



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1420

Case No. 1495

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. Goh Joon Seng;

Whereas, on 26 July and 26 September 2006, a staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed applications that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 1 December 2006, the Applicant, after making the necessary corrections, filed an Application requesting the Tribunal, inter alia:

- “3. ... [T]o order ... adoption of the report ... of the Nairobi Joint Appeals Board [(JAB)].
4. ... [T]o award compensation for [the] injury sustained in violating my rights ...
5. ... [T]o award compensation for [the] unfair rationale applied by the UNHCR Administration in the decision to deny me re-deployment to a duty station conducive to my health as recommendation by both, the [United Nations] doctor, and my doctors ...
6. ... [T]o award compensation for the financial embarrassment and loss of goods through auction and medical bills incurred. ...
7. ... [T]o award any other relief, it may deem appropriate ...”

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 11 May 2007, and once thereafter until 11 June;

Whereas the Respondent filed his Answer on 6 June 2007;

Whereas the Applicant filed additional documentation on 29 October 2008;

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 services of ... UNHCR on 2 January 1995 as Community Service Assistant at the GL-6 level, based at Kakuma Refugee Camp. She has an indefinite appointment with UNHCR.

Facts of the Case:

In June 2001, the Applicant was medically evacuated from her duty station at Kakuma Refugee Camp to Nairobi due to an illness. After examination and diagnosis of her illness, both her private doctor and the United Nations Joint Medical Services [(UNJMS)] recommended that she was fit for office work but at a different duty station. In June 2001, she was placed on sick leave with full pay.

While on sick leave, the Applicant had requested the Nairobi Office of UNHCR to consider her for ... temporary employment since her medical condition prohibited her to return to her duty station at Kakuma Refugee Camp. The Applicant accepted a temporary assignment as an Administrative Clerk, effective 4 February to 30 August 2002, on a replacement capacity for a staff member who had proceeded on maternity leave.

[On 26 November 2002, the Director of UNJMS concluded that the Applicant suffered from an autoimmune disease that is chronic ‘with varying degrees of severity’. The Director noted that her doctor had advised that she could not work in hardship conditions, i.e., in the field, particularly in the sun, as this would exacerbate the disease. He concluded that since she could perform office work ‘in her good phases’, she would be classified as ‘fit to work’.]

By memorandum dated 22 September 2003, the Applicant wrote to the Organization seeking payment of [daily subsistence allowance (DSA)] for the period she had worked temporarily in the Nairobi UNHCR Office. ... [On] 5 November 2003[, the] Applicant was informed that she was not entitled to DSA payment ...

The Organization [placed] the Applicant ... [on leave without pay] effective 12 August 2003 because she had exhausted her sick leave and annual leave entitlements effective 11 August ...

...

By letter dated 17 November 2003, the Applicant requested the Organization to re-deploy her to a duty station suitable to her health condition, as previously requested by the doctors.

By memorandum dated 19 November 2003, ... UNHCR, responded to the Applicant’s aforementioned letter by informing her that she had no right to employment with UNHCR in a duty station other than the one she was appointed to.

... [T]he Organization ... decided to negotiate an agreed termination with the Applicant, the terms of which were not acceptable to her. ...

By memorandum dated 28 November 2003, the Applicant submitted her request for administrative review to the Secretary-General. [On the same date, the Applicant submitted her initial statement of appeal, which consisted of a copy of her request for administrative review, to the Nairobi JAB. Her appeal was deemed premature, and was resubmitted on 16 February 2004. The remedy she was seeking was to 'be redeployed to a suitable duty station'.]

On 29 November 2004, the Applicant submitted [a] request for suspension of action regarding the administrative decision to withhold her salary effective 12 August 2003 until her Appeal is heard and determined by the Joint Appeals Board."

The JAB adopted its report on the request for suspension of action on 16 March 2005 which reads, in part, as follows:

"Considerations

...

