

ADMINISTRATIVE TRIBUNAL

Judgement No. 427

Case No. 456: RAJ

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Roger Pinto, Vice-President, presiding;
Mr. Ahmed Osman; Mr. Francisco A. Forteza;

Whereas, on 5 October 1987, Bigamudre Srinivasa Rao Guru Raj, a former staff member of the United Nations, filed an application that did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 3 February 1988, the Applicant, after making the necessary corrections, again filed an application, containing the following pleas:

"PLEAS

1. Rescind the decisions of the Joint Appeals Board and the Secretary-General.
2. Two Senior United Nations officials may be commissioned from headquarters preferably from the Tribunal to visit APCTT [Asian and Pacific Centre for Technology Transfer], Bangalore, India, personally to ascertain and determine the misuse of official United Nations property and abuse of official power.
3. [The] Applicant be paid salary from 11th May 1985 the date on which he was summarily dismissed, until the date of reinstatement.
4. Reinstatement of [the] Applicant in [the] United Nations service from 11th May 1985 with all benefits until reinstatement such as:
 - (a) Salary as given in (3) above
 - (b) Pension fund entitlements
 - (c) Leave

- (d) Within-grade salary increments
 - (e) Promotion
 - (f) Change in designation
5. Payment of damages of 10,000 by Dr. M.N. Sharif, Director, APCTT or from the Centre/ESCAP [Economic and Social Commission for Asia and the Pacific] to the Appellant.
 6. Declare that acts of the Director and the Administrative Officer in relation to the Applicant and the Advisor were with malafide intention;
 7. The Director and the Administrative Officer and the officers-in-default be suitably punished for their misdeeds;
 8. The Director and the other officials be prevented from misrepresenting about continuing expectancy of renewals of appointments to new prospective employees;
 9. Order prosecution of any penalty to Director, Administrative Officer and other officials concerned for their misuse of official United Nations property and abuse of official powers and recover costs of such misuse;
 10. Order removal of all those documents, which were fabricated from the Applicant's personnel file;
 11. Order payment of compensation in an amount equivalent to salary benefits as mentioned in (3) above from 11.5.1985 until the date on which the Applicant would retire in addition to damages at (4) above, in case [the] Secretary-General wishes to exercise the option given to him under article 9, paragraph 1, of the Statute, as the action is prejudicial and without any fault of the Applicant, Mr. B.S. Guru Raj.
 12. Probe into the fact that Dr. M.N. Sharif (Bangladesh) appointment was made though inexperienced, as he is related to the Executive Secretary of ESCAP, Mr. S.A.M.S. Kibria.
 13. Any other relief the Administrative Tribunal may think fit, in the interests of justice."

Whereas the Respondent filed his answer on 8 June 1988;

Whereas the Applicant filed written observations on 30 August 1988;

Whereas, on 7 October 1988, the Applicant submitted

additional documents;

Whereas, on 13 October 1988, the Tribunal put questions to the Respondent and on 19 October 1988, the Respondent provided answers thereto;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 14 November 1978. He was initially offered a one-year, temporary appointment as Personal Assistant/Secretary at the Asian and Pacific Centre for Transfer of Technology (ACPTT), an organ of the Economic and Social Commission for Asia and the Pacific, hereinafter referred to as ESCAP, located in Bangalore, India. The letter of appointment provided that the appointment was extendable "subject to satisfactory performance and availability of finances in RCTT [Regional Centre for Transfer of Technology¹]".

On 24 February 1979, the Applicant applied for a job with the United Nations and on 1 March 1979, he was offered a three-month fixed-term appointment in accordance with the UN 100 Series of the Staff Regulations and Rules. This appointment, which superseded the appointment with the Centre, was extended initially, for a fixed-term period of one year and then for a series of fixed-term periods until 1 January 1983 when it was extended for two successive fixed-term periods of one year until 1 January 1985. During the course of his employment, the Applicant's performance was evaluated in three performance evaluation reports dated 12 June 1979, 23 July 1980 and 16 November 1982. No further reports on the Applicant's performance are contained in the Applicant's personnel files.

In a memorandum dated 3 October 1984, the Director of the Centre informed the Chief, Personnel Section, ESCAP, that the Applicant, who had until January 1984 worked as Secretary to the Science and Technology Policy Advisor and who had, since the former's departure, been performing different jobs without a

¹ Predecessor of APCTT

specific assignment, would from then on be working as a Documentation Clerk. In addition, he proposed that the Applicant's appointment "be extended on a conditional basis for a period of six months...", since the Applicant had been informed that the extension of his appointment beyond June 1985 depended "on a satisfactory evaluation of his performance under the revised arrangements." According to the Applicant's personnel files, a copy of this memorandum was sent to the Applicant. The Applicant's appointment was thus extended for a further fixed-term period of six months through 30 June 1985.

On 12 March 1985, the Director of the Centre wrote to the Chief Personnel Section, ESCAP, concerning the Applicant's within-grade salary increment and recommended that the increment be withheld as the Applicant's appointment, after a "preliminary evaluation" of his performance, would in most likelihood, not be renewed. The Centre, however, would undertake a thorough evaluation of the Applicant's performance in April 1985 and would forward a recommendation for the extension of the Applicant's appointment if there was any "positive change in his performance". According to the Applicant's personnel files, a copy of this memorandum was sent to the Applicant.

On 26 March 1985, Mr. W.A. Clemente, Advisor, wrote to the Director, APCTT, to inform him that he had relieved the Applicant of all assignments under his supervision. He stated that the Applicant's "meager output which reflects a poor attitude towards work, is becoming more of a liability than a contribution ... [and] the only way he could be motivated to put out more effort [was] to be closely supervised everyday" which Mr. Clemente stated he was unable to do. Pending the arrival of the Director, he had asked the Applicant to report to the Administrative Assistant. According to the Applicant's personnel files, a copy of this memorandum was given to the Applicant.

On 15 April 1985, the Assistant Administrative Officer, APCTT, wrote to the Applicant regarding his absence from the office

since 3 April, pointing out that it was not until 9 April that the office had received a medical certificate, and this only after they had sent someone to the Applicant's home to enquire about his absence.

In a memorandum dated 10 May 1985, the Director, APCTT, informed the Applicant that, although his fixed-term appointment was valid until 30 June 1985, due to his "increasingly disloyal behaviour to the organization, and disrespectful attitude towards superiors", he had recommended to the Secretary-General his "summary dismissal with immediate effect". In addition, he was authorizing the Administrative Office to relieve him from all responsibilities as of that date. In a handwritten note at the bottom of the page, the Applicant stated "I do not agree with these charges". On the same day, the Director wrote to the Chief, Personnel Section, ESCAP, recommending the Applicant's summary dismissal. On 27 May 1985, the Chief, Personnel Services, ESCAP, forwarded these documents to a Personnel Officer at Headquarters. He noted that the Administration did not have the time to follow the procedures set forth in personnel directive 1/76, as the Applicant's appointment would expire on 30 June 1985.

In a cable dated 11 June 1985, the Personnel Officer informed the Chief, Personnel Section, ESCAP, that it was not within the Director's authority to summarily dismiss the Applicant. The Director should be informed in writing that he could not exceed his authority in matters of suspension or termination. Accordingly, he advised that the Applicant be reinstated in full pay status through 30 June 1985, the date of the expiration of his appointment. In addition, the Personnel Officer also referred to the Headquarters practice with respect to General Service staff, established in administrative instruction ST/AI/274. According to this practice, such staff are advised in writing, one month before the date of expiration of their fixed-term appointments, of the Administration's intention not to extend them. If such policy were to be applied in the Applicant's case, it would require an extension of his

fixed-term appointment.

The Applicant's appointment expired on 30 June 1985. On 3 July 1985, the Director, APCTT, informed the Applicant of the decision to maintain him in full pay status until the expiration of his appointment. He attached separation papers to be completed and returned by the Applicant. In a letter dated 8 July 1985, the Applicant sought clarification from the Director, APCTT, concerning his personnel situation. Having received no reply, on 12 August 1985, he lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 24 June 1987. Its conclusions and recommendations read as follows:

"Conclusions and Recommendations

48. The Appellant had no legal right to renewal of his fixed-term appointment. However, he was given an expectation of a short extension upon receiving a copy of the Headquarters' cable.
49. The Appellant is entitled to the reinstatement of his within-grade increment as of 1 March 1985.
50. The Appellant should be granted compensation for the one month notice of non-extension that he did not receive, in the amount equivalent to one month and eight days net salary at the level and step held at the time of his separation.
51. ESCAP should be instructed to ensure that Administrative Instructions concerning performance evaluation reports, etc. be observed properly.
52. If this has not been done already, ESCAP should follow up on accusations made against Centre Staff by the Appellant in his letter to the Secretary-General dated 22 May 1985 and in his observations dated 5 October 1986."

On 14 August 1987, the Assistant Secretary-General for Human Resources Management² informed the Applicant that the Secretary-General had decided:

- "(a) That [he] be paid the corresponding within-grade salary increment from 1 March 1985 to 30 June 1985;

² Successor of OPS

- (b) That, in view of the particular circumstances of [his] case, [he] be paid compensation in an amount equivalent to one month and eight days net base salary at the rate in effect at the time of [his] separation; and
- (c) To take no further action on [his] case."

On 3 February 1988, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Applicant always had an expectancy of continued employment.
2. The Applicant's dismissal and the non-extension of the Applicant's appointment were prejudiced actions by the Respondent.
3. The Respondent wilfully disregarded and violated his own administrative guidelines, and fabricated documents.

Whereas the Respondent's principal contentions are:

1. The Applicant had neither the right nor the legal expectancy of continued employment with the United Nations beyond the expiry of his fixed-term appointment on 30 June 1985, and is therefore not entitled to any further redress in respect of his separation from the UN service.
2. The Applicant has already received ample compensation for those claims considered by the JAB to be justified.
3. The Respondent has followed up on the accusations made by the Applicant against the Centre staff. Those matters are not within the competence of the Tribunal in its dealing with the present case regarding the Applicant's contract of employment.

The Tribunal, having deliberated from 13 October 1988 to 28 October 1988, now pronounces the following judgement:

- I. The Applicant appeals principally against the "decision of

the Director, APCTT [Asian and Pacific Centre for Transfer of Technology] for dismissing his services on 10 May 1985, and the non-extension of his services beyond 30 June 1985."

With regard to the Applicant's first contention that he was dismissed on 10 May 1985, the Tribunal notes that the Applicant was separated with effect from 30 June 1985, at the expiration date of his last appointment with the Centre. The Tribunal finds that what actually occurred on 10 May 1985 was only a recommendation from the Director to Headquarters for the Applicant's summary dismissal and an authorization to the Centre to relieve the Applicant from his duties from 10 May 1985.

II. The Tribunal observes that the Office of Personnel Services, by cable dated 11 June 1985, overruled the suspension and recommendation of termination by the Director of the Centre in the following manner:

"... SUCH DECISION IS NOT WITHIN AUTHORITY OF DIRECTOR APCTT AND HE SHOULD BE REMINDED IN WRITING NOT TO EXCEED HIS AUTHORITY IN SUCH SERIOUS MATTER AS SUSPENSION OR TERMINATION.
BBB. HAVING REVIEWED STAFF MEMBER'S RECORD IT IS CLEAR THAT DECISION WAS TAKEN ON ACCOUNT OF POOR PERFORMANCE AND CONDUCT ON THE JOB. THE PROPER PROCEDURE WOULD HAVE BEEN NOT TO RECOMMEND EXTENSION OF APPOINTMENT EXPIRING 30 JUNE 1985. IN VIEW OF FACT THAT DECISION DIRECTOR APCTT CONSTITUTES FLAGRANT VIOLATION OF RELEVANT REGULATIONS AND RULES AND DENIED STAFF MEMBER DUE PROCESS, DIRECTOR'S DECISION SHOULD BE RESCINDED FORTHWITH. STAFF MEMBER SHOULD BE REINSTATED IN FULL PAY STATUS THROUGH 30 JUNE 1985 AT WHICH TIME ESCAP MAY DECIDE NOT TO RENEW HIS CONTRACT."

