ADMINISTRATIVE TRIBUNAL

Judgement No. 885

Case No. 963: HANDELSMAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Julio Barboza; Mr. Kevin Haugh;

Whereas at the request of Simon D. Handelsman, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 September, 31 December 1996, and 31 March 1997, the time-limit for the filing of an application with the Tribunal;

Whereas, on 31 March 1997, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 11 April 1997, the Applicant, after making the necessary corrections, filed an application requesting the Tribunal, inter alia:

"[To find that]

...

(b) The administrative decision contained in the letter dated 28 December 1993, (...) disregards countervailing circumstances which gave the Applicant a legal expectancy of renewal of the Applicant's appointment;

(c) The Administration did not act in good faith;

(d) No good faith efforts were made to find the Applicant an appropriate assignment;

(e) The Applicant, having served for over nine years, acquired a legal expectancy of his appointment;

(f) The Administrations claim that 'there had been a declining demand for the Appellant's expertise' (...) was without basis;

(g) The Under-Secretary-General for Development Support and Management Services, in denying the existence of a request from the Government of India for the services of the Applicant, made a false statement which, without any basis in fact or law, inflicted damage upon the Applicant;

(h) The Applicant was denied fair and equitable consideration of his case since the Joint Appeals Board did not have all the relevant documents submitted to it, including the Respondent's statement for the record dated 8 September 1995, the Appellant's reply dated 26 October, the Applicant's letter dated 24 October 1995, and the reply of the Secretary of the Joint Appeals Board dated 2 November 1995, and therefore did not consider the issues raised in these documents in its deliberation (...).

...

(a) To order that the Respondent re-employ the Applicant in his previous functions and, failing that, pay him specific damages in the amount of two years of net salary considering the exceptional seriousness of the violations committed in the decision under appeal as well as the JAB's failure to address it properly;

(b) To order that the Respondent pay damages of $2,000 commensurate with the violation of the Applicant's rights, for the lack of due process, for discrimination, for abuse of discretionary authority, for the damage to his professional reputation, and the material and emotional suffering inflicted upon him and his family;

..."

Whereas the Respondent filed his answer on 24 November 1997;

Whereas the Applicant filed written observations on 3 March 1998;

Whereas, on 1 July 1998, the Tribunal put questions to the Respondent, to which he provided answers on 14 and 16 July 1998;

Whereas, on 21 July 1998, the Applicant submitted his comments thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 5 December 1983, on a Special Service Agreement (SSA) for a two-week and four-day period, as a consultant with the Department of Technical Cooperation and Development . He served on three additional SSAs, and on 1 November 1984, he was granted a one-year intermediate-term appointment at the L-5 level under the 200 Series of the Staff Rules, as an Interregional Adviser in Electronic Data Processing in Mineral Exploration and Development in what was then the Department of Economic and Social Affairs (and which was later incorporated into the Department for Development Support and Management Services (DDSMS)). Over the next nine and a half years, the Applicant remained in the service of the United Nations on a series of intermediate-term and long-term appointments. He separated from service on 30 April 1994.

During 1993, internal restructuring and decentralization efforts led to a discussion of the future prospects of staff under the 200 Series of the Staff Regulations and Rules. By letter dated 28 December 1993, from the Under-Secretary-General, DDSMS, the Applicant was informed that his appointment had been extended until 31 March 1994. The letter further stated that "the Department [was] ... confronted with serious financial difficulties ... [and] changing programmatic requirements" and, "therefore, the Department [was] not ... in a position to renew [the Applicant's] contract beyond its currently scheduled expiration date of 31 March 1994."

On 5 January 1994, the Applicant asked the Secretary-General to review the administrative decision of 28 December 1993, not to renew his fixed-term appointment beyond 31 March 1994.

Also on 5 January 1994, at a meeting of the staff of the Applicant's department, the Under-Secretary-General, Office of Human Resources Management (OHRM), distributed a written statement which noted that "every effort will be made to place supernumerary staff."

On 26 January 1994, the Chief of the Applicant's department wrote to the Director of Personnel, OHRM, with a copy to the Applicant, stating: "It is my understanding that the central administration is doing its utmost to ensure that the incumbents of the Interregional

Adviser posts earmarked for decentralization are redeployed along with the posts. In this regard, I would like to recommend that [the Applicant] be redeployed to ESCAP [Economic and Social Commission for Asia and the Pacific] ..."

On 9 March 1994, the Director of the Division of Economic Policy and Social Development, and the Director of the Division of Public Administration and Development Management, proposed to the Under-Secretary-General for DDSMS that he extend the appointments of a number of Advisers, including an extension of one month for the Applicant. The proposal was approved and the Applicant's appointment was extended through 30 April 1994, when the Applicant separated from service.