The Respondent has contended that since the staff member is already not being paid, the decision has been implemented. The Panel does not share this view. It is uncontentious that the Applicant is presently on an indefinite contract. It is also uncontentious that the Applicant is unable to perform her functions at the duty station at which she was hired, namely Kakuma Refugee Camp. Since the staff member is therefore still in the employment of the United Nations, she is either entitled to full pay or, at the very least, entitled to half pay in accordance with the Rules and Procedures governing the termination of staff member's contracts on the basis of ill-health (...).

The decision not to pay the Applicant is therefore a decision that continues to be implemented as long as the employment contract is still in force. In other words, as long as the contract is still in force, the implementation of the contested decision can not find its conclusion, precisely because non-payment is not an action but rather the exact contrary and as such, it can not exhaust itself as an action can. Consequently, the Panel unanimously agreed to accept the request of a suspension of action as receivable.

The Panel then examined whether the implementation of the administrative decision would directly and irreparably injure the Applicant's rights (...).

The Panel noted that the Applicant is on an indefinite contract and, as mentioned before, would normally be entitled to full pay as long as the contract is in force. However, the Panel also noted that the Applicant has exhausted her sick leave and is not suitable for employment at the duty station at which she was hired. It consequently appears that the conditions for initiating procedures under ST/AI/1999/16 'termination of appointments for reasons of health' [of 28 December 1999] are fulfilled.

... According to those stipulations, when a staff member has utilized all of his or her entitlement to sick leave with full pay, the Executive or the local Personnel Office shall bring the situation to the attention of the Medical Director or the designated medical officer in order to determine whether the staff member should be considered for disability benefit under Article 33 (a) of the United Nations Joint Staff Pension Fund [(UNJSPF)] regulations while the staff member is on sick leave with half pay (Section 3.1.). ST/AI/1999/16 further stipulates that if the medical conclusion is that the staff member's illness or injury constitutes an impairment to health, which is likely to be permanent or of long duration, the Medical Director or the designated medical officer shall so advise the relevant Human Resources Officer at Headquarters or the local Personnel Office for notification to the staff member (Section 3.2.). When the conclusion by the Medical Director is not contested, the relevant Human Resources Officer at Headquarters or the local

Personnel Office shall then submit as soon as possible a request to the United Nations Joint Staff Pension Committee for the award to the staff member of a disability benefit. Only after the Committee of the UNJSPF has decided that a disability benefit is to be awarded, can the employing agency make a recommendation for the termination of the staff member's appointment (Section 3.5.). According to Section 4 of ST/AI/1999/16, the staff member is entitled to be placed on Special Leave With Half Pay in accordance Section 8.2 of ST/AI/1999/12 if there is a delay in the medical determination of incapacity or in the Committee's decision.

It is very clear and uncontentious that UNHCR has not even began to initiate proceedings under ST/AI/1999/16. It follows that in accordance with Section 4 of that ST/AI, the Applicant is entitled to be placed on Special Leave With Half Pay. The continued refusal of UNHCR to pay the Applicant in accordance with those stipulations constitutes irreparable damage for every day that the Applicant is deprived of her salary. The Panel therefore has no doubt whatsoever that this request for suspension of action must be successful and payments in accordance with Section 4 of ST/AI/1999/16 must be taken up immediately pending the outcome of the Appeal proper."

The JAB recommended to the Secretary-General that the Applicant be placed on Special Leave With Half Pay with immediate effect. On 11 April 2005, the Under-Secretary-General for Management informed the Applicant that the Secretary-General did not agree with the JAB. First, because the contested decision had already been implemented and also, because Section 4 of ST/AI/1999/16 could not be applied to her case as her "medical condition was not of a nature that required for [her] to be considered for a disability benefit". The Secretary-General accordingly decided not to grant her request for suspension of action.

