



Administrative Tribunal

Distr. Limited
23 December 2009

Original: English

ADMINISTRATIVE TRIBUNAL

Judgement No. 1483

Case No. 1549

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Sir Bob Hepple, First Vice-President, presiding; Mr. Goh Joon Seng, Second Vice-President; Ms. Brigitte Stern, Member;

Whereas, on 15 August 2007, a staff member of the United Nations, filed an Application requesting the Tribunal, inter alia:

“II. PLEAS

...

(a) To declare that the placement in his file of two documents [c]onstitute[d] a violation of the applicable procedural rules and, for this violation, to order the Respondent to award the Applicant compensation amounting to two years' salary plus 8 per cent compound interest reckoned from the date of the documents in question.

(b) For the injury caused by the placement of these notes in his personnel file and the resulting pain and suffering, to order the Respondent to award the Applicant compensation amounting to two years' salary plus 8 per cent compound interest reckoned from the date of the documents in question.

(c) [For discrimination, harassment and constant humiliation to order the Respondent to award the Applicant compensation amounting to two years' salary plus 8 per cent compound interest reckoned from the date on which the case was submitted.

(d) For the delay in handling of this case by the Joint Appeals Board [JAB], to order the Respondent to award the Applicant compensation amounting to one year's salary plus 8 per cent compound interest reckoned from the date on which the case was submitted to the [JAB].

....

(e) To order the Respondent to expunge the documents in question from all United Nations files, in addition to his personnel file.

Production of documents

2. ...[T]o order the Respondent to produce memorandum dated 28 March 2002 and Memoranda dated 4 February and 22 March 2002....”

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 4 February 2008, and once thereafter until 5 March;

Whereas the Respondent filed his Answer on 20 February 2008;

Whereas, on 31 July 2009, the Tribunal decided to postpone consideration of this case until its next session;

Whereas on 17 November 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] was recruited on a one year Fixed-Term Appointment (FTA), effective 25 September 1995, to the International Criminal Tribunal for Rwanda (ICTR) as a Legal Translator/Interpreter. His FTA was extended to 27 March 1996, when he was separated from the service. [The Applicant] was reappointed on a Short-Term Appointment (STA), from 10 January 1999 to 26 March 1999, as a translator (T III) in the Department of General Assembly Affairs and Conference Services (DGAACS) at headquarters. His STA was reinstated effective 27 March 1999, and his separation was effective 7 May 1999. He was again reappointed, effective 4 January 2000, on a two-year FTA as Translator (P-3). [The Applicant] was on a FTA extension to retirement age at the end of August 2004.

Summary of Facts

... By a memorandum dated 22 December 2003 to [the] Executive Officer, DGACM, ...[the] Chief, French Translation Service, submitted an overall assessment of [the Applicant’s] performance for the period 1 January to 31 December 2003.

... By a letter dated 20 February 2004, [the Applicant] submitted a request for review of the decision to the Secretary-General.

... On 17 May 2004, [the Applicant] submitted a Statement of Appeal to the JAB.”

The JAB adopted its report on 19 December 2006. Its considerations, conclusions, and recommendation read, in part, as follows:

“Considerations

14. Appellant appeals against the decision to place a memorandum, dated 22 December 2003, from [the] Chief, French Translation Service in his OS [Official Status] file. The purpose of the memorandum was to inform of the recommendation to renew Appellant’s contract, and the memorandum included an overall assessment of Appellant’s performance for the period 1 January to 31 December 2003.

15. The present case raises two main issues: a) whether the placement of the memorandum in Appellant’s OS file violated his rights; b) whether the decision was motivated by bias and ill-motivation.

16. ST/AI/292 governs the filing of adverse material in personnel records. Under the terms of that instruction, adverse material is ‘any correspondence, memorandum, report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member.’ The Panel considers that the evaluation in the memorandum in question did indeed reflect on Appellant’s performance, and reflected it adversely. The Panel notes that, under the AI, the context or purpose in generating the material is irrelevant, provided it fulfil the other elements of the definition. Thus, here, to the degree performance was reflected, whether it was reflected in the context of a performance evaluation system or for the purpose of authorizing an extension of contract was immaterial. The Panel therefore finds that the memorandum in question falls under the AI as adverse material.

17. Paragraphs 2 and 5 of the AI describe the procedure to be followed with adverse material relating to an appraisal of the staff member’s performance and conduct, including ‘special reports and other communications pertaining to the staff member’s performance.’ That procedure is articulated with the basic principles that, as such evaluations are matter of record and open to rebuttal by the staff member, such material may not be included in a staff member’s OS file unless shown to the staff member, who is given an opportunity to make comments.

