ADMINISTRATIVE TRIBUNAL

Judgement No. 695

Cases No. 661: BURNETT
No. 662: FOURNIGAULT
No. 663: GIL
No. 664: LOPEZ
No. 665: NOGALES

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 29 April 1994, Luz Mariana Burnett, Fabienne Raymonde Fournigault, Maria Teresa Pilar Gil, Ingrid Lopez and Gemma Nogales, all of them staff members of the International Maritime Organization, hereinafter referred to as IMO, filed an application containing pleas requesting the Tribunal:

"(a) To rule that the Respondent has failed to implement Judgement No. 612 in a number of important respects;

(b) To reconfirm that all the Applicants and Interveners are entitled to the benefits of international recruitment status;

(c) To order the Respondent to define the administrative situation of the Applicants and Interveners in relation to their status as internationally recruited staff, thereby enabling them to avail themselves of their current entitlements;

(d) To order the Respondent to pay to them, without further delay and at current prices, all sums due in respect of past home leave entitlements for themselves and any other people entitled to travel

with them on home leave, irrespective of whether or not they actually went on holiday to their home countries at the dates when they would have been entitled to take home leave if their entitlement had been recognized at the time of their recruitment;

(e) To order the Respondent to reimburse them, under the education grant provisions, for documented educational expenses, making an adjustment for inflation;

(f) To rule that compensation is due to Applicants or Interveners who, on grounds of expense, did not incur educational costs in the past in respect of the education of their dependent children, but who would have done so if international recruitment status had been granted at their date of recruitment;

(g) To order the Respondent to pay to the Applicants and Interveners such additional sum as the Tribunal may deem appropriate to compensate them for the unconscionable delay in implementing the judgement and particularly for the distress caused to them by the Administration's suggestion that they might not be entitled to the benefits of international recruitment status which the Tribunal had ordered the Respondent to grant;

..."

Whereas the Respondent filed his answer on 29 September 1994;

Whereas the Applicants filed written observations on 23 May 1995 in which they stated that pleas (a), (b) and (c) were no longer relevant;

Whereas the Respondent submitted additional observations on 15 June 1995, on which the Applicants commented on 3 July 1995;

Whereas, on 4 July 1995, the Tribunal put questions to the Respondent to which he provided answers on 7 July 1995;

Whereas the facts in the case are as follows:

The Applicants and the Interveners, in a prior application to the Tribunal, challenged their status as "local recruits". In Judgement No. 612, issued on 1 July 1993, the Tribunal ordered the Respondent "to grant [the Applicants] international recruitment

status, together with corresponding benefits, with retroactive effect from the dates of their appointments," and ordered that "each of the Applicants should be paid the amounts which she has lost through inability to avail herself of the relevant benefits since appointment." This order also applied to the Interveners.

On 5 October 1993, the Director, Administrative Division, informed each of the Applicants as follows:

> "I write to advise you that, in the light of the decision of the UNAT concerning your recruitment status, the Administration regards your initial appointment as having been made on the basis of international recruitment status.
>
> Accordingly, the Administration will grant you the relevant benefits of such status, with retrospective effect from the date of your appointment, in accordance with the Staff Regulations and Staff Rules. No doubt you will be making the appropriate claims in respect of this change in your recruitment status for evaluation and settlement, to the Head of Personnel."

A Personnel Action Form, dated 14 October 1993, was issued for each Applicant indicating "change of status from local recruitment to international recruitment in accordance with UNAT Judgement No. 612." The forms gave no information on any amounts or adjustments due or paid. Under "remarks" it was noted "Further details to be given on a following Personnel Action form." In a memorandum dated 21 October 1993, the Director, Administrative Division, advised the Applicants that efforts were under way to "determine the methodology by which the retrospective entitlements will be determined and paid ..."

In a subsequent memorandum to the Applicants, dated 27 January 1994, the Director, Administrative Division, informed them that "the Administration has now finalized the special procedure and criteria to examine claims concerning entitlements deriving from this retroactive change of recruitment status." The memorandum further stated that (i) home leave benefits would be paid

on proof of expenses incurred by the Applicants in travelling to their home countries in the year of entitlement. If no proof of precise fares was available, the cost would be established by "using expenses incurred by staff members who travelled under similar home leave conditions to similar destinations, provided you can bring proof that the travel actually took place"; (ii) education expenses would be reimbursed "only on certification by the school that the child was in full-time attendance and confirmation that the fees were paid"; (iii) installation travel payment would be made only on the basis of evidence of expenses under the same conditions as home leave travel; and (iv) a non-resident's allowance could be claimed by staff recruited before 1 September 1983 who fulfilled the conditions set out in staff rule 103.2 for the payment of such allowance.

The Applicants were "to ascertain that your personal situation is such that you are entitled to the benefits which follow international recruitment. For instance, marriage to a person who would be considered as 'resident' (if appointed), or change of residential status to that of 'permanent resident in the UK', has always been considered in IMO and in other UN Agencies as leading to the loss of entitlements reserved to 'internationally recruited staff'."

On 1 March 1994, counsel to the Applicants wrote to the Director, Legal and External Relations Division, noting "the Applicants have not yet received any of the payments due to them and I consider the action taken to be totally inadequate to implement the judgement." He also noted the suggestion in the memorandum of 27 January 1994, that "the Applicants (or some of them) may not be entitled to the benefits of international recruitment," and the apparent intention to authorize payment for home leave only if such leave was taken and documentary evidence of travel could be provided, an approach he considered to be "totally incompatible with the judgement". Finally, he expressed concern over the intent of the Administration to let the Applicants "work out all aspects of their administrative situation for themselves and make appropriate claims" suggesting "it is for the Administration to tell the

Applicants what their administrative situation is and what their entitlements are in the light of the judgement."

