



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1408

Case No. 1479

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Spyridon Flogaitis, President; Ms. Brigitte Stern; Sir Bob Hepple;

Whereas at the request of a former staff member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 30 June 2006;

Whereas, on 28 May 2006, the Applicant filed an Application, requesting the Tribunal:

“To declare the decision of 1 July 2003 depriving the Applicant of his post of supervisor in the Delegation Distribution Unit [(DDU), Meetings and Publishing Division, Department for General Assembly and Conference Management (DGACM),] to be wrongful, arbitrary and void, since it was taken without prior consultation and based on discriminatory and vengeful motives with respect to the Applicant;

To order payment to the Applicant, in view of the obvious bad faith of the Respondent in this case, of compensation in the amount of two years’ net base salary, in view of the professional, moral and physical harm caused by the Respondent’s violations of procedures, his breach of administrative procedures, the persistent harassment by the Applicant’s supervisors, as well as the stress, humiliation, pain, suffering and delays experienced by the Applicant as a result of his being publicly stripped of his duties as DDU supervisor without any due process. ...”

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 9 November 2006, and once thereafter until 9 December;

Whereas the Respondent filed his Answer on 9 December 2006;

Whereas the Applicant filed Written Observations on 18 January 2007;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

“Employment history

... The [Applicant] joined the United Nations on 29 September 1975 on a short-term appointment ... as [a] Documents Clerk [at the G-2 level] with the Distribution Section, Publishing Division, Conference Services. [His appointment was regularly extended, and he received a series of promotions. At the time of the events which gave rise to his Application, the Applicant held a permanent contract and had been promoted to the G-6 position of Supervisor, DDU.]

...

... Effective ... 30 April 2004, the [Applicant] separated from the Organization on retirement.

Summary of the relevant facts

... The [Applicant's] performance evaluation reports (PERs) starting from 1 April 1986 through 31 March 1993 (two reports) mention that he performed administrative and supervisory functions 'in the absence of supervisor' and, starting from 1 April 1993 through 31 March 1996, (also two reports) that he was 'Assistant Supervisor of the Delegation Station'. None of these four PERs, however, assessed the [Applicant's] 'effectiveness in supervision' or indicated 'number and level of staff under his supervision' during the reporting periods. In fact, on all four PERs this parameter is marked 'Not applicable'.

... In ... 2000, the [Applicant] successfully rebutted his performance appraisal system (PAS) report for the period 1 April 1999 - 31 March 2000 and ... his overall rating for the said period [was upgraded] from 'fully meets performance expectations' to 'frequently exceeds performance expectations'. The PAS report did not contain any negative comments on the [Applicant's] accomplishment of his supervisory/managerial goals and the Rebuttal Panel also concluded that '[the Applicant's] performance during the appraisal period ha[d] ... not slipped despite the first appraising officer's insistence [to the Panel] that the [Applicant] failed to demonstrate "leadership"'. The Rebuttal Panel recorded its concern that 'the first reporting officer was not able to explain what he meant [by this]'.

... In ... 2001, the [Applicant] successfully rebutted his PAS report for the period 1 April 2000 - 31 March 2001 and ... his overall rating for the said period from 'fully meets performance expectations' [was upgraded] to 'frequently exceeds performance expectations'. The PAS report included a comment ... to the effect that '[the Applicant] should strengthen his supervisory skills by setting standards and ensuring compliance'. The Rebuttal Panel, however, concluded that '[the Applicant's] performance during the appraisal period ha[d] ... not slipped despite the first appraising officer's insistence that the [Applicant] failed to demonstrate "leadership"'. The Rebuttal Panel recorded [its] concern that 'the first reporting officer was again, second year in a row, not able to explain what he meant'.

... On 1 November 2002, [DGACM] announced ... that new arrangements regarding availability of official documents and publications to Secretariat officials were to be introduced effective 15 November ...

... According to the Respondent, there was a general meeting with all 8 staff members of both [DDU] and [the] Secretariat Distribution Unit (SDU), including the [Applicant], in mid-June 2003, where the Chief of the Publishing Section discussed with them the reorganization and closure of the SDU.

... On 23 June 2003, DGACM announced ... further details about the new arrangements ...

... In a memorandum dated 1 July 2003 the Chief, Publishing Section, informed the [Applicant] that as of 7 July ... his functions of Supervisor, [DDU], would be assumed by another staff member[, namely the person who had been Supervisor of the SDU].

...”

On 12 September 2003, the Applicant filed a request for administrative review. On 22 December, he lodged an appeal with the JAB in New York. The JAB adopted its report on 25 July 2005. Its findings, conclusions and recommendations read, in part, as follows:

“[Findings]

...

55. ... [T]he Panel made the following findings after careful review of the evidence presented by the parties:

...

(c) the review of the affected staff members was not transparent since it was carried out ‘primarily’ by the Chief of the Section and his Deputy rather than by an independent panel, which should have included a staff representative(s); also, it seems that no information on the available suitable posts, their duties and requirements was provided to the affected staff members, including the Appellant, prior to the review and the affected staff members were not given a reasonable opportunity to express their interest in and present their qualifications for those positions;

...

(e) the memorandum from the Chief of the Publishing Section to the Appellant dated 1 July 2003 notifying the Appellant about the decision in question, while informing him that another staff member was to take over his duties as of 7 July ..., did not say a word about the new functions of the Appellant himself and where he was supposed to report after 7 July ... The Panel found this to be somewhat inappropriate;

(f) the memorandum dated 23 October 2003 ... with the departmental comments on the Appellant’s request for administrative review revealed further that the decision in question was influenced by such an extraneous factor as the Appellant’s age.

Conclusions

56. The Panel concluded ... that in this particular case the Appellant was successful in demonstrating that the decision in question was motivated, inter alia, by an extraneous factor and could also have been motivated by bias and prejudice.

57. The Panel further concluded that the Respondent failed to demonstrate that the decision in question was made and carried out in accordance with the spirit and letter of the existing rules and regulations and the Appellant was accorded full and fair consideration.

Recommendations

58. The Panel agreed to recommend that the Appellant be paid compensation in the amount of 6 months net base salary for the violation of his due process rights and for the stress, anxiety and humiliation which he suffered as the result of the arbitrary decision in question.

59. The Panel made no further recommendations on the appeal.”

On 7 February 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that:

“The Secretary-General ...regrets not being able to agree with the findings and conclusions of the JAB. The contested decision arose in the context of combining the functions of two units, the SDU and DDU. This reorganization, taken pursuant to a comprehensive report on the matter in the light of technological advances, involved neither the abolition of posts, nor a selection process to new posts. Thus, neither staff rule 109.1 (c) nor administrative instruction ST/AI/2002/4 [of 23 April 2002] are applicable to the contested decision. The Secretary-General further finds that you have failed to substantiate the claim that the reorganization has been motivated by bias and prejudice, or that the reference to your retirement date could be construed as an extraneous factor in and of itself, especially considering the relatively minor age difference between you and the staff member who was assigned to the function of supervisor. The Secretary-General, while regretting any ill-feelings you had with respect to the decision, does not consider that any of your rights have been violated, and has therefore decided not to accept the JAB’s recommendation and to take no further action in your case.”

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

Whereas the Applicant’s principal contentions are:

1. The decision to remove him from his post was tainted by bias, prejudice and extraneous factors.
2. The Respondent violated his rights to due process.
3. He was unfairly treated.

Whereas the Respondent’s principal contentions are:

1. The Respondent has wide discretion in the area of reassignment of staff members in connection with reorganizations or otherwise.
2. The Applicant failed to prove the existence of bias, prejudice or discrimination.

The Tribunal, having deliberated from 2 to 25 July 2008, now pronounces the following Judgement:

I. The first issue in this case is whether staff rule 109.1 and administrative instruction ST/AI/2002/4 are applicable. Staff rule 109.1 (c) (i), so far as relevant, states that

“if the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, and staff members with probationary appointments shall be retained in preference to those on fixed-term or indefinite appointments, provided that due regard shall be had in all cases to relative competence, to integrity and to length of service”.

Administrative instruction ST/AI/2002/4 provides in section 11.1 (c) - under the heading “Placement authority outside the normal process” - that “[t]he Assistant Secretary-General for Human Resources Management shall have the authority to place in a suitable position ... [s]taff affected by abolition of post or funding cutbacks, in accordance with staff rule 109.1 (c)”. It further states, in section 11.2, that

“[a]fter determining the availability of a suitable position in consultation with the head of department/office and the staff member concerned, the Assistant Secretary-General for Human Resources Management shall decide on the placement, in accordance with staff regulation 1.2 (c), and so inform the appropriate central review body”.

Based on these provisions, the JAB found that as the decision to place another staff member in the post of Supervisor was made by the Chief of the Publishing Section and not by the Assistant Secretary-General and was not preceded by any meaningful consultation with the Applicant about the available suitable positions, and as the review was neither transparent nor fair, the Applicant “was successful in demonstrating that the decision in question was motivated, inter alia, by an extraneous factor and could also have been motivated by bias and prejudice”.

II. In the view of the Tribunal, the JAB erred in deciding that staff rule 109.1 and administrative instruction ST/AI/2002/4 were applicable. The decision to select the other staff member, the former Supervisor of the SDU, and not the Applicant for the post of Supervisor was made in the context of the merger of the DDU and the SDU, which were part of the Meetings and Publishing Division, DGACM. That merger was the outcome of a classification review carried out by the Assistant Secretary-General for Human Resources Management in August 2001, as part of the reforms proposed by the Secretary-General in document A/57/289, of 9 August 2002. The review found that the DDU and the SDU provided equivalent services, distributing the same documents to different customers at their counters only a few feet from each other. Both Units assisted in the provision of additional information when requested, used the same tools, shared and jointly maintained a common documents storage area, and each had a relatively small staff. There was a Supervisor for each Unit (both at GS-6 level), and also a post of Assistant Supervisor in each Unit (at GS-5 level). The review concluded that the “high percentage of time for supervisory functions was not borne out in the audit”, proposed the merger of the two Units, and stated that “[u]pon merging, one Supervisor’s post and one Assistant Supervisor’s post should be placed in other

capacities, as needed". The decision was then taken to close the SDU. The Chief of the Publishing Section decided to select one of the GS-6 Supervisors as head of the remaining DDU. He selected the staff member who had formerly supervised the SDU and asked the Applicant to express his wishes as regards reassignment. The Applicant said he wanted to remain in the Unit, and he was then appointed Assistant Supervisor, albeit remaining at the GS-6 level.

III. This reorganization did not involve the abolition of the post held by the Applicant, nor was there a reduction of staff at the GS-6 level. There was no recruitment or placement in a new post. The JAB erred by focusing upon the consequences for the Applicant resulting from the impugned decision. The question they should have asked was whether, objectively speaking, there had been an abolition of his post, a reduction of staff, or a selection for a new post. On the accepted facts, the answer to these questions must be in the negative. This was rather a case of transfer of a staff member (from the post of Supervisor to Assistant Supervisor, with salary and grade protection) as part of the reorganization of the Department. 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 case law of the Tribunal has emphasized that the Secretary-General "generally enjoys broad discretion in making decisions of this kind. Only where the Respondent's discretion is tainted by extraneous factors, such as prejudice, arbitrariness, improper motive, discrimination, for example, is such discretion subject to limitation." (Judgement No. 1163, *Seaforth* (2003).) Accordingly, the Tribunal is satisfied that the Respondent had the discretionary authority to take the impugned decision.

IV. The second and critical issue in this case is whether the decision taken by the Chief of the Publishing Section to place the other staff member in the Applicant's post was motivated by prejudice or some other extraneous factor. The Tribunal recalls that staff rule 111.2 (k) provides that where action is taken "on grounds of inefficiency or relative efficiency, the [JAB] panel shall not consider the substantive question of efficiency but only evidence that the decision was motivated by prejudice or by some other extraneous factor".

It is the consistent case law of the Tribunal "that the *onus probandi*, or burden of proof, is on the Applicant where allegations of extraneous motivation are made". (Judgement No. 1069, *Madarshahi* (2002).) In Judgement No. 521, *Saeed* (1991), the Tribunal made it clear that the burden of proof in such matters was "not the heavy one of proof beyond reasonable doubt". Analyzing the matter as one of requiring proof on the balance of probabilities, the proper approach where prejudice or other extraneous factors are alleged is to require the Applicant to establish facts from which the existence of that prejudice or those extraneous factors may be presumed (a *prima facie* case); it is then for the Respondent to provide evidence which satisfactorily rebuts this presumption.

