ADMINISTRATIVE TRIBUNAL

Judgement No. 642

Cases No. 696: SOW
No. 708: KANE
No. 723: DIATTA
No. 724: DIENNE
No. 725: CAMARA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 3 September 1992, Demba Sow, a former staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"(a) [To order] that the decision of termination be regarded as null and void;

(b) [To order] that my indefinite appointment [sic] be renewed with effect from 1 July 1990, with a back payment of my salary, my dependency allowances and my rights, with retroactive effect from the date of my termination;

(c) [To award] compensation for the moral and material injury suffered in the amount of US$30,000;

(d) [To award] interest at the rate of 20 per cent per annum on the amounts mentioned in (b) and (c).

[Or alternatively] to grant me:

(a) On the basis that my termination took effect on the date of the decision of the Tribunal, retroactive salary with effect from the date of termination which took place on

1 July 1990, until the date of the Tribunal's decision, plus the dependency allowances, leave entitlements, etc.;

(b) Compensation in lieu of notice equal to three months;

(c) An end-of-service allowance calculated from my date of employment in 1984, until the decision of the Tribunal;

(d) By way of compensation for the material injury suffered, an amount of US$30,000;

(e) For the moral injury suffered, an amount of US$50,000;

(f) Interest at the rate of 15 per cent per annum on the amounts mentioned in (a), (b), (c), (d) and (e)."

Whereas the Respondent filed his answer on 3 June 1993;

Whereas the Applicant Sow filed written observations on 13 August 1993;

Whereas at the request of Abdou Salam Kane, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 15 January 1993, the time-limit for the filing of an application to the Tribunal;

Whereas, on 16 December 1992, the Applicant Kane filed an application requesting the Tribunal, inter alia:

"...

(b) That it decide that the Secretary-General must pay me my entitlements to family allowances, leave, medical care;

(c) That it decide that I am entitled to damages for material prejudice suffered, in the amount of US$10,000;

(d) That it decide that I am entitled to the payment of 20 per cent interest on the sums mentioned in paragraphs (b) and (c) above."

Whereas the Respondent filed his answer on 15 April 1994;

Whereas at the request of Mbaye Diatta, a former staff member of the United Nations, the President of the Tribunal, with the

agreement of the Respondent, extended to 15 April 1993, the time-limit for the filing of an application to the Tribunal;

Whereas, on 2 April 1993, the Applicant Diatta filed an application requesting the Tribunal, inter alia:

> "...
>
> (b) That it revoke the decision to abolish my post;
>
> (c) That it decide that the Secretary-General must renew my indefinite appointment [sic] from 1 July 1990, with retroactive payment of my salary, my family allowances, my leave and my language allowance, it being understood that such payment will start from the day of termination;
>
> (d) That it decide that I am entitled to moral and material damages of US$50,000;
>
> (e) That it decide that I am entitled to the payment of 20 per cent interest on the sums mentioned in paragraphs (c) and (d) above."

Whereas the Respondent filed his answer on 15 April 1994;

Whereas at the request of Mamadou Makodou Dienne, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 15 April 1993, the time-limit for the filing of an application to the Tribunal;

Whereas, on 30 March 1993, the Applicant Dienne filed an application requesting the Tribunal, inter alia:

> "...
>
> (b) That it revoke the decision to abolish my post;
>
> (c) That it decide that the Secretary-General must renew my fixed-term appointment from 1 July 1990, with retroactive payment of my salary, my family allowances, my leave and my language allowance, it being understood that such payment will start from the day of my termination;
>
> (d) That it decide that I am entitled to material damages in the amount of US$10,000;

(e) That it decide that I am entitled to the payment of 20 per cent interest on the sums mentioned in paragraphs (c) and (d) above."

Whereas the Respondent filed his answer on 15 April 1994;

Whereas at the request of Ali Camara, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 15 April 1993, the time-limit for the filing of an application to the Tribunal;

Whereas, on 9 April 1993, the Applicant Camara filed an application requesting the Tribunal, inter alia:

"...

