



Administrative Tribunal

Distr. Limited
30 September 2009

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1463

Case No. 1551

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 9 October 2007, a staff member of the United Nations Joint Staff Pension Fund (UNJSPF), filed an Application in which she requested the Tribunal, inter alia:

“PLEAS:

9. With regard to its competence and to procedure ... to find:
 - (a) that it is competent to hear and pass judgment upon the present application under Article 2 of its Statute;
 - (b) that the present application is receivable under Article 7 of its Statute.
10. On the merits ... to find:
 - (a) that the Respondent further denied the Applicant due process by not fully assessing and examining the circumstances of the JAB [Joint Appeals Board] report wherein the dissenting opinion stated in its paras no 4 and 5 were not acknowledged and given appropriate consideration by the Secretary-General in [his] letter dated 22 August 2007, as valid grounds that the Applicant was not given fair and full consideration. It was obvious that the Secretary-General summarily dismissed the opinion of the dissenting member of the Panel despite the logic and validity of that opinion based on the actual facts.
 - (b) that the Applicant's non-inclusion in the short-list and subsequent non-selection [for] one of the two vacant posts in the Payments Unit of the ... (UNJSPF) where the Applicant had been working for more than 16 years with demonstrated overall

competence and qualifying experience for the same or identical functions, violated the Applicant's due process rights to a fair and full consideration.

11. [The Applicant requests the Tribunal] to order:

(a) that the Secretary-General uphold the recommendations of the dissenting opinion awarding compensation [in the amount of] 12 months net salary as compensatory damages for the flagrant discrimination, subsequent emotional consequences suffered in violation of her rights, and the derailment of the Applicant's career development.

(b) that the Applicant be given first priority for promotion for any existing G6 post or any G-6 that becomes available."

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 17 March 2008, and once thereafter until 17 April;

Whereas the Respondent filed his Answer on 10 April 2008;

Whereas the Applicant filed an addendum to the Application on 16 April 2008, amending her pleas as follows:

"a) The Applicant respectfully requests the Administrative Tribunal that in addition to the original request to uphold the recommendations of the dissenting opinion awarding 12 months net salary as compensatory damages; to increase the compensatory damages to 24 months for the continued flagrant discrimination and violation of the Applicant's right as well as the non-accountability of the UNJSPF for all their retaliatory tactics and irregular operations.

b) As the Applicant has only three and half more years to mandatory retirement, the Applicant respectfully requests the Administrative Tribunal to order the UNJSPF to calculate her retirement benefit at the G-6 level as would have been [her level] if she [had] not unfairly and unreasonably discriminated in her pursuit of career advancement in her UN career."

Whereas the Applicant filed Written Observations on 2 May 2008;

Whereas the Respondent filed a communication on 12 June 2008;

Whereas the Applicant filed a communication on 1 July 2008;

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

"Employment history

... The [Applicant] first joined the Organization on 14 June 1982, on a Short-Term Appointment (STA) for the duration of three months at the United Nations Centre on Transnational Corporations (UNCTC), Office of the Executive Director as Clerk/Typist, G-2 level. On 14 September 1982, the [Applicant] was granted a Fixed-Term Appointment (FTA) for the period of one year with the UNCTC/Advisory Services and Information Services Division. On 14 September 1983, her appointment was converted to a probationary appointment. On 10 December 1983, she was promoted to the G-3 level. On 1 July 1984, the [Applicant] was granted a permanent appointment. On 1 January 1985, her functional title changed to Secretary, G-3 level. On 1 January 1986, her grade level was upgraded to the G-4 level.

... On 1 July 1988, the [Applicant] transferred to the International Civil Service Commission (ICSC), Personnel Policies Division, as Secretary, G-4 level. On 1 May 1989, she was transferred from ICSC to the Office of the Secretary-General, (UNJSPF) as an Accounting Clerk, G-4 level. On 1 November 1989, she was promoted to the G-5 level.

... On 3 May 1999, the [Applicant] was granted a Special Post Allowance (SPA) at the G-6 level. The SPA was successively extended through 31 January 2001. The [Applicant] is currently at the same post at the G-5 level.

