

ADMINISTRATIVE TRIBUNAL

Judgement No. 491

Case No. 529: MURTHY

Against: The Secretary-General
of the United Nations

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

Whereas, at the request of Srinivasa Murthy, a former staff member of the United Nations, the Tribunal extended to 19 March 1990, the time-limit for the filing of an application to the Tribunal;

Whereas, on 15 November 1989, the Applicant filed an application, containing pleas that read in part as follows:

- "1. To order the following preliminary measure : Since joint appeals body's recommendations are in the right direction of awarding justice (though has failed to award full justice - reinstatement and all reliefs in full) and provide little relief, Honourable Tribunal is requested to kindly order Secretary-General to implement immediately JAB's recommendations in toto before proceeding to consider the merits and taking up of my application for consideration. This act of yours will give me some relief and give breath to sustain my sufferings till the Tribunal awards its final decision and justice.
2. To rescind the decision of the Secretary-General.
3. To review the decisions of joint appeals body and order full justice.
4. To reinstate the Applicant in United Nations service at APCTT [Asian and Pacific Centre for Transfer of Technology] from 1st January 1988 with all benefits until reinstated such as a) Salary, b) Pension Fund entitlements, c) leave, d) within-grade salary increments, etc.
5. To order payment of salary from 1 January 1988 until the date

of reinstatement.

6. To order Mr. M.N. Sharif [Director of APCTT] or Respondent payment of damages of US\$20,000 for the terrible mental agony and financial hardships imposed on the Applicant by Mr. Sharif's high handed rude behaviour, false allegations on conduct/integrity and prejudicial action.
7. To order suitable punitive action against the Director, Mr. Sharif and the Administrative Officer, Mr. Thamanoon for showing repeatedly wilful disregard to due process and procedures in administrative matters and for abuse of powers vested in them with good faith.
8. To probe, why ESCAP [Economic and Social Commission for Asia and the Pacific] did not take any actions to prevent/restrain the actions of Mr. Sharif, which completely violates established norms with regard to administrative matters that too knowingly and repeatedly[sic]. Also why ESCAP is keeping silent in my case without submitting any of its comments or answers to various questions addressed to them so far. Being the responsible body administering APCTT, it should have responded.
9. To pass judgement whether behaviour of the Director in treating his subordinates as in my case, so rudely to humiliate and belittle self-respect of an individual is justified and is it compatible with the standard of conduct expected from the Director of U.N. agency. Also to pass judgement under what circumstances such a mistreatment to demean individual's self-respect is justified.
10. May order any other relief Administrative Tribunal consider fit in the interest of justice."

Whereas the Respondent filed his answer on 5 March 1990;

Whereas the Applicant filed written observations on 31 July 1990;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 March 1979, on a three month fixed-term appointment at the local General Service level of BG-6, as an Information Assistant, with the Asia and Pacific Centre for Transfer of Technology (APCTT), (the Centre), in Bangalore, India. The Centre is an organ of the Economic

and Social Commission for Asia and the Pacific (ESCAP). The Applicant's contract was extended, first for a fixed-term period of one year and then subsequently, for further fixed-term periods ranging from one month to one year, until 31 December 1987, the expiration date of his last fixed-term appointment.

In August 1987, a dispute arose between the Administration and a gardener concerning the termination of the gardener's service contract. According to the documents in the Applicant's personnel files, the Applicant was instructed by the Director of the Centre, at the Associate Administrative Officer's suggestion, to assess the merits of the gardener's claim that, upon termination of the contract, he was entitled to take with him several potted plants he had provided, instead of monetary compensation. The Applicant was entrusted with the task because he was "an old-timer" and experienced in administrative matters since "the early stages of [the Centre]" and because, he was "supposed to know the arrangements with the previous gardener" as well as with the present gardener.

On 21 August 1987, the gardener wrote to the Director of the Centre and, referring to his discussions with the Applicant, set forth a proposal for settlement of his claim. On 24 August 1987, the Associate Administrative Officer wrote to the Director of the Centre, registering his objections to the settlement proposal and stating his suspicion that there was "some kind of understanding between [the Applicant] and [the gardener] ... against the interest of APCTT".

