

ADMINISTRATIVE TRIBUNAL

Judgement No. 380

Case No. 400: ALAM

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Samar Sen, President; Mr. Ahmed Osman;
Mr. Jerome Ackerman;

Whereas at the request of Khurshed Alam, a former staff member of the United Nations Development Programme, hereinafter referred to as UNDP, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit in which to file an application until 30 April 1986 and 31 July 1986;

Whereas on 31 July 1986, the Applicant filed an application in which he requested the Tribunal:

"A.To set aside the decision of the Secretary-General; and

B.To reinstate the Applicant with all appropriate entitlements; and

C.To compensate the Applicant for the period following his separation from service; and

D.To grant any other relief as may be determined by the Administrative Tribunal."

Whereas the Respondent filed his answer on 17 October 1986;

Whereas on 10 April 1987, the Applicant filed an additional document;

Whereas the facts in the case are as follows:

The Applicant was recruited by the United Nations Development

Programme on 11 November 1964 as a Clerk/Typist at the G-3 level. He was assigned to the Office of the UNDP Resident Representative in Dhaka, Bangladesh. On 1 August 1973, the Applicant was granted a permanent appointment, and on 1 April 1974, he was promoted to the G-4 level. On 1 January 1977, he was promoted to the G-5 level on an accelerated basis to the position of Reference Unit Assistant. The Applicant's performance during 1 January 1977 to 28 February 1981 was evaluated in a performance evaluation report in which the Applicant was rated as a "competent and well-qualified staff member whose performance meets expected standards."

Effective 22 June 1981, the Applicant was reassigned to the Registry. On 20 January 1982, the new Resident Representative, who, on the basis of his observations on the functioning of the office, had serious questions about the acceptability of the Applicant's performance, asked the Registry Officer to provide him with a "detailed confidential written assessment of [the Applicant's] performance in the Registry, taking into consideration his level and step in the Registry set up." In a reply dated 27 January 1982, the Registry Officer noted that the Applicant had actually joined the Registry on 18 September 1981 "as he had been ill and under the medical care of [the] UN doctor." She added: "Since his joining, I have been observing that Mr. Alam shows no interest in his assignment and hence it is difficult to give him added responsibilities."

In a letter dated 28 January 1982, the Resident Representative advised the Applicant that he had learned that several of the Applicant's supervisors had "complained about his performance". Unless his performance improved substantially within the next few weeks, he would be obliged to notify Headquarters.

On 29 January 1982, the Resident Representative wrote to the Personnel Officer at the Division of Personnel (DOP), Bureau for Finance and Administration at Headquarters, UNDP, to inform her of the Applicant's unsatisfactory performance and of what he stated were the views of the Dhaka Office concerning the Applicant, namely

that the Applicant's post should be abolished and that his appointment should be terminated. He requested Headquarters' advice on the matter. In a reply dated 9 March 1982, a Personnel Officer at Headquarters informed the Resident Representative that in order to separate a staff member from service on the ground of abolition of post, UNDP had to follow the procedures prescribed by the Staff Rules for that purpose. Furthermore, on the basis of UNDP's most recent assessment of the Applicant's performance, the Applicant's permanent appointment could not be terminated for unsatisfactory services either.

In the meantime, on 2 February 1982, the Applicant had fallen off a bus and developed back pains. On 10 February 1982, he submitted a medical certificate to justify his absence from the office. The doctor stated in the certificate that the Applicant suffered from "acute rheumatism" and recommended rest for a period of three weeks until 23 February 1982. However, the Applicant did not return to work. On 2 March 1982, the Resident Representative requested the Applicant "to report for duty immediately" and to produce appropriate evidence to justify his absence from work which was deemed "unauthorized". On 5 March 1982, the Resident Representative sought an opinion on the Applicant's absence, from the UN Medical Physician in Dhaka.