Summary of facts

... On 1 September 2004, the Pension Fund advertised the post of Accounting Assistant, G-6 level, [...] The [Applicant] applied for the said VA [Vacancy Announcement]. The said VA covered two posts.

... Eight candidates, including the [Applicant], were invited to interview for the two posts. The interview panel consisted of: the Deputy Chief of the Payment Units, the Chief of Financial Services, the UNJSPF Administrative Officer, and an Information Systems Officer, who was from outside the recruiting Unit. At the interview stage, the candidates were each asked the same set of questions. The candidates were evaluated on competencies such as education, experience, languages and other skills. The CEO [Chief Executive Officer] of the Pension Fund stated that the interview panel drew up their interview report, which was agreed to unanimously, and submitted it to him for the final selection decision. A comparative evaluation record of all the candidates was also submitted to the Central Review Panel (CRP). The [Applicant] received an overall comparative analysis score of 95. Thereafter, the CRP approved a list of qualified candidates. The [Applicant's] name was not included on the said list.

... On 25 August 2005, the Chief of Operations/UNJSPF, verbally informed the [Applicant] that the selection process for these posts was finalized and that the [Applicant] was not chosen for either post. The Respondent maintains that the said verbal notification was a normal practice within the Pension Fund, irrespective of the candidate's success.

... On 8 September 2005, the [Applicant] requested written notification concerning the Administrative decision regarding the two vacant posts. The [Applicant] informed the Administrative Officer/UNJSPF that she understood that pursuant to paragraph 10.1 of ST/AI/2002/4, no written communication was required to non-selected candidates.

... On 12 September 2005, the Administrative Officer/UNJSPF responded to the [Applicant's] initial request and informed her that the Administration would communicate with her after the selection process was completed.

... On 19 September 2005, the [Applicant] filed a request for administrative review of the decision taken by the Pension Fund to not select her for one of the contested G-6 posts. The [Applicant] stated that she was the most qualified candidate for the contested posts and that her non-selection was due to extraneous factors such as favoritism, harassment and discrimination.”

On 18 November 2005, the Applicant filed her appeal with the JAB in New York. On 9 July 2007, the JAB submitted its report. Its considerations and recommendation read, in part, as follows:

“Considerations

21. 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 as set forth in Staff Rule 111.2 (a).

22. The Panel then considered the parties' contentions. It determined that the central question in this case was whether the Appellant was fully and fairly considered for the contested posts. In this context, the Panel acknowledged that the selection and promotion for available posts are subject to the discretion of the Secretary-General and '...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.' (UNAT #312, Roberts (1983) and UNAT # 554, Fagan (1992)).

23. The Panel was also mindful that it cannot substitute its judgment for that of the Secretary-General and must scrutinize whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfilled. (UNAT #447, Abbas (1989)). The Tribunal has held that '[i]f once called seriously into question, the Administration must be able to make at least a minimal showing that the staff member's statutory right was honored in good faith in that the Administration gave 'the fullest regard' to it.' (UNAT #362, Williamson (1986) and see UNAT # 828, Shamapande (1997)).

24. The Panel examined first, if the Respondent had established the minimal showing required by UNAT that the Appellant's application was given full and fair consideration. The Panel noted that the evaluations of the interviewed candidates, including the Appellant's, were submitted by the Respondent. It analyzed these documents and the contentions of both parties and determined that:

- i. The applications of the Appellant and the other candidates were initially evaluated based on the qualification requirements of the post stated in the vacancy announcement, i.e. education, experience, languages and other skills;
- ii. The Appellant received the maximum score allotted for education, experience and other skills, while fully meeting the language requirements, and was determined to meet the qualification requirements for the post;
- iii. The Appellant and all other applicants that had been assessed to meet the qualification requirements for the post were selected to be interviewed.

25. The Panel reviewed the competency evaluation of the interview panel submitted by the Respondent. The Chairperson and the Member appointed by the Secretary-General observed the following:

- i. The records of the interviewed candidates show that the evaluations were conducted in a consistent manner;
- ii. The record of the Appellant's competency based interview reveals weaknesses and inadequacies in terms of satisfying established competency requirements. The interview panel concluded that the Appellant 'did not possess all the competencies required for the post...';
- iii. The records of the other interviewed candidates show consistently that those applicants who did not satisfy all competencies were found not possessing the required competencies for the post, while those meeting all competencies were found possessing the required competencies to effectively carry out the post functions.

