

Judgement No. 19

Case No. 27 :
Kaplan

Against: **The Secretary-General
of the United Nations**

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; the Lord Crook, Vice-President; Mr. Sture Petré, Vice-President; Mr. Omar Loutfi, alternate member;

Whereas Irving Kaplan, former member of the Division of Economic Stability and Development, Department of Economic Affairs, filed an application to the Tribunal on 17 February 1953, for rescission of the Secretary-General's decision of 28 April 1952 to terminate his employment, for reinstatement in his post in the United Nations and for compensation;

Whereas a memorandum was presented to the Tribunal in his name and in the name of other Applicants;

Whereas documents were produced on 23 and 29 July 1953 in justification of the amount of compensation claimed and substituting a request for compensation for the request for reinstatement;

Whereas the Respondent filed his answer to the application on 20 March 1953 and his comments concerning damages on 10 August 1953;

Whereas oral information was obtained at Headquarters from 15 to 21 April 1953 in accordance with article 9 (3) of the Tribunal's Rules;

Whereas the Tribunal heard the parties in public session on 20, 21, 22 and 23 July 1953;

Whereas the Tribunal has received from the Staff Council of the United Nations Secretariat a written statement of its views on the questions of principle involved in this case;

Whereas the facts as to the Applicant are as follows:

The Applicant entered the service of the United Nations on 2 February 1958 when he was appointed as an economic affairs officer in the Division of Economic Stability and Development, Department of Economic Affairs. After serving on a fixed-term contract, the Applicant received a temporary-indefinite contract on 1 May 1948. On 27 March 1952, the Applicant appeared as a witness before the Federal Grand Jury. On 17 April 1952, the Applicant was notified by the head of his Department that the Secretary-General had decided to terminate his appointment under the terms of staff regulation 9.1 (c) with the possible alternative of resignation with payment of indemnity.

On 28 April 1952, the Bureau of Personnel formally notified the Applicant of the termination effective 29 May 1952. On 7 May 1952, the Applicant requested the Secretary-General to give the reasons for the termination. The Secretary-General replied on 14 May 1952 confirming his authority to terminate temporary appointments in the interest of the United Nations and stating that the termination was not related to any allegations which might have been made against the Applicant. On 28 May 1952, the Applicant requested the Secretary-General to reconsider the decision to terminate him and, in view of the refusal encountered, filed an appeal with the Joint Appeals Board. After receiving the report of the Board, the Secretary-General informed the Applicant, by letter of 20 October 1952, that he reaffirmed the original decision. On 9 December 1952 the Applicant filed an application to the Tribunal which was returned to him for completion in accordance with the new rules. On 17 February 1953, the Applicant filed his completed application to the Tribunal requesting reinstatement in the post previously held by him.

Whereas the Applicant's principal contentions are that :

(a) The termination resulted from pressure exercised upon the Secretary-General by the Senate Sub-Committee and the State Department of the United States in violation of the Charter and the Staff Regulations.

(b) The termination violated the Applicant's right to independent political convictions as guaranteed to staff by the Staff Regulations and infringed the rights laid down in the Universal Declaration of Human Rights.

(c) The Respondent violated recognized standards of due process in withholding specific reasons for the termination.

(d) Staff regulation 9.1 (c) does not grant absolute discretion to the Secretary-General in terminating temporary-indefinite contracts as such an interpretation would conflict with the tenor of the entire body of Staff Regulations.

(e) Whatever interpretation is given to staff regulation 9.1 (c), the Applicant claims that under the rights acquired under staff regulation 12.1 he is entitled to benefit from the legal position existing prior to revision of the Regulations and, furthermore, that he must be informed of the exact reason for his termination and have full recourse to all means of appeal.

Whereas the Respondent's answer is that :

(a) The Respondent is entitled without doubt to receive information as to staff members from member governments.

(b) The Respondent denies that matters of opinion or belief were the cause of the termination of the Applicant's appointment.

(c) The Secretary-General is not required to give specific reasons

for terminating temporary-indefinite contracts under the terms of staff regulation 9.1 (c).

(d) The question of acquired rights does not arise in connexion with the amendment to the Regulations.

(e) The Respondent asserts that there is no evidence produced that he acted from prejudice or for unlawful purposes.

The Tribunal having deliberated until 21 August 1953, now pronounces the following judgement :

1. Under the terms of its Statute, the Tribunal is not competent to pass judgement on the validity, in relation to the Charter, of an agreement made between the Secretary-General and a Member State, whatever influence this agreement might actually have had on the decision taken in respect of the Applicant. It is part of the Tribunal's function, however, to consider whether the termination of the Applicant's employment is in conformity with the provisions of the Staff Regulations and the Staff Rules.

2. The Applicant contends that when he entered the service of the United Nations, the Staff Regulations then in force did not permit the Secretary-General to terminate a temporary appointment without stating the reasons.

He also contends that those Staff Regulations continue to apply to him, although they have been changed by the General Assembly, because he enjoys the benefit of an "acquired right" in this connexion.

He further submits that relations between the United Nations and its staff are contractual in nature and that consequently the two parties are bound by the contract and neither party may change its provisions without the consent of the other.

He points out in addition that regulation 28 of the former Staff Regulations states that : "These regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of members of the staff"; and that this provision was reproduced in regulation 12.1 of the new Staff Regulations.

3. The Tribunal considers that relations between staff members and the United Nations involve various elements and are consequently not solely contractual in nature.

Article 101 of the Charter gives the General Assembly the right to establish regulations for the appointment of the staff, and consequently the right to change them.

The General Assembly under that Article established new Staff Regulations and decided that these new Staff Regulations should become effective on 1 March 1952 and supersede all previous staff regulations.

It follows from the foregoing that notwithstanding the existence of contracts between the United Nations and staff members, the legal

regulations governing the staff are established by the General Assembly of the United Nations.

In determining the legal position of staff members a distinction should be made between contractual elements and statutory elements :

All matters being contractual which affect the personal status of each member — e.g., nature of his contract, salary, grade ;

All matters being statutory which affect in general the organization of the international civil service, and the need for its proper functioning — e.g., general rules that have no personal reference.

While the contractual elements cannot be changed without the agreement of the two parties, the statutory elements on the other hand may always be changed at any time through regulations established by the General Assembly, and these changes are binding on staff members.

The Tribunal interprets the provisions of regulation 28 of the Provisional Staff Regulations and article XII of the new Staff Regulations in this manner.

With regard to the case under consideration the Tribunal decides that a statutory element is involved and that in fact the question of the termination of temporary appointments is one of a general rule subject to amendment by the General Assembly and against which acquired rights cannot be invoked.

4. The Applicant states that he showed outstanding professional ability during his service in the Department of Economic Affairs of the United Nations, and that his appointment was terminated consequent upon his appearance before the Grand Jury and the inclusion of his name on the list of persons as to whom the State Department had made adverse comments.

5. The Respondent states that in this case he invoked the provisions of article 9.1 (c) in terminating the Applicant's appointment ; that in so doing without stating the reason he took a decision which, in his opinion, was in the interest of the United Nations ; that his conception of the interest of the United Nations was not subject to review by this Tribunal ; that above all no proof had been submitted that his decision had been based on improper grounds ; and that in those circumstances his decision could not be called in question or rescinded by the Tribunal.

6. The discussions in the Fifth Committee show that the intention of the authors of the United Nations Staff Regulations approved by General Assembly resolution 590 (VI) on 2 February 1952, was to invest the Secretary-General with discretionary powers in the termination of temporary appointments.

7. Article 9.1 (c) provides that the Secretary-General may terminate

temporary appointments, if, in his opinion, such action would be in the interest of the United Nations.

8. Such discretionary powers must be exercised without improper motive so that there shall be no misuse of power, since any such misuse of power would call for the rescinding of the decision.

9. With regard to the case under consideration, no evidence has established improper motivation and the Tribunal accordingly rejects the claim.

10. Whereas the Tribunal has received claims as follows :

(a) For full salary up to reinstatement, less amount paid at termination ;

(b) For additional remedial relief to the extent of \$9,000 ;

(c) For reimbursement of legal costs amounting to \$3,000 ;

and has considered Respondent's reply ;

the Tribunal awards

(a) Since reinstatement is not ordered, there can be no amount for full salary payment to date ;

(b) No amount for remedial relief ;

(c) no amount for costs ;

and so orders.

(Signatures)

Suzanne BASTID
President

CROOK
Vice-President

Sture PETRÉN
Vice-President

Omar LOUTFI
Alternate Member

Mani SANASEN
Executive Secretary

Geneva, 21 August 1953

Statement by Mr. Petrén

On the question of acquired rights, I have reached the same conclusion as the majority of the Tribunal, as the General Assembly, in adopting the new Staff Regulations, did not contemplate a transitional stage for contracts in force at the time of its decision, and as the Applicant's contract contained no provision prohibiting the immediate application of the new staff regulation 9.1 (c).

(Signature)

Sture PETRÉN