United Nations AT/DEC/1397

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1397

Case No. 1463 Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Brigitte Stern; Mr. Agustín Gordillo;

Whereas, on 8 September 2005, a staff member of the United Nations, filed an Application requesting the Tribunal, inter alia, to rescind the implicit decision of the Secretary-General accepting the conclusion of the Joint Appeals Board (JAB) that it lacks competence to review decisions of the Ombudsman, or to order an investigation into complaints of harassment and career obstruction. In addition, the Applicant requested the Tribunal to award him appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by him as a result of the Respondent's actions or lack thereof. Whereas on 21 November 2007, the Tribunal rendered Judgement No. 1359, rejecting the Application. The Tribunal held that, as decisions of the Ombudsman are not subject to appeal, the JAB rightly declared that it was not competent to hear a case of an "implied decision" made by the Ombudsman. The Tribunal thus confirmed its own lack of competence in this regard. The Tribunal further held that the request for review of the implied decision by the Administration not to launch an investigation was not receivable and that, in any case, it is well established that the decision whether to launch an investigation is at the discretion of the Administration. Finally, it observed neither a recommendation of the JAB nor the lack thereof, as claimed by the Applicant in this case, can be the subject of an appeal to the Tribunal.

Whereas, at the request of the Applicant, the President of the Tribunal granted an extension of the time limit for filing another application with the Tribunal until 31 January 2006;

Whereas, on 28 January 2006, the Applicant filed an Application, requesting the Tribunal, inter alia:

"(b) *to decide* to hold oral proceedings …

2. **On the *merits and substance*** ...

(a) *to declare* that the 27 June 2003 decision by the [Respondent] to re-assign the Applicant from [the Office of Programme Planning, Budget and Accounts (OPPBA)] to [a post in the Office of Human Resources Management (OHRM)] constitutes harassment;

...

(c) *to order* that ... the Applicant's other complaints of harassment and career obstruction prior to 27 June 2003 ... be investigated by the [Respondent] ...

(d) *to declare* the $23,000 compensation recommended by the JAB and paid by the Respondent grossly incommensurate with the extensive sufferings caused to the Applicant and order the payment of an additional compensation of [two] years' ... net base salary;

(e) *to fix* pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance by the Secretary General ... at three (3) year's net base pay in view of the special circumstances of the case;

(f) *[to order],* in addition, should the Respondent have failed at the time of judgment to implement his 6 September 2005 commitments to complete the outstanding performance reports and to provide guidance for the advancement of the Applicant's career, ... [payment of] additional compensation in an amount equivalent to three (3) years' ... net base salary ...

3. ***As Reparation Measures to his Career*** ...

(a) [to place] ... the Applicant on a substantive post ... as a budget officer at the P3 level;

(b) [to provide him with] a job description ...

(c) [to provide him with] a timely elaborated work plan ...

...

(e) [to provide him with] a [performance appraisal system report (PAS)] covering all periods missing in the past, … rated with a very good performance (2) …

(f) [to provide him with] a new PAS for the current cycle immediately prepared as soon as he returns to his position … ;

(g) [that all these post changes satisfy the provisions of the mobility policy]

(h) [that he be given external academic training]

(i) [to provide him with] a public apology ...

… [and, finally:]

> *that* sanctions … be imposed on the senior officials responsible for the improprieties and abuses of authority committed in this case [; and,]
>
> *that* $10,000 in costs be awarded … in view of the exceptional circumstances of this case."

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 13 July 2006, and once thereafter until 13 August;

Whereas the Respondent filed his Answer on 13 August 2006;

Whereas the Applicant filed Written Observations on 13 November 2006;

Whereas, on 26 June 2008, the Tribunal decided not to hold oral proceedings in the case.

Whereas the facts additional to those set out in Judgement No. 1359, as contained in the report of the JAB in this case, are as follows:

"***Summary of the facts***

… In a memorandum dated 13 June 2003, [the] then Director, Programme Planning and Budget Division (PPDB), OPPBA, solicited … the assistance [of the Officer-in-Charge (OiC), OHRM,] with respect to the [Applicant's] career. … [A reply from OHRM of the same date indicated that [the] Applicant could be accommodated in the Monitoring, Reporting and Planning Section, OHRM, against a P-2 position. In exchange, OHRM would provide the PPBD with the services of an Associate Human Resources Officer for an initial period of six months.]

