



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/024/  
UNAT/1648  
Judgment No.: UNDT/2011/026  
Date: 1 February 2011  
Original: English

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**Before:** Judge Goolam Meeran

**Registry:** New York

**Registrar:** Santiago Villalpando

MAJBRI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

George Irving

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

## **Issue**

1. The Applicant appeals against the administrative decision of 16 January 2007 not to select him for the D-1 post of Chief, Arabic Translation Services (“ATS”).
2. In the joint submission of the parties, dated 28 May 2010, they identified the legal issues as follows:
  - a. whether the Applicant was given full and fair consideration for the post of Chief, ATS;
  - b. whether the selection exercise was tainted by prejudice, bias, discriminatory or unfair treatment, or other extraneous factors; and
  - c. whether the selection exercise was vitiated by procedural irregularities.

## **Relief sought**

3. The Applicant seeks the following relief:
  - a. rescission of the decision not to appoint him as Chief, ATS;
  - b. retroactive promotion, or alternatively, for the Tribunal to fix an amount in compensation;
  - c. compensation of three years net base salary; and
  - d. costs of USD10,000 (legal fees) and USD500 in expenses and disbursement.
4. There was much documentary evidence relating to the alleged unfair and discriminatory manner in which the Applicant was treated by the Chief, ATS, Mr. Al-Jijakli. In particular, the reports of an investigation panel and a rebuttal panel

both found evidence of unfair treatment of the Applicant by Mr. Al-Jijakli (see at para. 12 below). However, this was not the claim that the former United Nations Administrative Tribunal was requested to consider and adjudicate upon.

## **Findings of fact**

### *The Applicant's professional background*

5. The Applicant is a career international civil servant with over 27 years of experience in the United Nations. At the time of the contested decision, he held the P-5 post of Senior Reviser, ATS, Department of General Assembly and Conference Management (“DGACM”), and continues to do so. He has held this post since 1 February 2000, making him the most senior Reviser in the Arabic Service, and has also served previously as Programming Officer, Training Officer and Officer-in-Charge (“OIC”) of the Service.

### *The previous appointment to the post of Chief, ATS*

6. Historically, it had been the practice in ATS, in filling vacancies for the post of Chief, for the most senior reviser to be appointed OIC pending a substantive appointment. In 2004, the Chief, ATS, retired from service and the post became vacant. At that time, the Applicant, who served as Programming Officer, his then colleague, Mr. Al-Jijakli, who served as Training Officer, and Mr. El-Shaer, a P-5 Officer, applied for the post. The Applicant was short-listed, but was not selected. Mr. Al-Jijakli was appointed Chief, ATS, some 16 months prior to his age of retirement. Both the Applicant and Mr. El-Shaer were rostered.

7. Immediately upon his appointment, Mr. Al-Jijakli removed the Applicant as Programming Officer and replaced him with Mr. El-Shaer. It is not surprising that the Applicant was upset at this decision. The continuing tensions between the Applicant and Mr. Al-Jijakli eventually led to the filing of a formal harassment complaint and an e-PAS rebuttal by the Applicant.

8. The Applicant complained to the Ombudsman about what he perceived as favouritism towards Mr. El-Shaer aimed at grooming him to be Mr. Al-Jijakli's successor. The Applicant also filed a formal harassment complaint and rebutted his electronic appraisal system ("e-PAS") evaluation. These complaints are of peripheral relevance to the claim before the Tribunal, though, Counsel for the Applicant submitted that the treatment by Mr. Al-Jijakli affected the Applicant's interview performance. A more appropriate question is whether there is any evidence that Mr. Al-Jijakli exerted undue influence in the selection process. If he did so, this would that have constituted a material irregularity in the proceedings. The evidence before the Tribunal is that Mr. Al-Jijakli was not involved in the selection process.

