



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1033

Case No. 1127: HOSSAIN

Against: The Secretary-General
of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Kevin Haugh, Vice-President, presiding; Mr. Spyridon Flogaitis;
Mr. Omer Yousif Bireedo;

Whereas, on 17 January 2000, Monowar Hossain, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application that did not fulfil all the formal requirement of article 7 of the rules of the Tribunal;

Whereas, on 13 March 2000, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read as follows:

"PLEAS

...

- b) Rescind the order of punishment of loss of two steps and of a written censure ... and initiate actions against UNICEF for instituting false and fabricated allegations against me.
- c) Rescind the separation action taken by UNICEF on grounds of abolition of post, the same being unfair and unjustified and done with malice through manipulation of the administrative mechanisms ...
- d) Retroactive reinstatement effective January 1999 as Senior Driver in UNICEF Bangladesh with all benefits and without prejudice ...

- e) Award payment towards all legal costs connected with appeal.
- f) Award any other relief or benefits, as the [United Nations Administrative Tribunal] deems fit."

Whereas, at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent answer until 31 August 2000 and periodically thereafter until 31 May 2001;

Whereas the Respondent filed his Answer on 30 April 2001;

Whereas the Applicant filed Written Observations on 15 July 2001;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 1 September 1975, on a three-month, fixed-term appointment as a Driver at the GS-2 level in the Bangladesh Country Office, UNICEF (BCO). His contract was subsequently extended and he was granted a permanent appointment effective 1 June 1990. On 3 September 1992, he was promoted to the GS-3 level position of Senior Driver. On 1 June 1995, the Applicant's appointment was confirmed.

On 17 December 1996, a Personnel Officer, BCO, wrote to the Applicant advising him, *inter alia*, that the Representative, BCO, (the Representative) "demand[ed] an immediate and full explanation" of several incidents. The Applicant was alleged to have entered the Representative's residence without permission "to consort with a woman" and, when caught by a domestic staff member, threatened the latter and her family "with dire consequences". In addition, the Applicant was reported to have approached several international staff members in an effort to obtain duty free alcohol, and to have attempted to take seven bottles of alcohol following a party at the Representative's residence. The Applicant was given two days to respond to these allegations.

At the request of the Representative, a preliminary fact-finding investigation was launched to investigate the allegation regarding the unauthorized entry into the Representative's residence. The Applicant, the female staff member with whom he was alleged to have "consorted", the domestic staff member and a security guard were interviewed and, on 7 March

1997, an investigation report was produced summarizing the interviews. The report noted inconsistencies in the statements of the Applicant and the female staff member, but did not reach any conclusions.

On 10 March 1997, the Applicant was formally charged with misconduct with respect to his unauthorized entry into the Representative's residence. He replied to the charge on 24 April 1997.

The case was referred to an *ad hoc* Joint Disciplinary Committee (JDC) which produced its report on 12 May 1997. The JDC concluded that the charge was substantiated and recommended that the disciplinary measures of written censure and the loss of two steps-in-grade be imposed upon the Applicant. The Applicant was subsequently informed that the Executive Director, UNICEF, concurred with the recommendation of the JDC and that, if he wished to appeal this decision, he should submit an application to the United Nations Administrative Tribunal.

In May 1997, the Programme Budget Review Committee (PBRC) approved a restructuring exercise for the BCO, which slated a number of posts for abolition including those encumbered by the Applicant and 15 other drivers. The drivers were given the option of accepting a separation package or applying for other posts. The Applicant did not accept the separation package.

On 15 June 1997, the Applicant was interviewed by a Special Advisory Panel (SAP) which had been constituted to conduct a preliminary review of the drivers' performance. The SAP determined that the Applicant should be given priority consideration for vacant posts.

On 14 July 1997, the Special Appointment and Placement Committee (APC), which had been constituted due to the restructuring exercise, submitted its recommendation in the Applicant's case to the Representative. It noted that the Applicant had not applied for a new post and that, as he had already been subject to two disciplinary measures, recommending him for a vacant post "would send the wrong signal". On 22 July 1997, the Representative wrote to the Applicant, formally advising him that the PBRC had approved the abolition of the post he encumbered, effective 31 December 1997, and that the APC had not found the Applicant suitable for a post in his occupational group, either at his grade level or below. He presented the Applicant with the option of accepting a mutually agreed termination package which carried

increased termination indemnity but required the Applicant to waive his right to appeal. If the Applicant chose not to accept this option, he would be separated from service due to abolition of post. The Applicant replied on 27 July 1997, stating, *inter alia*, that he would not accept this termination package.

On 5 August 1997, the Applicant requested administrative review of both the disciplinary measures imposed on him and the decision to separate him from service due to abolition of post. On 26 August 1997, the Deputy Director, Human Resource Administration, Division of Human Resources, acknowledged receipt of this request, but added "we reserve the right to raise the issues of receivability and competence, as deemed appropriate". On 28 October 1997, the Deputy Executive Director, UNICEF, informed the Applicant that she had decided to maintain the decision to separate him from service for abolition of post; the selection process for the remaining posts had been fair and reasonable; and, his rights of due process had been fully respected. Insofar as the disciplinary measures were concerned, she advised him that he should contest them before the United Nations Administrative Tribunal.

