

ORGANISATION
FOR ECONOMIC
CO-OPERATION
AND DEVELOPMENT



ORGANISATION DE
COOPÉRATION ET
DE DÉVELOPPEMENT
ÉCONOMIQUES

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 8 November 2021

JUDGEMENT IN CASE No. 97

AA

v.

Secretary-General

Translation (the French version constitutes the authentic text).

JUDGMENT IN CASE No. 97 OF THE ADMINISTRATIVE TRIBUNAL

Hearing on 7 October 2021

In Château de la Muette,

2 rue André-Pascal à Paris

The Administrative Tribunal consisted of :

Mrs. Louise OTIS, Chair

Mr. Pierre-François RACINE

And Mr. Chris DE COOKER

with Mr. Nicolas FERRE and Mr. David DRYSDALE providing Registry services.

The Tribunal heard

Mr. Christophe COURAGE, counsel of the Applicant ;

Mr. Auguste NGANGA-MALONGA, Senior Legal Advisor of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General ;

Monsieur Jeremy MADDISON, Président de l'Association du personnel

INTRODUCTION

1. In his application for annulment and compensation lodged with the Registry on 14 October 2020, Mr AA (hereinafter the Applicant) requests that the Secretary-General's decision of 23 August 2020 rejecting his prior request of 8 July 2020 for the withdrawal of a decision of 11 May 2020 refusing his request to refer a matter to the Joint Advisory Board (JAB) of the Organisation for Economic Cooperation and Development (hereinafter the Organisation) be annulled. He asks the Tribunal to order the Organisation to convene the Joint Advisory Board (JAB) for the purpose of obtaining an opinion, and to pay him 1,000 euros in moral damages as well as 3,840 euros in costs.
2. The Secretary-General submitted his comments on 16 December 2020.
3. The Applicant submitted a reply on 15 January 2021.
4. The Secretary-General submitted his comments in rejoinder on 15 February 2021.
5. The Staff Association submitted written comments on 14 January 2021.
6. All the documents cited and produced by the Applicant (annexes) bear the reference letter **R**, whereas those cited and produced in defence by the Organisation (documents) bear the reference letter **O**.
7. The application hearing was held on 7 October 2021. Counsels for the Applicant, the Organisation and the Staff Association were heard.

The facts

8. After reviewing the documentary evidence, the Tribunal singles out the following facts as relevant:
9. The Applicant, who is of French nationality, holds a first degree from Paris Nanterre University in science and techniques in sports and physical activities, a one-year master's degree from Paris Dauphine University in sports economics and management

and, finally, an MBA from the Institut d'Administration des Entreprises of Panthéon-Sorbonne University.¹

10. On 22 April 2014, the Applicant was recruited by the Organisation as a member of the temporary staff at the Copy Centre of the Organisation's Conference Centre.
11. In the summer of 2015, the Applicant applied for a job as an operator in the digital print shop, grade C4, within the Executive Directorate/Digital, Knowledge and Information Service (EXD/DKI). At the end of the selection process, the Applicant's application was unsuccessful.
12. However, the selection panel placed the Applicant on the list of candidates it considered likely to be selected to fill vacant positions. Thus, for a period of 24 months from the date of compilation of the list, the Applicant might be chosen for other identical or comparable positions without the need to launch a new selection procedure.²
13. In this context, on 4 April 2016, the Applicant received and accepted an offer of appointment as an official assigned to operator duties at the digital print shop. This appointment, lasting two (2) years, was classified as grade C3, as recommended by the selection panel in 2015. The appointment was subject to a probationary period of six (6) months.³
14. On 3 April 2018, on the recommendation of his superior, the Applicant was promoted to grade C4, step 1 and his appointment was renewed for one (1) year. There was then a final contract renewal from 3 April 2019 to 31 December 2019.⁴
15. Before the end of his appointment in 2019, the Applicant applied for a position as an operator at grade C4 in the digital print shop. He took part in the selection interviews but was unsuccessful, even though the vacancy was identical to that in 2015 for the position for which the Applicant had qualified and that he had held for three (3) years.

¹ Sorbonne Business School.

² Instructions 107/6 and 107/12

³ Documents O-3, O-3.1 and O-4.

⁴ Document O-8.