26. The Chairperson and the Member appointed by the Secretary-General noted that only those candidates who had met the qualifications requirements and also had satisfactorily demonstrated all competency requirements were placed on the recommended list which was subsequently endorsed by the CRP.

27. The Chairperson and the member appointed by the Secretary-General were mindful of the fact that the scores in the evaluation record relate only to the rating of a candidate's qualifications in reference to the set qualification requirements of a post. The Appellant's 16 years of work experience in the unit correctly resulted in a high score in terms of the qualification requirements

for the contested post. The evaluation records also showed that external candidates scored lower than [the Appellant]. Under the given circumstances the Chairperson and the Member appointed by the Secretary-General assessed that the evaluation of the qualification requirements was done in a fair manner. However, the Chairperson and the member appointed by the Secretary-General recognized that it was essential that all required post related stipulations of a vacancy announcement be met in order for a candidate to be recommended for a post. This included demonstrating the competency requirements during an interview. The Chairperson and the Member appointed by the Secretary-General noted that it was [on] the latter requirement for which the Appellant was unsuccessful, thus rendering her various contentions relating to her high score in the qualifications evaluation irrelevant.

28. The Panel reviewed the Appellant's performance appraisals. The Chairperson and the Member appointed by the Secretary-General were mindful that there were a number of shortcomings detailed in the Appellant's PASs regarding the performance of her duties and interrelation with colleagues. These PASs had been prepared by different supervisors. Covering the reporting period 1997-1998, it was suggested that the Appellant be '...more careful and diligent before presenting her work as final' because her errors could lead to 'significant overpayments.' For the reporting cycle 2000-2001, although the Appellant was considered an asset to the Unit, she did not accept new tasks involving in-depth analysis nicely and she did not accept constructive criticism well. For the reporting period 2002-2003, the Appellant was appraised as being impatient in relation to delays. The said Panel members noted certain correlations between the observations and comments in the previous PASs, and the weaknesses and inadequacies reflected in evaluation record of the Appellant's competency based interview.

29. In view of the foregoing, the Chairperson and the Member appointed by the Secretary-General concluded that the established procedure prescribed under the existing staff selection system was followed. The said Panel members rejected the Appellant's contention that not being placed on the recommended list, which the Appellant referred to as the 'short-list', was indicative that the Appellant had not been afforded full and fair consideration for the contested posts.

30. The Chairperson and the Member appointed by the Secretary-General undertook an in-depth assessment of the Appellant's claims of retaliation, harassment, favouritism and discrimination. On two separate occasions, the Panel requested clarification and supporting documentation regarding the Appellant's prior SPA, the organizational structure while the Appellant was on the SPA and the present structure, the identification of the candidates interviewed and the candidates selected for the contested posts, and the OIOS [Office of Internal Oversight Services] Investigation Report on [Alleged] Conflict of Interest, Favouritism and Mismanagement of the Pension Fund.

31. The Panel noted from the Appellant's employment history that she temporarily held a G-6 post in [the] same unit from 3 May 1999 to 31 January 2001 ... and that the Appellant received [an] SPA. The review of the facts revealed that this was a matter of circumstance as a staff member in a senior position had been away from the office for an extended period. As a result other staff members, including the Appellant, benefited from being placed retrospectively against the next higher level post without there being a competitive selection process. The Panel observed that the said grant of a prior SPA to the Appellant was not indicative of a competitive selection process. The Chairperson and the Member appointed by the Secretary-General further concluded that the documentation submitted did not substantiate that the Appellant possessed all the competencies required for the contested posts.

32. In relation to the OIOS report, the Panel observed that the CEO of the Fund stated that the investigation was conducted at his request and that it was classified strictly confidential. The CEO stated that '[he] regret[ed] that [he was] unable to supply [the Panel] with a copy of the [OIOS] report' but 'assure[d the Panel] that the report contain[ed] no information pertinent to [the Appellant's] case.' The Panel took note of the said reply.

