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ADMINISTRATIVE TRIBUNAL

Judgement No. 871

Cases No. 967: BRIMICOMBE
No. 968: ABLETT

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Deborah Taylor Ashford, Vice-President, presiding; Mr. Julio Barboza; Mr. Kevin Haugh;

Whereas, on 18 April 1997, Maria-Carmen Ablett and Regine Brimicombe, former staff members of the International Maritime Organization (hereinafter referred to as IMO), filed applications, each requesting the Tribunal "to rule that the Applicant is entitled to all the benefits of Judgement No. 612 of the Tribunal, as interpreted by the Tribunal in its Judgement No. 695."

Whereas the Respondent filed his answer to both applications on 17 December 1997;

Whereas the Applicants filed joint written observations on 23 March 1997;

Whereas the Respondent filed his reply to the Applicants' written observations on 12 June 1998;

Whereas, on 7 July 1998, the Tribunal put questions to the Respondent to which he provided answers on 10 July 1998;

Whereas the facts in the case are as follows:

Maria-Carmen Ablett was a staff member of IMO from 1 January 1974 until 31 July 1989, when she retired as an Editor-Proofreader at the G-8, step VIII level. She is a Spanish national who, from the time of her recruitment to the date of her retirement, served as a locally recruited staff member.

Regine Brimicombe was a staff member of IMO from 11 February 1974 until 30 June 1990, when she retired as Supervisor of the French Word Processing Unit. She is a French national, who, from the time of her recruitment to the date of her retirement, served as a locally recruited staff member.

On 1 July 1993, the Administrative Tribunal rendered Judgement No. 612, Burnett et al., in which it held that the applicants, IMO staff members living in the United Kingdom when recruited, who had been treated as "locally recruited" even though they were not nationals of the United Kingdom, should be granted international recruitment status retroactive to the date of their recruitment.

On 7 October 1994, the Applicant Ablett wrote to the Secretary-General asking for a retroactive change in her recruitment status on the same basis as those of her former colleagues who had benefited from the Tribunal's Judgement No. 612. In a letter dated 24 October 1994, the Secretary-General promised a substantive reply to her concerning the issues she had raised, once those matters had been reviewed.

On 29 November 1995, the Director of the Administrative Division wrote to the Applicant as follows:

> "The Secretary-General has no objection to you meeting with me to discuss your status at IMO in the light of UNAT Judgement No. 612. However, I should advise you that, after careful consideration, we are not able to contemplate applying the terms of the UNAT Judgement to retired staff

members."

On 11 January 1996, the Applicant Ablett wrote to the Secretary-General asking him to review that administrative decision. In a reply dated 9 February 1996, the Secretary-General informed the Applicant that there were "neither legal nor policy grounds for changing the decision concerning [her] recruitment status." On 7 March 1996, the Applicant Ablett lodged an appeal with the Joint Appeals Board (JAB).

On 22 January 1996, the Applicant Brimicombe wrote a letter to the Director of the Administrative Division, requesting that Judgement No. 612 be applied to her because she had been informed that the Respondent had decided to apply Judgement No. 612 to certain of her former colleagues "who neither appealed nor intervened in the application to the Tribunal". She argued that because her situation was "identical to that of [her] former colleagues" who "have now received 'international recruitment status' and the corresponding benefits, with retroactive effect", she should receive the same treatment.

In a reply dated 29 January 1996, the Director of the Administrative Division confirmed that the Secretary-General had decided "to extend the terms of Judgement No. 612 of the United Nations Administrative Tribunal to certain staff members who neither initiated the original appeal nor intervened in it." He noted, however, that "the Secretary-General has decided not to include former staff members in this extension." The Applicant decided to treat this letter as the notification in writing for the purposes of staff rule 111.2(a) and, on 7 March 1996, wrote to the Secretary-General requesting him to review the decision. On 18 April 1996, she lodged an appeal with the JAB.

On 3 and 6 January 1997 respectively, the Applicants Brimicombe and Ablett wrote to the Secretary-General, asking for his agreement to submit their respective appeals

directly to the Administrative Tribunal "[s]ince the facts of the case are not in dispute, and the disagreement is purely a matter of law".

In the absence of a reply, the Applicants decided to submit their applications directly to the Tribunal "on the grounds that the failure of the Respondent Organization to set up a joint appeals board within a reasonable period of time and its failure to even acknowledge receipt of successive requests for action are a denial of access to the means of justice provided for in the Staff Regulations and Staff Rules and in the Statute of the Tribunal."

On 18 April 1997, the Applicants filed with the Tribunal the applications referred to
earlier.

Whereas the Applicants' principal contentions are:

1. The Applicants' applications should be deemed receivable despite the lack of a JAB hearing or of the Respondent's agreement to submit the case directly to the Tribunal, because the Respondent has failed to convene a JAB within a reasonable time and has failed to respond to the Applicants' requests for direct submission.

2. Because the Respondent made a discretionary decision to extend the benefits of the Tribunal's Judgement No. 612 and No. 695 to members of the French and Spanish Typing Pool/Word Processing Units who did not initiate or intervene in the appeals, he exercised his discretion in a discriminatory manner by not extending such benefits to the Applicants, retired staff members who suffered from the same inequities as their colleagues who still serve the Organization.

Whereas the Respondent's principal contentions are:

1. The decision to extend Judgement No. 612 to non-applicants and non-intervenors was discretionary and thus, did not legally bind the Respondent to extend such judgement to former staff members.

2. The Applicants are not in the same factual or legal situation as those staff members who received benefits pursuant to Judgement No. 612, because the Applicants no longer work for the Respondent.

3. The decision to exclude former staff members from the application of Judgement No. 612 was a policy decision taken in the interests of the Organization.

4. The Applicants forfeited any rights they may have had by failing to act in a timely manner. The Applicant Brimicombe failed to challenge her recruitment status at any time during the 16 ½ years of her employment or during the 2 ½ years after Judgement No. 612 was rendered. The Applicant Ablett failed to challenge her recruitment status at any time during the 15 ½ years of her employment and for more than one year after Judgement No. 612 was rendered.

The Tribunal, having deliberated from 7 to 31 July 1998, now pronounces the following judgement:

I. The Applicants have requested that their claims be joined and the Respondent offers no objection. Cases may be appropriate for joinder when they contain similar pleas, relate to the same matter of law, or raise identical issues of fact and law. The Tribunal finds that the Applicants Ablett and Brimicombe raise the same legal issue and present comparable factual circumstances. The Tribunal finds it appropriate to join these claims in a single judgement.

II. This appeal is based on the Respondent's refusal to grant the Applicants' request that they receive international recruitment status in accordance with Judgements Nos. 612 and 695 of this Tribunal. On 22 January 1996, the Applicant Brimicombe requested a retroactive change in her employment status to "international recruitment status" on the same basis as those to whom UNAT Judgement No. 612 was extended by the Respondent's decision.

III. In a letter dated 29 November 1995, the Director, Administrative Division, notified the Applicant Ablett that the Respondent was "not able to contemplate applying the terms of [Judgement 612] to retired staff members".

IV. On 18 April 1996, both Applicants filed an appeal with the Joint Appeals Board (JAB). On 22 April 1996, the Head of the Personnel Policy Unit acknowledged receipt of the Applicants' appeal and informed them that she would "pass the envelope [containing the appeal] to the Chairman" once a JAB had been established to hear the case. The Applicants received no further communication from the Respondent in spite of several attempts to ascertain the status of their appeal. On 3 January 1997, the Applicants wrote to Respondent stating their intention to submit their appeals directly to the Tribunal in accordance with article 7, paragraph 1, of its Statute. The Applicants received no response to their request for the Respondent's consent to this direct appeal.

V. Although the Respondent has not challenged the applications on the basis of receivability, the Tribunal is of the view that this issue must be addressed as a preliminary matter. The Tribunal finds that this case presents an exception to the general rule, stated in article 7, that an applicant must exhaust administrative remedies, including a JAB hearing, in order to establish receivability. Article 7, section 1 of the Statute provides that "an application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body." The only exception expressly provided is "where the Secretary-General and the applicant have agreed to submit the application directly to the

Administrative Tribunal." The Tribunal finds that the Applicants made consistent, appropriate efforts to present their dispute before the JAB only to be ignored for more than eight months. This delay is not consistent with the "maximum of dispatch" necessary to "a fair review" as provided for in IMO staff rule 111.1(j). The Applicants made an appropriate effort to obtain consent from the Respondent prior to submitting this application directly.

