United Nations AT/DEC/1072

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1072

Case No. 1164: CHUTEAUX Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Brigitte Stern;

Whereas, on 8 April 2000, Dominique Chuteaux, a former staff member of the United Nations Environment Programme (hereinafter referred to as UNEP) filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 6 November 2000, the Applicant filed a corrected application with the Tribunal which read as follows:

"Section II: PLEAS

I respectfully request the United Nations Administrative Tribunal to:

...

Order my reinstatement to my permanent appointment at my former grade;

Order the payment of unpaid salary from 1 January 1998;

Order the payment of contributions to the United Nations Joint Staff Pension Fund from 1 January 1998.

..."

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Whereas at the request of the Respondent the Tribunal extended to 30 April 2001, and then, by means of successive periods of time, to 30 September 2001 the Respondent's deadline for filing his answer;

Whereas the Respondent filed his answer on 16 July 2001;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Office at Geneva (UNOG) on 14 April 1975 as a Registry Clerk on a short-term appointment at the G-3 level. On 1 January 1981, the Applicant was granted a permanent appointment.

From 1 October 1988 to 31 December 1993, the Applicant was on secondment to the UNEP International Register for Potentially Toxic Chemicals (IRPTC), based in Geneva, where he worked as a Research Assistant (G-6) and then as a Data-Processing Assistant. On 1 January 1994, the Applicant was transferred to IRPTC/UNEP as a Data-Processing Assistant at the G-7 level. On 7 June 1994, the Director of the Registry signed a request for classification action concerning the Applicant's job description.

On 5 December 1995, the Chief of the Human Resources Management Service (HRMS) at the United Nations Office at Nairobi (UNON) wrote to the UNOG Director of Administration about the ongoing restructuring at UNEP. She indicated that owing to financial constraints the Applicant's appointment would have to be terminated, despite his satisfactory job performance, adding that she was exploring the possibility of having him reabsorbed within UNOG.

On 19 January 1996, the UNOG Director of Administration informed the Chief of the UNON Human Resources Management Service that for financial reasons it would be "difficult, if not outright impossible" to reabsorb the Applicant within UNOG.

On 20 February 1996, the Applicant applied for a Network and Database Administrator post at the P-3 level, stating that the vacancy notice described the tasks and duties that he had been fulfilling up to the end of 1995. On 20 March 1996, the Director of the Registry carried out a comparative review of the two job descriptions concerned showing the overlap between them. He indicated that although he would have preferred to keep both posts he had to make a choice and was forced to terminate the Applicant's contract, since the Applicant was "not in

position to assume the supervisory, network administration or capacity-building activities" that corresponded to the P-3 post.

On 27 September 1996, the Director of the Registry transmitted to the Assistant Executive Director and Managing Director, Programme, the redeployment memoranda and individual review forms for five staff members, including the Applicant, in accordance with directive UNEP/ED/1996/14 of 11 September 1996, entitled "Redeployment exercise". He also transmitted to him comparative review forms for a number of staff members, but not for the Applicant, because the Applicant occupied a post "dissimilar from others in the G series". On 27 November the Chief of the UNON Human Resources Management Service informed the Applicant that he had been selected for redeployment and placed on the list of staff requiring priority review. She attached to her letter a list of four vacant posts in the General Service category in Geneva, and further informed him that UNOG would be contacted with a view to identifying more suitable vacancies. In his reply dated 28 November, the Applicant drew attention to the fact that the list of vacancies only included three G-4 posts and one G-5 post, and that as a G-7 he was not authorized to apply for them.

In a letter dated 1 December 1997, the Acting Chief of the UNON Human Resources Management Service informed the Applicant that his post would be abolished by 31 December 1997 and that his permanent appointment would be terminated, "in accordance with the final paragraph of staff regulation 9.1 (a)". On 15 December, the Applicant requested a review of that administrative decision.

On 16 December 1997, the Applicant filed with the Geneva Joint Appeals Board a request for suspension of the administrative decision to abolish his post and terminate his permanent appointment. On 22 December, the Joint Appeals Board recommended that the request for suspension of the administrative decision should be approved.

On 26 December 1997, the Officer-in-Charge of the Department of Management informed the Applicant that the Secretary-General had not accepted the Board's recommendation.

On 1 January 1998, the Applicant was separated from UNEP.

On 3 April 1998, the Applicant filed an appeal with the Geneva Joint Appeals Board.

On 10 December 1999, the Joint Appeals Board adopted its report, whose conclusions and recommendations were as follows:

"Conclusions and recommendations

170. In view of the foregoing, the Panel **concludes** that staff regulation 9.1 (a) and staff rule 109.1 (c) were adhered to as regards the abolition of the Appellant's post and the termination of his permanent appointment although the overall handling of this case leaves much to be desired.

171. In this instance, the Panel further **concludes** that the Appellant should be entitled to compensation for the administrative lapses and the confusion leading up to the termination of his appointment, as well as for the various shortcomings in the Rebuttal procedure and the Respondent's reply. The Panel deems that such compensation should at least amount to CHF 56,430.00 ....

...

173. Accordingly, the Panel:

(1) **Recommends** that the Secretary-General pay to the Applicant CHF 56,430.00, plus interest payments lost;

(2) Makes **no further recommendation** in support of this appeal."

On 18 April 2000, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had decided to accept the Board's conclusions and its unanimous recommendation that the Applicant should be compensated in the amount of CHF 56,430.00, plus interest.

On 6 November 2000, the Applicant filed the above-mentioned application with the Administrative Tribunal.

Whereas the Applicant's principal contentions are:

1. All the procedural documents are in English, although he requested that the proceedings should be conducted in French.

2. The Joint Appeals Board was biased in favour of the Respondent.

Whereas the Respondent's principal contentions are:

1. The Applicant's permanent appointment was properly terminated pursuant to staff regulation 9.1 (a).

2. The Respondent has fulfilled his obligation to make good-faith efforts to find an alternative post for the Applicant.

3. Consideration of the case by the Joint Appeals Board was not vitiated by prejudice or any other extraneous factor and the Applicant's due process rights were fully observed.

4. The Applicant was adequately compensated for the administrative delays and confusion in the handling of his case.

The Tribunal, having deliberated from 8 to 26 July 2002, now pronounces the following judgement:

I. The Tribunal wishes to make a preliminary remark. The Applicant complains in his application that all the procedural documents are in English, although he had expressly requested that the proceedings should be conducted in French. The Tribunal draws attention to the fact that although both French and English are working languages of the Tribunal only one working language should be used in connection with a given case and all proceedings should be conducted in the language chosen by the applicant. This is in keeping with the practice of the Administrative Tribunal of the International Labour Organization, where the Administration invariably drafts its documents in the language of the application, even if it must as a result translate a statement drafted in another language. The Tribunal hopes that in proceedings conducted before it the Administration will do likewise. Not only would such an approach ensure better observance of applicants' due process rights, it would also facilitate the work of the Tribunal, which would not be obliged to work in two languages in the same case.

II. The case under consideration concerns a termination process that took almost two years to complete. The Tribunal should first of all recall the rules on termination. Staff regulation 9.1 (a) allows the Secretary-General to take account of the Organization's financial problems to a certain extent:

> "The Secretary-General may terminate the appointment of a staff member who holds a permanent appointment and whose probationary period has been completed if the necessities of service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory or if he or she is, for reasons of health, incapacitated for further service."

In instances where financial problems apply, the Secretary-General must act within the framework of the provisions laid down in staff rule 109.1 (c):

> "*Abolition of posts and reduction of staff*
>
> (i) ... if the necessities of 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, and staff members with probationary appointments shall be retained in preference to those on fixed-term or indefinite appointments, provided that due regard shall be had in all cases to relative competence, to integrity and to length of service. Due regard shall also be had to nationality in the case of staff members with no more than five years of service and in the case of staff members who have changed their nationality within the preceding five years when the suitable posts available are subject to the principle of geographical distribution."

III. The Applicant was initially recruited by the United Nations in 1975 on a short-term contract, which was converted to a fixed-term contract in 1976 and a permanent contract on 1 January 1981. The Applicant, who initially worked at the United Nations Office at Geneva, was first of all assigned to a post in Geneva with the UNEP International Register for Potentially Toxic Chemicals (IRPTC), where he worked from 1988 to 1993 on fixed-term appointments, and was then transferred to the post under consideration, as from 1 January 1994, on a permanent appointment. It should be borne in mind that in June 1994 the functions corresponding to the Applicant's post, which was at the G-7 level, were divided between the Data-Processing Assistant post — which had earlier also included the functions of Project Manager (Database Administrator and Network Engineer) — and a P-3 post newly created to take over the functions of Database Administrator and Network Engineer.

