



ADMINISTRATIVE TRIBUNAL

Judgement No. 1493

Case No. 1573

Against: The Secretary-General
of the International Civil
Aviation Organisation

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Dayendra Sena Wijewardane, President; Sir Bob Hepple, First Vice-President;
Ms. Brigitte Stern;

Whereas, on 26 February 2008, a staff member of the International Civil Aviation Organization (ICAO), filed an Application requesting the Tribunal, inter alia:

“11. ... [To] find:

- a) that it is competent to hear and pass judgement upon the present application under Article 2 of its Statute;
- b) that the present application is receivable under Article 7 of its Statutes.

12. ...[To] find:

- a) that the ICAO Administration did not properly carry out the recruitment process in that no interview of staff member was effected even though she had successfully held the position before being moved to disability pension;
- b) that due process was denied in that the Administration did not take into consideration the warning of the local Staff Advisory Committee which stated that the Applicant would eventually return to her position;
- c) the Administration totally ignored the analysis of the ICAO Medical Consultant and the Applicant's personal physician which reiterated that the Applicant would indeed eventually be fit to return to the position in question; and

d) that the Administration was so determined to prevent the Applicant from obtaining the post that it concocted a job description that referred to 'high levels of stress' so that it could eliminate the Applicant.

13. Whereafter the Applicant respectfully requests that she be paid an indemnity of U.S. \$100,000.00 in damages to compensate for the wages she would have received had she obtained the post in question."

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 29 July 2008;

Whereas the Respondent filed his Answer on 23 July 2008;

Whereas the Applicant filed Written Observations on 12 August 2008;

Whereas the Respondent filed an additional communication on 2 December 2008;

Whereas the statement of facts, including the employment record, contained in the report of the Advisory Joint Appeals Board (AJAB) reads, in part, as follows:

"SUMMARY OF FACTS

... The [Applicant] first joined the Organization on 17 October 1988 when she was recruited on a temporary basis to a G-4 post as Secretary in the Field Operations Branch of the Technical Assistance Bureau. Effective 28 July 1989, she was given a term appointment. On 1 August 1989, the [Applicant] was promoted and reassigned to an acting appointment at the G-5 level as Clerical Assistant/Typist for the TRAINAIR Project. She subsequently held other positions at ICAO and, effective 30 March 1993, was granted a permanent appointment at level of G-5, Step 5 as Production Clerk in the TRAINAIR Central Unit. With effect from 9 June 1993, she was promoted and appointed to the post of G-7 Supervisor, Text Processing Unit, French Section, initially at the G-6 level, and, following a recommendation of her supervisor ... regarding her performance in 'a rather difficult post', as of 9 December 1993, at the level of G-7, Step 5.

... Subsequently, the [Applicant] developed an illness. On account of this, the Chief Personnel Branch (C/PER) advised the Secretary-General on 3 December 1998 that [the Applicant] had been placed on sick leave from 2 October 1997; she was on full pay status from 2 October 1997 to 29 March 1998, and on half pay status from 30 March 1998 to 2 October 1998. C/PER indicated that [the Applicant] had subsequently taken annual leave, and that her annual and sick leave entitlements were expected to be exhausted on 15 December 1998.

... With a view to facilitate the procedures for a termination on health grounds (Staff Regulation 9.5) and disability benefits in accordance with [a]rticle 33 of the United Nations Joint Staff Pension Fund (UNJSPF), the [Applicant] was placed on special leave with half pay for the period of 15 December 1998 to 15 February 1999 [, the special leave with half pay was then extended, on an exceptional basis, until 17 March 1999].

... The [Applicant] did not return to work on 17 March 1999, and was subsequently separated from service effective 17 March 1999 (noon). [The Applicant] received thereafter benefits from the UNJSPF.

... Following a notification by the ICAO Medical Consultant ... dated 8 November 2000, the Personnel Branch was advised that the [Applicant] may return to work for 3 full non-consecutive days. In a subsequent letter dated 10 January 2001 addressed to C/PER, [the ICAO Medical Consultant] advised that the [Applicant] had seen her [physician] on 8 January 2001, who still had recommended for her to return to work gradually at 3 days per week. The ICAO Medical

Consultant proposed to have [the Applicant] return to work as soon as possible at 4 days a week. He stated that, although [the Applicant] was being somewhat concerned about this, she was willing to give it a try. In the opinion of the ICAO Medical Consultant, [the Applicant] would be physically able of doing this. He concluded by noting that [the Applicant] was due to see her physician again on 5 March 2001, when 'it is hoped that she will be given the green light to return to work full-time'. In his reply dated 12 January 2001, C/PER advised that it had not been possible to absorb [the Applicant] due to lack of positions and stated that ICAO would keep [the Applicant] 'informed of all possibilities open to her for part-time work, i.e. 3 days per week'.