On 14 March 1994, the Applicant and another staff member lodged an appeal with the Joint Appeals Board (JAB) requesting a suspension of action of the administrative decision not to renew their fixed-term appointments. The JAB adopted its report on 25 March 1994. Its considerations and recommendation read as follows:

> "Considerations
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> ...
>
> 17. The Panel noted that the appeals concerned decisions not to extend the Appellants' appointments beyond 31 March 1994. It further noted that those decisions had been superseded by other decisions, that they were no longer applicable and that the appeals against them were moot. It finally noted that the new decisions had not been contested, as the Appellants had not requested their administrative review by [the] Secretary-General.
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> 18. The Panel therefore concluded that one of the above-mentioned conditions was not met, as the Appellants had not requested an administrative review of the new decisions.
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> Recommendation
>
> 19. In the light of the above considerations, the Panel unanimously recommends that the request for suspension of action be rejected."

On 30 March 1994, the Officer-in-Charge, Department of Administration and Management, informed the Applicant that the Secretary-General had decided to take no

further action on his request for a suspension of action.

On 2 June 1994, the Applicant requested the suspension of action on filling the post of Regional Adviser on Mineral Policy and Mineral Economics, ESCAP, which was advertised in the 26 March 1994 issue of The Economist, without first offering the post to him. That same day, the Applicant lodged an appeal with the JAB, requesting a suspension of action.

The JAB adopted its report on 16 June 1994. Its consideration and recommendations read as follows:

"Consideration

...

(I) The Panel found that the action to be suspended had not yet been implemented. It noted that the action which the Appellant asked to have suspended was the filling of the post in question.

(ii) The Panel found that the post of Regional Advisor on Mineral Policy and Mineral Economics in ESCAP is not the same post as the one Appellant encumbered in DDSMS, although there is some similarity in functions. The Panel noted that the Appellant had applied for the post in question, and the Respondent's statement during the hearing that the Appellant's former department (DDSMS) would support his application and that the Appellant would receive fair consideration.

(iii) Bearing in mind the Appellant's expertise and the implications of serving under the 200 Series, which is characterized by fixed term contracts contingent upon the necessity for their services and the availability of funds. [sic]

Recommendations

22. In light of the above considerations, the Panel recommends that the requested suspension of action be rejected.

23. The Panel found it necessary, however, to bring to the attention of the Secretary-General that, based upon the long satisfactory service of the Appellant, and in view of his expertise, the Administration should assure that Appellant receives the fullest consideration for the post in question, and, if not selected, that every endeavour be made to find Appellant appropriate assignments with other UN

bodies."

On 15 July 1994, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had decided to take no further action regarding his request. He further stated that:

> "... the Secretary-General has also taken note of the comments of the Board regarding your service and expertise and would like to assure you that you will receive full consideration for the post in question and for any other post for which you apply and are found to be qualified."

On 28 September 1994, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 8 March 1996. Its conclusions and recommendation read as follows:

> "Conclusions and recommendation
>
> 34. The Panel concluded that the decision not to renew the Appellant's contract did not violate his rights, including his right to due process.
>
> 35. The Panel also concluded that under the terms and conditions of the Appellant's employment, he had no right to the renewal of his appointment nor had the Organization led him to have a reasonable expectancy of continued employment.
> 36. Accordingly, the Panel recommends that the appeal be rejected.'

On 15 March 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

> "The Secretary-General has re-examined your case in the light of the Board's report. He has noted the Panel''s conclusions that the decision not to renew your contract did not violate your rights, including your right to due process; and, that under the terms and conditions of your employment, you had no right to the renewal of your appointment nor had the Organization led you to have a reasonable expectancy of continued employment. The Panel recommended that your appeal be rejected. The Secretary-General is in agreement with the Panel and has decided, accordingly, to maintain the contested decision and to take no further action on your case."

On 11 April 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had a legal expectancy of renewal of his contract. Given that the Respondent and the Applicant were in a special relationship as employer and employee, liability should be imposed on the Respondent for misstatements he made and on which the Applicant relied. The Applicant is entitled to obtain a post, based on assurances that the Administration was making efforts to redeploy him.

2. The Applicant is entitled to compensation for the period of over two years that he remained unemployed after his separation from service because of the stigma of having been "separated without notice".

Whereas the Respondent's principal contentions are:

1. The Applicant was the holder of a fixed-term appointment under the 200 Series of the Staff Rules, which expires on the date stated in that letter of appointment. Excellent service by itself does not create any expectancy of renewal.

2. Project Personnel appointments under the 200 Series of the Staff Rules are by their very nature limited both in scope and duration.

