ADMINISTRATIVE TRIBUNAL

Judgement No. 497

Cases No. 491: SILVEIRA
No. 528: SILVEIRA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Arnold Kean; Mr. Ioan Voicu;

Whereas, on 30 November 1989, Celine Silveira, a staff member of the United Nations, filed an application in case No. 528, hereinafter referred to as the "first case", containing the following pleas:

"II. Pleas

(a) The preliminary relief requested below is requested again, including the request for production of documents that was never addressed by the Joint Appeals Board;

(b) Applicant requests rescission of the decisions implicit in: the failure to order further revision of her performance evaluation report; the failure to enjoin the use of the fact sheet including reference to the rebuttal proceedings and the quotation from her harassing and biased supervisor (...); and the failure to restore the annual and sick leave charged to which Applicant has objected;

(c) Applicant invokes the Administration's obligation to use good faith efforts to transfer her to a post in an office which has no connection with the Office of Legal Affairs ('OLA') and provide her with fair and reasonable working conditions, including the opportunity for career development;

(d) Applicant seeks the following compensation:

(i) Two years' net base salary in respect of the moral injury resulting from sexual harassment and administrative bias inflicted on her;

(ii) Two years' net base salary in respect of the stress and stress-induced physical illness inflicted on her as a result of the above-described harassment and bias, the failure by the Secretary-General to fulfill the obligation he voluntarily and therefore, irreversibly, assumed to find her a position outside OLA and the Administration's persistence in resisting Applicant's legitimate claims against which there was clearly no meritorious defense; and

(iii) Two years' net base salary in respect of the injury to Applicant resulting from the OLA's failure to recuse itself because of the conflict of interest inherent in its position as Applicant's employer department and as counsel to the Secretary-General with a duty to inform him that no basis for a defense existed even though such would embarrass that office as the employing department;

(e) Referral of Applicant's claim for sick leave in February and March 1988 and November 1988 to an independent practitioner or medical board; and

(f) Such other relief, including monetary compensation, as the Tribunal deems appropriate in view of the exceptional nature of the case."

Whereas the Respondent filed his answer on 15 February 1990;

Whereas the Applicant filed written observations on 22 March 1990;

Whereas the application in the "first case" contained a request for oral proceedings;

Whereas, on 21 March 1990, the Applicant filed a new application in Case No. 491, hereinafter referred to as the "second case", in which she requested, under article 12 of the Statute of the Tribunal, a revision of Judgement No. 458 rendered in her case on 7 November 1989;

Whereas the application in the "second case" contained a request for oral proceedings;

Whereas the Respondent filed his answer on 20 April 1990;

Whereas the Applicant filed written observations on 28 June 1990;

Whereas the facts in the "second case" were set out in Judgement No. 458;

Whereas, on 20 September 1990, the Presiding member of the Tribunal ruled that no oral proceedings would be held in these cases.

Whereas the facts in the "first case" are as follows:

The Applicant's temporary assignment with the UNCTAD Liaison Office in New York was due to expire on 31 October 1988. Accordingly, on 23 September 1988, the Recruitment and Placement Officer, General Service Staffing Section, Office of Human Resources Management (OHRM), had informed the Applicant that she should report to the Executive Officer of the Office of Legal Affairs (OLA) on 1 November 1988, "for assignment within that Office" while efforts to place her elsewhere continued. In a reply dated 4 October 1988, the Applicant objected to her transfer, "for health reasons and because of the hostile work environment" at OLA, arguing that the Organization had "an ethical responsibility" to place her in a different Department.

On 7 October 1988, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had decided to maintain the Legal Counsel's appraisal of the report by a Rebuttal Panel which had, in accordance with administrative instruction ST/AI/240/Rev.2, examined the substance of her rebuttal to the performance evaluation report dated 12 January 1987, assessing her performance at the General Legal Division, OLA. He also informed her that he would continue to make "every effort to effect [her] transfer or reassignment to a post outside the Office of Legal Affairs".

On 20 October 1988, the Executive Officer, OLA, asked the Assistant Secretary-General, OHRM, to assign the Applicant "to some other post outside OLA until a permanent arrangement [could] be found for her", since the Applicant's "presence in the Office would be disruptive to other staff ...". He also asked the Assistant Secretary-General to annul the memorandum of 23 September 1988, requesting the Applicant to report to OLA. It appears from the record of the case that no action was taken on this request.

On 31 October 1988, the Chief, General Service Staffing Section, OHRM, circulated the Applicant's "fact sheet", which contained a summary of her personnel record, including a referral to the rebuttal proceedings and quotations from her supervisor's remarks in the contested report, to 16 Departments and Offices and inquired whether they would consider the Applicant for any vacant G-4 position.

