

**Administrative Tribunal**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1280

Case No. 1363

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Kevin Haugh, Vice-President, presiding; Mr. Dayendra Sena Wijewardane; Mr. Goh Joon Seng;

Whereas, on 9 June 2004, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF) filed an Application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 7 September 2004, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read as follows:

“II. Pleas

1. Consideration of the period of my loaned service in [the United Nations Development Programme (UNDP)] (from 9 April 1999 till 2 September 2000) as ‘Service in UNICEF’ and putting me on special leave with full pay (SLWFP) from 3 September 2000 onwards for the period I rendered my services to UNDP.
2. Making UNDP ...
 - a) reimburse my salaries, contributions to Pension and Medical Insurance Plan (MIP) for the period 9 April 1999 to 2 July 1999 ...;
 - b) pay me daily subsistence allowance (DSA) for the period 8 April 1999 (...) till 18 June 1999 (...);
 - c) reimburse my increased salary for the period upon completion of one year of my service with ... UNDP ...;

- d) [credit] to UNICEF ... my accrued annual leave during the period of my loaned service with UNDP and extension of my SLWFP status from 3 September 2000 as long as possible and thus deferring my separation from UNICEF and bridging the gap for early retirement benefits or pay me the benefits in cash directly.
3. Crediting in my account the deducted amount of Rs. 314,402.07 from UNDP reimbursement or adjusting this amount towards my contributions for [the United Nations Joint Staff Pension Fund (UNJSPF)] during the SLWFP from 3 September 2000 onwards and returning the balance to me;
4. Payment of installation allowance covering the assignment grant and DSA for myself, my spouse and children ...
5. Reinstating me in UNICEF or in any other [United Nations agency] in India or abroad at the earliest.”

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 March 2005 and once thereafter until 30 April;

Whereas the Respondent filed his Answer on 30 April 2005;

Whereas the Applicant filed Written Observations on 27 May 2005;

Whereas the statement of facts, including the employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

“Employment History

... From August 1974 to December 1991, the [Applicant] served [successively] as Secretary, Senior Secretary and Programme Assistant from GS-3 to GS-7 level in the UNICEF East India Office, Calcutta. From January 1992 to June 1995, he served in the UNICEF Bihar Field Office at Patna, as Senior Programme Assistant at the GS-7 level. From May 1996 to March 1999, he served in the UNICEF South India Office in Chennai (formerly Madras) as Assistant Project Officer/Senior Administrative Assistant at the National Officer (NO-B) level. He was served a notice of separation for abolishment of post on 3 December 1998 ... The [Applicant] negotiated a separation agreement with UNICEF whereby he would be placed at his request and for retirement/pension purposes on ... SLWFP for 18 months in lieu of termination indemnity. While on SLWFP, he was recruited by [UNDP] in agreement with UNICEF to work on a loan basis [during] the 18-month [period of SLWFP] on a UNDP South and South West Asia (SSWA) Project on HIV and Development in New Delhi from April 1999 to September 2000. The [Applicant’s] services with UNDP ended on 2 September 2000 and the [Applicant] was also separated from service with UNICEF on 2 September 2000, as part of a mutually agreed termination (MAT).

Summary of the facts

... On 19 June 1998, the [Applicant] was informed that the post of Senior Administrative Assistant he encumbered in the Chennai Sub-Office, India, would be abolished as of 31 December 1998. He was given a six-month advance notice of termination of employment.

... On 3 December 1998, he was served with a three-month formal notice of termination of appointment with effective separation date of 2 March 1999, should he not be placed.

... [On] 28 February 1999 ..., the [Applicant] requested that he be placed on

‘[SLWFP] for the period equal in cost to the indemnity being offered to enable him to complete more than 25 years of contributory service in the Pension Fund and bridging the gap as much as possible, between his present age and the early retirement age of 55 years’.

His request was approved and a personnel action form was issued to place him on SLWFP as from 3 March 1999.

... On 26 April 1999, the [Applicant] informed [UNICEF] that UNDP had selected him for a G-7 post and requested that UNICEF agree to transfer him to UNDP at his personal grade of NO-B level for the purpose of ‘continuing [his] Pension Contribution to cover the period of the enhanced indemnity UNICEF had already approved in the form of SLWFP ...’. ...

... On 3 May 1999, ... UNICEF [indicated that it] would be agreeable to his transfer to UNDP. ...

[On 26 May 1999, UNICEF provided the Applicant with its terms and conditions regarding his transfer.]

...

... In a 30 November 1999 Letter of Exchange, UNDP and UNICEF outlined, inter alia, the background and the modalities of payment of [the Applicant’s] salaries and allowances ...

... On 3 December 1999, the [Applicant] wrote a letter agreeing to the terms and conditions spelt out in the Letter of Exchange between UNDP and UNICEF ...

[On 2 September 2000, the Applicant separated from service.]

... On 23 September 2000, the [Applicant] wrote to the UNICEF Representative, India Country Office, requesting, inter alia, that: (a) UNICEF consider his service with UNDP ‘as service in UNICEF’, and thus, place him on SLWFP ... [following] the period he served with UNDP; (b) UNICEF request UNDP to reimburse salaries, contributions to Pension and MIP for the period 9 April-2 July 1999, DSA for the period and an increased salary for the period upon the completion of one year of service with UNDP, including annual leave accrued during the period of his service with UNDP, and (c) to explore the possibilities of suitable placement for him.

... On 27 October 2000, the UNICEF Representative [responded]:

‘... Please note that your date of separation from UNICEF, i.e. cob 2 September 2000 is final. In this context, I would request you to re-

read your letter of 3 December 1999 ... UNICEF has already invested a lot of extraordinary time and effort to assist you. We are simply not in a position to accommodate you any further.”

On 15 November 2000, the Applicant requested administrative review of the decision contained in the UNICEF Representative’s letter of 27 October and, on 16 April 2001, UNICEF responded,

“[from] the outset ... your request for administrative review is not receivable as you separated on mutually agreeable terms and as such UNICEF has not taken any specific administrative decision adversely affecting your terms and conditions of employment. Further, your requests are also inadmissible as they fall outside the scope of the terms agreed with you, with which terms UNICEF has fully complied, including by making all payments to you.”

On 8 May 2001, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 8 December 2003. Its considerations, conclusions and recommendations read, in part, as follows:

“Considerations

23. The Panel considered first the preliminary issue of competence and receivability. The Panel noted that in his request for review of the contested ‘administrative decision’ ..., the Appellant simply stated that the contested administrative decision was ‘the decision taken by the UNICEF India Country Office (...) Representative ... vide his letter dated 27 October 2000’. In his letter of 27 October 2000, [the Representative] stated that (a) the Appellant’s date of separation from UNICEF, i.e. cob 2 September 2000 was final. The Panel felt that this was a statement of fact contained in the mutually agreed termination (...) which the Appellant entered into in his own volition (...); and (b) UNICEF ... was not in a position to accommodate any further his new requests. The Panel recalled that ... new requests related to the Appellant’s future prospects of employment after he had already separated from the Organization were outside the purview of the [MAT] and as such could not have affected the terms of appointment of the Appellant. The Panel concluded, therefore, that the Appellant’s letter of 15 November 2000 which requested an administrative review contained no specific administrative decision ... The Panel also noted that staff rule 111.2 (a) (ii) provides that a staff member may appeal against the **original administrative decision** within one month. In the case under consideration the Panel observed that the ‘decision’ appealed in the Statement of Appeal (...) is different from the ‘original administrative decision’ for which a request for administrative review had been submitted ...

...

Conclusions and recommendations

26. In light of the foregoing, the Panel concluded *unanimously* that the appeal is not receivable.

...”

On 17 December 2003, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General “agree[d] with the reasoning and the findings of the JAB and ha[d] accordingly decided to take no further action on [his] appeal”.

On 7 September 2004, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant’s principal contentions are:

1. The Applicant’s service with UNDP should be considered as service with UNICEF. Accordingly, he is entitled to the remainder of his agreed SLWFP as from 3 September 2000 onwards.
2. The Respondent has failed to pay the Applicant various allowances and benefits.
3. The Applicant should be reinstated in service.

Whereas the Respondent’s principal contentions are:

1. The Applicant is bound by the terms of the 3 December 1999 MAT made with UNICEF.
2. The Applicant has received all entitlements and appropriate payments pursuant to the MAT.
3. The Respondent has no obligation to reinstate the Applicant in UNICEF or in any other United Nations agency.