... Recalling that the Secretary-General had earlier exceptionally approved the re-appointment of [the Applicant] (as an external candidate), the Chief of Recruitment and Establishment recommended on 6 February 2001 that the [Applicant] be recruited on a 40% part-time basis in the Registry and Telecommunications Unit (RTU). [The Applicant] was thereafter appointed at the level of G-5/step 8 monthly (40%, Tuesdays and Fridays) as a Registry Clerk from 15 February 2001 to 31 May 2001.

... On 9 May 2001, the ICAO Medical Consultant advised the Personnel Branch that beginning 1 June 2001 [the Applicant] could work four days a week excluding Wednesdays. He indicated that she was due to be re-evaluated on 6 August 2001. The temporary appointment in RTU was subsequently extended on 5 June 2001 on a part-time basis (80%) from 1 to 29 June 2001, and subsequently from 30 June 2001 to 11 January 2002. The latter appointment was made conditional upon the receipt of a satisfactory medical certificate. In his medical classification for employment purposes, the ICAO Medical Consultant graded [the Applicant] on 18 July 2001 at 'Class 2 A' (Individuals who have a serious medical condition and are not fit for employment, but could be considered for employment if the condition is corrected).

... On 25 May 2001, the [Applicant] submitted her application for the G-7 post of Supervisor, Text Processing Unit, ADB-LPB-FR-TPU/FR which had been advertised on 17 May 2001 ... In her application, [the Applicant] indicated that she was currently working in RTU on a temporary basis (Tuesdays and Fridays) until 31 May 2001. By IOM [Inter-Office Memorandum] dated 7 June 2001, the [Applicant] was advised by C/REC/EST that her application would be considered. By IOM dated 20 July 2001, C/REC/EST notified the [Applicant] that she had not been selected for the post.

... By letter dated 6 August 2001, [the Applicant] requested the Secretary-General to review his decision not to select her for the position of G-7 Supervisor. In her submission, she recalled her employment history, indicating that she had previously held the very post she now applied for. She also stated that '...I am still in the process of recuperating but I will return on a full time basis as my condition improves every day'. She added that she had successfully returned to work after a long illness. [The Applicant] also stated:

'..During a meeting with [the] C/FR, on 26 July 2001, she informed me of two main reasons I was not short-listed: a) she had doubt that I could do the job physically and b) that the fact that I had been away for 3 years, it would not be good to take me back for the morale of the Section. Regarding the first argument, I believe that physically I am very capable of accomplishing the tasks required. In fact, in my view, I am better prepared for the position now than I was when I applied for the first time. This information may not have been available to the reviewing officers. Regarding the second argument, I would like to mention the fact that I maintained very good working relationships with my colleagues from the French Section and thus I have great difficulties understanding why my return would negatively affect the morale of the Section. It would appear that this essential fact may have been overlooked in the process leading up to the decision.'

... Having received no reply from the Administration to her request, [the Applicant] lodged her appeal with the AJAB on 11 September 2001, stating that she had requested the Secretary-

General 'to review his decision not to shortlist me'. In her appeal, she requested ... the Secretary-General to:

- '- investigate the decision not to put me on the short-list';
- '- agree that the decision was taken based on incorrect interpretation of facts';
- '- compensate me for the loss in my career prospect'; and
- '- offer me a position at the level of the post in question commensurate with my skills and abilities'.

... By letter dated 19 September [2001], the Secretary of the AJAB advised [the Applicant] that her appeal was not lodged within the time prescribed by Staff Rule 111.1.6. Following her request dated 20 September 2001 for a waiver of the time limits, the AJAB recommended to the Secretary-General to exercise his discretionary power and to waive the time limits. The Secretary-General accepted the recommendation on 27 February 2002.

... In response to her request for review dated 6 August 2001, C/PER advised the [Applicant] on 31 October 2001 that the Secretary-General had reviewed all the facts relating to the post and concluded that 'all the relevant policies and procedures were fully adhered to in filling the post'. He, therefore, maintained the contested decision.

... From 15 October 2002, the [Applicant] was re-assigned on a temporary basis to the post of G-5, Quality and Project Management Clerk, and on 30 August 2003, [the Applicant] was granted a term appointment in the Legal Bureau at G-6, step 10 (top) as a Senior Secretary. This is the post she is currently holding.