III. In a memorandum dated 3 July 1985, the Director of the Centre informed the Applicant of the decision to maintain him in full pay status until the end of his appointment, which had expired on 30 June 1985.

IV. In view of the above, the Tribunal finds that the Applicant's separation from service was a result of the expiration of his fixed-term appointment, and not a termination by dismissal.

V. The Tribunal will now turn to the Applicant's plea against the non-extension of his appointment beyond 30 June 1985, claiming that he had a right to continued employment.

To substantiate his claim in this regard, the Applicant put forward two distinct sets of arguments:

(a) In his first set of arguments, the Applicant claimed the existence of an expectancy of renewal;

(b) In his second set of arguments, the Applicant contends that the decision not to extend his contract beyond 30 June 1985, was vitiated by prejudice and improper motives, and therefore the decision should be rescinded.

VI. With regard to his assertion about the existence of an expectancy of renewal, the Applicant put forward a number of considerations:

(a) The Applicant invokes paragraph 2, contained in his first letter of appointment No. RCTT/949/78 dated 2 November 1978 where it was stated:

"This temporary appointment is for a fixed-term of one year from the effective date of appointment shown above. It, therefore expires on the Thirteenth day of November 1979. However, subject to satisfactory performance on your part, and availability of finances in RCTT, your appointment in RCTT may be extended for further periods. ..."

(b) The Applicant argues that since he showed a very good performance and that finances were available, he is therefore entitled to a continuous expectation of extension of his appointment.

VII. The Tribunal cannot concur with the conclusion reached by the Applicant on the basis of his first letter of appointment, for two reasons:

First: The Tribunal considers that even if the two conditions

of satisfactory performance and availability of finances were met, this alone do not create a legal expectancy of renewal of appointment. The fulfilment of these two conditions only reveals when renewal is possible, but does not make such a renewal mandatory. The extension of an appointment still remains within the discretionary power of the Respondent, as it is evident from the use of the term "may" in the phrase " ... your appointment may be extended for further periods." (Emphasis added)

Second: The Tribunal considers that the Applicant, in any case, is not in a position to invoke in his favour his first letter of appointment of 2 November 1978.

The Tribunal notes that the Applicant, on 24 February 1979, submitted a UN Personal History Form in application for recruitment to UN service, and effective one week later, the Applicant commenced a UN fixed-term appointment with APCTT on 1 March 1979.

The Tribunal also notes that the Applicant signed the standard UN fixed-term "Letter of Appointment" in which are formulated the conditions of tenure in accordance with the relevant Staff Regulations and Rules.

According to staff rule 104.12(b): "The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment."

Moreover, a provision regarding non-expectancy of renewal is expressly included in the letter of appointment dated 8 May 1979 and on each one of its successive extensions.

VIII. In signing the letter of appointment on 22 May 1979, the Applicant accepted the new appointment as an international civil servant, subject to the conditions therein specified and to those laid down in the Staff Regulations and Rules.

From then on, the employment relationship between the Applicant and the UN was governed by the pertinent UN Staff Regulations and Rules.

IX. In view of the above, the Tribunal considers that the new letter of appointment superseded the Applicant's initial local contract dated 2 November 1978. The Applicant's argument in this regard is therefore without merit.