2. To revoke the decision to abolish my post;

3. To decide to reinstate me on the basis of a permanent contract with retroactive payment of salary, allowances and benefits...

4. To decide that I am entitled to retroactive promotion;

5. To order the Respondent to submit to the Tribunal the report of the mission of enquiry into the disappearance of IDEP equipment;

6. To declare that [the Chief, Administration and Finance] and [the Administrative Assistant] have committed serious violations and to decide on the penalties to be imposed in such circumstances."

Whereas the Respondent filed his answer on 15 April 1994;

Whereas the facts in the cases are as follows:

The Applicant Sow entered the service of the United Nations on 1 January 1984, as a Watchman on a one year fixed-term appointment at the G-1, step I level, at the African Institute for Economic Development and Planning (IDEP) in Dakar, Senegal. On 10 October 1985, his functional title was changed to Clerical Worker. He was promoted to the G-2, step IX level on 1 February

1989. His appointment was extended continuously through 30 June 1990, when he separated from service upon the expiration of his last fixed-term appointment.

The Applicant Kane was recruited by IDEP as a Watchman under a Special Service Agreement (SSA) for the period from 18 July to 2 September 1988. On 3 October 1988, he was given another SSA for the period from 1 October through 31 December 1988. On 1 January 1989, he was given a three-month appointment at the G-1, step I level. His appointment was subsequently extended for three-month periods through 30 June 1990, when he separated from service upon the expiration of his last fixed-term appointment. After his separation, the Applicant continued to work for IDEP under a series of SSAs, commencing on 1 October 1990. According to the record, he is currently employed by IDEP under an SSA.

The Applicant Diatta entered the service of IDEP on 17 January 1977. He was given a three-month appointment as an Office Clerk at the G-4, step I level. His appointment was extended continuously through 30 June 1990, when he separated from service upon the expiration of his last fixed-term appointment. By then, he had reached the G-5, step IX level.

The Applicant Dienne entered the service of IDEP on 1 January 1981, on a three-month appointment as an Accounting Assistant at the G-4, step I level. His appointment was extended continuously through 30 June 1990, when he separated from service upon the expiration of his last fixed-term appointment.

The Applicant Camara entered the service of IDEP on 1 January 1978. He was given a three-month appointment as an Accounting Assistant at the G-4, step I level. His appointment was extended continuously through 30 June 1990, when he separated from service upon the expiration of his last fixed-term appointment. By then, he had reached the G-5, step VI level.

On account of the financial crisis faced by IDEP and the need for restructuring its basic activities, the IDEP Governing Council, at its 32nd session on 11 May 1990, decided to abolish 11 posts funded from budgetary resources and encumbered by local staff. On 31 May 1990, the Chief, Administration and Finance, IDEP, informed the Applicants that the posts encumbered by them had been abolished and that they would not be entitled to the payment of a termination indemnity. In addition, he indicated that the posts to be abolished had been selected on the basis of the seniority of the incumbents.

On 11 June 1990, nine staff members, including all the Applicants, requested the Secretary-General to review the decision not to extend their appointments and not to pay them termination indemnities. In a reply dated 8 October 1990, the Director, Staff Administration and Training Division, Office of Human Resources Management (OHRM), informed the Applicants that the decision would be maintained.