... At two subsequent occasions, 8 December 2004 and 23 October 2006, [the Applicant] again applied for the post of G-7, Supervisor, Text Processing Unit, ADB-LPB-FRTPU/FR. Both times the [Applicant] was not selected."

The AJAB heard the appeal on 22 August 2007. Its findings and recommendation read, in part, as follows:

"...

5.3.1 *'Decision not to short-list'*

...

II. The Board, after examining all of the documentation related to the selection process, finds that all three candidates for the G-7 post, including the Appellant, had been named in the short-list dated 21 June 2001, which was prepared by Chief/French Section (C/FR). The short-list and the personnel files were subsequently forwarded through the appropriate channels to the appointments and promotion board (APB) which was properly constituted in accordance with the ICAO Service Code, paragraph 4.8.2 and Annex IV-B. The APB presented its advice and recommendations to the Director of the Administration and Services (D/ADB) who then confirmed the APB's recommendation for the appointment to the post. Based on its review of the material presented to the APB, the Board finds that the Appellant was included on the short list drawn up by C/FR for the G-7 vacancy in question.

...

IV. While noting that the routing of the material followed the guidelines, the majority of the Board is concerned with the inconsistency in the reporting of the three candidates' work history, and with the lack of detail contained in the resume of the candidates. It is noted with some concern that the other two candidates' work was reported as 'satisfactory' and 'very satisfactory' respectively, while the Appellant's work when she encumbered the post which was now to be filled, and for which she had received a merit award, was not qualified at all. From an examination of the material prepared by C/FR there is no indication of the required qualifications for the post, nor is there any discussion of the education or performance reports of the applicants. This information is recommended in the guidelines and would have assisted the APB in doing its work. The majority of the Board is also concerned with the supervisor's decision not to interview any of the candidates for the post in question. In the memorandum of 16 October 2001 from C/REC/EST it was indicated that: 'C/FR did not hold any interviews as the three candidates to the post had worked or were currently working in the French Section. The candidates were all well known to C/FR.'

V. The majority of the Board has some difficulty accepting that the Appellant was in fact well known to C/FR following her absence of more than three and a half years and her subsequent return to work after having been on disability pension for 26 months. The Appellant confirmed to the Board, during the hearing, that she had had no contact whatsoever with C/FR after applying for the vacancy. It is further noted that the Appellant had been required by the Personnel Branch (PER) to re-qualify for the language supplements which she had been in receipt of prior to her illness. This indicates that PER was not prepared to accept any of her previous qualifications. Following the same line of reasoning the Board, by a 2-to-1 majority, is not persuaded that the supervisor did not need to interview the Appellant. As there were only three applicants for the post it would not have been a difficult task to perform the interviews of all of the applicants.

VI. The medical condition may have influenced the supervisor's recommendations on the short-list. At the date of her application for the post vacancy (25 May 2001), the Appellant was working at 40% time. However she had received written authorization on 9 May 2001 to work at 80% time. The Appellant continued to work at 40 % only because her position in RTU was available 2 days per week, the post being shared with another staff member.

VII. The supervisor summarized the Appellant's candidature as follows: 'I feel that after such a lengthy absence it would be difficult for her to resume the very demanding and stressful duties of the post. Furthermore her reinstatement at this stage would not be good for staff morale.'

[VIII]. It is unfortunate that this statement was not substantiated in any way by the supervisor. Without having interviewed the Appellant or, for that matter, the other applicants for the post, the majority of the Board views this opinion with a certain amount of [skepticism]. While recognizing the supervisor's obligation to establish a ranking of the candidates, and the need to formulate an opinion on the candidates' relative merits, the majority of the Board does not consider that the supervisor took the necessary steps, in particular by not interviewing the Appellant, in order to establish the veracity of this statement.

IX. The Board notes the Appellant's assertion that she had maintained good relations with the staff of the French text processing unit, however, it is unfortunate that due to the passage of time the Board is unable to verify this statement.

X. For the preceding reasons, the Board, by a majority of 2 to 1, finds the short-list of 21 June 2001 to be inconsistent, and that it does not adequately adhere to the Guidelines

to supervisors for the preparation of material for the appointment and promotion board ... held by consultation. Nevertheless, after reviewing the file record of the Appointments ... (APB), this majority considers that this did not taint the decision of the APB in its recommendation of another candidate for promotion.