VI. Although the Tribunal has not previously established exceptions to the requirements in article 7, the Secretary-General's apparent inaction raises the question of the circumstances under which the Tribunal might consider an article 7 exception. The Tribunal agrees with the International Labour Organization Administrative Tribunal's statement that, "the rule [in Article VII of the ILOAT Statute, regarding exhaustion of internal administrative remedies] is not a hard-and-fast one" and that derogation from the rule should be permitted "if the complainant has done his utmost to obtain [an internal administrative] decision but on the evidence a decision seems unlikely to be taken in a reasonable time." (In re Klajman, ILOAT Judgement No. 791 (1986)). The Tribunal finds this case to be appropriate for an exception to article 7 receivability rules. The Applicants made diligent efforts to obtain internal review; there are no disputed issues of fact; and the Applicants have already endured an unjustified delay in having their dispute resolved. To remand the application to the JAB would only create further delay in resolving this dispute without any commensurate increase in accuracy or fairness. In finding that this case is receivable, the Tribunal reminds the Respondent of the importance of respecting both the letter and spirit of the Staff Rules.

VII. The Respondent asserts that the claim should be time-barred because the Applicants should have challenged their recruitment status in the course of their employment (each more than fifteen years with IMO) or during the course of the proceedings that led to Judgement No. 612. It is a well-established precedent of this

Tribunal that the starting point for measurement of the time bar is "the point at which one knows, or should have known, of the existence of the claim, not the time when a potentially favourable decision in another case is rendered" (cf. Judgement No. 549, Renninger (1992)). The requests that form the basis for this application were not made by the Applicants Brimicombe and Ablett for two and a half years and for more than one year, respectively, after Judgement No. 612 was rendered. The rendering of Judgement No. 612, however, is not the appropriate point for measuring the time bar, nor is the appropriate point the Respondent's answer to the Applicants' requests to extend Judgement No. 612 to them. The Applicant's claims are based on a request for a change in their recruitment status, which recruitment occured in 1974. During the more than 15 years that the Applicants, who were hired as local recruits, worked alongside other staff members who had international recruitment status, they made no complaint about their status. In 1994, when the Applicant Ablett "appealed", she had ceased to be a staff member of IMO five years earlier. In 1996, when the Applicant Brimicombe appealed, she had ceased to be a staff member of IMO six years earlier. At no time during the prior 20-22 years since the Applicants had first been recruited as "local recruits" did either Applicant request that her recruitment status be changed to "international". The Tribunal finds that the claims are time-barred, as the Applicants knew or should have known of the differences in the benefits attaching to their recruitment status.

VIII. The Applicants have asserted that IMO extended Judgement No. 612 to other current staff members and excluded former staff members and that this constituted an abuse of discretion. In fact, after a review of the facts applicable to each staff member, the Secretary-General agreed that requests received from four current staff members for a change in their recruitment status be granted. At least one other current staff member made a similar request that was not granted after the Agency determined that the staff member was not similarly situated to the Applicants in Judgement No. 612.

IX. It is not disputed by the parties that the Respondent had the authority to make a decision regarding whether to extend the benefits of Judgement No. 612 to those current staff members who were not parties to that judgement who requested that their status be changed also. The Tribunal agrees with the parties that the Respondent had the authority to make a decision regarding application of these benefits to other staff members. The Tribunal will approve an administrative decision that is not arbitrary or outside lawful boundaries. The Tribunal will not substitute its own judgment for that of the administrative authority. (Cf. van der Valk, Judgement No. 117 (1968)). The Respondent had a decision to make following Judgement No. 612. He might have extended the benefits only to the parties and according to the terms of the decision (later clarified in Judgement 695). Alternatively, he might have extended the benefits of the new rule to all staff members, past and present, who might have benefited from the decision had they been parties. Instead, the Respondent decided to extend the benefits only to current staff members who had not been parties to the judgement. The Respondent defends this decision with considerations of staff morale, finality and certainty. The Respondent might legitimately be concerned that, following Judgement No. 612, staff members doing identical work under identical hiring circumstances might be receiving different benefits according to whether they had been parties to the judgement.

X. With respect to the question of whether the benefits ought to have been extended to all staff members, including former staff members like the Applicants, who might have been affected by Judgement No. 612, the Tribunal finds that it was reasonable for the Respondent to decline to do so. As stated in paragraph VII above, if the Applicants had wished to challenge their recruitment status, the appropriate time to do so was within two months of their recruitment, in accordance with staff rule 111.2, and certainly within their employment, when they knew or should have known of their claim.

XI. In view of the foregoing, the applications are rejected in their entirety.

(Signatures)

Deborah Taylor ASHFORD
Vice-President, presiding

Julio BARBOZA
Member

Kevin HAUGH
Member

Geneva, 31 July 1998

R. Maria VICIEN MILBURN
Executive Secretary