



Administrative Tribunal

Distr. Limited  
30 September 2009

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1445

Case No. 1518

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 1 February 2007, a former staff member of the United Nations, filed an Application containing pleas which read, in part, as follows:

“II. PLEAS

...

8. On the merits ...

- (a) to find and rule [that] the Applicant was denied full and fair consideration for promotion, and that his due process rights were violated by the Respondent's action;
- (b) to find and rule that the decision to select a candidate for promotion who did not possess the minimum qualifications for the post, was improperly motivated and prejudicial;
- (c) to find and rule in addition that the award of damages recommended by the Joint Appeals Board (JAB) and accepted by the Respondent was insufficient to remedy the harm done to the Applicant's career and reputation;
- (d) to order the Applicant's retroactive promotion to the post in question as from 1 April 2005;
- (e) to award the Applicant additional and appropriate and adequate compensation....;

(f) to fix ... the amount of compensation to be paid in lieu of specific performance at three year's [sic] net base pay at the P-3 level in view of the special circumstances of the case;

(g) to award the Applicant as cost, the sum of \$7,500.00 in legal fees and \$500.00 in expenses and disbursements.”

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 12 August 2007, and once thereafter until 12 September 2007;

Whereas the Respondent filed his Answer on 29 August 2007;

Whereas the Applicant filed Written Observations on 31 March 2008;

Whereas, on 6 July 2009, the Tribunal decided not to hold oral proceedings in the case;

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] joined the Organization on 13 April 1989 on a fixed-term contract as an Administrative Clerk at the G-4 level at the World Institute for Development Economic Research and the UNU in Helsinki (UNU-WIDER). Effective 1 April 1992, he was promoted to G-5 and given the functional title of Administrative Assistant. Effective 1 June 1995, [the Applicant] was promoted to G-6 with the functional title of Senior Administrative Assistant. Effective 1 June 1999, he was promoted to the G-7 level as Senior Information Assistant. [The Applicant served in that capacity on a four-year fixed-term contract (2005-2009)].

***Summary of Facts***

... In December 2003, a vacancy announcement (VA) for the post of Administrative Officer, P2/3, at the New York Office of the UNU became vacant. By a letter dated 7 January 2004, [the Applicant] formally submitted his candidacy for the post.

... According to Respondent's submission, out of three hundred and eighty one candidates, seven – three internal and four external – were short-listed for interview[s] (one external candidate subsequently withdrew). The selection panel (SP) [was] comprised [of] three people: the Executive Officer, the Head of UNU Office to the UN, and the Special Advisor to the Rector. By a letter dated 3 March 2005 from ... Chief, Personnel & General Services, UNU, [the Applicant] was informed that he was not selected for the post.

... On 28 April 2005, UNU informed its staff of its decision to appoint [another candidate] to the post effective 1 March 2005.

... By a letter dated 26 April 2005 to the Secretary-General, [the Applicant] requested an administrative review of the decision.”

On 24 August 2005, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 25 April 2006. Its considerations and recommendation read, in part, as follows:

***“Considerations***

16. The selected candidate himself lacked the advanced University degree required for a P-3 position and [the] non-clerical experience with the major out-reach and public information requirements.

17. The Panel notes that selection and promotion for available posts are subject to the discretion of the Secretary-General and that, “consequently, qualifications, 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.” (Cf. Judgements No. 312, *Roberts* (1983), para. II and No. 554, *Fagan*, (1992), para. VIII). However, the Panel, emphasizing that it cannot substitute its judgment for that of the Secretary-General, must nevertheless examine whether the Secretary-General’s duty to give each candidate full and fair consideration has been reasonably fulfilled. See Judgement No. 447, *Abbas* (1989). Regarding Appellant’s claim that his application was not given fair and reasonable consideration, if there are reasons to suspect this, the onus of establishing this moves to the Respondent. See Judgements No. 362, *Williamson* (1986) and No. 828, *Shamapande* (1997).

18. In this regard, the Panel finds that Respondent has put forth no reasonable *prima facie* evidence that this was done. There was no contemporaneous documentation showing how the different candidates were rated or how their qualifications were considered. Respondent includes only a memorandum prepared by UNU Personnel stating:

‘Following the interview process, the panel determined that one of the candidates ... emerged from the selection process as the best candidate for the position, based upon his demonstrated skills at interview and on the mix of professional knowledge and relevant experience he has gained at UNU. Whilst [the Appellant] was regarded as exhibiting the best skills in the area of dissemination, other competencies and experience were also considered necessary for the position. [The Appellant] was unfortunately unable to convince the panel at interview that he had as good a mix of skills and relevant experience as [the selected candidate].’