*The report of the investigation panel*

9. Following the Applicant's complaint to the Office of Internal Oversight Services ("OIOS") over abuse of authority in the ATS, it was decided to delay the appointment and set up an investigation panel to look into the Applicant's charges of discriminatory treatment and favouritism.

10. The investigation panel's report of 12 October 2006 found that there was a conflict of personality between Mr. Al-Jijakli and the Applicant and that the latter had been treated unfairly by Mr. Al-Jijakli, although the report stated that the Applicant was not "a hapless victim". The panel concluded that the Applicant had originally "been treated as the successor-designate under Mr. Al-Jijakli's predecessor [the former Chief, ATS]", and when Mr. Al-Jijakli was chosen it "seemed ... there may have been an implicit agreement that [the Applicant's] turn would come next". Paragraph 18 of the report is significant in that it describes Mr. Al-Jijakli's interaction with the Applicant as "not always professional and may even be described as retaliatory". Following the report of the investigation panel, the Under-Secretary-General ("USG"), DGACM, asked the staff concerned in ATS to set aside past divisions and to focus on their professional duties. This seems to the Tribunal to have been sensible advice in terms of effecting a positive cultural change, but in the absence of concrete steps in relation to the Applicant it was of little comfort to him.

*The report of the rebuttal panel*

11. From April to July 2005, the Applicant, Mr. Al-Jijakli and Ms. Xian Zhang (the Applicant's Second Reporting Officer) worked on and signed off on the Applicant's e-PAS for the period 2004-2005. Mr. Al-Jijakli rated the Applicant's performance as "fully successful" while noting concerns and marking a number of core and managerial competencies as "developing". Ms. Zhang stated her concern for the record that the Applicant, whom she had evaluated as Second Reporting Officer since 2002 and whom she had rated as "consistently exceeds expectations", was now receiving "a considerable lowering" in his overall rating "for which no explanation has been forthcoming". The Applicant rebutted this e-PAS.

12. On 6 November 2006, the rebuttal panel submitted its report on the Applicant's 2004-2005 e-PAS. The rebuttal panel found the e-PAS to be "so tainted by improper motives as to merit being set aside". The rebuttal panel recommended that the Applicant's performance rating be upgraded to "frequently exceeds performance expectations".

*The selection process*

13. The Tribunal's findings, based on the documents and Mr. Sekel's evidence, are as set out below.

14. On 16 November 2005, a vacancy announcement was issued for Mr. Al-Jijakli's post in anticipation of his retirement from service on 1 April 2006. Five candidates in total were short-listed, including the Applicant and Mr. El-Shaer.

15. On 31 March 2006, Mr. Al-Jijakli retired. Prior to his departure, he named Mr. El-Shaer to be OIC of the Service, a practice he had followed on a number of occasions previously during his absences. Mr. Sekel, who then acted as OIC of the Documentation Division of which ATS was part, stated that he introduced a rotation system in the expectation that it would be a short process before a substantive appointment was made. In the event matters dragged on, and although he was not

certain as to the period when Mr. El-Shaer acted as OIC, he was prepared to accept that it was for a longer period than he would have expected. This practice was at variance with the one followed in the past whereby the most senior reviser had been appointed OIC in anticipation of a final decision on filling the post of Chief. Had this practice continued, the Applicant would have been appointed OIC instead of Mr. El-Shaer. The Applicant took this change in practice as further evidence of favouritism towards Mr. El-Shaer.

16. In compliance with the Tribunal's order, the Respondent called Mr. Sekel to give evidence. Prior to his retirement on 31 December 2008, Mr. Sekel was Director of the Documents Division in DGACM.

17. Mr. Sekel was aware of the difficult relationships within ATS, which he referred to as being dysfunctional. He called a meeting of ATS staff on 28 March 2006 in order to reassure them that there was no substance in the rumours that the outcome of the selection process for appointing Mr. Al-Jijakli's successor was predetermined.