The Applicant did not report to work at OLA on 1 November 1988.

In a certified letter dated 4 November 1988, the Executive Officer, OLA, informed the Applicant that while OHRM continued to make efforts to place her outside OLA, she was obliged to report for duty to OLA. He notified her that her annual leave balance as of 31 October 1988 was "minus seven days" and reminded her that any absence which was not fully justified by her, would "be considered as unauthorized" and constituted "a non-compensable period in accordance with paragraph 10 of Annex I of the Staff Rules".

In a letter dated 15 November 1988, the Applicant's holistic chiropractor advised the Applicant's counsel that the Applicant, who was under his care, suffered from a "stress disorder", which, in his view, had been precipitated by her experiences at work "in particular, the Office of Legal Affairs ... therefore, requiring a change in her work environment".

According to the Applicant's personnel file, efforts made by the Respondent to transfer the Applicant to another Department were unsuccessful.

On 28 November 1988, the Executive Officer, OLA, wrote to the Applicant to inform her that her counsel's letter, together with the letter from her holistic chiropractor, had been sent to the Director of the Medical and Employee Assistance Division, OHRM, (the U.N. Medical Director) who believed that although it was "still inadvisable for [her] to work in the Office of Legal Affairs on the 34th floor...", he saw "no objection to her working in the Office of Legal Affairs elsewhere (eg. on the 32nd floor)". Accordingly, it had been decided to assign her temporarily to the Treaty Section, OLA, which was located on the 32nd floor, two floors removed from the General Legal Division where she had previously worked. In addition, the Executive Officer notified her that since she had not reported to work since 31 October 1988, he had requested the Payroll Unit of the Accounts Division to withhold payment of her salary as of 16 November 1988.

On 6 December 1988, the Applicant's holistic chiropractor wrote to the U.N. Medical Director, stating that in his opinion, such an assignment would not "eliminate" contacts with the then Director of the General Legal Division, who could still be "in a position to control [the Applicant's] career ... more importantly, there would inevitably be associations which would trigger the stress disorder" which was afflicting her. On 7 December 1988, the Applicant wrote to the U.N. Medical Director, enclosing the letter from her holistic chiropractor, as well as a letter from a neurologist, attesting that she had a "job-related anxiety/stress disorder" and urging that she should be transferred to another Department. In a reply dated 8 December 1988, the U.N. Medical Director informed the Applicant that he did "not believe there [were] sufficient medical reasons" to prevent her from taking up her "temporary assignment in the Treaty Section (on the 32nd floor)".

On 12 December 1988, the U.N. Medical Director informed the Executive Officer, OLA, that "in a spirit of compromise, and considering all the factors involved", he considered that half of the Applicant's absence from work during the period 1 November -

2 December 1988, could be "treated as certified sick leave". On 15 December 1988, the Executive Officer, OLA, informed the Applicant that, in accordance with the U.N. Medical Director's instructions, he would treat half of the period running from 1 November - 2 December 1988, as certified sick leave and advised her in detail of the current status of her annual and sick leave.

On 16 November 1988, the Applicant requested the Secretary-General to review the administrative decision to submit her fact sheet, containing a reference to the rebuttal of her performance report, to different Departments and Offices. On 20 December 1988, she asked the Secretary-General for his consent to submission of her appeal directly to the Tribunal.

In a memorandum dated 22 December 1988, the Executive Officer, OLA, wrote to the Applicant concerning her allegations of sexual harassment against the then Director of the General Legal Division, and her refusal to work for the Chief of the Treaty Section. He also informed her that "although the General Service Staffing Section [had] sent out a letter to all Offices and Departments requesting offers of a post for [her], no one ... replied in the affirmative" thus rendering it "impossible to effect an ad hoc transfer to another Office or Department at this time".

Having received no reply from the Secretary-General to her letter requesting review, on 16 January 1989, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the decision of 4 November 1988, requesting the Applicant to report for duty at OLA and the circulation of her "fact sheet" to the 16 Departments and Offices requested to consider her for possible assignment to them. On 5 April 1989, the Applicant requested the Secretary-General to review the administrative decision of 15 December 1988, to withhold 17 days pay from her January 1989 pay check and the decision to deny her sick leave for her "job-related anxiety/stress disorder". The Board consolidated both appeals and adopted its report on 1 August 1989. Its conclusions and recommendation read as follows:

"Conclusions and Recommendation

34. The Panel could not find any merit in the appeals. The appeals as a whole were considered to be frivolous.

35. Accordingly, the Panel could not agree to any one of the five reliefs requested ranging from the request for restoration of leave to promotion and financial compensation.

36. The Panel recommended that a fresh effort be made by both the Administration and the appellant to find a solution to this case.