IV. The first attempts to terminate the Applicant were made towards the end of 1995 — after he had been employed by the United Nations for 20 years, including 14 years on a permanent appointment — when a new IRPTC director arrived. The new director transferred the Applicant's remaining functions to the Database Administrator and Network Engineer post created at the P-3 level in 1993. The staff member against the P-3 post was on short-term contracts. The functions performed by the Applicant from 1988 to 1993 were thus shifted in two stages to the P-3 post, first of all partly when the post was set up in 1993 and then again when the new director came in 1995. As a result, the Applicant's post was emptied of all content. On 5 December 1995, the Applicant was informed that he would be terminated

owing to budgetary constraints; in its letter notifying him of his termination, the Administration emphasized that his performance had been irreproachable and that every effort would be made to find him another post, if possible by having him reabsorbed within his original organization:

> "Please note that this would be necessitated only by financial constraints as [the Applicant's] records as well as the [IRPTC Director's] comments on his performance are fully satisfactory ... Before initiating termination procedures on [the Applicant's] contract, I am exploring the possibility of having [the Applicant] reabsorbed within UNOG."

The tenor of a memorandum dated 14 December addressed to the Applicant clarifying a number of points was similar:

> "... due to budgetary constraints it will be necessary for UNEP to abolish your post ... This action has nothing to do with your performance, which I have found to be fully satisfactory. This action is necessitated by the severe reduction in IRPTC's budget for the 1996-1997 biennium ... I consider terminating your contract to be a last resort to be undertaken only after other possibilities are ruled out. I have had discussions with ... the Chief of Administration in UNOG, who said that full consideration would be given in placing you back within that organization ..."

V. Here the Tribunal notes that it is somewhat contradictory to set up two similar posts only to cite financial difficulties and proceed to abolish one of those two posts, particularly as the post to be abolished was the one that had already existed, and that was occupied by a staff member on a permanent appointment, whereas the post to be retained had been newly created, and was occupied by a staff member on a fixed-term contract. The immediate impression is thus that the first termination attempt was not in accordance with staff rule 109.1 (c), which in the event of the abolition of a post for budgetary reasons gives a certain amount of priority to a staff member on a permanent appointment. To be more precise, the Tribunal believes that in fact the Applicant's post was not abolished for financial reasons because almost all the functions corresponding to it were shifted to a newly created post. In the Tribunal's view, citing budgetary grounds in order to eliminate a staff member's functions while at the same time creating another post to be assigned to a staff member performing the same functions clearly constitutes misuse of procedure (see Judgement No. 879, *Karmel* (1998)).

VI. The Tribunal notes that in the second stage of the process of removing the Applicant the spirit of the applicable provisions was not respected either. According

to staff rule 109.1 (c), staff on permanent appointments [the Applicant being a permanent staff member] must be retained in preference to staff on fixed-term appointments [which was the status of the individual who was retained]. Prima facie, the Administration did not observe that rule. The Administration, which, as may be seen from the correspondence between the various departments, was apparently aware of the questionable lawfulness of its action, finally kept the Applicant on, but did not assign him any work as from April 1996.

VII. Just a little later the Administration embarked on the redeployment exercise specified in directive UNEP/ED/1996/14, which was to be conducted in accordance with circular ST/AI/415 of 2 April 1996, and which would represent the last stage in the process of terminating the Applicant. On 27 September 1997, the Applicant was notified that he was on the redeployment list. The purpose of the redeployment exercise was to reduce staff costs, by achieving a given vacancy rate through the redeployment of functions and staff. But the circular states: "in the process, however, every effort shall be made to protect the career international civil service." The Administration accordingly suggested various forms of action that should be taken before any decision was made to terminate staff, in which event the following procedure would apply:

> "If all the means listed above are insufficient to achieve the necessary reductions, the head of department or office shall identify, on the basis of programmatic and structural considerations, the additional posts to be vacated. In accordance with the procedures set out below, he/she shall then initiate a review of staff members in the department or office who are at the level of the post(s) to be vacated and who belong to the same occupational group or discharge similar functions. The staff members eventually identified as being in need of placement shall be given the maximum opportunities for redeployment against available vacancies. The process shall be conducted as set out in detail below, in accordance with the requirements of the Charter of the United Nations and of the Staff Regulations and Rules."

VIII. It is thus clear that the redeployment process cannot be used as a way of eliminating staff members' safeguards under the Staff Regulations and Rules. In another context, the Tribunal has already had occasion to indicate that financial considerations may not be used in order to deprive staff members of their rights:

> "While the Tribunal does not underestimate the importance of these [financial] considerations, it is concerned that the need for economy may come in the way of protection that should normally be available in a timely fashion to staff members, as provided in the Staff Regulations and Rules. For, in some cases,

this can be tantamount to deprivation of rights." (Judgement No. 462, *Murphy* (1989), para. VI.)

IX. In examining the redeployment exercise, the Tribunal will pay close attention to two major aspects of the process: it will first verify that the specific procedures established for the exercise were followed, and then seek to determine whether those procedures were used as a pretext for termination, which would constitute misuse of procedure.

X. The Tribunal finds, first, that the procedures for the redeployment exercise, whose purpose was to protect staff members' rights, were not followed. The redeployment exercise was supposed to be conducted on the basis of both an individual and a comparative analysis, in accordance with the relevant circular. An individual evaluation of each of the candidates considered for redeployment was indeed carried out, but a comparative evaluation, which was essential, was not carried out. The Respondent contends by way of justification that he did not carry out the comparative evaluation because the Applicant and two other staff members in respect of whom such a comparison was not made "occupied posts dissimilar from others" and it was not considered necessary to produce a comparative review sheet for those staff. The Joint Appeals Board indicated in its report dated 10 December 1999 that "at the outset, it should be noted that contrary to the Respondent's assertion, the Appellant was not the only G-7 in Geneva". The Tribunal wishes to add that such a comparison should be made within one and the same occupational group or between staff members performing the same functions. By definition, there was at least one post with the same functions as that of the Applicant, because it was precisely owing to a certain amount of overlapping of functions that his post was abolished.

XI. However, in addition the Tribunal believes that the redeployment exercise was misused in order to carry out a termination that the administration had until then been unable to carry out. Once again, the Tribunal believes that the safeguards for staff members on permanent appointments were not respected: in the period from the beginning of the redeployment exercise up to the point at which the Applicant was terminated, a number of posts were created in the same occupational group. The only post abolished in the redeployment exercise was one occupied by a staff member on a permanent appointment, which means that the Applicant was terminated under the pretext of redeployment, without having been considered on a

preferential basis, as he should have been in the event of the abolition of his post, in accordance with staff rule 109.1 (c).

XII. The Tribunal could stop here, since it believes that the Applicant's post should never have been abolished. However, it will pursue its analysis of the handling of the Applicant's case, which shows that, even if his post had been properly abolished, the Applicant would not have received the equitable and good faith treatment to which he was entitled.

XIII. Although when he was notified that he had been selected for redeployment he was informed that he had been placed on the list of staff requiring priority review, the only posts offered to him were at the G-4 and G-5 levels, and since he was at the G-7 level he could not apply for them. The Respondent displayed unintentional humour when indicating that good faith efforts had been made to find the Applicant another post: it had offered him four posts, but "unfortunately, due to the high level of Applicant's post (GS-7), he could not apply for those vacancies". This implies that the Administration needs only to formally offer a staff member posts — even if he or she is unable to apply for them — in order to fulfil its obligation to make good faith efforts. The Tribunal cannot accept such an analysis; it requires the Administration to make specific, credible offers in order to be regarded as having made every effort in good faith. The Tribunal shares the Joint Appeals Board's surprise in that connection and endorses its comments on the matter: "at the outset, the Panel must express its surprise that the Chief of HRMS, when she informed the Appellant that he had been selected for redeployment, proposed him four alternative G posts (3 G-4 and 1 G-5) for which he could obviously not apply". Initially, the Administration does not appear to have offered the Applicant in good faith a way of finding a post to which he could be redeployed.

XIV. It might have seemed, shortly thereafter, that by offering him another post the Administration was indeed attempting to fulfil its obligations vis-à-vis the Applicant. As the Tribunal will demonstrate, however, this was a sham: the process of transferring the Applicant to that post was extremely opaque and, in addition, several months after the Applicant had in principle been assigned to the new post, it was abolished. To be more precise, in April 1997 the Applicant was finally informed that he had been assigned with immediate effect to a Network System Assistant post created in a new programme set up in Geneva, the Programme Support Unit (PSU).

But the necessary administrative action for transferring the Applicant to that new post does not appear to have been taken, and it was decided that the Applicant should stay in his IRPTC post. In a fax dated 12 August 1997, the IRPTC Director wrote to the Executive Director of UNEP, in an attempt to clarify the Applicant's status, while indicating that he did not wish to keep him on his staff:

> "On 4 April, [the Applicant] was, by memo, ordered to report to PSU/PSS by UNON/HRMS. [The Applicant] was concerned by that instruction, as it did not include an official notice of personnel action ... The level of [the Applicant's] concern is understandable: because of the redeployment process he has perceived the organization as trying to terminate him, and wanted to ensure that all personnel actions he agreed to were "official" ... [The Applicant] still has not received a copy of this action. So while still enthusiastic about starting work in PSS/PSU, [the Applicant] has still not yet been advised by PSS/PSU that the official transfer is complete."

XV. It was only on 13 August 1997 that the Applicant received his personnel action notice, indicating that he had been assigned to the Programme Support Unit, effective from 30 June 1997. That same day, the Applicant went to see the Chief of the Unit to show him the personnel action sheet and request an explanation as to why his appointment to the post in question expired on 31 December 1997 and why there was no functional title. According to the Applicant, the Chief of the Programme Support Unit "shouted at [him] that he [did] not want [him] in his unit and that there [was] no post for [him]. Two days later, on 15 August 1997, the Applicant was informed by the Chief of the Programme Support Unit that the Executive Director of UNEP had decided that he should stay in his IRPTC post until the end of 1997 and that "his position within IRPTC for the biennium 1998-1999 should be considered as part of their overall staffing/budget proposals for that biennium". On 12 September, the Administration offered the Applicant an agreed termination, but he declined, indicating that the offer was not in keeping with the assurances he had been given on 15 August 1997. Finally, following these administrative complications, on 1 December 1997 the Applicant was notified of his termination, under staff regulation 9.1 (a) on budgetary constraints.

XVI. The Tribunal wishes first of all to emphasize the Administration's pronounced inconsistency in handling the Applicant's case; it endorses the comments of the Joint Appeals Board in that connection:

> "As regards the Organization, the record shows also a great deal of confusion within UNEP management, in Geneva and Nairobi ... The summary of facts unequivocally points out the flow of contradicting information between Geneva and Nairobi, the inconsistency and lack of follow-up on the part of the Administration and the managers, as regards the Appellant's transfer to PSU."

XVII. The Tribunal finds that, as a result of the entire process described above, the Administration did not fulfil its obligation to make good faith efforts to find the Applicant an alternative post. Here the Tribunal recalls its Judgement No. 679, *Fagan* (1994), in which it stated, in paragraph XIII, that:

> "... staff rule 109.1 (c) requires that such efforts [to find alternative employment] be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation." (See also Judgement No. 943, *Yung* (1999).)

XVIII. The Tribunal cannot but be concerned at the number of catastrophic scenarios such as the one that unfolded in this case, and reiterates its conclusions, in which it went so far as to speak of "deviousness" in the *Karmel* judgement:

> "Unfortunately, the manipulations to which the Applicant was subject are becoming a habit in the United Nations Administration. The Tribunal notes that by this simple device, some staff members are dismissed and others are placed in their stead ... The Tribunal, more than once, has come across situations like the one just described." (Ibid., para. V. Cf., *Fagan*, ibid., and Judgement No. 882, *Ossolo* (1998).)

XIX. Accordingly, the Tribunal:

1. Orders that the Respondent's decision of 1 December 1997 to terminate the Applicant's permanent appointment be rescinded;

2. Orders that the Applicant be placed in a permanent post, equivalent to the one he encumbered before the artificial abolition of his own, within three months of the date of communication of this judgement;

3. Orders that, should the Respondent decide that, in the interest of the United Nations, the Applicant should be compensated without further action being taken in his case, in accordance with article 9, paragraph 1, of the Tribunal's Statute, the amount of compensation to be paid to the Applicant, in lieu of the specific

performance ordered, be fixed at two years of his net base salary at the rate in effect on the date of this judgement;

4. Orders that, in addition, compensation be paid to him in the amount of three months of his net base salary at the rate in effect on the date of this judgement;

5. Rejects all other pleas.

(Signatures)

Julio **Barboza**
Vice-President, presiding

Spyridon **Flogaitis**
Member

Brigitte **Stern**
Member

Geneva, 26 July 2002

Maritza **Struyvenberg**
Secretary