In his reply dated 25 March 1994, the Director, Administrative Division, stated that: "The Administration has every intention of fulfilling its understanding of UNAT Judgement No. 612. I have written to each of the Applicants and Interveners, inviting them to come and see me, individually, so that we can help them in formulating their claims."

On 29 April 1994, the Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. In implementing Judgement 612, the Administration has drawn an unjustifiable distinction between international recruitment status and international recruitment benefits.

2. The calculation of benefits owed to the Applicants should be based on their retrospective entitlements, rather than on the basis of expenses actually incurred.

Whereas the Respondent's principal contentions are:

1. The Applicants have been granted international recruitment status. The Administration has implemented Judgement No. 612 in good faith and in compliance with the letter and spirit of the judgement.

2. The Applicants are not entitled to compensation for hypothetical entitlements or speculative losses.

3. The Applicants have suffered no damages whatsoever for alleged delay or distress. They are thus entitled to no compensation for any alleged delay or distress.

The Tribunal, having deliberated from 4 to 21 July 1995, now pronounces the following judgement:

I. The Applicants contend that there is a failure on the part of the Respondent to implement in full Judgement No. 612. They request

that the Tribunal order immediate implementation of the Judgement and any other appropriate measures. The areas of contention are home leave and education grant.

II. In the matter of home leave, the Respondent's position is that the benefit is to be paid on proof that expenses were incurred in actual travel to the home leave destination in the year in which the Applicants would have been entitled to home leave.

The Applicants' submission is that this position is irreconcilable with the Judgement. They emphasize that the Judgement does not order the Respondent to reimburse them for fully-documented holidays which they might have taken in their home countries in the past. Instead it orders him to pay them the cost of all entitlements which they have lost in the past, through inability to avail themselves of them. It follows, therefore, the Applicants say, that the only documentation that can reasonably be requested of them is evidence of the existence of other people (spouse, dependent children) entitled in specific years of entitlement, to travel with them on home leave.

III. The Respondent's reaction to the Judgement falls far short of complying with its terms. It must be noted that the Tribunal ordered the Respondent to grant the Applicants "international recruitment status, together with the corresponding benefits, with retroactive effect from the dates of their appointments".

IV. The Applicants make the reasonable point that, if only those who actually travelled were to be paid now, this would penalize those who were not in a position to travel because of financial constraints.

In the Tribunal's view, the staff members who did not travel are entitled to the same compensation as those who did, as even those Applicants who did travel could not be considered to have been on home leave, because of their lack of international recruitment status at that time. The Respondent's action highlights his failure to fulfil the retroactive requirement of the Tribunal's Judgement.

All the Applicants must be compensated equally for the lack of entitlements.

V. Furthermore, to now pay the Applicants only the sums which they spent on travel at the time, or sums which they would have spent had they travelled, cannot be said to be just compensation for the loss. The Respondent would benefit undeservedly by making such payments now and the Applicants correspondingly would suffer because those sums would be of less value now than when, as expenses, they should properly have been incurred by the Administration at the relevant earlier times. The only manner in which to fully compensate the Applicants is to pay them sums which in today's values equate with the expenses which would have been incurred, had the Applicants had international recruitment status.

VI. The basis on which the Tribunal orders implementation of its Judgement renders unnecessary a discussion of the practical difficulties that would arise from the Respondent's proposals regarding proof of travel.

VII. With regard to the education grant, the Applicants accept that there is nothing intrinsically wrong in the Administration's regarding this as an entitlement which has to be claimed and calculated individually. In regard to those Applicants who did send their children to fee-charging schools, their entitlement is to reimbursement of the sums expended in accordance with the regulations in force at the time of expenditure, plus the interest which would have accumulated on such sums up to the date of reimbursement by the Respondent. These Applicants are entitled to payment of interest because if the education grant had been available to them, they would then have had the use of the funds which they were forced to pay as fees. The Tribunal establishes the appropriate rate of interest to be paid at nine per cent.

There is only one case of a staff member who would have been entitled to the education grant but who did not send her children to a fee-paying school. This staff member, Mrs. Eldridge, whose

intervention was admitted by the Tribunal in Judgement No. 612, could not afford to send her children to such schools, in the absence of an education grant, although she wished to do so.

The purpose of Judgement No. 612 was not only to rectify the question of status, but also to place the Applicants, and Interveners, in so far as it is possible, in the position in which they would have been, had they been internationally recruited. Because of her recruitment status, Mrs. Eldridge could not send her children to the type of school she preferred. Had she had her proper recruitment status, she would have availed herself of the education grant, which would have been paid by the Administration. She must be paid these sums now. Furthermore to give full effect to the Judgement, she must be paid not at the rate of the education grants as they were then, but rather at the current rate. In this way, equal and non-discriminatory treatment of all the staff members is effected.

VIII. The Tribunal, in making its orders, holds that the term "Applicants" includes both the Applicants and Interveners.

In summary, the Tribunal orders that:

(a) The Respondent pay to the Applicants all travel costs which they and their dependents would have been entitled to, had they been internationally recruited, such costs to be calculated at current rates.

(b) The Respondent reimburse the Applicants (with the exception of Mrs. Eldridge) the education grant benefits they would have been entitled to under the Staff Regulations and Rules, together with interest at a rate of nine per cent, accrued from the date of expenditure to the date of payment by the Respondent.

(c) The Respondent pay to Mrs. Eldridge the education grants she was entitled to, at the current rates set forth in the Staff Regulations and Rules.

The Tribunal makes no further order.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary