ADMINISTRATIVE TRIBUNAL

Judgement No. 693

Case No. 745: NUÑEZ
No. 746: TRAINI

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Hubert Thierry; Mr. Mayer Gabay;

Whereas at the request of Luis Nuñez and Fabio Traini, staff members of the International Maritime Organization, hereinafter referred to as IMO, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of applications to the Tribunal to 15 April, 15 July and 15 October 1992, 15 January, 15 May and 31 August 1993;

Whereas, on 29 July 1993, the Applicants filed applications requesting the Tribunal:

"1. To declare itself competent in this case;

2. To rule:

(a) That the employment of the Applicant[s] as a full-time member of the Secretariat of the International Maritime Organization (IMO) on terms other than the Staff Regulations of the Organization was contrary to the provisions of the Convention on the International Maritime Organization (the IMO Convention) concerning the staffing of the Secretariat;

(b) That the Respondent had no authority to impose on the Applicant[s] conditions of service other than those envisaged in the IMO Convention and that the

Staff Regulations must therefore be deemed to apply to the Applicant[s];

(c) That the denial to the Applicant [Nuñez] of rights under the Staff Regulations on the grounds that he is not a 'staff member' has no legal justification, particularly in view of the fact that the Applicant is a participant in the United Nations Joint Staff Pension Fund and has therefore been declared to the Pension Fund Secretariat, under article 21(a) of the Regulations of the Fund, as a 'full-time member of the staff' of the Organization;

That the denial to the Applicant [Traini] of rights under the Staff Regulations during the period when he was employed on supernumerary contracts on the grounds that he was not a 'staff member' has no legal justification, particularly in view of the fact that the Applicant became a participant in the United Nations Joint Staff Pension Fund during the period and had therefore been declared to the Pension Fund Secretariat, under article 21(a) of the Regulations of the Fund, as a 'full-time member of the staff' of the Organization;

(d) That the Staff Rules must be deemed to apply to the Applicant [Nuñez] as they do to staff members on fixed-term appointments;

That the Staff Rules must be deemed to have applied to the Applicant [Traini] when he was employed on supernumerary contracts as they do to staff members on fixed-term appointments;

(e) That the Applicant [Nuñez] is therefore entitled to be put on a par with staff members on fixed-term appointments with regard to entitlements under the Staff Regulations and Staff Rules from a date to be determined by the Tribunal which shall be either the beginning of the period of service that he was said to be entitled to validate for Pension Fund purposes, or the date on which his actual participation in the Pension Fund commenced;

That the Applicant [Traini] was therefore entitled, during the period in question, to be put on a par with staff members on fixed-term appointments with regard to entitlements under the Staff Regulations and Staff Rules from a date to be determined by the Tribunal which shall be either the beginning of his period of continuous service with IMO (22 January 1986) or the date on which his participation in the

Pension Fund commenced (1 August 1986);

3. To order the Respondent to accord to the Applicant [Nuñez] all the rights due to a staff member holding a fixed-term appointment under the Staff Regulations and Staff Rules with effect from the date of the judgement;

To rule that the Respondent erred in not according to the Applicant [Traini] all the rights due to a staff member holding a fixed-term appointment under the Staff Regulations and Staff Rules from the date determined by the Tribunal under paragraph 2(e) above to the date when he received a probationary appointment;

4. To order the Respondent to make good the injury suffered by the Applicant [Nuñez] as a result of the denial of those rights in the past, as follows:

(a) By paying to the Applicant [Nuñez], in respect of quantifiable entitlements, including, but not limited to, the right to receive a dependency allowance in respect of his son, the full monetary value of the entitlements withheld between the date determined by the Tribunal for backdating under paragraph 2(e) above and the date of the judgement, together with interest calculated at the average rate of interest received by IMO on its deposit accounts reckoned from the date when the entitlements became due;

(b) In respect of unquantifiable losses and moral injury, 10 per cent of the monthly salary paid to the Applicant [Nuñez] as a supernumerary employee between the date determined by the Tribunal for purposes of backdating under paragraph 2(e) above and the date of the judgement, together with interest calculated on the basis specified in subparagraph (a) above.

To order the Respondent to make good the injury suffered by the Applicant [Traini] as a result of the denial of those rights, as follows:

(a) By paying to the Applicant [Traini], in respect of quantifiable entitlements, including, but not limited to, the right to receive a dependency allowance and a special education grant in respect of his daughters, the full monetary value of the entitlements withheld between the date determined by the Tribunal for backdating under paragraph 2(e) above and the date when he received a probationary appointment, together with interest calculated at

> the average rate of interest received by IMO on its deposit accounts reckoned from the date when the entitlements became due;
>
> (b) In respect of unquantifiable losses and moral injury, 10 per cent of the monthly salary paid to the Applicant [Traini] as a supernumerary employee between the date determined by the Tribunal for purposes of backdating under paragraph 2(e) above and the date when the Applicant was recognized as a staff member and therefore as having entitlements under the Staff Regulations and Staff Rules, together with interest calculated on the basis specified in subparagraph (a) above."

Whereas the Respondent filed his answers on 27 June 1994;

Whereas the Applicants filed written observations on 17 February 1995;

Whereas, on 23 March 1995, Tobias Nehmy Neto filed an application for intervention, under article 19 of the Rules of the Tribunal;

Whereas, on 28 June 1995, the Respondent filed observations on the application for intervention, and submitted an additional document;

Whereas, on 3 July 1995, the Applicants filed observations on the Respondent's observations on the application for intervention;

Whereas the facts in the case are as follows:

The Applicant Nuñez entered the service of IMO as a porter pursuant to a 15 day temporary assistance supernumerary contract, from 25 October through 12 November 1982. Thereafter, the Applicant continued to serve IMO, alternately as a porter and as a messenger from November 1982 to April 1984, pursuant to a substantially unbroken sequence of 27 supernumerary appointment contracts, 26 of which were paid on a "per day" basis and one of which was a monthly contract for a one month period. From April through June 1984 and from October 1984 through January 1990, the Applicant served the IMO as a messenger in the Technical Cooperation Division (TCD) Registry, pursuant to 22 monthly temporary assistance supernumerary

appointments, ranging in duration from one to seven months. From 1 February 1990 through 31 May 1992, pursuant to 8 successive monthly supernumerary contracts, the Applicant Nuñez served in the Field Procurement Section of the Administrative Division. The Applicant Nuñez continued to be employed pursuant to supernumerary appointments on similar terms, until 10 April 1995, when he received a probationary regular appointment to the post of Clerk, G-3, step VII in the Office of General Services, Administrative Division.

The Applicant Traini entered the service of the IMO as a messenger pursuant to an eight day temporary assistance supernumerary contract from 22 January through 31 January 1986. Thereafter, from 1 February 1986 through 31 January 1991, he served as a clerk-typist, pursuant to an unbroken sequence of 28 monthly temporary assistance supernumerary contracts, ranging in duration from one month to seven months. With effect from 1 February 1991, the Applicant was granted a probationary appointment which became permanent with effect from 1 February 1992.

The Applicant Nuñez, on 21 March 1985, and the Applicant Traini, on 22 July 1986, were advised of their eligibility to participate in the United Nations Joint Staff Pension Fund (UNJSPF). On 28 March 1985, the Applicant Nuñez, and on 25 July 1986, the Applicant Traini, signed notes, indicating their acceptance of the changes in the terms and conditions of their appointments to include participation in the UNJSPF.

In a memorandum dated 20 July 1987, the Applicant Nuñez requested the Senior Deputy Director, TCD, to regularize his post. He noted that he had filled the post since September 1984 and that prior thereto it had been filled by a succession of supernumerary employees, indicating "a real and continuing need" for the post. He pointed out that under the terms of his contract he appeared to not be entitled to medical insurance and to the single parent child allowance. This memorandum was forwarded to the Head of the Personnel Section, with a handwritten note as follows: "For

favourable consideration. If he cannot be compensated for child allowance, perhaps something else could be consider[ed] e.g. higher steps."

In a similar memorandum, dated 22 November 1989, the Applicant Traini requested the Director, TCD, to consider "establishing [this] post on a permanent status". He noted that he had been in the post for four years, and that the short-term and monthly term contracts had created "a very uncertain time" for him. On this memorandum, the Deputy Director, TCD, wrote, "I think that this warrants our looking into with the Administration", and the Director wrote, "I agree. Please follow up." Having received no reply, on 19 February 1990, the Applicant wrote again to the Director, TCD, attaching a description of the duties he had been performing since September 1986. On the memorandum, the Director, TCD, wrote:

> "(1) I think it is essential that the Administration at least acknowledge this request without delay. Please take up with [the Head of the Personnel Section] and tell me what he says.
>
> (2) We can support the request on its merits."

On 7 March 1990, the Head of the Personnel Section advised the Senior Deputy Director, TCD, that "the Administration has been exploring various possibilities of identifying suitable posts for [the Applicant] and a number of other supernumeraries in similar situation. Regrettably, these endeavours have not as yet gained favourable results."

In a memorandum, dated 16 March 1990, the Applicant Traini asked the Director of the Administrative Division to "please let me know what steps are being taken to change the status of my present post to a permanent position." In a reply, handwritten on the memorandum, the Director of the Administrative Division wrote, "I regret that there is no possibility of your present work being made a permanent position for the foreseeable future."

In memoranda to the Director, Administrative Division, dated 23 April 1990 from Applicant Nuñez, and 12 September 1990 from

Applicant Traini, the Applicants each requested dependency allowances, Applicant Nuñez for his son and Applicant Traini for his two children. The Applicants also each requested recognition of their right to all other entitlements under the Staff Regulations and Staff Rules. They noted the position of the IMO Administration that as supernumerary employees, they were not staff members and that therefore the Staff Regulations and Staff Rules did not apply to them. They challenged this interpretation, arguing that as they were not in either of the categories of personnel to which the Staff Rules do not apply, in accordance with staff rule 101.1, the Staff Rules did apply to them and that they were therefore entitled to the corresponding benefits.

In a memorandum to the Applicant Nuñez dated 4 May 1990, and a memorandum to the Applicant Traini dated 13 September 1990, the Head of the Personnel Section rejected the Applicants' requests for entitlements, citing paragraph 21 of their supernumerary contracts, which states "that no allowance or entitlements other than those stipulated therein attach to your appointment."

In a letter dated 30 May 1990, the Applicant Nuñez, and in a letter dated 25 September 1990, the Applicant Traini each requested the Secretary-General to review the administrative decision not to grant him the entitlements he sought. Receiving no reply, the Applicant Nuñez lodged an appeal with the Joint Appeals Board (JAB) on 6 July 1990. In a reply dated 9 October 1990, the Head of the Personnel Section informed the Applicant Traini that the Secretary-General had maintained the contested decision. On 12 October 1990, the Applicant Traini lodged an appeal with the JAB. The JAB considered the Applicants' appeals jointly, and on 29 November 1991, the JAB adopted its report. Its ruling and other observations read, inter alia, as follows:

> "3 Ruling of the Board
>
> The Board is of the unanimous opinion that both appellants are covered by paragraph 6 of Annex 1 to the Staff Rules and Staff Regulations since their salaries are determined in the manner described. It concludes therefore

that regulation 3.3(c) also applies to them and that dependency allowances should be paid.

The Board has not been able to find substantiation for the definition of 'staff member' put forward by Head, Personnel Section and feels that such a definition would be contrary to the IMO Convention.

Article 47 of the IMO Convention, which forms the basis of the Organization's authority to employ staff, states:

> 'The Secretariat shall comprise the Secretary-General and such other personnel as the Organization may require. The Secretary-General shall be the chief administrative officer of the Organization and shall, subject to the provisions of article 22, appoint the above mentioned personnel'.

Article 22 specifies that the Council shall, in particular, determine the terms and conditions of service of the Secretary-General and other personnel ...

The Board holds the opinion that Mr. Nuñez comes under the category 'and such other personnel as the Organization may require' and is, if only implicitly, appointed by the Secretary-General. He would therefore come under the conditions of service as determined by the Council.

It therefore feels that even if rules 101.1 through 111.2 do not apply, the articles do and that the rights (and duties) under the articles should be amplified under the contract.

