

ADMINISTRATIVE TRIBUNAL

Judgement No. 376

Case No. 371: SHATBY

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Herbert Reis, Vice-President, presiding;
Mr. Luis M. de Posadas Montero; Mr. Ahmed Osman;

Whereas on 12 September 1985, Michel Wilson Shatby, a former staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, filed an application that did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas on 14 January 1986, the Applicant filed a corrected application, the pleas of which read in part as follows:

"PLEA NO. I: Re-assessment and remuneration of my special assignment 'Water Management Engineer' as 'Associate Expert':

... UN Administrative Tribunal is kindly requested to consider and decide on:

1. My correct recruitment should be 'Associate Expert' and not a project officer for UNICEF project.
2. Payment of compensation of 160,000 US dollars, the balance of the remuneration for this special assignment, during my four years service with UNICEF.

PLEA NO. II: Remuneration of my Consultative Services to UNICEF:

... UN Administrative Tribunal is kindly requested to consider and decide on:

Payment of compensation of 45,000 US dollars for my separate Consultative Services rendered to UNICEF.

PLEA NO. III: Remuneration of my Administrative and Supervisory Services for project No. YEM/82/C31:

... UN Administrative Tribunal is kindly requested to consider and decide on:

Payment of 37,500 US dollars as compensation for my administrative and supervisory services for this separate project.

PLEA NO. IV: Remuneration of my Administrative and Supervisory Services for project No. E/ICEF/P/L/2034

... UNICEF was reluctant to recruit a project officer for the implementation of this project, post Indent. No. 36315. UNICEF kept this post vacant from April 1980 onwards, meanwhile, instructed me to administer and supervise this 3,750,000 US dollars project.

... UN Administrative Tribunal is kindly requested to consider and decide on:

...

Payment of 25,000 US dollars as compensation for my administrative and supervisory services for this separate project.

PLEA NO. V: Intentionally Ruining my Career:

... UNICEF Representative has intentionally passed certain documents that belonged to me to external agency, without my knowledge or permission, as such he violated the staff rule 'regulation 1.5'.

UNICEF Representative, thereafter, intentionally and wilfully resorted to concealment of facts, with a view to wrongfully defaming my name and reputation and ruining my career.

The facts show that UNICEF violated both the Adm. [Administrative] Inst. [Instruction] No. ST/IC/82/7 of 3 Feb. 1982 and Adm. Inst. No. ST/AI/292 of 15 July 1982, concerning rebuttals of regular periodic reports as well as of special reports and filing of adverse material in personal records, respectively.

Of course, all these actions have caused serious damage and

injuries to my name, career and reputation.

UN Administrative Tribunal is kindly requested to consider and decide on:

Payment of 500,000 (five hundred thousand) US dollars as compensation for this particular and serious suit.

PLEA NO. VI:Arbitrary Termination:

... UN Administrative Tribunal is kindly requested to consider and decide on:

Payment of 200,000 (two hundred thousand) US dollars as compensation for arbitrary termination."

Whereas the Respondent filed his answer on 1 April 1981;

Whereas the Applicant filed written observations on 12 June 1986;

Whereas on 8 October 1986, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas on 13 October 1986, the Applicant filed additional documents;

Whereas on 20 October 1986, the Respondent replied to certain questions put to him by the Tribunal;

Whereas the facts in the case are as follows:

On 16 February 1978, UNICEF published an advertisement in Al-Ahram, a newspaper in Cairo, in which UNICEF requested a "Water Management Engineer" to "assist in promoting and speeding up the implementation of rural water supply project". In a letter dated 9 July 1978, the UNICEF Representative in the Yemen Arab Republic informed the Deputy Director, Central Planning Organization, that "after interviewing more than twenty candidates", UNICEF had selected Mr. Michel Shatby as an "expert in rural water supply management, in order to meet the requirements of Rural Water Supply Department, Ministry of Works and as a contribution from UNICEF to activate the administrative work within the above subject". In a reply dated 16 July 1978, officials of the Government approved the

selection of the Applicant for the post as "Administrative and Technical Assistant to the Rural Water Supply Department of the Ministry of Public Works".

The Applicant entered the service of UNICEF on 10 January 1979. He was initially offered a project personnel appointment under the 200 Series of the Staff Regulations and Rules at the L-4, step 1 level, for a fixed-term period of two years and twenty-two days. He was assigned to Sana'a, Yemen Arab Republic as a Project Officer, Water Management Engineer.

