



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1039

Case No. 1132: SHAH

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha A. Echols; Mr. Omer Yousif Bireedo;

Whereas, on 26 November 1999, Zain-ul-Abedin Shah, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 21 March 2000, the Applicant, after making the necessary corrections, again filed an Application containing the following pleas:

"II. PLEAS

...

- (a) To rule that the provisions of staff rule 109.1 (i) [and] (ii) (a) were grossly violated since no consistent, honest and serious efforts were made on the part of UNICEF Management in Pakistan to effectively utilize the [Applicant]'s services and [retain him] ...
- (b) To rule that the constitution and composition of [the] special Appointment and Promotion Committee, to review the candidature of the [Applicant], was based on the *mala fide* intentions of the UNICEF Pakistan Management, *ultra vires* and against the mandatory provisions of the UNICEF Personnel Administration Manual – Section 6, Sub-section 4.6.4 ...

- (c) To rule that the decision of the BPRC [Budget Planning and Review Committee] to abolish the post held by the [Applicant] was tainted with mis-representation on the part of the UNICEF Pakistan Management, which was the result of extraneous considerations.

III. RELIEF SOUGHT

1. To rescind the decision to terminate the Applicant's permanent appointment ...
2. That in the event of a decision by the Secretary-General not to reinstate, the payment of compensation of six months net base salary for the wrong done, recommended by the UN JAB [Joint Appeals Board] ... shall not offset the enormous consequences of termination of the staff member ...
3. Any compensation the UN Administrative Tribunal may deem fit."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 September 2000 and periodically thereafter until 30 June 2001;

Whereas the Respondent filed his Answer on 30 April 2001;

Whereas the Applicant filed Written Observations on 5 July 2001;

Whereas the facts in the case are:

The Applicant entered the service of UNICEF, as a Steno-Secretary at the GS-4 level, on a three-month, fixed-term contract in Islamabad, Pakistan, on 30 June 1975. His contract was subsequently extended several times and, on 1 April 1978, he was granted a permanent appointment. On 1 February 1979, the Applicant's functional title changed to Finance Assistant. The Applicant received a series of promotions until 1 January 1993, when he was promoted to the NO-C level with the functional title of Finance Officer.

On a number of occasions in 1993 and 1994, Grindlay's Bank, Islamabad, was invited to send representatives to meetings with the UNICEF Pakistan Staff Association (UPSA) to discuss delays in the processing of staff members' applications for personal loans. The dossier contains Minutes from such a meeting attended by the Applicant, an executive committee member of UPSA, on 27 January 1994. On 27 February 1994, the UNICEF Representative, Islamabad, (the Representative) and the Operations Officer, UNICEF, Islamabad, wrote a "Note for the Record" in which they stated that they had been informed by the Bank Manager that, at a

meeting a few days earlier, the Applicant had threatened the withdrawal of all official UNICEF accounts if another staff member did not receive a large personal loan. On 7 September 1994, the Representative transmitted the Note for the Record to the Applicant and asked for an explanation. The Applicant denied making any such statement on 18 September 1994.

In July 1995, the Applicant was elected for a one-year term as Chairperson, UPSA.

On 1 February 1996, the BPRC endorsed the abolition of the Applicant's post. The Representative wrote to the Applicant on 7 March 1996, formally notifying him of this decision. The Representative advised the Applicant, *inter alia*, that he was entitled to six months notice which would expire on 8 September 1996, and that UNICEF would assist him in "identifying and applying for other suitable posts in the Organization" and would place his name on a "special roster" for review and priority placement.

On 16 April 1996, the Representative sent an inter-office memorandum to all staff, informing them that, following consultations with the UPSA Executive Committee, he had established a special Appointment and Promotion Committee (APC)/special Selection Advisory Panel (SAP) for the restructuring process.