On 11 October 1990, the Applicants lodged appeals with the Joint Appeals Board (JAB). The JAB grouped their appeals and considered a single representative case, which by agreement with the Applicants, would apply to all of them. The JAB adopted its report on 31 March 1991. Its considerations and recommendations read, in part, as follows:

> "Considerations
>
> 16. The Panel had, in the first instance, to deal with questions of fact. Appellant had submitted with his letter of 13 May 1991, addressed to the Secretary, JAB, copies of the agreement concerning the establishment of IDEP concluded between the Government of Senegal and the UN and of a portion of the Senegalese Labour Code, including Article 35. The Panel noted that Respondent did not question the validity of the text of the Labour Code. Respondent did, however, question the validity of the text of the agreement, as provided by Appellant. The Panel noted that the Office of Legal Affairs (OLA) had requested a copy of the agreement from the Director of IDEP (...), and that Respondent had requested additional time to submit a reply until OLA had received a copy of the authentic text and had commented on it. It was not clear, however, from Respondent's comments of 15 August 1991, whether the objections raised therein were

based on the text provided by Appellant or on a text provided by the Director of IDEP in reply to OLA's cable.

17. The Panel found it difficult to believe that there was not a base agreement for an institution as important as IDEP, which had been in existence since at least 27 February 1964 (date of approval of its Statute by the Economic Commission for Africa (ECA)), and for which the General Assembly had approved a revised statute on 20 December 1979. The Panel noted that Respondent did not deny that such an agreement existed and that the Revised Statute (Article II, para. 2) states that the host government shall provide certain facilities 'in agreement with the United Nations.' The Panel had no evidence that Respondent had searched the files and archives of the UN, the UNDP (which provides part of the financing of IDEP), and ECA for a true copy of any such agreement.

18. Respondent also attacks the validity of the text provided by the Appellant on the grounds that 'it purports to subject the application of the Staff Regulations and Rules to Senegalese labour law.' In an earlier paragraph of the same submission (15 August 1991), however, Respondent quotes the paragraph of the Revised Statute of IDEP, which provides that it shall be subject to the Staff Rules, except as authorized by the Secretary-General. As Respondent had failed (a) to demonstrate that no base agreement with respect to IDEP existed, or (b) to produce a text of the valid agreement, the Panel concluded that it had to accept the text submitted by Appellant as a basis for its further consideration.

19. The Panel noted that, ... , the Respondent was bound by this Treaty Agreement, which effectively subordinates UN Staff Rules to the Senegalese Labour Code. The Panel rejected the contention of the Respondent that even if the United Nations had seemingly acceded to the Treaty Agreement, the Treaty Agreement should be considered null and void ab initio, as it was contrary to internal UN legislation. The Panel disagreed with this argument as a Treaty Agreement between the parties would supersede any internal laws of either party to the Agreement. The Panel had reached this stage in its considerations when it received from Appellant a copy of a letter dated 10 February 1992, from the Minister of Foreign Affairs, Republic of Senegal, (...). That letter removed any doubt that might have remained as to the existence of the Agreement and its validity.

...

23. ... the Panel finds that Appellant was deprived of the fair and just treatment to which he was entitled as a staff

member and of due process under both the Senegalese Labour Code and the UN Staff Rules.

Recommendations

24. The Panel recommends that:

(a) Appellant be reinstated with full retroactive payment of salary, allowances and benefits;

(b) If his post has in fact been abolished as stated by Respondent, and not reinstituted after Appellant's departure as alleged by Counsel, he be paid termination indemnities as if he had had a regular appointment under the 100 Series of the Staff Rules; and

(c) In either case, in compensation for being deprived of fair treatment and due process, Appellant be paid an indemnity of US$2,000.00. (This indemnity should be paid to all appellants, including Mr. Kane)."

On 9 July 1992, the Assistant Secretary-General for Human Resources Management transmitted to the Applicants a copy of the JAB report, and informed each of them as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has serious reservations with the Board's reasoning. Nevertheless, in view of the exceptional circumstances of the case where your terms of appointment may have been unclear to you, he has decided to accept the Board's recommendation contained in paragraph 24(b) of the report that you be paid a termination indemnity calculated on the basis of the schedule normally applicable to permanent appointments, as set out in Annex III(a) to the Staff Regulations.

The Secretary-General has noted the delays which have prevented a prompt resolution of your case. On this ground, he has also decided to accept the Board's recommendation that you be paid US$2,000 in damages."