The JAB adopted its report on the merits on 14 February 2006. Its considerations and recommendation reads as follows:

V. Considerations:

Regarding the merits of this case, the Panel took note of the considerations provided by the Panel deliberating on the Suspension of Action request in its Report ... It is in complete accordance with those considerations and therefore full reference is made to the reasoning provided in that report. That reasoning also applies to the present appeal, as the facts of the case, as far as the [JAB] is aware, have not changed. Since the Respondent did not submit any observations, the [JAB] can assume that the [Applicant] still is working on a permanent [sic] contract and that that contract has not been terminated either for reasons of ill-health or for any other reason. It is a fundamental principle in law that contractual obligations are to be honoured (*pacta sunt servanda*) and that if a person is in the employment of an Organization, he/she shall be entitled to salary. If the Organization wishes not to pay any salary to the [Applicant], it must initiate termination of the permanent [sic] appointment and since the Organization has not terminated the [Applicant's] appointment, there is no doubt in the JAB's mind that she must be paid her salary and her emoluments both retroactively as well until such time as the employment contract is terminated."

VI. Recommendations:

1. The [Applicant] be paid retroactively all the salary due to her since the Organization discontinued payment of her salary, including all emoluments due to her under the Staff Regulations and that she continues to receive payment of her salary and emoluments until a final decision on her employment status is taken.

2. The Secretary-General instructs UNHCR to expeditiously make a decision on the employment status of the [Applicant].”

On 9 June 2006, the Under-Secretary-General for Management transmitted a copy of the JAB report on the merits to the Applicant and advised her as follows:

“The Secretary-General regrets not being able to agree with the JAB’s conclusion. He first notes that, contrary to the JAB’s finding that you have been working, you have actually not worked since mid August 2003, when you were placed on leave without pay. This decision was taken pursuant to section 3.1 of administrative instruction ST/AI/2005/3 [dated 6 May 2005], which provides that staff members, whose entitlement to sick leave and annual leave has been exhausted, may be placed on special leave without pay indefinitely. Therefore, the Secretary-General cannot accept the JAB’s recommendation for the payment of salary. It is noted, in that regard, that, were you to be considered for a disability benefit under article 33(a) of the Regulations of the ... UNJSPF, you would have been placed on special leave with half pay until the date of the decision by the UNJSPF. However, your health condition was not determined to be of such a nature that would permit your case to be considered for a disability benefit. Nevertheless, the Secretary-General agrees with the JAB’s view that such a situation cannot continue indefinitely and that a decision needs to be taken concerning your contractual status. To that end, the Secretary-General has decided that UNHCR should act expeditiously towards ascertaining your current medical status, and requests you to cooperate with such an effort. UNHCR is also requested to explain to you the options available to you, especially once the results of a medical examination are known.”

On 1 December 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. She should have been terminated on medical grounds.
2. The failure of UNHCR to redeploy her to a duty station conducive to her health was a violation of her rights.
3. She should have been paid DSA for the period during which she worked at the UNHCR Nairobi Office while on sick leave in Nairobi, and failure to do so constituted a violation of her rights.
4. Being placed on SLWOP upon exhaustion of her sick leave entitlements was improper. While her contract was in effect, she was entitled to the payment of her full salary.
5. The denial of salary, the denial of redeployment, and the denial of termination on medical grounds was based “on a motivation of personal animosity”.

Whereas the Respondent’s principal contentions are:

1. The issues raised in this Application which have not previously been submitted for determination by the appropriate specialized administrative body, or for administrative review or for consideration by a joint appeals body, as well as issues on which a joint appeals body has not communicated its opinion to the Secretary-General, are not receivable by the Tribunal. Issues which were filed late are equally not receivable.

2. The Secretary-General's decision not to accept the recommendations made by the JAB on the Applicant's request for suspension of action, is not subject to appeal. Moreover, any such application would be time-barred.

3. The Applicant had no right to special leave with half pay under ST/AI/1999/16 as there had been no claim for the award of a disability benefit, and consequently, no delay in a decision as to the award of a disability benefit. Moreover, as this issue was not submitted for administrative review, it is not receivable by the Tribunal.

4. The Applicant has no right to the award of a disability benefit, unless so decided in accordance with the UNJSPF Regulations and Rules.

5. The Applicant has no right to payment of salary after exhaustion of her sick leave entitlements.

6. The Applicant's claim for redeployment was never considered by a joint appeals body, and is not receivable by the Tribunal.

7. The Applicant's claim for payment of DSA is not receivable.

The Tribunal, having deliberated from 10 to 26 November 2008, now pronounces the following Judgement:

I. The Applicant, who holds an indefinite appointment, entered the service of the United Nations on 2 January 1995, at the Nairobi branch office of UNHCR and was later deployed at the Kakuma Refugee Camp. When, in June 2001, the Applicant was diagnosed with a skin disease, the symptoms of which were exacerbated by exposure to the sun, she was placed on medical leave until 4 February 2002. After occupying an administrative assistant post until 30 August, the Applicant filed a request with the Administration for DSA, which was denied. Her attending physician certified that the Applicant was able to work if she stayed out of the sun but could no longer be sent on field missions.

II. Following her temporary assignment, the Applicant was again placed on medical leave on full salary for 45 days. She then received a combination of half salary and half annual leave for 45 days, in accordance with the usual practice. On 6 October 2003, the Applicant was informed that, from September onwards, her salary would no longer be paid and she would be placed on SLWOP.

III. On 29 November 2004, the Applicant filed a request with the JAB for suspension of action on the decision to withhold her salary. In its report of 16 March 2005, the Board recommended suspension of action on the Administration's decision to withhold the Applicant's salary, reasoning that, since she was still employed by the Organization, the Applicant was entitled to the payment of her full salary or, at least, half her salary. In view of the violation of her rights resulting from the implementation of the decision in question, the Board also decided that, in light of the particular circumstances of the case (existence of an

indefinite contract, refusal of the Administration to terminate the Applicant on medical grounds), the Applicant should be placed on special leave with half pay. However, the Secretary-General refused to follow the Board's recommendations.

IV. Meanwhile, the Applicant asked to be redeployed to another post, but the Administration refused, recalling that she had no right to be redeployed to a duty station other than the one to which she had initially been appointed. The Applicant rejected an agreed termination proposal made to her in October 2003, although she herself had made the request for termination to the Human Resources Section.

V. On 28 November 2003, the Applicant submitted a request for administrative review of the Administration's decision not to redeploy her to another post and, on 16 February 2004, she appealed this decision to the JAB. In its report of 14 February 2006, the JAB, referring to its previous considerations and recommendations in its report of 16 March 2005, concluded that the Applicant was still in the employ of the Organization under an indefinite contract. As a result, the Administration was required to honour its contractual obligations and to pay the Applicant her salary. The JAB, therefore, recommended that the Administration pay the Applicant her salary and emoluments until the Administration found a satisfactory solution to her situation. The JAB also recommended that the Administration remedy the situation as expeditiously as possible. The Secretary-General accepted only the last of these recommendations, in his decision of 9 June 2006.

VI. The Applicant has made several requests to this Tribunal:

- First, the Applicant requests the Tribunal to order the adoption of the report of the JAB dated 16 March 2005, upholding her request for suspension of action on the administrative decision to withhold her salary beginning September 2003 and recommending that she be placed on special leave with half pay;
- Second, the Applicant is claiming compensation for the financial loss she suffered from being placed in a situation in which she had no means of subsistence, notably because the Administration had refused to grant her DSA;
- Third, the Applicant is claiming compensation for the unjust and discriminatory treatment she suffered, notably because the Administration refused to redeploy her in another post or to terminate her contract on medical grounds;

- Fourth, the Applicant is claiming compensation for the injury she suffered more generally from the Administration's mismanagement of her career in the Organization and for the injury she suffered from the failure of the Administration to take her state of health seriously.

VII. On his part, the Respondent maintains that the majority of the Applicant's claims are not receivable by the Tribunal, *ratione materiae* or *ratione temporis*. The Respondent further maintains that, if the Tribunal nonetheless decides that it is competent to hear the Applicant's requests, the Applicant has no right to the benefits she is claiming.

VIII. The case before the Tribunal is highly complex in view of the many and sometimes confused requests the Applicant is making and the various prior proceedings. In order to handle the Application in as clear a fashion as possible, the Tribunal will take a two-step approach: it will first consider which of the Applicant's claims cannot be received because they do not fall within the competence, *ratione materiae*, of the Tribunal. It will then proceed to take up the claims that can be considered on the merits.