On 9 March 1982, the UN Medical Physician in Dhaka provided the Resident Representative with a report on the Applicant's medical condition, and with a summary of the events that led to the Applicant's absence. According to the report, the UN physician had referred the Applicant to an orthopaedic surgeon. On 20 February 1982, the orthopaedic surgeon had recommended the Applicant's hospitalization for a traction treatment. On 23 February 1982, the Applicant sought advice from the UN Medical Physician in Dhaka, who in turn confirmed the orthopaedic surgeon's recommendation. It appears that the Applicant then asked for a further week in order to prepare himself for admission to the hospital. The UN Medical Physician did not accede to this request. He felt that if the

Applicant was really sick, he should be admitted to the hospital not later than 24 February 1982. The Applicant did not do so. Consequently, the UN Medical Physician in Dhaka refused to certify further sick leave beyond 23 February 1982.

On 13 March 1982, the Applicant submitted a medical certificate from his personal physician to justify his continued absence from work. On 15 March 1982, the Resident Representative asked him to provide a "confirmatory medical certificate from the UN Examining Physician ... by Friday, 19 March 1982 at the latest." Instead, the Applicant submitted further medical certificates from his personal physicians. An exchange of correspondence ensued between the Applicant and the Resident Representative. The Applicant did not comply with the Resident Representative's request to see the UN physician, nor did the Applicant comply with a request that he return to work.

The Resident Representative had transmitted to the Personnel Officer, Division of Personnel, DOP, at Headquarters, all the medical certificates provided by the Applicant, as well as the report by the UN Medical Physician in Dhaka. On 25 May 1982, the Personnel Officer sent them to the UN Medical Director at Headquarters for advice as to whether the Applicant's absence until 20 April 1982 could be "certified as approved sick leave." In a reply dated 3 June 1982, the UN Medical Director at Headquarters requested an up-to-date report on the Applicant's condition from the UN Medical Physician in Dhaka. In a cable dated 9 June 1982, the Personnel Officer transmitted this request to the Resident Representative in Dhaka and instructed him not to approve further sick leave for the Applicant pending the UN Medical Director's advice.

On 11 June 1982, the Resident Representative wrote to the Personnel Officer to transmit further sick leave certificates provided to the Applicant by his personal physicians and designed to cover his absence from the office from 9 May to 3 June 1982. The Resident Representative added:

"There is suspicion in our minds that Mr. Alam is not at all sick, as alleged in the certificates, but that he may be devoting his time to his private business interests. Mr. Alam is known to our Bengali colleagues as a fully-fledged businessman."

In a memorandum dated 13 July 1982, addressed to the Personnel Officer, DOP, UNDP, the UN Medical Director at Headquarters advised, that on the basis of the information he had received so far, UNDP should not certify any more sick leave for the Applicant. He strongly recommended that the case be reviewed by the UN Physician in Dhaka, who would be in a better position to give "a first-hand opinion" thereon.

The UN physician in Dhaka scheduled an appointment to examine the Applicant on 16 July 1982. The Applicant did not honour this appointment. The Resident Representative sought advice from Headquarters on how to further proceed since the Applicant had raised questions concerning the impartiality of the UN Physician in Dhaka. In addition, he informed Headquarters that UNDP continued to pay the Applicant's salary. In a reply dated 22 July 1982, the Personnel Officer stated that the UN Medical Director's position was that the Applicant should be examined by the UN physician in Dhaka.

If the Applicant refused to see him, the Resident Representative should advise the Applicant in writing, that if he did not resume his duties immediately, he would be separated from service for abandonment of post upon the expiration of his accrued annual leave, to be retroactively charged from 24 February 1982. In addition, since no sick leave had been approved from 24 February 1982, the Applicant's salary should be withheld pending a detailed clarification of his medical condition.

The Resident Representative scheduled another appointment with the UN Medical Physician in Dhaka on 28 July 1982. The Applicant did not keep the appointment. On 28 July 1982, the Resident Representative informed the Applicant that since he had, on two occasions, refused to see the UN physician, his absence from

duty, effective 24 February 1982 would be considered unauthorized. If he did not resume his functions immediately, and not later than 6 August 1982, he would be separated from the service of UNDP for abandonment of post.