18. The selection panel was broadly representative and consisted of five members with no preconceived notions or preferences regarding the final outcome. The selection process was competency-based and in accordance with the Office of Human Resources Management ("OHRM") guidelines. There were in excess of fifty applications and five were deemed to meet the eligibility requirements. All candidates were asked the same questions.

19. Mr. Sekel instructed the selection panel that no account was to be taken of the disputed e-PAS report, but that the prior rating given to the Applicant, where he scored the highest marks, and the fact that he had been rostered previously should be taken into account so as to ensure that he was not disadvantaged. Mr. Sekel was required to explain why it was necessary to conduct an interview given the fact that three of the candidates had previously been rostered. He explained that since two had

not been rostered, and would have been subjected to an interview, fairness demanded that all concerned should have been interviewed

20. Interviews were held on 5 and 6 April 2006. Mr. El-Shaer was recommended for appointment by Mr. Sekel as the Programme Case Officer (“PCO”).

21. Mr. Al-Jijakli played no role whatsoever in the recruitment process. The panel reached its decision by each member first assessing the candidates and then the panel reached an agreed score after discussion. Mr. Sekel stated that there was not a wide divergence in scores and he produced the relevant documentary evidence to prove this point.

22. As PCO for the selection process, Mr. Sekel made the final recommendation to the USG, DGACM. Four candidates were rostered. He heard that the USG, having regard to the difficult relationship between the Applicant and Mr. El-Shaer, wanted to ensure that all reasonable steps had been taken to arrive at a fair decision. The USG asked for an investigation into the way the Applicant was treated by Mr. Al-Jijakli and also into the question regarding the rebuttal process.

23. On 30 May 2006, Ms. Zhang submitted a letter to the USG, DGACM, relating her concerns of favouritism in the selection process for the D-1 post.

24. On 24 November 2006, the USG asked the interview panel to review its evaluation of the candidates in light of the investigation report and the outcome of the rebuttal process, both of which lent support to the Applicant’s allegations against Mr. Al-Jijakli. Such a review, the Tribunal was told, was unprecedented. In the event, the panel met on 1 December 2006. They read the reports and, having taken into account the contents, including the criticisms made against Mr. Al-Jijakli, they concluded that the reports had no bearing on the assessment and ratings they had given to the candidates.

25. On 16 January 2007, the USG, DGACM, informed the Applicant that he had not been selected for the post and that he was being placed on a roster of candidates for similar posts. He has not since been promoted.

26. On 9 February 2007, the Applicant requested an administrative review of the decision not to select him for the vacant post.

*Comment on Mr. Sekel's evidence*

27. Despite Counsel of the Applicant's cross-examination of Mr. Sekel for the purpose of testing the objectivity and procedural propriety of the entire selection process, he was unable to adduce evidence that would call into question the fairness and objectivity of the process. However, there is one aspect in respect of which Mr. Sekel's evidence did not seem to be entirely convincing to the Tribunal. This relates to the question whether the manner in which Mr. Al-Jijakli had treated the Applicant could have had an adverse effect on the Applicant's self-confidence such that it could have affected his interview performance. Furthermore, the fact that Mr. El-Shaer had been given considerable opportunities as OIC could have placed him at an advantage, particularly in relation to questions regarding management. The Tribunal takes note of Mr. Sekel's assurances that these factors did not disadvantage the Applicant in any way. However, the Tribunal takes judicial notice of the fact that in the vast majority of cases an individual working in an oppressive environment, as found by the investigation panel, is bound to suffer a loss of self-esteem, which could affect interview performances. To this extent, the Tribunal was skeptical of Mr. Sekel's evidence. However, in the absence of any cogent evidence that the Applicant's interview performance was adversely affected by the manner in which he had been treated by Mr. Al-Jijakli and, more importantly, evidence that Mr. Al-Jijakli influenced the outcome, the Tribunal does not have sufficient material from which it would be reasonable or legitimate to conclude that there was a material irregularity in the selection process.



