

PROVISIONAL TRANSLATION

ADMINISTRATIVE TRIBUNAL

Judgement No. 955

Case No. 1013: AL-JASSANI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Victor Yenyi Olungu; Ms. Marsha A.

Echols;

Whereas, on 23 March 1998, Abdul Razzaq Al-Jassani, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an application containing pleas which read as follows:

“II. PLEAS

I request the Tribunal to:

1. Recalculate my termination indemnities to include the supplement salary in US dollars to the net salary of 1994 salary scale which is identical to the net salary of 1989 scale.
2. [Pay an] additional 50 percent of termination indemnity pursuant to staff regulation 9.3 (b), UN precedents and due to abolishment of my post.
3. [Pay] appropriate interests for the damage resulting from undue delay in the payment of the termination indemnity and the three months in lieu of notice unreasonably held for ten months.

4. Award me an appropriate and adequate compensation for material and moral injuries as a direct consequence of the UNDP actions.
5. [Pay] costs.”

Whereas the Respondent filed his answer on 22 October 1999;

Whereas the Applicant filed written observations on 5 December 1999;

Whereas the facts in the cases are as follows:

The Applicant entered the service of UNDP, Baghdad, on 3 April 1983 as a local recruit on a three-month fixed-term appointment at the G-6 level, with the functional title of Senior Translator. His appointment was subsequently extended, and on 1 January 1986 he was promoted to the G-7 level. His appointment was converted to a probationary appointment on 1 July 1987, and on 1 January 1988, he received a permanent appointment. On 1 January 1989, his functional title changed to that of Senior Administrative Assistant. The Applicant was separated from service on 30 June 1994.

In 1992, UNDP evaluated its staffing needs for reduced operations in Iraq and offered voluntary separation to a number of staff members. On 15 October 1992, the Applicant was offered an agreed separation package with a lump sum termination indemnity equivalent to 12.5 months salary.

According to a Note for the File dated 20 October 1992, a meeting was held on 18 October 1992 to discuss issues relating to the terms of agreed termination. During the meeting, the Applicant mentioned that staff members of the Economic and Social Commission for Western Asia (ESCWA) in Baghdad received generous agreed termination terms including the 50 per cent increase to the indemnity provided in Annex III under staff regulation 9.3 (b). He noted that, because no revision had been made to the General Service salary scale since 1989, the United Nations had started paying a non-pensionable bonus equivalent to 50 per cent of the net salary in US dollars in October 1991. The staff requested their indemnity entitlement to be calculated to include the 50 per cent “bonus”.

In a memorandum dated 13 January 1993, the Resident Representative a.i. informed the Applicant that he would appreciate receiving within the next four days his letter of no contest

indicating his actual date of separation. Alternatively, he requested the Applicant to submit his performance appraisal review to his supervisor. On 20 January 1993, the Resident Representative a.i. again wrote to the Applicant advising him he had 24 hours to submit his written response to the offer. On 26 January 1993, the Applicant replied that he would not accept the terms offered.

On 5 July 1993, the Applicant wrote to the Resident Representative a.i., outlining his proposals for an agreed separation. On 12 July 1993, the Director, Human Resources Planning and Change Management, Division of Personnel (DOP), UNDP, wrote to the Resident Representative a.i., informing him that the conditions set by the Applicant for his agreed separation could not be granted by UNDP, "if for reasons of equity alone". As a solution, he proposed to keep the Applicant on board until the end of the year and then extend his employment status until February 1994 exhausting his annual leave, so as to reduce his pension loss.

On 18 August 1993, the Officer-in-Charge, UNDP, Baghdad, informed the Applicant that his proposal had not been accepted and asked him to consider the proposal from the Director, Human Resources Planning and Change Management, DOP. On 8 September 1993, the Applicant communicated his dissatisfaction with the proposal offered.