This leaves the question as to the date from which the payment of dependency allowances should begin.

[Counsel for Applicant], acting on behalf of Mr. Nuñez, in his memorandum of 1 June 1990 to the Secretary-General, puts forward four possible scenarios. However, in the Board's view the fact that a contract was signed by the appellants which clearly states that 'no allowance or entitlement other than those specified in the contract attach to the appointment' weighed heavily. It therefore agreed unanimously that the date from which the emoluments should apply should be the date upon which this clause was challenged.

In the case of Mr. Nuñez this date would be 23 April 1990, for Mr. Traini the applicable date is 25 September 1990.

4 Other observations

During its discussions the Board concentrated solely on interpreting the Staff Regulations and Rules. Nevertheless, it felt strongly that other considerations should not be completely ignored.

In particular, it seems illogical to describe somebody who has worked for the Organization for nine years as a 'temporary' staff member. No matter how the Regulations and Rules are interpreted the Board feels that there is a strong case for granting staff members who have worked for IMO for a number of years similar allowances and privileges to those who have permanent contracts."

On 10 January 1992, the Head of the Personnel Section transmitted a copy of the JAB report to the Applicants and informed them as follows:

"The Secretary-General ... has decided not to accept the Board's recommendation that the appellants be regarded as staff members of IMO ...

The decision is based on the fact that the appellants were offered and accepted supernumerary contracts with clearly defined terms and conditions of employment. ... Therefore, as the appellants were not offered letters of appointment by the Secretary-General in accordance with the applicable provisions of the Staff Regulations and Staff Rules, ..., they cannot be regarded as staff members of the Organization.

..."

On 29 July 1993, the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Staff Rules apply to them, pursuant to staff rule 101.1, which only excludes from application of the rules technical assistance project personnel and personnel specifically engaged for conferences and short-term services. The Applicants were not engaged for short-term services.

2. The Secretary-General has no authority to employ staff on a long-term basis, except pursuant to the IMO Convention, which

provides that the Staff Regulations and Rules govern their terms and conditions of service.

Whereas the Respondent's principal contentions are:

1. The interpretation and application of the IMO Convention is outside the scope of the Tribunal's competence, and as the Applicants are not staff members, they are not within the jurisdiction of the Tribunal as defined by article 2 of its Statute. The matter is therefore non-receivable.

2. The supernumerary appointment contracts govern the Applicants' conditions of employment. The Applicants have not alleged non-observance of their contracts of employment. The Staff Regulations and Rules are not applicable to the Applicants.

The Tribunal, having deliberated on 9 November 1994 in New York, and from 4 to 21 July 1995 in Geneva, now pronounces the following judgement:

I. The Applicants in these cases appeal from decisions of the Secretary-General of IMO dated 10 January 1992. By those decisions, the Secretary-General rejected a recommendation of the JAB that the Applicants be paid a dependency allowance under staff regulation 3.3(c). The underpinning for the JAB's recommendation was its conclusion that the Applicants were staff members of the Organization and were therefore entitled to the dependency allowance. The Respondent's reason for declining to accept the JAB recommendation is that the Applicants were not staff members of the Organization at the time in question but were supernumeraries in the employ of the Organization, under short-term contracts which spelled out their entitlements and which made it clear that these did not include payment of a dependency allowance. In keeping with this view of the matter, the Respondent further argues, inter alia, that the appeals are not receivable by the Tribunal because its jurisdiction is limited under article 2(1) of the Tribunal's Statute

to "applications alleging non-observance of contracts of employment of staff members ... or of the terms of appointment of such staff members" (emphasis added). The Respondent also advances a series of arguments addressing each of the Applicants' contentions with respect to their claims of entitlement to the dependency allowance and other employment benefits.

II. The tenor of some of the arguments before the Tribunal suggests that if the Applicants are treated, for any purpose, as though they were staff members, they would, without regard to the language of their contracts of employment, be entitled to a dependency allowance and should be treated for all purposes as though they were indistinguishable from regular employees of the Organization serving under other than supernumerary appointments. The Tribunal, however, does not regard the case in that fashion.

