United Nations AT/DEC/1214

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1214

Case No. 1303: SAM-THAMBIAH Against: The Secretary-General of the International Seabed Authority

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Kevin Haugh, Vice-President; Ms. Jacqueline R. Scott;

Whereas, on 4 July 2003, Nithi Sam-Thambiah, a former staff member of the International Seabed Authority (hereinafter referred to as ISA or "the Authority"), filed an Application containing pleas which read as follows:

"**II PLEAS**

(a) the Applicant … requests the Authority to provide the following documents:

…

(b) Decision contested: the Conciliation Committee's findings … that the Secretary-General's decision … to terminate the Applicant's service on grounds of unsatisfactory service was substantiated. The Applicant therefore respectfully requests the rescission of the Secretary-General's decision …

REMEDY SOUGHT

- The Applicant … requests his reinstatement on full salary and allowances for the remainder of the period of his two-year fixed-term appointment …
- The Applicant requests payment of the Mobility and Hardship Allowance [(MHA)] on the basis of his four previous duty stations;

- [The Applicant] requests payment in lieu of shipping allowance …
- The Applicant also requests financial compensation for the personal and professional prejudice caused by his unjust termination, the humility and affront to his human dignity and moral damages, in an amount of [US$ 25,000] and reimbursement of his legal expenses."

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 2003 and once thereafter until 31 December 2003;

Whereas the Respondent filed his Answer on 18 December 2003;

Whereas, on 18 June 2004, the Applicant filed Written Observations, amending his pleas as follows:

"97. … [R]equests the Tribunal:

- to order for a hearing in person of the Parties;

…

- to find that the Respondent's decision of 19 July 2002 to terminate [his services is] null and void being:

  i. Unfounded in fact. …

  ii. Motivated by a desire to avoid addressing serious allegations raising questions … of management …

  iii. The procedure followed in determining the Applicant's unsatisfactory performance was flawed.

  iv. The Conciliation Committee was established in a manner that was irregular …"

Whereas, on 18 November 2004, the Tribunal decided not to hold oral proceedings in the case;

Whereas the statement of facts, including the employment record, contained in the Report and the Executive Summary of the Conciliation Committee reads, in part, as follows:

"[The Applicant] was given a fixed-term appointment with ISA for two years in Kingston, Jamaica, as Chief, Administration and Management, at the P-5, step I level, effective 4 December 2001. Upon [the Applicant's] entry on duty, [the] Deputy to the Secretary-General (DSG), gave him a full briefing on the nature of his work and the expectations of the Authority as the employer. The [Applicant's] letter of appointment clearly state[d] that the offer of

appointment [was] on the basis, inter alia, of his certification of the accuracy of information provided by him in the Personal History form and that the appointment was to the position of Chief, Administration and Management, at the P-5, step I level. It also provided that the fixed-term appointment [might] be terminated prior to its expiration date in accordance with the relevant provisions of the Staff Regulations and Staff Rules, in which case the Secretary-General [would] give 30 days written notice or one month salary and allowances in lieu thereof. …

[On 10 December 2001, after ascertaining from the records that Kingston was the Applicant's fifth duty station, it was decided that the Applicant should be paid MHA as a lump sum. Subsequently, the Applicant was advised that, as one of his duty stations, Washington, was not part of the United Nations system, he was only entitled to MHA on the basis of four duty stations.]

[In March 2002, the Applicant was paid US$ 12,000 in lieu of shipping entitlements.]

[On 17 June 2002, the Applicant wrote a letter to the Secretary-General, requesting a meeting to discuss a number of "sensitive" issues. According to the Respondent, this letter was never received by the Secretary-General.]

The Secretary-General, by a letter dated 19 July 2002, informed [the Applicant] that, in accordance with the terms of the letter of appointment and the relevant provisions of the Authority's Staff Regulations and Staff Rules, he had decided to terminate his appointment with effect from 31 July 2002, on the grounds of unsatisfactory performance. The letter cited examples of specific instances of unsatisfactory service:

> '(i) Wrongful payment of non-accountable shipping allowances to several staff members, including [himself], in clear breach of the Staff Rules.
>
> (ii) Advance and overpayment of mobility and hardship allowance to [himself] when [he] should know that [his] previous service under appointments of limited duration [did] not entitle [him] to such allowance.
>
> (iii) [The Applicant's] failure to contribute in a meaningful way to the preparation of the budget of the Authority.
>
> (iv) [The Applicant's] failure to arrange for the audit of the Authority's accounts in a timely manner.
>
> (v) [The Applicant's] poor personnel management skills.
>
> (vi) [The Applicant's] general lack of competence in performing [his] duties to the standard expected of a staff member at the P-5 level.'

