



Administrative Tribunal

Distr.
LIMITED

T/DEC/910

20 November 1998

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 910

Case No. 1006: SOARES

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. Chittharanjan Felix Amerasinghe;

Whereas at the request of Belmira F. Soares, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), the President of the Tribunal, with the agreement of the Respondent, extended to 30 November 1997, the time-limit for the filing of an application to the Tribunal;

Whereas, on 22 September 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 23 February 1998, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, inter alia:

- “(a) *To rescind* the decision of the Secretary-General dated 27 June 1997 not to take further action in regard to her case;
- (b) *To find and rule* that the Letter of No Contest signed by the Applicant was the product of duress and misinformation and was therefore invalid; that the decision to place the Applicant on SLWFP [special leave with full pay] was procedurally flawed, improperly motivated and violated the Applicant’s contractual rights; that the exercise of the Respondent’s discretion in refusing to grant the Applicant SLWFP for

study purposes was arbitrary and discriminatory; and that the refusal of the Respondent to commute her annual leave entitlement to cash at the start of her status on SLWFP is arbitrary and capricious;

...

- (d) *To order* the Applicant's immediate reinstatement with international status for a period of not less than two years;
- (e) *To award* the Applicant compensation in the amount of two years salary as well as two months additional salary for the loss of her annual leave together with interest thereon;
- (f) *To award* the Applicant in addition appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;
- (g) *To fix* pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;
- (h) *To award* the Applicant as costs, the sum of \$7,500.00 in legal fees and \$500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 5 August 1998;

Whereas the Applicant filed written observations on 21 October 1998;

Whereas, on 10 November 1998, the Tribunal put questions to the Respondent, to which he provided answers on 13 November 1998;

Whereas, on 13 November 1998, the Tribunal ruled that no oral proceedings would be held in this case;

Whereas, on 17 November 1998, the Applicant submitted comments on the Respondent's 13 November submission;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP in Addis Ababa, Ethiopia, on 1 January 1974, on a three-month fixed-term appointment as Secretary, at the GS-8 level. Her contract was extended several times. On 16 April 1979, her functional title was changed to Senior Secretary, and on 1 July 1980, she was granted a permanent appointment. The Applicant was promoted to the GS-9 level with effect from 1 January 1981. On 1 April 1990, her appointment was converted from local to international status. On 1 October 1993, she was placed on special leave with full pay (SLWFP) and was separated from service on 30 June 1995, pursuant to an agreed termination.

On 22 January 1987, and again on 3 November 1989, the Applicant wrote to the UNDP Director, Division of Personnel (DOP), seeking conversion of her status to internationally recruited, noting that the prior incumbents of her post had been international recruits, that her workload had increased substantially, and that, as a foreigner living in Ethiopia, she was experiencing financial difficulties. On 8 March 1990, the Director of Personnel informed the Resident Representative in Addis Ababa that the UNDP Governing Council had approved an Field Service Level (FSL) post for the country office, available for the deployment of the Applicant on international status for a five-year period, after which she would be considered for similar assignments elsewhere or revert to general service status. On 9 May 1990, a Personnel Officer offered the Applicant an international assignment at the FSL-5 level and informed her that there would be "no lien on [her] local post". The Applicant accepted the offer on 13 June 1990.

During January and February 1993, the Applicant wrote a series of letters to the Administration, requesting the continuation of her FSL post for the remaining two years of her FSL assignment and, in the light of information that the FSL posts were to be phased out, placement in a P-1 post at any duty station for the subsequent five years until retirement age.

On 4 May 1993, the Director, Human Resources Planning and Change

Management (HRPCM), wrote to the Applicant recapitulating their earlier discussions and setting out the options available to her, as follows:

- "1. Reassignment to another field office. As the FSL function will be abolished UNDP-wide as from 1 January 1994, reassignment under FSL conditions is not a viable option anymore.
2. Conversion of your contract to a local appointment if a post is available in Addis. However, from next year you would be paid a local salary, lose your international benefits, including educational entitlements for your children, and your current pension entitlements may be reduced.
3. Agreed separation from the Organization on early retirement. The separation conditions in your case would be as follows:

Upon separating from the Organization in accordance with the provisions of staff regulation 9.1 (a), at a date to be determined by your office, you will receive payment of 12 (twelve) months salary plus an exceptional payment of six (6) months additional indemnity in accordance with the provisions of staff regulation 9.3 (b) plus three (3) months in lieu of notice under staff rule 109.3 (c). Altogether, this amounts to a payment of 21 months net salary. In addition, if you have any accrued annual leave, up to 60 days will be paid to you.

You can either choose to have the equivalent amount paid in a lump sum upon separating, or you can opt to go on special leave with full pay for the equivalent amount of time and separate officially at the end of that period at which time you would be eligible for early retirement as an international staff member - I understand that this will also coincide with your husband's retirement. For the evaluation of these two options it is important to note that throughout the period of your SLWFP your international entitlements, including education benefits for your children, would continue. You would also continue contributing to the pension plan during these months, and it would give you time to plan for your retirement in Portugal. Finally, this option would, in fact, give you the full five years as an FSL as had been envisioned when you first took up your FSL assignment in April 1990."

On 18 June 1993, the Applicant signed a "Letter of No Contest", addressed to the Resident Representative a.i., UNDP, Addis Ababa, which read as follows:

"I hereby certify that I will not contest the termination of my permanent appointment effective 1 October 1993 under the terms and conditions specified below.

This Letter of No Contest is signed by me in accordance with the provisions of staff regulation 9.1, 9.3 and staff rule 109.3 and in accordance with paragraph 3 of [the Director, HRPCM's] letter of 4 May 1993 stipulating the terms of payment under special leave with full pay (SLWFP) upon separation from the service of UNDP at the end of September 1993."

On 24 June 1993, the Administrative Officer, Career Development and Training Unit, informed the Resident Representative, UNDP, Addis Ababa that "by virtue of passing the Competitive Examinations for the French Language Fellowship given by the French Government to United Nations Agencies, [the Applicant had] been selected to go for a two month (August and September 1993) training in French Language Intensive Course at Grenoble, in France". On 12 July 1993, the Applicant requested the Director, HRPCM, inter alia, to grant the Applicant SLWFP for the two-month French course. On 14 July 1993, the Resident Representative sought the advice of the Personnel Officer, DOP/UNDP, New York, as to whether the Applicant could be accorded special leave with full pay during those two months, pointing out that other UN agencies permit SLWFP for such courses.

On 6 August 1993, after the Applicant had left for France, the Director, HRPCM, faxed a response, stating:

"... We are, of course, delighted for [the Applicant] [for] having been so successful and to have gained this opportunity to perfect her French in the country itself, and are naturally inclined to be as sympathetic as possible to her request. Therefore, we have carefully considered her request for SLWFP during the two-month period of the course, also noting other agencies' practice. In light of the fact that on 1 October [the Applicant] will proceed on SLWFP already for 21 months as part of a separation agreement with the Organization, however, we feel that it is more appropriate that she use her annual leave entitlement to cover this period. Please remember in this regard that during the 21-month period of SLWFP she will also accrue annual leave. ..."

On 26 October 1993, the Applicant wrote to the Director, HRPCM, expressing her disagreement with the decision to deny her request for SLWFP, on the grounds that (1) during August and September 1993 she was in active service with UNDP, (2) she had signed the "Letter of No Contest" on the understanding that she would receive all the UN benefits for another 21 months, and (3) that under UN Regulations and Rules, she was "entitled to this leave with full pay."

The Director, HRPCM, responded by letter dated 10 December 1993 and explained:

"... it must be understood that this is not a fundamental right for every staff member going on study leave. Indeed the UN Rules and Regulations specify that special leave - unspecified whether with or without pay - may be granted when it is in the interests of UNDP. The usual practice in these cases is to give the staff special leave without pay. ... No regular staff member would have been given special leave with full pay for a study leave either, unless there were unusual, special circumstances ..."

On 15 March 1994, the Applicant wrote to the Director, Regional Bureau for Africa, UNDP, claiming, inter alia, that she had been incorrectly informed that all FSL posts were being phased out when, in fact, such posts still existed in other duty stations. She further stated in that letter that she "was pressured by UNDP office in Addis Ababa in July 1993 to sign the Letter of No Contest ..." On 10 April 1994, the Applicant wrote to the Chairperson, UNDP/UNFPA Staff Council, stating that she was "forced by UNDP here to go on SLWFP from October 1, 1993 and was pressured against [her] will to sign the 'Letter of No Contest'." On 22 November 1994, she wrote to the Administrator, UNDP, claiming that she had been victim of discrimination and alleging again that she was "forced to sign the Letter of No Contest against [her] will." (Emphasis in original.) She indicated that not all FSL posts had been abolished and asked for reinstatement "in UNDP or in any UN office for another five years ..."

By memorandum dated 2 December 1994, the Applicant informed the

Assistant Resident Representative (Admin) a.i., UNDP, Addis Ababa, that she understood that all locally recruited staff members placed on SLWFP were “paid a compensation of accrued leave of 60 days upon commencement of SLWFP”, and that although she had 68 days of accrued annual leave as of 30 September 1993 these had not been commuted to cash upon commencement of her SLWFP on 1 October 1993. She asked that arrangements be made to pay her the “compensation for 60 days annual leave accrued”.

The Deputy Resident Representative (Operations) responded on 12 December 1994, pointing out that she had a leave balance of 7.5 days upon commencement of her SLWFP and that she had already been advised by memorandum dated 6 August 1993 that her language training in France had been covered by her annual leave.

On 31 January 1995, the Applicant requested the Secretary-General to review the administrative decision to separate her from UNDP before the expiration of her contract, as well as the decision to deny her request for SLWFP for her French course in Grenoble and the denial of her request for 48.5 days compensation at the start of her SLWFP.

Also on 31 January 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 22 February 1995, the Assistant Secretary-General for Human Resources Management acknowledged receipt of the Applicant’s letter dated 31 January 1995 and informed her that the matter had been forwarded to DOP/UNDP “for review and possible investigation.”

On 5 May 1995, the Applicant informed the Resident Representative, Addis Ababa, that contrary to the information on her “Certificate of Annual Leave Balance”, she had an annual leave balance of 48.5 days as at the end of September 1993, for which she should have been compensated upon her separation from UNDP. She further stated as follows: “Since all other separated UNDP staff were paid for 60 days annual leave upon separation from UNDP, I should be entitled to the same benefit. I

have taken up this case with a lawyer in New York, including my termination from UNDP before the expiry of my contract, and pending the outcome of the case, I am signing the 'Certificate of Annual Leave Balance' under protest."

On 9 June 1995, the Representative of the Secretary-General informed the JAB that UNDP was seeking to resolve the matter but that if no resolution was reached, the Respondent would submit a reply to the Applicant's appeal. On 30 April 1996, the Respondent submitted his reply.

The JAB adopted its report on 14 April 1997. Its conclusions and recommendations read, in part, as follows:

"Conclusions and recommendations

...

61. The Panel unanimously agreed [that] the Appellant did not discharge the burden of showing, by evidence, that the Letter of No Contest was signed by her under pressure, or that she was misled by UNDP.

62. The Panel unanimously agreed that the granting of SLWFP status to a staff member is not a right but one solely within the discretion of the Secretary-General, and that the decision not to grant the Appellant SLWFP status in August and September 1993 while she pursued the French Language Intensive Course at Grenoble, France, was a legitimate exercise of the discretionary power of the Secretary-General.

63. The Panel unanimously agreed that the Appellant was not entitled to have her accrued annual leave of 48.5 days, at the start of her SLWFP status on 1 October 1993, commuted to cash.

64. The Panel unanimously agreed that the Respondent, having agreed that it was proper for the Appellant to accept employment with UNFPA while on SLWFP status with UNDP, is estopped from repudiating his own acts. The Panel unanimously recommends, therefore, that the Respondent reimburse the Appellant whatever amounts were recovered from her representing remuneration for services which she rendered to UNFPA.

65. The Panel unanimously agreed to make no further recommendation in support of the appeal."

On 27 June 1997, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

“The Secretary-General has considered your case in the light of the Board’s report. He has taken note of the Board’s unanimous conclusions that your appeal was receivable; that you did not discharge the burden of showing by evidence that the Letter of No Contest was signed by you under pressure or that you were misled by UNDP; that the granting of special leave with full pay (SLWFP) to a staff member is not a right but one solely within the discretion of the Secretary-General, and that the decision not to grant SLWFP status in August and September 1993 while you pursued the French Language Intensive Course at Grenoble, France, was a legitimate exercise of the discretionary power of the Secretary-General; that you were not entitled to have your accrued annual leave of 48.5 days, at the start of your SLWFP status on 1 October 1993, commuted to cash; that UNDP, having agreed that it was proper for you to accept employment with UNFPA while on SLWFP status with UNDP, is estopped from repudiating [its] own acts.

The Secretary-General has taken note of the Board’s recommendation that UNDP reimburse you whatever amounts were recovered from you representing remuneration for services which you rendered to UNFPA. He has also taken note of the Board’s determination to make no further recommendation in support of your appeal. The Secretary-General has decided to accept the Board’s conclusions and recommendations. He has, however, been informed that UNDP has, in the meantime, decided to reimburse you, with interest, the amounts recovered for services you rendered to UNFPA. The relevant recommendation of the JAB having thus been rendered moot, the Secretary-General has decided to take no further action in regard to your case.”

On 23 February 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The Respondent violated the Staff Rules by failing to make a good faith effort to find an alternative post for the Applicant, who had been a permanent contract holder.

2. The Applicant was a victim of discriminatory and bad faith treatment by the Respondent. Although she was told that all FSL posts were being abolished, FSL posts have been maintained in other duty stations.

3. The Applicant signed the "Letter of No Contest" under duress, and therefore the Respondent is estopped from relying on that document.

Whereas the Respondent's principal contentions are:

1. The appeal is not receivable since the Applicant agreed, by Letter of No Contest dated 18 June 1993, not to contest the termination of her appointment, including the terms thereof, and the Respondent has fully met the terms set forth in the offer of agreed termination dated 4 May 1993.

2. The Respondent's refusal to grant SLWFP for study purposes was a valid exercise of the Respondent's discretion and in no way infringed any contractual right of the Applicant.

3. The Applicant was not entitled, at the start of her period of SLWFP, to the commutation of the annual leave that she had used for the period of study in France.

The Tribunal, having deliberated from 9 to 20 November 1998, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Respondent dated 27 June 1997. That decision adopted a unanimous Joint Appeals Board (JAB) recommendation that, inter alia, rejected the Applicant's claim that she had signed a "Letter of No Contest" under pressure and that she had been misled by the United Nations Development Programme (UNDP). The Respondent also agreed with the JAB's finding that the granting of special leave with full pay (SLWFP) to a staff member is not a right but is solely within the discretion of the Secretary-General and

that the decision not to grant the Applicant SLWFP status while she pursued a French language course was a legitimate exercise of the discretionary power of the Secretary-General.

II. A number of preliminary questions are before the Tribunal. The first is whether the application is receivable in the light of the “Letter of No Contest” signed by the Applicant. The existence of a “Letter of No Contest” does not preclude the Tribunal from receiving an application. In this case, the Tribunal considers that the application is receivable. It finds that it is competent to hear and pass judgement upon the present application under article 2 of its Statute. Because the record of the case is sufficiently complete, there is no need for the Tribunal to conduct an oral hearing.

III. The Tribunal examined the question whether the Applicant signed the “Letter of No Contest” under duress, thereby rendering it invalid. In a letter dated 4 May 1993, the Director, Human Resources Planning and Change Management, informed the Applicant of the three options available to her: reassignment to another field office, conversion of her contract to a local appointment if a post were available, or early retirement based on a separation package. The Applicant chose the last option. On 18 June 1993, she signed a “Letter of No Contest”. The Applicant alleges that she signed the letter under pressure and under the mistaken belief that all FSL posts had been abolished. The burden of providing evidence of duress is on the Applicant. In her appeal, she has failed to furnish the Tribunal with such evidence. The Tribunal cannot find in her favour on this point.

IV. Concerning the status of permanent staff members, staff rule 109.1(c) provides in part:

“(i) ... if the necessities of the service require abolition of a post or

reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments ..., provided that due regard shall be had in all cases to relative competence, to integrity, and to length of service. ...”

This rule has been interpreted to mean that a good faith effort must be made by the Organization to find alternative posts for permanent appointment staff members whose posts are abolished. The Respondent must show that the staff member was considered for available posts and was not found suitable for any of them prior to termination (cf. Judgement No. 85, Carson (1962)). The Tribunal has held in the past that where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given (cf. Judgement No. 447, Abbas (1989)).

V. In Judgement No. 679, Fagan (1994), paragraph XIII, the Tribunal addressed the importance of respecting the rights of permanent staff as set forth in staff rule 109.1 (c):

“The Tribunal has referred repeatedly to the application of this provision, which is vital to the security of staff who, having acquired permanent status, must be presumed to meet the Organization's requirements regarding qualifications. In this connection, while efforts to find alternative employment cannot be unduly prolonged and the person concerned is required to cooperate fully in these efforts, staff rule 109.1(c) requires that such efforts be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation.”

Contrary to the Respondent's claim, in his letter dated 4 May 1993, that all FSL posts were to be abolished throughout UNDP, the records show that this was indeed not the case. In response to questions put by the Tribunal, the Respondent confirmed

that no FSL posts were in existence in the UNFPA office in Addis Ababa. However, he admitted that such posts existed in Viet Nam and China in 1993. Given the Applicant's excellent performance over many years and her flexibility in terms of assignments, there was no reason which would justify her separation from service without any attempt by the Administration to examine alternative placement. The Respondent has not demonstrated to the Tribunal that he conducted a good faith search for an alternative post for the Applicant in accordance with staff rule 109.1(c). In addition, since it appears that a number of FSL posts were still available at the time, the Applicant signed the "Letter of No Contest" under a mistaken belief that they were all being abolished. Accordingly, she is entitled to be compensated on that account.

VI. In her pleas, the Applicant asks the Tribunal to order her immediate reinstatement with international status for a period of not less than two years. As stated by the Respondent, the Applicant wants to "eat her cake and have it too". Under the separation agreement, which the Applicant accepted, she received 21 months of SLWFP and continued international status, entitling her to education grant and home leave. Having reaped the fruits of the separation agreement, she is now asking the Tribunal to order her reinstatement. The Tribunal rejects her claim. (Cf. Judgement No. 547, McFadden (1992)).

VII. Further, the Applicant submits that the Respondent's refusal to grant her SLWFP for study purposes, as well as his refusal to commute her annual leave entitlement to cash at the commencement of her SLWFP, is arbitrary and capricious.

Under staff rule 105.2(a)(i):

"Special leave may be granted for advanced study or research in the interest of the United Nations ... for such period as the Secretary-General may prescribe ... In exceptional cases, the Secretary-General may, at his initiative, place a staff member on special leave with full pay if he considers such leave to be in the interest of the Organization."

The above provision makes it clear that the grant of SLWFP is discretionary, that exceptional circumstances are required to justify such grant, and that it must be “in the interest of the Organization”. The governing principle is that the Secretary-General’s discretionary authority is not absolute but must function within the requirements of due process and the pertinent rules and regulations (cf. Judgement No. 388, Moser (1987), para. II). This discretionary authority may be subject to review if it is shown to be based on lack of due process or mistake of fact, or that it is arbitrary or motivated by prejudice or other extraneous factors (cf. Judgements No. 309, De Shields (1983) and No. 515, Khan (1991), para. II). The Tribunal does not find any evidence of arbitrariness in the Secretary-General’s decision to refuse to grant the Applicant special leave and therefore will not interfere with the exercise of his discretionary power. Moreover, at the end of her 21 months of SLWFP, the Applicant’s Certificate of Annual Leave Balance showed a total of 60 days, and pursuant to staff rule 109.8, this is the maximum days of leave which can be commuted into cash upon separation. Therefore, the Tribunal agrees with the Respondent that the Applicant was in no way injured by this decision.

VIII. By the date of her separation from service, the Applicant had 48.5 days of accrued annual leave. The Applicant had requested that the months of August and September 1993, when she attended a French language training programme in France, be considered SLWFP, but her request was denied. The Respondent instead required her to use her accrued annual leave entitlement to cover her absence during that period. Thus, 41 days were deducted from her accrued annual leave prior to her separation from service on 30 September 1993, leaving a balance of 7.5 days of accrued annual leave. The Applicant argues that all the other staff members who accepted the same separation package as she were granted compensation for 60 days of annual leave at the commencement of the agreed-upon SLWFP period, in addition to payments made for accrued annual leave at the end of

such period. She contends that she is entitled to the same treatment. The Applicant admits that she received payment for 60 days accrued annual leave at the end of the 21-month period. The Tribunal understands that this includes the balance of 7.5 days of accrued annual leave.

IX. For the reason stated in paragraph V, the Tribunal orders the Respondent to pay the Applicant compensation in the amount of three months net base salary, at the rate in effect on the date of her separation.

X. For the foregoing reasons, the Tribunal rejects the remainder of the Applicant's pleas, as well as her request for costs.

(Signatures)

Mayer GABAY
Vice-President, presiding

Julio BARBOZA
Member

Chittharanjan Felix AMERASINGHE
Member

New York, 20 November 1998

R. Maria VICIEN MILBURN
Executive Secretary