



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1385

Case No. 1472

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Spyridon Flogaitis, President; Mr. Dayendra Sena Wijewardane, Vice-
President; Ms. Brigitte Stern;

Whereas, on 17 March 2006, a former staff member of the United Nations, filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 29 March 2006, the Applicant, after making the necessary corrections, filed an Application in which he requested the Tribunal:

“5. ... *to find*:

...

(c) that due to the seriousness of the situation and the continuing harm inflicted to the [Applicant], including rapid declining of [his] health, an extraordinary session will be convened by the President pursuant [to] article 6 of the Rules of the Tribunal.

6. [And] ... *to find*:

(a) that the Appeal [was] fully admissible;

(b) that the Respondent further denied the Applicant due process by not allowing the case to go forward as the only alternative left ...

7. [And] *to order*:

(a) that the case be remanded to the [Joint Appeals Board (JAB)] for consideration on the merits and decision of the proper compensation and other remedies;

(b) that a complete, independent and neutral investigation ... be ordered ...”

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 6 September 2006, and once thereafter until 6 October;

Whereas the Respondent filed his Answer on 6 October 2006;

Whereas the Applicant filed Written Observations on 26 January 2007.

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] entered [the] service of the United Nations Office of the High Commissioner for Human Rights (hereinafter OHCHR) in April 1998 as Human Rights Mobile Monitor in Cambodia. [Thereafter he served on a series of contracts with the Department of Peacekeeping Operations (DPKO), OHCHR and the United Nations Office for Project Services until 31 August 2003.]

...

... On 4 November 2003, the [Applicant] was appointed as Human Rights Officer with the New York Liaison Office of [OHCHR] at the P-3 level, step VIII, under a two-year fixed-term appointment (100 series).

... The [Applicant] was separated from service at the [OHCHR] effective 3 December 2004 for reasons of health. The ... Staff Pension Committee decided on 30 November ... to award the [Applicant] disability benefits.

Summary of Facts

... The [Applicant, who suffered from a serious illness,] went on sick leave as of 29 March 2004. From 4 August ..., he was on sick leave with half pay.

... In a statement dated 21 May 2004, his attending physician indicated that stressors involving the [Applicant’s] work situation had exacerbated his condition, that in the interest of his health he should not return to the position he held at the time, and that the ongoing treatment of his illness required that he remain in New York.

... The [Applicant] presented several alleged incidents of harassment by the management ... and claims that his health conditions worsened as a result.

... On 2 April 2004, the [Applicant] wrote an e-mail to all the [New York Office] staff, with copies to the Chief of Staff and the Acting High Commissioner in Geneva, indicating his concerns and requesting that they consider asking for outside expert help from [the Office of Human Resources Management (OHRM)] in dealing with the issue of the high tension in the office. [The] Director of the [New York Office] did not appreciate the way the [Applicant] had chosen to express his concerns.

... Between April and August 2004, the [Applicant] contacted numerous persons via e-mail [in New York and] Geneva for advice and for help in finding a solution. In particular, he asked for assistance concerning a (temporary) transfer to the DPKO Civilian Training Unit in New York or, alternatively, a transfer back to the Geneva Office or to any other office in any other country provided that a reasonable level of medical care was available there.

... On 5 May 2004, the [Applicant] sent a confidential note to [the] Acting [High Commissioner for Human Rights], requesting his urgent assistance in finding a solution. On 23 June ... he sent another letter to the Acting [High Commissioner]. The [Applicant] never received an answer.

... The [Applicant] also sought the advice of the Ombudsman's Office in New York. [The Ombudsman's Office brokered an agreement for the Applicant to be released, together with his post, to DPKO.] Members of the Civilian Training Unit interviewed the [Applicant] and were welcoming him to the team upon his return from sick leave. On 24 June 2004, the Director agreed with the Ombudsman's Office on the transfer. However, [the] Deputy Director intervened and the compromise was called off.

...

... On 30 November 2004, the [Applicant] sent an e-mail titled 'formal complaint' to [the High Commissioner for Human Rights], asking her to initiate proper investigations and accountability for the staff members responsible. Furthermore, the [Applicant] noted in his e-mail, that he was entitled to a formal apology from the Organization and to compensation for all the damages he had suffered. [The Applicant resent this email on 1 and 2 December.]

... Since [the High Commissioner for Human Rights], did not answer, the [Applicant] sent her another e-mail on 5 January 2005, to remind her that some action had to be taken in his case.

