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ADMINISTRATIVE TRIBUNAL

Judgement No. 864

Case No. 945: MADARSHAHI

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Hubert Thierry, President; Mr. Samar Sen,  
Vice-President; Mr. Julio Barboza;

Whereas, on 7 October 1996, Mehri Madarshahi, a staff member  
of the United Nations, filed an application requesting the Tribunal,  
inter alia:

"...

- (a) To rescind the decision of the Secretary-General freezing the post formerly occupied by the Applicant and subjecting ... her to redeployment;
- (b) To find that administrative instruction ST/AI/415 of 2 April 1996 is null and void as a matter of law in that it violates the Staff Regulations and Rules;
- (c) To order the Respondent to issue new instructions of further redeployment measures consistent with the contractual rights of permanent contract holders, following appropriate consultations in accordance with Article VIII of the Staff Regulations;
- (d) To award the Applicant and the Applicant's sponsor, the United Nations Staff Union, as costs, the sum of approximately \$25,000.00 in legal fees, expenses and disbursements, the exact amount to be determined at a subsequent time."

Whereas, on 5 December 1996, Valeri Moskalenko, a staff member of the United Nations, filed an application to intervene in the case;

Whereas the Respondent filed his answer on 2 January 1997;

Whereas the Applicant filed written observations on 23 April 1997;

Whereas, on 9 June 1997, the Applicant submitted additional comments to the Tribunal;

Whereas, on 4 August 1997, the Tribunal informed the parties that it had decided to adjourn consideration of the case until its next session;

Whereas, on 17 October 1997, Beatrice Bokouin Akassi, Sarita Aggarwal, Lois Karmel, Mohammed Asif Siddiqui, Amnat Choeypatkul, Maria A. Tartell, Madeleine Walker, Odile Sahoua Legre, Debra Baruch Smith, Antonio A. Tirado, Michael Clarke, Norman Alinea, Gilles Vauclair, Bernard Koffi Brou, Bernard Ehouman N'Gouandi, Premali S. Mendis, Alla Yao and Henriette Houessouvi, all staff members of the United Nations Children's Fund, filed applications for intervention in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 25 April 1977, on a fixed-term contract for eight months and seven days, as an Associate Classification Officer, at the P-2, step I level, in the Department of Administration and Management (DAM). This appointment was subsequently extended. On 1 April 1979, the Applicant was promoted to the P-3 level and became an Administrative Management Officer. On 1 August 1979, her fixed-term appointment was extended for two years. On 1 July 1981, it was converted to probationary and on 1 April 1982, it became permanent, when the

Applicant was promoted to the P-4 level. On 1 October 1982, the Applicant was assigned to the International Conference on the Question of Palestine, as Liaison Officer, through 31 December 1983.

On 1 January 1984, the Applicant resumed her duties in the Administrative Management Service. On 1 July 1985, she was assigned to the Office for Emergency Operations in Africa for a period of six months. On 1 January 1986, the Applicant was reassigned to the Management Services Division of DAM. On 25 April 1991, she was reassigned within the Department, under the Vacancy Management and Staff Redeployment Programme, as Management Analysis Officer. On 1 May 1991, the Applicant was promoted to the P-5 level. On 1 January 1994, the Applicant was reassigned to the Audit and Management Control Division of the Office of Internal Oversight Services. On 1 May 1995, she was transferred to the Office of Human Resources Management (OHRM), Staff Administration, Compensation and Classification Division. By the end of April 1996, the Applicant was assigned to the secretariat of the Efficiency Review Board, initially, with effect until 1 July 1996. On 21 April 1997, the Applicant was transferred to the Office of the Special Coordinator for Africa and the Least Developed Countries.

On 30 November 1995, the Secretary-General announced to the staff in ST/SGB/281 the establishment of an Efficiency Board to review all programmes. On 23 December 1995, the General Assembly adopted resolution 50/214, Questions relating to the proposed programme budget for the Biennium 1996-1997 and resolution 50/215, Programme budget for the Biennium 1996-1997, which mandated a vacancy rate and budgetary reductions to be achieved during the course of 1996.

On 2 April 1996, the Secretary-General promulgated ST/AI/415, Redeployment of Staff, announcing measures "to achieve the vacancy rate and budget reductions mandated by the General Assembly in its

resolutions 50/214 and 50/215 of 23 December 1995." On 2 May 1996, the Assistant Secretary-General (ASG) for Administration and Management (A&M) wrote to the Applicant that: "based on programmatic and structural considerations, your post has been identified for

suspension, effective 1 July 1996, as part of the measures to implement GA resolutions 50/214 and 50/215. [...] we have ... determined that, given the specialized nature of your functions, there are no staff members within [O]HRM at the level of your post who are discharging similar functions. It was therefore not necessary to conduct a comparative review." The Applicant replied on 7 May 1996, providing additional information with respect to her training and experience, and, with respect to the redeployment issue generally. She expressed the wish that "in any redeployment offer my family and personal circumstances would be duly taken into account, as for the time being any overseas assignment would be exceedingly disruptive for my personal life and well-being." On 8 May 1996, the ASG, OHRM, wrote to the Applicant, reminding her that "Staff Regulation 1.2 states that 'Staff members are subject to the authority of the Secretary-General and to assignment by him to any of the activities or offices of the United Nations.'"