XI. Dissenting opinion of the Chairman of the Board. The dissenting opinion of the Chairman of the Board, with regard to paragraphs IV to IX (both inclusive), and the first sentence of paragraph X, is set out in paragraphs XI to XVI below. The task of the AJAB is to review the factual evidence before it and ask: a) Were the procedures complied with? b) Is there evidence that the Applicant's candidacy was given due consideration? c) Does it appear that the result was based on reason? d) Was the result free from extraneous considerations (e.g., free from prejudice, bias, discrimination, breach of procedure)? e) On the whole, was the promotion process fairly and reasonably conducted? (UNAT Judgements 1252 [(2005)] and 312 [*Roberts* (1983)] refer). The documentation is quite clear: all questions can be answered 'Yes'.

XII. Therefore, as the procedures were complied with, as the candidacy was given due consideration, as the result was based on reason and was free from extraneous considerations, and as the process was fairly and reasonably conducted, I have difficulty in accepting the reasoning applied, and the conclusions arrived at, by the majority of the Board on the points raised above. Hence, my dissent with this part of the findings.

XIII. UNAT, in Judgement 1252 [*ibid*], has stated that it is 'not for the JAB to say which . . . candidates it [considers] to have been most qualified or most suitable, nor is it for this Tribunal to express any view on this particular issue. The United Nations has in place a comprehensive system for evaluating and assessing those very matters. It entrusts those duties to a body with appropriate experience in that particular field. *It vests that body with some discretion as to what matters should be considered and taken into account. . . .*' (emphasis [added]). Following this line of thought, it is my view that it is not this Board's task to determine what factors (including the interviews) in the Guidelines should be considered and taken into account in the preparation of the material for the APB. It is not the task of this Board to second-guess the supervisor in the performance of her duties.

XIV. Further, all relevant information (e.g. required qualifications for the post, educational qualifications, performance reports, candidates' work history) was readily available in the candidates' files that were circulated among the APB. Therefore, the comment by the majority, that there was a lack of detail (para. IV refers), is puzzling.

XV. With regard to the statement reproduced in paragraph VII, it is clear that this was an opinion, formed after a review of all candidates' applications. UNAT Judgement No. 784 [*Knowles* (1996)] is clear on this: opinions cannot be viewed as improper influence and they do not constitute prejudice. The APB did not question this opinion. The Director/ADB, who confirmed the APB's decision on the appointment, did not question this opinion. Whatever the reasons for this opinion, it is not the task of the AJAB to engage in speculation and require that this statement should have been substantiated or its accuracy established (para. VIII refers).

XVI. Finally, on the matter of the interviews: it is a fact that C/FR and the Appellant were colleagues for some four years, in the French Section, prior to the latter going on disability. It is documented that C/FR, herself, had recommended that the Appellant be upgraded from G-6 to G-7 during the latter's incumbency as Supervisor, TPU/FR. In my view these facts, by themselves, indicate that the Appellant was 'well known' to C/FR. Would the absence of the Appellant on disability lead C/FR to 'forget' the Appellant's abilities? This question, though it will remain unanswered, leaves doubts in one's mind. The requirement of PER for the Appellant to re-qualify for the language supplement is

irrelevant because the issue is not whether the Appellant was 'well-known' to PER but whether she was 'well-known' to C/FR.

5.3.2 *'Decision taken based on incorrect interpretation of facts'*

I. The Appellant was requested to explain what she meant by the phrase 'incorrect interpretation of facts'. The Appellant listed three facts that she alleged were not considered by the APB when it made the decision not to select her for the post:

- a. she had returned to work from her disability;
- b. she had not been interviewed; and
- c. she had been 'judged' on her medical condition.

II. The Board has considered each of these allegations, in turn:

A. Return to work from disability:

1. In 1999, the Appellant was separated from service and subsequently received a disability benefit from the [UNJSPF]. In 2001, she re-joined ICAO, working at 40 percent time. The Appellant claims that the fact that she had returned from disability was not made known to the APB and that this non-disclosure to the APB was one element of 'incorrect interpretation' that led to her not being selected.

2. The Board has examined the relevant documentation and is unable to agree with the Appellant's claim. The Appellant's personnel files, which were circulated to the members of the APB, contained full information regarding her current work arrangements, including ICAO medical consultant's report of 9 May 2001 authorizing the Appellant to work up to 80 percent. How much importance the APB placed on this information is beyond the competence of this Board to consider. It is not for the Board to substitute its judgement for that of the APB in the decision-making process (see, for example, UNAT Judgement No.1188, [*Agbele (2004)*]). All that the Board can do is to examine whether the decision-making was bona fide and whether it was made on acceptable evidence. The Board is satisfied after fully reviewing the minutes of the APB that its decision to recommend another candidate was not tainted by any bias or other improper motive. The minutes indicate that all candidates were evaluated by the APB and that the Appellant's application was fully considered by the APB.

B. No interview:

1. The Board's examination of the files indicates that all three candidates for the post were internal candidates and no interviews were held for the vacancy in question. On the matter of such interviews, UNAT, in Judgement No. 1122 [*Lopes-Braga (2003)*], has held that a decision not to conduct interviews is within the Administration's right if there are no external candidates. Accordingly, taken in isolation, the decision not to interview cannot be impugned.

2. However, based on the findings at paragraph V above, the Board, by majority, considers that performing an interview could have resulted in greater transparency of the decision-making process and would have been helpful for the work of the APB.

C. 'Judged' on medical condition:

1. The Appellant claims that her application was 'judged' on her medical condition. The Board finds that the file records do not support this claim. A thorough examination of the personnel files, which were also available to the APB, shows that the files contained accurate and relevant information on the Appellant's medical condition. In particular the file records show that, at the time of the appointment for the G-7 post, the Appellant was

authorized by the ICAO medical consultant to work at 80 percent capacity. The Board can find no evidence that the Appellant was judged in a prejudicial manner based on her medical condition.

5.3.3 *Appellant's request for compensation for loss of prospect; Offer of position*

I. The Appellant's request for compensation for loss of career prospect, and for offer of a position at the level of the post in question would be remedies which rest on, and are consequent to, the success of the first two allegations that the Appellant was not included on the short-list, and that the decision to promote another candidate was based on an incorrect interpretation of the facts. These requests will be taken into consideration in the Board's recommendations.

5.4 *Other matters raised by the Appellant:* The Appellant has raised issues concerning her difficulty in reintegrating into the ICAO Secretariat following her medical recovery and subsequent return from a disability pension. Any consideration by the Board of the questions involving the right of a staff to be re-hired following recovery from a long-term illness, calculation of seniority, and consideration for promotion of such staff members would be fruitless as these matters predate the decision being appealed or are outside the terms of reference of the letter of appeal. However, as a comment, the Board considers that it would be beneficial if the Organization, in particular the Staff Advisory Committee, would look into the matter to determine if ICAO should develop appropriate policies on each of these issues and/or suggest appropriate amendments to the Staff Rules. Accordingly, the Board will bring these issues to the attention of the Staff Advisory Committee for consideration and whatever action it might deem appropriate.

5.5 *Issue of Delay in hearing the Appeal:* The Board notes with great concern the long delay in hearing this Appeal. The Appeal was submitted on 11 September 2001, but, as this date did not respect the prescribed time limit of 30 days from the request for review of the Respondent's decision, the Board was obliged to wait for the Respondent's waiver dated 27 February 2002. This date, therefore, is the date on which the Appeal can be said to have been properly submitted.

5.5.1 The Representative of the Secretary-General presented his comments on 17 August 2007, and the Appeal was heard on 22 August 2007, nearly five and one-half years after it was filed. The matter of this delay was raised by the Appellant, during the hearing.

5.5.2 Even if it is considered that, in the period following 27 February 2002, several Appeals were taken up as a matter of priority, under Staff Rule 111.1.3, second sentence, over the current Appeal, and that two Appeals were taken to UNAT, thereby tying up resources, the Board is of the opinion that such an excessive delay of nearly five and one-half years cannot be accepted and is wrong, both legally and morally. The ICAO Staff Association has tried to address the delays in hearing cases before the AJAB. In particular the Board notes the meeting arranged in April 2005 ... at which solutions to the delays were proposed to the Administration.

5.5.3 UNAT has developed extensive jurisprudence on the subject of excessive delays in hearing appeals at the JAB level. UNAT has held, for example, that such delays are wrongful administrative treatment (Judgement No. 305 [*Jabbour* (1983)], can lead to a denial of justice (No. 414 [*Apete* (1988)], adversely affect the administration of justice and can inflict unnecessary anxiety and suffering (No. 353 [*El-Bokany* (1988)], and, by themselves, are damaging to the conditions of service of United Nations staff members (No. 880, [*Macmillan-Nihlen* (1998)].

5.5.4 In Judgement No. 784 [ibid] UNAT held that '... [A]ll staff members are entitled to a prompt resolution of disputes. Although the Tribunal is fully aware of the Administration's problems arising from the inadequacy of resources, which resulted in this delay, this does not absolve it of its responsibility to hear appeals in an expeditious manner.' In *Apete*, it said that '[n]o extreme burden of work sustained by the representative of the Respondent can excuse such an unconscionable delay of almost three years, merely for the preparation of a rebuttal.'

5.5.5 In Judgement No. 917 [*Ali* (1999)], UNAT held that '[u]ndue delay in taking an administrative decision is a procedural irregularity which adversely affects the administration of justice . . . The violation of the Applicant's procedural rights is in itself adequate moral injury which warrants compensation'. (Emphasis by AJAB.)

5.5.6 Therefore, the Board finds that the Appellant's right to justice was violated by the excessive delay in hearing her Appeal.

6. RECOMMENDATIONS:

Based on the findings above the Board unanimously recommends that:

- a. the claim of the Appellant that she was not included in the short-list should be rejected;
- b. the Appellant's claim ... that the decision to appoint another candidate to the G-7 position was based on an incorrect interpretation of facts, should be rejected;
- c. the Appellant's claim for compensation for the alleged 'loss in career prospect' should be rejected. The Board makes no recommendation on the Appellant's request that she be offered a position at the G-7 level; and,
- d. the Appellant should receive a payment of Canadian \$1,000 as financial compensation from the Organization for the excessive delay in hearing her Appeal."

On 20 August 2007, the Secretary-General of ICAO informed the Applicant as follows:

"I have carefully considered the Opinion of the Advisory Joint Appeals Board ... fully accept the recommendations of the Board in paragraph 6 of its Opinion, in particular that the substance of the Appeal should be rejected but that the Appellant should receive CAN \$ 1,000 as compensation for the excessive delay in hearing her Appeal."

On 26 February 2008, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The ICAO Administration did not properly carry out the recruitment process.
2. The Applicant's due process rights were violated
3. The analysis of the ICAO Medical Consultant was ignored.
4. The job description was intentionally biased in an effort to eliminate the Applicant from the recruitment process.

Whereas the Respondent's principal contention are:

1. There is no right to promotion.
2. The decisions were not based on prejudice, bias, or other extraneous factors.
3. There is no right to be interviewed.
4. The Applicant was not denied due process.

The Tribunal, having deliberated from 16 to 25 November 2009, now pronounces the following Judgement:

I. The Applicant joined the ICAO on 17 October 1988. She was separated from service with effect from 17 March 1999, after a period of sick leave. She thereafter received benefits from the UNJSPF. At the time of separation she held the post of Supervisor, Text Processing Unit, French Section, at the level G-7, Step 5. She did not wish to remain on disability benefits, but made strenuous efforts to return to work. Following medical advice, she returned to work with ICAO as a Registry Clerk in the RTU at G-5/step 8 on a 40% part-time basis from 15 February 2001. Following advice from the ICAO Medical Consultant, that she could work four days a week, her temporary appointment in RTU was extended for further periods from 5 June 2001 to 11 January 2002 on an 80% part-time basis. She has subsequently held other posts, and, as of the date of her Application to the Tribunal, she was a Senior Secretary G-6 level in the Legal Bureau.

II. On 25 May 2001, after a vacancy had been advertised, the Applicant submitted an application for the G-7 post of Supervisor, Text Processing Unit, which she had previously held. She was not selected for the post. She requested a review by the Secretary-General and was advised on 31 October 2001 that the Secretary-General had maintained the contested decision. On two subsequent occasions, on 8 December 2004 and 23 October 2006, the Applicant again applied for the G-7, Supervisor, Text Processing Unit post, but was not selected. The present Application to the Tribunal challenges solely her non-selection in 2001.

Delay in proceedings

III. The Applicant submitted an appeal to the AJAB which is considered to have been properly submitted on 27 February 2002. It then took five-and-a-half years for the AJAB to hear and determine the matter. In its Report of 23 November 2007, the AJAB described the delay on the part of the Administration in presenting its comments as “excessive” and “wrong, both legally and morally”. The AJAB recommended (and the Secretary-General accepted) that the Applicant should receive a payment of Canadian \$1,000 as financial compensation for the excessive delay in hearing her appeal.

IV. The Applicant’s representative states that “all delays were initiated by ICAO Administration” and that “consequently, it was impossible for the Applicant’s representative to call to witness any of the personalities involved in the case as they had left the Organisation for one reason or another”. The Respondent’s representative does not specifically deal with these allegations in the Answer, but the Tribunal notes that the Report of the AJAB found that the Respondent presented its comments on the appeal only on 17 August 2007, and that several other appeals to UNAT were “tying up” resources. The

Tribunal feels bound to comment that, although delays are not unusual, the delay in this case was outrageous and unjustified, and brings the administration of justice in the ICAO into disrepute. However, the Applicant did not present any plea concerning the amount of compensation recommended by the AJAB in respect of this delay.

