

Translated from French

---

ADMINISTRATIVE TRIBUNAL

Judgement No. 886

Case No. 969: Al-Omari

Against: The Commissioner-General of the  
United Nations Relief and  
Works Agency for Palestine  
Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

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

Mr. Kevin Haugh;

Whereas the President of the Tribunal, at the request of  
Ramadan Mohamed Al-Omari, staff member of the United Nations Relief and Works  
Agency for Palestine Refugees in the Near East, postponed until 31 May 1997 the  
deadline for the submission of an application to the Tribunal;

Whereas on 9 April 1997 the Applicant submitted an application the pleas of  
which read:

- "1. I (the applicant) am contesting UNRWA's (the Agency) decision not to pay me the termination indemnity payable upon the termination of my area staff appointment with the Agency on 30 November 1994 in accordance with the Area Staff Regulations and Rules and the Letter of Appointment issued to me on 30.07.1984.
2. The termination of the above appointment was not done in accordance with the Agency's Area Staff Regulations and Rules applicable at the time of termination ...

/...

mt

3. The amount payable should be the termination indemnity as determined by the Agency's Area Staff Regulations and Rules plus the lost interest for the period when this indemnity was due until its actual date of payment. The rate of interest to be applied should be the one declared by the Agency as income for the Provident Fund of its Area Staff members."

Whereas the Respondent filed his answer on 26 October 1997;

Whereas the Respondent submitted an additional document on  
10 November 1997;

Whereas the Applicant submitted written observations on 14 December 1997;

Whereas the facts in the case are as follows:

The Applicant joined the service of UNRWA on 1 October 1970 under a 10-month fixed-term contract as Technical Instructor "C", grade 8, in the Kalandia Professional Training Centre. His fixed-term contract was renewed several times, and on 1 September 1972 he was promoted to grade 9. On 1 October 1973, the Applicant was given a temporary indefinite Area staff appointment as Technical Instructor "B", grade 10. The Applicant resigned on 13 March 1977.

On 1 August 1984, the Applicant rejoined the service of UNRWA under a temporary indefinite Area staff appointment, grade 12, as Claims Examination Officer in Gaza. On 1 October 1988, he was appointed Senior Finance Officer, grade 16. On 1 October 1991, the Applicant was selected to participate in the Agency's new rotation programme and was offered a two-year fixed-term assignment, with effect from 20 October 1991, as Budget Officer (Education), grade 16, at UNRWA headquarters in Vienna. On 1 November 1993, the Applicant was reassigned to the post of Budget Officer, grade 16; however, he was appointed at grade 17. On 1 November 1994, the Applicant was declared provisionally redundant because of the relocation of UNRWA headquarters from

/...

mt

Vienna to Gaza. On 2 November 1994, an Area staff personnel action form was issued to terminate the Applicant's appointment as an Area staff member.

On 10 November 1994, the Applicant signed a letter of offer of appointment to the International post of Deputy Chief, Accounts Division, P-4 level, at UNRWA headquarters in Vienna, with effect from 1 December 1994. In the terms of the relevant part of this letter:

"Should the Agency find it necessary in the future to initiate your separation from service in circumstances which would entitle you to a termination indemnity, this indemnity will be calculated (a) for your period of service as International Staff member, in accordance with International Staff Regulation 9.4; and (b) for your period of service as Area Staff member, in accordance with Area Staff Rule 109.9, paragraph 3(A), at the rates applicable at the date of your separation from the Agency, provided that the total payment shall not exceed the greater of the following: the termination indemnity payable in respect of your Area staff service to date or the termination indemnity to which you would have been entitled had all your services been as an International staff member".

The letter of offer specified that it was subject to the conditions set forth in the letter of appointment which the Applicant had signed on 11 November 1994, the relevant portion of which specified:

An **INDEFINITE APPOINTMENT** has no specific expiration date (other than that determined by your retirement under Regulation 9.2) but may be terminated by the Commissioner-General on thirty days' notice in writing, in accordance with the relevant provisions of the Staff Regulations and Staff Rules.