On 3 September 1992, the Applicant Sow filed with the Tribunal the application referred to earlier.

On 16 December 1992, the Applicant Kane filed with the Tribunal the application referred to earlier.

On 2 April 1993, the Applicant Diatta filed with the Tribunal the application referred to earlier.

On 30 March 1993, the Applicant Dienne filed with the Tribunal the application referred to earlier.

On 9 April 1993, the Applicant Camara filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. By virtue of the Agreement between the United Nations and the Government of Senegal, the relationship between IDEP and its staff is subject to the Senegalese Labour Code.

2. The Applicants were entitled to an indefinite appointment after 1985 and protection from separation, in accordance with the relevant provisions of the Senegalese Labour Code.

3. As all the Applicants, except the Applicant Kane, served IDEP satisfactorily for more than five years, they were entitled to a career appointment pursuant to General Assembly resolution 37/126.

Whereas the Respondent's principal contentions are:

1. The Administration of a UN subsidiary body has no authority to derogate from the Staff Regulations and Rules.

2. The provisions of the Agreement entered into between the United Nations and the Government of Senegal would not create rights and obligations for UN staff members.

3. The Applicants expressly accepted that their appointments with IDEP would be subject to the UN Staff Regulations and Rules.

4. The Applicants had no reasonable expectation of the renewal of their fixed-term appointments.

5. The Respondent properly exercised his discretion in establishing the amount of compensation to be paid to the Applicants.

The Tribunal, having deliberated from 29 June to 14 July 1994, now pronounces the following judgement:

I. As the Applicants' respective claims are all based fundamentally on common contentions, the Tribunal has decided to consider the Applicants' cases together and turns first to their central and common contentions before dealing with other features of the Applicants' claims.

II. The Applicants appeal from a decision by the Secretary-General, dated 9 July 1992, to uphold the separation of the Applicants from the service of the Organization, following the expiration of their fixed-term appointments, and to accept a Joint Appeals Board (JAB) recommendation that the Applicants be paid an indemnity calculated on the basis of the schedule normally applicable to termination of permanent appointments. In addition, the Secretary-General accepted a recommendation of the JAB to pay each of the Applicants US$2,000 in damages on account of delays.

III. The Applicants' claims are premised on the contention that, under the terms of a Treaty Agreement between the United Nations and the Government of Senegal (the Treaty), locally recruited staff of Senegalese nationality were subject to United Nations Staff Rules only to the extent that those Rules did not conflict with the Labour Code of Senegal, which was to remain applicable to those staff members. The Applicants assert that such a conflict existed and that it is pertinent to their situation. According to the Applicants, Article 35 of the Labour Code of Senegal provides that no worker can have more than two fixed-term contracts with the same employer and that service beyond those fixed-term contracts is deemed to continue under an indefinite contract. Under Article 47 of the Labour Code, separation is conditioned on approval by an official of the Government of Senegal. In their view, therefore, the Organization could not lawfully separate the Applicants from their posts, as it did, upon expiration of their last fixed-term appointments, despite the fact that the reason for doing so was a severe financial crisis faced by IDEP, a subsidiary body of the Economic Commission for Africa.

IV. The JAB found merit in the Applicants' contention with regard to the applicability of the Labour Code of Senegal. In its view, the Respondent was bound by the terms of the Treaty. The JAB also concluded that the Applicants should have been appointed under the 100 Series of the Staff Rules rather than the 200 Series of the Staff Rules. The Administration had indicated its belief that the appointments had been made under the 200 Series of the Staff Rules. However, the JAB believed that this was improper, and that those Applicants who had served more than five years should have been entitled to every reasonable consideration for a career appointment, under General Assembly resolution 37/126. It found that no such consideration appeared to have been afforded to them. Accordingly, the JAB recommended reinstatement with full retroactive salary and benefits. If, in fact, the Applicants' posts had been abolished and not reinstituted, the JAB recommended that they be paid a termination indemnity as if they had held a regular appointment under the 100 Series of the Staff Rules, plus US$2,000 in damages. As noted above, the recommendations regarding termination indemnities and damages were adopted in the Secretary-General's decision under appeal.

