



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 667

Case No. 740: ESSAIED

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Mikuin Leliel Balanda; Mr. Hubert
Thierry;

Whereas, on 4 July 1993, Abderrazak Essaied, a former staff member of the Office
of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR),
filed an application requesting the Tribunal, inter alia:

"- To rule that, the Applicant's supervisors, by not preparing periodic
performance evaluation reports, violated staff rule 112.6 and the administrative
issuance concerning the performance evaluation system; ...

...

- To rule that the decision of the Appointment and Promotion Board was
irregular, as it was based on non-recommendation [by the Chief of the Bureau],
which in itself was improper, and on the pending assignment to Lesotho, which in
fact was a disguised demotion;

- To rule that the early retirement/agreed termination was imposed on the
Applicant through dilatory manoeuvres on the part of the Administration, that it was
thus vitiated by lack of concurrence and that, accordingly, it is null and void;

- To rule that the refusal of UNHCR to provide him with a certificate

stating the quality of the work performed by him and his professional conduct in the performance of his duties from 1981 to 1990 constitutes a flagrant violation of the Staff Regulations;

- To rule that UNHCR, by not challenging the conclusions of the Joint Appeals Board and agreeing to award the Applicant a 'symbolic' sum equivalent to the sum of six weeks salary, has clearly acknowledged that it did not observe the terms of his contract; ...

Accordingly, to order UNHCR:

- To award [the Applicant] compensation equivalent to the total financial loss sustained by him as a result of his forced separation before his legal date of retirement (May 1993) and to restore his rights as if he had served during such period and, accordingly, to award him damages in the amount of US\$151,745;

- To award him the amount of US\$4,700 as reimbursement of counsel's fees ...;

- To issue to him a certificate stating the quality of the work performed by him and his professional conduct during the entire period of his service with UNHCR, including the period 1981-1990;

- In addition, the Applicant requests the Tribunal to recognize the hardships which the Administration has imposed on him through its repeated machinations and, accordingly, to order the Administration to award him, as damages, additional compensation in the amount of US\$60,000."

Whereas the Respondent filed his answer on 5 July 1994;

Whereas the Applicant filed written observations on 14 October 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNHCR on 19 September 1977, on a one-year fixed-term appointment, as a Programme Officer, at the P-4 level. His appointment was repeatedly renewed for fixed-term periods. With effect from 19 September 1981, the Applicant was transferred from UNHCR Headquarters in Geneva to the Branch Office in Burundi, as Representative. On 1 August 1983, his appointment was converted to a

permanent appointment. He was promoted to the P-5 level on 1 July 1984, and transferred to Zaire as UNHCR Regional Representative. In this capacity the Applicant received a special post allowance (SPA) at the D-1 level, with effect from 1 January 1985. The Applicant was then appointed UNHCR Regional Representative in Bahrain, with effect from 1 February 1987, and remained at the P-5 level with an SPA at the D-1 level. The Applicant served in this post until his separation from service on 7 December 1990.

In a telex dated 27 January 1990, the Applicant informed his supervisor, the Chief of the Regional Bureau for South West Asia, North Africa and the Middle East (SWANAME), that he had learned that two staff members had undertaken a mission to Beirut on 5 December 1989 without informing him. The Applicant asked the Chief of the Bureau to remind the two staff members that such action must be coordinated with and approved by him, the Regional Representative. In a further telex to the Chief of the Bureau, dated 30 January 1990, the Applicant confirmed that no authorization had been given for the mission undertaken to Beirut by the two staff members.

In a reply dated 1 February 1990, the Chief of the Regional Bureau, SWANAME, stated, "I do not wish to compare the two versions which you yourself have given us", noting that one of the staff members involved had claimed that her mission to Beirut had been "covered" by the Applicant. The memorandum noted as "regrettable" the Applicant's "inability to make yourself heard by your colleagues" and concluded that the fault was "shared by both sides". Attached was a copy of a memorandum from the Chief of the Bureau to the two staff members involved, reprimanding them for the mission.

On 19 February 1990, the Applicant wrote to the Chief of the Regional Bureau, SWANAME, reaffirming that he had not authorized the mission to Beirut, and that he was not even aware of it until after it had taken place. On these grounds, he rejected the "'verdict' of shared blame" and requested that one of the staff members involved be asked to write a report on the incident, to be considered along with a report from him, before judgement was passed. In doubting his version of events, the Applicant wrote to the Chief of the Bureau, "you question my credibility and impair my professional dignity". In this

conduct, he stated, "you have exceeded your authority".

The Deputy Chief of the Bureau wrote to the Applicant on 27 February 1990, conveying that the Chief of the Bureau had asked him to return the Applicant's memorandum of 19 February 1990, and to relay that "he could accept neither its tone nor its content".

On 27 April 1990, the Administration issued circular IOM/46/90, soliciting recommendations for promotion from all UNHCR supervisors for the 1990 annual session of the Appointment and Promotion Board (APB). In the circular, supervisors were requested to bear in mind the financial situation of the Organization and to exercise "maximum restraint and careful judgement" by making recommendations "only in favour of the most outstanding staff members". The circular provided that seniority was not to be considered in itself as a justification for recommendation, and that the level of the post occupied by the staff member as well as the fact that he or she had occupied posts at a higher level in the past were important elements to be taken into account. The deadline for submissions of recommendations for promotion was set as 25 May 1990.

The Chief of the Bureau, SWANAME, did not recommend the Applicant for promotion. The Applicant's case was reviewed at the session of the APB held from 11 to 21 June 1990 and he was not recommended by the Board for promotion. On 14 July 1990, the Applicant filed a recourse requesting a review of his non-recommendation by the Board. In a letter dated 14 August 1990, the Chief, Recruitment, Career Development and Placement, UNHCR, informed the Applicant that the Board reviewed his case and noted that "in the absence of a recommendation and pending a decision on your next assignment, they were unable to retain your name".

On 15 August 1990, the Applicant was sent a performance evaluation report (PER) for the period from September 1986 to July 1990, with a request to complete and return it within one week. On 21 August 1990, the Applicant wrote to the Chief of the Bureau, SWANAME, expressing his dissatisfaction with his non-promotion, which he attributed to the absence of a recommendation and the absence of a PER. He requested an explanation as

to why he had not been recommended for promotion. In a reply dated 25 September 1990, the Chief of the Bureau stated that he had followed the instructions in circular IOM/46/90.

In the meantime, by telex dated 30 July 1990, the Acting Director, Human Resources Management Division, informed the Applicant that he had been appointed UNHCR Representative in Maseru, Lesotho, a P-5 post with no entitlement to an SPA at the D-1 level. By telex dated 6 August 1990 to the High Commissioner, the Applicant stated that he was "not in a position to accept post proposed to him in Lesotho" and requested a meeting with the High Commissioner to explain "the degree of divergencies" between him and his supervisor. In a telex dated 9 August 1990, UNHCR Geneva informed the Applicant that the mission was not authorized and the appointment of the Applicant to Lesotho was "firm", asking him to make arrangements to proceed there by 17 September 1990.

In a letter dated 10 August 1990, the Applicant informed the High Commissioner that although the mission had not been authorized, he would be in Geneva from 12 to 15 August and hoped to have a meeting with him to discuss the proposed appointment. In Geneva, the Applicant had a meeting with the Deputy High Commissioner who, according to the Applicant, told him that if he refused to accept the Lesotho posting, he would have to leave the Organization.

On 2 September 1990, the Applicant cabled the Director, Division of Human Resources Management, expressing his continued hope that the High Commissioner would reconsider his case and give him responsibilities at the D-1 level. He also stated:

"... if overall situation does not ensure availability of posts at D-1 level and regardless of the outcome of my appeal to the recourse committee, I would be considering early retirement for staff members who are 55 years of age ...".

On 10 September 1990, the Director, Division of Human Resources Management, replied, informing the Applicant that UNHCR was not in a position to offer him an alternative posting at the D-1 level and requesting "urgent clarification" on his assignment to

Lesotho or formal confirmation that he wished to be considered for early retirement. By cable of 24 September 1990, the Applicant confirmed his non-acceptance of the post in Lesotho and requested specific details concerning early retirement. In cables dated 25 and 28 September 1990, UNHCR Headquarters provided this information to the Applicant.

In a memorandum dated 8 October 1990, the Applicant formally accepted an agreed termination. In return for termination indemnities pursuant to the Staff Regulations, the Applicant undertook not to contest the agreed termination of his appointment. He further agreed that the Organization would have no further obligation, financial or otherwise, upon separation, and that he would not be eligible for employment with the Organization for a period of three years following separation. The High Commissioner's concurrence to the agreed termination was confirmed to the Applicant in a memorandum from the Director, Division of Human Resources Management, dated 5 November 1990. In accordance with the terms of the agreed termination, the Applicant separated from service on 7 December 1990.

In the meantime, on 19 September 1990, the Applicant submitted a recourse to the APB against his non-promotion, stating that his non-recommendation had been motivated solely by a personal difference between him and his supervisor over the incident involving the two UNHCR staff members who had undertaken an unauthorized mission to Beirut. On 26 November 1990, the Applicant wrote to the Secretary-General requesting a review of the administrative decision relating to his non-promotion. In a reply dated 25 January 1991, the Applicant was informed that there was not yet an administrative decision to appeal because the outcome of his recourse to the Board was still pending. At the Board's recourse session, held from 14 to 24 January 1991, it was decided to maintain the recommendation made at the regular promotions session. This recommendation was communicated to the Applicant in a letter dated 30 May 1991 from the Chief, Recruitment, Career Development and Placement Section.

On 11 March 1991, the Applicant lodged an appeal with the Geneva Joint Appeals Board (JAB) against the administrative decision to accept the recommendation of the APB,

i.e., not to promote him to the D-1 level. The JAB adopted its report on 11 March 1993. Its considerations and recommendations read:

"Considerations

...

22. ... the Panel noted that not only was there no up-to-date PER, but there was not even a note in the Appellant's file on his performance. These administrative omissions had deprived the APB of the basic tools necessary to undertake an objective assessment of the Appellant's work performance and to decide whether the Appellant merited promotion ...

23. The completion of performance evaluation reports at regular intervals would also have provided the Appellant with the opportunity to be aware of any negative assessments on his performance by his supervisor ... The Appellant in fact appeared to have believed that he was performing good work. Under such circumstances, the Appellant was left with the impression that his non-promotion was due to prejudice on the part of his supervisor and the UNHCR Administration, taking into account the other incidents which had resulted in misunderstandings between himself and his supervisor.

24. The Panel noted that the UNHCR Administration had offered the Appellant a post at the P-5 level, involving an effective demotion. It is understandable that the Appellant was reluctant to assume such a post. The circumstances may then have exerted pressure on the Appellant to accept the early retirement package, ...

25. The Panel has taken into account that the agreed termination arrangement provides that the Organization had no further obligation, financial or otherwise, upon separation but considered that this would not relate to any rights in respect of rules infringed by the Administration.

Recommendations

26. In view of the consequences resulting from the infringement of the Appellant's rights, the Panel recommends that he be granted a symbolic compensation equivalent to the sum of six weeks of his salary at the time of his separation.

27. The Panel also recommends that the Appellant be provided with a document evaluating his service up to his date of termination, which would be of

use to him with respect to future employment."

On 14 April 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has re-examined your case in the light of the Board's report and has decided to accept the Board's recommendation that you be granted compensation for the irregularities in connection with the preparation of your performance evaluation reports in the amount of six weeks of your salary at the rate in effect at the time of your separation. You shall also be provided with a document evaluating your service up to its termination."

On 4 July 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The absence of an updated PER violated staff rule 112.6 and the applicable administrative issuances.
2. The non-recommendation of the Applicant by his supervisor for promotion was improperly motivated by personal differences arising from an incident involving the unauthorized mission of two staff members to Beirut.
3. The decision of the APB not to recommend the Applicant for promotion was irregular, as it was based on the improper absence of a recommendation for promotion and on the Applicant's pending assignment to Lesotho, which was in fact a demotion and a disguised sanction.
4. The agreed termination was imposed upon the Applicant and is, accordingly, null and void.

Whereas the Respondent's principal contentions are:

1. Termination of the Applicant's appointment following the agreed termination was consistent with applicable provisions of the Staff Regulations and did not violate the Applicant's rights.
2. The agreed termination was voluntarily agreed to by the Applicant. The Applicant's claims violate the terms of the agreed termination, in which the Applicant expressly undertook not to contest the decision to terminate his appointment or any decision related thereto. The Applicant's claims are thus unreceivable.
3. The Applicant had no right to promotion.
4. The Applicant had no right to re-employment during three years following the agreed termination.

The Tribunal, having deliberated from 13 October to 4 November 1994, now pronounces the following judgement:

I. The Applicant served in the Office of the United Nations High Commissioner for Refugees (UNHCR) from September 1977 to December 1990. During this period, he assumed major responsibilities, especially as UNHCR Regional Representative in Zaire at the P-5 level, his salary being supplemented by a special post allowance (SPA) at the D-1 level. He was then posted to Bahrain on the same terms. During this entire period, the Applicant received favourable evaluations.

II. Nevertheless, not having been proposed by his supervisor for promotion to the D-1 level, the Applicant did not receive a recommendation for promotion at the session of the Appointment and Promotion Board (APB) held from 11 to 21 June 1990, and therefore was not promoted to this level. At the same time, he was offered a posting as UNHCR Regional Representative in Lesotho, a P-5 post with no entitlement to an SPA at the D-1 level.

