



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1442

Case No. 1515

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Sir Bob Hepple; Mr. Agustín Gordillo;

Whereas, on 15 January 2007, a former staff member of the United Nations, filed an Application containing pleas which read, in part, as follows:

“II. PLEAS

[To:]

... (a) overrule the recommendation of the JAB [Joint Appeals Board] and decide that [the Applicant's] appointment to the position of Head, Commodities Branch, UNCTAD [United Nations Conference on Trade and Development] be implemented retroactively to 1 July 2003 with full back pay and pension implications fulfilled; and (b) decide that three months' net base pay at the D-1 level be awarded to [the Applicant] as personal and moral injury for undue delay and unfair treatment.”

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 28 July 2007, and thereafter decided to suspend the time limits on this case until 28 September 2007;

Whereas the Respondent filed his Answer on 24 December 2007;

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

“[Applicant’s] Professional Record

... The [Applicant] entered [the] service [of UNCTAD] ... Geneva, on 14 May 1980, as a Statistical Adviser, in the Division of Commodities, at the L-2 level. His five-month fixed-term appointment was extended until 17 October 1980, [the] date of his separation.

... As of 14 March 1982, [the Applicant] was rehired by UNCTAD on a two-year fixed-term appointment as Economic Affairs Officer at the P-3 level (step I), in the Agricultural, Raw Materials and Livestock Section, Commodities Division. His contract was renewed twice, each time for one month, until 14 May 1984, when he was offered a probationary appointment, [at the] same post and level.

... On 1 March 1985, the [Applicant] received a permanent appointment as Economic Affairs Officer at the P-3 level (step IV), in the same division, and on 1 October 1986, he was promoted to the P-4 level, to fulfil the functions of Economic Affairs Officer, in the Policy Review and Development Unit, Commodities Division, UNCTAD.

... Effective 1 July 1988, the [Applicant’s] functional title changed to Officer-in-Charge [OIC], General Studies Section, Commodities Division, UNCTAD. He was promoted to Chief, General Studies Section, Commodities Division, UNCTAD, at the P-5 level, step II, on 1 July 1992.

... Effective 7 November 2001, the [Applicant] was nominated [OIC] of the Commodities Branch, Division of International Trade in Commodities (CB, DITC), UNCTAD.

... From 7 February 2002 through April 2004, the [Applicant] received a Special Post Allowance (hereinafter SPA) at the D-1 level.

... Effective 1 May 2004, the [Applicant] was promoted to the D-1 level step IV, against the same post that he had been occupying as [OIC] since 7 November 2001....

Summary of Facts

... The [Applicant] was nominated [OIC] of the Commodities Branch, DITC, between 7 November 2001 and 30 April 2004. From 7 February 2002, he received a SPA at the D-1 level, initially step VII.

... From 16 August 2001 to 18 October 2002, the staff member who was previously occupying the post of Head of the Commodities Branch was assigned [OIC] of DITC ... from 19 October 2002, the same staff member was assigned Senior Inter-Regional Advisor in the Office of the Secretary-General of UNCTAD.

... In a memorandum dated 29 October 2003, addressed to the Chief Administrative Service, UNCTAD, the [Applicant] expressed his concerns [that] the vacancy announcement [had not been] circulated. He stated that the post he was occupying could be considered as ‘definitely vacant as from 16 August 2001, and certainly at least as from 19 October 2002’. Furthermore, he expressed that the delay in the circulation of the vacancy had important impact on his and other candidates’ career and contractual benefits. By a handwritten note on the memorandum, the Director of DITC strongly supported the views expressed therein.

... The staff member occupying the post before the [Applicant], left the Organization on early retirement on 31 January 2004....

... The post of Head of the Commodities Branch was advertised in Galaxy on 18 February 2004.

... Having been verbally informed about his selection [to] the post, the [Applicant] addressed a memorandum to the Chief, Human Resources Management, Administrative Service, UNCTAD, on 19 April 2004. He underlined that the post was to be filled more than 29 months after he had taken up its functions and reminded [him of] the loss of [his] pension entitlements that would occur if he were not promoted retroactively, at least as of July 2003.

... On the following day, on 20 April 2004, the Chief replied by informing the [Applicant] that the promotion could not be done retroactively. He explained that the staff selection system did not provide for retroactive promotions and recalled that, according to the same system, the effective date of promotion would be 1 May 2004.

... By memorandum dated 21 April 2004, the [Applicant] was officially informed that he had been selected for the post.

... On 13 May 2004, the [Applicant] sent a letter to the Secretary-General requesting administrative review of 'the decision by [the] UNCTAD Administration not to implement [his] selection to the post of Head, Commodities Branch, DITC, UNCTAD', retroactively.

... By memorandum of 1 July 2004, the [OIC], Human Resources Management Service (HRMS), [United Nations Office at Geneva] UNOG, submitted the office's comments on the case to the Chief of the Administrative Law Unit (ALU), New York.

... By letter dated 15 July 2004, the Chief, ALU, transmitted the Respondent's comments on the case to the [Applicant]. The Chief indicated that the comments together with the letter made part of the Secretary-General's reply to the request for review, and that the [Applicant] had one month from the receipt of the letter to file an appeal against the reply."

On 15 August 2004, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 15 June 2006. Its considerations and recommendation read, in part, as follows:

“Considerations

Admissibility

29. Considering admissibility *ratione temporis*, the Panel noted that no time limits had been waived in this case and that the Appellant had complied with Staff Rule 111.2(a).

30. Concerning admissibility *ratione materiae*, the Panel confirmed that the Appellant did indeed contest an administrative decision under the terms of Staff Regulation 11.1, namely the Secretary-General's reply to his request for review of 'the decision by UNCTAD Administration not to implement [his] selection to the post of Head, Commodities Branch, DITC, UNCTAD, retroactively'.

31. In view of the foregoing, the appeal was deemed admissible.

Applicable Law

32. Regarding the applicable law, the Panel noted that the Administrative Instruction on the Staff Selection System (ST/AI/2002/4) dealt with promotions.

Merits

33. Concerning the legality of the Respondent's refusal to implement the Appellant's promotion retroactively, the Panel first examined whether there had been an undue delay in the

filling of the post as it could examine the legality of the appealed decision only after such a preliminary examination.

34. The Panel recalled that in his request for review, the Appellant asserted that the post fell definitely vacant on 19 October 2002 upon the former incumbent's assignment as Inter-Regional Advisor, whereas the post was advertised more than one year later, namely on 18 February 2004. The Secretary-General and the Respondent replied that the latter staff member was temporarily charged against other temporarily vacant posts and that the post in question therefore fell definitely vacant only on 1 February 2004 following this staff member's early retirement. The Panel agreed with the Appellant that his 26 months long period as Officer-in-Charge was not a satisfactory situation. It stressed that such a situation was neither in the interest of the Appellant, nor in that of the Administration. However, the Panel underlined that the Administration could not have done differently as long as the former post occupant was only *temporarily* charged against other posts. As such, the latter continuously formally occupied the post of Head, Commodities Branch, until his retirement on 31 January 2004.

35. The Panel noted that in his observations, the Appellant had limited his arguments to the three-months period between the date on which the post fell vacant, i.e. on 1 February 2004, and the date on which the post was filled, i.e. on 1 May 2004. He nevertheless submitted that the filling of the post had been delayed by at least three months. The Panel took note of the Appellant's contention that the post should have been advertised six months before the anticipated retirement, i.e. in September 2003, in order to fill the post immediately when it fell vacant. The Panel recalled ST/AI/2002/4, annex II, para. 2, which stated that '*[p]rogramme managers must start the process early for anticipated vacancies*' (Emphasis added). Indeed, it agreed with the Appellant that the aforesaid provision was a directive to programme managers to expedite the filling of vacancies. The Panel took, however, note of the Respondent's assertion that the process was initiated in 2003 with classification and completion of the vacancy announcement and found nothing in support of the Appellant's contention that the aforesaid provision had been disregarded.

36. The Panel recalled that the post was advertised in Galaxy two and a half weeks after it fell vacant, i.e. on 18 February 2004 and that the Appellant's promotion was effective on 1 May 2004 (exactly three months after the post fell vacant). To the mind of the Panel, promotion to a post three months after the post fell vacant could hardly be considered as unacceptable. In this context, the Panel further took note of ST/AI/2002/4, Section 10.5, which stated that '*the earliest date on which [] promotion may become effective shall be the first day of the month following the decision*' (Emphasis added). The Appellant was officially informed about his promotion by memorandum dated 21 April 2004. Hence, the Panel confirmed that the effective date of promotion was fully in compliance with the applicable rule and that there had not been any undue delay in the filling of the post.