The Tribunal is aware of the Respondent's position that only the issue of dependency allowance is properly before it by virtue of article 7 of the Tribunal's Statute, as well as the Respondent's contentions with regard to timeliness. However, the Tribunal's disposition of these appeals makes those matters moot.

Mindful of the views expressed by the International Court of Justice which are referred to in Judgement No. 628, Shkukani, paragraphs IX and X (1993), the Tribunal has been loath to conclude that persons in the employ of the Organizations subject to its jurisdiction are to be left without any avenue for judicial review of claims arising out of their employment. (Cf. Judgement No. 461, Zafari (1989)).

III. This is particularly true here, where employees have served, albeit under short-term contracts, for lengthy periods and where, unlike the situation in the UN under Special Service Agreements and the situation in UNESCO, there is no explicit contract provision or staff rule that the employee may not be considered a staff member for any purpose. However, merely because the Tribunal may decide under article 2(3) of its Statute that it is competent to consider

an appeal in order to implement the policy objectives enunciated by the International Court of Justice does not necessarily resolve the question of whether the Applicants are entitled to the dependency allowance or other benefits provided to other employees of the Organization. That is an entirely different matter. In the present case, the Tribunal is persuaded, for the above reasons, that it should declare itself competent with respect to these applications, and the Tribunal therefore finds that it is competent under article 2 of its Statute.

IV. In the view of the Tribunal, the central issue before it is whether there has been non-observance of the contracts of employment of the Applicants. As the Applicants concede in their written observations, neither Applicant is alleging that any provision of his supernumerary contract of employment has been violated. No provision of those contracts has ever provided for a dependency allowance, or has incorporated by reference any staff regulation or rule which does. On the contrary, paragraph 21 of the contracts expressly states that "No allowance or entitlement other than those specified in this contract attach to the appointment." From the inception of their employment with the Organization, the Applicants were fully aware of the nature of their supernumerary appointments and could not help but know that no words in the contracts incorporated the Staff Regulations or Staff Rules, or entitled them to the dependency allowance.

V. Despite their acceptance of supernumerary contracts of employment on terms markedly different from the contracts of employment of staff members to whom the Staff Regulations and Staff Rules are contractually made applicable, the Applicants contend that the Tribunal should interpret the Staff Regulations and the Staff Rules, as well as the IMO Convention and its Headquarters Agreement, in a manner that would accord to the Applicants terms and conditions of employment identical to those of regular IMO staff not employed under supernumerary contracts of employment. In effect, the

Applicants ask that the Tribunal create contracts of employment for them quite different from the ones they agreed to. This the Tribunal has no authority to do.

VI. The IMO Assembly over the years has consistently authorized the Secretary-General to resort to temporary assistance in addition to the list of posts it has approved to carry out the work of the Organization, and it has budgeted and appropriated separate amounts for that purpose. At no time during any period pertinent to these appeals did the Applicants encumber posts budgeted for and approved in IMO Assembly resolutions for staff members to whom the Staff Regulations and Staff Rules were applicable.

VII. Against this background, and in the face of the unequivocal language of the supernumerary contracts of employment, the Tribunal is unable to accept the Applicants' contention that staff rule 101.1 may be properly interpreted as supporting the view that the Staff Regulations apply to the Applicants because those regulations are not referred to and because the Applicants are not within the excepted category of staff rule 101.1. The Tribunal neither agrees with the contention nor accepts the conclusion that the Applicants must be treated as staff members.

VIII. The same may be said of the Applicants' argument that paragraph 6 of annex 1 to the Staff Regulations is germane to the issue in this case. That paragraph provides, inter alia, for the manner of determining salary scales for the General Service category. Even if the Secretary-General, as a matter of discretion, chose to determine salary scales in that manner for persons serving under supernumerary contracts, it would not follow that persons serving under such contracts were therefore automatically eligible for a dependency allowance under staff regulation 3.3(c). Whether a person in the employ of the Organization is covered by staff regulation 3.3(c) is dependent upon that person's contract of employment.

IX. The Applicants also argue that, despite the terms of their supernumerary contracts, they are entitled to the same treatment as employees holding other types of contracts of employment by reason of article 47 of the IMO Convention. That article provides:

> "The Secretariat shall comprise the Secretary-General and such other personnel as the Organization may require. The Secretary-General shall be the chief administrative officer of the Organization and shall, subject to the provisions of article 22, appoint the above-mentioned personnel."