On 4 June 1996, the Representative advised the Applicant that he had not been selected for any of the posts for which he had applied. Consequently, he offered the Applicant three options: early separation before the expiration of his notice period; special leave with full pay for the remainder of his notice period; or, reporting for duty with the understanding that he might be assigned to functions which were not within his area of expertise. The Applicant elected to continue reporting for duty.

On 3 August 1996, the Applicant wrote to the Secretary-General, requesting administrative review of the decisions to abolish his post and terminate his appointment. By copy of this letter, he requested the Joint Appeals Board (JAB) to suspend action under staff rule 111.2 (f).

On 9 September 1996, the Applicant received a one-month extension of his appointment.

On 18 September 1996, the JAB rejected the Applicant's request for suspension of action. On 20 September 1996, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General concurred with the JAB's recommendation.

On 30 September 1996, the Applicant applied for the post of Assistant Finance Officer, UNICEF Afghanistan Programme, Peshawar, Pakistan. Although no formal appointment had been made at that time, the SAP and the APC had already met and made a recommendation in April and June 1996, respectively.

On 8 October 1996, the Applicant received another one-month extension of his appointment. The Applicant separated from service on 8 November 1996.

On 29 November 1996, the Applicant lodged an appeal on the merits with the JAB. The JAB submitted its report on 25 May 1999. Its considerations, conclusions and recommendations read as follows:

"Considerations

...

16. The Panel examined the facts of the case in order to determine whether the contested decision was tainted by prejudice or other improper motives. It observed that the decision to abolish the Appellant's appointment was not specifically directed at the Appellant, but resulted from a general restructuring exercise in the UNICEF-Pakistan Office.

On the face of the evidence, the Panel could not conclusively attribute the contested decision to the Appellant's involvement with the Staff Union, or to the incident involving the Grindlays Bank. The Panel was of the view that the Appellant did not adduced any concrete evidence tending to prove that the decision to abolish his post was vitiated by prejudice or other improper motives.

17. The Panel then turned to the second issue, i.e. whether the Respondent made genuine efforts to find another suitable post for the Appellant ...

18. ... [T]he Panel was not satisfied with the efforts by the UNICEF Administration to fairly consider the Appellant against other suitable posts. It noted that as a permanent staff member who had served the Organization for some 20 years, the Appellant should have been given preference over other staff members with temporary appointments. The Panel felt that the Respondent's failure to effectively attempt to secure another suitable post for the Appellant constituted a violation of the Appellant's rights as a staff member for which he deserved some compensation.

Conclusions and Recommendations

19. The Panel ... found that the decision to abolish the Appellant's post was not vitiated by prejudice, bias, or any other improper motive.

20. However, the Panel also came to the conclusion that ... the Respondent's actions were inadequate inasmuch as [he] failed to make genuine efforts to find a suitable post for the Appellant. This inaction caused irreparable harm to the Appellant and called for compensation. Accordingly, the Panel *unanimously recommended* that the Appellant be paid compensation equivalent to six months' net base salary."

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

"...

The Secretary-General has ... taken note of the Board's conclusion that the decision to abolish your post was not vitiated by prejudice, bias or any other improper motive. However, having regard to the permanent status of your appointment and your long career with UNICEF, the Board also concluded that the UNICEF Administration did not make genuine efforts to find a suitable post for you and recommended that you be paid compensation in the amount of six months net base salary.

The Secretary-General has decided to accept the Board's conclusions and recommendation for the payment of compensation. ...

..."

On 21 March 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The decision to abolish the Applicant's post was tainted and was the result of extraneous considerations.
2. The Respondent violated the provisions of staff rule 109.1 as no consistent, honest and serious efforts were made to utilize and retain the Applicant's services, despite the fact that he applied for suitable posts.
3. The constitution and composition of the special APC was *ultra vires*, based on the *mala fide* intentions of the Respondent and in violation of the UNICEF Personnel Administration Manual.
4. The JAB report was submitted two and a half years after the Applicant lodged his appeal. This delayed the Applicant's grievance process which began on 3 August 1998. As a result, the Applicant has suffered dismay, distress and suffering.

Whereas the Respondent's principal contentions are:

1. The process which resulted in the abolition of the Applicant's post was part of a general restructuring exercise which was properly effected and was not vitiated by improper motive or other extraneous consideration. As an exercise of managerial discretion and in the absence of improper motivation, the restructuring exercise is not properly the subject of an application to the Tribunal.
2. The constitution of the special APC was in full compliance with the UNICEF Personnel Administration Manual, Section 6, Chapter 4.6.4, and followed consultation with staff representatives.
3. The Applicant was given full and fair consideration by a duly constituted special APC, and their decisions were not vitiated by extraneous factors.
4. The decision to separate the Applicant due to the abolition of his post was not vitiated by bias, discrimination or any other extraneous consideration.
5. It is recognized that further efforts should have been made to place him during his notice period. The Applicant has been duly compensated for this irregularity.

The Tribunal, having deliberated from 26 October to 29 November 2001, now pronounces the following Judgement:

I. The Applicant was separated from service as a Finance Officer at the NO-C level in 1996, having served with UNICEF since 1975. The separation occurred when his post was abolished during a general restructuring of the Pakistan Office. Although the Applicant applied for other posts within UNICEF, he was not selected. In the Application he asks the Tribunal to rescind the termination and to order his reinstatement, among other relief.

II. The Applicant contends that the Respondent had an obligation to, but did not attempt to find him a suitable alternative post. Staff rule 109.1 (c) (i), in relevant part, requires that, when a post is to be abolished, a staff member with a permanent appointment be retained in preference to those on all other types of appointments, "subject to the availability of suitable posts in which their services can be effectively utilized", and giving due regard to relative competence, integrity

and length of service. This rule was reiterated in section 18.5.12 of Chapter 18 of the UNICEF Human Resources Policy and Procedure Manual of 1 February 1996. However, the Respondent argues that at the time the Applicant was being considered for alternative posts, Chapter 18 was in draft form.

Staff rule 109.1 (c) (ii) (a) adapts the general rule of subsection (c) (i) to locally recruited staff, for whom the general rule is satisfied if they "have received consideration for suitable posts available at their duty stations".

III. In its letter giving the Applicant notice that the post would be abolished, the Representative wrote that UNICEF would assist the Applicant in identifying and applying for other suitable posts and that his candidature would be placed against those available posts at his level for which he was qualified. There is no evidence that this assistance was provided. The Representative suggested that the Applicant apply for posts within and without the United Nations.

The Applicant applied for two posts in Islamabad: Education Officer and Assistant Project Officer, Monitoring and Evaluation. For each post it was determined that he did not have the basic requirements for the post, although no rationale was given by the special APC for those conclusions. The Respondent states that the Applicant was considered for other vacant posts but another candidate was always more suitable. There is no support in the record for this conclusion.

IV. The Applicant also applied for the post of Assistant Finance Officer (NO-B) in Peshawar. This post, at another duty station, was within the Applicant's finance expertise but below the level of the abolished post. According to the Respondent the application was dated and reached the Peshawar office on 30 September 1996, after the 16 November 1995 closing date and after the selection process had been completed. However, the Regional Director did not give his approval of the person recommended for the post until 14 January 1997. The written offer was not sent to the successful candidate until April 1997. There is no explanation for why UNICEF did not make the Applicant aware of the post. When he was notified on 7 March 1996 of the decision to abolish his post, the deadline for applications for the Peshawar post had passed but the special SAP and the special APC had not yet met. However, the Respondent states that it

had fulfilled its obligation to place the Applicant in available posts at Islamabad, his duty station, implying correctly that it had no explicit duty toward him with regard to the post at Peshawar. However, the Tribunal is not convinced that the Respondent fulfilled its duty toward the Applicant with regard to posts at Islamabad.

V. The JAB was not satisfied that the Respondent had undertaken the required effort to fairly consider the Applicant against other suitable posts. It noted the Applicant's 20 years of service as an important consideration and recommended compensation of six months net base salary. The Respondent accepted that recommendation but the Applicant argues that the recommendation failed to take into account his circumstances. With regard to that amount, the Applicant commented on his age, the difficulty in finding another post in a developing country and the service with UNICEF. The Tribunal agrees that the harm done was irreparable under the circumstances.

VI. Like the JAB, the Tribunal does not consider the rescission of the decision to terminate the Applicant's appointment to be an appropriate remedy, given UNICEF's restructuring. The Applicant is incorrect when he states that the Respondent terminated his permanent appointment. The Respondent terminated the post held by the Applicant, which resulted in his separation after no alternative post was offered to him. The post he held no longer exists, making the rescission of the decision to separate him and reinstatement in the post impossible. The appropriate remedy appears to consist of having the Respondent follow its own rules, which protect permanent staff when a post is abolished. That is, the Applicant must be considered for and placed in a post for which he is qualified.

VII. Chapter 18 reinforces the policy that gives priority for posts to a staff member in an abolished post by allowing a period of training to complete any necessary qualifications. Section 18.5.13 allows the SAP and/or APC to recommend appointment when it believes that a staff member could become fully qualified with three months or less training. Even if the Chapter was inapplicable it provides a reasonable approach that could still be applied to the Applicant.

VIII. The Applicant also contends that his post should not have been abolished because it was not redundant. The Respondent replies that, in connection with its Management Excellence Programme, it engaged in a strengthening of its operations, which required a complete restructuring of the operations area. Under the program the national officer posts were abolished and replaced with international posts. The Tribunal is not convinced by the Applicant's arguments that the restructuring was based on prejudice, bias or discrimination. Moreover, the Applicant's claim that an episode with Grindlay's Bank or his participation in staff association activities led to or contributed to the actions by the Respondent was unconvincing.

IX. As a procedural error, the Applicant claims that the use of a special APC in his case violated the UNICEF Personnel Administration Manual because the Staff Committee was not asked to submit the names of staff participants. The Applicant argues that outsiders should not have been appointed. Staff rule 104.14 (c) (i) concerns the APC. An APC outside Headquarters must have five or seven members at the Second Officer level and above. The Respondent instead created a special APC and a special SAP in connection with the restructuring. The 16 April 1996 interoffice memorandum regarding "Special APC Membership/Special SAP" states that there had been consultation between the Respondent and the UPSA Executive Committee. Following the consultation, the Representative made appointments to a special APC for the restructuring process. The Tribunal has recognized the acceptability of a special procedure under certain circumstances, such as a special working group regarding the termination of a permanent appointment, so long as there was a complete, fair and reasonable procedure. (See Judgements No. 98, *Gillman* (1996); and No. 456, *Kioko* (1989).) Here, the procedure for the selection of members of the special APC seems to meet that standard.

X. For the reasons stated above, the Tribunal orders the Respondent to:

(a) Properly consider the Applicant for posts for which he is suitable (with or without three months training) and place him against the first available post for which he is qualified; or

(b) Should the Secretary-General, within 30 days of the notification of this judgement decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in this case, the Tribunal fixes the compensation to be paid to

the Applicant at two years of his net base salary at the rate in effect on the date of separation of service.

XI. Further, the Tribunal orders the Respondent to pay the Applicant six months net base salary at the rate in effect on the date of separation of service in addition to the amount already paid, for the harm sustained and for the delays in the proceedings.

XII. The Tribunal rejects all other pleas.

(Signatures)

Mayer GABAY
President

Marsha A. ECHOLS
Member

Omer Yousif BIREEDO
Member

New York, 29 November 2001

Maritza STRUYVENBERG
Executive Secretary