3. General Assembly resolution 37/126 does not apply to staff serving under the 200 Series of the Staff Rules.

4. Statements made by the Administration did not constitute a commitment on the part of the Organization.

5. A statement contained in a memorandum dated 26 January 1994, from the Chief of the Sustainable Development and Environmental Management Branch to the Director of Personnel, recommending that the Applicant be redeployed to ESCAP in light of ESCAP's active mining programme, was not addressed to the Applicant, but to a third party,

and could not create a legal expectation of renewal of the appointment.

The Tribunal, having deliberated from 9 July to 4 August 1998, now pronounces the following judgement:

I. The lengthy written submissions by the parties, along with their responses to questions put by the Tribunal during the proceedings, were sufficient to render an oral hearing unnecessary.

II. The Applicant held an appointment under the 200 Series of the Staff Rules and Regulations (hereinafter the "200 Series"), the rules applicable to technical assistance project personnel. Under staff rule 204.3:

> "Project personnel shall be granted temporary appointments as follows:
>
> (a) Temporary appointments shall be for a fixed term and shall expire without notice on the date specified in the respective letters of appointment. They may be for service in one or more mission areas, and may be for short, intermediate or long term, as defined in rule 200.2 (f). ...
>
> (d) A temporary appointment does not carry any expectancy of renewal."

The rules thus permit the Respondent to separate a staff member appointed under the 200 Series from a post, even without prior notice and without regard to either the quality of the services that the staff member rendered or the staff member's personal attributes. The Tribunal has consistently upheld the application of these rules. (Cf. Judgement No. 610, Ortega, para. VII (1993), Judgement No. 614, Hunde, para. IV (1993)).

These rules are designed to conform to the nature and purpose of appointments under the 200 Series, as these appointments are entirely dependent on contingencies such as the requests of Governments and the availability of funds. The 200 Series system simply could not function as intended, if staff members appointed under the 200 Series had the same guarantees concerning employment and career development as staff members appointed under

the 100 Series.

III. The starting point of our reasoning must be that, unless there exist countervailing circumstances, project personnel staff members may see their relationship with the Organization terminated when the last of their 200 Series appointments expires. Countervailing circumstances may include (1) an abuse of discretion in not extending the appointment, or (2) an express promise by the Administration that gives a staff member an expectancy that his or her appointment will be extended. The Respondent's exercise of his discretionary power in not extending a 200 Series contract must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness or other extraneous factors that may flaw his decision. The Tribunal finds no evidence of any improper motive on the part of the Administration. Nor does the Tribunal find that the Administration became obliged to find the staff member a new and equivalent post to the one he occupied because it made an express promise to that effect.

IV. The Applicant claims that an express promise was made during discussions of the Joint Advisory Committee on the future prospects of staff serving under the 200 Series, in the light of the imminent restructuring of the economic and social sectors of the Secretariat. What the Applicant cites as the Administration's position at that meeting appears to consist of nothing more than opinions expressed by some representatives of the Administration about what the policy of the Organization *should be* in relation to the staff serving under the 200 Series. These statements cannot be understood as express promises concerning the Applicant's employment. The Applicant also refers to correspondence between the Under-Secretary-General for Development Support and Management Services and the Under-Secretary-General for Administration and Management, regarding redeployment of staff appointed under the 200 Series to Regional Offices. However, he fails to point out in those communications any express promise made to him concerning his continued employment. Nor can the memorandum from the Director of Personnel to all DDSMS staff members, including the Applicant, dated 6 December 1993, seeking to identify all those who were

interested in reassignment, be construed as an express promise to reassign the Applicant.

V. The Applicant cannot rely on General Assembly resolution 37/126, dated 17 December 1982, Section IV, paragraph 5, which requires that "staff members on fixed-term appointments upon completion of five years of continuing good service ... be given every reasonable consideration for a career appointment", since that resolution does not apply to staff members appointed under the 200 Series.

VI. The Administration made slight efforts towards finding a post for the Applicant. In a memorandum dated 19 August 1994, to the Executive Secretary, Environmental and Natural Resources Management Division (ENRMD), ESCAP, the Chief, Division of Administration, noted that the Administration had, by memorandum dated 15 July 1994 from the Under-Secretary-General for Administration and Management, requested ENRMD to re-evaluate the candidacy of the Applicant "who was considered but not short-listed previously, against the post." The Chief, Division of Administration, further noted in that memorandum, that on re-evaluation, the Director, ENRMD, in his memorandum dated 6 August 1994 to the Chief, Personnel Services Section, explained that the Applicant did not have the necessary qualifications for that particular post.