16. On 11 September 2019, the Applicant received written confirmation from the Human Resources Management Service that his fixed-term appointment would end on the scheduled date, i.e. 31 December 2019.
17. On 2 December 2019, the Applicant sent the Secretary-General a letter complaining of unjustified and discriminatory treatment he had suffered within the Mail and Printing team in the EXD/DKI/DWS division, including the laborious and unfair terms attached to the renewal of his appointments and to his move to grade C4 even though he was performing the same duties as other officials classified at grade C4. He also alleged that he was treated unfairly in April 2019 when he was rejected for a vacancy that exactly matched the positions he held at the end of the recruitment process. He recommended that the Organisation's contractual policy be revised in order to avoid the continuation of such arbitrary practices, and also asked for 28,000 euros of compensation for the damages suffered.⁵
18. On 14 February 2020, the Secretary-General, through the Organisation's Executive Director, stated that no fault had been committed and rejected the Applicant's compensation claim, but offered him outplacement services to facilitate his professional transition.⁶
19. On 4 April 2020, the Applicant asked the Secretary-General to refer the matter to the Organisation's Joint Advisory Board (JAB) 'in order to obtain its opinion on the decision dated 14 February 2020 taken on the Secretary-General's behalf (...) not to acknowledge the injustices of which I was a victim during the period of my appointment at the OECD from 4 April 2016 to 31 December 2019 and not to compensate for this damage accordingly'.⁷
20. This request, which was rejected by the Executive Director on 11 May 2020 on grounds of late submission and lack of competence⁸, was the subject of a withdrawal request which the Secretary-General rejected on 23 August 2020 for the same reasons.⁹ It is

⁵ Document R-1.

⁶ Document R-2.

⁷ Document R-3.

⁸ Document R-4. R-5

⁹ Documents R-5, R-6.

this decision refusing to refer the matter to the JAB that has been brought before the Tribunal.

The dispute

21. The Applicant alleges that the decision to deny him access to the Organisation's Joint Advisory Board (JAB) is groundless in that:
 - i) His request for referral to the JAB was admissible because it was submitted within the time limits provided for in the Staff Regulations.
 - ii) The JAB is competent to give an opinion on an individual dispute concerning the unfair treatment suffered by the Applicant and the Organisation's breach of its duty of care.
22. The Organisation disputes the Applicant's request, claiming that the application seeking referral to the JAB is late, and therefore inadmissible, because it essentially uses pleas in favour of review linked to his classification and the non-renewal of his contract which he is time-barred from invoking.

Analysis

Admissibility

23. The application to the Tribunal was submitted on time, i.e. within three months of the notification of the decision dated 20 August 2020 rejecting the previous request.
24. Consequently, the application is admissible and the Tribunal will examine the parties' pleas on the merits of the case.

The merits of the case

The admissibility of the request for referral to the JAB.

25. Under the title 'Disputes', Regulation 22 of the Staff Regulations provides for two advisory bodies, namely the Joint Advisory Board and the Re-evaluation Commission, whose missions are defined below:

- a) 'The Secretary-General shall establish an Advisory Board comprising a Chairman from outside the Organisation, and six other members, three of whom shall be nominated by the Staff Association. Unless, under a specific provision, another body is responsible for giving its opinion in a particular field, this Board shall advise the Secretary-General, at the request of the official concerned, on any individual dispute arising from a decision of the Secretary-General and which an official, former official or the duly qualified claimants to their rights consider inequitable to themselves or contrary to the terms of the appointment or to the provisions of these Regulations or of applicable Rules.'
- b) 'The Secretary-General shall establish a Re-evaluation Commission comprising a Chairman and two members nominated by him/her. This Commission shall advise the Secretary-General, at the request of an official, on any individual dispute arising from a decision of the Secretary-General relating to the official's performance evaluation, periodic advancement or post classification and which the official considers contrary to the terms of the appointment or to the provisions of these Regulations or of applicable Rules. Prior referral to this Commission is a precondition for filing an application with the Administrative Tribunal mentioned in paragraph c) of this Regulation.'

