



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1195

Case No. 1290: NEWTON

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Spyridon Flogaitis; Mr. Dayendra Sena Wijewardane;

Whereas, on 3 January 2003, Murray Newton, a former staff member of the United Nations Environment Programme (hereinafter referred to as UNEP), filed an Application containing a plea which reads as follows:

“Section III: PLEAS

[The] Applicant requests the Tribunal to execute the recommendation of the Joint Appeals Board [(JAB)] ... Specifically, [the] Applicant asks the Tribunal to order payment ... of [US\$] 2,000, pursuant to the [JAB’s] recommendation ...”

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 11 August 2003 and thereafter until 20 October 2003;

Whereas the Respondent filed his Answer on 14 October 2003.

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 6 May 1999, under the 200 Series of the Staff Rules, on a two-year fixed-term contract at the L-4 level as a Scientific Adviser, Chemicals Unit, UNEP, Geneva. His appointment was renewed from 6 to 23 May 2001, on which date he separated from service.

The Applicant's offer of appointment, prepared by the United Nations Office at Nairobi (UNON) on 2 March 1999, specified that he would be entitled to "non-removal element of US\$ 2,948.50 per annum". The offer lists his salary at the L-4, step XII, as US\$ 90,197. The Applicant signed the offer on 12 April. On 13 July, the Administrative Officer, Chemicals Division, e-mailed the Applicant confirming that "once ... on the payroll [his] salary [would] be adjusted to receive the non-removal allowance every month (US\$ 2,948.50 per annum) divided by 12".

In his letter of appointment, however, which was prepared by the United Nations Conference on Trade and Development (UNCTAD) on 2 August 1999, and which the Applicant signed on 23 August, his salary is listed as US\$ 92,756 and, under the heading "Allowances", the letter states "[t]he salary shown above does not include any allowances to which you may be entitled". There is no elaboration as to the allowances.

In October 1999, the Applicant notified the Administration that he had not received his non-removal element. Thereafter, correspondence between Geneva and Nairobi reflects that an error had been made in the Applicant's initial offer of appointment, as the wrong rate had been applied to the non-removal element. Accordingly, on 26 January 2000, a Personnel Action form was issued indicating that the Applicant should receive "Non-removal element of mobility and hardship allowance" of US\$ 1,812.99 per annum. The Applicant began receiving the allowance, with retroactive effect, in March 2000.

On 2 April 2000, the Applicant requested reconsideration of the decision not to "abide by an express written condition of [his] employment contract" with regard to the amount payable for non-removal element and, on 6 April, UNCTAD replied as follows:

"... [T]he rate for non-removal element is established as per the 'classification of duty stations according to conditions of life and work' ...

... [T]he figure to be paid for staff member, with your grade, at dependency rate, and based in Geneva, is US\$ 1813 per annum. Naturally, the Payroll Unit paid the proper amount and not the amount indicated in your letter of offer".

On 7 April 2000, the Applicant requested the Secretary-General to review the administrative decision not "to honour a written commitment of UNON's on which [he] relied in choosing to accept [his] current position with UNEP in Geneva, a written commitment on which [he] based several irrevocable financial and personal decisions".

On 7 July 2000, the Applicant lodged an appeal with the JAB in Geneva. The JAB adopted its report on 2 September 2002. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

29. ... [T]he Panel agreed that the Appellant’s contract appears to be more of a consultancy nature. It therefore provided that the contractual aspect of the Appellant’s terms of employment prevailed over the statutory aspect, namely the submission to the United Nations Staff Rules.

30. While recognizing the value of the commitment created by the contract for both parties, the Panel however rejected the Appellant’s contention according to which he allegedly based ‘irrevocable financial and personal decisions’ on this commitment. The Panel found that the difference in the amount of money was not enough to account for ‘irrevocable’ financial decisions.

31. The Panel also emphasized that the reference to the general principle of ‘unlawful enrichment’, as brought to the fore by the Respondent, was unfounded, since the non-removal element had never been paid nor received by the Appellant. Furthermore, had the excessive amount of money been paid to the Appellant, it would have happened with [no] fraudulent intention [but] on the basis of the contractual commitment.

32. ... [T]he Panel noted that UNON Administration made a mistake by allocating the wrong classification to the Appellant’s duty station, which resulted in the allocation of the wrong amount of money. It therefore admitted that it is the Administration’s duty to correct an administrative oversight.

33. The Panel however noted that the handling of the matter by the Administration of UNCTAD was, to say the least, questionable. ...

...

Conclusions and Recommendations

37. In view of the foregoing, the Panel **concludes** that the Appellant is entitled to a financial compensation equivalent to the damage he suffered because of the inadmissible handling of his case by UNCTAD Administration.

38. Hence, the Panel **recommends** that the Appellant be granted the amount of US\$ 2000 corresponding to the damage suffered.

39. The Panel wishes to specify however that the financial compensation is in no way to be assimilated to the difference between the amount mentioned in the letter of appointment and the amount paid to the Appellant: it was UNCTAD Administration’s duty to correct the administrative oversight and therefore not to persist in its error. Indeed, the Panel wishes to show its attachment to the notion of equality of treatment for staff members with the same status ... Notwithstanding this assertion, the Panel wants to underline that the statutory or contractual aspect of each staff member’s terms of employment has to be assessed in the management of his/her career within the United Nations.”

On 3 January 2003, the Applicant, having not received any decision from the Secretary-General regarding his appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 9 January 2003, 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 Board that the Administration was duty-bound to correct the error about the allowance and that the difference between the erroneous amount and the correct one that was paid to you was not enough to account for any ‘irrevocable’ financial decisions on your part. However, the Secretary-General is not able to agree with the Board that your appointment was more of a consultancy nature. He observes that your letter of appointment incorporated by reference the Staff Regulations and Rules and, accordingly, you could not be paid amounts to which you, as a staff member, were not entitled to under the Staff Regulations and Rules. Furthermore, although the correction of the error, as well as your being notified of the correction, could perhaps be done in a more timely manner, the Secretary-General notes that there was no bad faith or other extraneous factors involved in the handling of your case. Consequently, he considers that no compensation for damages is warranted in this case. The Secretary-General has therefore decided not to accept the Board’s recommendation for compensation and to take no further action on your appeal.”

Whereas the Applicant’s principal contentions are:

1. The Organization offered, and the Applicant accepted, a contract that specified a precise amount of non-removal element. The Organization should not be permitted to unilaterally alter the terms of the contract.
2. The Applicant relied on the contract in good faith.
3. The behaviour of the Organization fails any reasonable test of fairness.

Whereas the Respondent’s principal contentions are:

1. The Applicant was not entitled, under the Staff Regulations and Rules, to the payment of the incorrect and higher amount of the non-removal element of the mobility and hardship allowance.
2. There was no bad faith, improper motive or other extraneous factors involved in the handling of the Applicant’s case.

The Tribunal, having deliberated from 26 June to 23 July 2004, now pronounces the following Judgement:

- I. The Applicant was working for the United States Environmental Protection Agency when, on 2 March 1999, he was offered a fixed-term contract of two years as a Scientific Advisor in the Chemicals Unit of UNEP in Geneva. That contract was subsequently renewed from 6 to 23 May 2001, the date of his separation from service. After the expiration of his final contract, the Applicant returned to the employ of the United States government.
- II. The Applicant’s offer of appointment indicated that he would receive salary of US\$ 90,197 plus non-removal element of US\$ 2,948.50 per annum. The Applicant signed the offer, accepted the position and subsequently signed a letter of appointment, or contract, with

the Organization. In that contract, it was indicated that his salary would be US\$ 92,756 plus unspecified “allowances to which [he was] entitled”.

After entering the service of UNEP, the Applicant started receiving his monthly salary, which should have included the monthly installments of his non-removal element. In a Personnel Action form issued on 26 January 2000, the Administration informed him that his true non-removal element was US\$ 1,812.99 per annum. In fact, no monthly payments of this allowance had been paid to the Applicant at that time as, even after he notified them that he had not been paid the amount, the Administration needed time to resolve the oversight and mistake made in the initial offer.

Thereafter, the Applicant contested the administrative decision to pay the lower amount and the JAB decided that damages should be paid to him. The Secretary-General disagreed with the JAB and the case was brought to the attention of the Tribunal.

III. At this point, the Tribunal recalls Judgement No. 1089, *Roman* (2002), in which it stated as follows:

“The Tribunal wishes to note that, normally, cases of such low financial interest should not be worth litigating, following the principle *de minimis non curat praetor*. However, as this principle is supported neither by the Statute of the Tribunal nor by the intentions of the Applicant, the Tribunal is bound to decide upon this case.”

The Tribunal will proceed to consider the merits of the instant case, but considers that the statement above is equally applicable thereto.

IV. The Tribunal notes that employment within the United Nations is regulated by a series of regulations and rules, which have been drafted and are the result of long lasting policies; agreements with staff representatives; experience; and, the desire to create a well-functioning working environment. Unless it is shown that the Administration had the authority to, and indeed did, deviate from the Staff Regulations and Rules to the benefit of the employee, exceptions of this kind are presumed to have been due to a mistake.

In the circumstances of this case, the Administration made an offer on the basis of a certain amount of annual salary and a certain amount of non-removal allowance. In so doing, the Administration erred as to the duty station on the basis of which the non-removal element should have been calculated. In the final letter of appointment, which is the contract itself, it adjusted both salary and the non-removal element as it increased the salary and did not specify the exact amount of the non-removal element, which is, in any event, specified by administrative issuances according to duty station. From the whole series of documents, including the initial offer and the subsequent contract, the Tribunal finds no evidence that the

Administration wanted to, or could, deviate from the Staff Regulations and Rules. Further, the Tribunal finds from the file that the Organization had neither the intention nor the ability to offer the Applicant the non-removal element applicable to a duty station other than his.

V. The Tribunal must now turn its attention to the Applicant's implication that, had he known the true amount of his non-removal element, he would not have accepted the position. It concludes that this claim is not founded: firstly, because as his salary was higher than initially offered, when all his emoluments are calculated together it can be seen that he suffered no financial loss; and, secondly, and more importantly, because the Applicant did not produce any evidence to substantiate his claim that he suffered an injury due to the mistake of the Administration. Nor did he provide proof of any other job opportunity that he missed because of this contract. In fact, the Tribunal notes that he left a position with the US Environmental Protection Agency to come to the United Nations and returned to the same Agency at the expiration of his contract.

VI. In view of the foregoing, the Tribunal decides that, in accordance with the Secretary-General's decision, no compensation for damages is warranted in this case. Accordingly, the Application is rejected in its entirety.

(Signatures)

Julio Barboza
President

Spyridon Flogaitis
Member

Dayendra Sena Wijewardane
Member

Geneva, 23 July 2004

Maritza Struyvenberg
Executive Secretary