In a memorandum dated 25 August 1987, the Applicant advised the Director of the Centre that the gardener's proposal, consisting of taking back approximately 60 per cent of the potted plants that he had grown in the office, should be accepted as the contract did not provide for payment for, or retention of, potted plants. This recommendation was not accepted by the Director of the Centre who instructed the Associate Administrative Officer, to renegotiate directly with the gardener different termination conditions.

On 11 September 1987, the Applicant was asked by the Associate Administrative Officer, upon the Director's instructions, to witness

the final settlement which he had renegotiated with the gardener. Initially, the Applicant refused to do so. A discussion ensued between the Applicant and the Director of the Centre, during which, the Applicant asserts the Director treated him rudely. The Applicant subsequently witnessed the settlement with the gardener.

In a letter dated 12 September 1987, the Applicant complained to the Chief of Personnel, ESCAP, and to the Chief, ESCAP/UNIDO Division of Industry Housing and Technology (IHT), that he had received "rude and humiliating treatment" from the Director of the Centre during the meeting at which the Applicant, when asked to witness the financial settlement with the gardener, "politely expressed [his] disinclination to the assignment".

The Director of the Centre was asked by senior officials at ESCAP to discuss the matter with them during his visit to Bangkok, in order to provide a report to the Executive Secretary. The Director of the Centre declined to do so, on the ground that "it was procedurally wrong for [the Applicant] to send his complaint directly to ESCAP", instead of through the Director of the Centre, or at least, with a copy to him. The Director of the Centre was then asked to submit a note explaining his procedural objections.

On 30 September 1987, the Director of the Centre called a general meeting of the staff. After a discussion on project activities, the Director informed the staff that the Administration had notified him of a complaint by a staff member of the Center, and that he would "ignore it" since it was "procedurally wrong", not having been sent or copied to him.

On 6 October 1987, the Director of the Centre wrote to the Officer-in-Charge of the ESCAP/UNIDO Division of IHT, reiterating his position on the procedures to be followed when filing complaints against him. He indicated also, that he had discussed the matter with the Executive Secretary on 28 September 1987. On the same date, the Associate Administrative Officer transmitted to ESCAP Headquarters, at the Director's request, all documentation concerning the Applicant's involvement with the gardening contract and the meeting of

11 September 1987. In the memorandum of transmission, the Associate Administrative Officer noted the Applicant's "gross partiality" towards the gardener.

In a memorandum dated 15 December 1987, addressed to the Executive Secretary, the Director of the Centre recommended that the Applicant's fixed-term appointment be not extended, on the ground of "gross misconduct". In support of his recommendation, he referred to the staff meeting of 30 September 1987 and described the Applicant's conduct as "disrespectful" towards superiors, "irresponsible and disloyal". He noted that continued tolerance of the Applicant's behaviour was "detrimental to the morale and discipline of the Organization".

In a cable dated 17 December 1987, the Applicant asked the Executive Secretary to delay any decision on the non-renewal of his appointment until receipt of a detailed letter and after an investigation was conducted at the Centre. In a letter dated 21 December 1987, addressed to the Executive Secretary, the Applicant refuted in detail the Director of the Centre's comments on his conduct. In a memorandum dated 24 December 1987, addressed to the Chief of Personnel, the Associate Administrative Officer set forth his account of the confrontation between the Applicant and the Director of the Centre on 11 November 1987, at which he himself had been present.

On 24 December 1987, the Director of the Centre wrote to the Chief of Administration reiterating that he could not recommend an extension of the Applicant's appointment. He stated that his comments of 15 December 1987, were based on his close supervision of the Applicant during 1987, after the departure of the Advisor on Information Services (at the end of 1986) and the Advisor on Technology Utilization (in early 1987). He maintained that the Applicant's allegations against him were "fabricated" and that he should be requested to provide evidence. The Director of the Centre also noted, that the Applicant had failed to comply with his instructions either to resubmit his complaint through him, or to withdraw it. The Director of the Centre asserted that the Applicant

had insulted him and stressed that he had been very lenient towards him, since, instead of recommending disciplinary action, he had given the Applicant the opportunity to improve his behaviour.

In a cable dated 31 December 1987, the Deputy Executive Secretary informed the Applicant that his fixed-term contract with the Center would not be renewed beyond its expiry date of 31 December 1987. On 15 January 1988, the Applicant requested the Secretary-General to review the decision not to renew his appointment.