On 17 June 1996, the ASG, OHRM, advised the Applicant that "your post has been frozen as part of the measures required to reach OHRM's mandated reductions and vacancy levels." He noted that OHRM would either approach the Efficiency Board for a further assignment for the Applicant, or she could be assigned to the Economic Commission for Africa (ECA) for four months, on a specific assignment. In a reply dated 20 June 1996, the Applicant indicated that she would prefer an extension of her assignment with the Efficiency Board.

On 25 June 1996, the ASG, OHRM, wrote to the Under-Secretary-General for A&M, requesting approval of one of the following suggestions:

"The P-5 post encumbered by [the Applicant] would be 'unfrozen' for at least the period of 1 July through 31 August 1996, by which time we hope the results of the

redeployment programme would be known ...

-[The Applicant] could be placed against the P-5 Secretary, JAB [Joint Appeals Board] post ... pending filling of the post."

On 27 June 1996, the ASG, OHRM, wrote to the Applicant, "asking that [she] again consider accepting the ECA assignment opportunity." Nonetheless, he noted that he was "pursuing the possibility [of an assignment with the Efficiency Review Board] with the Office of the Under-Secretary-General for Administration and Management" but stated that the Applicant was "again urged to apply for posts in the compendium of vacancies in the Professional and higher categories."

On 2 July 1996, the Applicant wrote to the Secretary-General, requesting "a review of the administrative decision to redeploy [her] in accordance with the provisions of ST/AI/415". She asked permission to submit an appeal directly to the Tribunal.

On 31 July 1996, the ASG, OHRM, wrote to the Applicant, granting her permission to submit her appeal directly to the Tribunal, on the following conditions:

"[a]s long as your application is limited to the question of compatibility between the provisions of the above-mentioned administrative instruction and the staff rules and regulations and, therefore, does not encompass factual issues, and as long as you can establish that you were personally affected by the implementation of the administrative instruction, ...".

On 20 August 1996, the Applicant requested an expedited hearing in her case. The request was denied by the Tribunal on 30 August 1996.

On 30 August 1996, the ASG, OHRM, informed the Applicant that

"you have not been recommended for any of the vacancies included in the compendium of vacancies for the 1996 redeployment exercise" and that OHRM had "forwarded [the Applicant's] name to ... DPKO [Department of Peace-keeping Operations] for consideration for an assignment to a special mission". OHRM was also "exploring the possibility of temporary projects or activities financed by extrabudgetary funds on the understanding that [the Applicant's] appointment may be terminated at the end of such assignments if no other placement opportunity arises." The letter also requested the Applicant to notify OHRM in writing whether she would accept a mission assignment. She was informed that if she was not placed, she "w[ould] have to be separated under staff rule 109.1(c) by 30 September 1996."

On 20 September 1996, the ASG, OHRM, wrote to the Applicant, informing her that "the Secretary-General ha[d] decided to defer action related to the involuntary separation of staff until the General Assembly ha[d] considered the report of the Secretary-General on the implementation of the budget reduction." The ASG, OHRM, also informed the Applicant that as "the suspension of the placement and promotion process ... has been lifted, we urge you to apply for all advertised vacancies within your field."

In a reply dated 26 September 1996, the Applicant stated that she had not applied for more of the posts listed in the compendium of vacancies because "[she] did not consider [her]self qualified for a number of posts..the majority of which required specialized knowledge and skills in statistics, legal and language-related fields."

On 27 September 1996, Counsel for the Respondent wrote to the Applicant suggesting that, in view of a General Assembly decision taken on 17 September 1996, deferring action relating to involuntary separation of staff, the Applicant might wish to postpone the filing

of an appeal with the Tribunal pending General Assembly review.

In a reply dated 4 October 1996, the Applicant notified the Office of Legal Affairs that, since the Administration had neither withdrawn nor suspended administrative instruction ST/AI/415, the basis for her application had not changed and, accordingly, she did not wish to defer the filing of her appeal.