[According to the Secretary-General, his referees who might have some knowledge of his work either gave unhelpful appraisal of his performance or stated that they were unable to give references for him. Thus, it was apparent to the Secretary-General that the Applicant did not possess the necessary competence and abilities to perform the functions of a post at the P-5 level.]

By a letter dated 14 August 2002 … [the Applicant] sought a review of the Secretary-General's decision in accordance with the provisions of rule 111.2 (a) of the Staff Rules. He alleged that there was breach of due process and

> further alleged that the letter of termination of appointment was a reaction to his efforts to alert the Secretary-General of mismanagement and irregularities in the Authority. He also made a series of allegations against the Secretary-General and other senior staff.
>
> In a letter dated 9 September 2002, the [DSG] … responded on behalf of the Secretary-General to [the Applicant's] letter of 14 August 2002. It was conveyed to [the Applicant] that the Secretary-General, after having reviewed the matter, could find no substantive reason to alter his decision to terminate [his] contract. The Secretary-General further responded that [the Applicant's] letter was full of misrepresentations, distortions and fabrications. It was also stated that no trace could be found of [the] letter, which [the Applicant] claimed he had sent to the Secretary-General on 17 June 2002, and that it could therefore only be another fabrication. Reference was also made to additional matters, which came to light subsequently and reflected negatively on [the Applicant's] conduct inside and outside the Authority and his inability to handle the responsibilities and position of Chief of Administration and Management and of an officer at the P-5 level. These matters were allegations of dealings with junior female staff, which bordered on sexual harassment, and allegations of downloading pornographic material from the Internet during office time and with office equipment. It also referred to some unsavoury remarks [the Applicant] was alleged to have made to some persons who provide goods and services to the Authority and its staff including medical and dental practitioners.
>
> [On] 9 October 2002, [the Applicant] submitted his complaint to the Conciliation Committee."

The Conciliation Committee presented its report on 28 April 2003. Its proposals, conclusions and recommendations read, in part, as follows:

> "The Committee presented to the Respondent the parameters it considered appropriate and possible for seeking a conciliated agreement between the parties …
>
> …
>
> 43. The Respondent indicated to the Committee that it was not opposed to conciliation and that it would be prepared to consider the approach proposed by the Committee, as part of a conciliated settlement. …
>
> …
>
> 45. The same proposal as presented to the Respondent … was communicated to the Complainant by the Chairman of the Committee by *letter dated 10 January 2003* …
>
> …
>
> 47. At the meeting with the Committee, the Complainant informed the Committee of his unwillingness to accept the proposals of the Committee to achieve a conciliated settlement. In the event of failure to conciliate between the parties, the Committee is required to draw up a report summarizing the procedure followed, the arguments of the parties and the recommendations of

the Committee. Accordingly, this report has been drawn up and deals with matters in contention, comprehensively and extensively.

…

SECTION VIII *CONCLUSIONS*

91. In considering this matter and in arriving at its conclusions the Committee was mindful of the provisions of article 167 of the [United Nations] Convention on the Law of the Sea …

92. The Committee after examining all the facts in this matter was satisfied that there was ample material on record to support the conclusion that the termination of the Complainant's service with the Authority on grounds of unsatisfactory service has been fully substantiated as elaborated in this report. It can only be concluded that the Complainant withheld material information regarding his lack of qualifications for the post of Chief of Administration and Management at the high level of P-5. The Authority was thereby mislead into giving him an appointment, at a level at which he was not capable of performing. Immediately upon entering on duty the facts disclose that he knowingly misapplied the experimental practice of another organization to his own financial benefit in breach of the Authority's Staff Regulations and Rules and the conditions of his letter of appointment. His declarations in his Personal History form regarding the employment status of his wife were certainly seen to be false to his knowledge. His claim and the receipt of payment for Hardship and Mobility Allowance based on misleading information about his previous duty stations could only be concluded to be for improper personal gain. Cumulatively, these acts would be considered to constitute serious impropriety, particularly in the case of a staff member who takes on the responsibility of Chief of Administration and Management, charged with implementing faithfully the Staff Regulations and Rules of an organization.