18. In the instant case, the memorandum was generated for purposes of deciding whether to renew Appellant’s contract. Logically, recommendations favouring renewal follow on a brief note of satisfactory performance, while recommendations favouring non-renewal follow upon a note of unsatisfactory performance. The memorandum in this case can be characterized as a hybrid. The circumstances appear to be that non-renewal may have been considered the logical recommendation given the evaluation, but given the need to await the finalization of a rebuttal of his PAS [Performance Appraisal System] prior to taking a decision (a need which follows from the Staff Rules and the jurisprudence of the United Nations Administrative Tribunal in, *inter alia*, its Judgment No. 826, *Beliayeva* (1997)), Respondent decided in favour of an extension. Having so decided, however, [the] Respondent also decided to include a negative evaluation of his performance, most probably to ensure that the record maintained consistency with any previous evaluations then the subject of the rebuttal processes.

19. It would seem that the least encumbering course of action would have been to simply indicate in the note that Appellant’s rebuttal was still under review and recommend renewal for a period anticipating the end of that review for the purpose of considering future renewals. Nevertheless, the material ultimately included in the note included negative comments on performance. The memorandum and accompanying note thereafter found their way into Appellant’s OS file. The Panel finds that this violated the Administration’s procedures under AI/292. Irrespective of the fact that the purpose of the memorandum and note was administratively unrelated to PAS (and that the effect of that administrative process was, ironically, beneficial to [the Applicant]), the material included was that type of which the AI considers a matter of record and as such open to rebuttal by [the Applicant]. The Panel considers that these considerations follow from UNAT jurisprudence in Judgment No. 1380, (2006), para.

IV, which recognized that placement of adverse material amounted to a violation of the AI. *See also* Judgement Nos. 1268, (2005), 1294, (2006).

20. Next, the Panel considered Appellant's contentions of bias and ill-motivation, bearing in mind the jurisprudence of UNAT under which the 'burden of proof is on the Applicant where allegations of such extraneous motivation are made.' *See* Judgements No. 639, *Leung-Ki* (1994); No. 784, *Knowles* (1996); and, No. 870, *Choudhury et al* (1998). Following on this standard, the Panel considers that the evidence which Appellant provides lands far from achieving the burden for the contentions he raises. In his statement of appeal, he alleges extreme bad faith motivated by the aim of destroying him psychologically. This may be of course a plausible contention in the context of almost any administrative decision. Yet as he provides little evidence beyond the actual memorandum and accompanying note to file, the Panel can only assume that he wishes the JAB to infer bias from the fact that the decision itself was taken. However, this evidence is only conjectural. Given that the Administration has a legitimate reason for expecting the record to reflect the rationale for a recommendation to renew a contract, the Panel notes that, while that rationale was recorded in a way which violated the administration's rules, the actions of Appellant's supervisor nevertheless reflected compliance with that expectation. Any other conclusion, however plausible, must be borne out by the evidence. In commenting on [the] Respondent's reply, [the Applicant] contends that the answers of the Administration 'reflect and gloss over the real problems' which, in sum, are discrimination against Canadian translators, lack of training and incompetence of staff members responsible for the French Translation Service, hostility by some against him, and harassment, as well as personal jealousy and envy on the part of his supervisor. Here again, these contentions exist within the realm of possibility, but do not automatically arise from the challenged decision itself, and [the Applicant] offers little evidence in his statement of appeal to support them. The Panel finds that [the Applicant] did not shoulder the required burden of proof.

21. Finally, the Panel considered whether any compensation would be appropriate in the present case. Appellant himself gives no indication that placement of the material in his file had any impact on future renewals, promotions, etc. It finds that Appellant suffered no damage. In this sense, the Panel distinguishes the facts here from those in Judgement No. 1380, in which the Tribunal awarded five months' net base salary. In the latter case, the Administration had included not only references to poor performance among the adverse material placed in the Applicant's file, but disparaging remarks regarding the Applicant's character and conduct, as well as allegations of fraud. In addition, it found that the adverse material was 'deliberately placed in the Applicant's file with the intention of preventing her re-employment and finds that it is reasonable to assume that it did impact the recruitment process.' Here, the only evidence as to the impact of the decision was the contract renewal he received on the basis of the memorandum.

22. The Panel concludes that, while there was no evidence of actual damage on which basis to recommend compensation, the potential damage and the AI calls for removal of the adverse memorandum and note to file from his OS file. In this regard, the Panel considers furthermore that removing the harmful material in the record would not harm the record of the renewal. Such a record could easily be established for example by either supplanting it with a note indicating the date of [the French Translation Service's Chief's] recommendation for renewal and stating the removal of the actual document from the record pursuant to the AI and the Secretary-General's decision on Appellant's appeal, or by simply redacting the adverse material from the copy and adding the same reference to the AI and the Secretary-General's decision.

