



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1441

Case No. 1505

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Ms. Jacqueline R. Scott, First Vice-President, presiding; Mr. Dayendra Sena
Wijewardane, Second Vice-President; Mr. Goh Joon Seng;

Whereas, on 25 September 2006, staff members and former staff members of the United Nations,
filed an Application requesting the Tribunal, inter alia:

“II. PLEAS

2. ...[R]espectfully requests...:

- (a) *to find* that the Joint Appeals Board [JAB] was incompetent and has erred in addressing this case as a reclassification issue, and by failing to address the core issue of transparent selection and of full and fair consideration of the Applicants' candidatures ...;
- (b) *to find and rule* that the Respondent, by refusing to give full and fair consideration to the Applicants' candidature[s] for 14 newly-reclassified posts violated their contractual rights;
- (c) *to rescind* the Respondent's decision to waive advertising and competition requirements for 14 newly upgraded posts in the Publishing Section ...;
- (d) *to declare* an abuse of authority ... the Respondent's use of an abolished administrative instructions ...;

...

- (g) *to award* the Applicants appropriate and adequate compensation ...;

....”

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 20 March 2007, and once thereafter until 20 April 2007;

Whereas the Respondent filed his Answer on 20 April 2007;

Whereas the Applicants filed Written Observations on 18 May 2007;

Whereas the statement of facts, including the employment record contained in the report of the JAB reads, in part, as follows:

“Employment History

... The [Applicants] have been in the service of the Organization for more than 10 years as General Service staff members within the Publishing Section ... Department for General Assembly and Conference Management (DGACM).

Summary of the facts

... In 1998, a Staff/Management Task Force was established to assess issues and concerns pertaining to the Publishing Section. In December 1998, the Task Force published a report wherein it recommended the reclassification of 28 job descriptions within the Publishing Section. In November 1999, a Staff/Management Working Group was convoked to review the job descriptions within the Publishing Section. By memorandum dated 2 October 2000, ... [the] then Executive Officer of DGACM requested the reclassification of the 28 job descriptions in the Publishing Section consistent with the findings of the Working Group.

... By memorandum dated 12 December 2002 from ... [the] Director, Meetings and Publishing Division/DGACM addressed to ... [the] then Director, Operational Services Division/ [Office of Human Resources Management (OHRM)], requested that [OHRM] grant a waiver of the requirement to post vacancies announcements for 18 posts. [He] stated that:

‘[s]ince the classification review has extended to more than two years while the earlier placement and promotion system was in place in the Organization, it would seem reasonable to consider giving the benefit of promotion to those incumbents who have spent considerable years in the post by waiving the requirement of vacancy announcement in accordance with para. 3.4 of ST/AI/1999/8 ..., instead of applying the new staff selection system that came into effect on 1 May 2002 [ST/AI/2002/4 ...]’.

... By memorandum dated 27 January 2003, addressed to ... [the] Under-Secretary-General/DGACM, ... [the] now Officer-In-Charge/OHRM, waived the vacancy announcement for 12 of the 18 posts, for which reclassification were confirmed upwards by one level and the incumbents performed the functions of the upgraded post for the last three years, in conformity with paragraph 3.4 of ST/AI/1999/8, which was the placement and promotion system in place when these 12 posts were reclassified. ... [The Officer-In-Charge/OHRM] stated that these 12 subject posts were to be submitted directly to the Appointment and Promotion Panel (APP). Regarding the six remaining posts, ... [the Officer-In-Charge/OHRM] stated that three ... G-5 posts were subject to discussion between DGACM and OHRM and the other three ... were confirmed classifiable at the G-7 level, pending budgetary funding approval by the General Assembly (GA) for the biennium session in 2004-2005. ... [The Officer-In-Charge/OHRM] further stated that if any of the six remaining posts resulted in an upgrade by one level and if the GA approved their budget, these cases should be submitted to OHRM for the biennium 2004-2005.

... By memorandum dated 10 February 2003, addressed to ... [the] Chief, Cluster IV, Operational Services Division/OHRM, from ... [the] Executive Officer/DGACM, requested a waiver of the requirement to post vacancy announcements for two of the three posts which were previously under discussion by DGACM and OHRM and were reclassified up by one grade level.