On 20 April 1988, he lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 22 May 1989. Its conclusions and recommendations read as follows:

"Conclusions and Recommendations

43. Despite its conclusion that neither the alleged oral assurances nor the Director's written comments cited by the appellant were sufficient to create a legal expectancy of continued employment, the Panel still found that the appellant had a reasonable and legitimate expectancy of renewal of his contract on the grounds that the Administration gave a specific reason for not renewing the appellant's contract. This implied that, were it not for that specific reason, a contract renewal was imminent. In this case, the specific reason given was unjustified. Moreover, the decision not to renew the contract was flawed by procedural irregularities, and the appellant was denied the benefit accorded him by General Assembly resolution 37/126, IV, of 17 December 1982.
44. Thus, the Panel concludes that the appellant had a legitimate expectancy of continued employment. The Tribunal has held (Judgements No. 132, Dale; No. 142, Bhattacharyya) that a situation such as the appellant's may be assimilated to the case of a fixed-term contract which is terminated on the day it is supposed to start running. In such a situation, the appellant would be entitled to a termination indemnity in accordance with Annex III of the Staff Regulations. The Panel recommends that the appellant be so compensated; based on his eight years of service he should receive seven months of pensionable remuneration less staff assessment.
45. The Panel concludes that in failing to consider the appellant's rebuttal to the Director's charge, the Administration disregarded the principle of good faith in relations between the parties causing injury to the appellant (Judgement No. 128, Al Abed). The Panel concludes further that the proper procedures for establishing the existence of gross misconduct

were never followed and that, accordingly, all documents alleging gross misconduct on the part of the appellant, which he rebutted but which were never reviewed or appraised, constitute incomplete documents (Judgement No. 138 Peynado). The Panel, therefore, recommends that all material relating to the charge of gross misconduct be expunged from the appellant's files.

46. The Panel also concludes that the Administration's actions towards the appellant were arbitrary. Accordingly, the Panel recommends an award to the appellant in the amount of US\$5,000 for the injury suffered which represents approximately the equivalent in U.S. dollars of ten months' net base salary in the appellant's local currency at the current exchange rate.
47. The Panel makes no further recommendation in support of the appeal".

On 29 August 1989, the Acting Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General, having re-examined his case in the light of the Board's report, had decided to maintain the decision not to renew his fixed-term appointment beyond its expiration on 31 December 1987. The letter read in part as follows:

" The Secretary-General's decision is based on his conclusion that you had no legal expectancy for the renewal of your fixed-term appointment which expired automatically as provided in staff rules 104.12(b) and 109.7. In this connection, the circumstances surrounding your case do not demonstrate that the Organization made any firm commitment to renew your appointment, which is required to found such an expectancy. However, in view of the procedural aspects of your case and the resulting consequences of the Organization's treatment towards you, the Secretary-General has decided to grant you three months compensation at the BG-8 step VI level in final settlement of the matter. The Secretary-General has further decided that all material relating to the charge of gross misconduct against you be expunged from your official status file".

On 15 November 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision was vitiated because it was based solely on the Director of the Centre's allegations which were false, malicious and prejudiced.

2. The Applicant was deprived of due process since the Administration declined to investigate the facts before taking a decision.

3. The Applicant had an expectancy of continued employment with the Organization.

Whereas the Respondent's principal contentions are:

1. As the Applicant had neither the right nor the legal expectancy of continued employment with the Centre beyond the expiry of his fixed-term contract on 31 December 1987, his separation from service did not violate his rights.

2. A legal expectancy of further employment is not created retroactively by a later JAB finding that a stated reason for non-renewal is flawed.

3. The decision not to renew the Applicant's fixed-term contract was not motivated by prejudice or other extraneous factors.

4. The Applicant was accorded due process and granted sufficient compensation.

The Tribunal, having deliberated from 10 October to 1 November 1990, now pronounces the following judgement:

I. The Applicant's first plea is for a "preliminary measure" to be taken by the Tribunal, "to order the Secretary-General to implement immediately the Joint Appeals Board's (JAB) recommendations in toto before proceeding to consider the merits...". This would not assist with the consideration of the case and would prejudice the issue before the Tribunal. The plea is therefore rejected.