33. In conclusion, the Chairperson and the Member appointed by the Secretary-General determined that the Appellant failed to provide concrete and convincing substantiation of her contentions relating to retaliation, favouritism and discrimination in the selection process. Based on the available information received, the said Panel members were [unable] to find evidence for the claims regarding harassment by the Appellant's supervisor. Furthermore, the Chairperson and the Member appointed by the Secretary-General were not able to find evidence of other irregularities or extraneous factors in the selection process.

34. Based on the above cited observations, the Chairperson and the Member appointed by the Secretary-General concluded that the Respondent submitted reasonable prima facie evidence that the Appellant's application for the contested posts received full and fair consideration.

Recommendation

35. In light of the foregoing, the Chairperson and the Member appointed by the Secretary-General found that the Respondent put forth a reasonable basis for the decision not to select the Appellant for the posts of Accounting Assistant. They found that the Respondent fully and fairly appraised the Appellant's candidacy for the contested posts, and thus concluded that the Appellant's due process rights were not violated.

36. The Chairperson and the Member appointed by the Secretary-General therefore decided to make no recommendation in support of the appeal."

A dissenting member of the JAB concluded:

"1. The facts of this case clearly demonstrate that her right for full and fair consideration for the two contested posts had been violated. Also, and despite the Administrative Tribunal's jurisprudence ... the Respondent failed to demonstrate that the Appellant's statutory right for full and fair consideration were respected.

2. As noted in the Appellant's employment history, she had previously performed identical functions at the G-6 in same unit from 3 May 1999 to 31 January 2001 inclusive

....

9. I would therefore recommend that the Appellant be promoted to the G-6 level in the Payments Unit, retroactively from 1 September 2005 or that she be compensated equivalent to the money value of the comparable G-6 level post had she been promoted, and be given priority for the next available similar position in the UNJSPF. In addition, the Applicant should be compensated for the flagrant discrimination, and subsequent emotional consequences suffered in this case in the amount of 12 months net salary."

On 22 August 2007, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her as follows:

"The Secretary-General has examined your case in the light of the findings, analysis and conclusions of both the majority and the dissenting members of the JAB and all the circumstances of the case. The Secretary-General agrees with the findings and analysis of the majority of the JAB that your candidacy received full and fair consideration for the posts, that your due process rights were not violated, and that there was no evidence to substantiate your allegation of extraneous factors affecting the contested decision. Accordingly, the Secretary-General decided to accept the recommendation of the majority and to take no further action in respect of your appeal."

On 9 October 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent violated her due process rights by not fully assessing and examining the circumstances of the JAB report. The dissenting opinion of the JAB was not acknowledged or given appropriate consideration by the Respondent.
2. The non-inclusion of her name in the short-list and subsequent non-selection for one of the two vacant posts in the Payments Unit of the UNJSPF violated her due process rights to a full and fair consideration.

Whereas the Respondent's principal contentions are:

1. The Respondent gave appropriate consideration to the opinions set forth in the JAB report.
2. The JAB was correct in determining that the Applicant's due process rights had not been violated.
3. The Applicant is not entitled to any compensation or to be given priority consideration for promotion to a G-6 post.

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

I. There are two principal issues for consideration in the present case. The first is whether the Applicant received full and fair consideration for the contested posts, and second, whether the Applicant's procedural rights were violated.

II. The Tribunal recalls that staff rule 4.2 and article 101 of the Charter, vests the Secretary-General with the discretionary authority to select the candidate that he considers the most suitable for a vacant post. Article 101 provides that:

“[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity.” (See also Judgement No.828, *Shamapande* (1997)).

Furthermore, the Tribunal has consistently recognized that “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 [of promotion]”. (See Judgement No. 958, *Draz* (2000)). However, this latitude is not limitless. The Secretary-General must also act without bias, prejudice, or improper motive, and he may not exercise his discretion in an arbitrary or capricious manner. (See Judgement No. 834, *Kumar* (1997)).