93. The Complainant, rather than defend his own incompetence and acts of impropriety, attempted to allege or insinuate impropriety and mismanagement on the part of the Secretary-General and other senior staff of the Authority. The Committee examined many of these allegations and found them to be unsubstantiated and misrepresentations of fact. Nevertheless, in order to achieve a conciliated resolution of the complaint, the Committee made a proposal … which was accepted by the Secretary-General but rejected by the Complainant."

On 4 July 2003, 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 for unsatisfactory service was in breach of ISA's own Staff Regulations and Rules.

2. The charges of unsatisfactory performance are ill-founded.

3. New charges in the letter of 19 September 2002 are irrelevant to the termination decision, and also ill-founded.

4. The composition of the Conciliation Committee was illegal: the Rules of ISA do not conform to the ISA Staff Regulations.

5. During the conciliation process, new charges were brought forward in the Respondent's Reply of 11 November 2002: there were also errors in the report and the recommendations of the Conciliation Committee.

6. In general, the Conciliation Committee acted more as an accusatory body than as a conciliation body.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's contract fell within the discretion of the Respondent. As this was not a disciplinary measure, there was no obligation to hold disciplinary proceedings.

2. The Applicant was afforded due process and the decision was not tainted by improper motivation.

3. There is ample evidence of the unsatisfactory service of the Applicant and the allegations made in this regard are well-founded. The decision of the Respondent cannot be vitiated as having been unreasonable or based on erroneous findings of fact.

4. In causing payment of a shipping allowance to be made to himself and to others, the Applicant was applying a procedure that had been adopted as a pilot programme by UNDP applicable to certain staff holding UNDP letters of appointment. There was no basis for applying the same procedure to the staff of the Authority.

5. The Applicant was never entitled to MHA on the basis of four previous duty stations.

6. The Respondent rejects the Applicant's assertions that the Conciliation Committee was illegally constituted and biased in that it did not include staff participation and was established without prior consultation with the ISA Staff Committee. The Respondent also rejects the allegations of bias and improper motivation on the part of the members of the Conciliation Committee.

The Tribunal, having deliberated from 5 to 24 November 2004, now pronounces the following Judgement:

I. The Applicant asks the Tribunal to order the Respondent to produce a number of documents. The Tribunal, however, considers that it has sufficient documentation to

adjudicate the issues raised by this Application and, accordingly, it declines to issue such order.

II. Before entering into what constitutes the subject of the present appeal, the Tribunal believes it must engage in some considerations regarding the administrative procedures available in the ISA before a case reaches the Tribunal. The Staff Regulations and Rules of the ISA have established, for disciplinary matters, a procedure which seems adequate to the finding of facts and which would normally permit the Tribunal to consider cases coming from that jurisdiction. However, the same Regulations and Rules make no provision for fact-finding in cases that involve non-disciplinary matters. In contrast with most organizations within the family of the United Nations, there is no advisory body like the Joint Appeals Board (JAB) which could find the facts of the case in a quasi-judicial manner, and advise the administrative authority before it makes its final decision. There is, in its place, a "Conciliation Committee", the mission of which does not seem to be one of finding facts, so much so that its President himself said, at a certain moment in the consideration of the Applicant's plight, that the Conciliation Committee was not an "investigative body". Even a perfunctory look at ISA staff rules 111.1 and 2, regarding the establishment of, and the proceedings before, the Conciliation Committee, shows that this body is not made to ascertain facts. There is no reference made to any powers to call witnesses or to pose questions to the parties or to request documents or evidence from other organizations or offices or the like. Its only function seems to be, according to the cited Rules, that of looking for a common ground of agreement between the positions of the parties. Unlike a conciliation body as is known in international law, for example, where fact-finding and solution proposals go hand in hand, the Conciliation Committee of the ISA as set out in the above-mentioned provisions, seems to be a mediator, as understood by international law. Such mediation function is, by its very nature, much less concerned with a solution on the merits, or with either an adverse or investigative process, than with a quick and smooth resolution of a conflict. That is why mediators do not generally attempt to ascertain the facts of a case or legal background thereto, but rather focus on the possibility of simply harmonizing interests and look for a way to solve the conflict.

III. The Tribunal has not been designed for fact-finding and is not properly equipped to fulfil that function, which has to be exercised by joint advisory bodies, such as the JAB and the Joint Disciplinary Committee (JDC). So, unless a joint

advisory body along the lines of the JAB is also established by the ISA for non-disciplinary cases, it may very well be that the Tribunal may not be able in the future to accept a case where facts are not established by such a joint body. Alternatively, the parties may wish to provide to the Tribunal a signed Statement of Agreed Facts. As the Tribunal said in *Makil* (Judgment No. 1009 (2001)):

> "The Statute of the Tribunal does not envisage that findings of fact upon which a decision of the Tribunal is reached would ordinarily or usually be made following the Tribunal's own investigations or upon facts found by the Tribunal itself. This is so because matters coming before the Tribunal arrive almost invariably after a preliminary investigation by a JDC or a JAB or like body which carries out investigations and makes findings of facts and then reports thereon. The exception to this general rule arises when the parties have no dispute as to the facts and the matter can be referred to the Tribunal in the first instance on the basis of 'Agreed Facts', in accordance with article 7 of the Statute. Where an application is submitted on the basis of such agreed facts and it transpires that sufficient facts have not been agreed as would enable the Tribunal to embark on a hearing and the making of a decision, the Tribunal will ordinarily refer such a case back to the parties to see if they can agree on sufficient facts or, in default, refer the matter to a JAB for a further investigation or fact finding, as was done for example in Judgement No. 902, *MacNaughton-Jones et al.* (1998).
>
> Accordingly, the Tribunal will ordinarily operate on facts as found by the JDC or JAB or other primary fact finding body, unless the Tribunal expresses reasons for not doing so, such as identifying a failure or insufficiency of evidence to justify the finding of fact allegedly made or where it identifies prejudice or perversity on the part of the said fact finding body or finds that it has been influenced in making that finding of fact by some extraneous or irrelevant matter. Unless such reasons are identified by the Tribunal, then facts as found by the JDC or the JAB will stand for the purposes of the Tribunal's deliberations. The Tribunal stresses that the above principles are applicable to findings of primary facts and have no bearing on the question of interpretation of documents or the drawing of inferences from primary facts. Such inferences may often be described as findings of secondary facts rather than findings of primary facts. This is because the Tribunal is in no way disadvantaged when compared to a preliminary fact finding body, be it a JDC, JAB or other such body in matters of that nature, whereas such body is usually best suited to making findings of primary facts, as it has seen and heard the witnesses. The Tribunal also emphasizes that it of course enjoys the power conferred by the Statute to embark on fact finding in appropriate cases. For instance, it enjoys the power to have oral hearings, albeit it exercises this power infrequently."

IV. The Tribunal is satisfied that the Conciliation Committee has gone a long way, notwithstanding the limitations imposed upon it by the rules governing its functioning, in establishing certain relevant facts that the Tribunal considers decisive. Having said that, the Tribunal wishes to state, in the present case, that there are facts which are

easily ascertainable by examining the information contained in the dossier, and that those easily ascertainable facts are sufficient to enable the Tribunal to pronounce a judgement on the substance.

V. The main issue in this case is whether or not the termination of the Applicant's appointment prior to the expiration of his contract was lawful, i.e., in accordance with his terms of employment, including the Regulations and Rules of the ISA. Regulation 9.1 specifies the reasons for separating a staff member with a fixed-term contract in its subparagraphs (a) to (d). The Secretary-General may, accordingly, terminate the appointment of a staff member holding a permanent appointment and a staff member with a fixed-term contract prior to the expiration date as follows (mention is made only of those *prima facie* applicable to the present case):

> "(a)(i) If the services of the individual concerned prove unsatisfactory;
>
> …
>
> (a)(v) For such other reason as may be specified in the letter of appointment;
>
> …
>
> (b)(i) If the conduct of the staff member indicates that the staff member does not meet the highest standards of integrity required by article 167, paragraph 2, of the Convention;
>
> (b)(ii) If facts anterior to the appointment of the staff member and relevant to his suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Convention and these Regulations, have precluded his or her appointment.
>
> …
>
> (d) The Secretary-General may terminate the appointment of a staff member with a fixed-term contract prior to the expiration date for any of the reasons specified in subparagraphs (a) [and] (b) …, or for such other reason as may be specified in the letter of appointment."

VI. The Tribunal considers that it is important to dwell somewhat on the way the Respondent communicated to the Applicant his decision to terminate the Applicant's contract. In his letter of 19 July 2002, the Respondent mentions "the terms of your letter of appointment" and the "relevant provisions of the Authority's Staff Regulations and Rules" as the norms applicable to this particular case. In fact, then, the Respondent is invoking subparagraphs (i) and (v) of Regulation 9.1 (a), the last one being identical to the last words of subparagraph (d) of the same Regulation 9.1. The

letter announces to the Applicant that termination will take effect as of 31 July 2002, and that there will be a payment of one month salary in lieu of notice.

Although the main reason mentioned in the letter was that of "unsatisfactory services", the Tribunal notes that both grounds ("unsatisfactory service" and the "other reasons that may be specified in the letter of appointment") have been invoked by the Respondent, not only because of the mention the letter makes of the Applicant's terms of employment, but mainly because when the Respondent gave examples of actions and omissions constituting "unsatisfactory service", he mentioned:

> "[(i)]wrongful payment of non-accountable shipping allowances to several staff members, including yourself, in clear breach of the Staff Rules; [(ii)] advance and over-payment of mobility and hardship allowance to yourself when you should know that your previous service at the P-3 level under appointments of limited duration does not entitle you to such allowance; [(iii)] your failure to contribute in a meaningful way to the preparation of the budget of the Authority; [(iv)] your failure to arrange for the audit of the Authority's accounts in a timely manner[; (v)] your poor management skills[; and, (vi)] your general lack of competence in performing your duties to the standard expected of a staff member at the P-5 level."

Some of these reasons were due more to the lack of personal integrity of the Applicant than with the services he gave the Authority, like (i) and (ii). It is precisely because these traits of the Applicant's character were mentioned in the letter of 19 July, that other actions of the Applicant confirming that lack of integrity, like his failure to mention that his wife was employed by the Organization and that, therefore, he was not entitled to dependency allowance, may be taken into consideration by the Tribunal notwithstanding having been brought to attention only after the Secretary-General's decision to terminate his appointment was communicated to the Applicant.

Likewise, the other reasons for termination under Regulation 9.1 are applicable, namely, "conduct not meeting the highest standards of integrity required by article 167, paragraph 2 of the Convention", and:

> "If facts anterior to the appointment of the staff member and relevant to his suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Convention and these Regulations, have precluded his or her appointment."

Both clearly emerge from the omissions from, and ambiguities in, the Applicant's Personal History form, among them his careful concealment of the fact that none of the posts he had held before his appointment to the Authority ever exceeded the P-3 level.

Jura novit curia, as the Latin saying goes, and it is therefore up to the Tribunal to call things by their legal name. Besides, then, unsatisfactory services, the Tribunal finds that such reasons as identified under staff regulation 9.1 (b) (i) and (ii) are more than sufficient to justify the termination of the Applicant's contract. It is not necessary to enter into whether or not his managerial skills were really satisfactory or if he should or should not have prepared the budget.

VII. The Secretary General of ISA chose not to pursue disciplinary action against the Applicant in this case. He chose to have the matters alleged against the Applicant investigated and dealt with as performance issues rather than as allegations of misconduct, thus obviating the need to investigate or seek to prove the mental element or the wilfulness of the actions which would ordinarily be relevant had he chosen to seek to establish misconduct. The Tribunal considers that this decision was legitimate in the circumstances, having regard to the nature of the issues raised. This would not necessarily be so had they been of different character, as some activities can only be viewed as allegations of dishonesty, and in such instances, disciplinary procedures must be involved.

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

(*Signatures*)

Julio **Barboza**
President

Kevin **Haugh**
Vice-President

Jacqueline R. **Scott**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary