

Translated from French

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ADMINISTRATIVE TRIBUNAL

Judgement No. 882

Case No. 955: OSSOLO

Against: The Secretary-General  
of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Hubert Thierry, President; Mr. Julio Barboza;

Mr. Victor Yenyi Olungu;

Whereas, on 26 January 1996, Daniel Ossolo, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an application that did not meet all the requirements as to form established in article 7 of the Rules of the Tribunal;

Whereas on 23 May and 9 September 1996, the Applicant again filed applications that did not meet all the requirements as to form established in article 7 of the Rules of the Tribunal;

Whereas on 4 December 1996, after making the necessary corrections, the Applicant filed an application, the pleas of which read in part as follows:

"The UNDP office in the Congo having violated my rights by wrongfully terminating me and replacing me by Mrs. ... cut short my professional career ... Had UNDP continued to use my services as documentation clerk during the four (4) years that Mrs. ... worked there, I should have received a permanent contract, been promoted and earned as much money as she earned or received by replacing me in this unjust and discriminatory manner. Furthermore, the fact that UNDP abolished the post that I was

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encumbering, without applying the relevant provisions of the Staff Rules concerning abolition of posts which would require payment of three months salary to a staff member who is made redundant, is further clear proof of the violation of [my] rights and of the injustice which have prompted [me] to institute this action.

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..., I request that the United Nations Administrative Tribunal apply the existing rules and justice and that it order UNDP to pay me the sum of 50,000,000 (fifty million) CFA francs by way of compensation, of which:

- 38 million CFAF by way of damages with interest for the prejudice suffered in connection with the hiring for four (4) years of Mrs. ... as assistant documentalist at the BZ8 level (1991-1995) (...)
- 7,000,000 (seven million) CFAF by way of damages with interest for failure to observe the Staff Rules which would require payment of three (3) months salary as indemnity for suppression of my post on 28 May 1991 (...)
- 5,000,000 (five million) CFAF representing the difference in the emoluments that would have been due me had my post been classified at the BZ8 level, the level accorded to the person who replaced me on 1 July 1991 when [Mrs. ...] performed identical tasks, ...
- Reinstatement with a permanent contract since I had worked for more than six (6) years [at UNDP] and spent more than six (6) months on a variety of training courses (...)

Furthermore I request that the Administration provide me with an attestation such that the quality of my previous work and my professional conduct would not be tarnished but be acknowledged and re-established (...)."

Whereas the Respondent replied on 2 December 1997;

Whereas the facts of the matter are as follows:

The Applicant was recruited locally by UNDP as a registry clerk at the BZ6 level in Brazzaville (Congo) on 16 April 1985. He was initially given a three-months fixed-term contract which was followed by further successive fixed-term appointments. On 16 July 1987, he was given a new functional title, that of

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documentation clerk. On 1 January 1988, he was assigned to a project of the Department of Technical Cooperation for Development entitled "Aid coordination and information service". On 31 December 1989, he was transferred to a post funded from the UNDP core budget. On 1 January 1990, he was given a new fixed-term appointment as assistant documentalist. He held successive fixed-term appointments until 30 June 1991, at which time the Applicant separated from UNDP.

On 28 May 1991, the resident representative informed the Applicant that due to the need to reduce the office's operating expenses the administration had decided to freeze the post he was occupying. As a result, his contract, which was due to expire on 30 June 1991, would not be renewed. On 10 June 1991, the Applicant wrote to the Chief of the Legal Section, Division of Personnel of UNDP contesting the decision.

On 20 June 1991, the UNDP Office in Brazzaville concluded a Special Services Agreement with a French national, engaging her as consultant documentalist for the period from 1 July to 31 August 1991. The duties specified in the agreement were as follows:

- See to it that the holdings of the documentary fund are recorded,
- Select the documents to be kept in order to facilitate points of access for purposes of research,
- Supervise the filing of documents on the shelves,
- See to it that all bibliographical data are entered in the computer database,
- Produce a bibliographical index,
- Propose a method for managing the documentary fund so as to ensure its continuity.

On 22 June 1991, the Applicant wrote to the Chairperson of the UNDP/UNFPA Staff Association alleging that the decision to freeze his post had been the result of a plot to have him replaced by a consultant, a French national, (hereinafter referred to as "the consultant"). On 2 July 1991, the Applicant

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wrote to the Chief of the Legal Section, Division of Personnel of UNDP reiterating the allegation.

The consultant was given a second and third Special Services Agreement for the periods 1 to 30 September and 1 October to 31 December 1991. The duties listed in these agreements were identical to those listed in the first.

On 3 December 1991, the Chief of the Legal Section, Division of Personnel of UNDP wrote to the UNDP resident representative in Brazzaville asking for details regarding the non-renewal of the Applicant's contract and the recruiting of the consultant. On 18 December 1991, the resident representative replied that the post had been frozen because the Director of the Budget had called for a reduction in the staffing level of the Brazzaville office and the Applicant's post had been deemed the "least essential to the smooth running of the office".