Article 22 provides:

> "The Council, with the approval of the Assembly, shall appoint the Secretary-General. The Council shall also make provision for the appointment of such other personnel as may be necessary, and determine the terms and conditions of service of the Secretary-General and other personnel, which terms and conditions shall conform as far as possible with those of the United Nations and its specialized agencies."

X. Whether or not the Convention creates rights as between employees and the Organization is an issue that need not be reached in this case. (Cf. Judgement No. 437, Ahmed, para. VIII (1988)). The Tribunal sees nothing in article 22 which bears on the question here. The Tribunal notes, in addition, that, despite the facts set forth in paragraph VI above, the essence of the Applicants' arguments with respect to the IMO Convention is that the Secretary-General had no authority to act as he did in employing them under supernumerary contracts. In short, having accepted such employment and the benefits therefrom, the Applicants are now challenging the basis of the Secretary-General's action from which they derived benefits. With the possible exception of extraordinary circumstances, not present here, the Tribunal would not be inclined to entertain a contention of that nature. (Cf. Judgement No. 452, Acebes, para. IX (1989); see also In re Clark, ILOAT Judgement No. 1396, para. 7 (1995)).

XI. The Applicants' arguments also rely, in part, on their view as to the interpretation and application of the IMO's Headquarters Agreement. The Tribunal has held that it is not normally empowered to interpret or apply a Headquarters Agreement. (Cf. Judgement No. 588, Darlington (1993); Judgement No. 642, Sow, et al. (1994)). The Tribunal notes, however, that because an employee of the Organization may fall within the definition of an "official" for the purposes of the Headquarters Agreement, that, in itself, does not mean that the Organization must observe terms and conditions of employment different from those contained in the Letter of Appointment. Nor does the fact that the Applicants' supernumerary contracts now provide for their participation in the UN Joint Staff Pension Fund support their position. Their status was changed only with respect to pensions. This change came about through an amendment of their contracts which resulted from action by the UN General Assembly in 1982, to the effect that officials who were not staff members would begin participating in the Pension Fund on the same conditions as staff members. Prior to the amendment, the Applicants were not entitled to Pension Fund coverage by the express language of paragraph 21 of their contracts that "Holders of supernumerary appointments are NOT entitled to participation in the United Nations Joint Staff Pension Fund." (Cf. Judgement No. 423, Isaacs (1988)).

XII. The Tribunal understands and is not unsympathetic with the discomfort of the Applicants and their sense of insecurity stemming from lengthy service under a series of supernumerary appointments. This alone, however, is no justification for the type of relief sought by the Applicants from the Tribunal. As noted above, the Tribunal's function is to remedy instances of non-observance of contracts of employment; it is not the Tribunal's function to revise employment agreements or create new ones. Here, no non-observance of any contract of employment was alleged and none could be found. What the Applicants seek in this case is for the Secretary-General or for the IMO Assembly to grant or withhold; it is not a matter for

the Tribunal. However, the Tribunal recommends that further consideration be given to the possibility of adopting a more definitive schedule for determining what is to be the ultimate status, in all its aspects, of supernumeraries in order to address the problems of uncertainty and insecurity created by lengthy service under successive short term appointments. The Tribunal notes that the Secretary-General eventually took a definitive measure with respect to the Applicant Traini, by granting him a probationary appointment with effect from 1 February 1991, and subsequently, by awarding him a regular appointment with effect from 1 February 1992, and in the case of the Applicant Nuñez by awarding him a probationary appointment, with effect from 10 April 1995.

XIII. For the foregoing reasons, the applications are rejected.

XIV. Mr. Tobias Nehmy Neto has submitted an application to intervene in case No. 745, Nuñez, alleging that his position is in all relevant respects identical with that of Applicant Nuñez. He requests that the Tribunal's judgement in case No. 745 apply to him mutatis mutandis. The Tribunal grants his request for intervention and rejects his pleas.

(Signatures)

Jerome ACKERMAN
President

Hubert THIERRY
Member

Mayer GABAY
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary