



Administrative Tribunal

Distr. Limited  
23 December 2009

Original: English

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1496

Case No. 1598

Against: The Secretary-General  
of the International Maritime  
Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Dayendra Sena Wijewardane, President; Ms. Jacqueline R. Scott; Ms. Brigitte  
Stern;

Whereas, on 23 May 2008, a staff member of the International Maritime Organization (“IMO”) filed an  
Application requesting the Tribunal:

“II. PLEAS

- (a) To rule that the application is receivable despite the lack of a JAB [Joint Appeals Board] hearing or of the Respondent’s agreement to submit the case directly to the Tribunal;
- (b) To order the Respondent to make arrangements for a JAB hearing in accordance with Staff Regulations and Staff Rules of IMO, as previously requested by the Applicant;
- (c) To order the Respondent to pay to the Applicant the sum of US\$2,000 as compensation for the trouble she has been put to in availing herself of the right to a JAB hearing.”

Whereas the Respondent filed his Answer on 2 September 2008;

Whereas the Applicant filed Written Observations on 6 October 2008;

Whereas the facts of the case read as follows:

At the time of the Applicant's separation from IMO, she held a non-established post at the G-5 level (Principal Secretary) on a fixed-term appointment basis in the Pollution Response and TC Coordination Section of the Marine Environment Division (MED). During her employment with the IMO, the Applicant had worked in a variety of posts, including 18 months in temporary posts, since October 1997. The Applicant was appointed to the post in MED on 1 July 1999.

On 28 June 2007, following discussions between the Administration and the Applicant, the Applicant was offered terms and conditions for an agreed separation from employment with the Organization which included a lump sum payment of 12 months net pensionable salary and special leave with pay for two months (subsequently extended to three months). On 3 September 2007, the Applicant signed a memorandum agreeing to the proposed terms and conditions.

On 12 December 2007, the Applicant wrote to the Secretary-General stating that, while on sick leave, she had been manoeuvred into signing a letter of agreed separation after eight years of unblemished service in the MED. She explained that she had been given no reason why it had been necessary to terminate her employment and announced her intention of initiating steps to file an internal appeal.

On 30 January 2008, the Applicant wrote to the Director of the Administrative Division, enclosing a sealed envelope addressed to the JAB Chairman setting out the substance of her appeal and asking the Director of the Administrative Division to forward the letter to the JAB Chairman.

On 22 February 2008, the Director of the Administrative Division returned the sealed envelope to the Applicant, noting *inter alia*, that her appeal was time-barred and informing her that IMO would not entertain further exchange of correspondence in relation with her case.

On 5 March 2008, the Applicant wrote back to the Director of the Administrative Division arguing, *inter alia*, that the Administration could not refuse to set up a Board to consider her appeal which she considered to be within the scope of the relevant staff regulation; and that it was for the JAB and not the Secretary-General to determine whether exceptional circumstances existed to waive the time limits.

On 25 March 2008, the Head, Human Resources, again returned the sealed envelope addressed to the JAB Chairman, advising the Applicant that the Organization's position remained unchanged and that it would no longer respond to the Applicant's correspondence in relation to this matter.

On 11 April 2008, the Applicant wrote to the Director of the Administrative Division seeking the agreement of the Secretary-General to directly submit the case to UNAT. The Applicant received no reply to her letter.

On 23 May 2008, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant's application is appropriate for an exception to article 7 receivability rules.
2. The Administration denied the Applicant's right to have access to the appeals procedure, including recourse to the Administrative Tribunal.

3. Her request for compensation is justified by the Administration's failure to respect "both the letter and the spirit of the Staff Rules".

Whereas the Respondent's principal contentions are:

1. The Applicant's application is not receivable under article 7 of the Statute since, in the absence of any administrative decision to be appealed, the dispute has not been submitted to a JAB, and in the absence of any grounds to do so, the Secretary-General has declined to give his consent to having the Applicant's appeal submitted directly to the Tribunal.

2. The Applicant's request for the Respondent to be ordered to convene a JAB to consider the Applicant's case should be denied on the grounds that, in light of the separation agreement signed by the Applicant, there is no administrative decision which can be subject of review by a JAB.

3. The Applicant's request for compensation should be denied because there is no existing right to a JAB in her case, and there are no grounds or justification for awarding compensation under the circumstances.

The Tribunal, having deliberated from 26 October to 25 November 2009, now pronounces the following Judgement:

I. The facts relating to this rather unusual Application are relatively simple as far as they are known to the Tribunal. The Applicant worked with the IMO since October 1997. She worked as a Principal Secretary in the MED of IMO from July 1997 until her separation from service in October 2007. For a period of about two years prior to her separation the Applicant sought a transfer from her post with the MED but such opportunities were limited in IMO and she had to remain where she was. It would appear that she sought a transfer because of her general dissatisfaction with what she was doing and differences which had arisen with her immediate supervisor in the discharge of her functions. Efforts to resolve these issues led to more pointed discussions on the subject of her future with the Organization, commencing February 2007, leading finally to an agreed separation, the terms of which were communicated to the Applicant by the Administration on 28 June 2007. On 3 September 2007, she accepted these terms in "full and final settlement of any claims related to [her] separation from IMO service". For three months prior to her separation the Applicant was placed on Special Leave with Full Pay.

II. Some three months after she had separated from service the Applicant wrote a letter, dated 12 December 2007, to the Secretary-General of IMO questioning the validity of the arrangements that had led to her separation and claiming that a "serious miscarriage of justice" had taken place. She maintained that at a time when she was on sick leave she had been "manoeuvred" into signing the letter of agreed separation. She put her grievance thus: "Against a background of a deteriorating situation with my immediate supervisor ... and having exhausted all IMO grievance procedures available to me to redress the situation I found myself pressured into terminating my contract prematurely". She claims that the breakdown in her working relationship arose out of her questioning "certain practices"; that she had not been informed "sufficiently" of her rights; that she had signed the letter of 3 September 2007 under "duress", and that her separation amounted to a "possible constructive dismissal". She followed up on

this letter with a further letter, dated 30 January 2008, asking for an investigation into the circumstances which led to what she describes again as her “unfair dismissal”; expressing a wish “to put forward further evidence” to substantiate her claims; and requesting that a JAB be convened. She claimed that there were “exceptional circumstances” which justified the delays in pursuing her grievances. She also enclosed a letter, apparently in a sealed envelope and addressed to the Chairman of the JAB.

III. However, the letter addressed to the Chairman of the JAB did not reach the addressee but was returned to the Applicant. Little effort was made to address the Applicant’s concerns. Had such efforts been made, it might have led to a more expeditious resolution of her complaints – whether justified or not. The Applicant’s sealed letter to the Chairman of the JAB sent on 30 January 2008 was returned to her on 22 February 2008 on the grounds that there was no administrative decision for her to question and that in any case it was out of time under staff rule 111.2. The Applicant sent the letter back to the Administration on 5 March 2008 and it was again returned on 25 March. She was also told that no further correspondence with the JAB would be acknowledged or returned. The Applicant then sought the agreement of the Secretary General of IMO to make a direct submission to this Tribunal under article 7 of the Tribunal’s Statute. There is some doubt whether that letter was responded to, but in any case there is no doubt that such agreement was not forthcoming.

IV. Consequently, the Applicant seeks the intervention of this Tribunal unilaterally, despite the terms of article 7, and asks the Tribunal to (a) rule that the Application is receivable despite the lack of a JAB hearing or of the Respondent’s agreement to submit the case directly to the Tribunal; (b) order the Respondent to make arrangements for a JAB hearing in accordance with the Staff Regulations and Rules of IMO, and (c) order the Respondent to pay the Applicant a sum of US\$2,000 as compensation for the trouble she experienced in availing herself of the right to a JAB hearing.

V. There is no question that the Administration found the Applicant’s attempt to question the validity of the agreed separation as irksome and even frivolous, especially it would seem, after the time and effort the Administration had invested in reaching such a settlement. They saw the Applicant’s separation not as any form of dismissal but as a “separation from service agreed on the basis of the most favourable conditions allowed under the applicable Staff Regulations and Rules” which had followed a “process of negotiations” and was “voluntar[y] with full knowledge of its substance and implications and with more than adequate time to seek advice”. What was at issue was a mutual agreement entered into in good faith and at arms length. The Respondent believed it was not appealable as there had been no administrative decision as required by the Staff Rules.