V. As presented to the Tribunal, the central issue in this case appears to revolve around whether the Treaty is applicable and may be invoked by the Applicants before the Tribunal. As a preliminary matter, the Tribunal has previously held that its competence does not extend to the interpretation and application of a Headquarters Agreement (similar to the Treaty) in the absence of specific language in the contract of employment incorporating the provisions of a Headquarters Agreement. (Cf. Judgement No. 588, Darlington (1993), para. VIII). Nothing in the Staff Regulations or Staff Rules governing the Applicants' contract of employment incorporated any provision of the Treaty.

VI. No action by the General Assembly incorporated any provisions of the Treaty into the Staff Regulations. Similarly, no such action

was taken by the Secretary-General with respect to the Staff Rules, notwithstanding that he had authority under article 3, paragraph 2 of the IDEP Statute to make exceptions to the Staff Rules. And the Tribunal notes, parenthetically, that this authority does not appear to have been delegated under the IDEP Statute to the Director of IDEP, who signed the Treaty on behalf of the United Nations. Hence, the Tribunal is unable to agree with the view of the JAB that the Applicants' contracts of employment included both article IV of the Treaty and provisions of the Labour Code of Senegal.

VII. The Respondent has contended that the Treaty does not create rights between the Organization and staff members enforceable before the Tribunal. He argues that it applies only to the parties who signed it. There is no need for the Tribunal to express an opinion on the issue of international law as such. It is sufficient for the Tribunal to point out, as it has in other cases, that its jurisdiction is limited to assertions of violation of the terms of a staff member's contract of employment, including terms of appointment, and applicable Staff Regulations and Rules. (Cf. Judgement No. 437, Ahmed (1988); Judgement No. 361, Minter (1986)).

VIII. If, as has been contended by the Applicants, the Organization had obligations under the terms of the Treaty with respect to Senegalese nationals and failed to comply with these obligations, such failure presents an issue for resolution between the Organization and the Government of Senegal. In the context of this case, such issues are not within the competence of this Tribunal.

IX. The Tribunal observes that, if the Labour Code of Senegal were applicable as part of the Applicants' contracts of employment, they would be entitled not only to conversion of their fixed-term appointments to permanent appointments, but also to immunity from separation pending authorization by an official of the Government of Senegal. This would constitute a most unusual state of affairs in

terms of the administration of the staff of the United Nations. It might also raise questions under Article 8 of Chapter III of the Charter, or with respect to the principle of equal treatment which the Tribunal has addressed in its jurisprudence. But there is no necessity for the Tribunal to address these matters in this case.

X. The Applicants who were in the service of IDEP for the requisite period have contended that they were entitled to but did not receive the benefit of General Assembly resolution 37/126, calling for "every reasonable consideration for a career appointment." The JAB found no indication that they received such consideration. The Respondent contends that, because of IDEP's precarious financial situation, it was not in a position to give the Applicants career appointments, and the evidence supports the Respondent's contention. In the circumstances of this case, the Tribunal is unable to find any material injury to the Applicants in this respect.

XI. Although the Tribunal concurs in the JAB view that the Applicants should be regarded as having been appointed under the 100 Series rather than the 200 Series of the Staff Rules, it does not appear that the outcome of the Applicants' appeals is affected thereby. The Applicants, who were serving on fixed-term appointments, were entitled to and received 30 days' notice that their fixed-term appointments would not be renewed. As staff members serving under fixed-term appointments, they were not entitled to any termination indemnity. However, for the reason set forth in the Respondent's decision dated 9 July 1992 (which did not convert the Applicants' fixed-term appointments to permanent appointments), the Respondent awarded them the same termination indemnity they would have received had they been serving under a career appointment, plus an additional sum of US$2,000. Under the circumstances of this case, the Tribunal considers that the Applicants have been fairly treated. Had they been serving on permanent appointments, the Respondent would have been authorized to