The Secretary-General's discretion

V. The substantive issues raised by the Applicant all relate to alleged flaws in the procedures adopted by the ICAO when considering the Applicant's application for the G-7 post in 2001. The well-established jurisprudence of the Tribunal "recognises the broad discretion enjoyed by the Secretary-General in matters of personnel, including the decision of whether to maintain a staff member in the employ of the United Nations". (Judgement No. 1231, (2005)). "Only where the Respondent's discretion is tainted by extraneous factors, such as prejudice, arbitrariness, improper motive, discrimination, for example, is such discretion subject to limitation." (See Judgement No. 981, *Masri* (2000), para. VII). Judgement No. 1163, *Seaforth* (2003). In Judgement No. 951, *Al-Khatib* (2000), the Tribunal held:

"Whilst the Respondent enjoys a wide discretion as to what constitutes 'the interest of the Agency' it is not a discretion that is unfettered. It is a discretion which must be exercised rationally. If a decision to terminate the appointment of a staff member under the provisions of staff regulation 9.1 is made capriciously or arbitrarily, that decision will be neither lawful nor valid. Furthermore, the reasons for such a decision should be apparent so that they may be reviewed by a JAB or another body or by the Tribunal. Otherwise the staff member concerned would be unable to exercise fruitfully his or her rights."

The need for transparency is also emphasized in Judgement No. 1092, *El-Hudhud* (2002). In Judgement No. 834, *Kumar* (1997), the Tribunal stated:

"The Tribunal is sympathetic to the fact that the Applicant sincerely believes himself deserving of this post. It has noted that the Applicant's performance evaluation reports have consistently assessed his performance as 'very good' or 'good' and that he has received a number of complimentary letters for a job well done. Nonetheless, 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."

In Judgement No. 828, *Shamapande* (1997), the Tribunal said:

"The Tribunal's jurisprudence emphasizes that it is not the Tribunal's role to substitute its judgement for that of the Secretary-General, but merely to ascertain whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfilled."

Moreover, once the Applicant has made a *prima facie* case of discrimination the Respondent bears the burden of adducing evidence that this is not the case. 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.” (see too Judgement No. 828, *Shamapande* (1997)), and Case No. 1252 (2005), paras. II and III.

These principles must be applied not only to cases of termination and promotion, but also to those, such as the present one, where a staff member seeks reappointment to a post which she left for reasons of disability.

Failure to interview

VI. The first procedural irregularity alleged by the Applicant is that she was not interviewed for the post. The C/FR prepared the short-list for the G-7 post. Three candidates, including the Applicant, were listed. This short-list together with the personnel files were forwarded to the APB. The APB presented its advice and recommendation to the Director of Administration and Services who then confirmed the APB’s recommendation. The AJAB found that all three candidates for the post were internal candidates and none of them was interviewed. The AJAB held that taken in isolation, the decision not to interview cannot be impugned. However, a majority of the AJAB considered that “performing an interview could have resulted in greater transparency of the decision making process and would have been helpful for the work of the APB”. There is some dispute as to what was the “normal practice” of the Organisation in relation to interviews. Apparently, the practice of interviewing candidates is now increasing, but the Tribunal is not satisfied that there was such a policy or practice in 2001. In this case, there was disagreement between the Chairman and members of the AJAB as to whether the Applicant was “well-known” to the C/FR. The Chairman of the AJAB (in his dissenting views) found as follows:

“[I]t is a fact that the C/FR [Chief/French section] and the [Applicant] were colleagues for some four years, prior to the latter going on disability. It is documented that C/FR, herself, had recommended that the [Applicant] be upgraded from G-6 to G-7, during the latter’s incumbency as Supervisor. TPU/FR. In my view, these facts, by themselves, indicate that the [Applicant] was well-known to C/FR.”

The majority of the AJAB, however, had “some difficulty” in accepting that the Applicant was, in fact, well-known to the C/FR following her absence of more than three and a half years.

VII. The Tribunal has consistently held that a decision not to conduct interviews is within the discretion of the Administration if there are no external candidates (see Judgment No.1122, *Lopes Braga* (2003)). One aspect of that discretion is to decide what matters, including interviews, should be considered and taken into account. It is not for the AJAB or for this Tribunal to determine whether or not interviews should be held. Since the candidates were all known to some degree by the C/FR and all the relevant

information, including qualifications for the post, education, performance reports and work history was made available to the APB, the APB was fully entitled to proceed without interviews. For this reason, the Tribunal agrees with the Chairman's dissenting opinion on this point, and finds that the Applicant did not substantiate her claims of discrimination.