37. The Panel then [went] on to examine the Appellant's contention that he had been discriminated against through the Administration's refusal to implement his promotion retroactively. He referred in this regard to what he purported to be a practice of retroactive promotions and invoked several UNAT judgements. Indeed, in Judgement No. 1299 *Thomas* (1999), the Tribunal stated that a reasonable solution would be to make the promotion effective retroactively. Yet, the Panel stressed that the circumstances in that case were very different to the present case in that the former dealt with a delayed classification of a post. Similarly, Judgement No. 1171 *Mungai* (2004), in which the Tribunal affirmed that it was within its mandate to determine whether the decision as to the effective date of promotion was a proper exercise of the Administration's discretion, involved an 'inordinate delay' in the promotion of the Applicant. Also Judgement No. 974 *Robbins* (2000) involved an undue delay of a promotion decision. The Panel agreed with the Respondent that the judgments were not applicable to the present case insofar as there had been no procedural irregularity such as an undue delay in the filling of the post. Therefore, the Panel was of the opinion that the Appellant had not substantiated the existence of any practice of promotions implemented retroactively. Consequently, [the Panel found that] the Appellant had not been discriminated against through the contested decision.

Conclusions and Recommendations

38. In view of the foregoing, the Panel concludes that the decision not to implement the Appellant's selection to the post of Head, Commodities Branch, DITC, UNCTAD, retroactively [was] in conformity with the applicable rules.

39. Hence the Panel recommends the Secretary-General to reject the appeal as unfounded."

On 11 October 2006, Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

"The Secretary-General accepts the JAB's finding and conclusions with respect to the decision by [the] UNCTAD Administration not to implement your selection to the post of Head, Commodities Branch, DITC, UNCTAD, retroactively, and, in accordance with its unanimous recommendation, has decided to take no further action in this case."

On 15 January 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Application is receivable.
2. The decision not to implement the Applicant's promotion, retroactively, did violate his rights.
3. He should be adequately compensated for personal and moral injury.

Whereas the Respondent's principal contentions are:

1. The Application is not receivable as it is *res judicata*.
2. The decision not to implement the Applicant's promotion retroactively, did not violate his rights.

The Tribunal, having deliberated from 29 June to 31 July 2009, now pronounces the following Judgement:

I. This is the Applicant's second application to the Tribunal in which he requests the Tribunal to order that he be appointed to a post within UNCTAD on a retroactive basis. The underlying facts established in the first application, which gave rise to the Tribunal's Judgement No. 1334 (2007), are the same as certain facts in the current application, and overlap in time. In Judgement No. 1334, the Tribunal rejected the application on the ground that it was time-barred. The preliminary issue in respect of the current application is whether the cause of action or the essential issue is *res judicata*, and therefore, not receivable by the Tribunal.

II. The doctrine of *res judicata* is a general principle of law that has been consistently applied by the Tribunal. It is applied in the interest of justice so as to ensure that there is finality and certainty in legal proceedings. In this regard, the Tribunal recalls that in Judgement No. 1111, *Miller* (2003), it stated:

“The Tribunal will finally deal with the Applicant’s attempt to reopen issues raised in his earlier Application in 1992, resulting in Judgement No. 623. According to the Applicant, several of the pleas contained in that Application were not examined by the Tribunal, and thus he requests the Tribunal’s permission to resubmit those pleas for its reconsideration as an integral part of his current submission. The Tribunal notes that it had considered these pleas in Judgement No. 623 and had decided to reject them. Thus, these pleas are considered to be *res judicata*, and, therefore, are not subject to further appeal.”