This generic narrative, prepared for the purposes of Respondent’s reply, sheds only bland light on what consideration Appellant received. There is no indication as to how the candidates were rated, if at all, or how Appellant’s mix of experience compared with that of the successful candidate, or what specific “mix of skills, knowledge and experience” Appellant lacked. It amounts to a conclusory statement, rather than the analysis thereof, that Appellant was qualified but the selected candidate was better.

19. Added to this is the fact that the selected candidate lacked one of the basic requirements for the post. Respondent concedes that the selected candidate did not possess the requisite academic degree, but states that both the SP and the CRB were aware of this. The SP and the CRB agreed to recommend that he should be offered the job at the lower P-2 level on the express understanding that he was to complete his degree within 2-3 years. The CRB apparently noted that UNU, by its nature, should encourage staff to complete their academic studies. ‘Thus, based on the fact that the candidate exhibited the best set of competencies, knowledge and professional experience and was persevering with his studies, the Board unanimously agreed that it would recommend to the Rector that the [selected candidate] be appointed on an exceptional basis.’ Normally – even as a means of encouragement by an academic institution – staff members are motivated towards continuous learning and achievement of higher degrees for the purpose of pursuing promotion, rather than as a condition upon selection for retaining the post to which the staff member is being promoted. This amounts to an attempt to bestow a requisite qualification on an otherwise unqualified candidate. Unlike many other VA’s, the Panel finds no language in the VA in question allowing for a certain amount of professional experience to serve in lieu of an academic requirement, although in practice the drafters of the VA were free to make that allowance. It finds no provision in the Rules which would allow a candidate to work towards earning the prerequisites for a post to which he or she has already been appointed. No rules

exceptionally enacted by UNU – to reflect its nature as an academic institution – exist to create the exception at all, much less to set out the procedural safeguards required in a selection exercise to ensure equal treatment and transparency. Not only does this beg the question of his selection for the post, it raises an issue as to how out of the 381 applications his candidacy survived the vetting process to reach the short-list.

20. While the Panel does not substitute its judgment for the discretion of the Respondent, he must follow his own rules. In this regard, the Panel recalls the jurisprudence of the United Nations Administrative Tribunal (UNAT) in Judgement No. 1122, *Lopes Braga* (2003). In that case as in the present one, the successful candidate did not possess an undergraduate degree, as required by the vacancy notice. UNAT stated:

‘V. ...

The vacancy notice did indeed require an “undergraduate degree preferably at the advanced level”, and the Respondent provides no evidence that the successful candidate possessed the requisite academic degree; the Respondent merely asserts that academic qualifications are only one factor in the decision-making process. Based on the record, it would appear that the Applicant, who did possess the requisite “undergraduate degree preferably at the advanced level” satisfied the threshold requirements of the vacancy but was rejected, while the successful candidate who did not possess the requisite minimum academic qualifications got the job, notwithstanding his inadequate qualifications. The Tribunal finds that the Respondent’s failure to follow its own procedures; i.e., to apply objective criteria of evaluation in a consistent manner, was a violation of the Applicant’s right to be fully and fairly considered for the post and irreparably harmed the Applicant. In reaching this decision, however, the Tribunal notes that it expresses no independent opinion as to whether the possession of an academic degree was essential to the performance of the tasks of the post in question. Had the Respondent advertised the post as preferring an undergraduate degree, rather than requiring one, the Respondent would have been free to give the possession of the degree, or lack thereof, whatever weight it chose. By advertising the post, however, as one that required an undergraduate degree, the Respondent made the degree a pre-requisite to selection for the post and cannot now be heard to argue that the possession of the degree was but one factor in its determination. To allow otherwise harms not only the Applicant, who was misled and not fairly considered by objective criteria for the position, but also harms all those putative applicants who did not apply because they did not possess an undergraduate degree.