... By letter dated 14 February 2005, the [Applicant] requested the Secretary-General 'to review the administrative decision of [the High Commissioner for Human Rights] not to reply to a formal complaint, and request[ed] compensation for abuse of power, harassment and discrimination ...'

...”

On 7 June 2005, the Applicant lodged an appeal with the JAB in Geneva. The JAB adopted its report on 22 December. Its considerations, conclusions and recommendation read, in part, as follows:

“Considerations

...

35. The Panel considered 5 January 2005 to be the date when the 'administrative decision' was taken by the OHCHR since it was that day the Appellant wrote for the last time to the [High Commissioner for Human Rights] in order to ask her to initiate an investigation of his case.

36. Since the Appellant sent his letter to the Secretary-General on 14 February 2005, the Panel stated that the Appellant complied with staff rule 111.2 (a).

37. However, the Panel noted that the Appellant did not comply with staff rule 111.2 (a) (ii) because he submitted his statement of appeal only on 7 June 2005 ... With respect to staff rule 111.2 (ii), the time limit expired on 14 April 2005 in case the Appellant's duty station would be considered New York. In case the Appellant's duty station would be considered elsewhere

because he was already separated from service and repatriated to Colombia when he submitted the statement of appeal, the time limit elapsed on 14 May 2005.

38. Although the Panel considered the appeal to be time-barred it allowed the Appellant the benefit of the doubt concerning possible exceptional circumstances and acknowledged that he may not have been able to submit his statement of appeal on time ...

39. The Panel took note that the Appellant moved to Bogotá in February 2005 [but that] he was in very bad health and had to be hospitalized. The Panel underlined that, proven by a medical certificate, the Appellant brought sufficient evidence to support his claim that [his poor] health prevented him from lodging his statement of appeal on time.

40. The Panel considered these circumstances to be exceptional and beyond the Appellant's control and therefore waived the time limits of staff rule 111.2 (a) (ii).

...

43. The Panel considered the crucial point to be whether the decision of the [High Commissioner for Human Rights] 'not to reply to a formal complaint and request of compensation for abuse of power, harassment and discrimination by staff of the OHCHR' can be considered an administrative decision ...

44. The Panel recognized that in ... Judgement No. 916, *Douaji* (1999), the Tribunal determined that 'the administrative decision that [the Applicant] sought to challenge ... was the Secretary-General's failure to take appropriate measures'. However, the Panel considered the non-reply by the [High Commissioner for Human Rights] *not* to be an implied administrative decision because the non-reply did not produce any legal consequences for the Appellant. His terms of appointment were not affected by the non-reply. The Panel also noted that when he wrote his second letter to the High Commissioner for Human Rights ... he was already separated from service and receiving disability benefits and that this separation process was not forced upon him.

45. Furthermore, the Panel noted that the Appellant cannot be considered to have lodged a formal complaint with the High Commissioner for Human Rights ... since he sent his request to initiate an investigation only via e-mail.

46. The Panel also remarked that in case the Administration had decided to start an investigation, it was under no obligation to inform the Appellant.

47. Additionally, the Panel concurred with the Respondent that it is within the High Commissioner's discretionary power to decide whether or not a formal investigation should be carried out and that there is no provision stipulating the right of a staff member to demand such an investigation.

Conclusions and Recommendations

48. In view of the foregoing, the Panel concluded that the appeal is ... not admissible, *ratione materiae*.

...”

On 23 January 2006, 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 its unanimous recommendation and to take no further action on his appeal.

On 29 March 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The absence of a reply from the High Commissioner for Human Rights constitutes an administrative decision with many legal consequences for the Applicant and his terms of employment.
2. A complaint via e-mail can be considered as a formal complaint.

Whereas the Respondent's principal contention is:

The appeal was not receivable, *rationae materiae*. The absence of a reply by the High Commissioner for Human Rights is not a challengeable administrative decision.

The Tribunal, having deliberated from 22 April to 2 May 2008, now pronounces the following Judgement:

I. The Applicant entered the service of OHCHR in Cambodia in April 1999, as a Human Rights Mobile Monitor. At the time of the events that gave rise to his Application, he was serving on a two-year fixed-term contract as a Human Rights Officer at the P-3 level.

Some months prior to his separation from service on health grounds on 3 December 2004, the Applicant requested a transfer and sought the assistance of the Ombudsman's Office after experiencing difficulties at work. His request was unsuccessful and, on 30 November, he sent the High Commissioner an e-mail requesting that she initiate an investigation into his situation, seeking a formal apology as well as compensation. On 1 and 2 December, he resent this email and, on 5 January 2005, he sent a follow up e-mail.