…

… On Friday, 27 June 2003, the [Applicant] received an amended Personnel Action (PA) together with [a] memorandum from [the OiC, Department of Management,] informing him of his reassignment to OHRM, effective Monday, 30 June …

… On 26 August 2003, the [Applicant] submitted to the Secretary-General a request for administrative review of [this] decision, claiming that it] … 'constitute[d] an abuse of authority based on extraneous considerations and [was] the result of collusion between senior officials at OPPBA and OHRM'.

… On 24 November 2003, the [Applicant lodged an appeal with the JAB in New York]. ….

… In a memorandum dated 1 October 2004, [the Applicant was advised that] … effective 18 October …, he would be reassigned back to … OPPBA.

…"

The JAB adopted its report on 12 August 2005. Its considerations, conclusions and recommendation read, in part, as follows:

"***Considerations***

…

23. Firstly, the Panel noted the inconsistent arguments put forward by the Administration as justification for its decision. In the memorandum informing the Appellant of his reassignment, the mobility policy was advanced, while in his Reply, the Respondent invoked staff regulation 1.2 (c) emphasizing the Administration's discretion to transfer or reassign a staff member.

24. Secondly, the Panel noted, and it was not contested by the Respondent, that the Associate Officer who had swapped post with the Appellant had a personal relationship with the then OiC, OHRM, who had proposed such an arrangement.

25. Thirdly, the 'transcript' of the meeting with the then OiC, OHRM, provided by the Appellant, while not commented upon by the Respondent who had been requested to do so, led to suggestion that the transfer of the Appellant from OPPBA to OHRM served the interest of an individual rather than that of the Organization.

26. Fourthly, the Panel noted the lack of evidence showing that the mobility policy had been implemented for the needs of the Office. In addition, the Panel noted that there was no evidence suggesting that the mobility policy had been applied to other staff members within the two relevant offices.

27. Fifthly, in considering whether the lateral transfer of the Appellant from OPPBA to OHRM was in the interest of the Organization, the Panel noted the lack of consideration given to the Appellant's career prospects.

28. With regard to the issue of the violation of the Appellant's due process rights, ... the Respondent failed to demonstrate that it had followed the proper procedures for carrying out the reassignment of the Appellant. ...

29. The Panel was aware that the *onus probandi,* or burden of proof, was on the Appellant where allegations of extraneous motivations were made. … The Panel was satisfied that the Appellant had provided adequate evidence to show that the administrative decision to reassign him was not taken in the best interest of the Organization as part of the Administration's commitment to foster occupational mobility as part of the Human Resources Action Plan.

30. The Panel … found that the Administration's decision was influenced by extraneous factors and it was therefore prejudicial to the Appellant.

31. The Panel then turned to the issue of compensation for the damage suffered as a result of the tainted decision. The Panel determined that the Administration's bad faith and ill-motivated decision was prejudicial to the Appellant and caused him moral injury compensable in monetary terms. …

32. The Panel noted the absence of properly completed performance evaluation reports for the Appellant in accordance with the organizational regulations and rules since his PER covering the period from May 1991 to October 1995. …

Conclusions and Recommendations

33. In light of the forgoing, the Panel *unanimously agreed* that there was adequate evidence suggesting that the decision to reassign the Appellant was ill-motivated, taken in bad faith, influenced by extraneous factors and was generally an abuse of discretionary authority.

34. The Panel therefore *unanimously agreed* that the Appellant sustained moral injury, distress and anxiety, violation of his due process rights. Consequently, the Panel *unanimously*

recommends that the Appellant be compensated in the amount of [five] months' net base salary for the arbitrary decision of the Administration.

35. The Panel *unanimously recommends* that the Administration ensure that all outstanding performance appraisals of the Appellant be completed in accordance with the regulations and rules of the Organization within a reasonable time frame and in so doing provide the necessary guidance to the staff in order to advance his professional career …"

On 6 September 2005, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had decided to accept the JAB's recommendations.

On 28 January 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. His reassignment from OPPBA to OHRM constituted harassment and was based on extraneous considerations.

2. The compensation awarded by the Secretary-General was not commensurate with his "extensive sufferings".

3. He was unfairly treated.

Whereas the Respondent's principal contentions are:

1. The Applicant accepted the Secretary-General's decision taken on the basis of the JAB report, contesting only the non-implementation of the performance appraisals. He should now be estopped from repudiating that acceptance.