VI. The Tribunal has consistently emphasized a staff member’s right to judicial recourse against administrative decisions. In Judgement No. 1390, the Tribunal made the following finding:

In addition, the Tribunal here notes that it is not simply the Applicant who is harmed when the Administration fails to follow its own rules, as it is required to do. (See Judgement No. 1275 para. X

(2005), citing Judgement No. 943, *Yung* (1999).) The whole administrative process, in fact, has a diminished value when a staff member is substantially deprived of due process. The Tribunal underlines this point, for the consistent and unfailing respect for the due process of law by the Administration is the first and foremost part of any successful and satisfactory system of administrative justice. Judgement No. 1390 (2008); *see also* Judgements No. 650, *Bakr et al.* (1994) and No. 684, *Abdul Rahim* (1994).

VII. The Respondent's approach to the claims which the Applicant sought to advance was essentially to bolt the doors. The correspondence reveals that the letters which the Applicant sent addressed to the JAB were tossed around without any serious consideration or reference to substance. Plausible and convincing as the position of the Administration might have been in the eyes of the Respondent, it led the Respondent to commit a serious error in the way the Applicant's protestations were handled. Whilst the Respondent was not in any way inhibited in stating its case and making clear its position, it could not deny the Applicant access to the recourse process which the Respondent itself had put in place under established rules and procedures. Nor can the Respondent become the judge in its own cause. The matters of fact and law at issue in this Application should have been evaluated by the established appeals process as it was clearly the right of the Applicant to have her case examined and to canvass it before the independent body established for this purpose. If, as alleged by the Respondent, the Applicant sought to "abuse the process", if her case was frivolous, if she had not observed the rules which were binding as to time limits, or other constraints and procedures applicable to her, as to all other possible applicants, then the Respondent should have taken up these positions before the very legal mechanisms and procedures that the Respondent had laid down for such purposes. The Respondent's position in this case cannot lead him to arrogate the task of deciding it with no reference to the legal machinery provided by the rules.

VIII. The Tribunal finds the Respondent's position all the more surprising in view of its decision in *Brimicombe and Ablett*, which was a case arising from the IMO itself. (See, Judgement No. 871, *Brimicombe and Ablett* (1998)). In that case, the Tribunal upheld the principle that an applicant cannot be excluded from having access to a fair and independent review as provided for in IMO staff rule 111.1. Implicit in the judgement is the assertion by the Tribunal of the staff members' right to have their claims adjudicated even on the basis of a special exception to the provisions of article 7 of the Statute, despite the explicit language in which the provisions as to "receivability" of applications by the Tribunal are laid out in that Article. The Tribunal in that case dealt with what it termed the "apparent inaction" to do what was necessary and reminded the Respondent of the "importance of respecting both the letter and the spirit of the Staff Rules". In the case at hand the Tribunal is not dealing with an issue of delay or apparent inaction but a refusal to submit the Applicant's case for whatever it was worth to the JAB or to agree to the case being submitted directly to the UNAT pursuant to article 7 of the Tribunal's Statute. However frivolous the Respondent might consider the Applicant's claim to be, there are matters of fact which needed elucidation and therefore had to pass through an initial fact finding stage.

IX. In light of the foregoing, the Tribunal finds that the Administration violated the Applicant's due process rights by refusing to either convoke a JAB to consider her case or to agree to submit her case directly to the Tribunal

on an agreed statement of facts. The Tribunal finds that the sum of US\$2,000 requested by the Applicant is an appropriate compensation for the violation of the Applicant's due process rights by the Administration.

X. The Tribunal further finds that the Applicant must be given the opportunity to have her case considered by a competent fact-finding body.

XI. Accordingly, the Tribunal:

1. Awards the Applicant US\$2,000 in respect of the violation of her due process rights, payable at eight per cent per annum from 90 days from the date of distribution of this Judgement; and
2. Orders the Respondent to ensure that a Joint Appeals Board be convoked for the consideration of the Applicant's case without delay.

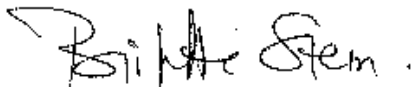
*(Signatures)*



Dayendra Sena **Wijewardane**  
President



Jacqueline R. **Scott**  
Member



Brigitte **Stern**  
Member

New York, 25 November 2009



Tamara **Shockley**  
Executive Secretary