

ADMINISTRATIVE TRIBUNAL

Judgement No. 432

Case No. 459: LACKNER

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 Michael Roy Lackner, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit in which to file an application until 1 March 1988;

Whereas, on 22 February 1988, the Applicant filed an application, the pleas of which read as follows:

"II. PLEAS

7. Applicant respectfully requests the Tribunal:

- (1) To find that the Joint Appeals Board erred in deciding that he was not competent to appeal the above-referenced decision;
- (2) To order the Joint Appeals Board to consider his Appeal on its merits; and
- (3) To order that the administrative decisions downgrading post INT-270-3-P56-1301 and refusing to continue the secondment of the incumbent of post INT-270-3-P56-1103 be rescinded with retroactive effect until Applicant's Appeal has been considered on its merits by the Joints Appeals Board or the Tribunal."

Whereas the Respondent filed his answer on 23 March 1988;

Whereas the Applicant filed written observations on 14 April 1988;

Whereas, on 30 August 1988, the Applicant filed additional documents;

Whereas the facts in the case are as follows:

Michael Roy Lackner has been a staff member of the United Nations since 22 February 1972. During the course of his employment, he has served on a series of successive project personnel appointments under the 200 Series of the Staff Regulations and Rules as a Technical Assistance Expert and Technical Advisor in Data Processing in the Department of International Economic and Social Affairs (DIESA). Effective 1 July 1980, the Applicant was transferred to the Department of Technical Co-operation and Development (DTCD) as Project Coordinator of TCD/Projects.

On 1 January 1987, the Applicant accepted a one year appointment as Project Coordinator of project INT/83/P56 entitled "Computer Software and Support for Population Data Processing". He is now responsible for the management of technical co-operation project INT/88/P42, whose work programme includes some activities performed by its predecessor project INT/83/P56, together with several new activities. The objective of the project is to provide developing countries with computer software for population and census surveys. In addition, the project supplies training and expert assistance. According to the Project Document, among the international staff of the project are: the Applicant, who acts as Project Co-ordinator, "responsible for overall management and coordination of the project..."; a Computer Software Administrator who is responsible for "assisting in all technical work of the project and for maintaining copies and documentation for all software packages", and an Administrative Assistant who is "responsible for preparing and maintaining documentation and publications of the project, for support of all administrative work of the project and correspondence. ... [and] for assisting with group training activities."

On 15 July 1981, Mr. Manuel Chua, a general service staff

member, who currently exercises the function of Computer Software Administrator for the Project, had been detailed from the Statistical Office, DIESA to a DTCD project as a Computer Software Specialist. The Personnel Action Form issued to record his detail states that Mr. Chua "will be paid at L/2 Step I during the period of Detail after which he will revert to his (G-5) appointment with DIESA." The projects on which Mr. Chua served in this capacity were predecessor projects to the one in which the Applicant presently acts as Project Co-ordinator. Effective 1 January 1988, Mr. Chua's detail was discontinued. The Personnel Action Form issued to record his reassignment states "Discontinuance of assignment at the L-2 level under the 200 series of S.R. [Staff Rules]. ... Functions at G-5 level not yet classified." Mr. Chua's functional title was changed to "Principal Statistical Clerk".

Mrs. Flora Rockett is also a general service staff member. Effective 1 January 1984, she was granted a Special Post Allowance (SPA) to the G-5 level and her functional title was changed to "Administrative Assistant". She currently exercises this function for the Project. Effective 1 January 1987, her SPA was discontinued and her functional title was changed to "Senior Clerk-typist E".

The Applicant asserts that these two administrative actions by the Respondent were taken without any prior discussion with the Applicant and without notice to him. On 4 June 1987, the Applicant requested the Secretary-General to review his administrative decision to downgrade the project post of the Administrative Assistant from the G-5 to the G-3 level and discontinue payment to Mrs. Rockett of a an SPA to the G-5 level, and to refuse to extend the services of Mr. Chua in a professional post on a SPA basis.

On 31 August 1987, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 8 October 1987. Its conclusion and decision read as follows:

"Conclusion and decision

5. The Panel concludes that the subject matter of the appeal does not constitute an administrative decision affecting the

appellant's terms of appointment within the context of Staff Regulation 11.1.