2. The Applicant's pleas that his reassignment to OHRM be found to constitute harassment, and that it be deemed null and void as having been motivated by extraneous considerations, have been resolved by the Secretary-General's acceptance of the JAB's recommendations. Therefore, those pleas are not receivable.

3. Issues which were not previously submitted for administrative review, or which were not considered by the JAB, are not receivable.

4. The Applicant should not be compensated for his own refusal to participate in the performance appraisal process.

5. The Applicant is not entitled to the payment of additional compensation for the moral injury incurred.

The Tribunal, having deliberated from 26 June to 25 July 2008, now pronounces the following Judgement:

I. Before entering into the merits, the Tribunal takes note of the fact that the Respondent has raised a number of receivability concerns in the instant proceedings. First, the Respondent argues that the

Applicant is estopped from making certain contentions because of his previous acceptance of these issues. Second, the Respondent argues that several of the Applicant's pleas are not receivable, *ratione materiae*, because of a lack of sufficient nexus between the plea and the originally contested administrative decision. Third, the Respondent argues that certain of the Applicant's pleas have been rendered moot by the Secretary-General's decision implementing the JAB's recommendations. Fourth, the Respondent argues that the Applicant's plea that the Tribunal order the Respondent to pay him three years' net base salary in lieu of fulfilling his 6 September 2005 commitment to complete the Applicant's outstanding performance appraisals is not properly before it because the Applicant seeks to have this decision implemented, not to contest its substance. The Tribunal will address each of these preliminary arguments in turn.

II. First, concerning the question whether the Applicant is estopped from making certain pleas before the Tribunal, the Respondent brings to the Tribunal's attention the letter of 7 November 2005 from the Applicant to the Under-Secretary-General for Management. In that letter, the Applicant noted that the JAB's report and recommendations accepted by the Secretary-General were two-fold, namely:

> "a) 'that [he should] receive compensation for moral injury, distress and anxiety and violation of [his] due process rights …'
>
> b) '[that] the Administration ensure the completion of all [the Applicant's] outstanding performance appraisals within a reasonable timeframe and, in so doing, provide [him] with the necessary guidance for the advancement of [his] career'."

The Applicant then stated that no action had been taken with respect to item (b); requested that the Under-Secretary-General for Management "kindly advise whether [the latter] ha[d] given any instructions for the situation to be rectified"; and added "that in the absence of prompt correction of the situation, he would have no choice but to appeal to the Tribunal". The Respondent argues that because this letter focused completely on item (b), the Applicant implicitly accepted the adequacy of compensation he had been awarded under item (a), and that he is now estopped from raising this question before the Tribunal.

The Tribunal cannot accept this argument of the Respondent. In the view of the Tribunal, the mere fact that the Applicant has raised a question of implementation of one part of the Secretary-General's decision has no bearing on the Applicant's position regarding other aspects of that decision. Rather, it is the Tribunal's view that the Applicant is free to appeal any issue to the Tribunal which was considered by the JAB, provided he does so in a timely manner and in accordance with the Tribunal's Statute. In the instant case, following one request for extension, the Applicant timely filed his Application with the Tribunal, including his plea concerning the adequacy of his compensation for moral injury, distress and anxiety and violation of his due process rights. The Tribunal therefore rejects the Respondent's argument that the Applicant's 7 November 2005 letter rendered this plea moot, and it will proceed to consider this plea.

III. Second, the Respondent argues that several pleas of the Applicant are not receivable, *ratione materiae*, because of a lack of sufficient nexus between the plea and the originally contested administrative decision. In this regard, the Tribunal recalls the scope of the Applicant's request for administrative review:

> "In accordance with staff rule 111.2, I request an administrative review of [the] 27 June 2003 decision (…), where, in his half-day capacity as [OiC] at the Department of Management, [the OiC] arbitrarily and without due process transferred me away from the Budget Division to a Human Resources Officer non-functional post at OHRM".

Thus, the question arises whether a sufficient link exists between this administrative decision and the Applicant's current pleas.

Receivability of a plea, *ratione materiae*, is predicated upon compliance with staff rule 111.2 (a) which provides:

> "A staff member wishing to appeal an administrative decision … 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".