VI. The Tribunal has previously held that formal procedures are safeguards which must be strictly complied with. The failure of the Respondent to adhere to its own rules, the adherence to which is strictly and solely within the power of the Respondent, represents an irregularity which amounts to a violation of the Applicant’s right to due process, for which the Applicant should be compensated. (See Judgement No. 1047, *Helke* (2002).)’

In that case, UNAT awarded 6 months net based salary for the violation of his due process rights stemming from procedural irregularities.

21. Respondent’s failure to follow the Rules by carving out such an exception, seen through the prism of Respondent’s sparse account of what consideration was given to Appellant’s candidacy and the lack of any contemporaneous evidence -- only demonstrates the lack of transparency in the selection process. The Panel cannot determine whether Appellant should have been selected for the post. However, in light of the above, it finds that Respondent’s actions in this case violated his right to due process.

22. As to Appellant's contentions regarding the selected candidate's outside activities, the Panel notes that, to the degree these lack relevance to the issues he raises as to the selection process, they are not receivable. However, the Panel expresses its concern at the specificity of Appellant's allegations in this regard – in contrast with the relatively brief treatment Respondent gives them in his reply – and considers that they merit closer attention by the Administration.

***Conclusions and recommendation***

23. In light of the foregoing, the Panel *unanimously concluded* that the selection of a candidate who lacked the requisite educational degree was an irregularity which amounted to a violation of Appellant's right to due process. In light of UNAT precedent, it therefore *unanimously recommended* that Appellant be compensated in the amount of six months net based salary."

On 23 June 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that:

"The Secretary-General accepts the JAB's findings and conclusions and in accordance with its unanimous recommendation, has decided that you be compensated six months net base salary at the rate in effect at the time of the contested decision for violation for your due process rights."

On 1 February 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. He should be retroactively promoted to the contested post.
2. He was not adequately compensated for the egregious nature of the contested decision and requests exceptional compensation.
3. He should be awarded costs and additional fees.

Whereas the Respondent's principal contentions are:

1. The six months' net based salary awarded to the Applicant constitutes appropriate compensation for the irregularities in the present case.
2. The Applicant's request for additional monetary compensation is without merit.

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

I. It is not disputed that the Applicant was denied full and fair consideration for promotion to the P-2/P-3 post of Administrative Officer of the UNU, New York Office. The Respondent has accepted the JAB's findings that the selected candidate "lacked the advanced University degree required for a P-3 position and [the] non-clerical experience with the major out-reach and public information requirements", and that the Respondent had not put forth any reasonable prima facie evidence that the Applicant's

application for promotion was given the fair and reasonable consideration to which he was entitled. The JAB noted that while it does not substitute its judgment for the discretion of the Administration, the Administration must follow its own rules. In this case the Respondent accepted that the selection of a candidate who lacked the requisite educational degree was an irregularity which amounted to a violation of the Applicant's due process rights.

II. The point in issue is whether the award of the sum of six months' net base salary at the rate in effect at the time of the contested decision, as recommended by the JAB, was adequate compensation for the injury the Applicant suffered as a result of the procedural irregularities. The Applicant also requests that "either he should be promoted with retroactive effect or be afforded priority consideration for promotion to the Professional level and be compensated in a more equitable manner for the losses he has suffered".

III. In reaching its conclusions the JAB relied on the Tribunal's jurisprudence, in particular in Judgement No. 1122, *Lopes Braga* (2003). In that case as in the present one, the successful candidate did not possess an undergraduate degree preferably at a higher level as required by the vacancy notice. In *Lopes Braga*, the Tribunal awarded six months' net base salary for the violation of the staff member's due process rights.

IV. The Applicant submits that the violations of his due process rights in this case were far more egregious than in the case of *Lopes Braga*, and that the circumstances of the present case were far more serious than a simple procedural irregularity. The Applicant puts forward a number of aggravating features of this case to justify a higher award of compensation. The first of these is that the Applicant was the sole internal candidate who possessed the requisite qualifications. The Applicant submits that the JAB's finding that it could not determine that the Applicant should have been selected, "defies logic since the Applicant was the sole internal candidate who possessed the requisite qualifications". However, the Tribunal notes that in *Lopes Braga*, the Tribunal declined to conclude that the Applicant would have been appointed except for the procedural irregularity. This factor distinguishes the case from Judgement No. 1136, *Sabet and Skeldon* (2003), and also from Judgement No. 1031, *Klein* (2001), on which the Applicant relies. The Tribunal has consistently emphasized that it is not the Tribunal's role to substitute its judgement for that of the Secretary-General, but merely to ascertain that the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfilled. In the present case, there were three internal and four external short-listed candidates, and the selection panel was entitled to consider a mixture of skills and experience. Accordingly, the Tribunal sees no reason to disagree with the JAB's finding in this respect.