The Tribunal, having deliberated from 27 October to 23 November 2005, now pronounces the following Judgement:

I. The Applicant had been employed by UNICEF from August 1974 and was serving as Assistant Project Officer/Senior Administrative Assistant at the National Officer (NO-B) level with the UNICEF South India Office in Chennai when, on 3 December 1998, he was informed that his post would be abolished on 2 March 1999. Upon his request, UNICEF agreed to a separation agreement whereby, as from 3 March 1999, he would be placed on SLWFP for 18 months in lieu of termination indemnity.

Thereafter, however, the Applicant, with the help of UNICEF, secured a position with UNDP and an agreement was reached by all parties concerned whereby UNICEF would loan him to UNDP for the duration of his SLWFP. The chronology of this agreement may be summarized as follows: on 3 May 1999, UNICEF notified the Applicant of its accord, subject to certain provisos, and on 9 June, UNICEF wrote to UNDP setting out the modalities of the arrangement. UNDP accepted the terms of the reimbursable loan of the Applicant by letter dated 26 July, and all details were finalized on 30 November.

By letter dated 3 December 1999, the Applicant formalized his agreement to the terms and conditions agreed by UNDP and UNICEF, the mutually agreed termination (MAT), stating:

“... I am pleased to confirm my acceptance of the conditions laid down by UNICEF, as follows:

(a) I will not contest the abolition of the post encumbered by me in Chennai.

(b) During the period of my [SLWFP], I will be released to ... UNDP ... from 9 April 1999 until 2 September 2000, after which I will cease to be a UNICEF staff member.

(c) During the period of my release to UNDP, UNDP will reimburse UNICEF salary and pension fund at GS-7/step 5. In the event of a salary increase, the revised salary scale will be applicable. UNICEF will maintain me at the level of NO-B/step 5 on [SLWFP].

...

(e) Any previous correspondence on this issue is superseded by this letter.”

On 2 September 2000, the Applicant separated from service under the MAT. On 23 September, however, the Applicant wrote to the UNICEF Representative, India Country Office, requesting, inter alia, that UNICEF consider his service with UNDP “as service in UNICEF” and, thus, place him on SLWFP with effect from 3 September for the period he served with UNDP. He also made various requests regarding salary and allowances, and asked UNICEF to explore the possibilities of suitable placement for him. UNICEF responded on 27 October that the Applicant’s “date of separation from UNICEF, i.e. ... 2 September 2000, [was] final” and reminded him of the terms of the MAT.

On 15 November 2000, the Applicant submitted a request for administrative review of this decision and, on 8 May 2001, he lodged an appeal with the JAB, requesting that:

- (a) his period of loaned services to UNDP be considered as “service in UNICEF” and that he be placed accordingly on SLWFP after 3 September 2000, for a period equivalent to the 17 months he served with UNDP on loan from 9 April 1999 to 2 September 2000;
- (b) UNICEF settle all his dues from UNICEF and UNDP;
- (c) UNICEF ask UNDP to reimburse his salaries, contributions to the Pension Fund and MIP for the period 9 April 1999 to 2 July 1999; and, that
- (d) UNICEF reinstate him.

The JAB held that as the request for administrative review was against the “administrative decision” taken by UNICEF by its letter of 27 October 2000, referring to the Applicant’s date of separation from UNICEF which was a statement of fact contained in the MAT and was not, therefore, an administrative decision, the appeal was non-receivable. On the substantive points of the relief sought, the JAB held that UNICEF had fulfilled all of its obligations under the MAT.

On 7 September 2004, the Applicant filed this Application with the Tribunal.

III. The Tribunal must first address the issue of receivability of this case. The JAB had rejected the appeal as non-receivable, on the basis that the Applicant’s request for administrative review “contained no specific administrative decision resulting in the non-observance of [his] terms and conditions of service”. The Tribunal is not of the same opinion. It finds that UNICEF’s effective refusal to depart from the terms of the MAT amounted to an administrative decision. The fact that UNICEF relied on the terms of the MAT in making its decision goes to the merits, not receivability, of the case.

Notwithstanding, the Tribunal is satisfied that the current proceedings are validly before it for the reasons set out in paragraph VII of Judgement No. 1074, *Hernandez-Sanchez* (2002).

IV. The Application is based substantially on the same pleas set out in the Applicant’s appeal to the JAB.

The Application raises 3 main issues:

- Issue I: Is the Applicant bound by the MAT?
- Issue II: If the Applicant is bound by the MAT, does the relief applied for fall within the terms of the MAT?
- Issue III: If he is not bound by the MAT or if the relief applied for does not fall within the MAT, is the Applicant entitled to any relief?

The reliefs applied for are as follows:

1. Consideration of the period of the Applicant's loaned service in UNDP from 9 April 1999 until 2 September 2000 as "service in UNICEF", placing the Applicant on SLWFP from 3 September 2000 onwards for the period the Applicant rendered his services to UNDP.
2. Making UNDP:
 - (a) reimburse the Applicant's salaries, contributions to Pension and MIP for the period 9 April 1999 to 2 July 1999 to the Applicant directly or through UNICEF;
 - (b) pay the Applicant DSA for the period 8 April 1999 when he arrived in New Delhi from Chennai to take up the assignment with UNDP SSWA Project on HIV and Development until 18 June 1999 when the Applicant left New Delhi for Chennai;
 - (c) reimburse the Applicant's increased salary for the period upon completion of one year of service with UNDP to the Applicant directly or through UNICEF;
 - (d) credit to UNICEF service the Applicant's accrued annual leave during the period of his loaned service with UNDP and extension of his SLWFP status from 3 September 2000 for as long as possible, thus deferring the Applicant's separation from UNICEF and bridging the gap for early retirement benefits or pay the Applicant the benefits in cash directly.
3. Crediting the Applicant's account with the deducted amount of Rs. 314,402.07 from UNDP reimbursement or adjusting this amount towards the Applicant's contributions for UNJSPF during the SLWFP from 3 September 2000 onwards, and returning the balance to the Applicant;

4. Payment of installation allowance covering the assignment grant and DSA for the Applicant, his spouse and children.
5. Reinstatement of the Applicant in UNICEF or in any other United Nations agency in India or abroad at the earliest opportunity.

V. The Tribunal will first address “Issue I”, *supra*. The Tribunal recalls its Judgement No. 955, *Al-Jassani* (2000), wherein it found as follows:

“On numerous occasions the Tribunal has laid stress on the elementary and basic principle that commitments, whether made by the Administration or by staff members, must be honoured. *Pacta sunt servanda*.

Thus, where an agreement has been formally concluded between the Administration and a staff member, it cannot be called into question by either party, except in exceptional cases of invalidity provided for in the statutes, as strictly interpreted.”

The Applicant’s case is that he agreed to the terms of the MAT under “coercion and duress”. It is the consistent jurisprudence of the Tribunal that one who makes such allegations bears the burden of proof. (See Judgements No. 672, *Burtis* (1994) and No. 1069, *Madarshahi* (2002).) The Applicant has not produced an iota of evidence of such coercion and duress. On the contrary, a review of the communication between the Applicant and the UNICEF India Country Office, *supra*, clearly rebuts such a baseless allegation. Moreover, even were the Applicant in a position to support his contention, the issue might well have proven to be time-barred.

The Tribunal therefore holds that the Applicant is bound by the terms of the MAT.

VI. With respect to Issue II, the Tribunal will address each request for relief in turn, albeit concluding that the Applicant is not entitled to such relief under any of the circumstances claimed.

The Applicant’s request that he be put on SLWFP from 3 September 2000 for a period equal to the time he served with UNDP is contrary to the terms of condition (b) of the MAT. Moreover, insofar as the Applicant’s request that UNDP reimburse his salaries, contributions to pension and MIP for the period 9 April 1999 to 2 July 1999 is concerned, these were deducted from the value of the Applicant’s SLWFP in accordance with conditions (c) and (d) of the MAT.

The Applicant requests that he be paid DSA for the period 8 April 1999, when he arrived in New Delhi from Chennai to take up his appointment with UNDP, to 18 June 1999, when the Applicant left New Delhi for Chennai. It is pertinent to note that the Applicant did not move to and from New Delhi at the request of UNICEF. As a result, UNICEF had no obligation to pay DSA; if DSA is to be paid, it should be by UNDP. However, it had been made clear that UNDP would not pay the Applicant DSA by its letter of 3 May 1999. Hence, DSA was not provided for in the MAT and the Applicant is not entitled to same.

Insofar as the Applicant's request to be reimbursed the increased salary upon completion of one year of service with UNDP is concerned, his level and step at the beginning of his SLWFP on 3 March 1999 was NO-B, step 4. In July 1999 his level was increased to NO-B, step 5 and, in June 2000, to step 6. This was in line with condition (c) of the MAT and the Applicant is therefore not entitled to additional payment.

The Applicant's request to credit his accrued annual leave during the period of his service with UNDP and further extend his SLWFP status from 3 September 2000 as long as possible, thus bridging the gap for early retirement benefit, or that he be paid the benefits in cash, directly, is, in the Tribunal's view, a request to extend his service with UNICEF beyond the agreed separation date of 2 September 2000 by the addition of annual leave accrued during his service with UNDP. This did not form part of the agreed terms of the MAT. Further, the provisions of UNICEF Administrative Instruction CF/AI/1999-007 on Abolished Posts, option 6 section 4 state that, during the SLWFP period for separation purposes, staff members who are within two years of retirement age or 25/30 years of contributory service in the Pension Fund "will not accrue annual leave or be granted sick leave or maternity leave". Therefore the Applicant is not entitled to this claim.

The Tribunal will now consider the Applicant's request to be credited the sum of Rs. 314,402.07, as deducted from the UNDP reimbursement, or that this sum be applied towards his contributions to the UNJSPF during his SLWFP from 3 September 2000 onwards, returning the balance, if any, to him. The Tribunal notes that this sum represents the costs to UNICEF over and above the amount reimbursed by UNDP under the SLWFP arrangement and is recoverable by UNICEF from the amount due to the Applicant by way of termination indemnity. This was made clear to the Applicant in UNICEF's letter of 26 May 1999:

“The balance of the remaining cost of your [SLWFP] with UNICEF (i.e. 18 months’ [SLWFP], less the period you have been on [SLWFP] with UNICEF from 3 March 1999 until the date of your appointment with/transfer to UNDP, and the cost to UNICEF for maintaining you at NO-B/step 4 until October 1999 while serving with UNDP) will be used to defray the cost of your assignment grant on transfer to UNDP from Chennai”.

Thus, in accordance with condition (d) of the MAT, the balance of the termination indemnity less the reimbursement from UNDP amounting to Rs. 519,687.77 has been paid to the Applicant.

As regards the Applicant’s request for assignment grant and DSA for himself, spouse and children, the Applicant did not move from Chennai to New Delhi at the request of UNICEF. UNICEF is therefore not liable to pay such grant and allowance. In the case of UNDP, the Applicant had been informed by UNICEF as early as 3 May 1999 that UNDP would not pay same because “they have already identified locally an equally qualified person to do the job, but in response to [UNICEF’s] plea and since you were already in the [United Nations] system they were prepared to offer you the job”. It is clear to the Tribunal that it must have been for the reasons given above that the MAT did not provide for payment of assignment grant and DSA.

Finally, the last request before this Tribunal is for reinstatement of the Applicant in UNICEF or in any other United Nations agency in India or abroad, at the earliest opportunity. This request runs counter to condition (b) of the MAT. Additionally, UNICEF has fulfilled its obligation under staff rule 109.1 (c) which reads:

“Except as otherwise expressly provided in subparagraph (ii)(b) below, if the necessities of the service require abolition of a post or reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments ... provided that due regard shall be had in all cases to relative competence, to integrity and to length of service”.

The Tribunal is satisfied that UNICEF did all it could to find the Applicant a suitable post. This was acknowledged by the Applicant in his letter of 28 February 1999 which reads, in relevant part, “I am glad that [the] organization is making a sincere effort by organizing interviews in UNICEF ..., New Delhi ... in order to place me in a suitable post”. It was indeed through the efforts of UNICEF that the Applicant came to be employed by UNDP.

In the circumstances, therefore, neither UNICEF nor any other United Nations office has any obligation to re-employ the Applicant.

VII. The Tribunal having found that the Applicant was bound by the terms of the MAT, and that his claims for relief fall thereunder, notwithstanding the fact that they are not supportable under such terms, need not enter into any discussion under “Issue III”.

VIII. The Tribunal therefore dismisses the Application.

(Signatures)

Kevin Haugh
Vice-President, presiding

Dayendra Sena Wijewardane
Member

Goh Joon Seng
Member

New York, 23 November 2005

Maritza Struyvenberg
Executive Secretary