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.". (See Judgement No. 571, *Noble* para. V (1992).) That said, the Tribunal has recognized that, within the limited context of the request for administrative review, there may be associated claims which are receivable. For example, a staff member who challenged his performance evaluation may be permitted to request damages not merely for denial of his rights in respect of the performance evaluation but also on the basis of the non-renewal of his contract, where he can show that the harm suffered is inextricably linked to the conduct to which he objected. (See generally Judgement No. 1237 (2005).) Similarly, in Judgement No. 1134, *Gomes,* para. III (2003), the Tribunal stated:

> "As to the issue of receivability, the Tribunal notes that in his letter to the Secretary General, the Applicant sought administrative review of only two issues … These issues *and the matters related thereto* are the only issues presented to, and addressed by, the JAB, and these are the only issues that this Tribunal will consider. All other pleas and requests of the Applicant are rejected as not receivable." (Emphasis added.)

IV. Thus, in the instant case, the Tribunal must determine whether the pleas of the Applicant are sufficiently "related" or "linked" to the original contested administrative decision so as to be receivable. With respect to the request that the Tribunal order that the Applicant's other complaints of harassment and career obstruction be investigated by the Respondent, and that he order that disciplinary sanctions be imposed on those responsible for such improprieties, the Tribunal considers that, in principle, these pleas may be considered sufficiently related to the contested administrative decision so as to be receivable *ratione materiae*, but recalls that the decision to launch an investigation or to initiate disciplinary action

falls squarely within the discretionary authority of the Respondent. (See Judgements No. 1086, *Fayache* (2002); No. 1234 (2005); No. 1271 (2005); and, No. 1319 (2007).) Thus, such pleas would be unsuccessful on the merits.

With respect to several of the Applicant's remaining pleas - namely that the Tribunal order that he be provided with a job description; that he be placed on a regular budget post at the P-3 level in the Budget Division; that he be provided with an "elaborated work plan" which "derives from the Division's work plan"; that he be given training directed towards his "career development plan"; that he be given a minimum of three months "external academic training"; and, that his reassignment satisfied the mobility requirements which entered into force in 2007 - the Tribunal finds these are unrelated to his request for administrative review and are thus not receivable, *ratione materiae*, pursuant to staff rule 111.2 (a). In light of these conclusions, the Tribunal need not address the Respondent's arguments that the Tribunal is not the proper body to entertain certain of these pleas, or that taking action on them would necessarily take the form of an advisory opinion which the Tribunal is not empowered to make.

V. Third, the Tribunal turns to the Respondent's argument that "[b]y accepting the JAB's finding that the contested decision was improperly motivated and constituted an abuse of authority, and by reassigning him back to OPPBA from OHRM, the Secretary-General has resolved those issues" and that therefore "those issues are no longer receivable". The Tribunal notes that the JAB did in fact address the motivation for the Applicant's reassignment; found that it was improperly motivated; recommended that the Applicant be paid compensation in the amount of five months' net base salary; and, that the Respondent accepted the JAB's recommendation. Moreover, it notes that the Applicant was reassigned back to OPPBA from OHRM on 1 October 2004, even before the JAB's consideration of the case. Thus, the Tribunal agrees with the Respondent that the substantive question of the impropriety in the impugned decision need not be reconsidered. Rather, the Applicant's principal contention now, as discussed below, concerns the adequacy of compensation awarded. The Tribunal may need to consider the substance of the original violation in order to assess the adequacy of compensation awarded, but this is different from conducting a *de novo* review of the violation itself. Accordingly, the Tribunal agrees with the Respondent that it need not reconsider the Applicant's pleas that the Tribunal declare that his reassignment from OPPBA to OHRM constituted harassment and that the reassignment be considered "null and void" based on extraneous considerations.

VI. Fourth, the Respondent argues that the Applicant's plea that the Tribunal order the Respondent to pay him three years' net base salary in lieu of fulfilling his 6 September 2005 commitment to complete the Applicant's outstanding performance appraisals is not properly before it because the Applicant seeks to have this decision implemented, not to contest its substance. The Tribunal agrees that an important distinction must be drawn between contesting a decision of the Respondent, on the one hand, and merely seeking to have a decision implemented, on the other hand. The Tribunal recalls Judgement No. 916,

Douaji (1999), where it set forth the manner in which staff members should proceed to challenge the Administration's failure to implement decisions taken in their favour:

> "VI. … It is clear that the Applicant is satisfied with that decision and seeks only to have it implemented. The "administrative decision" that she sought to challenge, first by writing to the Secretary-General and later by appealing to the JAB, was the Secretary-General's failure to take appropriate measures to implement his decision of 29 April 1993.
>
> …
>
> VII. … The JAB should have been convened to consider the Applicant's case and determine whether the Respondent was in fact properly implementing the … decision."

