



**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1077

Case No. 1155: BEKELE

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Mr. Kevin Haugh, Vice-President;  
Ms. Marsha Echols;

Whereas, on 28 February 1997, Michael Bekele, a former staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an Application against a decision to terminate his appointment and grant him a disability benefit.

Whereas on 31 July 1998, the Tribunal rendered Judgement No. 868, *Bekele*. The Tribunal concluded that:

"the Applicant might have been misled by the Administration's instruction to address the matter to the [United Nations Joint Staff Pension Fund (UNJSPF)] and not informing him that any challenge to the decision had to be addressed to the Secretary-General in accordance with staff rule 111.2(a). These were exceptional circumstances which should have induced the [Joint Appeals Board (JAB)] to excuse the Applicant for his untimeliness in filing for administrative review. This is a sufficient ground for the Tribunal to order the Applicant's case to be remanded to the JAB. The Tribunal does not examine the merits."

Whereas at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, granted an extension of the time limit for filing a new application with the Tribunal until 30 September 2000 and once thereafter until 30 November 2000;

Whereas, on 2 October 2000, the Applicant filed an Application containing pleas which read, in part, as follows:

**"II: PLEAS**

...

II.1. Cancel the decision of March 9, 2000, rendered by the ...Under-Secretary-General for Administration and Management ...

...

II.4. RULING ON THE MERITS

II.4.1. Order the file held by the [JAB] to be produced before the ... Tribunal.

...

II.4.3. ... [O]rder the immediate reinstatement of the Applicant into his functions ... as well as the reimbursement, to the Applicant, of all costs incurred ... during the preceding appeal proceedings ...

[or, alternatively]

[Order] the Respondent to pay to the Applicant the latter's salaries from September 25, 1991 until the date on which the Applicant will have reached his age of ordinary retirement, including all and any participation in the Applicant's pension fund.

II.5.2. Allow the Applicant to establish, by all legal means including the production of documents and the hearing of witnesses, the correctness of his assertions made before this Tribunal."

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 April 2001 and once thereafter until 30 July 2001;

Whereas the Respondent filed his Answer on 24 July 2001;

Whereas the Applicant filed Written Observations on 27 December 2001;

Whereas, on 2 July 2002, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts of the case subsequent to the statement of facts contained in Judgement No. 868 are as follows:

On 11 October 1999, the JAB adopted its report. Its considerations, conclusion and recommendation, and special remark read, in part, as follows:

### **"Considerations**

...

31. The Panel found therefore that the Administration had acted consistently in order to preserve the interests of the Appellant.

### **Conclusion and Recommendation**

32. In view of the foregoing, the Panel **concludes** that the Administration has acted in accordance with the pertinent staff regulations and rules, established procedures and practice.

33. Accordingly, the Panel makes **no recommendation** in support of the present appeal.

### *Special Remark*

34. The Panel wishes to draw the attention of the Secretary-General to the fact that it fails to fully understand why this case was remanded to the JAB for examination on the merits. At the outset, it should be noted that the JAB is an *administrative machinery* - not a tribunal - established by the Secretary-General to *advise* him regarding appeals filed by staff members. As such, the JAB should not be considered as a first instance, the UNAT being the second instance.

35. Moreover, under staff rule 111.2(f) ... it falls within the discretionary powers of the JAB to grant a waiver of the time limits ... When the majority of the first panel constituted to examine this appeal found it to be time-barred, it acted in accordance with 111.2(f). ...

36. However, by remanding the case to the JAB in accordance with article 9 of its Statute, the Tribunal found that the procedure prescribed in staff rule 111.2(f) had not been observed by the JAB. In other words, the Tribunal's position would render staff rule 111.2(f) null and void.

37. Therefore, it is the view of this Panel that, should the Tribunal disagree with the panel's opinion that the appeal was time-barred, it was then within the Tribunal's responsibility, pursuant to its mandate, to examine the case on its merits, instead of remanding it to the JAB. By following this course, the Tribunal would have avoided further delay and expense."

On 9 March 2000, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General accepted the findings and conclusion of the Board and had decided to take no further action on his appeal.

On 2 October 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The termination of the Applicant's appointment was not based solely on his medical record, but was arbitrarily taken because the decision of the UNJSPF was merely a pretext to dismiss him.
2. At the moment the Staff Pension Committee took its decision, the Applicant was not incapacitated for further service.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's appointment pursuant to the medical determination that he was incapacitated for further service was properly taken and did not violate his rights.
2. The decision of the UNJSPC, based upon a recommendation by the Joint Medical Service (JMS), that the Applicant was medically unfit for further service, was a medical decision, free from extraneous considerations. As such, it could not properly be the subject of an application before the Tribunal.

The Tribunal, having deliberated from 2 to 26 July 2002, now pronounces the following Judgement:

- I. The Applicant, who held an indefinite appointment in UNHCR, was terminated. The 22 July 1992 notice of termination stated that the Applicant had been "incapacitated from service

due to health reasons for an extended period". He was given a termination indemnity and a disability benefit. He appealed to the JAB, which held that the Application was time-barred, and then to the Tribunal, which remanded the case back to the JAB for an examination on the merits. Following the second JAB review of the case, the Respondent repeated his decision to terminate the Applicant on the grounds of disability. The Applicant asks the Tribunal to cancel this 9 March 2000 decision, order the production of the JAB file and order his reinstatement, among other relief. The Tribunal decides that the Applicant has not satisfied his burden of proving that the Respondent failed to follow its rules or acted improperly.

II. In Judgement No. 868, *Bekele* (1998), the receivability of the Application was an issue. In June 1996 the JAB had found the appeal time-barred and made a "no recommendation" report, as a consequence of which the Respondent decided to take "no action" and, in effect, maintained its July 1992 decision. The 9 March 2000 decision is the subject of this Application, although it relates to the situation that existed in 1992.

The Tribunal, which did not examine the merits of the case in Judgement 868, found that there were "exceptional circumstances which should have induced the JAB to excuse the Applicant for his untimeliness in filing for administrative review". The rationale was that the Applicant might have been led by the Administration to file his initial application with the wrong entity. Judgement No. 868 has *res judicata* effect regarding the timeliness of this Application. Consequently, the Tribunal does not re-examine the issue.

In October 1999 the JAB, following the remand instructions, "deemed" the Application receivable and found no fault in the actions of the Respondent, as its Conclusion and Recommendation again made "no recommendation", based on which the Respondent took no further action. The Tribunal deems that the Conclusion and Recommendation of the JAB to offer "no recommendation" to the Respondent was a recommendation that the decision appealed from should be adopted and an opinion that the decision accorded with the applicable rules. Any other interpretation would mean that the JAB had abdicated its role as an adviser to the Respondent and had not played its intended role in the administration of justice for staff members.

III. Article 33 of the Regulations of the Fund states that a:

"disability benefit shall ... be payable to a participant who is found by the Board to be incapacitated for further service in a member organization reasonably compatible with his or her abilities, due to injury or illness constituting an impairment to health which is likely to be permanent or of long duration".

Under Administrative Rule H.1 (b) of the Fund, the incapacity must be found to exist or to have existed on the date of separation. This dispute concerns whether in July 1992 the Respondent properly determined that the Applicant was incapacitated for any further service.

The record makes it clear that the Applicant had health problems, a fact that he does not deny. The record clearly evidences his on-going illness and a years long attempt by the Respondent to maintain the Applicant in service in spite of the illness, absences and his poor work pattern. At one point he was terminated then reinstated. He was placed on sick and annual leave on several occasions and, finally, by September 1991 had exhausted all his sick leave and annual leave entitlements. An October 1991 report from the Applicant's personal physician certified that the Applicant was capable of working only half-time, a judgment with which the Director of the Joint Medical Service agreed. When the Applicant refused to be considered for a disability benefit and when there was no half-time post available (none existing in the General Service or Professional category at UNHCR), he was placed on special leave with half pay as of 25 September 1991. Thus for many months the Applicant was on the staff payroll but did not work, as mentioned in his notice of termination.

IV. Under these circumstances it was clear that the Staff Pension Committee justifiably concluded that the Applicant did not have the capacity for further service at UNHCR reasonably compatible with his ability to work, because the only service available was on a full time basis. It also had before it the conclusion of the Medical Director, based on his examination of the Applicant, that the latter had only a half-time capability. This conclusion was supported by reports from the Applicant's own physician and from another doctor in the Medical Service. Only one doctor, a private physician, offered the opinion that the Applicant could work full time. However, this 14 December 1992 opinion was offered after the termination, attested that the

Applicant would be 100% on a date - 21 December 1992 - after the termination and was a mere form that lacked any explanation.

V. A determination may be made under regulation 33 (a) without the consent of the participant. Consequently, if the Applicant objected to the termination for disability, that is a factor that could be taken into account but it was not a deciding factor.

VI. There were unfortunate comments by the JAB in its second report. The Tribunal notes the years of harmonious cooperation between that body and itself and expresses its hope that this positive relationship will continue. The Tribunal has noted in many cases its relationship to the JAB (see Judgement No. 1009, *Makil* (2001)). It also notes statements by the Administration in which it praises the fact-finding role of the JAB.

VII. For the foregoing reasons, and having considered the pleas, contentions and the record, the Tribunal rejects the Application in its entirety.

(Signatures)

Mayer GABAY  
President

Kevin HAUGH  
Vice-President

Marsha ECHOLS  
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG  
Executive Secretary