He added that the consultant had not been recruited to replace the Applicant and that "even if she is currently helping in reorganizing the documentation service" her "main function ... is to coordinate the financial aspects of the Programme".

The Special Services Agreements given the consultant for the periods between 1 January and 31 December 1992 listed, under the heading "Nature of services", duties of a financial nature as well as those of documentalist.

In a letter dated 11 August 1992, the Chief of the Legal Section, Division of Personnel of UNDP informed the Applicant that the contested decision not to renew his contract would be maintained. On 3 February 1994, the Applicant filed an appeal with the Joint Appeals Board. The latter adopted its report on 16 October 1995. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

17. The Panel noted the explanation from the Respondent that Ms. Ngouolali was granted a Special Service Agreement to do mostly financial work, which the

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Appellant was incapable of doing. Her record however, shows that she did not have any background in finance; she was a linguist and a documentalist.

The Panel questioned Ms. Ngouolali's placement in a post whose main focus were financial issues. Her contract had been for three months.

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21. The JAB has examined the documentation outlining the Appellant's job description, as well as the job descriptions contained in SSA Nos. 91/05, 91/17 and 91/20, entered into between the Respondent and Ms. Ngouolali, immediately following the termination of the services of the Appellant. It is apparent from a comparison of the documents that for the period of 1 July 1991 to 31 December 1991, Ms. Ngouolali's job description was similar, if not identical, to that of the Appellant. The Panel is, therefore, of the opinion that it was not only ethically, but legally unacceptable, for an official of the United Nations to represent, falsely, that for financial constraints a post was being frozen and a staff member's contract not extended, only to have someone else employed to carry out the identical functions.

#### Conclusions and Recommendations

22. In view of the foregoing, the Panel is of the opinion that the Appellant's right to be informed of the true reason for the decision affecting his status under the Staff Rules has been violated.
23. The Panel therefore recommends that the Appellant be compensated in an amount equivalent to three months salary, for the violation of Appellant's rights.
24. The Panel recommends that all other financial claims of the Appellant be denied.
25. With regard to the Appellant's request that the JAB recommend that his titles and qualifications be recognized, the Panel noted that it was not within its competence or mandate to pronounce itself on the merits of staff members or their qualifications for any particular post."

On 7 December 1995, the Under-Secretary-General for Administration and Management transmitted a copy of the Board's report to the Applicant and informed him as follows:

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"The Secretary-General has examined your case in the light of the Panel's report and has taken note of its finding, in paragraph 21, that the work assignment of a new hiree appears to be similar to the job description for the post you encumbered at UNDP in Brazzaville. However, the Secretary-General finds that while the wording of the consultant's initial SSA may give this impression, in reality the foremost responsibility of this new consultant was to assist in financial management in addition to ancillary functions of a document assistant. This is borne out by the fact that all subsequent SSAs after 1 January 1992 did reflect these additional responsibilities in financial management. Furthermore, the Secretary-General cannot agree with the Panel's judgement on the consultant's qualifications and skills to undertake financial work, considering that the Panel was in no position to interview and judge the consultant's actual experience and qualifications.

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The Secretary-General has concluded, based on the above clarifications, that none of your rights were violated, but recognizes that the consultant's initial SSAs were indeed incomplete and misleading. The Secretary-General has decided in view of this circumstance and of the 5-year delay in your case that you be paid, as compensation, 3 months net base salary at the rate in effect at the time of your separation, as recommended in paragraph 23 of the Panel's report."

On 4 December 1996, the Applicant filed the aforesaid appeal with the Tribunal.

Whereas the Applicant's main pleas are as follows:

1. The Respondent's decision not to renew the Applicant's contract was unjust and discriminatory for it was taken so that the latter could be replaced by a French national, not in order to freeze his post because of "budgetary constraints".

2. The Applicant should have been promoted from the BZ6 level to the BZ8 level or above, since the consultant who took over his duties on 1 July 1991 was recruited at the BZ8 level.

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Whereas Respondent's main arguments are as follows:

1. The Applicant had no legal grounds for expecting a renewal of his fixed-term contract.

2. The decision not to renew his contract was taken because of the budgetary problems of the UNDP office in Brazzaville.

3. The consultant was recruited to perform different tasks than those of the Applicant.

4. The Tribunal does not need to deal with the plea whereby the Applicant claims that he should have been promoted to a higher level since that issue was not raised with the Joint Appeals Board; in any event, the Applicant cannot adduce the consultant's level since her functions were different from those of the Applicant.