6. Accordingly, the Panel decides that it is not competent to entertain the appeal."

On 22 February 1988, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The unilateral decisions taken by the Respondent which detrimentally affect the staff of his project and materially reduce the resources called for in the Project Document INT/88/P42 violate the Applicant's terms of appointment, since the Applicant's continued employment is entirely dependent on the successful conduct of project INT/88/P42 for whose management he is responsible.

2. The Applicant is entitled to consideration of the circumstances in which his employment contract was concluded in order to determine whether the Respondent has violated the terms of his appointment. Since the Applicant is subject to staff rule 204.1, the Applicant's employment contract must be understood to incorporate such fundamental facts and circumstances as the terms of reference of his job description, set forth in the project document. They include the fact that competent staff were in place for two key project posts and that the grades of these posts were sufficiently high to ensure employment of adequately qualified replacements if the staff in place were to vacate the posts.

3. The JAB failed to discharge the responsibility levied upon it by staff regulation 11.1 by refusing to consider the Applicant's appeal on its merits.

Whereas the Respondent's principal contentions are:

1. The Applicant cannot, under staff regulation 11.1 or article 2.1 of the Tribunal's Statute, appeal decisions affecting the status of his subordinates.

2. A project document signed by a Member State and the

United Nations is not, under any reasonable interpretation, part of the Applicant's terms of appointment.

The Tribunal, having deliberated from 13 October 1988 to 4 November 1988, now pronounces the following judgement:

I. For the sake of clarity, one of the issues raised in this case should be disposed of first, especially since it is not in dispute. That issue is whether the Applicant can appeal, on behalf of persons he supervises, against administrative decisions which affect their status and their rights.

II. The Applicant contests two decisions:

(a) One relates to the non-extension of the secondment to his office of Mr. Manuel Chua, a staff member on his project; and

(b) The decision by the Classification Board to reclassify a post occupied by Mrs. Flora Rockett, another staff member on his project.

These staff members would have been entitled to appeal, if they wished to do so, the decisions which concerned them, according to the prescribed rules and procedures.

III. The Tribunal finds that the Applicant has no authority to bring an appeal on their behalf. This is also the opinion of the Respondent and the Applicant himself admits clearly in his written observations that he leaves it to his subordinates to appeal on their own behalf any violations of their rights stemming from these administrative decisions.

IV. The second issue before the Tribunal is the Applicant's contention that these two administrative decisions, whatever their effect on the status of his subordinates, at the same time have adverse repercussions on the Applicant, amounting to a violation of his terms of employment and of his contractual rights. This, he

claimed, entitled him to submit an appeal to the JAB in conformity with staff regulation 11.1

V. The JAB, before considering the merits of the case, raised a preliminary question concerning its competence to entertain the appeal. The JAB concluded that it was not competent to entertain the appeal on the ground that its subject-matter did not constitute an administrative decision affecting the Applicant's terms of employment within the context of staff regulation 11.1

VI. After the Respondent had accepted the Board's conclusion, the Applicant introduced his appeal, requesting the Tribunal in his first plea to find that the JAB erred in deciding that it was not competent to consider the above-mentioned administrative decisions.

Since the Applicant has made two other pleas whose disposition depends on the answer given by the Tribunal to this first plea, the Tribunal will deal first with the preliminary question whether the JAB, in declaring its non-competence to entertain the appeal before it, correctly applied staff regulation 11.1 in this case.

VII. Staff regulation 11.1 provides that:

"The Secretary-General shall establish administrative machinery with staff participation to advise him in case of any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules ... " (emphasis added).

According to this text, to establish the competence of the JAB to entertain an appeal by a staff member, two basic requirements must be fulfilled:

1. The appeal must be directed against an administrative decision.
2. The subject-matter of the appeal must be an allegation of non- observance of the staff member's terms of appointment by the

administrative decision contested.

In the Tribunal's view, if one of these two requirements is not met, the JAB is not competent. In the present case, the two parties disagree on the fulfilment of the second requirement. The Applicant claims that these two administrative decisions violate his terms of employment, and the Respondent disputes the Applicant's contention.

VIII. The central question before the Tribunal is, therefore, whether the second requirement referred to above has been fulfilled in the circumstances of this case. The Tribunal notes that the two administrative decisions in question are in the first place addressed directly to two other staff members within the project. Therefore, the Applicant must show how they could affect his own terms of employment, let alone violate them. This is all the more so, since his letter of appointment is silent on the rights the Applicant alleges to be affected by these two decisions.

