

Judgement No. 85*(Original: English)***Case No. 85:**
Carson**Against: The Secretary-General
of the United Nations**

Termination on the ground of abolition of post of the permanent appointment held by a staff member of the United Nations Children's Fund.

Factual evidence establishing that the abolition of the Applicant's post was neither mala fide nor motivated by prejudice.

Nature of permanent appointments.—Respondent's obligation to prove that the Applicant was in fact considered for the UNICEF posts which were available and was genuinely found not suitable for any of them.—Absence of written records which would enable the Tribunal to establish that that obligation had been fulfilled.

Rescission of the contested decision.

In the event of reinstatement, award to the Applicant of full salary from the date of termination up to the date of reinstatement, less the amount paid at termination in lieu of notice and less also the amount of termination indemnity.

In the event of a decision by the Secretary-General, in virtue of article 9, paragraph 1, of the Statute of the Tribunal, not to reinstate, award to Applicant:

(a) of full salary, from 1 August 1961 to the date of the decision not to reinstate, less the amounts paid in lieu of notice and less also the amount of termination indemnity;

(b) of an amount equal to that which would be payable under staff regulations and rules if the Applicant's appointment were terminated on the date of such decision by the Secretary-General.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; the Lord Crook, Vice-President; the Honourable Mr. R. Venkataraman; Mr. James J. Casey, alternate member;

Whereas, on 30 March 1962, Edna May Carson, a former staff member of the United Nations, specifically recruited for the United Nations Children's Fund, hereinafter called UNICEF, filed an application to the Tribunal requesting the Tribunal:

(a) to rescind the decision to terminate her permanent appointment, notified to her by a letter dated 24 July 1961 from the Deputy Director of UNICEF;

(b) to order her reinstatement;

(c) to order, in the event that the Respondent exercises the option given under article 9.1 of the Statute of the Administrative Tribunal, the payment as compensation of the sum of \$23,500, being the amount the Applicant would have been entitled to claim as lump sum in lieu of pension on the day before reaching the age of sixty, had she remained in the employment of the United Nations;

Whereas the Respondent delivered his answer on 22 May 1962;

Whereas the Applicant filed written observations on the Respondent's answer on 18 June 1962 ;

Whereas, on 2 July 1962, the Respondent submitted written comments on the Applicant's observations ;

Whereas, on 29 August 1962, the Tribunal requested the Respondent to supply additional information ;

Whereas, on 2 September 1962, the Respondent supplied the additional information requested ;

Whereas the facts in the case are as follows :

The Applicant entered the service of the United Nations on 21 January 1957 as a Public Relations Officer under a Special Service Agreement with UNICEF expiring on 1 March 1957 and was assigned to the post of Manager of the Greeting Card Fund. After a renewal for a period of three months, the Special Service Agreement was converted on 1 June 1957 into a probationary appointment. On 16 January 1959, the Executive Director of UNICEF addressed to the Applicant a Letter of Appointment offering her, as from 1 January 1959, a "permanent appointment in the Secretariat of the United Nations (*United Nations Children's Fund*)". The letter specified, *inter alia*, that the Applicant's initial assignment would be "Manager, Greeting Card Fund" at the Second Officer (P-3) level and pointed out that Staff Rule 109.1 provided that, in the case of abolition of post, "staff members specifically recruited for the United Nations Children's Fund have no entitlement . . . for consideration for posts outside that agency". On 3 February 1959, the Applicant accepted the permanent appointment offered to her. On 17 July 1961, the Applicant's supervisor called her by telephone in California where she was spending her leave and told her that UNICEF had decided to terminate her appointment. After her return to New York, she received a notice of termination dated 24 July 1961 from the Deputy Director of UNICEF, informing her that "the Administration of UNICEF has decided to terminate your Permanent Appointment in accordance with the provisions of Staff Regulation 9.1 (a)". The letter added that "since it has been agreed that your services will not be required during the period of notice, you will receive compensation in lieu of three months' notice in accordance with Staff Rule 109.3 (c), and your last working day will be 31 July 1961". On 25 July 1961, it was suggested to the Applicant on behalf of the Administration of UNICEF that she should resign in lieu of termination. On 31 July 1961, the Applicant addressed the following memorandum to the Deputy Director :

"With reference to your letter of termination to me, dated 24 July, I am sure you will understand that it is important to me, as part of my permanent job history to have in writing, from the Administration, the reason for the termination, *i.e.* as you have explained to me verbally that the post is being abolished."

On 4 August 1961, she requested the Secretary-General in writing to reconsider the decision to terminate her permanent appointment. Following the refusal of that request, the Applicant took her case to the Joint Appeals Board on 14 September 1961. On 28 November 1961, the Board submitted a unanimous report to the Secretary-General. The report noted that, in the course of the proceedings before the Joint Appeals Board, the Respondent claimed that the Applicant's permanent appointment had been terminated on the ground of

abolition of post. It observed, in this connexion, that there were "two decisive issues . . . before the Board:

"1. Did the administrative action of the respondent represent a *bona fide* abolition of a post ?

"2. Were the procedural guarantees required by Staff Rules and Regulations and by the jurisprudence of the Tribunal observed when the permanent contract of the appellant was terminated on the grounds of abolition of the post ?"

As regards the first issue, the report observed that "the appellant questioned the administrative soundness of the reorganization measures which led to the abolition of the post and the termination of her permanent contract". It concluded, however, that the Board "was not required to consider this aspect. The Administration is entitled to reorganize services and to abolish posts as a result of such reorganization. The advantages or disadvantages of such action were not held by the Board to be within its purview". As regards the second issue, the report recalled the obligations imposed on the Secretary-General by Staff Rule 109.1 and reviewed the jurisprudence of the Administrative Tribunal on the matter. The Board stated that it

" . . . made a thorough inquiry into the degree to which the respondent had complied with the . . . obligations [laid down in Staff Rule 109.1]. It found no evidence of efforts to find another post for the appellant made in the short interval, during the month of July 1961, between the decision to abolish her post and the serving of the notice of termination. Indeed, the Administration of UNICEF took pains to inform the appellant of her termination without delay, by telephone, as soon as the abolition of the post was decided upon. Nor is there conclusive evidence of efforts made in a systematic manner, with the knowledge of the staff member, during the period between the granting of the permanent contract and the decision to terminate, throughout which period, according to the respondent, abolition of the post had already been under consideration. As to the respondent's single recorded attempt to recommend the appellant after termination for a position outside UNICEF, and his stated intention to seek other employment for her during the three-month notice period, the Board felt that these are no substitute for compliance with procedures the primary aim of which is to obviate the need to terminate a permanent contract."

The report concluded that, having regard to the "evidence and considerations" quoted above,

"the Board finds that the respondent has failed to observe essential procedural requirements established for cases of termination of permanent contract on grounds of abolition of post or reduction of staff. It therefore unanimously recommends the rescinding of the decision to terminate."

On 11 January 1962, the Director of Personnel informed the Applicant in writing that, after reviewing the report of the Joint Appeals Board, the Secretary-General had decided to maintain the decision to terminate her appointment. On 30 March 1962, the Applicant filed the application referred to above.

Whereas the Applicant's main contentions are:

1. No grounds were indicated in the notice of termination issued to the Applicant on 24 July 1961. Subsequently, however, the Administration of

UNICEF stated that the permanent appointment of the Applicant had been terminated on the ground of abolition of post. Actually, no abolition of post was required by the necessities of the service in the meaning of Staff Regulation 9.1 (a) and the ground stated by the Administration did not constitute the real reason for the termination of the appointment as may be inferred from the following facts:

(a) The Applicant's post was not redundant and the duties previously performed by her had to be entrusted to other staff members after her termination.

(b) The post appeared in the budget for 1962 and the funds required to pay her salary were available. Moreover, the abolition of the post resulted in negligible savings.

(c) The Administration of UNICEF granted the Applicant a permanent appointment at a time when, according to what it subsequently claimed before the Joint Appeals Board, it was already contemplating abolishing her post.

(d) The decision to terminate the Applicant's permanent appointment was taken in an off-hand and unfriendly way. The Applicant was informed of the decision by telephone while she was on leave in California, one week before her scheduled return to work.

(e) The Administration of UNICEF suggested to the Applicant that she should submit her resignation in lieu of termination. If the suggestion was meant to help the Applicant, it clearly showed that, in the Administration's opinion, a statement of the real grounds for termination could have reflected on the Applicant's character and impaired her chances of finding a new employment.

(f) In the course of the proceedings before the Joint Appeals Board, the Respondent systematically disparaged the Applicant's performance although this performance had been previously recommended by the Applicant's supervisor in the only periodic report about her and in a recommendation for the granting of a permanent appointment which was subsequently approved by the Administration of UNICEF.

(g) The Respondent contended before the Joint Appeals Board that one of the reasons for the abolition of the Applicant's post was that the responsibilities of the post had become a source of friction with the United States Committee for UNICEF—the major customer of the Greeting Card Fund. When, however, the Administration of UNICEF abolished the post, it did not discontinue the responsibilities thereof but entrusted them to other staff members, clearly showing thereby that the Administration's aim was not the abolition of the responsibilities but their removal from the Applicant.