V. The real distinguishing feature of this case, in comparison with *Lopes Braga*, is that in *Lopes Braga* there was no evidence to support the claims that the Respondent's decision was tainted by prejudice,

discrimination, or improper motive. In the present case, the Tribunal finds that the JAB paid insufficient attention to the evidence of prejudice and improper motivation. The Tribunal notes that the JAB found that no reasonable prima facie evidence was put forward by the Respondent to show that the Applicant was given “full and fair consideration”. There was no contemporaneous documentation showing how the different candidates were rated or how their qualifications were considered. The Respondent provided only a memorandum prepared by UNU Personnel which, according to the JAB, “sheds only bland light on what consideration [the Applicant] received”. Added to this was that the selected candidate lacked one of the basic requirements for the post, a fact that was recognized by the SP and CRB in recommending that he should be offered the lower P-2 post on the express understanding that he was to complete a degree within 2-3 years. The Tribunal endorses the comment of the JAB that “this amounts to an attempt to bestow a requisite qualification on an otherwise unqualified candidate”. This was particularly troubling because the vacancy announcement contained no language to allow professional experience to count in lieu of an academic degree. In view of this, the JAB wondered “how out of 381 applications [the selected candidate’s] candidacy survived the vetting process to reach the short list”.

VI. These are facts from which the JAB should have drawn an inference of prejudice and discrimination or improper motivation. The contested decision lacked transparency and was not substantiated by credible explanation, contemporaneous documentation, or any indication of what objective criteria, if any, were applied. Therefore, the Tribunal finds that the compensation recommended by the JAB was inadequate.

VII. The Applicant has made a number of additional allegations regarding the selected candidate’s outside activities and has sought to introduce evidence, subsequent to the selection process, that the selected candidate has been unable to perform the basic requirements of the post. The Tribunal rejects these allegations as they lack relevance in relation to the selection process.

VIII. In regard to the plea that the Applicant should be awarded retroactive promotion, the Tribunal acknowledges that it has the power, under article 10 of the Tribunal’s Statute, to rescind the contested decision or award compensation in lieu of the specific performance of the obligation invoked. However, the Tribunal may not substitute its judgement for that of the Secretary-General, in the absence of evidence showing bias, prejudice, improper motivation or extraneous factors, which the Tribunal has not found in this case.

IX. The Tribunal agrees that the amount of damages must be sufficient to compensate for the injury sustained. The existence of discrimination and improper motive, as found in paragraph VI above, justifies a much higher award than six months’ compensation. The Tribunal notes that this appointment was in the first instance for two years, that there are few possibilities for promotion from G to P in UNU due to

continuing budgetary constraints and the area of expertise required for the post of Administrative Officer in New York. Additionally, the faulty and discriminatory selection process has clearly had a negative effect on the Applicant's career. Based on the foregoing, the Tribunal finds it just and equitable to award the Applicant nine months' net base salary in addition to the six months' already awarded by the Respondent on the recommendation of the JAB.

X. The Tribunal now turns to the Applicant's application for costs. In Judgement No. 237, *Powell* (1979) the Tribunal held that:

"...the Tribunal will not, as a general rule, grant costs to Applicants whose claims have been sustained by the Tribunal. Nor does the Tribunal order costs against the Applicant in a case where he fails. In exceptional cases, the Tribunal may, however, grant costs if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the Tribunal."

In the present case, there are no exceptional circumstances justifying the award of costs, and this plea is rejected.

XI. In view of the foregoing, the Tribunal:

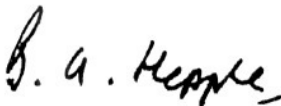
1. Awards the Applicant compensation in the amount of an additional nine months' net base salary at the rate in effect at the date of Judgement, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,

2. Rejects all other pleas.

*(Signatures)*



Spyridon **Flogaitis**  
President



Bob **Hepple**  
Member





Agustín **Gordillo**  
Member

Geneva, 31 July 2009



Tamara **Shockley**  
Executive Secretary