It appears from the record of the case that after his recruitment, the Applicant did not properly understand the nature of his assignment. Indeed, in a confidential memorandum dated 19 June 1979, the Applicant asked the then UNICEF Representative in Sana'a, for his "clear decisions on [his] future assignments to avoid confusion". He referred to his "personal responsibilities and duties relating to UNICEF and UNCDF [UN Capital Development Fund] Water Programmes in YAR ..."; he sought guidance as to what was the "wide ranging operational independence" of a project officer; he complained about the lack of proper clerical assistance; and he requested office equipment and allocation of transport.

In a reply dated 20 June 1979, the Resident Representative stated that he was "most surprised that after six months [the Applicant] still [found his] assignment confusing"; suggested to the Applicant that he "commit [himself] to the job description"; and then addressed in general the issues raised by the Applicant.

In a memorandum dated 7 October 1980, the Acting UNICEF Representative in Sana'a recommended to the Chief, Personnel Services Section at Headquarters, that the Applicant's appointment be extended for a further fixed-term period of two years. However, in a cable dated 23 October 1980 addressed to the Director, DPA (Division of Personnel and Administration), and to the Personnel Officer at Headquarters, the Acting UNICEF Representative in Sana'a asked them to suspend administrative action in that regard. On 28 October 1980, he wrote a confidential report concerning the

Applicant to the Director, DPA, at Headquarters. He described the Applicant's performance and his relationship with the Department of Public Works of the Yemen Arab Republic and with UNICEF, as well as the Applicant's alleged plagiarism of a project proposal for UNICEF assistance from a project proposal prepared by the USAID (United States Agency for International Development).

As a result of these events, on 10 November 1980 the Acting Director, Programme Division at Headquarters, informed the Chief, Personnel Services Section, that a Principal Officer from the Internal Audit Service who was scheduled to leave for Beirut, would then proceed to Sana'a to conduct an investigation on the matter. The question whether or not to extend the Applicant's appointment would be decided after the Principal Officer reported on the outcome of his discussions with the Regional Director.

In a memorandum dated 1 December 1980 addressed to the Director, DPA, the Principal Officer set forth his conclusions on the investigation conducted in Sana'a. He stated in this connexion: "Mr. Shatby's professional conduct has been generally satisfactory and ... his services within the Rural Water Supply Department [RWSD] are highly appreciated by the Government of Yemen. The question of the extension of Mr. Shatby's contract of services beyond 31 January 1981, could therefore be considered independently on [its] merits".

As regards the "Nature and Circumstances of Mr. Shatby's Submission", the Principal Officer remarked that "Mr. Shatby's job description and terms of service were not clearly spelt out so as to avoid confusion between his functions as a UNICEF project person and as an Advisor to the Government. Indeed he [had] been functioning exclusively at RWSD". Upon the Acting UNICEF Representative's request, the Applicant had prepared a project for UNICEF co-operation by the Acting UNICEF Representative "within a short period of one week". In the Principal Officer's view "any such submission [was] in the nature of a UNICEF internal working document deserving of restricted use and circulation... It [was] regrettable that the draft should have been let out and cause embarrassment to

Mr. Shatby, UNICEF, USAID and the Government of Yemen alike". In the light of this and other factors, the Principal Officer recommended that the "renewal of Mr. Shatby's service contract could be favourably considered" and that the Applicant's job description and terms of reference be reviewed by placing "appropriate emphasis on the future UNICEF project implementation".

On 2 December 1980, the Director, DPA, UNICEF, agreed to extend the Applicant's project personnel appointment "with the understanding that the Job Description would have to be revised to show clearly Mr. Shatby's role in the implementation of UNICEF's water project in Yemen". The Applicant's appointment was thus extended for a further fixed-term period of two years effective 1 February 1981.

On 14 April 1981, the Acting UNICEF Representative in Sana'a transmitted to Headquarters the Applicant's performance evaluation report for the period January 1980 to January 1981. On 10 February 1982, the Applicant submitted to the Acting UNICEF Representative, who now exercised the functions of Area Representative, a progress report on his activities during the year 1981. In addition, he noted that he had never received his performance evaluation report for his period of service with UNICEF.

On 23 February 1982, the Area Representative transmitted the Applicant's progress report to the Senior Advisor, Water Supply, and stated that it was his "personal feeling ... that [the progress report] reflects the confusion of Mr. Shatby's position from the early days of his appointment". In addition, he enquired as to what had happened with the Applicant's performance evaluation report for 1980 which had been forwarded by him to Headquarters on 14 April 1981.

In a reply dated 9 March 1982, the Assistant Personnel Officer at Headquarters informed the Area Representative that the Applicant's performance evaluation report for the period January 1980 to January 1981 had been sent to the Applicant on 24 June 1981.