*The appeal to the Joint Appeals Board (“JAB”)*

28. The JAB concluded that the selection process had not violated the Applicant’s terms of appointment.

29. The Applicant’s complaint to the JAB was that he was denied full and fair consideration for promotion to the post of Chief, ATS, by the actions of the previous Chief. It should be noted that it was not the function of the JAB panel to decide who was the most suitable candidate. Its task was to review the process and to determine if the relevant procedures appeared to have been complied with, that there was evidence that the Applicant’s candidacy was given due consideration and that the result appears to have been free from extraneous considerations and bias or prejudice. (See also the former Administrative Tribunal Judgements No. 828, *Shamapande* (1997) and No. 834, *Kumar* (1997), which are persuasive on this point, though not binding).

30. The Dispute Tribunal is, in effect, exercising an appellate jurisdiction in substitution for the former Administrative Tribunal in relation to appeals against the administrative decisions of the Secretary-General. It is not the function of the Dispute Tribunal to carry out a comprehensive investigation into the substantive complaints made before the JAB. The Tribunal’s task is to consider whether there were any procedural errors that call into question the legitimacy of the findings and/or recommendation of the JAB panel. Did the JAB panel misinterpret or misapply the relevant legal principles or ignore material evidence such that a manifest injustice may have been caused to the staff member? (See also *Bridgeman* UNDT/2010/018, para. 37.)

31. In its Report No. 1991 of 15 July 2008, the JAB panel dismissed the Applicant’s appeal, since it found that the Respondent had not violated his terms of appointment in the selection process. On 23 September 2008, the Deputy Secretary-General transmitted to the Applicant a copy of the report of the JAB panel and informed him that the Secretary-General had decided to follow the JAB panel’s

recommendation and that no further action would therefore be taken in regard to his appeal

32. On 14 November 2008, the Applicant submitted an application to the former United Nations Administrative Tribunal, contesting the Secretary-General's decision.

### **Conclusion**

33. The case before the Tribunal was whether the Applicant was given full and fair consideration as candidate for the post of Chief, ATS, whether there were any procedural irregularities, and whether the selection process was tainted with bias.

34. Having examined the documents and having heard the evidence from the PCO of the selection panel, Mr. Sekel, the Tribunal is satisfied that there was no material irregularity in that all relevant procedures and guidelines were followed. The JAB panel's examination of the facts is not tainted by procedural error or bias. The application before this Tribunal fails and is dismissed.

### **Comment**

35. Although the claim before the Tribunal fails, it is clear that had the Applicant brought proceedings alleging unfair treatment on the part of Mr. Al-Jijakli, the outcome might well have been different.

36. Article 101, para. 3, of the Charter of the United Nations states that:

The 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.

...

37. Staff regulation 1.2 (Basic rights and obligations of staff) mentions, amongst others, as "core values" that:

...

(b) Staff members shall uphold the highest standards of efficiency, competence and integrity. The concept of integrity includes, but is not

limited to, probity, impartiality, fairness, honesty and truthfulness in all matters affecting their work and status.

38. In the present case, the Applicant's complaints of unfair treatment were upheld by the investigation panel, whose report and conclusion gave rise to serious questions relating to the integrity of the system and its failure to ensure a working environment free from unfair and oppressive managerial behaviour. Yet the Applicant, as the recipient of such conduct, is left without a remedy because he did not negotiate a further hurdle of bringing a separate complaint in accordance with the applicable procedures. The question that has to be asked is whether there is an effective mechanism for redress of grievances within the United Nations. It would be wholly undesirable, and inconsistent with the underlying scheme of internal justice, if staff members were compelled to resort to formal mechanisms to resolve grievances because their management appears to seek cover behind formal processes.

*(Signed)*

Judge Meeran

Dated this 1<sup>st</sup> day of February 2011

Entered in the Register on this 1<sup>st</sup> day of February 2011

*(Signed)*

Santiago Villalpando, Registrar, New York