26. Instruction 122/1.3 of the Staff Regulations adds:

' a) Where an official, a former official or a duly qualified claimant to the rights of an official or former official wishes to have a dispute referred to the Joint Advisory Board, he shall submit a request to the Secretary-General within six months of the date on which he was notified of the decision by the Secretary-General that he is challenging.

b) As part of the request for referral to the Joint Advisory Board, he shall attach:

- the challenged decision of the Secretary-General as mentioned in the preceding paragraph;
- the main reasons for requesting the opinion of the Joint Advisory Board;
- the main points on which he wishes the opinion to bear;
- and if he claims to have suffered damages, the documents he deems useful to the review of his claims in this respect.

c) In exceptional cases, the Secretary-General may accept a request submitted after expiry of the time limit provided in paragraph a) above.’
(our underlining)

27. The request for referral to the JAB was presented on 4 April 2020.¹⁰ The Applicant sought the JAB’s opinion on the inequitable, unfair and discriminatory treatment he claimed to have suffered. He alleged that the Organisation had breached its duty of care.¹¹ He sought the JAB’s opinion on the compensation that should be granted to him for this inequitable treatment.
28. The referral request did not seek the annulment of the non-renewal of the fixed-term contract or a review of the classification of the contract(s). Rather, the Applicant claimed that he had experienced unfair treatment during the performance of the contracts until the end of his appointment on 31 December 2019.
29. The Applicant alleged that he was treated differently from other officials performing the same duties; he thus claimed that there was discriminatory treatment without grounds that would justify his being treated differently from other officials.
30. The Applicant claimed: ‘I felt isolated despite the support of my direct colleagues in the print shop, who were powerless to do anything about my situation. Today I have to say that this has affected me psychologically, and that the reasons for this treatment are unknown to me or are at least unjustified.’¹²
31. The Applicant alleges ‘a series of harmful and unjustified acts’ and claims that the Organisation was determined not to recognise his competence and to place him in an unfairly precarious situation by deliberately and groundlessly seeking to ‘get rid’ of him. He claims that the Organisation failed in its duty of care to him. In view of the fault committed, he seeks redress. There is nothing in Regulation 22 a) or in Instructions 122/1.3 of the Staff Regulations to prevent the JAB from giving its opinion on the damage suffered. On the contrary, Instruction 122/1.3 mentions: ‘- and if he

¹⁰ Document R-3.

¹¹ On the duty of care see ILOAT 4427, 4240,4405, 4385,4369, 4239,4171,2067. UNDT/2018/099;

¹² *Supra*, note 5.

claims to have suffered damages, the documents useful to the review of his claims in this respect.'

32. At this stage, it is not for the Tribunal to rule on the inequity of the treatment alleged by the Applicant, to determine whether it constitutes a breach of the duty of care or even to rule on the evaluation of the damage incurred. In the present case, the only point to be decided is whether the Applicant was able to request a referral to the JAB in order to seek its opinion on the fault committed and the damage suffered.
33. First of all, the Tribunal considers that the Applicant was within the time limit of six (6) months for submitting his request.
34. The Applicant's appointment ended on 31 December 2019. The non-renewal of the last contract was the culmination of the evolving situation from 4 April 2016 to 31 December 2019, which the Applicant describes as unfair and characterised by a breach of the duty of care.
35. In the present case, the Applicant rightly bases the calculation of the period of six (6) months on the Secretary-General's response given on 14 February 2020 to his request dated 2 December 2019. The referral request dated 4 April 2020 was therefore presented within the period of six (6) months.
36. Furthermore, the Applicant's request for referral to the JAB related to an individual dispute based on allegations of inequitable treatment of the Applicant by the Secretary-General. The Applicant sought the JAB's opinion on whether he had been treated inequitably and on the appropriate remedy.
37. The JAB is a joint consultative body of a statutory nature which issues opinions which are not binding on the Secretary-General, but which may enable him or her to obtain an informed opinion on the dispute. This is a non-judicial mode of dispute resolution, since the opinions do not have the status of a final and binding decision.
38. On the usefulness of the JAB, the Tribunal has written:

The Tribunal is not impressed by the Organisation's argument that the Joint Advisory Board is not a decision-making instance and that therefore its unavailability to the Applicant would not be a matter of substantive detriment to her. Staff members may have great interest in availing

themselves of consultative, deliberative, or simply mediating bodies which hold out the possibility of resolving disputes without the formal confrontation of pleadings before the Tribunal.¹³

(our underlining)