Conclusions and recommendation

23. In light of the foregoing, the Panel *unanimously concluded* that [the] Respondent violated ST/AI/292 by placing adverse material in Appellant's OS file, although [the] Appellant failed to show damages or sufficient evidence of bias. It therefore *unanimously recommended* that the material be expunged from Appellant's OS file."

On 12 June 2007, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him as follows:

“The Secretary-General has examined your case in the light of the JAB’s report and all the circumstances of the case, and is in agreement with the JAB[’]s findings. He has accordingly decided to accept the JAB’s recommendation that the adverse material be expunged from your OS file. Pursuant to Staff Rule 111.2(p), this decision is ‘the final decision on the appeal’. Therefore, any recourse in respect of it should be addressed to the Administrative Tribunal.”

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

Whereas the Applicant’s principal contentions are:

1. The contested memorandum containing the performance review report for the period 1 January to 31 December 2003, and an additional document on the evaluation and recommendation as regards his professional conduct for the same performance period, both included in his OS file, violated his rights and warrants compensation.
2. The placement of these two documents in his OS file caused pain and suffering for which he should be compensated.
3. He was discriminated, harassed, and faced constant humiliation for approximately five years and should be compensated accordingly.
4. The JAB’s delay in handling his case violated his rights and also warrants compensation.

Whereas the Respondent’s principal contentions are:

1. The contested memorandum containing the performance review report for the period 1 January to 31 December 2003, has been withdrawn from the Applicant’s OS file, and therefore, no further measures are required.
2. The Applicant has not substantiated his claim as to the existence of discrimination, harassment, and humiliation.
3. The Applicant has not substantiated his claim as to harm caused by the delays in reviewing his case.
4. The Applicant has not substantiated his claim that he suffered prejudice by the fact that the Chief, French Translation Service, was briefly nominated as Chairperson of the JAB panel.

The Tribunal, having deliberated from 17 November to 25 November 2009, now pronounces the following Judgement:

- I. The Appellant contends that a Memorandum, dated 22 December 2003, written by the Chief, French Translation Service to the Executive Officer, DGACM, and the subsequent inclusion of the

Memorandum in the Applicant's Official Status file, violated his rights. It is noted that the Memorandum, while containing adverse comments on the performance of the Applicant, nonetheless recommended extension of his FTA to his mandatory age of retirement at the end of August 2004.

II. The Tribunal considers that, although the Memorandum was subsequently removed from the Applicant's Official Status File, the Memorandum included negative comments on his performance. Such material was open to rebuttal by the Applicant. In accordance with ST/AI/292 "anything that is adverse to the staff member should not go on a confidential file unless it has been shown to the person concerned." The material included in the Memorandum was the type which ST/AI/292 considers as adverse, and the Applicant should have been given an opportunity to make comments thereon, prior to inclusion in the Applicant's Official Status file.

III. The Applicant is nonetheless entitled to damages for breach of his rights to due process arising from non-compliance with ST/AI/292. Accordingly, the Tribunal awards the Applicant two months' net base salary as of the date of his separation from service.

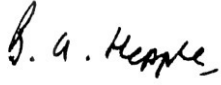
IV. On the Applicant's claim for discrimination, harassment, and humiliation, the Tribunal has not been persuaded that the JAB erred in holding that the Applicant had not discharged his burden of proof. On this issue the JAB stated:

"Next, the Panel considered [Applicant's] contentions of bias and ill-motivation, bearing in mind the jurisprudence of UNAT under which the "burden of proof is on the Applicant where allegations of such extraneous motivation are made." See Judgements No. 639, Leung-Ki (1994); No. 784, Knowles (1996); and, No. 870, Choudhury et al (1998). Following on this standard, Panel considers that the evidence which [Applicant] provides lands far from achieving the burden for the contentions he raises."

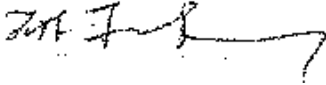
V. In light of the foregoing, the Tribunal:

1. Finds that the Respondent violated the Applicant's due process rights by inserting the Memorandum at issue in the Applicant's Official Status file in contravention of ST/AI/292;
2. Orders the Respondent to pay to the Applicant two months' net base salary at the rate in effect on the day of his separation from service, with interest payable at eight per cent per annum as from 30 days from the date of distribution of this Judgement until payment is effected; and
3. Rejects all other pleas.

(Signatures)



Bob Hepple
First Vice-President



Goh Joon Seng
Second Vice-President



Brigitte Stern
Member

New York, 25 November 2009



Tamara Shockley
Executive Secretary