II. The Applicant's case raises two separate points:

(a) That he had a legal expectancy of the renewal of his contract when it expired on 31 December 1987; and that,

(b) Under General Assembly resolution 37/126, he was entitled to every reasonable consideration for a career appointment, inasmuch as he had completed more than five years of continuing good service under a series of fixed-term contracts.

III. Even though the Applicant may fail under point (a), it is still possible for him to succeed under point (b). The Tribunal recalls, in this regard, the Advisory Opinion of 27 May 1987, in which the International Court of Justice stated:

"65. Once the Tribunal had found that the Applicant did not possess a 'legal expectancy' of further employment, involving a corresponding obligation on the United Nations to 'provide continuing employment' (...), his entitlement was only to receive 'every reasonable consideration'. Such consideration must by definition involve latitude for the exercise of the Secretary-General's discretion; and the Tribunal in fact found that 'the Respondent had the sole authority to decide ... whether the Applicant could be given a probationary appointment' and that he 'exercised his discretion properly' (para. XVIII) [of Judgement No. 333]. The consistent jurisprudence of the Tribunal itself is to the effect that where the Secretary-General has been invested with discretionary powers, the Tribunal will in principle not enquire into their exercise, provided however that 'Such discretionary powers must be exercised without improper motive so that there shall be no misuse of power, since any such misuse of power would call for the rescinding of the decision' (Judgement No. 50 (Brown))."

(Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, ICJ, Report of Judgements, Advisory Opinions and Orders, 1987, page 53)

IV. It is apparent that relations between the Applicant and his supervisor deteriorated gravely in August 1987 and were exacerbated by questions arising out of the terms for ending the services of a gardener, in particular as to the retention by the gardener of a number of potted plants. Charges and counter-charges were made and offensive language is alleged to have been used, though there is no

evidence sufficient to enable the Tribunal to determine who was to blame, particularly whether the Applicant was in fact guilty of gross misconduct as his superior alleged.

V. It is, however, clear that the proper procedure would have been for the charge of gross misconduct to be dealt with by disciplinary proceedings, in accordance with the applicable rules.

VI. The Administration did not, however, take this course. Instead of giving the Applicant every reasonable consideration for a career appointment, it refused to give him a further contract, basing the refusal on the alleged gross misconduct which ought properly to have been the subject of disciplinary proceedings. The Tribunal need not speculate about the likely outcome of such proceedings: it is sufficient to establish that the Administration did not follow the procedure it had itself prescribed, thereby depriving the Applicant of whatever safeguards that procedure would have provided for him.

VII. Examining the position in the light of the passage quoted in paragraph III above from the Advisory Opinion of 27 May 1987 of the International Court of Justice, the Tribunal holds that the Respondent did not afford the Applicant every reasonable consideration for a career appointment. At the same time, he denied the Applicant due process of law in not referring the charges of gross misconduct to the proper authorities, in order that disciplinary proceedings be conducted.

VIII. Although the Tribunal does not consider that the Applicant had a legal expectancy of a further appointment, the Tribunal finds that there was an abuse of power by the Administration concerning the decision not to renew his appointment: in not giving him every reasonable consideration for a career appointment, and in depriving him of due process of law with regard to the charges of misconduct levelled against him. Accordingly, the decision not to extend the

Applicant's appointment must be rescinded.

IX. For the foregoing reasons, the Tribunal:

1. Rescinds the decision taken by the Respondent not to extend the Applicant's fixed-term appointment beyond 31 December 1987.

2. Orders the reinstatement of the Applicant into the service of the Asian and Pacific Centre for Transfer of Technology (APCTT) for duties appropriate to his qualifications and expertise.

3. In accordance with article 9, paragraph 1 of its Statute, fixes the compensation to be paid to the Applicant, should the Secretary-General, within thirty days of the notification of this judgement, decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in his case, at two years net base salary of the Applicant as at the date of his separation from service.

X. The Tribunal draws the attention of APCTT to the necessity to observe strictly the requirements of due process and the prescribed administrative procedures in connection with alleged misbehaviour or unsatisfactory service of staff members.

(Signatures)

Ahmed OSMAN
Vice-President, presiding

Arnold KEAN
Member

Francisco A. FORTEZA
Member

New York, 1 November 1990

R. Maria Vicien-Milburn

Executive Secretary