IX. To establish his case, the Applicant advances the following arguments:

1. In accordance with the precedent set by the Tribunal in Judgement No. 95, Sikand (1965), and in Judgement No. 142, Bhattacharrya (1971):

"... The Tribunal is competent to examine the surrounding facts in which the letter of appointment was signed. The Tribunal has to consider the contract as a whole, not only by reference to the letter of appointment but also in relation to the circumstances in which the contract was concluded."

2. His contractual entitlements are not strictly limited to those expressed in his letter of appointment, but should also include due consideration of the relevant facts and circumstances surrounding his contractual obligation to manage successfully a technical co-operation project. In his case, the Applicant claims, these facts and circumstances include:

- (a) His job description, setting forth his duties; and
- (b) The project document which identifies the resources available for the execution of the project, including the number and levels of professional and administrative posts.

3. Since his job description and the project document have become, in his view, part and parcel of his terms of employment, any unilateral change in these two documents constitutes a violation of his terms of employment.

X. The Tribunal notes that the Applicant's case is based on the validity of his assumption that his job description and the project document are implicitly included in his terms of employment. If this assumption is not correct, it follows that an administrative decision modifying the two documents would not, in itself, constitute a change in his terms of appointment, and therefore would remain outside their sphere. Consequently, the change could not legally be viewed as non-observance of his terms of employment, and his application would fail.

XI. With regard to his job description, the Applicant quotes its terms of reference, which specify his duties in the following way:

"The employee will be responsible for overall management and coordination of the project, planning and participation in technical work, and provision of ad-hoc advisory services as requested by UNFPA [United Nations Fund for Population Activities]."

In the Tribunal's view, the job description in this case serves as a practical formula by which the Secretary-General exercises his power to assign work among staff members. This power has a statutory basis in staff regulation 1.2, which confers on the Secretary-General a broad discretionary power in that respect. It follows that a job description of a staff member can be unilaterally changed, by adding to or subtracting from it. Any other interpretation would impose a significant restriction on the

discretionary power conferred on the Secretary-General by staff regulation 1.2. In order for such a restriction to exist, it must be either expressly stated in the letter of appointment of the staff member concerned, or emerge clearly from the facts and circumstances of the case in the form of a legal commitment undertaken by the Secretary-General in favour of a staff member. In the present case, the Tribunal does not find either an express stipulation in the Applicant's letter of appointment, or an obligation implied in the facts and circumstances of the case.

XII. With regard to the Applicant's contention that his terms of appointment could be presumed to include the project document, the Tribunal notes that the project document contained in the file is an agreement between two bodies of the United Nations, viz. the United Nations Department of Technical Co-operation for Development and the United Nations Fund for Population Activities, and the Respondent asserts that the project is also covered by an agreement between the UN and a Member State.

In either case, the Applicant, not being a party to these agreements, cannot invoke an alleged violation of their terms. Moreover, the Tribunal finds nothing in the project document stating, or even suggesting, that the project manager's status was that of a party to the agreements, giving him the right to invoke the project document as part of his terms of employment.

XIII. Therefore, the Tribunal finds that:

(a) The Applicant's job description and the project document are not parts of his terms of employment;

(b) Any change in these two documents does not, in itself, constitute non-observance of his terms of employment, and therefore the Applicant's appeal before the JAB lacks one of the two requirements necessary to establish the competence of the JAB to entertain the appeal;

(c) The JAB did not err in refusing to entertain the appeal,

and correctly applied staff regulation 11.1.

XIV. In view of the foregoing, the Tribunal considers it unnecessary to examine the two other pleas of the Applicant.

The Tribunal also wishes to note that even in extraordinary circumstances, such as an administrative decision motivated by prejudice, which allegedly interferes improperly with the performance of a staff member's terms of employment, a preliminary question would be the presence of imminent or actual injury to the staff member as a result. Mere speculation as to the possibility of future events that might cause injury would ordinarily lead to the rejection of the appeal.

XV. Accordingly, the Tribunal rejects the application in its entirety.

(Signatures)

Samar SEN
President

Ahmed OSMAN
Member

Jerome ACKERMAN
Member

New York, 4 November 1988

R. Maria VICIEN-MILBURN
Executive Secretary