terminate their appointments on 30 June 1990, under staff rule 109.1(c). At most, the Applicants would have been entitled to only an additional two months' advance notice, or pay in lieu thereof. The Tribunal sees no justification for treating the Applicants as though they had been separated as of the date of the Tribunal's judgement. While the Applicants contend that they were improperly selected for separation from the Organization, the Tribunal finds no flaw in the basic procedure followed by IDEP to reduce its staff in order to cope with the financial problems confronting it.

XII. With respect to individual claims made by the Applicants, the Tribunal finds as follows:

XIII. The Applicant Sow invites the Tribunal's attention to the recruitment by IDEP, after his separation, of a female staff member who was employed as a secretary, not the work previously done by the Applicant, and who later separated from the Organization, leaving a vacancy which the Applicant contends he should have been rehired to fill. The claim sought to be made by the Applicant Sow was not considered by the JAB. Indeed, it does not appear to have been raised until after the adoption of the JAB report. It is, therefore, not for consideration by the Tribunal under article 7 of the Tribunal's Statute.

XIV. The Applicant Kane argues that, in fact, his post was not abolished. He cites in support of this contention the fact that he continues to do the same work for IDEP under a Special Service Agreement (SSA). In fact, the post was abolished. That he is doing the same work under an SSA does not alter the situation. An individual serving under an SSA is not a staff member. Moreover, the SSA was entered into with the Applicant Kane as a humanitarian gesture on the basis of his individual circumstances. It ill behooves the Applicant to attack the Organization for acting on humanitarian grounds to his benefit.

XV. The Applicant Diatta also contends that, in fact, his post was not abolished and that it was offered to another individual who served under an SSA. The Applicant Diatta claims discrimination because he was not offered an SSA. In fact, the Applicant Diatta's post was abolished. The record shows that the work of the person serving under an SSA was different from the work the Applicant had done and was work for which the Applicant was not adequately qualified. The Tribunal also notes that this issue does not appear to have been presented to the JAB. He also cites the case of the Applicant Kane. The fact that the Applicant Kane received an SSA for humanitarian reasons does not constitute unlawful discrimination and is irrelevant to the central issue in this case.

XVI. The Applicant Dienne contends that, after his separation, IDEP created a new post that he could have encumbered but which was given to another staff member. He contends that this was in violation of his rights under the Staff Rules and Regulations, as well as contrary to the spirit of the communication informing him of the abolition of his post. This issue does not appear to have been presented to the JAB, which dealt with the Applicant Dienne's case on the same basis as the case of the other Applicants. Before the JAB, the decisive issue was the legality of the abolition of the Applicants' posts and their resulting separation. Accordingly, the claim of the Applicant Dienne regarding the subsequent creation of a new post is not properly before the Tribunal. The Applicant Dienne also cites the case of the Applicant Kane who received an SSA as constituting unlawful discrimination. As the Tribunal notes above, the Applicant Kane's work under an SSA did not give him the status of a staff member and, under the circumstances, did not constitute unlawful discrimination in his favour.

XVII. The Applicant Camara asserts a claim to a retroactive promotion. It does not appear that this issue was before the JAB, which treated the case as an appeal against a decision to separate

the Applicant from the service of the Organization. That being so, the issue is not properly before the Tribunal.

The Applicant Camara also asks the Tribunal to order the Respondent to submit a report dealing with an inquiry into the disappearance of IDEP equipment, and to declare that other staff members have committed serious violations. Neither of these matters was before the JAB and will not be considered by the Tribunal.

XVIII. For the foregoing reasons, the applications are rejected in their entirety.

(Signatures)

Jerome ACKERMAN
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

Geneva, 14 July 1994

R. Maria VICIEN-MILBURN
Executive Secretary