5. The decision not to renew the Applicant's contract was not prompted by prejudice nor by any extraneous factor.

The Tribunal, having deliberated from 13 July to 4 August 1998, now pronounces the following judgment:

I. The Applicant asks the Tribunal to rescind the decisions having to do with the non-renewal of his fixed-term appointment and the freezing of his post of assistant documentalist for budgetary reasons. He asks to be reinstated and also promoted to the BZ8 level, retroactive to the date of his recruitment, or that he be compensated. He also asks for payment of damages for the violation of his rights and for the moral injury sustained. Finally, he asks for a certificate of service.

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II. With regard to the rescinding of the decision not to extend the fixed-term appointment, the Tribunal recalls its consistent position in its case law on such matters, to the effect that a decision whether or not to renew a fixed-term appointment is within the discretionary powers of the Secretary-General. Barring special circumstances, non-renewal does not give rise to any right for the staff member.

III. It is also clear from this case law that the exercise of discretionary powers cannot lead to arbitrary results. For this reason and despite the precarious nature of a fixed-term appointment which, as stated in rule 104.12 of the Staff Rules in effect at the time, does not carry any expectancy of renewal or of conversion to any other type of appointment, the Tribunal will consider whether the Applicant might reasonably have expected his appointment to be renewed.

The Applicant joined the United Nations Development Programme (UNDP) on 16 April 1985 on a three-months fixed-term appointment which was successively extended until 30 June 1991, at which time he separated from service. He performed a variety of functions ranging from registry clerk to assistant documentalist and performed special functions for the project entitled "Aid coordination and information service".

The Tribunal further notes that the Applicant has produced in the file the "request for general service job classification" dated 29 January 1990 in which his supervisor noted his intellectual capacities, his management qualities, his deep sense of responsibility and his great experience. Nowhere in the file does the Respondent say anything impugning his honour or performance.

IV. The Applicant asks that his fixed-term appointment be converted into a permanent appointment on the grounds that he has worked for the United Nations

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for six years and two months. He terms this conversion, erroneously, "renewal by tacit agreement".

The Respondent challenges the Applicant's claims in their entirety, citing rule 104.12 of the Staff Rules and the contents of the Applicant's various letters of appointments.

The Tribunal considers that simply referring to the relevant provision of rule 104.12 of the Staff Rules, the text of which is included in the letters of appointment, is not enough to evade the problem for the said reference does not take into account section IV, paragraph 5, of General Assembly resolution 37/126 whereby the Assembly declared that "staff members on fixed-term appointment upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment" or section VI, paragraph 5, of resolution 38/232 whereby it invited the Organization normally to dispense with the requirement for a probationary appointment for that type of staff member.

V. Concerning the decision to freeze his post, the Applicant states that it was taken unfairly and in a discriminatory fashion and that the Respondent simply wanted to hire someone from outside the service in his place.

The Respondent maintains that budgetary constraints were the sole motive for freezing the Applicant's post, and emphasizes the difference between the job description of the Applicant's post and that of the consultant, which had more financial responsibilities.

The Tribunal notes, as the Joint Appeals Board correctly pointed out, that the day after the Applicant's appointment expired, UNDP hired a documentalist with no special training in accounting or finance to perform the same type of duties as had been performed by the Applicant, but at a higher salary. This action clearly undermines the Administration's claim of budgetary constraints.

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It should be recalled, in this connection, that in paragraph VI of its judgment No. 412, Gross (1988), the Tribunal recalled that it had made it clear in past decisions, that the authority of the Administration with regard to the reorganization of departments was very broad indeed. However, it noted in the same paragraph that while it continued to adhere to its judicial decisions, if, as a result of unfair or improper procedures or the injection of extraneous motives in connection with those processes, a staff member was adversely affected, he could legitimately claim remedy.

Without wishing to go further, in this case, into whether the Respondent's conduct was prompted by discrimination, prejudice or any other motive, the Tribunal affirms that the decisions concerning the extension of the Applicant's contract and the freezing of his post were not taken with the circumspection and care that he was entitled to expect, that these decisions caused him injury and that he is therefore entitled to remedy.

VI. With regard to the claim for promotion, the Tribunal declares that this claim is no longer applicable, having regard to paragraphs II, III, IV and V of this judgment, while at the same time reaffirming its position that promotions are within the discretionary powers of the Secretary-General and that the latter cannot be ordered to promote the Applicant, no matter what his qualifications, experience, merit and seniority.

VII. The claim concerning issuance of a certificate of service is also no longer applicable for, on 24 March 1992, the Applicant received from the resident representative the certificate of service he had been requesting and concerning which he has made no complaint.

VIII. For these reasons the Tribunal:

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1. Awards the Applicant, by way of compensation, the equivalent of one year's net base salary at the rate in effect at the time of his separation from service. This compensation is in addition to that awarded him by the Secretary-General on the recommendation of the Joint Appeals Board.

2. Rejects the other claims.

(Signatures)

Hubert THIERRY  
President

Julio BARBOZA  
Member

Victor YENYI OLUNGU  
Member

Geneva, 4 August 1998

R. Maria VICIEN-MILBURN  
Secretary

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