... By email dated 13 February 2003, ... [the Chief, Cluster IV, Operational Services Division/OHRM] informed ... [the Executive Officer/DGACM] that after a review of two of the G-5 incumbents and confirmation that they had fulfilled the functions of their posts for three years, OHRM approved the waiver of advertising the vacancy announcements pertaining to these two upgraded posts and authorized DGACM to submit the applications of these two additional incumbents directly to the APP for promotion in accord with the terms of the waiver previously granted in [the Officer-In-Charge's/OHRM] memorandum of 27 January 2003.

... Effective on 1 March 2003, 14 of the vacancies were filled by appointing incumbents who had performed the functions of the posts for at least three years of the classification review. These vacancies were filled without advertising the posts in the compendium of vacancies, in accordance with the procedures established in paragraph 3.4 of ST/AI/1999/8.

... By email dated 4 March 2004, the Respondent announced the audit and reclassification of [the Applicants'] posts. By letter dated 8 May 2004, addressed to the ... ASG/OHRM, the [Applicants] formally challenged the audit and reclassification of their posts.

... By letter dated 9 September 2004, addressed to ... [the Applicants'] Counsel ... [the] then Director, Division of Organizational Development/OHRM, explained that the reclassifications for all posts within the Publishing Section were completed in accordance with the requirements set forth in section 2 of ST/AI/1998/9. Additionally, [the Director] called [the Applicants'] attention to section 5 of ST/AI/1998/9, should the [Applicants] decide to appeal the reclassification decisions.

... By letter dated 8 November 2004, the [Applicants] requested administrative review of the decision to not advertise the vacancy announcement for the "over 20" upgraded posts, therefore denying the [Applicants] the opportunity to be fully and fairly considered for the reclassified posts.

... On 2 December 2004, the [Applicants] each completed the [JAB's] Request to File an Appeal. [The Applicants] contended that the Respondent violated their rights as staff members by failing to advertise and submit the upgraded posts to an open competition as required by ST/AI/2002/4."

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

“Considerations

30. The Panel first considered the preliminary issues of competence and receivability. The Panel found itself competent to consider this case and found also that this appeal complied with the time-limits set forth in Staff Rule 111.2 (a). Regarding four vacancies ... the Panel noted that these vacancies were published in the compendium of vacancies. The Panel further noted that the [Applicants] did not apply for these four posts. The Panel concluded that because these vacancies were advertised and the [Applicants] did not apply for said vacancies, they lack standing to contest the Respondent's staff selection decision. Accordingly, the Panel further concluded that the [Applicants'] claim regarding these four posts is not receivable.

31. The Panel acknowledged that the issue in this case is whether ST/AI/1999/8 was correctly applied to the classification and promotion decision, or whether ST/AI/2002/4 should have been applied instead, requiring all upgraded and reclassified posts to be formally advertised. The Panel noted that staff members do not have a right to promotion. It further noted that wide discretion is afforded to the Administration with regard to staff selection. The Panel recognized that its review of due process considerations is restricted under Rule 111.2 (k) which prohibits the JAB from substituting its judgement for that of the Administration on the substantive question of efficiency. The Panel further recognized that the Tribunal has concluded that: “[Q]ualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy of promotion”. (See UNAT No. 312, *Roberts* (1983), UNAT No. 428, *Kumar* (1988) and UNAT No. 1118, *Khuzam* (2003)). In this context, the due process principle requires that the Administration gives full and fair consideration to a staff member’s qualifications and experience. When a staff member raises the question of lack of consideration, the Respondent bears the burden of proving that due consideration was afforded to him or her. *Williamson*, (1986), para. VII, UNAT No. 447, *Abbas* (1989), para. VII, UNAT No. 828, *Shamapande* (1997) para. VI.