On 20 June 1994, the Director, Human Resources Planning and Change Management, DOP, wrote to the Applicant offering ten months salary plus three months in lieu of notice (in all 13 months) to be taken in the form of a lump sum payment upon separation, and asking the Applicant to sign a letter of no contest. On 26 June 1994, the Applicant signed the letter of no contest. Subsequently his appointment was terminated in accordance with staff regulation 9.1 (a), effective 30 June 1994.

On 25 May 1995, the Applicant wrote to the Administrator, UNDP, requesting administrative review of the decision "taken in connection with [his] separation and the termination indemnities", and to consider payment of interest for the damages resulting from "undue delay in the payment of the termination indemnities".

On 17 July 1995, the Director, DOP, addressed a memorandum to all Resident Representatives and Nationally-Recruited Staff Serving with UNDP, attaching Guidelines for

Processing of Agreed Separations of Nationally-Recruited Staff Serving on UNDP Posts in Country Offices (UNDP *Guidelines*), in order to streamline the process for agreed separations.

On 11 August 1995, the Chief, Legal Section, DOP, replied to the Applicant's letter of 25 May, stating, *inter alia*, that the Applicant was expected to honour his commitment as contained in the no contest agreement he had signed, and that the UNDP Financial Rules contained no provision for payment of interest.

On 21 September 1995, the Applicant lodged an appeal to the JAB. On 15 September 1997, the JAB submitted its report. Its conclusions and recommendation read as follows:

“Conclusions and recommendation

47. ..., the Panel *unanimously agreed* that the Appellant's appeal was receivable.

48. The Panel *unanimously agreed* that besides merely alleging that he was pressured into accepting the 'unfair agreed separation offer and signing the letter of no contest on 26 June 1994', the Appellant did not discharge the burden of substantiating, by evidence, that such was the case.

49. The Panel *unanimously agreed* that the power granted to the Secretary-General under staff regulation 9.3 (b) is discretionary in nature, and that the Appellant did not discharge the burden of substantiating, by evidence, that the Secretary-General abused the exercise of the power.

50. The Panel *unanimously agreed* that the Appellant could not expect to benefit from the UNDP *Guidelines* which were promulgated after his separation from service with the Organization.

51. The Panel *unanimously agreed* that there was no evidence that the Respondent deviated from its overall financial policy governing the official United Nations exchange rate of Iraqi dinar to the United States dollar when it calculated the Appellant's termination benefits.

52. While the Panel regretted the delay on the part of the Respondent in making payment of the US\$51,688.02 to the Appellant, the Panel *unanimously agreed* that it could not grant the request of the Appellant for an award of interest on the amount.

53. The Panel *unanimously agreed* to make no recommendation in support of the appeal.”

On 20 January 1998, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

“... ”

The Secretary-General has examined your case in the light of the Board's report. He has first taken note that the Panel considered your appeal to be receivable. He has also noted the following conclusions of the Panel: (1) that besides merely alleging that you were pressured into accepting the 'unfair agreed separation offers and signing the letter of no contest on 26 June 1994' you did not discharge the burden of substantiating, by evidence, that such was the case, (2) that the power granted to the Secretary-General under staff regulation 9.3 (b) is discretionary in nature, and that you did not discharge the burden of substantiating, by evidence, that the Secretary-General abused the exercise of power, (3) that you could not expect to benefit from the UNDP *Guidelines* which were promulgated after your separation from service with the Organization, (4) that there was no evidence that the UNDP Administration deviated from its overall financial policy governing official United Nations exchange rate of the Iraqi dinar to the United States dollar when it calculated your termination benefits, and (5) that while the Panel regretted the delay on the part of the UNDP Administration in making payment of the US\$51,688.02 to you, it unanimously agreed that it could not grant your request for an award of interest on the amount. The Secretary-General also noted that the Panel made no recommendation in support of your appeal, and, accordingly, he has decided to take no further action in your case.

The above-mentioned decision of the Secretary-General is 'the final decision on the appeal' mentioned by staff rule 111.2 (o). Therefore, any recourse should be addressed to the Administrative Tribunal.

...”

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

Whereas the Applicant's principal contentions are:

1. The Applicant was forced to accept the unfair separation offer and sign the letter of no contest on 26 June 1994.
2. ESCWA locally recruited staff members in Baghdad who were separated in accordance with staff regulation 9.1 have been given the applicable termination indemnity as

indicated in Annex III to the Staff Regulations, *increased by 50 percent* as provided for in staff regulation 9.3 (b). Since the Applicant's status is exactly the same as that of the ESCWA staff members, he should be paid 50 percent higher termination indemnity.

3. Furthermore, under paragraph 4 of the UNDP *Guidelines*, it is the policy and practice of UNDP to pay the additional 50 per cent indemnity under staff regulation 9.3 (b) in cases of agreed separation resulting from downsizing of operation, including abolition of posts. As the Applicant's post was abolished after his separation due to downsizing of UNDP operation in Iraq, he is entitled to the 50 per cent increase in indemnity payment.

4. The Applicant's indemnity payment should be recalculated to for reasons of equity to include the supplement salary in US dollars (equivalent to 50 per cent net salary in US dollars) to the net salary of 1994.

5. The Applicant's termination indemnity and three months salary in lieu of notice were paid ten months after his separation from service. Therefore, the Applicant is entitled to the appropriate interest from the date of separation to the date of payment.

Whereas the Respondent's principal contentions are:

1. The Applicant voluntarily accepted the terms of the separation offer. He failed to adduce any evidence that he was obliged or in any way coerced into accepting that offer. All the Applicant's pleas concerning specific terms of separation entitlements are not receivable.

2. The decision whether or not to grant an additional 50 per cent to a termination indemnity is within the Administration's discretion, and non-payment of this additional indemnity did not violate the Applicant's rights. He was not subjected to any discrimination. The Applicant's termination indemnity was correctly calculated.

3. Applicant did not sustain any material or moral injuries as a result of the Administration's actions, and is not entitled to compensation. The Applicant's request for the award of costs is without merit.

The Tribunal, having deliberated from 11 to 31 July 2000, now pronounces the following judgement:

I. On numerous occasions the Tribunal has laid stress on the elementary and basic principle that commitments, whether made by the Administration or by staff members, must be honoured. *Pacta sunt servanda*.

Thus, where an agreement has been formally concluded between the Administration and a staff member, it cannot be called into question by either party, except in exceptional cases of invalidity provided for in the statutes, as strictly interpreted. This, again, is the principle at issue in this case, as it was, for example, in *MacFadden* (Judgement No. 547 (1992)) and *Bhatia* (Judgement No. 573 (1992)).

II. Recruited locally in 1983, the Applicant was employed in the UNDP office in Baghdad. In May 1992, however, UNDP operations in Iraq were reduced and staffing was decreased. Offers of voluntary separation were made to 14 staff members, including the Applicant. Thirteen of them accepted the terms offered to them; the applicant, however, chose not to do so, opting instead to enter into negotiations with the Administration. In June 1994, after numerous discussions and exchanges of correspondence, the parties arrived at an agreement which offered the applicant a termination indemnity consisting of 10 months' salary plus three months in lieu of notice and 60 days' accrued annual leave, a total of US\$67,195.74. This was paid to him in part upon his separation from service, on 30 June 1994, and in part with delay, on 17 April 1995.

The Applicant not only accepted this agreement, he also signed a "letter of no contest", dated 26 June 1994, stating explicitly that he would not contest the termination of his employment, in accordance with staff regulation 9.1 (a), subject to his receiving the indemnities stipulated in the letter of 20 June 1994 (this is the letter which contained the proposals set forth above).

III. The Applicant did not wait long before calling into question his agreement and his letter of no contest. On 25 May 1995, less than a year after signing his agreement, he requested an administrative review of the terms of his separation from service. Alleging that

the Respondent had made him accept an unfair agreement under pressure, he requested that his indemnities be recalculated because of the rampant inflation in Iraq following the Gulf war, that he be paid an additional 50 per cent indemnity which had, apparently, been granted to terminated staff members of ESCWA and, lastly, that he be paid interest on the sums that had been paid to him with delay by the Administration.

These requests were rejected by the Administration; unanimously by the JAB, in a strongly worded recommendation dated 15 September 1997; and lastly, by a decision of the Secretary-General transmitted to the Applicant on 24 February 1998.

It would be surprising if the Tribunal did not endorse these positions and decisions which are based on its own judicial precedents and on concern for commitments made, as referred to in paragraph I above. Indeed, with the exception of the one relating to interest on the sum paid with undue delay by the Administration, the Applicant's requests are irreceivable because they clearly contravene the no-contest agreement accepted by him.

IV. The Tribunal cannot under any circumstances entertain the claim that the agreement between UNDP and the applicant might be open to question because it was accepted under "pressure" from the Administration. The Applicant refers in this regard to administrative harassment, such as a change of office, which does not in any way constitute a constraint apt to vitiate his consent. A constraint of that nature must be such as to leave no scope for the exercise of free will by one of the parties. Such is not the case in this instance, where the agreement in question was the outcome of protracted negotiations, while the Applicant remained on board and was thus free from want. The Applicant's appointment was not terminated until the agreement concerning his indemnities had been concluded. The Tribunal considers, therefore, that the agreement is valid and produces its full effects.

Nor can the Tribunal entertain the claim for recalculation of the indemnities granted to the Applicant because of inflation. If UNDP had envisaged such a recalculation, it would have proceeded on the basis of a general measure applicable to all staff members receiving separation indemnities, not just the Applicant. Likewise, the Applicant cannot claim an additional 50 per cent indemnity by reference to the benefits granted to ESCWA staff members.

The applicable rules are not the same in the two cases, and it is intriguing to note that the Applicant does not invoke the principle of equity, to which he seems greatly attached, in relation to his own UNDP colleagues in Baghdad, who, having accepted the offers made to them at the outset, received smaller indemnities than the Applicant.

V. The question of interest on the sums owed to the Applicant by the Administration under the agreement is different from the preceding ones. It concerns not the substance of the agreement, but its application. Therefore, it does not fall within the scope of the no-contest agreement made by the Applicant. As has been noted, the overall indemnity granted to the Applicant, amounting to US\$67,195.74, was paid in two stages: the sum of US\$15,507.72 was paid upon his separation from service, on 30 June 1994, and the additional sum of US\$51,688.02 was not paid until 10 months later, on 17 April 1995. The Respondent attributes this delay to administrative difficulties. The Tribunal believes that, fallacious as the Applicant's claims may be with regard to the calculation of his indemnities, the Administration was nonetheless wrong to withhold the final sum owed to him for 10 months. The Tribunal decides, therefore, that the Administration should pay interest to the Applicant on the additional sum of US\$51,688.02 at the then prevailing rate for the period from 30 June 1994, the date of his separation from service, to 17 April 1995, the date on which the additional sum was paid.

VI. Subject to the payment of this interest, the Applicant has suffered no loss and therefore is not entitled to any compensation in this regard. By the same token, he is not entitled to reimbursement of legal fees.

VII. In the light of the foregoing, the Tribunal:

1. Rejects the Applicant's claims with regard to the recalculation of the separation indemnities granted to him;

2. Orders UNDP to grant interest to the Applicant on the sum of US\$51,688.02 for the period from 30 June 1994 to 17 April 1995 at the rate in force on that date.

(Signatures)

Hubert THIERRY
President

Victor YENYI OLUNGU
Member

Marsha A. ECHOLS
Member

Geneva, 31 July 2000

Maritza STRUYVENBERG
Executive Secretary
