



ADMINISTRATIVE TRIBUNAL

Judgement No. 1096

Case No. 1170: MOUSSA

Against: The Commissioner-General  
of the United Nations  
Relief and Works Agency  
for Palestinian Refugees in  
the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Mr. Omer Yousif Bireedo;  
Ms. Brigitte Stern;

Whereas at the request of Cornelia Moussa, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended to 31 July 2000 the time limit for the filing of an application with the Tribunal;

Whereas, on 31 July 2000, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 21 December 2000, the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal:

"...

7. ... *[T]o find:*

(a) [T]hat on her voluntary separation from the Agency in January 1999, the Applicant was entitled to receive the incentive promised by the Agency (*termination indemnity*) because she fulfilled the Agency's conditions for this incentive, i.e. relocation to Gaza and serving there for at least one year.

8. ... [T]o order:

(a) [T]hat the Applicant be paid the incentive (*termination indemnity*), based on her years as an Area staff member."

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 31 July 2001 and periodically thereafter until 28 February 2002;

Whereas the Respondent filed his Answer on 21 February 2002;

Whereas the Applicant filed Written Observations on 31 July 2002 and, on 29 October 2002, the Respondent submitted comments thereon;

Whereas the facts in the case are as follows:

The Applicant joined UNRWA on a temporary indefinite appointment as an Area staff member in the capacity of Chief Clerk (Admin. Services), Grade 9, at UNRWA Headquarters, Vienna, effective 1 September 1978. On 28 October 1994, the Applicant was informed that she was declared provisionally redundant with effect from 1 November 1994, due to the relocation of UNRWA Headquarters from Vienna to Gaza. However, by letter of 10 October 1995, the Applicant was offered the International post of Deputy Chief, Recruitment and Staff Development Division, Vienna, at the P-4 level, as she was considered a key staff member whose services the Agency required on a continuing basis. She was advised that the appointment, which was conditional on her relocating to Gaza and serving there at least for one year, would be for a fixed term to expire on 30 June 1997, or one year after the relocation of the post to Gaza whichever was the later, and that, subject to certain conditions, the appointment would be extendable for further periods of three years. The letter also indicated that:

"As provided in paragraph 3 of Area Staff Circular 5/95, dated 6 April 1995, you will receive a termination indemnity calculated on the basis of your years of service as an Area staff member ... if and when you are terminated from the International post on

redundancy grounds or, in the event of voluntary separation at the end of a fixed-term appointment but not during it."

Finally, she was advised that by accepting the offer, she would no longer be regarded as provisionally redundant. On 16 October 1995, the Applicant signed the formal letter of appointment. She was transferred to UNRWA Headquarters, Gaza, on 13 July 1996.

On 18 March 1997, the Applicant's fixed-term contract was extended for three years from 1 July 1997 to 30 June 2000.

On 20 October 1998, the United Nations Population Fund (UNFPA) advised UNRWA that the Applicant had been selected for the post of Personnel Officer and requested that UNRWA agree to the Applicant's inter-agency transfer. UNRWA agreed to release the Applicant on an inter-agency transfer effective 31 December 1998.

On 23 December 1998, the Applicant, based upon her prior service as an Area staff member, requested payment of a termination indemnity, which she asserted was due to her upon separation from the Agency under the terms of her International staff contract. On 24 December, she was advised that, in accordance with the terms of her International staff appointment, she was not entitled to payment of a termination indemnity based upon her former Area staff appointment because she was neither being terminated on redundancy grounds nor being voluntarily separated from service at the end of a fixed-term appointment.

On 26 January 1999, the Applicant requested the Commissioner-General to review the Administration's decision and to authorise the payment to her of a termination indemnity. By letter dated 3 February, UNRWA confirmed that, under the circumstances of her separation, the Applicant was not entitled to payment of a termination indemnity for her period of service as an Area staff member.