On 14 February 2005, the Applicant requested administrative review of the "decision ... not to reply to a formal complaint and request[ed] compensation". He lodged an appeal with the JAB in Geneva on 7 June. The JAB noted that he had failed to comply with the time limits for lodging an appeal with the Board, as contained in staff rule 111.2 (a) (ii), but determined that the Applicant had demonstrated exceptional circumstances which justified waiver of the time limits. His appeal was, therefore, deemed receivable, *ratione temporis*. However, the JAB proceeded to conclude that the appeal was not receivable, *ratione materiae*, on the basis that the High Commissioner's lack of response to the Applicant's email did not amount to an administrative decision, as it had no legal consequences for the Applicant. The JAB noted, moreover, that he had separated from service by the time he sent the second e-mail and that an email could not be considered "a formal complaint". While the JAB indicated it would not proceed on the merits of the case, it did state that the decision to launch an investigation falls within the discretionary authority of the Respondent. The Secretary-General accepted the JAB's findings and conclusion.

II. The Tribunal recalls the rules and jurisprudence pertinent to the present case. Staff rule 111.2 provides, in relevant part:

“(a) 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; such letter must be sent within two months from the date the staff member received notification of the decision in writing. The staff member shall submit a copy of the letter to the executive head of his or her department, office, fund or programme.

(i) If the Secretary-General replies to the staff member's letter, he or she may appeal against the answer within one month of the receipt of such reply;

(ii) If the Secretary-General does not reply to the letter within one month in respect of a staff member stationed in New York or within two months in respect of a staff member stationed elsewhere, the staff member may appeal against the original administrative decision within one month of the expiration of the time limit specified in this subparagraph for the Secretary-General's reply.”

This rule has been repeatedly confirmed by the Tribunal in its jurisprudence. In Judgement No. 571, *Noble* (1992), it stated that “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”.

III. This case presents the Tribunal with two essential issues which must be addressed: whether e-mail is the appropriate means of presenting a formal claim or complaint within the administrative system of the United Nations; and, whether the JAB erred in finding the Applicant's claim non-receivable, *ratione materiae*.

IV. Insofar as the matter of e-mail is concerned, the Tribunal is fully aware of the widespread use of electronic communication within the administrative system of the Organization. Indeed, its usage is so prevalent that the Tribunal was surprised to see the Respondent's submission that “the Applicant's e-mail does not constitute a complaint ‘adequately’ brought to the attention of management”. While, *as a matter of principle*, it seems evident that e-mail is not a formal method of communication, the reality for anyone exposed to the working methods of the United Nations common system easily contradicts that assessment.

In the present case, the Applicant used e-mail to present formal complaints or claims; he has provided copies and delivery confirmation receipts for his messages and the Respondent does not contradict their existence. Rather, the Respondent relies upon the contention that they do not constitute formal claims. In general, the Respondent's position might be persuasive. E-mail constitutes a dangerous means of communication as it can easily go astray; not be received; be forgotten, unseen, mistakenly erased, etc. In the present case, of course, the Respondent does not question the fact that the e-mail messages were received. However, the Respondent, upon receipt of the messages, did not reply to the Applicant, who was clearly ignorant of the correct procedure, in order to advise him and to ask him to

present his claims via the necessary formalities. (See generally Judgement No. 868, *Bekele* (1998).) Accordingly, the Administration disregards the fundamental rule *venire contra factum proprium* (“no-one may set himself in contradiction to his own previous conduct”), which is considered by this Tribunal to amount to a general principle of administrative law, as set out in Judgement No. 1319 (2007): “there is a general principle of administrative law that the Administration has to act in good faith and that, in light of that principle, the Administration cannot be seen contradicting its own decisions (*venire contra factum proprium*)”.

V. With respect to the issue of receivability, *ratione materiae*, raised by the JAB and the Secretary-General, the Tribunal first recalls its jurisprudence on implied administrative acts.

In Judgement No. 818, *Paukert* (1997), the Tribunal held that an administrative decision can be in the form of a failure to respond. In that case, the JAB had determined that the Applicant’s appeal was not receivable, *ratione materiae*, because the Respondent’s refusal to respond to her request for compensation was not an administrative decision. The Tribunal found that the JAB had erred, as

“[t]he fact that the administrative decision was in the form of a failure to respond, rather than an explicit rejection of [her] claim, does not change the underlying nature of the claim, i.e., injury due to decisions in violation of the [United Nations] Charter and Staff Rules with respect to [her] employment”.

In Judgement No. 916, *Douaji* (1999), the Tribunal determined that the administrative decision the Applicant sought to challenge was the Secretary-General’s failure to take appropriate measures to implement a commitment he had made that she would be retained on the roster of candidates for employment and would be given priority consideration for appointment to any future vacant post for which she was qualified. The Tribunal held that:

“The Presiding Officer of the JAB improperly rejected the Applicant’s papers instituting an appeal. She, like the Respondent, incorrectly assumed that the decision that the Applicant was challenging was the [original commitment], when in fact she was challenging the Administration’s inaction in relation to the implementation of that decision. The JAB should have been convened to consider the Applicant’s case and determine whether the Respondent was in fact properly implementing [his commitment].”

The Tribunal found that the Applicant was entitled to lodge an appeal with the JAB as “[a]ny other result would tie the hands of staff who wish to challenge the Administration’s failure to implement decisions taken in their favour”.

Finally, in Judgement No. 1157, *Andronov* (2003), the Tribunal systematically addressed the issue of implied administrative decisions:

“The Tribunal believes that the legal and judicial system of the United Nations must be interpreted as a comprehensive system, without *lacunae* and failures, so that the final objective, which is the

protection of staff members against alleged non-observance of their contracts of employment, is guaranteed. The Tribunal furthermore finds that the Administration has to act fairly vis-à-vis its employees, their procedural rights and legal protection, and to do everything in its power to make sure that every employee gets full legal and judicial protection.

Consequently, the Tribunal determines that, in cases where the Administration believes that there is no specific administrative decision to be challenged in proceedings before the JAB, the rules should be interpreted by the Administration so as to ensure that legal and judicial protection is provided.

...

There is no dispute as to what an ‘administrative decision’ is. It is acceptable by all administrative law systems, that an ‘administrative decision’ is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as *implied* administrative decisions.”

It is clear from *Andronov* that not every decision of the Administration, written or implied, is an administrative decision; only those decisions imparting direct legal consequences are administrative acts.

VI. In the present case, while the Applicant had no right to oblige the Administration to launch an investigation, it is clear from the circumstances that the inaction of the Administration carried direct legal consequences for him.

The Tribunal has repeatedly stated that the instigation of disciplinary proceedings falls within the discretion of the Respondent. In Judgement No. 1086, *Fayache* (2002), it noted that “[i]t is not legally possible for anyone to compel the Administration to take disciplinary action against another party”. (See also Judgement No. 1234 (2005).) In Judgement No. 1271 (2005), the Tribunal held that “[t]his reasoning applies, by analogy, to the kind of general investigation requested by the Applicant in the present case”. (See also Judgement No. 1319 (2007): “the Tribunal recalls its long-standing jurisprudence that to hold an investigation is at the discretion of the Administration”.)

However, in Judgement No. 1235 (2005), the Tribunal held that:

“Whilst the Tribunal condemns the Administration’s practice of ignoring written requests from its staff members, its failure to act [on the Applicant’s request that disciplinary proceedings be instigated against other staff members] may be considered an implied rejection of the Applicant’s request for action ...”.

The Tribunal considers this reasoning applicable to the present case, because the inaction - the silence - of the Administration had direct legal consequences for the Applicant. The latter was seeking justice to him personally and justice must always be guaranteed by the Organization because otherwise the rights of personnel could be jeopardized. It appears from the file that there are many aspects of this case which are not clear, perhaps because no investigation was done. Thus, the Tribunal is bound to find that there was an implied negative administrative decision; that the JAB erred on this matter; and that, therefore, the Applicant's appeal was receivable, *ratione materiae*.

VII. In view of its finding that the JAB erred on receivability, and mindful of its statutory powers under article 10 (2) of the Statute of the Tribunal, the Tribunal has decided to remand the case to the JAB for consideration on its merits. It notes in this regard that both the Applicant and the Respondent asked the Tribunal to make such an order, in the event that it determined the case was receivable. In view of the procedural delays encountered by the Applicant, the Tribunal awards him compensation for the injury suffered.

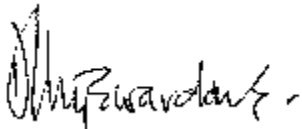
VIII. In view of the foregoing, the Tribunal:

1. Orders that the case be remanded to the JAB for consideration on its merits; and,
2. Orders the Respondent to pay the Applicant compensation in the amount of three 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.


(Signatures)



Spyridon **Flogaitis**
President

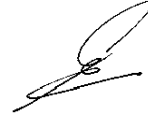


Dayendra Sena **Wijewardane**
Vice-President



Brigitte Stern
Member

New York, 2 May 2008



Maritza **Struyvenberg**
Executive Secretary