2. Staff Rule 109.1 (c) requires that, before terminating a permanent appointment, the Administration should review all the available posts for which the holder of the appointment might be considered. In the present case, no such review was undertaken before the decision to terminate the Applicant's permanent appointment. After the decision, a review was undertaken but it was carried out in such a perfunctory way that no positive results could have been achieved. The most exacting standards were used to assess the Applicant's qualifications. An available post at her level was not offered to her, even on a trial basis, while part of the duties previously performed by her were given to the holder of a probationary appointment.

3. In the absence of an available post, the duties of the Administration of UNICEF towards the holder of a permanent appointment should have caused it to refrain from, or at least to delay, abolishing the Applicant's post.

Whereas the Respondent's main contentions are:

1. The decision to terminate the Applicant's permanent appointment was based on a *bona fide* abolition of her post. The Applicant's allegations of a misuse of power or improper motivation are not supported by an evaluation of the administrative merits of the abolition of post or by an examination of the Respondent's conduct towards her.

(a) The fact that the Applicant's duties were absorbed by existing staff shows that the post was not necessary.

(b) There is no inconsistency between the ability to pay the salary attached to a particular post and the administrative justification for the abolition of the post in the interest of greater efficiency and economy. The Applicant's reference to the allegedly negligible savings which resulted from the abolition of her post is entirely irrelevant.

(c) The decision to terminate the Applicant's appointment was not taken in an unfriendly or off-hand way. It was the outcome of many months of careful consideration and discussion of all possible alternatives.

(d) The Applicant, who was then on leave in California, was informed by telephone of her prospective termination two weeks before the effective date of formal notice. The reason for telephoning the Applicant was to allow her the possibility of making plans for future employment in California where her closest family ties were.

(e) The Respondent's suggestion that the Applicant should submit her resignation while retaining termination indemnities was not inconsistent with termination for abolition of post. The procedure had been preferred in the past by staff members to termination on any ground, including abolition of post, for the reason that it was likely to minimize explanations to prospective employers.

(f) Nothing in the opinions expressed by the Respondent before the Joint Appeals Board concerning the Applicant's performance suggests the operation of concealed personal reasons for unfavourable action against the Applicant.

2. As regards the requirements of Staff Rule 109.1 (c), the Respondent made an affirmative showing of UNICEF's efforts to find alternative employment for the Applicant when, in the course of the proceedings before the Joint Appeals Board, he indicated the posts for which the Applicant might reasonably have been considered and the reasons why she was not deemed suitable for such posts as became vacant or were held by non-permanent appointees. The Board, however, failed to take into account the difference between the effective means of conducting a search for alternative employment in the whole United Nations Secretariat and suitable measures to find a vacancy among the limited number of professional posts at UNICEF. In a small agency like UNICEF, the absence of a written record of efforts and inquiries could hardly in itself imply non-observance of a staff member's right to consideration for available alternative posts.

3. Since there was no available post for the Applicant, the decision to terminate her permanent appointment was in conformity with proper administration and the relevant Staff Regulations and Rules.

The Tribunal, having deliberated from 29 August to 14 September 1962, now pronounces the following judgement :

1. The Applicant claims the rescission of the administrative decision terminating the permanent appointment on the grounds that the abolition of post was motivated by prejudice and was *mala fide* and that the Staff Regulations and Rules were not duly observed when the permanent appointment was terminated.

2. The Applicant's contentions that the post was not redundant and that the post had been provided for in the budget for 1962, do not prove that the abolition of the post was *mala fide*. The Tribunal has recognized in Judgement No. 2 the authority of the Administration to make any reductions in posts in the interest of economy and efficiency. The Tribunal has also held in the same judgement that the provision of funds in the budget only conferred authority and imposed no obligation to spend the entire credit provided for in the budget.

3. On the question of improper motivation, the Applicant relies on the letter of termination (Annex 6) where the ground for termination was not specified and on the suggestion by the Respondent that the Applicant should resign her post. It is a matter of importance to a staff member that the grounds for termination should be communicated to him. The Tribunal has emphasized this aspect in its earlier decisions. However, since the reason was orally communicated to the Applicant, the Tribunal does not draw any inference of improper motivation from the non-disclosure of grounds in the letter of termination. Similarly, the suggestion that the Applicant may voluntarily resign could have been made, as explained by the Respondent, in the interest of the Applicant herself.

4. Another suggestion of personal prejudice put forward by the Applicant refers to her relations with the Executive Director of the United States Committee for UNICEF and the alleged statement of the Executive Director that he would get her out of the job. Even if the statement were true, it was made by one without any authority in the United Nations Organization, and made far too long—more than 18 months—before the termination, to warrant an inference of prejudice against the Applicant.

5. Taking all these circumstances together and taking into account that a reorganization of the staff was actually under contemplation during the period, the Tribunal concludes that the abolition of the post was neither *mala fide* nor motivated by prejudice.