More recently, in its Judgement No. 1343 (2007), the Tribunal further stated:

“[T]he Tribunal recalls its rationale in Judgement No. 1158, *Araim* (2003). In that Judgement, the Tribunal noted that the

‘contested decision is related to and stems from procedures that followed the Administration’s decisions taken between 1990-1992, not to promote the Applicant to a D-1 post, which lead to the Tribunal’s Judgements, No. 622, *Araim* (1993); No. 657, *Araim* (1994); and, No. 658, *Araim* (1994). In these Judgements, the Tribunal, inter alia, rejected the Applicant’s claims that his non-selection was motivated by discrimination based on his national origin or ethnic background.’

In two of these Judgements (Nos. 622 and 657) and in an earlier Judgement (533, (1991)) the Tribunal had awarded the Applicant Araim a total of US\$ 9,000 for the Administration’s failure to give his candidature for D-1 posts meaningful consideration, but rejected his allegations of discrimination. In Judgement No. 1158, the Tribunal stated:

‘In deciding the case, the Tribunal concluded that, ‘in the circumstances of this case, the Tribunal, like the JAB, is unable to find that the Applicant was the victim of discrimination based on ethnic or national origin’. Consequently, the Tribunal finds that the underlying contention of the present Application is covered by the *res judicata* of the Tribunal’s decision in its Judgement No. 622’,

and that, ‘even if [the Applicant claimed that the Investigation Panel had not been properly constituted] it too would be subject to *res judicata*, as the Tribunal in its previous Judgements, with the same Applicant, dealt with the same issues.’”

Therefore, the doctrine may be applied in two contexts. The first is where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties and having involved the same subject matter. The bar on later proceedings is absolute in relation to all the points decided in the earlier proceedings unless fraud or collusion can be proved. The second context is where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided between the same parties, and one of the parties seeks to re-open that issue in subsequent proceedings.

III. The first application to the Tribunal, leading to Judgement No. 1334, related to the withdrawal by the Respondent of the vacancy announcement for the post of Chief, Trade Analysis Branch, DITC, UNCTAD (D-1) (“the first post”). The Applicant was informed of this withdrawal on 25 October 2001. In

his (first) appeal against this decision to the JAB, the Applicant requested the JAB “to recommend that UNCTAD make a recommendation...for his appointment with retroactive effect to a reasonable date either to the [first post] or to another post at the D-1 level in UNCTAD”. The (first) JAB report, dated 3 June 2003, recommended that the appeal be rejected because the rights of the Applicant had not been violated by the exercise of the Respondent’s discretionary power to withdraw the announcement of a vacancy. The Applicant was notified on 11 August 2003, that the Respondent accepted this recommendation. On 29 March 2005, the Applicant made an application to the Tribunal requesting that this decision be overruled. He claimed retroactive implementation of his promotion, effective to 1 January 2001. The Tribunal noted that “the Applicant does not explain why he chose this particular date”. The Tribunal held that this application was time-barred, and dismissed the application in its entirety.

IV. On 21 April 2004, while the first application to the Tribunal was pending, the Applicant was appointed to the post of Head of the Commodities Branch (“the second post”), in respect of which the Applicant had been acting as OIC since 7 November 2001. He was informed that this promotion would be effective 1 May 2004, and that it could not be made retroactively. On 15 August 2004, the Applicant filed his second appeal to the JAB, this time against the refusal of the Respondent to make the appointment to the post retroactive to no later than 1 July 2003. In its second report dated 15 June 2006, a differently constituted panel of the JAB was apparently unaware of the first JAB report, and made no reference to that report. The second JAB held that the Applicant’s rights had not been violated by the Respondent’s decision not to implement retroactively the Applicant’s appointment to the second post. The Respondent’s decision to accept the JAB’s recommendation was notified to the Applicant on 11 October 2006, and he filed the present Application to the Tribunal on 20 November 2006. The Applicant requests the Tribunal to (a) overrule the JAB’s recommendation and retroactively implement the Applicant’s promotion to the second post with effect from 1 July 2003, with full back pay and pension adjustment, and (b) award him three months’ net base pay at the D-1 level as compensation for “personal and moral injury for undue delay and unfair treatment”.

V. In both these cases the point at issue is whether the Applicant should be appointed to a D-1 post in UNCTAD on a retroactive basis. The differences in the facts between the cases are twofold.

(1) In the first application (Judgement No.1334) the issue related to appointment to the first post, or to another post at the D-1 level in UNCTAD. In the second application, the issue relates solely to the second post which is also at the D-1 level.