In the memorandum dated 6 August 1994 referred to above, the Director, ENRMD, stated:

> "The qualifications stipulated in the job description require a post graduate degree in economic geology, mining or mineral exploration with a minimum of 12 years experience as advisor to governments and private sector entities in mineral policy and mineral economics.
>
> The review of [the Applicant's] cv has indicated that the candidate is a mining engineer who worked as an Interregional Advisor in the Mineral Resources Branch of DDSMS/New York from 1984 to 1994. The candidate's main area of specialization is in computer applications for mining and earth sciences development programmes and applied finance. The applicant lacks experience in policy issues related to mineral resource development, including the formulation of national

mineral resource development plans." (Emphasis in original.)

VII. The Tribunal cannot substitute its own judgement for that of ESCAP when it chose a candidate other than the Applicant. Assurances that a candidate should receive "full consideration" do not impose an absolute right to a candidate to receive a post. The granting of such post depends on whether other candidates are better qualified for and better suited to the post. (Cf. Judgement No. 362, Williamson (1986) and Judgement No. 447, Abbas (1989)).

VIII. On the other hand, besides the recommendation to ESCAP, there is no record of the Administration's efforts to place the Applicant anywhere else in the Organization. In response to questions put by the Tribunal, the Respondent provided a memorandum from the Chief, Division of Administration, ESCAP, dated 16 July 1998, which stated, "... I [do not] find a record that [the Applicant] was considered for other posts in ESCAP."

The Administration thus appears to have made only half-hearted efforts to place the Applicant.

IX. The Tribunal finds that, while no *express* promise was made to the Applicant concerning his future employment, the Administration's conduct toward the Applicant may have caused the Applicant to believe that the Administration would soon find him a new post. The Respondent's plans concerning the reorganization of staff serving under 200 Series appointments, which resulted in the non-extension of a large number of staff members' contracts and the retention of other staff, coupled with the statements made by the Administration described above, could, in the Tribunal's view, have allowed room for ambiguous interpretation so as to have misled the Applicant. Further, in a letter dated 15 July 1994, transmitting to the Applicant the JAB report concerning the Applicant's request for suspension of action and informing the Applicant of the Respondent's decision to take no further action in the case, the Under-Secretary-General for Administration and Management stated, in relevant part:

"The Secretary-General has also taken note of the comments of the Board

> regarding your service and expertise and would like to assure you that you will receive full consideration for the post in question [i.e., the ESCAP vacancy] and for any other post for which you apply and are found to be qualified."

This letter also could have had the effect of misleading the Applicant.

As in Noyen, the statements made by the Administration to the Applicant, "coupled with the Applicant's erroneous assumptions concerning his status, must be considered as having adversely affected his alternate plans for employment resulting in possible loss. ..." (Cf. Judgement 839, Noyen (1997), para. IX). Likewise, the Applicant in this case is entitled to compensation.

X. Furthermore, the Applicant points to an exchange of correspondence that may have had the effect of thwarting the placement of the Applicant and for which the Respondent does not appear to have an explanation. On 12 May 1994, the Assistant Resident Representative transmitted to the Chief, Sustainable Development and Environmental Management Branch (SDEMB), Division of Economic Policy and Social Development, DDSMS, New York, a request from the Government of India "for the services of an Adviser in the field of Computer Applications in Mineral Sector for a period of two weeks under the UN/DDSMS Regular Programme funds." On 13 July 1994, the Chief, SDEMB, answered as follows: "Resulting from the recent decentralization of some of our Department's technical responsibility, the post of Interregional Adviser in Electronic Data processing is no longer available", and advised the Assistant Resident Representative to address his enquiries to ESCAP. That the post was "no longer available" was true, since the Applicant's post had been abolished on 30 April 1994. But what is difficult to understand is why, in a confidential memorandum to the Chief, Administrative Review Unit, SACCD, OHRM, dated 17 May 1995, the Under-Secretary-General for Development Support and Management Services stated, with respect to the Applicant's appeal to the JAB:

> "In para. 17 of his observations, the appellant states that the Department had received a request from the Government of India for his services. No such official request from the Government was received".

The Tribunal considers that this was, at best, a tendentious and unhelpful reply, one which lends yet further support to the view that the Administration's efforts to assist the Applicant were disingenuous.

XI. For all the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant three months of his net base salary at the rate in effect on the date of his separation, as compensation for the damage he suffered due to the conduct of the Administration.

The Tribunal rejects all other claims.

(Signatures)

Mayer GABAY
Vice-President, presiding

Julio BARBOZA
Member

Kevin HAUGH
Member

Geneva, 4 August 1998

R. Maria VICIEN MILBURN
Executive Secretary