IX. With respect to the claims that are not receivable, the Tribunal will begin by recalling one of its fundamental rules of procedure. Article 7, paragraph 1, of the Statute of the Tribunal states:

“An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the Staff Regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal”.

X. With respect to the DSA that the Applicant requested of the Administration, the denial of which she claims contributed to the extremely difficult and damaging financial situation in which she finds herself, the Tribunal finds that the Applicant never appealed this administrative decision to the JAB. For that reason, the claim is not receivable, *ratione materiae*.

XI. The same might be said of her plea regarding special leave with half pay as recommended by the JAB in its report of 16 March 2005 but refused by the Secretary-General. The Applicant never initiated the proper proceeding to claim such leave. However, the JAB recommended that the Administration should grant her special leave with half pay, following its examination of her request for suspension of action on the decision to withhold her salary beginning September 2003. The Secretary-General, for his part, did not question the receivability of this matter in his decision of 9 June 2006. Therefore, the Tribunal agrees to consider the argument. On the merits, however, it finds that the Applicant does not have the right to such special leave. In accordance with Article 33 (a) and section H of the Regulations of the UNJSPF, a claim for a disability pension should first be submitted to the staff pension committee of the Organization, which shall make the determination of incapacity. This claim has not been made either by the Applicant or by the Administration. Hence, the plea must be rejected.

XII. With respect to the Applicant's request concerning suspension of action on the administrative decision to withhold her salary, the Tribunal finds that it is not competent to decide that question. Staff rule 111.2 (c) (iii) expressly provides that the Secretary-General's decision on such a request is not subject to appeal. The Applicant's request is, therefore, not receivable.

XIII. With respect to the Applicant's claim for compensation for the situation created, in part, by the decision not to redeploy her to another post, the Tribunal notes that the request is somewhat confusing, since the Applicant also invokes the loss she suffered because the Administration did not arrange for her separation on medical grounds. In order to address this part of the Application, the Tribunal must focus on the precise issue that was the subject of the Applicant's request for administrative review and subsequent appeal to the JAB. On that point, the Applicant says that she contested the administrative decision not to redeploy her to a post at a duty station where the working conditions were compatible with her state of health. The Tribunal will, therefore, focus solely on that issue.

XIV. It would appear that the Applicant cannot claim any right to be redeployed. When there is a vacancy, staff members wishing to change posts certainly have the right to have their application properly considered. But it is the responsibility of staff members to make the effort to apply for such posts and to take the appropriate steps to have their candidacy accepted. In Judgement No. 1169, *Abebe* (2004), para. XV, the Tribunal had occasion to pronounce on a similar question and, in that case, it emphasized the difference between being eligible for a post and having the right to be appointed to that post:

“The Applicant's claim is based on her premise that because she was a woman who had been in the service of the United Nations for at least one year, she was entitled to be placed against a Professional post when her temporary, 200 Series, Professional appointment was not extended and she was reappointed to a 100 Series, G-level position. The Applicant, however, confuses eligibility with entitlement. *While the Applicant was certainly eligible to apply for an internal position by virtue of ST/AI/412's special measures designed to create gender parity between men and women in the upper echelons of employment, she thus had to actually apply, and she was by no means entitled to be placed against a post. In fact, ST/AI/412 makes very clear that in addition to being eligible to apply, the Applicant would also have to document that she met the qualifications and experience of any post to which she applied*”. (Emphasis added.)

The inference to be drawn is that staff members have the obligation to take the initiative in applying for posts that become vacant or are created. The Applicant cites examples of some of her colleagues who, for medical reasons, were able to be redeployed. The Tribunal can certainly take those examples into account in finding that redeployment was a possibility. They do not, however, justify the conclusion that a right of the Applicant was violated.

XV. The Tribunal now turns to the Applicant's claim for compensation for the injury she suffered because she was not treated properly by the Administration, which did not take her state of health seriously,

and completely compromised her career with the Organization. In that regard, the Tribunal can only underline that the Applicant is in an unusual situation: she holds an indefinite appointment and is capable of working provided that it is in conditions compatible with her state of health (which would imply administrative duties carried out in an office) but finds herself without a post and without pay because her state of health prevents her from occupying the post to which she was originally appointed. The Applicant's state of health is not such that she is prevented from engaging in any occupational activity whatsoever. The proof is that after her disease was diagnosed, the Applicant temporarily filled a post in Nairobi from 4 February to 30 August 2002. However, since her state of health requires a total change of work environment and since the Administration is under no obligation to provide her with such other post, the Applicant's situation, at first glance, appears insoluble. Nonetheless, in light of the circumstances, it appears evident to the Tribunal that the situation in which the Applicant finds herself today is, in large part, due to the bad faith of the Administration.

XVI. For more than five years now the Applicant has been on special leave without pay because the Administration is incapable of finding her a post suitable to her state of health. The Tribunal has stated on several occasions that placing a staff member on special leave without pay, or even with pay, for a prolonged period is an unacceptable situation that necessarily has serious consequences for the career of the person concerned. (See, for example, Judgements No. 1172, *Ly* (2004) and No. 1403 (2008). See also Judgement No. 2324 (2004) of the International Labour Organization Administrative Tribunal.) The Tribunal is well aware that the cases referred to concern the imposition of special leave in different circumstances and for different reasons than those for which, today, this Applicant is without a job or pay while still holding an indefinite appointment with the Organization. Nonetheless, it seems worthwhile to draw the parallel in order to underline the damaging and unacceptable nature of the situation in which the Applicant finds herself. It denotes an intention on the part of the Administration to "get rid" of the staff member, without facing the consequences that would follow from a decision to terminate her contract.

XVII. On this point, the Respondent stresses that the Applicant should have made a greater effort to apply for posts that would be suitable given her state of health and implies that the Applicant herself showed bad faith by refusing a proposal for an agreed termination. The Tribunal cannot overlook these elements and notes that the Applicant may have partially contributed to her current situation. However, that aspect of the case in no way relieves the Administration from its responsibility in dealings with a staff member. The Administration has an obligation to respect the dignity of its staff members and to treat them with consideration. (See Judgements No. 1192, *Mbarushimana* (2004) and No. 1387 (2008).)

XVIII. The Tribunal is, moreover, extremely surprised that no action has been taken to comply with the Secretary-General's request, reflected in his decision of 9 June 2006, that a solution to the Applicant's situation should be found expeditiously. The situation is unacceptable and reinforces the impression that

the Administration has clearly shown bad faith in its management of the Applicant's case. It is intolerable that the Administration should continue to neglect or even ignore the Applicant's situation as it has done, disregarding the decisions of the highest official serving the Organization.

XIX. In consideration of these factors, the Tribunal concludes that the Administration has failed in its obligation to treat the Applicant with dignity and consideration. She has suffered serious moral damage, which should be compensated.

XX. For the foregoing reasons,

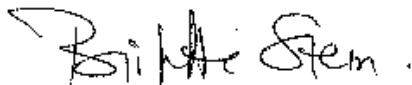
1. The Tribunal orders the Administration to bring to an end the Applicant's indefinite appointment with the appropriate termination indemnities, in accordance with the undertaking of the Secretary-General, or, if the Secretary-General decides in the interest of the Organization not to fulfil that obligation, fixes the compensation owed to the Applicant at the amount of one year's net base salary at the rate in effect on the date of this 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. In compensation for the moral damage suffered by the Applicant to this day because the Administration has allowed the situation to prolong itself without making the least effort to find a solution, the Tribunal orders the Respondent to pay the Applicant an amount equal to six months' net base salary at the rate in effect on the date of this 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)

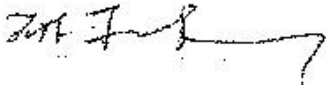


Spyridon Flogaitis
President



Brigitte Stern
Member

AT/DEC/1420



Goh Joon Seng
Member

New York, 26 November 2008



Maritza Struyvenberg
Executive Secretary