Similarly, in Judgement No. 1229, para. IV (2005), the Tribunal stated that, in order to challenge the implementation of a judgement, the procedure to be followed is "the normal appeals procedure; that is, request a review of the administrative decision and, if the request is denied, appeal to the [JAB], unless the case is brought to the Tribunal under article 7 of the Statute, on agreed facts.".

In the view of the Tribunal, it is clear that the Applicant in the present case is not seeking to contest the administrative decision taken by the Secretary-General, in response to the JAB's recommendation that "the Administration ensure the completion of all … outstanding performance appraisals within a reasonable timeframe". Rather, the Applicant seeks to have that decision implemented. Therefore, consistent with the cases cited above, the Applicant must request administrative review of this decision, and, if necessary, subsequently appeal it to the JAB and then the Tribunal. Accordingly, the Tribunal concludes that the implementation of the Secretary-General's decision to ensure completion of outstanding performance appraisals is not properly before it at this time.

VII. The Tribunal now turns to the merits of the Applicant's case. In this regard, the principal issue before the Tribunal is whether the compensation awarded by the JAB and accepted by the Secretary-General for violations to the Applicant's due process rights with regard to his reassignment - and the resultant moral injury, distress and anxiety - is adequate. In this regard, the Tribunal recalls that staff regulation 1.2 (c) provides that "[s]taff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations". The Tribunal concluded in Judgement No. 1069, *Madarshahi* (2002) that it was

> "satisfied that staff regulation 1.2 grants the Secretary-General the discretionary power to assign staff members to any of the activities or offices of the Secretariat. That power is, of course, subject to the usual limitations: namely, respect for due process, and the absence of bias, discrimination, arbitrariness, or other extraneous motivations." (para. II)

VIII. In the present case, the JAB identified five separate factors which caused it to question the motivation behind the decision to reassign the Applicant. The Tribunal agrees with the JAB that the decision has not caused irreparable damage to the Applicant's career. As the Tribunal finds that the JAB

adequately analyzed the case and made a reasonable recommendation as to compensation, the Tribunal will not upset that recommendation. Accordingly, the Tribunal is satisfied that the Applicant has received sufficient compensation for the acknowledged violation of his rights by the Administration and, thus, declines to award any additional amounts under this heading. (See generally Judgement No. 1105, *Kingham* (2003).)

IX. Related to the adequacy of compensation, the Applicant also requests the Tribunal to order that the Respondent issue a public apology concerning the way he handled the Applicant's reassignment. The Tribunal is of the view, as discussed above, that the five months' net base salary awarded by the JAB constitutes sufficient compensation for the violations to the Applicant's rights. Consequently, the Applicant's additional plea for a public apology is denied. The Tribunal notes that as its opinions are in the public domain, this Judgement constitutes a public record that the Applicant was wronged and was compensated accordingly. Thus, "the Tribunal considers that the Applicant receives satisfaction for the wrongs done to him through this Judgement." (See Judgement No. 1234, para. VII (*ibid*.).)

X. The Tribunal notes that the Applicant has also made a plea for the award of $10,000 in legal costs. The practice of the Tribunal is to award costs only in exceptional circumstances. In Judgement No. 237, *Powell*, para. XXVIII (1979), the Tribunal held:

> "As regards costs, the Tribunal has declared in its statement of policy contained in document A/CN.5/R.2 dated 18 December 1950 that, in view of the simplicity of its proceedings, the Tribunal will not, as a general rule, grant costs to Applicants whose claims have been sustained by the Tribunal. Nor does the Tribunal order costs against the Applicant in a case where he fails. In exceptional cases, the Tribunal may, however, grant costs if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the Tribunal."

The Tribunal is not satisfied that the Applicant was obliged to incur unreasonable costs in the present case and the application for costs, therefore, is refused.

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

(Signatures)

Spyridon **Flogaitis**
President

Brigitte **Stern**
Member

Agustín **Gordillo**
Member

Geneva, 25 July 2008

Maritza **Struyvenberg**
Executive Secretary