On 1 March 1999, the Applicant lodged an appeal with the International Staff Joint Appeals Board (JAB). The JAB submitted its report on 2 December 1999. Its findings, conclusions and recommendation read, in part, as follows:

### ***"Findings***

19. The Board noted that it was necessary to differentiate between termination indemnity as defined in the Staff Regulations and Rules and the '*termination indemnity*' which was offered as a special *incentive* to a select number of former Area staff

members, who agreed to relocate to Gaza and serve there for at least one year. The rationale behind offering this incentive was that at the time these staff members were considered '*mission critical*' to the Agency's successful relocation of its Headquarters from Vienna to Gaza.

20. ... The special *incentive* or so-called '*termination indemnity*' does not find any basis in the Area or International Staff Rules and from a legal perspective must ... be governed by the relevant clauses of the ... letter of appointment ... in conjunction with paragraph 3 of Area Staff Circular 5/95.

...

23. What is relevant in this case is that the Administration has acted in such a way as to give the Appellant the impression that if she relocated to Gaza and served there for at least one year, in a satisfactory manner, she could count on receiving the special *incentive* ... Therefore, the Appellant had a *reasonable expectancy* that she would receive the special *incentive* ... On the other hand ... the Appellant could have opted for a course of action that may have enabled her to safeguard what she considered was her *entitlement* ... [as did] other staff members upon completion of their initial one year assignments ... [but] the Appellant apparently accepted a further three year extension without renegotiating ...

### ***Conclusions***

24. The Board concluded that, while the Appellant had a reasonable expectancy that she would receive the special incentive (...) ... she had also failed to take the appropriate action ... both prior to her relocation ... and following the completion of the initial one year assignment that may have secured and clarified her entitlement ... The Board also concluded that both parties share responsibility for the fact that their apparent intentions ... have not been satisfactorily reflected in their contractual arrangements. ... [T]he Board noted that the policy [of the Administrative Tribunal] in such cases appears to be an apportionment of responsibility among the parties, which takes into consideration issues of equity over and above contractual obligations.

### ***Recommendation***

25. The Board recommends that the Appellant receive compensation in the amount of fifty per cent of the '*termination indemnity*' calculated on the basis of the amount of termination indemnity the staff member would have received had she been made redundant as a result of the relocation of the Agency's Headquarters from Vienna to Gaza."

On 6 January 2000, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed her as follows:

"...

3. ... [T]he Board concludes that the Administration's actions led you to reasonably expect you would receive the indemnity. The Board, however, does not disclose the relevant actions of the Administration or provide any reason why such undisclosed actions could reasonably lead you to have such an expectation. ... I note that the Board makes no reference to, and appears not to have taken into account, the Administration's letter ... extending your appointment. This letter ... made no reference to extending the 'special incentive'. This indicates that the so-called 'special incentive' was no longer applicable and, if you accepted the three-year extension, you would thereafter be treated in the same way as other staff who did not have any such 'special incentive'.

Further, nowhere in its report does the Board indicate how the Administration acted so as to enable you to have any reasonable expectation which contradicted the clear terms of the agreed letter of appointment ... that *'you will receive a termination indemnity ... in the event of voluntary separation at the end of a fixed-term appointment but not during it.'* ...

... I do not agree that you could reasonably have expected you would receive a termination indemnity if, as occurred, you voluntarily separated from the Agency after the end of your initial one year assignment in Gaza and during a fixed-term appointment. Hence I have not accepted the Board's recommendation and have dismissed your appeal."

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

Whereas the Applicant's principal contentions are:

1. The Applicant relocated to Gaza and served satisfactorily for one year. Thus she met the condition to qualify for the special incentive (termination indemnity).

2. The Applicant had a reasonable expectancy that she would receive the special incentive on her separation from the Agency, as she did not only complete the required one year, but worked for a longer period in Gaza. Although she separated voluntarily in the course of her second fixed-term appointment, this did not invalidate whatever acquired entitlements she accrued at the end of her first fixed-term appointment.

3. The contract terms offered by the Agency prior to relocation were not subject to individual negotiation.

4. When accepting the International professional appointment in Gaza, the Applicant did not carry forward any longevity benefits accumulated under her Area staff contract: this is a further reason why the payment of termination indemnity is justified.