32. The Panel noted that the reclassification of the posts and the promotion of the incumbents of the posts are two different matters, although they are interrelated. See UNAT #1136, *Sabet and Skeldon* (2003). The Panel further noted that both the reclassification of posts and the promotion of the incumbents must conform to Staff Regulation 2.1 which states that: ‘[i]n conformity with principles laid down by the General Assembly, the Secretary-General shall make appropriate provision for the classification of posts and staff according to the nature of the duties and responsibilities required.’ The Panel was mindful that the Secretary-General has discretion in classification matters and that the JAB cannot substitute its judgment for that of the Secretary-General and the classification bodies in job classification matters. See UNAT #1250, *Christonikos* (2005). See also UNAT #892, *Stinikova* (1998) cf. UNAT #396[,] *Waldegrave* (1987); UNAT #541 *Ibarria* (1991); UNAT #597 *Colayco* (1993); and UNAT #780[,] *Maia-Sampaio* (1996)). However, this discretion is not without restraints, as UNAT has repeatedly held that ‘...it may be vitiated by the existence of bias, prejudice, discrimination, lack of due process or other improper motivation.’ UNAT #1073, *Rodriguez* (2002), UNAT #892, *Sitnikova* (1998), UNAT #662, *Potookian* (1994). The Panel recognized that its task is to determine whether the Respondent acted within his reasonable discretion and whether there were any material errors in procedure or substance, or other significant flaw in the contested decision. See UNAT #1099, *Thomas* (2002) cf. UNAT #541, *Ibarria* (1991) and UNAT #396, *Waldegrave* (1987). By virtue of the [Applicants’] rights created under this Regulation, the Panel found it was competent to consider the case for any violations of due process that may have tainted the decision not to advertise the upgraded and reclassified posts.

...

35. In the instant case, the Panel found no evidence that the Respondent’s decision to forego advertisement of the upgraded and reclassified posts violated the Organization’s rules and regulations because the Panel concluded that the date of the reclassification request was in October 2000 and that at that time, ST/AI/1998/9 and ST/AI/1999/8 controlled matters pertaining to the classification of posts and placement and promotion, respectively. For example:

(1) First, in its evaluation of the [Applicants’] claim that [the Officer-In-Charge/OHRM] did not have the authority to grant a waiver of advertisement of 14 of the 18 upgraded and reclassified post, filled by incumbents and that ST/AI/2002/4 was the controlling Administrative Instruction, the Panel noted that in November 1999, a Staff/Management Task Force was convoked to review the job descriptions within the Publishing Section. The Panel further noted that under cover of memorandum dated 2 October 2000, [the then Executive officer of DGACM] requested the reclassification of 28 job descriptions, including the 14 at issue in this case, consistent with the findings of the Working Group. The Panel observed that Administrative Instructions ST/AI/1998/9

and ST/AI/1999/8 were the governing Instructions on 2 October 2000. The Panel reviewed paragraph 4.1 of ST/AI/1998/9 which establishes the time frame by which classification decisions become effective. Pursuant to paragraph 4.1, the classification decision became effective as of the first of the month following receipt of the classification request. The Panel also reviewed paragraph 3.4 of ST/AI/1999/8 which authorizes foregoing advertising of vacancies when the post has been reclassified upward by one level in the General Services categories and when the incumbent had performed the functions of the reclassified post for at least three years prior to the date of the upgrading, and allowing for the recommendation for promotion to be made by the head of the office to the appropriate appointment and promotion body.

(2) Second, the Panel noted that ST/AI/1999/8 was abolished and replaced by ST/AI/2002/4 effective on 1 May 2002. The Panel examined paragraphs 12.3 ... pertaining to transitional measures and 13.2 (b) ... pertaining to final provisions of ST/AI/2002/4. As acknowledged in paragraph 1 above, the Panel found that the reclassification decision date was 2 October 2000, the date the classification request was made. Therefore, after considering the transitional measure in accordance [with] paragraph 12.3 of ST/AI/2002/4, the Panel concluded that ST/AI/1998/9 and ST/AI/1999/8 were the systems in place at the time the reclassification request[s] were made. The Panel further concluded that pursuant to paragraph 3.4 of ST/AI/1999/8, advertisement of the 14 vacancies was not required because the incumbents had been performing the functions of the upgraded and reclassified posts for at least three years. The Panel was mindful that after the date of the request for reclassification, the matter lagged on. The Panel was further mindful that this delay may have caused frustration for both the [Applicants] and the incumbents.

(3) Third, the Panel noted that the incumbents of the 14 upgraded and reclassified posts were already performing the duties of the new job description for over four years after the classification exercise. The Panel further noted that the incumbents' qualifications, including their PASs and audited job descriptions were submitted to the APP for review and approval. The Panel acknowledged that the APP found these 14 incumbents suitable for promotion and approved them to fill the upgraded vacancies in accordance with ST/AI/1999/8. Because of the lack of convincing evidence to the contrary, the Panel found that the decision not to advertise the considered posts constituted a valid exercise of the Respondent's discretion and that the [Applicants'] due process rights were not violated.

