



Administrative Tribunal

Distr. Limited
30 January 2009

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1425

Case No. 1487

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Jacqueline R. Scott, Vice-President, presiding; Mr. Goh Joon Seng; Sir Bob Hepple;

Whereas, on 26 June 2006, a former staff member of the United Nations Office of the High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an Application requesting the Tribunal, inter alia:

“... [T]o find and rule as follows:

- (1) that the provisions of staff rule 109.1 (c) (i) and (ii) (a) were grossly violated by the Respondent since no consistent, honest, bona fide and serious efforts were made on [his] part to effectively utilize the Applicant's service and retain him in continuous employment;
- (2) that the Respondent did not produce any solid evidence on securing another suitable post for the Applicant and that such a failure constituted a violation of the statutory/acquired rights of the Applicant;
- (3) that the Applicant did not receive due consideration through due process for the suitable post at his duty station ...; and
- (4) that the process which resulted in the abolition of the particular post (No. 587013) was superficial and a targeted abolition since no solid justification/rationale on cost savings or reduction of staff was given by the Respondent. Moreover, the mandatory comparative review of the two parallel posts No. 587013 and 587017 available on 31 December 2001 (...) was not done by the Respondent and that no justification or rationale was given on abolition of the post.”

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 10 January 2007, and once thereafter until 10 February;

Whereas the Respondent filed his Answer on 9 February 2007;

Whereas the Applicant filed Written Observations on 9 March 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] entered service at [UNHCR] on 5 August 1981 in Islamabad, Pakistan, as a Senior Secretary (GL-6 level, step 1-1)

... On 1 January 2000, he was granted an indefinite appointment [as Senior Programme Assistant at the GL-7, step 9 level].

... On 31 December 2001, the [Applicant's] post ... was abolished. However, he continued working as a Senior Programme Assistant at the GL-7 level ... Effective 1 October 2002, his functional title was changed to Senior Supply Assistant. During this period, the [Applicant's] salary was charged to various allotment accounts.

...

... As of 31 May 2003, the post of the Senior Supply Assistant was also abolished and the [Applicant] separated from service in Islamabad.

...

Summary of Facts

... Two GL-7 Senior Programme Assistant posts existed until 31 December 2001 in Islamabad. ... [In October 2001, one of the posts was recommended for upgrade to National Officer level].

...

... On 31 December 2001, the post ... of which the [Applicant] was the incumbent was abolished, based on the recommendation of the Operations Review Board. Effective 1 January 2002, the [other GL-7] post was reclassified to National Officer [level] ...

... The [Applicant] received no formal written notification concerning the abolishment of his post. Rather, he learned about the situation through informal sources.

...

... On 7 March 2002, the decision of the High Commissioner to assign [another candidate] to the [National Officer] post ... became effective. ... The [Applicant] had applied for this post ... but was not successful. The [Applicant] and the former incumbent of the reclassified post were

the only two candidates ... The Board concluded that all selection procedures had been followed correctly.

...

... By letter dated 5 May 2003, the [Applicant] was notified by the UNHCR Representative in Pakistan that his indefinite appointment would be terminated with effective date 31 May 2003 under the terms of staff regulation 9.1 (a) following the abolition of his post.

... The letter recalled that ‘the only post in [his] occupational group in Branch Office in Islamabad was ... Senior Programme Assistant, GL-7’ and that ‘this post was reclassified to the National Officer level effective 1 January 2002’. It further mentioned ‘whilst [he] applied, another staff member was appointed to the post ...’. Furthermore, it mentioned that

‘no comparative review was required upon the abolition of [his] post, and UNHCR Islamabad had the option to terminate [his] indefinite appointment effective the date of the abolition and subsequently grant [him] a fixed-term appointment, [which] UNHCR Islamabad chose not to do ... at that time but in [the] absence of an alternative post and, as a result of cuts in the Temporary Assistance Budget, it [had] no option [then] but to proceed with the termination of [his] indefinite contract for the abolition of the post’.

...

... On 20 May 2003, the [Applicant] wrote [to] the Secretary-General ... requesting review of the administrative decision ... to terminate his indefinite appointment effective 31 May 2003.

... By facsimile dated 21 May 2003, the [Applicant] ... submitted ... [a] request for suspension of action [to the JAB in Geneva].

... On 27 May 2003, the Panel recommended to the Secretary-General to reject the [Applicant’s] request for suspension of action since there was no evidence ... that the implementation of the decision would result in irreparable injury to him.

... [On] 27 May 2003, ... the [Applicant was advised that] the Secretary-General ... had ... decided not to grant the [Applicant’s] request for suspension of action.

...”

On 22 August 2003, the Applicant lodged an appeal on the merits of his case with the JAB in Geneva.

On 5 January 2004, he re-entered the service of UNHCR on a fixed-term appointment, albeit at a lower level. Effective 31 December 2006, however, his fixed-term contract was terminated under staff regulation 9.1 (b) due to abolition of post.

The JAB adopted its report on 31 January 2006. Its considerations, conclusion and recommendation read, in part, as follows:

“Considerations

...

Merits

...

66. The Panel stressed that the decision to abolish the posts lies within the discretionary power of the Administration. The abolition of the post ... due to organizational needs in the UNHCR Branch Office in Islamabad can therefore not be objected [to] in the absence of evidence that the Administration's discretion was abused. ...

67. The Panel examined the Appellant's argument that the abolition of the post ... seemed to be a disciplinary measure in disguise, that the post was the only one targeted for abolition and that there was no necessity for the Organization to reduce staff. ... In the present case, however, the Panel could not conclude that the abolition of the post the Appellant was the incumbent of was a disciplinary measure in disguise and a method to remove the Appellant from office. The Panel found that there is no evidence that this post was selected to be abolished just because the Appellant was the incumbent of it.

...

69. The Panel noted that after the abolition of the post, the Respondent decided to further employ the Appellant for another year and five months and made efforts to arrange this. ... Additionally, the Panel took note that the Appellant was reemployed by UNHCR in Quetta, Pakistan, seven months later and that there is obviously no 'ban' on him because the same organization was still willing to employ him.

70. ... By further employing the Appellant for a period of one year and five months, the Respondent has fulfilled [his] obligation and made bona fide efforts to find a solution for the Appellant.

...

77. The Panel noted that although the Respondent never explicitly informed the Appellant about the abolition of the post ..., the Respondent was not legally obliged to inform the Appellant. The Panel observed that there is no provision which requires that in case of the abolition of a post the incumbent of the abolished post has to be informed about this action. ...

78. In this regard, the Panel wishes to draw the attention of the Secretary-General to the fact that in a case like this it is possible to communicate the decision to abolish the post to the staff member concerned not explicitly. The Panel is convinced that it would be good management practice to inform the staff members about the abolition of his/her post explicitly and without delay since this decision to abolish the post can affect the staff member's career. Moreover, the Panel would like to stress that being more transparent in this sense would signal more respect for ... staff members and their desire to be informed properly about organizational changes that affect them.

...

Conclusion and Recommendation

81. In the view of the above, the Panel *concludes* that the decision to terminate the indefinite appointment as of 31 May 2003 was in conformity with the applicable rules.

82. Accordingly, the Panel *recommends* the Secretary-General to reject the appeal."

On 13 April 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

conclusion and had decided to accept its unanimous recommendation and to take no further action on his appeal.

On 26 June 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The provisions of staff rule 109.1 (i) and (ii) (a) were grossly violated by the Respondent since no consistent, honest, bona fide and serious efforts were made to effectively utilize his service and retain him in continuous employment.
2. The Respondent did not produce any solid evidence on securing another suitable post for him.
3. His rights of due process were violated.

Whereas the Respondent's principal contentions are:

1. The abolition of the post was a valid exercise of the Secretary-General's authority.
2. The Applicant failed to establish that the process which followed the abolition of his post was prompted by prejudice or other improper motivation.
3. The Administration fulfilled its obligations under staff rule 109.1 (c) to make a bona fide effort to find the Applicant a suitable alternative post.

The Tribunal, having deliberated from 5 to 26 November 2008, now pronounces the following Judgement:

I. The Applicant, who had been employed by UNHCR in Islamabad, Pakistan, since 1981, was granted an indefinite appointment at the GL-7 level on 1 January 2000. On 31 December 2001, however, his post was abolished, and the only other GL-7 post was upgraded to National Officer level. UNHCR continued to keep the Applicant in service, placing him against the post of Senior Programme Assistant from 1 January to 30 September 2002; thereafter, his functional title changed to Senior Supply Assistant.

Notwithstanding the abolition of his post, the Administration maintained the Applicant in service for as long as possible, until cuts in the Temporary Assistance Budget meant that it could no longer do so. In early May 2003, the Applicant was notified that, pursuant to the abolition of his post in 2001, his indefinite appointment would be terminated under staff regulation 9.1 (a). Accordingly, he separated from service at the end of that month. Some seven months later, on 5 January 2004, he re-entered the service of the Organization on a fixed-term appointment at the GL-5 level and, on 1 February 2005, he successfully applied for a GL-6 post. Effective 31 December 2006, this GL-6 post was abolished, and the Applicant's fixed-term contract was terminated under staff regulation 9.1 (b).

II. The Applicant sought administrative review of the decision to terminate his indefinite appointment in 2003. He subsequently lodged an appeal with the JAB in Geneva, which, in its report dated 31 January 2006, interpreted the appeal as also contesting the 2001 decision to abolish his post. The JAB concluded that the decision to abolish his post was not arbitrary or discriminatory and noted that the Respondent had kept him in service for more than a year following the abolition of his post and had later re-employed him. Thus, it was not persuaded that the decision was vitiated by malice or lack of good faith. Equally, it found that the decision to terminate his appointment was taken in conformity with the applicable rules. On 13 April 2006, the Applicant was informed that the Secretary-General had decided to accept the JAB's findings as well as its recommendation to take no further action.

The Applicant filed his Application with the Tribunal on 26 June 2006. His Application thus relates to the 2001 abolition of post and the 2003 termination of his indefinite appointment but not the subsequent 2006 abolition of post procedure.

III. In this case of abolition of post, the Tribunal must address two arguments: (1) was the abolition of the Applicant's post and termination of his appointment a valid exercise of the Secretary-General's authority; and, (2) did the Respondent fulfill his obligations under staff rule 109.1 (c) to make a bona fide effort to locate a suitable alternative post for the Applicant?

IV. With respect to the first question, as the Tribunal has consistently held, "[t]he Tribunal's jurisprudence recognizes the broad discretion enjoyed by the Secretary-General in matters of personnel". (Judgement No. 1231 (2005).) His discretion may not, however, be exercised in a discriminatory manner, and the Tribunal will review the exercise of such discretion in order to determine whether it was vitiated. In Judgement No. 1163, *Seaforth* (2003), the Tribunal recalled that "[o]nly where the Respondent's discretion is tainted by extraneous factors, such as prejudice, arbitrariness, improper motive [or] discrimination, for example, is such discretion subject to limitation. (See Judgement No. 981, *Masri* (2000), para. VII.)"

The Applicant argues that the abolition of his post was "targeted". A staff member alleging such prejudice or discrimination bears the burden of proving his allegation. (See Judgement No. 1069, *Madarshahi* (2002).) In the instant case, the Tribunal is not satisfied that the Applicant has discharged his burden, as the Respondent has presented persuasive evidence that the decision to abolish the Applicant's post was based on the recommendation of the Operations Review Board and taken in the context of the restructuring of the Branch Office. It is not for the Tribunal to evaluate how the Office could - or ought to - have been restructured. As the Tribunal held in Judgement No. 117, *Van der Valk* (1968), it "cannot substitute its judgement for that of the Administration in respect to reorganization of posts or staff in the interest of economy and efficiency". While the Applicant appears to believe he was the focus of malfeasance, his assertion is not consistent with the efforts made by the Respondent to keep him in service or with the fact that he was subsequently re-employed. Accordingly, the Tribunal cannot find for the Applicant in respect of the decision to abolish his post.

V. The Tribunal, having satisfied itself that the Secretary-General had the authority to abolish the Applicant's post and that he did not vitiate his discretion in this case, will turn to the issue of whether the Secretary-General was entitled to terminate the Applicant's indefinite appointment. It is evident from staff regulation 9.1 that the Secretary-General has such authority. In abolition of post cases, however, such a decision is predisposed upon a finding that no other suitable post was available for the staff member to be placed against.

Staff rule 109.1 (c) (i) provides, in relevant part, as follows:

"... 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". (Emphasis added.)

It is apparent that even for staff members with permanent contracts, the obligation on the Administration to find them alternative employment following abolition of post is "subject to the availability of suitable posts". The Tribunal has empathized with the position of long-serving staff members who find themselves in such unfortunate circumstances, but recognizes that the Organization must act within the constraints of the positions available:

"It is not contested that, as the holder of a permanent appointment, the Applicant was entitled to benefit from the provisions of staff rule 109.1 (c). That paragraph provides that staff members whose posts have been abolished should be given preference in being retained within the Organization, subject to the availability of suitable posts in which their services can be effectively used. The Tribunal has referred repeatedly to the application of this provision, which is vital to the security of staff who, having acquired permanent status, must be presumed to meet the Organization's requirements regarding qualifications. In this connection, while efforts to find alternative employment cannot be unduly prolonged and the person concerned is required to cooperate fully in these efforts, staff rule 109.1 (c) requires that such efforts be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation." (See Judgement No. 679, *Fagan* (1994).)

In Judgement No. 1128, *Banerjee* (2003), the Tribunal held that "[if] a doubt exists with respect to the Administration's *bona fides* in its efforts to place the Applicant in a suitable position[,] ... the Tribunal's repeated contention that the *onus probandi* falls on the Respondent is amply applicable". It recalled that "where there is a doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given". (*Banerjee*, citing Judgements No. 447 *Abbas* (1989) and No. 910, *Soares* (1998).)

VI. In the Applicant's case, as a locally recruited staff member, his rights under staff rule 109.1 (c) were tempered by subparagraph (ii) (a) which provides: "the provisions of subparagraph (i) insofar as they

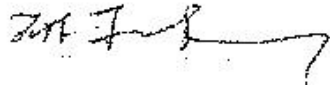
relate to locally recruited staff members shall be deemed to have been satisfied if such locally recruited staff members have received consideration for suitable posts available at their duty stations". The Tribunal recalls that the only other GL-7 position at the Applicant's duty station had been upgraded to a National Officer post, meaning there was no suitable available position for the Applicant. Moreover, it takes note of the fact that the Respondent apparently maintained the Applicant in service for as long as possible, against other posts; that the UNHCR Representative in Pakistan wrote to the UNDP Office in Islamabad asking that the Applicant be "considered favourably for any suitable vacant position"; and, that UNHCR re-employed the Applicant some months later. Accordingly, the Tribunal is satisfied that the Administration fulfilled its obligations under staff rule 109.1 (c) and, thus, that the decision to terminate the Applicant's indefinite appointment did not violate his rights.

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

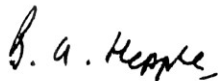
(Signatures)



Jacqueline R. **Scott**
Vice-President



Goh Joon Seng
Member



Bob **Hepple**
Member

New York, 26 November 2008



Maritza **Struyvenberg**
Executive Secretary