(2) In the first application the Applicant requested retroactive implementation to the D-1 level effective 1 January 2001, without explaining why he chose that particular date. In the present Application he requests retroactive implementation to 1 July 2003.

VI. In the Tribunal's judgement, these differences in the facts relied on are not material. They do not change the issues. In the first application the Applicant sought retroactive appointment not only to the first post but, in the alternative, appointment to "another post at [the] D-1 level". In the second application the Applicant sought retroactive appointment to a specific post which would obviously fall under the rubric "another post at [the] D-1 level". The particular issue forming a necessary ingredient in both cases was the retroactive implementation of an appointment at D-1 level. The preliminary issue in the present case is whether the ruling by the Tribunal in Judgement No. 1334, that the application to the Tribunal was time-barred, and dismissing that application in its entirety, now prevents the Applicant from raising the substantive issue of retroactive implementation in the present Application which was itself not time-barred. The Respondent submits that if the Applicant were now allowed to use a second appeal to the JAB, followed by an appeal to the Tribunal, relying once again on the argument for retroactive implementation, he would thereby avoid the consequences of his delay in filing the first application. This, the Respondent submits, would be contrary to the principle of *res judicata*, and to the Tribunal's consistent practice of seeking to enforce time limits in the interests of justice. On the other hand, it could be argued that the Tribunal merely decided that it was too late to challenge the JAB's decision in the first case, but that this procedural issue did not render the substantive issue of retroactive appointment to any post at the D-1 level *res judicata*. However, in the present case, the Tribunal need not make a determination on this point, because even if the issue of retroactive implementation were not *res judicata*, the Applicant would fail on the merits.

VII. The substantive issue raised by the Applicant is that his appointment to the second post be implemented retroactively to 1 July 2003 with full back pay and pension entitlements. As the Tribunal has noted, the JAB found that the Applicant's rights had not been violated by the refusal to implement his promotion to the second post retroactively. The JAB's conclusions were based on the following reasons: (1) the filling of the post within three months of the post becoming vacant was in full compliance with the applicable rules (ST/AI/2002/4, annex II, para. 2, and section 10/5) and therefore, there had been no procedural irregularity; and, (2) the Applicant had not substantiated any practice of promotions being implemented retroactively.

VIII. The Tribunal notes that the Applicant has not provided any explanation as to why he selected the date 1 July 2003 as the date to which the appointment should be made retroactive. The Tribunal also notes that in his observations to the JAB, the Applicant limited his arguments to the three months' period between the date on which the post became vacant and the date on which the post was filled. The Tribunal further observed that the second post became vacant on 1 February 2004, and that the vacancy was advertised on 18 February 2004, following the incumbent's early retirement (the retirement was due on 30 April 2004). The Applicant contends that the post should have been advertised six months before the anticipated retirement, i.e., at the end of October 2003. Therefore, there is considerable uncertainty as to

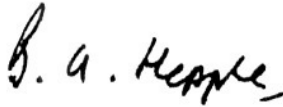
the date to which the appointment would be made retroactive. The Tribunal notes that the Applicant served as OIC for approximately 26 months while the incumbent of the post was temporarily assigned to another post. The Applicant contends that the post was effectively vacant from 19 October 2002, when the incumbent of the post was assigned to another office. The Tribunal understands the Applicant's frustration in this respect, but it is quite clear, as the JAB found, that the Administration could not have advertised a vacancy as long as the incumbent was only temporarily charged to another post. As such the incumbent's post only became vacant when he took early retirement, i.e., from 1 February 2004. The Tribunal accepts the JAB's finding that the filling of the vacancy within three months and the implementation from the first day of the month following the decision to appoint the Applicant (i.e. 1 May 2004) was in full accordance with the provisions of the Rules. Since there was no procedural irregularity and the Applicant has failed to demonstrate a practice of retroactive implementation, the Tribunal concludes that the Secretary-General did not err in accepting the JAB's recommendation to dismiss the Applicant's appeal.

IX. Accordingly, the Tribunal rejects the Application in its entirety.

(Signatures)



Spyridon **Flogaitis**
President




Bob **Hepple**
Member



Agustín **Gordillo**
Member

Geneva, 31 July 2009



Tamara **Shockley**
Executive Secretary