39. The Staff Association submitted its comments, correctly concluding that: ‘The dispute arose out of the way in which Mr AA’s administrative situation was handled, and the decision to which this dispute gave rise is the decision of 14 February 2020.’¹⁴ The Association stresses the need to preserve the JAB as an advisory body and to ensure its effectiveness by ensuring that it remains available to claimants.
40. The handling of the Applicant’s administrative situation is not based on a classification problem or on the non-renewal of the last fixed-term contract. These administrative acts are the consequence, according to the Applicant, of ‘a series of harmful acts’ intended to put an end to his career in the Organisation.
41. Some international organisations have dispute resolution mechanisms that involve two judicial bodies, implying a right of appeal against decisions given by the first instance.¹⁵ Several international organisations have committees or boards to which officials must resort ex officio before taking a matter to the Administrative Tribunal. Other organisations have committees or boards, usually consisting of three to five members, to which officials may resort without obtaining the permission of the Secretary-General, and consultation of which is not a prerequisite for taking a matter to tribunal.¹⁶ The JAB, consisting of seven (7) members, falls into this latter category. A JAB consisting of three (3) or five (5) members would also meet the purposes of Regulation 22 of the Staff Regulations, i.e. an advisory opinion intended for the Secretary-General.

¹³ OECD Administrative Tribunal, Judgment no 71, 28 March 2012 p.5

¹⁴ Written comments submitted by the Staff Association.

¹⁵ The UN, the Organisation de la francophonie.

¹⁶ Joint committee, joint commission, disciplinary board, report committee, joint appeal board: see *Fonction publique internationale*, Plantey A. and Loriot F, CNRS Éditions, 2005, para 1328.

42. In this case, the officials of the OECD only have access to one judicial body, the Administrative Tribunal. They may, however, have recourse to the Joint Advisory Board after having made a request for referral to the Secretary-General.
43. In order to fully guarantee access to administrative justice, it is necessary to give a broad interpretation of the rules governing the establishment of and access to the Joint Advisory Board set out in Regulation 22a) as well as in Instruction 122/1.3 of the Staff Regulations so as to ensure their usefulness.
44. Accepting that the Secretary-General has the power to decide, on a discretionary basis, whether to refer a request to the Joint Advisory Board would affect its relevance and undermine its usefulness. Such an interpretation of Regulation 22a) and Instruction 122/1.3 of the Staff Regulations would allow the Secretary-General to paralyse the functioning of the advisory bodies and to infringe the right of officials to have recourse to them, when the instructions simply determine the procedures for the procedural application of a right clearly recognised in Regulation 22 of the Staff Regulations.
45. Consequently, the interpretation of Regulation 22a) of the Staff Regulations, read in conjunction with Instruction 122/1.3 c), is as follows: if an official, a former official or a duly qualified claimant to the rights of an official or former official submits a formal request for referral, the Secretary-General must forward it to the Joint Advisory Board. He or she does not have the discretionary power to assess the content of the request. His or her sole discretionary power is to admit a request submitted outside the time limit of six (6) months.
46. In this case, the Secretary-General did not have the power to refuse the referral to the JAB, since the request met the criteria of Regulation 22a) and Instruction 122/1.3 of the Staff Regulations.
47. The question of compensation does not have to be decided by the Tribunal at this stage, as the Applicant does not refer to it in his application to the Tribunal. It will be up to the JAB to consider it, if necessary, in the exercise of its competence. It should be noted, however, that Case No. 63 involved moral harassment, blocking of the applicant's

career and administrative mistakes for which the applicant submitted a claim for compensation. The Tribunal emphasised:

Secondly, and in any event, Mrs. M. is not asking for old decisions, such as the refusals of her requests for promotion, to be annulled but for monetary compensation for the prejudice she claims to have suffered as a result of these decisions.¹⁷

48. As to any compensation claim based on Regulation 17/8 or set out in an application to the Tribunal, such questions remain hypothetical and need not be considered at this stage. Only the request for referral to the JAB is at issue in this proceeding. It is possible that the advisory opinion will bring the dispute to an end. It is therefore premature to request a declaratory decision on a dispute which is not before the Tribunal.

FOR THESE REASONS, THE TRIBUNAL

1. **DECIDES** that the Applicant's application is admissible
2. **UPHOLDS** the Applicant's right to request a referral to the JAB and orders the Organisation to comply with the request.
3. **DISMISSES** the Applicant's claim regarding moral prejudice,
4. **DECLARES** that 3,840 euros should be awarded to the Applicant's counsel in costs.

¹⁷ OECD Administrative Tribunal, Judgment no 63, 24 February 2009 p.4; See applications in OECDAT nos 57, 63, 68, 90; ILOAT nos 2829, 3064, 4222.