V. In the present case, the Applicant and the other staff member had equal seniority in grade. The Respondent claims that the selection of the other staff member was based “on leadership qualities and performance, as reflected in their PAS reports”. Although the decision was based on a side-by-side comparison, the other staff member’s PAS reports were apparently not placed before the JAB, nor were they produced by the Respondent in response to this Application. It is, however, undisputed that on two occasions the Applicant successfully rebutted his PAS reports. The Rebuttal Panel upgraded his overall report for 1999-2000 from “fully meets performance expectations” to “frequently exceeds performance expectations”. The PAS report did not contain any negative comments on the Applicant’s performance of his supervisory/managerial goals, and the Rebuttal Panel also concluded that “[the Applicant’s] performance during the appraisal period ha[d] ... not slipped despite the first appraising officer’s insistence that the [Applicant] failed to demonstrate ‘leadership’”. The Rebuttal Panel recorded its concern that “the first reporting officer was not able to explain what he meant” with his comment about the Applicant’s failure to demonstrate leadership. The following year, the Applicant rebutted his 2000-2001 PAS and the Rebuttal Panel again upgraded his overall rating from “fully meets performance expectations” to “frequently exceeds performance expectations”. The Rebuttal Panel again reiterated its language that “[the Applicant’s] performance during the appraisal period ha[d] ... not slipped despite the first appraising officer’s insistence that [the Applicant] failed to demonstrate ‘leadership’”. As in the previous year, the Rebuttal Panel recorded concern that “the first reporting officer was again, [for a] second year in a row, not able to explain what he meant”. In light of the Applicant’s complaint that his supervisor had written negative and disparaging comments on his annual PAS evaluations, which he had to rebut each time, it was incumbent on the Respondent to provide a satisfactory explanation for the comments made regarding the selection procedure, in particular of what was meant by the failure to demonstrate leadership. In the absence of such an explanation, the Tribunal must find that the Applicant has established facts from which a *prima facie* presumption of prejudice or extraneous considerations can be drawn, and that this has not been rebutted by the Respondent.

VI. The JAB found that the memorandum dated 23 October 2003 from the Executive Officer, DGACM, to the Chief, Administrative Law Unit, providing an explanation for the Applicant’s reassignment, “revealed further that the decision in question was influenced by such an extraneous factor as the [Applicant’s] age”. The relevant part of this memorandum states:

“The decision to select [another staff member] as head of the [DDU] does not have any negative impact on [the Applicant’s] career and has no potential for doing so, as the post remains at the G-6 level and there is no upgrading planned for the post. Furthermore, [the Applicant] reaches retirement age on 30 April 2004.”

The Respondent claims that there is only a “minor difference in age” between the other staff member and the Applicant, but no information has been provided about the retirement date of the former. Whether or not the age difference is minor, the JAB was entitled to draw the inference from the 23 October 2003

memorandum that age was considered by the Department as a relevant factor. The reference to age seems to be used to support the claim that the selection of the other staff member had no negative impact on the Applicant's career, partly because he would be retiring within nine months of his reassignment. This explanation entirely fails to take into consideration the loss of status and humiliation suffered by the Applicant as a result of being reassigned from the post of Supervisor to Assistant Supervisor. Accordingly, the Tribunal finds that the Applicant's age was an "extraneous factor" that influenced the decision not to select him as Supervisor of the remaining DDU.

VII. The result is that the Tribunal agrees with the JAB's conclusion, although for somewhat different reasons. The Applicant has established, *prima facie*, that the decision in question was motivated in part by two extraneous factors - namely, the seemingly unjustified comments about the Applicant's leadership skills in his PAS, which were never adequately explained by the Respondent, and the references to the Applicant's age in the memorandum explaining his reassignment. The Respondent has failed to rebut the presumption of either of these extraneous factors, and the Applicant is thus entitled to appropriate compensation for the stress, anxiety and humiliation which he suffered as a result.

VIII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant compensation of six months' net base salary, 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.

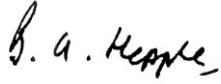
(Signatures)



Spyridon **Flogaitis**
President

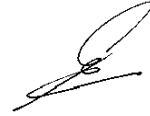


Brigitte **Stern**
Member



Bob **Hepple**
Member

Geneva, 25 July 2008



Maritza **Struyvenberg**
Executive Secretary