Should the appointment be thus terminated, UNRWA will pay such indemnity as may be provided for under the Staff Regulations and the Staff Rules. There is no entitlement to either a period of notice or indemnity payment in the event of summary dismissal for serious misconduct. The **INDEFINITE APPOINTMENT** does not carry any expectancy of conversion to any other type of appointment in the United Nations.

/...

mt

On 2 December 1994 the Applicant sent a letter to the Director of Administration and Human Resources asking him to review the decision to defer payment of the termination indemnity contained in the personnel action form of 1 November 1994.

In a reply dated 30 January 1995, the Director of Administration and Human Resources informed the Applicant that, since he had accepted the terms of appointment for International staff, he was not entitled to the termination indemnity provided for in Area Staff Rule 109.9.

On 31 January 1995, the Applicant filed an appeal with the Joint Appeals Board.

On 7 May 1995, the Director of Administration and Human Resources wrote to the Secretary of the Joint Appeals Board asking that one of the members of the Board be disqualified from three cases, including that of the Applicant, because of a conflict of interest.

The Joint Appeals Board adopted its report on 19 May 1996. Its recommendation reads as follows:

#### **"IV. RECOMMENDATION**

21. ... the Board is of the opinion that the Appellant's Area appointment was terminated on grounds of redundancy effective close of business on 30 November 1994 which, at that time, qualified the Appellant for payment of termination indemnity, and that his international appointment with the Agency is a new one.

Therefore, the Board unanimously makes its recommendation that the administrative decision appealed against be reviewed, and that the termination indemnity to which the Appellant is entitled at the time of termination of his Area appointment with the Agency be settled and paid."

On 24 June 1996 the Commissioner-General forwarded to the Applicant a copy of the report of the Joint Appeals Board and informed him of the following:

/...

mt

"Regrettably, the Board in your case was improperly constituted, as you are the supervisor of one of the Board members, ..., who thus had a patent conflict of interest. Although this matter was brought to the attention of the Board's Chairman, he inexplicably failed to disqualify the member from the Board. As you will appreciate, under these circumstances I cannot accept the conclusions and recommendations of the report. However, in view of your right to have your case reviewed by a Joint Appeals Board, I have decided to refer your case back for review by a properly constituted Board."

A newly constituted Joint Appeals Board met to consider the appeal and adopted its report on 1 October 1996. Its evaluation, judgement and recommendation read in part as follows:

**"III. EVALUATION AND JUDGMENT**

23. ... the Board examined all documents cited before it, including the Appellant's personal file, and came out with the following:

(a) The state of being an Area Staff Member accepting an international post is not governed by any Rules or Regulations;

(b) The Administration liquidated all of the Appellant's entitlements except the termination indemnity which is of a very similar nature to the provident fund and which is usually payable upon the termination of the post;

(c) The absence of Rules and Regulations governing the state of being an Area Staff Member accepting an International appointment resulted in inconsistency on the side of the Administration in dealing with these kind of cases ...

...

In conclusion the Board ... notes that ... the Administration is inconsistent as to whether they should treat this case as a transfer or as a termination/new appointment. The Board considers that the services of the Appellant have been terminated from UNRWA effective 30 November 1994, because UNRWA Area Staff Rules will not be applicable to him effective 1 December 1994, and another set of entirely different Rules will govern his services as an International Staff Member. Therefore the Appellant is

/...

mt

entitled for a Termination Indemnity, in accordance with Rule 109.9, paragraph 2 (A). Since his Area Post was terminated as proved above he is entitled for payment of Termination Indemnity on the time of that termination.

#### IV. RECOMMENDATION

In view of the foregoing, and without prejudice to any further oral or written submission to any party, the Board unanimously makes its recommendation that the Administration's decision appealed against be reviewed, and that the termination indemnity to which the Appellant is entitled at the time of termination of Area appointment with the Agency be settled and paid."

On 14 November 1996, the Commissioner-General forwarded to the Applicant a copy of the report of the Joint Appeals Board and informed him of the following:

"... The Board noted that the Agency's regulations and rules did not address the transfer of a staff member from the Area staff to the International staff and accordingly, it was necessary to examine the circumstances of your transfer to determine whether your services as an Area staff member were terminated by the Agency prior to the commencement of your tenure as an International staff member. The Board was of the opinion that the Administration's internal documentation of the mechanics of the transfer was inconsistent on this issue. The Board, however, disregarded the wording of the letter of offer which you signed, which indicated that the transfer was consensual, that you were not leaving the service of the Agency and that you furthermore agreed to the payment of a termination indemnity on the conditions stated therein. Accordingly, the Board concluded that your services were terminated when you left the Area staff and recommended that you be paid a termination indemnity.

I have carefully reviewed the Board's report and noted its conclusions. You have remained in the service of the Agency and thus there is no logical reason why you should receive a windfall payment upon joining the International staff. The offer which you signed was part of a consensual transfer and it indicated that you were not leaving the service of the Agency and that you had no right to the payment of a termination indemnity at that time. I do not believe that the basis upon which the Board disregarded this document to be a reasonable interpretation of the facts of this case. Accordingly, your appeal is dismissed.

/...

mt

..."

On 9 April 1997 the Applicant submitted to the Tribunal the above-mentioned application.

Whereas the Applicant's principal contentions are:

1. The personnel action form dated 30 November 1994 provided that he would be "terminated under mutual consent", and the Applicant is therefore entitled to a termination indemnity. It is the separation from service as an Area staff member which calls into play Staff Rule 109.9, and consequently the Applicant, even though he continued to work for the Agency as an International staff member, should receive the termination indemnity to which he was entitled when he was separated from service as an Area staff member. The Respondent cannot - for some purposes, such as the payment of other separation benefits and Provident Fund entitlements - treat the Applicant as having "terminated" his service, while failing to consider him as such for the purposes of payment of the termination indemnity.

2. Other Area staff members whose appointments were converted into International appointments received termination indemnities when their Area appointments were terminated.

3. The Respondent should not have rejected the recommendation of the first Joint Appeals Board. Contrary to the Respondent's assertion, the member of that Board who was supposed to have had a conflict of interest was not one of the Applicant's subordinates.

Whereas the Respondent's principal contentions are:

1. The Applicant was not entitled to a termination indemnity because he continued to be employed by the Agency; he was simply transferred from one mode of appointment (Area) to another (International).

/...

mt

2. The Applicant signed a letter of appointment which expressly states that the payment of the termination indemnity will be deferred until such time as his appointment as an International staff member is terminated, and the Applicant thus accepted the conditions established for the payment of such an indemnity.

3. Paragraph 2 (A) of Area Staff Rule 109.9, which provides that "[n]o termination indemnity shall be payable under this rule where ... the Agency secures an alternative offer of employment which in the opinion of the Commissioner-General ... is not to the disadvantage of the staff member", applies in this case.

4. The two Area staff members who were paid termination indemnities upon their transfer to the International staff category received early retirement benefits, and therefore their case is not comparable to that of the Applicant.

5. The Respondent's rejection of the report of the first Joint Appeals Board was justified because one of the members of that Board was the subordinate of the Applicant in his division, which gave rise to a conflict of interest. The Applicant waived his right to appeal against the Respondent's decision with regard to the first Joint Appeals Board, since he did not submit an appeal against this decision when he was informed of it.

The Tribunal, having deliberated from 10 July to 4 August 1998, now pronounces the following judgement:

I. The Tribunal has now to consider whether the Applicant, who was transferred from an Area post to an International post when UNRWA was relocated to Gaza, was entitled to be paid a termination indemnity when his Area post was terminated.

The Applicant claims, in brief, that there was a complete separation between his two successive posts in the same organization, so that the

/...



mt

termination indemnity pertaining to his first post should have been paid to him before he acceded to his second post. The Administration considers, on the contrary, that there was continuity between the two posts, so that the years of service as an Area staff member would eventually be taken into account upon the termination of his International appointment, if such termination gave rise to a termination indemnity.

II. The Applicant relies mainly on three arguments: the first lies in the name given to the personnel action form of 2 November 1994 terminating his employment as an Area staff member. This form was entitled "termination under mutual consent". Secondly, the Applicant was paid various benefits (accumulated annual leave, Provident Fund entitlements) which according to him should normally have been accompanied by a termination indemnity. Lastly, the Applicant argues that he was unjustly deprived of his termination indemnity, since termination indemnities were paid to the interested parties in analogous cases.

III. These arguments are unconvincing, in the Tribunal's view. The reference to mutual consent in the above-mentioned personnel action form has no effect with respect to the termination indemnity, since nothing in the Area Staff Rules and Regulations covers this particular method of termination. The fact that some payments were made as benefits relating to the Applicant's years of service as an Area staff member is without consequence as to the termination indemnity, unless by analogous reasoning, which is insufficient to establish an obligation on the Administration having to do with the specific indemnity for termination. Lastly, it seems that the so-called analogous cases to which the Applicant refers are those of staff members who received early retirement benefits; these cases differ from that of the Applicant in that the staff members had enough years of service to qualify for retirement.

/...

mt

IV. The Administration's arguments, on the other hand, deserve to be accepted.

In the first place, when he accepted an International post, the Applicant signed, in acceptance, a letter of offer dated 10 November 1994, which deliberately settled the question of the termination indemnity. This document states:

"Should the Agency find it necessary in the future to initiate your separation from service in circumstances which would entitle you to a termination indemnity, this indemnity will be calculated (a) for your period of service as International Staff member, in accordance with International Staff Regulation 9.4; and (b) for your period of service as Area Staff member, in accordance with Area Staff Rule 109.9, paragraph 3(A), at the rates applicable at the date of your separation from the Agency, provided that the total payment shall not exceed the greater of the following: the termination indemnity payable in respect of your Area staff service to date or the termination indemnity to which you would have been entitled had all your services been as an International staff member."

These terms are totally unequivocal. They deliberately exclude the possibility that a termination indemnity pertaining to the Area post could be paid immediately to the Applicant.

The Applicant therefore made a commitment by which he waived the immediate payment of a termination indemnity upon termination of his Area post. Pacta sunt servanda.

Secondly, the Applicant's situation appears to be expressly provided for in Area Staff Rule 109.9, paragraph 2 (A), which states:

"No termination indemnity shall be payable under this rule where ... The Agency secures an alternative offer of employment which in the opinion of the Commissioner-General ... is not to the disadvantage of the staff member."

/...

mt

This provision is applicable in this case, and it is clear that the International post is considered by the Commissioner-General to be more favourable to the Applicant than his Area staff post.

V. The Tribunal notes that at no time was the Applicant in a situation of separation, since his International service began on 1 December 1994, the day after the termination of his Area staff appointment on 30 November 1994.

The termination giving rise to the right to indemnity assumes that the service has been terminated by a separation. The term of separation is defined in Area Staff Rule 112.3, as follows: "'Separation' shall mean the cessation of the employment of a staff member by the Agency". The Applicant was never separated from UNRWA, and there is therefore continuity in this case between the Applicant's two posts. He cannot in these circumstances claim entitlement to the payment of a termination indemnity, both because of the commitment he signed and by reason of the provisions of Area Staff Rule 109.9, paragraph 2 (A).

VI. For these reasons, the Tribunal rejects the application.

(Signatures)

Hubert THIERRY  
President

Julio BARBOZA  
Member

Kevin HAUGH  
Member

Geneva, 4 August 1998

-----