In a letter dated 13 August 1982, the UN Medical Director at Headquarters informed the UN physician in Dhaka that he had decided not to certify the Applicant's leave, but had decided instead to convene a Medical Board under the Staff Regulations and Rules in order to determine whether the Applicant was fit to work. He asked the UN Physician in Dhaka to represent the United Nations on the Board, and to find a third doctor "of some standing and reliability in the community" to act as a "neutral chairman acceptable to both sides".

On 18 August 1982, the Acting Resident Representative informed the Applicant "that issues of [his] health condition and related sick leave from [2]3 February 1982 should be submitted to a Local Medical Board for evaluation as provided in staff rule 106.2 (a) (viii)". He also asked him to designate a physician of his choice to represent him on the Board.

The Board met on 11 October and submitted its report to the UN Medical Director on 21 November 1982. Its unanimous conclusions read as follows:

"OPINION:

Mr. Khurshed Alam sustained back injury in February 1982 for which he has received medical advice. As per the report of the orthopaedic surgeon (the only examination report available) his pain was due to muscle spasm causing postural scoliosis. Later on he had other problems like pharyngitis, fever and bleeding piles, for which he sought treatment and advice from his selection of physicians and surgeons.

It appears that Mr. Alam has not heeded to the advice of the UN doctor, the orthopaedic specialist and his own chosen specialist physician in time (consulted general surgeon only on 10 October 1982). He has therefore as it appears delayed his possible early recovery of his own accord. He has developed a sense of persecution against the UN system and particularly the UN Clinic doctor. The physical findings at

the time of our examination did not correspond in severity with his symptom."

On 21 December 1982, the UN Medical Director advised UNDP that he had received the report by the Medical Board and believed that the Board had "been very objective in its findings". He quoted the final paragraph of the opinion and concluded:

"At the present time, I am unable to approve any further sick leave for Mr. Alam. This will only be possible if I receive detailed medical reports from his physicians in Dhaka which would definitely indicate when he was receiving treatment and also that he was definitely disabled from working. I believe now that the future handling of this situation should be an administrative matter."

On 10 January 1983, the Personnel Officer at Headquarters cabled the Resident Representative, as follows:

"CONFIDENTIAL

... WISH CONFIRM MEDICAL BOARD REPORT ON KHURSHED ALAM RECEIVED BY UN MED [MEDICAL] DIRECTOR WHO HAS NOTIFIED US THAT REPORT WAS UNFAVOURABLE TO STAFF MEMBER AND HE THEREFORE UNABLE APPROVE ANY FURTHER SICK LEAVE FOR ALAM (BEYOND 23 FEBRUARY 1982). THIS WILL ONLY BE POSSIBLE IF MED [MEDICAL] DIRECTOR RECEIVES DETAILED MEDICAL REPORTS FROM STAFF MEMBER'S PHYSICIANS IN DHAKA DEFINITELY INDICATING i) WHEN HE WAS RECEIVING TREATMENT AND ii) ALSO THAT HE WAS DEFINITELY DISABLED FROM WORKING.

AS SICK LEAVE NOT APPROVED NO REPEAT NO MED [MEDICAL] CLAIMS TO BE APPROVED COVERING PERIOD IN QUESTION, IF SUBMITTED BY S/M [STAFF MEMBER] WHO SHOULD BE REQUESTED RESUME DUTY WITH IMMEDIATE EFFECT."

In turn, the Resident Representative wrote to Applicant on 24 January 1983 stating:

"The UN Medical Director, after reviewing the report of the Local Medical Board, has notified UNDP that he is unable to approve any further sick leave for you beyond 23 February 1982. Therefore, your absence from duty for the last eleven months is unauthorized.

You are hereby requested for the last time to return to duty

immediately. Please note, if you fail to comply with this request we shall have no option than to separate you for abandonment of your post."

The Applicant did not report for duty as requested. On 1 February 1983 the Resident Representative informed the Applicant that the pertinent authorities at UNDP Headquarters had approved his separation from service for abandonment of post. The effective date of the Applicant's separation from service was determined by the Office of Personnel Services to coincide with the date of the letter from the Resident Representative of 24 January 1983, referred to above, requesting the Applicant "for the last time" to return to duty.

In a letter dated 1 February 1983, addressed to the Resident Representative, the Applicant asked for the report of the UN Medical Director and the report of the Local Medical Board. He also contested the Resident Representative's decision to separate him from service for abandonment of post. In a reply dated 6 February 1983, the Resident Representative stated that medical reports were confidential and kept with the UN Medical Service in New York.

On 20 February 1983, the Applicant wrote to the Personnel Officer at Headquarters to inquire about his termination. In a reply dated 9 March 1983, the Personnel Officer explained the action taken as follows:

"I wish to acknowledge receipt of your letter of 20 February 1983 and to advise you that in accordance with the UN Staff Rules and Regulations, you exhausted your approved sick leave entitlement on 23 February 1982. When you claimed additional sick leave the matter was submitted to a Medical Board in Bangladesh. On the basis of that report your claim for additional sick leave was not approved by the UN Medical Director. Therefore on 24 January 1983, the Resident Representative wrote you requesting you for the last time to return to duty immediately otherwise you would be separated for abandonment of post. Since you failed to return as requested the Resident Representative had no alternative but to effect your separation for abandonment of post.

Finally, for a copy of the report of the Medical Review Board, you should request it from the Physician whom you

designated to be a member of that Board."

On 3 May 1983, the Applicant requested the Personnel Officer at Headquarters to be reinstated to the service of UNDP. His request was denied. On 25 July 1983, the Applicant requested the Secretary-General to review the administrative decision to separate him from service for abandonment of post. On 8 September 1983, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had rejected his request. On 28 November 1983, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 26 July 1985. Its conclusions and recommendations read as follows:

"Conclusions and recommendation

70. The Panel concludes that the appellant's unauthorized absence from service constituted abandonment of post, and that the decision to terminate his appointment on that ground was proper.
71. The Panel therefore makes no recommendation in support of the appeal."

On 20 August 1985, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had taken note of the Board's report and, in the light of the Board's report, had decided to maintain the contested decision.

On 31 July 1986, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Respondent did not request further detailed medical reports from the Applicant's physicians in Dhaka which would have enabled the UN Medical Director to consider approving further sick leave for the Applicant beyond 23 February 1982.

2. The JAB failed to consider that the Resident Representative, while expressing his desire to terminate the Applicant's appointment by abolishing his post, was, at the same

time, informing the Applicant that if he did not improve his performance he would so inform Headquarters. This conduct by the Resident Representative demonstrates an improper motive -- prejudice on the Respondent's part.

3. Allegations were made about improper motives concerning the Applicant's absence from duty but no evidence was submitted to substantiate them, and the Applicant did not intend to abandon his post within the meaning of UN procedures and practice.

4. The Applicant's sick leave records were not sent to Headquarters for evaluation as referred by Section 20402, subsection 1.4, paragraph (a)(2) of the UNDP Personnel Manual for locally recruited staff.

Whereas the Respondent's principal contentions are:

1. The Applicant's separation for abandonment of post was a proper exercise of the Respondent's authority under the Staff Regulations, Rules and the relevant administrative issuances made thereunder.

2. There is no proof that the Applicant's separation was tainted by any prejudice or improper motives or that it was in violation of any of the Applicant's procedural rights.

The Tribunal, having deliberated from 11 May 1987 to 25 May 1987, now pronounces the following judgement:

I. The Tribunal has carefully reviewed the facts in this case relating to the Applicant's termination. Having done so, the Tribunal concludes, as did the Joint Appeals Board, that no justification exists for (a) setting aside the decision of the Secretary-General; (b) reinstating the Applicant with entitlements; and (c) compensating the Applicant for the period following his separation from service.