On 7 October 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The provisions of administrative instruction ST/AI/415 of 2 April 1996 are at variance with the traditional application of staff rule 109.1(c) and violate the contractual rights of holders of permanent appointments.
2. The application of the provisions of ST/AI/415 is arbitrary, improper and discriminatory, and, further, violates procedural due process.
3. The newly elaborated provisions of ST/AI/415 violate the Applicant's rights as a holder of a permanent contract.

Whereas the Respondent's principal contentions are:

1. Staff regulation 1.2 enables the Secretary-General to reassign staff. The Secretary-General's decision that the distribution of work among staff must change in order to implement the General Assembly's requirement that all mandated programmes be carried out with a \$154 million reduction in resources is a valid exercise of administrative discretion.
2. Administrative instruction ST/AI/415, promulgated after staff consultation, establishes a joint mechanism to ensure that staff in excess of regular budget funding are fairly considered in an objective and consistent way Secretariat-wide for available



positions based on the criteria set out in the Staff Regulations and Rules.

3. The promulgation of ST/AI/415 does not violate the "acquired rights" of the Applicant.

4. The Applicant's assertion that the selection of the post that she encumbered was motivated by prejudice is not properly before the Tribunal.

The Tribunal, having deliberated from 4 to 31 July 1997 in Geneva and from 12 to 26 November 1997 in New York, now pronounces the following judgement:

I. Article 7 of the Tribunal's Statute establishes that:

"An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations ... except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal."

II. The Tribunal notes that the Applicant had submitted her case to the Joint Appeals Board (JAB), alleging a number of procedural irregularities and discriminatory treatment. Action on that appeal was suspended pending the appeal to the Tribunal. The Tribunal recognizes that this case was submitted directly to it pursuant to an agreement between the parties, purportedly established in an exchange of letters dated 2 and 31 July 1996, by the Applicant and the Respondent, respectively. The Tribunal recalls the statement made in the Applicant's letter requesting the Respondent's permission for direct submission to the Tribunal: "there are no issues of fact in dispute and only legal issues to be decided." In reply, the Respondent stated: "As long as your application is

limited to the question of compatibility between the provisions of the above-mentioned administrative instruction [ST/AI/415] and the staff rules and regulations, and, therefore, does not encompass factual issues, and as long as you can establish that you were personally affected by the implementation of the administrative instruction, you may submit your case directly to the Tribunal without prior consideration by the joint appeals body."

III. In his submission to the Tribunal, the Respondent clarified his position that "any factual allegations of prejudice against [the Applicant], as an individual, must be submitted to the JAB." The Applicant then claimed that "the Respondent now states that there has been no agreement as to the facts without specifying in what respect the facts set out in the letter of 2 July 1996 are in dispute. He then proceeds to give his own account of the facts, introducing new information and allegations that are incomplete, inaccurate and misleading. ... While it was not the intention of the Applicant to request the Tribunal to enter into arguments over questions of fact, ... it is nevertheless important to provide an accurate record ..."

IV. The Tribunal notes that each party has a different interpretation of the terms of the agreement to submit the case to the Tribunal. The parties came to the Tribunal in the erroneous belief that their agreement was real, but, at the pleadings stage, demonstrated that they differed as to what its terms were. Therefore, the Tribunal finds that no real agreement exists, that the parties did not have the opportunity fully to discuss the issues; and that they were not able to benefit from a proceeding before the JAB to establish the facts of the case.

V. The Tribunal is also of the view that the case does not involve only the resolution of purely legal issues, since the facts are still in dispute. The Tribunal points out that were it to put aside the disagreements of the parties as to the facts and to the nature of the agreement concluded by them, and limit itself to the consideration of the issue of the compatibility of administrative instruction ST/AI/415 with the Staff Regulations and Rules, without reference to the facts to which such Administrative Instruction was applied, the Tribunal would be asked to render an advisory opinion.

The International Court of Justice has the competence to render advisory opinions, but, under its Statute, the Tribunal has no such competence. Under article 2 of its Statute, the Tribunal "shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members."

VI. Since the Tribunal is not competent to render in abstracto opinions on the interplay of legal rules, and since there remain disputed questions of fact between the parties, the Tribunal finds that the application should follow the ordinary procedure of consideration by the JAB. Should it be necessary, the Applicant may appeal to the Tribunal after that procedure has been completed.

VII. In the light of the foregoing, the Tribunal orders that the case be remanded to the JAB for consideration on the merits. The Tribunal also rejects the request for an oral hearing.

VIII. With respect to the interventions that have been made in the case, the Tribunal finds that, as a result of the order made in paragraph VII above, the requests are premature. For that reason,

they are rejected.

(Signatures)

Hubert THIERRY  
President

Samar SEN  
Vice-President

Julio BARBOZA  
Member

New York, 26 November 1997

R. Maria VICIEN-MILBURN  
Executive Secretary