III. In Judgement No 362, *Williamson* (1986), the Tribunal held that:

“... since the staff member has a statutory right to have ‘the fullest regard’ given to his candidature, the burden of establishing the Administration’s failure to consider that candidacy does not fall upon him. If once called seriously into question, the Administration must be able to make at least a minimal showing that the staff member’s statutory right was honoured in good faith in that the Administration gave its ‘fullest regard’ to it.”

Thereafter, the burden of proving discrimination or abuse of discretion lies upon the one claiming it and he or she must prove so by adducing evidence to substantiate the claim. (Judgement No. 1122, *Lopes Braga* (2003)).

IV. In the present case, the Applicant asserts that she was the best candidate and that she should have been selected for one of the two contested posts. She obtained the second highest score, 95, among the selected qualified candidates. Additionally, she has 16 years of demonstrated competence and qualifying experience in the same Unit, along with experience with unique administrative and payroll systems. Nevertheless, she was not placed on the short-list and another candidate who scored 88 was selected. She claims that extraneous factors were taken into consideration during the selection process.

V. However, the Respondent claims that he based the evaluation of the candidates not only on the qualification requirements of the post cited in the vacancy announcements, i.e., education, experience, language, and other skills, but also on the results of the interview following the first stage of the selection process. The Respondent asserts that the Applicant’s competency-based interview revealed weaknesses and inadequacies in terms of satisfying established competency requirements and that conclusion was also supported by the Applicant’s PASs, which apart from certain positive comments on her performance, detailed her inefficiency in some areas. Concretely, in the PAS for the reporting period 2002-2003, the Applicant was appraised as being impatient in relation to delays. In previous PASs, it was suggested that the Applicant be “more careful and diligent before presenting her work as final” and also that she did not accept new tasks involving in-depth analysis “nicely” and she did not accept constructive criticism well.

VI. The Tribunal is satisfied that by providing the aforementioned explanation, the Administration has shown that the staff member’s right to full and fair consideration was respected.

VII. The Tribunal next considers that while the Applicant sought to establish the facts in order to prove that her right for full and fair consideration has been violated, the Administration has not provided her with all the documents pertinent for the case. In Judgement No. 1056, *Katz* (2002), the Tribunal was “sympathetic to the Applicant’s legitimate interest” to obtain information. The Tribunal notes that it is impossible for anyone competing for a post to establish discrimination and request judicial review, unless

he or she has full access to the file, as being prevented from having full access may jeopardize a staff member's rights and interests. Otherwise, a violation of procedure may occur.

VIII. The Tribunal finds it questionable how the Applicant who had previously performed identical functions at the G-6 level in the same Unit from May 1999 to 31 January 2001, who was consecutively appraised as "fully meeting performance expectations" (this refers to the overall rating of the Applicant in her PASs instead of the selected excerpts used by the Respondent to show her inefficiency), and received the second highest score of the candidates (95), was not selected for one of the contested posts.

IX. The Respondent's submission that the Applicant did not meet the requirements of the interview process during which the other candidate scored higher than the Applicant is troubling to the Tribunal because the Respondent does not provide any specific information about the interview process. Apart from stating that three other candidates; two of them had scored lower than the Applicant in the written assessment of the qualifications, possessed the qualifications and the competencies most relevant for the contested posts, the Respondent does not refer to the interview process in any detail or explain why the Applicant was not selected for one of the two contested posts.

X. Moreover, since the interview was conducted separately for each candidate, the Applicant cannot provide the Tribunal with evidence as to whether the other candidates were better qualified and to explain how their interview score could cover the difference of 7 points, the Applicant had scored 95 whereas the selected candidate scored 88 at the first stage.

XI. Therefore, the Tribunal is not satisfied with the explanations proffered by the Respondent and, although the Applicant's presumptions that extraneous factors influenced the selection process are not supported by concrete and convincing substantiation relating to retaliation, favouritism, and discrimination, the Tribunal finds that the fact that the Applicant did not have access to all documents produced during the interview process that describes each candidate's performance and score in detail, denied her procedural rights.

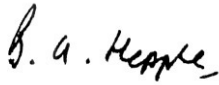
XII. For the foregoing reasons the Tribunal:

1. Awards the Applicant compensation for violation of her procedural rights in the amount of six months' net salary, 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