II. The Applicant's employment was terminated as of January 24,

1983 for abandonment of post. The Respondent in so doing purported to act under Section 20800, subsection 1.4 of the UNDP Personnel Manual applicable to locally recruited staff which reads in pertinent part as follows:

- "1. This applies to a staff member absenting himself from duty without satisfactory explanation for more than 15 working days.
2. The Resident Representative investigates all unexplained absences of staff members and reports them promptly to the Division of Personnel.
3. Following five working days of unexplained absence (including failure to report for duty after authorized leave) the Resident Representative notifies the staff member by hand delivered or registered letter direct to the staff member's last known address, with a copy to the Division of Personnel, that action may be taken to separate him unless an acceptable explanation of his absence is received. Refusal to accept a registered letter is evidence of delivery. When no reply is received within ten working days, the staff member is considered as having abandoned his post and separated from service.
4. If the staff member responds by claiming to be sick, he should be reminded in writing of staff rule 106.2 (a)(vi) which provides that 'a medical certificate shall, except in circumstances beyond the staff member's control, be submitted no later than the end of the fourth working day following the initial absence from work'. The staff member should be given a further opportunity and be instructed to provide the required certificate within five days. If no reply is received within ten days and there is proof or a strong presumption that he has no intention of returning to work, action should be initiated to separate the staff member for abandonment of post."

III. Although the events giving rise to the Respondent's conclusion that the Applicant had abandoned his post are more fully described earlier and in the JAB report, those discussed below have important bearing on the issue of abandonment of post. Following the expiration on February 23, 1982, of a leave of absence for illness, the Administration on March 2, 1982, again later that month and again on July 28, 1982, requested the Applicant to report for

duty immediately. But the Applicant did not do so. He continued to stay away from work asserting all the while that he was unable to work because of illness. Ultimately, this claim was rejected by a Medical Board after it had been repeatedly rejected by the UN Medical Director and by the UN Physician in Dhaka.

IV. The Applicant asserts without any supporting evidence, that the UN Physician in Dhaka was prejudiced against him; he did not credit the Applicant's claims of illness and had reasonable grounds for doing so. The Applicant failed to follow the advice of the doctor he had been referred to and had refused to keep appointments with other physicians. The Tribunal cannot assume prejudice merely because a physician who is carrying out his responsibilities disagrees with the patient or with the latter's physician. Indeed, there is no evidence of prejudice against the Applicant by the UN Medical Director or the UN Physician in Dhaka, though they may well have believed - not without cause - that the Applicant's claims of illness were largely, if not entirely, false, and that, in any event, they did not warrant his prolonged absence from work.

V. Hence, when the Medical Board convened by the UN Medical Director under staff rule 106.2 (a)(viii) reported that its physical findings did not confirm what the Applicant sought to establish, i.e. illness so severe that he was unable to work, the UN Medical Director decided that he had no justification for certifying sick leave after February 23, 1982.

VI. This means that for the entire period after March 2, 1982, when he was first asked to return to work, and failed to do so, the Applicant remained away from work at his peril relying chiefly on intermittent medical certificates from his own physician, which the UN Physician in Dhaka and the UN Medical Director found inadequate.

The Applicant was asked once again and for the last time - on January 24, 1983 - to return to work or be terminated for abandonment of post. He failed to do so. In these circumstances,

the Tribunal agrees with the JAB's conclusion that, regardless of the Applicant's professed intent not to abandon his post, his true intent must be judged by his conduct. Without suggesting that fewer than four refusals would be insufficient to establish abandonment of post, the cumulative effect of the Applicant's four unjustified refusals to report for work are regarded by the Tribunal in this case as clear abandonment of his post justifying his termination.

VII. The Tribunal observes that ordinarily the intention to abandon a post may be inferred when, as provided in UNDP Personnel Manual, Section 20800, subsection 1.4 (3) and (4), no reply is received within 10 working days after a staff member has been notified that his unexplained absence will be taken as abandonment of post, or if the staff member claims illness but fails to furnish a required medical certificate within 10 days. The Tribunal notes that the procedure described above was not followed by the Administration in this case, and that in other circumstances this might raise questions whether a staff member was accorded due process. Here, however, the Applicant had been asked four times to return to work. The issue of medical certificate had been debated for several months. The Applicant had furnished all such evidence, as was available to him. Neither this evidence, nor the Medical Board's own examination was found sufficient to excuse the Applicant's absence on the basis of his alleged illness. On these facts, there was, accordingly, no need to repeat the process another time in order for the Administration to draw the inference of an intention by the Applicant to abandon his post.

VIII. The Applicant maintains that the termination of his appointment should be nullified because the Administration did not notify him that the UN Medical Director - in deciding on December 21, 1982, that the report of the Medical Board did not justify certification of sick leave subsequent to February 23, 1982 - had indicated that he would require "detailed medical reports from

the Applicant's physician in Dhaka which would definitely indicate when he was receiving treatment and also that he was definitely disabled from working", in order to be able to approve any further sick leave for the Applicant. Even if the Tribunal were disposed to find some theoretical merit in the Applicant's contention on this point, the fact remains that although the Applicant had ample opportunity to furnish further detailed medical reports before the JAB, he did not do so despite his awareness of the words in the Medical Director's evaluation of the Medical Board report.

IX. The Tribunal notes that the physician nominated by the Applicant signed the Medical Board report dated November 21, 1982. The Applicant can be presumed to have known the substance of this report at that time, even without further communication from the Respondent advising that he could obtain the report on request. It should then have been clear to the Applicant that the Medical Board had made no finding that the Applicant was so ill that he was unable to report for work with respect to the period after February 23 until the date of its report. Thus, no valid reason appears for the Applicant's failure to report for work long before he was asked to do so for the last time in January 1983. Instead, the Applicant simply chose to continue to remain away from work. In the Tribunal's view, this demonstrated no true interest on his part in continued employment by the Organization. For these reasons as well, the Tribunal finds no merit in the Applicant's contentions regarding the absence of notice about the Medical Director's statement concerning further detailed medical reports.

X. The Applicant also maintains that the termination of his appointment should be set aside because of an alleged failure by the Respondent to act in conformity with Section 20402, subsection 1.4 (a)(2) of the UNDP Personnel Manual calling for the transmittal of a medical certificate to the UN Medical Service when an illness is expected to last more than two weeks. The alleged failure by the

Administration consists of its not having forwarded the Applicant's medical certificates until mid-May 1982. But there is nothing in subsection 1.4 (a)(2) which specifies how soon after receipt such certificates must be forwarded. And while it is undoubtedly good practice for them to be submitted promptly, the Tribunal has difficulty in understanding why, in the absence of some prejudicial effect on the Applicant, the fact that the certificates were not forwarded until mid-May should affect the validity of the termination. In this case the Applicant would hardly have been in a better position if his certificates had been forwarded sooner, disapproved sooner and the Medical Board convened sooner to find what it found later. For, at the time he was examined by the Medical Board, the Applicant was not claiming that his health had improved materially from what it had been earlier. His claim was, and continued to be, that his inability to work because of his illness persisted throughout the entire period. For that is the chief basis on which the Applicant resists the Administration's assertion that he abandoned his post. Since no prejudicial effect has been shown, the Tribunal holds that the Applicant's contentions with respect to subsection 1.4 (a)(2) must fail.

XI. Finally, the Applicant points to the fact that prior to his illness for which sick leave to February 23, 1982 was granted, the Resident Representative was considering possibilities for abolishing the Applicant's post and terminating his appointment. The Resident Representative and others in the Dhaka Office had become increasingly displeased with the Applicant's performance and his lack of interest in his job. This reached the point where the Resident Representative inquired of the UNDP Personnel Office at Headquarters whether the Applicant's post could be abolished or whether there might be some other basis for terminating his employment. The Personnel Office advised the Resident Representative of the limitations in the Staff Rules and other procedures regarding these matters. There is no evidence to show

that thereafter any improper action was taken by the Resident Representative along these lines. Instead, the Applicant by electing to remain absent from work for 11 months without authorization created an entirely valid reason for his termination.

Although this may not have upset the Resident Representative, he was not precluded on that ground from taking the action that he did.

In this case, there is no ground to conclude that a pretext was advanced by the Respondent to justify the termination of the Applicant's appointment.

XII. For the foregoing reasons, the application is rejected.

(Signatures)

Samar SEN
President

Ahmed OSMAN
Member

Jerome ACKERMAN
Member

Geneva, May 25, 1987

R. Maria VICIEN-MILBURN
Executive Secretary