Warning of local Staff Advisory Committee

VIII. The Applicant next alleges that due process was denied because "the Administration did not take into consideration the warning by the local Staff Advisory Committee which stated that the Applicant would eventually return to her position". In his Written Observations on the Respondent's Answer the Applicant's representative now states that it was the representative of the ICAO Governing Body on the Staff Pension Committee (SPC), who had cautioned the Administration to take alternative action as the medical condition seemed curable. The suggestion by the Applicant's representative was that the Applicant had been prematurely "pushed into disability", contrary to the recommended precaution.

IX. The Tribunal finds that there was no failure of due process in this respect. If the Applicant was not satisfied with the termination of her employment on medical grounds or with the determination of the Pension Committee, she could have lodged an appeal against these decisions at the relevant time. The Administration had the discretionary authority to determine whether or not to terminate the employment and was not bound to accept a "warning" given by one member of the SPC.

Analysis of ICAO Medical Consultant and Applicant's personal physician

X. The Applicant then alleges that the Administration initially ignored the analysis of the ICAO Medical Consultant and the Applicant's personal physician that the Applicant would eventually be fit to return to work. The record shows that in a letter dated 9 May 2001 the Consultant stated that the Applicant was due to be re-evaluated on 6 August 2001 and "she should optimistically be able to return to work full time soon after that". In fact, she was not medically cleared to resume full-time duties (not for any specific post) until 1 January 2002.

XI. This information was in the possession of the APB when they decided not to select the Applicant. The Tribunal agrees with the AJAB that it is not for the Board to substitute its judgment for that of the APB in the decision-making process (see, for example, Judgement No.1188, *Agbele* (2004)). There is no evidence on record that would raise a doubt as to whether full and fair consideration was given to the medical information.

The job description

XII. The Applicant alleges that the post description was “concocted” so as to eliminate the Applicant. This argument was not raised before the AJAB which, therefore, could not deal with it and it is not receivable before the Tribunal.

Memorandum from the Chief of the French Section

XIII. In a confidential memorandum dated 21 June 2001, produced by the Applicant, the Chief of the French Section gives her opinion on the three candidates for the post. In relation to the Applicant she states:

“[The Applicant] has not worked in the French section for over three years. Moreover she is still not working full time. I feel that after such a lengthy absence it would be difficult for her to resume the very demanding and stressful duties of the post. Furthermore, her reinstatement at this stage would not be good for staff morale.”

The Tribunal finds it unnecessary to express any view on the issue of how this document came into the Applicant’s possession, but it is satisfied that the document was included in the APB file, even though it was marked “confidential” and was not made available to the Applicant.

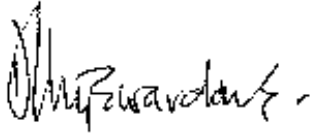
XIV. The Applicant claims that the memorandum amounted to a denial of due process because the C/FR “countermanded the opinions of the ICAO Medical Consultant, the Applicant’s personal physician and the local Staff Advisory Committee”. There is no evidence that the Consultant, physician or SPC ever commented on the ability to fill this particular post. The majority of the AJAB, after reviewing the file record of the APB concluded that the supervisor’s report did not taint the decision of the APB in its recommendation of another candidate for promotion. The Tribunal agrees with the Chairman of the AJAB that the C/FR’s memorandum was an opinion formed after a review of all the candidates’ applications, and that “opinions cannot be viewed as improper influence and they do not constitute prejudice,” citing UNAT Judgement No.784, *Knowles* (1996). It was not the task of the AJAB to engage in speculation as to the effect of this opinion on the APB and on the Director/ADB, who confirmed the APB’s decision on the appointment.

Conclusion

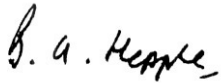
XV. Accordingly, the Tribunal finds that the Administration afforded the Applicant full and fair consideration, and that there was no prejudice, bias, improper motive, or failure of due process.

XVI. For the foregoing reasons, the Tribunal rejects the Application in its entirety.

(Signatures)



Dayendra Sena **Wijewardane**
President



Sir Bob **Hepple**
First Vice-President



Brigitte **Stern**
Member

New York, 25 November 2009



Tamara **Shockley**
Executive Secretary