On 27 October 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 7 July 1999. Its considerations, conclusions and recommendations read as follows:

"Considerations

19. The Appellant is contesting the decision to terminate his permanent appointment. However, in the Statement of Appeal as well as the request for administrative review, he also questioned the fairness of the *ad hoc* JDC proceedings and the decision to impose disciplinary measures against him.

20. The Panel did not believe that it was the proper forum for reviewing the Appellant's disciplinary case. Staff rule 110.4 (d) designates the Administrative Tribunal as the forum to review 'an appeal in respect of a disciplinary measure considered by a Joint Disciplinary Committee.' It was noted that the UNICEF Administration had, more than once advised the Appellant that he could go directly to the Administrative Tribunal to appeal the disciplinary measures against him. Consequently, the Panel decided to disregard that part of the appeal that related to the disciplinary measures, and focus on the termination of the Appellant's permanent appointment.

...

23. ... It ... appeared to the Panel that the Appellant had been separated in the wake of the UNICEF/BCO's restructuring exercise, and not because of malice or ulterior motives on the part of some senior personnel in management, as the Appellant asserted. In the view of the Panel, during the restructuring exercise, the Appellant had been accorded all the procedural protection to which he was entitled, in that he had been apprised of the available options and his case had been reviewed by different joint advisory bodies charged with evaluating the qualifications and performance of the staff members concerned.

24. The Appellant might have had a better chance to be kept on board had there been no disciplinary measures against him. However, that should not be held against the Organization. The Panel believed that it was in no position to second guess the judgement of the Special APC, for it fell within the Special APC's mandate and competence to devise certain criteria such as integrity to evaluate the candidates with, and to find the Appellant not up to the standard especially in view of the disciplinary measures against him. The Panel was concerned only about whether there was evidence that the contested decision had been motivated by prejudice or by some other extraneous factors. It did not believe that the Appellant had provided any concrete evidence to substantiate his allegations of malice or ulterior motives.

25. The Appellant also contended that the action of terminating the service of a staff member holding a permanent appointment such as him would come into effect only if it was not contested by the staff member concerned. The Panel did not think that this was a complete reading of the relevant Staff Regulation.

Conclusions and Recommendations

28. The majority of the Panel thus found:

a) That the Appellant had not carried the burden to substantiate his allegations of ulterior motives and malice on the part of the UNICEF Administration in connection with the termination of his permanent appointment, and that there was no evidence that the termination of his permanent appointment had violated his rights as a staff member; and

b) That it was not necessary to obtain consent from the Appellant before the UNICEF Administration could terminate his permanent appointment.

29. In light of the foregoing, the majority of the Panel agreed to make no recommendation in support of the appeal."

In a dissenting opinion, the third member of the Panel recommended as follows:

"...

Conclusion and recommendation:

a. The ad hoc [Joint Disciplinary Committee] found that the charge of unauthorized entry into the [Resident Representative's] house was substantiated and recommended ... disciplinary measures. UNICEF ... implemented the disciplinary measures.

b. that punishment should have been considered enough ...

c. It was indeed necessary ... to obtain the consent from the appellant before UNICEF ... could terminate his permanent appointment.

23. ... I recommend that the appellant be reinstated as a driver at the GS3 level and that UNICEF ... should ... offer him a fair monetary compensation for the losses and damages that he has suffered."

On 7 September 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General agrees with the conclusions of the majority and has decided to accept its recommendation and take no further action on your appeal. ...

..."

On 13 March 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The disciplinary measures imposed on the Applicant and the abolition of his post and his resulting separation from service were the result of a malicious conspiracy, designed to cause economic suffering, and damage to the Applicant's social and family life.

2. The Applicant was denied the opportunity of participating in the JDC investigation.

3. Drivers' posts were disproportionately slated for abolition.

4. The Respondent violated the Staff Regulations and Rules, as well as the principles of fairness and justice, in not retaining the Applicant's services. In particular, the Respondent failed to consider the Applicant's competence, efficiency and length of service

Whereas the Respondent's principal contentions are:

1. Submission of the Applicant's disciplinary case to the Tribunal is now time-barred.
2. The disciplinary procedures were fairly conducted and respected the Applicant's rights of due process.
3. The JDC made its recommendation on the basis of correct and complete information and its process was free from improper motivation or other extraneous considerations.
4. The process which resulted in the abolition of the Applicant's post was part of a restructuring exercise, conducted in coordination with Headquarters. The process was properly effected and not vitiated by improper motivation or other extraneous factors. As such, the restructuring exercise is not properly the subject of an application to the Tribunal.
5. The Applicant's separation from service for abolition of post was properly effected, free from extraneous consideration and in full accord with the Regulations and Rules of the Organization.
6. The Applicant's integrity was a valid issue for consideration in determining his placement in the context of the restructuring exercise.

The Tribunal, having deliberated from 2 to 23 November 2001, now pronounces the following Judgement:

I. The Applicant entered the service of the UNICEF Bangladesh Country Office (BCO) on 1 September 1975 as a Driver at the GS-2 level. He was granted a permanent appointment on 1 June 1990, and was promoted to the post of Senior Driver at the GS-3 level on 3 September

1992. On 1 June 1995, his permanent appointment was confirmed, however his post was subsequently scheduled for abolition effective 31 December 1997.

On 10 March 1997, the Applicant was charged with misconduct. On 16 April 1997, his case was submitted to an *ad hoc* JDC for review. The *ad hoc* JDC report, which was issued on 12 May 1997, was adopted by the Executive Director, and the Applicant was so informed in a letter dated 3 July 1997. The Applicant was advised that pursuant to the recommendations of the JDC, the Executive Director had decided that he should be subject to the loss of two steps-in-grade and be issued a written censure. By the same letter the Applicant was informed that an application against this decision could be filed with the United Nations Administrative Tribunal.

II. In May 1997, the Programme Budget Review Committee (PBRC) approved a restructuring exercise in the BCO which UNICEF had instituted in light of its restrictive financial situation. As a result of the restructuring, a considerable number of posts, including the post encumbered by the Applicant, were slated for abolition. The affected employees were asked to apply for other suitable UNICEF posts, but the Applicant did not submit any applications. On 14 July 1997, the Special Appointment and Placement Committee (APC) noted that the Applicant had not applied for a new post but determined that, in any event, as he had already been subject to two disciplinary measures, his selection "would send the wrong signal". The Applicant was informed of this development in person and was offered various options which he refused to consider.

By letter dated 22 July 1997, the Representative, formally advised the Applicant that the PBRC had approved the abolition of the post he encumbered with effect from 31 December 1997, and that the APC had not found him suitable for any posts in his occupational group at his grade level or one level below. The Applicant was informed of his separation entitlements and was given six months' formal notice of termination.

III. On 5 August 1997, the Applicant requested administrative review of both his disciplinary case and the decision to separate him from service. In his letter acknowledging receipt of this request, the Respondent stated "we reserve the right to raise the issues of receivability and competence, as deemed appropriate". In her substantive response of

28 October 1997, the Deputy Executive Director, Operations, UNICEF, informed the Applicant that the disciplinary action should be contested directly before the United Nations Administrative Tribunal. With respect to his separation for abolition of post, she stated that she had decided to maintain the decision, the process having been fair and reasonable and in full accord with his rights of due process.

On 27 October 1997, the Applicant lodged an appeal with the JAB challenging the disciplinary measures and the decision to separate him from service. The JAB decided, by majority, that it was not the proper forum for reviewing the Applicant's disciplinary case. It decided, furthermore, to reject the Applicant's contention that his separation from UNICEF was unjustified and motivated by malice or other ulterior motive. The Panel decided that the Applicant "might have had a better chance [of being] kept on board had there been no disciplinary measures against him ... [but it] did not believe that the [Applicant] had provided any concrete evidence to substantiate his allegations of malice or ulterior motives". The Panel found that the abolition of the Applicant's post was the result of a restructuring exercise, approved by UNICEF headquarters, in which 18 posts were abolished and "agreed with the Respondent that such a restructuring exercise was a management prerogative".

In his letter of 7 September 1999, the Under-Secretary-General for Management advised the Applicant that he had accepted the recommendation of the JAB. The Applicant filed an Application against this decision on 13 March 2000.

IV. The Tribunal notes that the Applicant requests that it re-examine and rescind two different decisions: the decision of the Executive Director, UNICEF, to discipline him pursuant to the recommendation of the JDC; and, the decision of the Secretary-General to separate him from service due to abolition of post.

V. Insofar as the first request is concerned, the Tribunal finds the Application time-barred. It considers that the Applicant should have been aware of the appropriate time limits. The Administration provided him with the relevant information on a number of occasions and had specifically advised him that if he wished to appeal, such appeal should be addressed to the Tribunal. Notwithstanding this advice, the Applicant appealed to the JAB who found his appeal

to be inadmissible. The Tribunal recalls Judgement No. 359, *Gbikpi* (1985), in which it stated that "the suspension of a time-limit must be justified by serious reasons which prevented the Applicant from acting, and must be for a reasonably short time". In the instant case, the Applicant made no request for suspension of the time-limits established in article 7 of the Statute and Rules of the Tribunal, and has not brought to the Tribunal's attention any "serious reason" which might justify such suspension.

VI. With respect to the second request, the Tribunal is in agreement with the findings made, and conclusions reached, by the majority of the JAB. The abolition of the post encumbered by the Applicant took place during a general restructuring and following a procedure which guaranteed the Applicant's rights. Further, the JAB had no authority to re-examine the disciplinary measures taken against the Applicant which had binding force. Finally, the Applicant failed to substantiate either prejudice or any other extraneous factor.

VII. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Kevin HAUGH
Vice-President, presiding

Omer Yousif BIREEDO
Member

Spyridon FLOGAITIS
Member

New York, 23 November 2001

Maritza STRUYVENBERG
Executive Secretary