Whereas the Respondent's principal contentions are:

1. The Applicant did not separate from the Agency's service at the end of her fixed-term appointment. The absence of a separation from service means the Applicant had no entitlement to a termination indemnity at the end of her fixed-term appointment.

2. The Applicant and the Agency agreed that she would only be paid a termination indemnity if and when she was terminated from the International post on redundancy grounds or in the event of a voluntary separation at the end of a fixed-term appointment but not during it.

3. The termination indemnity was not an additional bonus, incentive or windfall, except in the sense that it was an incentive not to leave the Agency other than at the end of a contractual term. The fact that no such termination indemnity was paid can in no sense be considered unfair to the Applicant, as she was not at any relevant time without employment.

4. There is no evidence that the Applicant took any steps to renegotiate the agreement at the time her fixed-term appointment was due to expire to obtain a better deal.

5. The Applicant knew at the time of taking up the International staff appointment that she could not carry forward her "longevity benefits" from her previous Area staff appointment.

The Tribunal, having deliberated from 8 to 29 November 2002, now pronounces the following Judgement:

I. The Applicant appealed to the Tribunal against a decision of the Administration to not pay her termination indemnity upon her transfer from UNRWA to UNFPA. The Respondent maintains that, in accordance with the provisions of the contract she accepted and signed, the Applicant has no entitlement to a termination indemnity.

II. The Applicant claims that she is entitled to payment of termination indemnity because she had fulfilled her contractual obligation as termination indemnity was offered to her as an

incentive to transfer from Vienna to Gaza. The Applicant was one of a small number of Area staff whom the Agency referred to as "mission critical staff whose services the Agency was keen not to lose". Accordingly, they were offered as an incentive a termination indemnity if they accepted relocation to Gaza and served there for at least one year. In this context, the JAB noted that it was necessary to differentiate between termination indemnity as defined in the Staff Regulations and Rules and the "termination indemnity" in question, which was offered as a special incentive. The rationale behind this incentive was that these staff members were considered "mission critical" to the Agency's successful relocation of its Headquarters from Vienna to Gaza.

III. The Applicant claimed that she accepted relocation to Gaza and served the Agency for not one year but for two-and-a-half years. Furthermore, the Applicant added that the Agency had shown considerable flexibility in extending the fixed-term appointments of certain International staff, in order to enable them to receive the termination indemnity. In one of these cases, for example, the Applicant claims that a staff member was offered a new contract before his first contract expired, but was allowed to take a break in service between contracts which enabled him to receive termination indemnity.

The Respondent counters that it is impossible to ascertain from the records whether this staff member was indeed offered a new contract before the expiration of his first contract. He adds that, even if this was so, the staff member was formally separated from the Agency's service, received separation entitlement, and was re-employed one month later on a different post. The Tribunal notes that the fixed-term appointment of the staff member in question expired 30 June 1997 and that he assumed his new post on 3 August 1997. This, in the Tribunal's view, lends support to the Applicant's claim that the Agency was flexible in accommodating the personal circumstances of some staff members, but not of others.

IV. In the instant case, the Respondent contends, in unequivocal terms, that the Applicant had no entitlement to a termination indemnity because she was not terminated on redundancy grounds, nor did she separate from service at the end of a fixed-term appointment. Her contract clearly stipulates as follows:

"As provided in paragraph 3 of Area Staff Circular 5/95, dated 6 April 1995, you will receive a termination indemnity ... if and when you are terminated from the international post on redundancy grounds or, in the event of voluntary separation at the end of a fixed term appointment but not during it."

Moreover, the Applicant was specifically advised in advance of her transfer to UNFPA, that she would not receive a termination indemnity if she completed the transfer at that point in time, i.e., during her three-year contract.

V. In view of the foregoing, the Tribunal concurs with the conclusion of the JAB that, strictly speaking, the Administration's position seems to be correct. However, the established jurisprudence of the Tribunal reaffirms that, in spite of strict legal provisions, there may be situations where a staff member has a reasonable expectancy to receive compensation or an incentive. In such situations, the Tribunal apportions the responsibility among the parties, taking into consideration issues of equity over and above contractual obligations, as can be seen in the cases discussed below.

In Judgement No. 233, *Teixeira* (1978), the Tribunal ruled that:

"[I]n view of the length of the period during which the Applicant worked for ECLA and the Administration's rating of the quality of his work, as are contained on the dossier, the Tribunal considers that, although his contracts contained no provisions to that effect, the Applicant could count on receiving a termination indemnity from the Respondent".

Similarly, in Judgement No. 647, *Pereyra* (1994), the Tribunal stated that:

"[T]he Applicant was employed continuously and gave satisfactory service for more than six years. Her contracts were renewed 12 times and, even though she did not have a right to their renewal, the Tribunal finds that in the particular circumstances of this case, the Applicant had a reasonable expectation of renewal. This would justify the payment of some compensation."

VI. Adopting the above-referenced equitable approach, the Tribunal is convinced by the analysis of the JAB which stated:

"The Board noted that it was necessary to differentiate between termination indemnity as defined in the Staff Regulations and Rules and the '*termination indemnity*', which was



offered as a special *incentive* to a select number of former Area staff members, who agreed to relocate to Gaza and serve there for at least one year. ... From the documentation presented it is clear that there was a consensus between the Administration and the Applicant that, if she relocated to Gaza and served (satisfactorily) for one year, she would qualify for the special *incentive*."

In other words, notwithstanding the fact that if the Staff Regulations and Rules were strictly applied, the Applicant would not be legally entitled to a termination indemnity, the analysis herewith takes into account the special circumstances under which this incentive was offered to the staff members.

VII. This conclusion is reinforced by the Administration's treatment of certain staff members similarly relocated to Gaza, who managed to obtain the termination indemnity, through what can only be called manipulations of the Agency of the stated periods of their fixed-term contracts, precisely in order to enable those staff members to benefit from the termination indemnity. In other words, all circumstances have to be taken into account in order to ascertain whether the Applicant was discriminated against in the manner in which her "termination indemnity" was handled, when compared with the provisions made for other staff members.

More specifically, after her first one-year fixed-term contract expired, one staff member who was offered a new one-year fixed-term contract, said that she would prefer an extension of only eight months so she could leave before the summer, in order to look for another job. The Administration accepted this "tailoring" of her contract in order to enable the staff member to receive her termination indemnity after the eight-month period: this is clear from the handwritten remark on the offer for a one-year fixed-term contract, which states that the staff member in question "eventually wishes to return to UK and make a life there. She would like to leave in spring 1998 rather than summer 98, as the former is a better time for job hunting." The notation continues to say that the staff member could leave immediately so that she would not lose her "considerable termination indemnity". In order to keep the person as long as possible while still allowing her payment of the termination indemnity, the Administration agreed to offer her a fixed-term contract of only eight months. In yet another case where a second one-year fixed-term contract was offered to a staff member, the Administration agreed to an extension of two-and-a-half months which enabled the staff member to leave when it was convenient but still get the termination indemnity. The case referred to in paragraph III above is an even more salient

example of this favourable treatment. Taking all these other cases into consideration, the Tribunal, albeit conscious that these cases are not identical to that of the Applicant, considers that refusing the Applicant a termination indemnity goes against the spirit of the incentive and amounts to discrimination.

VIII. Finally, other considerations have to be taken into account to complete the picture of the Applicant's situation. The Applicant was considered one of the mission critical staff whose services the Agency was keen not to lose and, therefore, encouraged to relocate to Gaza by virtue of an incentive or termination indemnity after one year of service. The Tribunal notes the finding of the JAB that the Applicant was in a good position to negotiate the terms of her extension of contract in Gaza, following the completion of her initial one-year assignment, in order to secure her termination indemnity. The same course of action followed for the staff members referred to in paragraph VII above, could have been followed in the Applicant's case, but she did not insist on such an arrangement.

Considering, therefore, that the Applicant did not safeguard her own interests, i.e., what she considered to be her right to a termination indemnity, as did the other staff members, the Tribunal concurs with the JAB that she also bears some responsibility in this matter for not clearly raising the issue of her termination indemnity at the end of her first one-year contract. Had she left her post at that point, even to return after a break in service (vacation), like the staff member referred to in paragraph III above, she would have been legally entitled to receive the termination indemnity.

IX. For these reasons, the Tribunal agrees with the unanimous conclusion of the JAB and resolves that the Applicant should receive compensation equivalent to thirty per cent of the termination indemnity to which she would have been entitled.

X. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant compensation equivalent to thirty per cent of the termination indemnity she would have received had she been made provisionally redundant or had she voluntarily separated from service at the expiration of her contract; and,
2. Rejects all other pleas.

(Signatures)

Omer Yousif BIREEDO  
Member

Brigitte STERN  
Member

New York, 29 November 2002

Maritza STRUYVENBERG  
Executive Secretary

DISSENTING OPINION — MR. JULIO BARBOZA

I. I disagree, regretfully but firmly, with the majority opinion. It is my view that the present case could be viewed from two different angles, one regarding the contractual relationship between the Applicant and the Administration, the other one regarding a possible discrimination against the Applicant, taking into account the different deal that two other staff members obtained from the Organization in relation to the termination indemnity.

II. I shall refer to each one of those two approaches. As far as the contractual relationship between the Applicant and the Administration, there is no doubt in my mind that the Applicant did not comply with her part of the contract, clearly establishing two conditions in order for the Applicant to be granted termination indemnity; namely that she stayed in Gaza for at least one year and in case the contract was extended, that she did not leave her post until the very end of the period of extension. Both conditions are equally important, since the Administration wanted

staff members disposed to go to Gaza and to remain there for as long as possible, given the scarcity of staff members willing to go and stay in Gaza. The minimum of one year applied to the first contract, the required permanence until the end of the extension applied to cases where the first contract was extended. That was precisely the case of the Applicant, who had signed an extension for three more years of her original contract. I fear that the majority opinion may open the floodgates to the possibility of not fulfilling contractual obligations and obtaining, notwithstanding that, some form of compensation. I also fear that as the cases the majority opinion quotes are rather exceptional ones, judgements contradicting the instant case may be rendered in future cases presenting essentially similar facts.

III. As to the other aspect of the case, that of the different treatment granted to two other staff members, I consider that the circumstances surrounding the Applicant's case and those prevailing to the other two staff members were dissimilar and therefore justified completely different treatment. The other two staff members had finished their contracts and had no obligation to prolong their stay. They collected their termination indemnity and after that they obtained prolongations of their contracts. Perhaps that attitude of the Administration could be understood against the background of the above-referenced problem in obtaining and keeping staff members in Gaza, but the point is that the Administration was in a position to accept their proposals for new extensions.

IV. The situation of the Applicant was entirely different, however: when the moment came for her to choose, she chose to stay in Gaza for three more years. Then, having received the offer of a more attractive post than the one she was encumbering, and in the middle of the period of her extension, she decided to leave. She was warned that if she left Gaza she would lose the termination indemnity, which was conceived as an incentive for staff members to finish their contracts. She preferred to leave.

V. There was no other possibility for the Administration to treat the Applicant in a better or more kind-hearted manner than it did, because she had not fulfilled her contract. The other two had complied with their contracts and there lies the essential difference between their situation and that of the Applicant.

VI. Personally, I cannot possibly subscribe to a decision that gives compensation to a staff member who not only failed to comply with the conditions necessary to obtain such compensation but, according to what seemed to be the prevailing conditions in Gaza, left the Agency without any regard for the difficulties it confronted in obtaining and keeping personnel. The fact that she is not awarded the full termination indemnity, but only a part of it, does not change the error in which, in my opinion, the Judgement incurs. I fail to see the damage the Applicant suffered by the Administration's action requiring full or partial compensation and I fail to see any discrimination against the Applicant.

(Signatures)

Julio BARBOZA  
Vice-President, presiding

New York, 29 November 2002

Maritza STRUYVENBERG  
Executive Secretary