36. In light of the foregoing, the Panel finds that the Respondent produced a reasoned basis for the decision not to advertise the 14 posts, that the decision was within his discretion and taken by the competent authority under the staff selection system in place at the time the reclassification request was made, and that there was no evidence of bias or prejudice in taking that decision.

37. The Panel was mindful that the incumbents, who filled the 14 reclassified posts, performed the functions of these posts at the upgraded and reclassified level for over 4 years. The Panel was further mindful that based on ST/AI/1998/9 and ST/AI/1999/8, the Administrative Instructions in place at the time the reclassification request was made, the incumbents were recommended for promotion and approved by the APP to fill the upgraded vacancies without prior advertisement of said vacancies. Based on the particular facts of the present appeal, the Panel concluded that it was within the Respondent's discretion to promote the 14 incumbents.

Recommendation

38. In light of the foregoing, the Panel *unanimously found* that the Respondent put forth a reasoned basis regarding his decision to not advertise the considered posts, and thus *unanimously concluded* that the Appellants' due process rights were not violated. It therefore *unanimously*

decided to make no recommendation in support of the appeal. The Panel rejected all other claims.”

On 29 August 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicants and informed them as follows:

“The Secretary-General accepts the findings and conclusion of the JAB with respect to the decision not to formally advertise the posts at issue and in accordance with its unanimous recommendation, has decided to take no further action in this case.”

On 25 September 2006, the Applicants filed the above-referenced Application with the Tribunal.

Whereas the Applicants’ principal contentions are:

1. The decision not to advertise the 14 reclassified posts was not a valid exercise of the Secretary-General’s discretionary authority.
2. The decision not to advertise the 14 posts and disregard their candidatures violated advertisement procedures and was *per se* discrimination and favoritism.
3. They should be compensated for the prejudice suffered personally and professionally or should be retroactively reclassified to their posts.

Whereas the Respondent’s principal contentions are:

1. The decision not to advertise the 14 contested posts was a valid exercise of the Secretary-General’s authority and did not constitute an abuse of authority.
2. The correct rules were applied and the Applicants did not substantiate their claim that the process utilized was prompted by prejudice or other improper motivation.
3. The Applicants’ pleas for monetary compensation are without merit.

The Tribunal, having deliberated from 23 July to 31 July 2009, now pronounces the following Judgement:

I. The issue in this case is whether the Applicants’ rights have been violated by the action which the Administration took under ST/AI/1999/8 in connection with the reclassification of 14 posts, namely, the placement of the incumbents at one grade higher without posting vacancy announcements. The Applicants claim that they did not have the opportunity to apply, were not afforded fair consideration in filling these posts, and that consequently they were discriminated against by such action.

II. The Applicants had been General Service staff members for over 10 years with the Publishing Section of the DGACM. The critical date for purpose of this appeal is 2 October 2000, when the Executive Officer, DGACM, requested a reclassification of 28 posts within the Publishing Section, consistent with the recommendations of a working group which predated the request. The history is not strictly relevant, but

for sake of completeness it may be stated that since 1998 these matters of concern to the Publishing Section had been under review and discussion, and the request for reclassification was the eventual outcome. However, it was not until March 2003 that the classification decision was implemented. It is this delay that gives rise to these proceedings.

III. Effective 1 May 2002 there was a statutory regime change. On 23 April 2002, the Administration published a new Administrative Instruction (ST/AI/2002/4), entitled “Staff Selection System”, which abolished the existing Administrative Instruction 1999/8 and replaced the former legal regime. This occurred whilst the issues relating to the request for reclassification were in the process of being examined but had not yet been finalized. The change in the applicable Administrative Instruction led to further delays.

IV. Ultimately, the incumbents of the 14 upgraded posts that had been included in the request for reclassification of October 2000 were appointed to these posts. All of the incumbents had performed their functions for at least three years prior to the effective date of upgrading, and the posts which they held had been upgraded by one level only. No vacancy announcements had been circulated with respect to these posts. This led to the Applicants’ appeal on the grounds that their due process rights had been violated.

V. The issue at stake is whether management’s action was legally justified, given that the 1999/8 Administrative Instruction had been repealed and replaced by the 2002/4 Administrative Instruction. Since the classification review had extended over two years, DGACM on 12 December 2002 asked for authorization or waiver from OHRM to allow the promotion of the incumbents of the relevant posts without issuing vacancy announcements. This waiver was granted. The Respondent argues that it was within its discretion to grant a waiver and promote the 14 incumbents in this manner. The Tribunal need not consider this question since the rights of the incumbents of these posts were to be determined by the AI in effect at the date of the reclassification request or, at the latest, one month following that date when the reclassification should have been completed (see section 4.1 of ST/AI/1998/9 below). Accordingly, the rights of the incumbents had to be determined under the ST/AI/1998/9 and not under the ST/AI 2002/4.

VI. Section 4.1 of ST/AI/1998/9 of 6 October 1998 provided that “classification decisions shall become effective as of the first of the month following receipt of a classification request fulfilling the conditions of section 2.2 ...” of that Instruction. It is not in dispute that the conditions of section 2.2 were satisfied. This provision is based on the assumption a review process would be completed within a month from the date of a request. A review of the record reveals that the classification review process here was complicated and that extensive information and comments from various sources had to be obtained and processed. However, the Administration’s failure to comply with the time requirements of its own procedures – whether for good reasons or bad – could not prejudice the acquired rights of the incumbents if

they had satisfied all the requirements under the existing regime. Section 3.4 of ST/AI/1999/8 provides as follows:

“A vacancy announcement shall be issued when an encumbered post is reclassified upwards. However, when such a post has been classified by one level in the General Service and related categories....no vacancy announcement shall be required when the incumbent had performed the functions for at least three years prior to the effective date of the upgrading. In such cases, a recommendation for promotion shall be made by the head of office to the appropriate appointment and promotion body.”

VII. The Tribunal noted that the incumbents indeed acquired a right to be confirmed in their posts pursuant to the provisions of section 4 of ST/AI/1998/9. If it had not been applied, the incumbents of the 14 posts who had fulfilled all the required conditions would have had their acquired rights violated. The ST/AI/2002/4 procedures were not applicable to the incumbents; and had those provisions been applied, there would have been discrimination against the incumbents. The mere fact that ST/AI/2002/4 abolished the earlier ST/AI did not mean that the process initiated under the earlier Instruction had become null and void or had fallen by the wayside. The Tribunal notes that the reclassification exercise had been properly initiated under this prevailing regime although, understandably, it gave rise to the question as to which AI applied until the completion of the process. The reclassification exercise did not need to be commenced anew nor could the Administration rely on its own failure to act expeditiously within the time frame required by the rules, to deny the rights acquired by the incumbent staff members under the previous AI. The Tribunal therefore cannot entertain the Applicants' claim that they had been prejudiced by the Administration's action to protect the rights of another group of staff members.

VIII. In *Meron* (Judgement No. 1197 (2004), para. XIV) the Tribunal held that a change in policy cannot adversely affect the acquired right of an Applicant to compensation. In the present case the rights of the concerned staff members would have been implemented no later than November 2000 had the Respondent adhered to the applicable timeframe. The Tribunal finds that the Respondent's effort to correct this failure was merely recognition of the rights which the particular group of staff members would have acquired had the Respondent acted within the applicable timeframe. Accordingly the Applicants may not rely on the Respondent's action to claim discrimination or a violation of their due process rights.

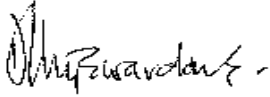
IX. Finally, the Tribunal turns to the Applicants' contention that there was an "abuse of authority", that the staff members promoted were "favourites" of the Administration and that there was no "rationale" or "explanation" for the decision. Whilst recognizing that the repeal of one Administrative Instruction and the introduction of another did raise transitional questions not fully covered and dealt with by the express wording of the latter, the Tribunal has found no evidence in support of these allegations. It is clear from the considerations set out above that there was a sound rationale for the decision. These contentions are therefore rejected.

X. The Tribunal rejects all other pleas.

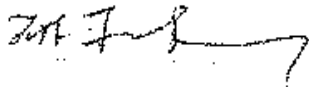
(Signatures)



Jacqueline R. **Scott**
First Vice-President



Dayendra Sena **Wijewardane**
Second Vice-President



Goh Joon Seng
Member

Geneva, 31 July 2009



Tamara **Shockley**
Executive Secretary