X. In addition, the Applicant claims, as a basis for continued employment, that extending fixed-term appointments was only a formality in the United Nations. The Tribunal recalls its Judgement No. 422, Sawhney (1988), paragraph X, in which it stated:

"... The Tribunal considers that a series of successive fixed-term appointments by itself is not enough to detract from the effect of staff rule 104.12(b), which stipulates that fixed-term appointments carry no right of renewal or conversion to any other type of appointment. Moreover, this provision was incorporated verbatim in each and every one of the Applicant's letters of appointment. According to staff rule 109.7(a) such appointments expire automatically and without prior notice.

Therefore, after the expiration date of a fixed-term appointment, there is no automatic renewal, but a new contract must be concluded to keep the staff member in the service of the United Nations."

In view of the above, the Applicant's argument in this respect must also fail.

XI. The Applicant also contends that he had an expectation of continued employment because of his good performance during his service.

The Tribunal considers that good performance by itself is not enough to impose an obligation on the Respondent to extend the Applicant's appointment.

The Tribunal recalls in this connexion its Judgement No. 205, El-Naggar (1975), para. IV, in which it stated:

" ... under Article 101 of the Charter the power of appointment rests with the Secretary-General. The type of appointment to be offered to a staff member is within the discretion of the Secretary-General. Neither the exceptional competence of a

staff member nor favourable recommendations for a particular type of appointment by themselves create an entitlement to such an appointment. ..."

XII. For all the foregoing reasons, the Tribunal finds that the Applicant had no legal expectation of continued employment, and his contention in this regard must fail.

XIII. The Tribunal proceeds now to examine the Applicant's contention that the decision not to extend his appointment was motivated by prejudice and improper motives on the part of his superiors in the Centre and not justified by poor performance and conduct on the job.

The Applicant puts forward as principal evidence demonstrating prejudice against him, the attitude of the Director of the Centre on a number of issues affecting the Applicant's status.

XIV. The first issue relates to allegations by the Applicant that the Director of the Centre and other officials misused UN property and abused their power.

The Applicant argues that a specific cause for his being victimized was that he talked freely about the misuse of United Nations property and abuse of power on the part of his superiors in the Centre.

The Tribunal notes that the Applicant only decided to raise the question of these allegations officially with the Secretary-General, in an annex to a letter addressed by him to the Secretary-General on 22 May 1985, i.e., until after the Director of the Centre had recommended his dismissal on 10 May 1985.

Whatever the truth concerning these allegations, in the Tribunal's view, the fact remains that such delay by the Applicant in raising these issues until after 10 May 1985, weakens the credibility of his contention that the allegations were a primary cause for his being victimized by his superiors in the Centre.

XV. The second issue concerns the evaluation of the Applicant's performance. In this connexion, the JAB observed that:

(a) Three performance evaluation reports covering the Applicant's period of service from 1 March 1976 until 30 November 1982 showed a very good performance rating;

(b) The dossier does not include any report after 30 November 1982;

(c) There is no reference to any criticism against the Applicant for the period 30 November 1982 until the beginning of October 1984.

The Tribunal notes that beginning October 1984 until the expiration of the Applicant's appointment, the Centre expressed its dissatisfaction with the Applicant's performance on various occasions.

XVI. The Applicant contested this charge on the grounds that:

(a) No notice of poor performance was given to him at all;

(b) Under the present Director of the Centre, Dr. M.N. Sharif, it became a practice to evaluate the performance of staff "in camera", in total violation and disregard of the administrative instructions.

XVII. The Tribunal notes that the Director of the Centre explained that, in his view, the deterioration in the Applicant's performance was due to the higher educational degrees which the Applicant obtained, which changed his aspirations and hence his interest in secretarial jobs diminished. With regard to the absence of the performance evaluation report, the Director stated that ESCAP did not request him to prepare such report.

XVIII. On the other hand, the Tribunal observes that the Applicant was not completely unaware of the dissatisfaction of his superiors in the Centre about his work.

In his submissions, the Applicant admitted that already in

March 1985, both the Director and the Advisor on Technology warned him to seek a job elsewhere and to submit his resignation. The Applicant added that he listened to their advice, applied for jobs and even attended many interviews.

It is the view of the Tribunal that a controversy over the evaluation of the Applicant's performance could have been avoided and the issue settled properly, if the procedure for the establishment of the performance evaluation report had been respected and adhered to strictly. Hence, the Administration is liable for its failure to act in accordance with proper procedures.

Nevertheless, the Tribunal is unable to consider this failure in itself as concrete proof of prejudice against the Applicant.

XIX. The third issue relates to the Applicant's contention that four memoranda were deliberately withheld from him.

The Applicant claims that four memoranda of 3 October 1984, 12 March 1985, 26 March 1985 and 15 April 1985, which reflected negatively on his performance, were deliberately withheld from him in order to subvert his right of rebuttal.

The Respondent asserts that the Applicant was furnished with copies of those various memoranda in which the subject of his performance was discussed.

XX. On examining the Applicant's personnel files, the Tribunal notes that at the end of each memorandum mention is made that a copy was sent to the Applicant.

The Applicant puts forward as evidence for his denial that he received a copy of these memoranda, the absence of any signature on his part acknowledging receipt.

The Director of the Centre explained the lack of signature by stating that it is not the established practice at ESCAP or APCTT that a signature must be obtained as acknowledgement from the person to whom a carbon copy of a document is provided.

XXI. In view of the conflicting views of both parties on the actual handing over of copies of the above-mentioned memoranda to the Applicant, and in view of their importance, the Administration should have secured the Applicant's acknowledgement of receipt of these memoranda.

Failure to do so on the part of the Administration is regrettable, but in the Tribunal's view, that failure in itself does not constitute concrete evidence of prejudice or malafide intention against the Applicant.

XXII. The Tribunal has taken note that upon the recommendation of the JAB, the Respondent decided to pay to the Applicant:

- (a) The within-grade salary increment from 1 March 1985 to 30 June 1985, which was due to him but withheld from him improperly;
- (b) The equivalent of one month and eight days net base salary at the rate in effect at the time of the Applicant's separation as compensation in view of the particular circumstances of this case.

XXIII. The Tribunal finds that:

- 1. The Applicant had no legal expectancy of continued employment after 30 June 1985.
- 2. There is no concrete evidence that the decision not to extend the Applicant's fixed-term appointment beyond 30 June 1985 was motivated by prejudice or extraneous motives, and therefore the Respondent's decision not to extend the appointment is valid;

XXIV. However, the Tribunal finds that the Applicant has not been treated fairly by the Respondent who, on a number of occasions noted above, failed to comply with proper procedures. Accordingly, the Tribunal decides that, in addition to the amounts awarded by the Secretary-General on 17 August 1987, the Applicant should be awarded adequate compensation equivalent to three month's net base salary at the level and step held by the Applicant at the time of his

separation, to be calculated at the rate in effect at the time of this judgement.

XXV. The Applicant has requested the Tribunal to address itself to a number of allegations directed by him against the Administration of APCTT and its Director. The Tribunal notes that although the Respondent in his answer has noted that he has initiated an investigation of these allegations, he has also asserted that these matters are not within the competence of the Tribunal in the present case, which concerns exclusively the Applicant's contract of employment. Indeed, the Tribunal considers that these allegations are internal matters that fall beyond the jurisdiction of the Tribunal. The reference made by the Tribunal in paragraph XIV to these allegations is limited to the evaluation of the Applicant's claim, that he was a victim of prejudice by senior staff of the Centre because he had made these allegations.

XXVI. For the foregoing reasons, the Tribunal:

(a) Orders the Respondent to pay to the Applicant three months net base salary at the level and step held by the Applicant at the time of his separation, to be calculated at the rate in effect at the time of this judgement;

(b) Rejects all the other pleas.

(Signatures)

Roger PINTO
Vice-President, presiding

Ahmed OSMAN
Member

Francisco A. FORTEZA
Member

New York, 28 October 1988

R. Maria VICIEN-MILBURN
Executive Secretary