It appears that it was lost in a missing pouch and, therefore, the

UNICEF Representative in Sana'a transmitted to the Applicant a new performance evaluation report on 7 June 1982.

On 1 July 1982, the Personnel Officer at Headquarters asked the UNICEF Representative in Sana'a to submit a recommendation concerning the extension of the Applicant's fixed-term appointment.

In a reply dated 21 September 1982, the UNICEF Representative in Sana'a recommended that the Applicant's appointment not be renewed and set forth his reasons therefor.

In a letter dated 29 September 1982, the Director, DPA at Headquarters, informed the Applicant that his project personnel appointment with UNICEF, due to expire on 31 January 1983, "[would] not be renewed beyond that date". In addition he stated:

"Although a project personnel appointment expires automatically at a pre-determined date without prior notice, this letter is intended to give you ample time to plan your future accordingly."

On 14 October 1982, the Applicant signed his performance evaluation report for the period January 1980 to January 1981. His performance was evaluated as "a good performance."

In a cable dated 23 October 1982, the Applicant asked the Director, DPA, to reconsider his decision not to renew his appointment on humanitarian grounds and to grant him a further extension of one year in order that his rights to a pension would vest. In a reply dated 3 November 1982, the Director, DPA, informed the Applicant that after "careful consideration, and consultation with all concerned" he regretted to inform him that no possibility existed for the continuation of his services with UNICEF.

On 20 February 1983, the Applicant requested the Secretary-General to review the administrative decision not to extend his fixed-term appointment. On 18 May 1983 he lodged an appeal with the Joint Appeals Board. The Board adopted its report on 1 May 1985. Its conclusions and recommendations read as follows:

"CONCLUSIONS AND RECOMMENDATIONS

133. The Panel concludes that all the assignments carried out by the appellant during his service with UNICEF were part of his official duties under the terms of his appointment as a staff member of the Organization. Therefore, the appellant's claim for reassessment of his salary could not be upheld as he had been paid in accordance with the principle set out under these terms.

134. The Panel finds that the reasons given by the UNICEF representative for the non-renewal of the appellant's appointment were supported by the documentation on file. In addition, having carefully considered the arguments advanced by the appellant in support of his contention that the decision was arbitrary, the Panel finds them unconvincing or irrelevant as evidence against the accuracy of the factual situation described by Mr. Roberfroid [Area Representative, UNICEF] or the appropriateness of his assessment.

135. The Panel also finds that following the appellant's rebuttal of the evaluation of his service contained in Mr. Roberfroid's letter of 21 September 1982, the UNICEF Administration at Headquarters had supported, by implication, that evaluation and maintained the decision not to renew the appellant's appointment. Moreover, the Panel finds that the appellant had not provided any convincing evidence in support of his contention that the non-renewal of his appointment had been motivated by prejudice against him. Instead it finds sufficient evidence of the efforts made by the UNICEF local management to clarify the appellant's position and assist him with his assignments.

136. The Panel therefore concludes that the decision not to renew the appellant's appointment beyond its expiration dates had been taken in proper and reasonable use of the respondent's discretion recognized by the law and the jurisprudence of the Administrative Tribunal.

137. In view of the foregoing, the Panel decides to make no recommendation in support of the present appeal."

On 12 June 1985 the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had decided to maintain the decision not to renew his fixed-term appointment and to take no further action on the case.

On 14 January 1986 the Applicant filed with the Tribunal the application referred to above;

Whereas the Applicant's principal contentions are:

1. The Applicant was incorrectly appointed as a Project Officer because there were no water projects in Yemen. His title should have been "Assistant Expert" as had been agreed between UNICEF and the Government of the Yemen Arab Republic.

2. The Respondent did not clearly describe the Applicant's duties and responsibilities in his job description and this was confirmed by the Senior Auditor who conducted an investigation in Sana'a in 1980.

3. Under the terms of staff rule 200.2b, the Applicant's appointment and his job description, the Applicant's assignment should not have included the preparation of a water programme. The Respondent violated the rules and did not respect the Applicant's terms of appointment when he instructed the Applicant to prepare such a programme.

4. The Respondent violated staff rule 200.2b and the joint agreement between the Government of Yemen and UNICEF when he assigned the Applicant to administer the project YEM/82/C 31 instead of recruiting an expert for that purpose.

5. The Respondent violated staff regulation 1.5 and intentionally ruined the Applicant's career when he passed on to the Director of USAID documents that belonged to UNICEF. The Respondent intentionally ignored the contents of the Senior Auditor's report and thus prejudiced the Applicant.

6. The Applicant was deprived of his rights when the Respondent intentionally and wilfully concealed adverse material concerning the Applicant.

6. The Respondent arbitrarily terminated the Applicant's appointment.

Whereas the Respondent's principal contentions are:

1. Staff regulation 1.2 requires staff members to perform assigned duties; in return staff members are entitled to the salary and emoluments specified in their Letters of Appointment and the

Staff Regulations and Rules.

2. The Applicant's separation from UNICEF occurred as a result of the expiration of his temporary appointment for a fixed-term. The expiration of this appointment did not violate his rights.

3. The Applicant was not defamed by his supervisor reporting to UNICEF Headquarters allegations by the Director of USAID that Applicant's work was plagiarised from the work of USAID. Those allegations were investigated and the Applicant was cleared and the Applicant's appointment was subsequently extended so this incident did not damage his career.

The Tribunal, having deliberated from 13 October 1986 to 6 November 1986, now pronounces the following judgement:

I. The Tribunal notes that as a result of the way in which the Applicant's appointment was processed, a situation of ambiguity arose, and therefore, the Applicant was placed in a position where it became difficult to define exactly where the limits of his duties lay.

II. The sequence of events in the Applicant's appointment was as follows: first, an announcement was published in a newspaper requesting a water management engineer "to assist in promoting and speeding up the implementation of rural water supply project." The second step was Mr. Shatby's application for the job, which was favorably considered from among twenty other applications received.

The third step was a communication by UNICEF to the Government of the Yemen Arab Republic, the country in which the successful candidate was to serve, announcing the selection of Mr. Shatby for the post.

In this communication from UNICEF to the Government of the Yemen Arab Republic, the Applicant was not described in accordance with the terms of the advertisement published in the newspaper. The

relevant document states:

"Since some time, we are looking for an expert in rural water supply management, in order to meet the requirements of Rural Water Supply Department, Ministry of Works and as a contribution from UNICEF to activate the administrative work within the above subject ...",

thus hinting at a much broader task than the one described in the newspaper advertisement.

This communication was answered by the Government accepting the designation of Mr. Shatby as an Administrative and Technical Assistant for the Department.

Thus, the engineer who had been selected pursuant to a newspaper advertisement referring to assistance in the implementation of a rural water supply project was offered to, and accepted by, the Government of the Yemen Arab Republic as Administrative and Technical Assistant to the Rural Water Supply Department of its Ministry of Public Works. According to the newspaper advertisement, the post offered was tightly linked to a specific project or set of projects. According to what was offered to the Government of the Yemen Arab Republic by UNICEF and accepted by it, the post was of adviser to the Rural Water Supply Department of that country. Having secured the Government's acceptance in the way described ut supra, the Administration hired the Applicant with a job description that clearly fell short of what UNICEF had offered to the Government. Not only does the task to be fulfilled by the Applicant appear to be much broader, but even the nature of the Applicant's status would differ substantially.

III. The Tribunal recalls that in its Judgements No. 142, Bhattacharyya (1971) and No. 95, Sikand (1965) it held that:

"The Tribunal in its jurisprudence has established that the terms and conditions of employment of a staff member with the United Nations may be expressed or implied and may be gathered from correspondence and surrounding facts and circumstances".

In this particular case, and in view of the subsequent difficulties encountered by the Applicant, the Tribunal holds that the letter of appointment signed by the Applicant cannot be considered without taking into consideration that the Administration had earlier referred to the future tasks to be entrusted to the Applicant as something much broader and not altogether of the same nature as those set forth in the job description.

IV. This difference is not one of degree but of substance. A difference merely in the type or the intensity of the work to be performed would not have led the Tribunal to take the present view.

But the difference is much more profound and led to the placing of the Applicant in an ambiguous situation, prejudicial to him. Indeed, some five months after his recruitment by UNICEF, the Applicant sought guidance as to the nature of his work. The UNICEF Representative replied that the Applicant should commit himself to the job description. The Tribunal notes that this reply did not clarify the situation since a year and a half later a Principal Officer from the Internal Audit Service of UNICEF recommended that the Applicant's job description and terms of reference be reviewed.

V. As a consequence of this uncertain and not clearly defined situation, the Applicant could, on the one hand, be considered as a staff member implementing or designing a specific project or set of projects or, on the other hand, as an advisor working with the Government of the Yemen Arab Republic in accordance with a bilateral agreement. The Tribunal notes that about a year and a half later when a responsible UNICEF Officer at Headquarters from the Internal Audit Service conducted an inquiry, he concluded that the Applicant's job description and terms of reference "were not clearly spelt out so as to avoid confusion between his functions as a UNICEF project officer and as an advisor to the Government".

As a result of the different interpretations that could be

given to the Applicant's status, on the one hand he was liable to be entrusted with work that should not have been performed by him, and on the other hand he was open to be misjudged or criticized for playing a role that should not have been his.

VI. This situation also had a bearing on the non-renewal of the Applicant's appointment. In fact, the Tribunal notes that when his supervisor recommended the non-renewal of the Applicant's appointment, the supervisor strongly emphasized that the Applicant had interpreted his duties as those of an advisor to the Government of the Yemen Arab Republic rather than those of an official directly working for UNICEF. In light of the ambiguous circumstances in which the Applicant found himself after his recruitment by UNICEF, the Tribunal considers that either course of conduct was equally conceivable.

In recommending the non-renewal of the Applicant's appointment, his supervisor based himself on one interpretation of the nature of the Applicant's duties, and for this the Applicant cannot be held responsible.

VII. Therefore, the Tribunal is of the opinion that the ambiguity that surrounded the conditions of the Applicant's work had a considerable prejudicial impact, not only during his period of service, but also when the renewal of his contract was considered, and the Administration should be held responsible for it.

VIII. As a consequence the Applicant is entitled to compensation in the amount of three months' net base salary at the date of the expiration of his appointment on 31 January 1983.

IX. All of the pleas in the application are otherwise rejected.

(Signatures)

Luis M. de POSADAS MONTERO
Member

Ahmed OSMAN
Member

New York, 6 November 1986

R. Maria VICIEN-MILBURN
Executive Secretary

DISSENTING OPINION BY MR. HERBERT REIS

I. This Judgement does not have an importance beyond the particular facts of the case, nor do I wish by writing a farewell dissent to give it an unwarranted significance. But I consider the Judgement to be wrong in two respects, first, in the analysis of the water resources work for which the staff member was employed, and, second, in the way it has failed to comprehend the special position of those numerous members of the United Nations staff who serve as Project Personnel on developmental enterprises in the field.

II. The Applicant sought employment with UNICEF and was appointed, at approximately twice his previous, non-UN salary, to serve in Sana'a as what the Letter of Appointment described as a "Project Officer (Water Management Engineer)". The relevant UNICEF job description characterized the purpose of the post as "To assist in promoting and speeding up the implementation of rural water supply project", and it listed as principal among a series of duties "Under the supervision of the UNICEF Representative: 1. Assist the RWS (Yemen Arab Republic Rural Water Supply Department) in administering rural water supply projects carried out by the department including projects implemented by UNICEF under special assistance, particularly with a view to speeding up implementation."

In my view, the record does not contain anything to suggest that

the work expected of the staff member exceeded his capabilities in the field of his expertise as described in the Letter of Appointment and job description.

The Judgement appears to consider that UNICEF sought to portray the staff member to the Government of Yemen in a more exalted manner, but I see nothing in the verbal disparity, in this case, between the traditions of diplomatic intercourse and the internal employment documents of an international organization. The staff member was employed to perform a humanitarian and developmental task in the field of water supply in the difficult environment of the Yemen Arab Republic. That is what he did. If the actual challenge to the staff member turned out to be the more creative design of new schemes of water supply where few or no projects existed, rather than supervision of already existing projects, he was fortunate indeed; in any event this fact does not entitle him to any additional measure of financial compensation for his work. The wording of the advertisement in Al-Ahram that initially attracted the Applicant's attention to the possibility of seeking employment with UNICEF might have taken a different form, but it cannot be considered as a part of the contractual arrangement nor, needless to say, a deceitful effort by UNICEF to obtain skilled labor on the cheap.

III. Concerning the responsibilities of the staff member, the Judgement fails to comprehend the special position of a Project Personnel officer in the field. Such a person is an employee of, works under the supervision of, and owes full loyalty to the international organization that hired him, in this case UNICEF. Working closely with, often using premises of, the host government, the Yemen Arab Republic, he needs a sympathy for and comprehension of the challenges and opportunities faced by that government in the field of his expertise, here water resources. The trilateral reality of this work -- involving an international organization, a host government, and a technical expert -- requires not only

technical competence but a high level of empathy, discretion and maturity. If the majority finds "ambiguities" in the trilateral reality, these merely attest to the complexity of the work. Such ambiguities or difficulties provide no basis for an award of damages.

IV. I trust that the Secretary-General will pay the relatively modest award contained in this Judgement, as is required. I do not think that the text calls for reform in the hiring of Project Personnel Officers under the 200 Series.

(Signatures)

Herbert REIS
Vice-President, presiding

New York, 6 November 1986

R. Maria VICIEN-MILBURN
Executive Secretary