37. The Panel makes no further recommendation in favour of the appeal."

On 1 September 1989, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had re-examined her case in light of the Board's report and had decided to maintain the contested decisions. He also noted the Board's unanimous recommendation that "a fresh effort be made by both the Administration and the appellant to find a solution to this case". On 30 November 1989, the Applicant filed with the Tribunal the application referred to above in the "first case".

In a letter dated 4 December 1989, the Assistant Secretary-General, OHRM, advised the Applicant that the post encumbered by her since December 1988 at the Treaty Section was slated to be abolished by 31 December 1989. Accordingly her name had been placed "on a list of staff to receive priority placement under the vacancy management and staff redeployment system". In a further letter dated 7 December 1989, the Assistant Secretary-General, OHRM, informed the Applicant of the procedures being followed by the Administration to place staff whose posts were being abolished. The Applicant currently encumbers a post in the Treaty Section. On 21 March 1990, the Applicant filed with the Tribunal the application referred to above in the "second case".

Whereas the Applicant's principal contentions in the first and second cases are:

1. In its review of the Applicant's appeal, the JAB made several errors which vitiate its conclusions.

2. The JAB has failed to fully exercise its jurisdiction in considering the Applicant's appeals frivolous.

3. The Respondent did not make good faith efforts to place the Applicant outside OLA.

4. The Respondent charged sick leave as annual leave and consequently the Applicant received less than her full emoluments.

5. The new decision by the Respondent to abolish the Applicant's post is vitiated by lack of due process and constitutes additional evidence of the operation of extraneous factors in administrative decisions affecting the Applicant's career.

6. The Applicant suffered injury because of unfair treatment and lack of good faith by the Respondent.

Whereas the Respondent's principal contentions are:

1. Limitations on receivability of appeals is a characteristic of all judicial systems. Article 7.3 of the Statute of the Tribunal ensures that the Tribunal does not have to consider frivolous claims. Such a limitation does not violate the rights of staff members.

2. The failure of the Applicant to be placed is a consequence of her own behaviour in making baseless allegations. That behaviour makes it highly improbable that any department would willingly offer her a position.

3. The Applicant's claims for sick leave have been finally determined in accordance with an appeal procedure of her own choosing. The history of this case discloses no reasons to permit the same claims to be re-opened by a different procedure.

4. The application for revision of Judgement No. 458 is not timely made and the facts relied upon by the Applicant do not constitute a "decisive factor" within the meaning of Article 12 of the Tribunal's Statute, to justify revision of Judgement No. 458.

The Tribunal, having deliberated from 16 October to 8 November 1990, now pronounces the following judgement:

I. Since the applications submitted in cases No. 491 and No. 528 are related, the Tribunal orders the joinder of the two cases.

II. In the application submitted in case No. 491, the Applicant seeks revision of Judgement No. 458 dated 7 November 1989. The Applicant alleges discovery of facts of a decisive nature within the meaning of article 12 of the Tribunal's Statute. The facts are a letter of 4 December 1989, to the Applicant from the Assistant Secretary-General for Human Resources Management (OHRM), advising her that her post was going to be abolished, and a further letter of 7 December 1989, from the Assistant Secretary-General, OHRM, advising the Applicant that every effort would be made to find her an alternative post. The Applicant argues that these new facts are decisive because they establish unfair treatment and prejudice.

III. The Tribunal recalls that the revision of a judgement is governed by article 12 of the Tribunal's Statute.

IV. It is the view of the Tribunal that article 12, which provides inter alia that "the application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement" is clearly mandatory. Accordingly, any application for revision of a judgement must be made "within thirty days of the discovery of the fact" relied upon. In the present case, the Applicant relies on letters dated 4 and 7 December 1989, which were plainly known to the Applicant more than thirty days before 21 March 1990, the date on which the application was filed. Consequently, the Tribunal finds that the application is not receivable. Contrary to the Applicant's contention, the thirty day period is not enlarged by the fact that the Applicant sought to have the Committee on

Applications for Review of Administrative Tribunal Judgements act with respect to Judgement No. 458.

V. In the application submitted in Case No. 528, the substantive issues are whether use of a "fact sheet" to circulate the candidature of the Applicant for vacant posts violated her rights, and whether efforts were made in good faith to transfer her to another department. A subsidiary issue is whether the Applicant's claim to sick leave was properly denied. However, the decisive issue is procedural, i.e. whether the application is receivable, since the Joint Appeals Board (JAB), after considering in detail the Applicant's contentions, unanimously found the Applicant's appeals, as a whole, to be frivolous.

VI. Paragraph 3 of article 7 of the Tribunal's Statute provides that "In the event that the recommendations made by the joint body and accepted by the Secretary-General are unfavourable to the applicant, and in so far as this is the case, the application shall be receivable, unless the joint body unanimously considers that it is frivolous".

VII. Nevertheless, the Tribunal has ruled in Judgement No. 269, Bartel (1981), paragraph III, that "... even where the joint body unanimously concluded that an appeal was frivolous, the Tribunal is not precluded from considering whether the joint body's conclusion was vitiated by some irregularity". The Applicant alleges that the JAB's conclusion of frivolousness is vitiated by irregularity because cases involving recourse and revision of performance evaluation reports have been considered by JABs, the Tribunal, and the International Court of Justice. The Tribunal finds no merit in this contention. The issue before the JAB was not whether revision of a performance evaluation report may be the proper subject of an appeal. It was whether the appeals in question, based on unsupported and unjustified assertions of bias and harassment, were

frivolous. After examining this issue, the Tribunal finds that the conclusions of the JAB were not vitiated by any irregularity.

VIII. The Applicant contends that consolidation of her two appeals is an irregularity. The Tribunal disagrees. Under the applicable staff rule 111.1(e), a JAB may establish its own procedures. Joinder of multiple appeals is a permissible procedural technique, which the Tribunal itself has utilized.

IX. The Applicant claims that, because an answer by the Respondent cannot be declared frivolous, the concept of equality between parties requires that a JAB should not declare an application frivolous. The Tribunal finds no valid basis for this contention. Article 7.3 of the Tribunal's Statute provides for the declaration that an application is frivolous as a proper mechanism for preventing abuse of the appellate procedure by vexatious applicants.

X. The Applicant alleges irregularity on the part of the JAB in a supposed misstatement of fact. The misstatement alleged is not considered by the Tribunal to be a misstatement at all. The reference by the JAB to the "decision", is to the Legal Counsel's decision, of 10 December 1987, following his appraisal of the report of the Rebuttal Panel established to review the Applicant's performance evaluation report. It is quite clear from the JAB report that the JAB was aware of the correct dates of the Applicant's temporary assignments.

XI. Another claim of the Applicant is that the JAB's finding of frivolousness was irregular because it was proper for her to proceed before the JAB if the Administration was not implementing a Tribunal judgement. The Tribunal finds no merit in this claim. The issue is not whether the JAB was a proper body to consider the appeals. The real question is whether the JAB could properly have considered the

appeals frivolous. In this regard, there is no evidence that the JAB's finding was vitiated by any irregularity, particularly since no proof was ever offered to support the attacks and accusations made by the Applicant on her colleagues.

XII. The Applicant also claims an irregularity since, in recommending rejection of her appeal against denial of her sick leave claim, the JAB referred to Judgement No. 422, Sawhney (1988). The Tribunal finds no irregularity here. The JAB properly mentioned that judgement in dealing with the Applicant's claimed entitlements to sick leave. That the JAB cited that case did not affect in any irregular manner its conclusion that her appeals, as a whole, were frivolous.

XIII. The Applicant finally claims that it is improper for the JAB to find an appeal frivolous, since the result of such a finding is to deny her the right to be represented before the Tribunal by outside counsel. The argument is that, since outside counsel are not permitted to appear at JAB hearings, the finding of frivolousness blocks the Applicant's access to the Tribunal, and therefore prevents her from being represented on the merits by outside counsel before the Tribunal. This argument cannot be sustained. There is no due process requirement that forecloses the Tribunal from depriving a frivolous Applicant of access to the Tribunal. Any lack of access to outside counsel which the Applicant might suffer is a consequence of her filing frivolous appeals to the JAB.

XIV. At the same time, the Tribunal observes that the Applicant was able to appeal, and has appealed, to the Tribunal with the assistance of outside counsel with respect to the claim that the JAB conclusion of frivolousness was vitiated by irregularity.

XV. In the light of the above considerations, the Tribunal finds that the JAB's conclusions were not vitiated by any irregularity. Accordingly, the Tribunal holds that it has no jurisdiction to review the appeal on its merits. Moreover, the Tribunal observes that the application attempts to re-argue issues already decided by Judgement No. 458, Silveira (1989) and which are res judicata. The Tribunal considers this improper, and an abuse of its procedures.

XVI. In conformity with Judgement No. 458, the Tribunal reiterates its hope that the efforts to effect the Applicant's transfer or re-assignment to a post outside the Office of Legal Affairs, in accordance with medical advice received, will continue to be pursued.

XVII. For the foregoing reasons, the applications in cases No. 491 and No. 528 are rejected in their entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Arnold KEAN
Member

Ioan VOICU
Member

New York, 8 November 1990

R. Maria VICIEN-MILBURN
Executive Secretary