III. Believing that a posting to Lesotho on these terms would be an effective demotion, the Applicant explained that he could not accept it and that, accordingly, he was considering early retirement in accordance with the provisions applicable to staff members who were 55 years of age. Having been notified by UNHCR that it was not in a position to offer him a post at the D-1 level, the Applicant formally accepted early retirement, accompanied by termination indemnity payments calculated at the highest level consistent with the Staff Regulations. In return, the Applicant formally undertook, in a memorandum dated 8 October 1990, not to contest the decision of UNHCR to terminate his appointment. It was further stipulated that he would not be eligible for employment with the United Nations for a period of three years following separation.

IV. Prior to the agreed termination, the Applicant had contested the decision of the APB not to recommend him for promotion to the D-1 level. In this connection, he maintained that his supervisor had declined to recommend him out of animosity arising from a difference over a mission involving his staff members, and that, in the absence of up-to-date PERs, the Board had been misinformed. Nevertheless, at its session held from 14 to 24 January 1991, the Board confirmed its initial recommendation.

V. The Joint Appeals Board (JAB), with which the Applicant also lodged an appeal, subsequent, however, to his agreed termination, ruled in his favour with regard to the recommendation of the APB. It considered that in the absence of updated PERs, the APB had, in fact, been misinformed, and that the posting to Lesotho which had been offered to the Applicant was an effective demotion. Nevertheless, the terms used by the JAB to refer to the circumstances of the Applicant's early retirement are more nuanced. The Board believed that the "circumstances" might have exerted "pressure" on the Applicant to accept early retirement. Accordingly, the Board recommended that he be granted "symbolic" compensation equivalent to the sum of six weeks of his net salary at the time of his separation, and that he be provided with a document evaluating his service which would be

of use to him with respect to future employment.

The Secretary-General having accepted this recommendation by the JAB, the envisaged compensation was awarded to and received by the Applicant.

VI. The Applicant requests the Tribunal to take a position on the various incidents recounted above and to award him much higher indemnity payments than he has already received. Describing his early retirement, to which he agreed, as "forced separation", he demands to be treated "as if he had served" until normal retirement age and to receive the appropriate remuneration.

VII. The Respondent considers principally that the application in its entirety is unreceivable because of the formal undertakings entered into by the Applicant when he requested and agreed to early retirement with its concomitant settlements and indemnities.

The Respondent also believes, secondarily, that the Applicant has already been compensated for the effects of the irregularities noted by the JAB.

VIII. The Tribunal shares the view of the JAB and the Secretary-General, who accepted the Board's recommendation concerning the lack of information available to the APB called upon to decide on the Applicant's case. In this respect, the absence of formal evaluations of the Applicant's performance for nine years was contrary to the relevant provisions of the Staff Rules and prejudicial to the Applicant. Moreover, while it is inaccurate to state that the offer to appoint the Applicant to the post of UNHCR Regional Representative in Lesotho would have constituted a demotion in the exact sense of the term, it is none the less true that this post did not have the same attraction or advantages for the Applicant as the posts which he had occupied earlier.

Nevertheless, the Applicant has already been compensated for the prejudicial effects of the irregularities committed by the APB as noted by the JAB. In this connection, the

Tribunal believes that the damages awarded to the Applicant and received by him represent a reasonable assessment of the injury sustained.

IX. On the other hand, the Tribunal believes that the Applicant is not entitled to contest his early retirement or to claim compensation because of it. Early retirement under the terms of an agreement negotiated with the Administration cannot, in the event, be identified with "forced separation" or termination. The "circumstances" of such retirement make it impossible to maintain that pressure which can legally be regarded as such, and which would have rendered the agreement null and void, was exerted on the Applicant. While it is true that the post of UNHCR Regional Representative in Lesotho which was offered to him did not entail the same material advantages as those which he had occupied previously, it was fully of his own accord that the Applicant, who was not threatened with termination, chose to request early retirement rather than to accept this post. Furthermore, his early retirement at his request gave rise to an agreement with the Administration, accompanied by an indemnity, accepted by the Applicant, at the highest level consistent with the Staff Regulations. Lastly, the Applicant endorsed the clause of this agreement whereby he undertook not to contest the decision of UNHCR that would ensue.

It was therefore in violation of this formal undertaking that the application was submitted to the Tribunal. The Tribunal disapproves of such an action and finds itself unable to recognize on the Applicant's part a right which he himself voluntarily waived. In so doing, the Tribunal conforms to its jurisprudence as set forth in its Judgement No. 547, McFadden (1992).

X. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Samar SEN
President

Mikuin Leliel BALANDA
Member

Hubert THIERRY
Member

New York, 4 November 1994

R. Maria VICIEN-MILBURN
Executive Secretary