of the appointment of the new Director of DITC, and of the 'temporary' reassignment of [the Applicant] as 'Senior Inter-Regional Adviser in the Office of the Secretary-General, reporting to the Deputy Secretary-General'.

...

... On 17 December 2002, [the Applicant] wrote to the Secretary-General, requesting [administrative] review ..."

On 25 April 2003, the Applicant lodged an appeal with the JAB in Geneva.

By letter dated 10 October 2003, the Applicant submitted his resignation. He separated from service on 31 January 2004.

The JAB adopted its report on 30 May 2005. Its considerations, conclusions and recommendations read, in part, as follows:

***“Considerations***

...

***Applicable Law***

...

65. ... [T]he Panel noted that in the current case, ... the selection process for the post under discussion had been conducted in accordance with 'ST/AI/392 of 27 January 1994 and ST/AI/1999/8 of 17 August 1999'. ...

...

***Merits***

...

69. ... [T]he JAB Panel sought to establish whether the Appellant had been fully and fairly considered for promotion to the post of Director, DITC, UNCTAD. It tried to determine in particular whether the decision of non-promotion was tainted by a lack of due process, a breach of procedure or the influence of extraneous factors, such as prejudice or discrimination.

70. First, the Panel examined the Appellant's contention about an alleged 'breach of promise' by the Secretary-General of UNCTAD in not promoting him to the post under discussion. Indeed,

even if a staff member has generally no right to promotion, there might be exceptional circumstances that give the staff member such a right ... In the case under consideration, the Panel considered that the Appellant did not prove the existence of any agreement or promise to promote him to the disputed post. In reality, the Panel noted that the Appellant only alleges that the Secretary-General of UNCTAD once assured him, during a conversation, that he would have his 'support for confirmation in due time on the post in question'. ... The fact that he had been the temporary incumbent of the post for a period of 14 months did not constitute any right of the Appellant for a preferential treatment. The Panel therefore did not find any support for this claim of the Appellant.

71. ... [T]he Panel could ... not determine conclusively that there was bias or discrimination against the staff member. ...

...

73. ... Having examined the pertinent documentation, the JAB Panel was struck by the lack of transparency of the dealings of this UNCTAD 'ad hoc' Panel. ...

74. Indeed, it appears from the memorandum sent [to] ... OHRM on 24 May 2002 (...), that the evaluation of the candidates was not undertaken on the basis of what was stated in the vacancy announcement. In fact, paragraph 5 of this memorandum mentions the four qualities that the successful candidate must have 'as stated in the vacancy announcement'. However, the Panel noted that these four qualities ... are not all mentioned in the vacancy announcement. Conversely, some of the requirements of the post stated in the vacancy announcement are not listed in the above-mentioned memorandum. ...

75. The JAB Panel was especially concerned about these discrepancies because it appears that the 'evaluation table' of the candidates, which was submitted to the Senior Review Group for its consideration, had been elaborated on the basis of the requirements listed in the foresaid memorandum of 24 May 2002, rather than on the criteria listed in the vacancy announcement. ...

76. In a similar vein, the Panel held the view that the requirement of an 'advanced university degree in economics or related disciplines with specialization in international trade and development', as stated in the vacancy announcement, had not been duly taken into consideration by the evaluators. ... [I]t noticed that the university degree of the successful candidate was a Masters (MA) in History (Hons), obtained after a Bachelor (BA) in History. The Panel held the view that a degree in history is not equivalent to the required 'Advanced university degree in economics or related disciplines with specialization in international trade and development' stipulated in the vacancy announcement. ...

77. Finally, the Panel was struck by the fact that no interviews were conducted at the UNCTAD level prior to the first recommendation sent to the Senior Review Group. ...

78. ... [P]ursuant to paragraph 7 of ST/AI/392, once the Senior Review Group has received the recommendation of the head of department, it shall prepare 'a short list of all fully qualified candidates in ranking order and submit it to the Secretary-General for final decision'. In the present case, the Senior Review Group did not submit a short-list of candidates to the Secretary-General, but only agreed with the recommendation of the Secretary-General of UNCTAD. ... A detailed examination of every short-listed candidate against the basic requirements of post as specified in the vacancy announcement would have led it to detect that the recommended candidate was not meeting the requirements with regard to the university degree, and that the criteria used by UNCTAD for the evaluation of the candidates were different from the ones specified in the vacancy announcement. The Panel regretted the lack of attention of the Senior Review Group to these important details.

...

### Conclusions and Recommendations

80. In view of the foregoing, the Panel *concludes* that the decision not to promote the Appellant to the post of Director, DITC, UNCTAD, has indeed been tainted by a lack of due process. As there was a violation of the Appellant's right to a full and fair consideration of his candidature, ... compensation should be granted.

81. Hence the Panel *recommends* the Appellant be paid six months' net base salary at the last level of his appointment (D-1, step 9).

...”

On 7 October 2005, the Applicant, having not received any decision from the Secretary-General regarding his appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 25 January 2006, the Applicant was advised that the Secretary-General had accepted the findings and conclusion of the JAB as well as its unanimous recommendation to pay him six months' net base salary.

Whereas the Applicant's principal contentions are:

1. The promise to promote him was valid.
2. The decision not to promote him was tainted by bias or improper motives.
3. He suffered discriminatory and humiliating treatment.
4. The compensation paid is not commensurate with the harm he suffered.

Whereas the Respondent's principal contentions are:

1. The Secretary-General accepted the JAB'S findings that the procedures applicable to the placement and promotion system were not strictly complied with and that the Applicant's candidacy did not receive full and fair consideration.
2. The Applicant received no promise of promotion. He had no legal expectancy of, or right to, promotion.
3. The Tribunal cannot substitute its judgement for that of the Respondent as to which candidate was the most qualified for the contested post.
4. The contested decision was not tainted by discrimination, bias or other improper motivations.
5. The Applicant's plea for additional monetary compensation is without merit. He has been appropriately and adequately compensated.

The Tribunal, having deliberated from 29 October to 21 November 2007, now pronounces the following Judgement:

I. The present case concerns two main issues: first, whether the Applicant received full and fair consideration for promotion to the D-2 level; and, second, whether the conduct of the Administration in assigning him to the D-1 position of Senior Inter-Regional Adviser violated his rights.

II. As a preliminary matter, the Tribunal shall consider the Applicant's plea that oral proceedings be held in order to hear witnesses. The Tribunal does not deem that necessary, as consideration of the two issues on which the Applicant wants witnesses to testify is not required for the Tribunal to decide the present case, as will be seen below.

III. With respect to the first issue, the Tribunal is in agreement with the JAB that the Applicant did not receive full and fair consideration by the authorities because of "procedural flaws in the evaluation process of the candidates". The JAB devoted a whole section of its report to consideration of the applicable procedural law, the final paragraph of which reads:

"In conclusion, the Panel was confronted with a legal vacuum regarding the applicable procedures for the filling of D-2 posts. It also noted that UNCTAD did not furnish any legal basis for the proceedings of the UNCTAD 'ad hoc' Panel. However, the JAB Panel stressed that the paramount consideration in filling all posts at the [United Nations] Secretariat was the one enshrined in Article 101.3 of the ... Charter and staff regulation 4.2 (highest standards of efficiency, competence and integrity), and that general principles of law shall further apply in such cases. Moreover, the Panel highlighted the fact that the Respondent stated that the ST/AI/392 was applicable to the case under consideration. The JAB Panel decided therefore to examine the selection procedure for the filling of the post of Director, DITC, UNCTAD, notably in connection with the aforesaid ST/AI/392. Indeed, it held the view that it was appropriate to keep on implementing the procedures in force at the time the vacancy announcement was published, in order to ensure legal certainty and respect the principle of non-retroactivity of law."

The Tribunal cannot but agree with the JAB that the paramount consideration in assessing the legality of the Administration's conduct in promotion matters must be compatible with Article 101 of the Charter and staff regulation 4.2, and is satisfied that the procedure employed with respect to the Applicant violated the object and purpose of those legal norms.

IV. The JAB examined the procedure employed for the selection of candidates: OHRM sent a list of screened candidates to the Deputy Secretary-General, UNCTAD, who selected nine and sent a short-list to an ad hoc panel he had established to provide advice on the candidates. The JAB was struck by the lack of transparency of this panel: no information was maintained regarding its meetings and it produced no reports other than an "evaluation table" where the candidates were listed in order of merit. Moreover, as is apparent from the memorandum sent by the Deputy Secretary-General of UNCTAD to the Assistant Secretary-General, OHRM, on 24 May 2002, the criteria applied to rank the candidates were not those stated in the vacancy announcement. The memorandum listed four qualities that the successful candidate was expected to have "as stated in the vacancy announcement" but, as the JAB noted, "these four qualities ... [were] not all mentioned in

the vacancy announcement [and, c]onversely, some of the requirements of the post stated in the vacancy announcement [were] not listed in the above-mentioned memorandum”.

The Tribunal finds this fact decisively against the Respondent. The vacancy announcement called for an “[a]dvanced university degree in economics or related disciplines with specialization in international trade and development”. In addition, it required “[t]wenty years of progressively responsible experience at the national and international levels dealing with issues relating to trade and development, with particular reference to trade negotiations”. The message sent by the vacancy announcement was conceived in no uncertain terms; the successful candidate, however, had a master’s degree in *history*, and her undergraduate education was in the same discipline. UNCTAD had indicated that the successful candidate was the only candidate to have “fully” met all the requirements of the post, the Applicant having been considered to meet only “most” of the requirements. The Tribunal agrees with the JAB that, “on the contrary ...[,] the successful candidate was not meeting this important formal requirement of the post”.

The Tribunal recalls its jurisprudence in Judgement No. 1122, *Lopes Braga* (2003), in which it held 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”, and 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.”

More recently, in Judgement No. 1326 (2007), citing *Lopes-Braga (ibid.)*, 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”.

V. The Tribunal is also in general accord with the JAB’s remarks about other irregularities in the procedure. In particular, the Tribunal finds that the JAB’s expressed disapproval of the fact that UNCTAD interviewed only two candidates, both of them women considered to be the best-placed candidates, is well-founded.

In conclusion on the first issue, then, the Tribunal agrees that the Applicant did not receive full and fair consideration for the position. It finds that the compensation of six months’ net base salary, recommended by the JAB and paid by the Secretary-General, was proportionate to this harm, and in keeping with the jurisprudence of the Tribunal, and holds that the Applicant received adequate compensation under this heading.

VI. With respect to the second issue, the Tribunal is satisfied that the treatment to which the Applicant was subjected, not only in the promotion procedure but afterwards, was humiliating and degrading. It is true that the Applicant had no *right* to be placed in a post of the same level as the one he had been temporarily occupying,



but the Tribunal takes note of the fact that he was a distinguished, high-level, staff member of UNCTAD; merited the highest grades in his performance evaluation; had graduated from a well-known and important university; and, had published a number of articles of a technical or scientific character. Not satisfied with having violated the Applicant's rights in the promotion exercise, with his retirement imminent the Administration assigned him to a position in which he had literally nothing to do, was left without a secretary, was not invited to events in which he would normally have participated, and, in short, indicated, in the most direct and brutal way, that the Applicant was no longer necessary to the Organization.

The Tribunal is mindful of its jurisprudence in Judgement No. 1313 (2006):

“The Tribunal can readily accept that many persons would suffer deep unhappiness and upset at being required to daily attend an office for no useful purpose; for being denied the dignity and satisfaction of doing one's work; and, for the humiliation attendant on such a pointless way of passing time. The Tribunal accepts that the Applicant has suffered in the manner described by her in her Application and that she is, in the circumstances, entitled to compensation for moral injury. (See Judgements No. 997, *van der Graaf* (2001); No. 1008, *Loh* (2001); No. 1009, *Makil* (2001); and, No. 1290 (2006).)”

Likewise, it finds the Applicant in the instant case deserves compensation under this heading, in addition to the compensation he was paid for the denial of his rights in the promotion exercise.

The Tribunal feels compelled to add in this case that consideration should be given to invoking staff rule 112.3, which provides that “[a]ny staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of the staff member's negligence or of his or her having violated any regulation, rule or administrative instruction”.

VII. Finally, as to the delays that the Applicant experienced in the system of administration of justice, 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 overburdened, 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).)

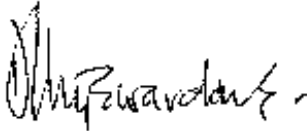
VIII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant, by way of compensation for the moral injury he suffered, four months' net base salary at the rate in effect at the date of

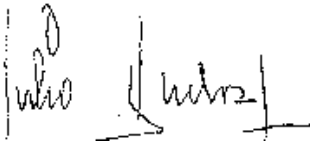
Judgement, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,

2. Rejects all other pleas.

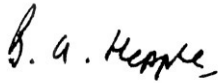
*(Signatures)*



Dayendra Sena **Wijewardane**  
Vice-President



Julio **Barboza**  
Member



Bob **Hepple**  
Member



Maritza **Struyvenberg**  
Executive Secretary

New York, 21 November 2007