6. In terminating the permanent appointment of a staff member, the Respondent has certain obligations under Staff Rule 109.1 (c). The Chief of the Administrative Division has stated in Annex 22 that the UNICEF Administration fully recognized and took account of its obligation under Staff Rule 109.1 (c) "with respect to placing the appellant [Applicant herein] in another available post". The burden of proving that the Respondent made a diligent search for another available post for the Applicant rests on the Respondent.

7. The Respondent contends that by reason of lack of qualifications, the Applicant was not suitable for various posts for which she was considered. Unfortunately there is nothing on record in the personal file of the Applicant to show that the Applicant was in fact considered for any of these posts. The Tribunal has noticed that in similar cases, the Administration prepared a memorandum giving details of the qualifications required for available posts and the reasons for its decision regarding suitability. Such a document, prepared contemporaneously, will help to establish whether a reasonable search was made

in the observance of Staff Rule 109.1 (c). The Respondent contends in paragraph 26 of the answer that "the absence of a written record of efforts and enquiries could hardly in itself imply non-observance of Applicant's right to consideration for available alternative posts ; for such a record is not the only means of showing compliance with Staff Rule 109.1 (c)". The Respondent also states that in a small office like UNICEF "the observance of the rule can be established by an indication of the actual existence or non-existence of posts for which the staff member may reasonably have been considered".

8. The Tribunal wishes to repeat its observations on the nature of a permanent appointment made in Judgement No. 29 and quoted thereafter in later judgements. Permanent appointments are granted to those staff members who are intended for the career service. "This type of appointment has been used from the inception of the Secretariat to ensure the stability of the international civil service and to create a genuine body of international civil servants freely selected by the Secretary-General." In order to prove that the staff rights have not been disregarded, the Respondent has to show in this case:

(a) that the Applicant was in fact considered for available posts and

(b) that the Applicant was genuinely found not suitable for any of them.

It is not sufficient to state that the Applicant could not have qualified for any available post without in fact making an assessment at the relevant date of the requirements of the available post and the qualifications of the Applicant. In its Judgement No. 68, the Tribunal scrutinized a memorandum prepared by the Administration and found that "in considering the qualifications of the Applicant, sweeping generalizations have been made which are not warranted by the facts relating to the Applicant's qualifications. The Tribunal cannot help coming to the conclusion that the decision that the appointment of the Applicant was not feasible in the near future was taken in haste and without due care and consideration". The Tribunal finds that such a scrutiny is not possible in this case because of the absence of material evidence of any consideration given by the Respondent regarding the Applicant's suitability for the available posts.

9. The Tribunal is also of the view that the small size of the Organization does not exempt it from the observance of the Staff Regulations and Rules.

10. From the fact that even the ground for termination was not communicated in the letter of termination and the manner in which efforts were said to have been made by the Respondent to place the Applicant in another available post, the Tribunal draws the inference that the Respondent was not fully alive to his statutory obligations.

11. The Tribunal therefore decides that the Respondent has failed to fulfil his obligations under Staff Rule 109.1 (c) and that the administrative decision terminating the appointment of the Applicant should be rescinded. In the event that the Applicant is reinstated, the Tribunal awards full salary from the date of termination up to the date of reinstatement, less the amount paid at termination in lieu of notice and less also the amount of termination indemnity.

12. In the alternative event that the Secretary-General exercises his option under article 9, paragraph 1, of the Statute of the Tribunal and decides not to reinstate the Applicant, the Tribunal is required to fix the amount of compensation to be paid to the Applicant.

The Applicant claims a lump sum of \$23,500 on the basis of what she would have been entitled to claim in lieu of pension on the date before reaching the age of 60. The Tribunal considers that the basis of the claim is unsustainable. The Tribunal has held in its Judgement No. 67 that "this compensation is fixed in the light of personal circumstances and is distinguishable from the system of remuneration applicable to serving staff members, which is fixed by means of general provisions. The compensation is intended to repair a wrong, not to remunerate services".

Taking into account the personal circumstances of the Applicant, namely :

- (i) that the Applicant was 53 years of age,
- (ii) that her rating in service was good,
- (iii) that she received her permanent contract in January 1959,
- (iv) that the Applicant's skills are such as to make it possible for her to secure employment in a reasonable period of one year, and
- (v) that the number of posts in UNICEF is limited and the expectation of continued employment is slender,

the Tribunal orders :

(a) the payment of full salary to the Applicant, from 1 August 1961 till the date of the decision of the Secretary-General under article 9, paragraph 1, of the Statute of the Tribunal, less the amounts paid to the Applicant in lieu of notice and less also the amount of termination indemnity and

(b) the payment of an amount equal to that which would be payable under Staff Regulations and Rules if the Applicant's appointment were terminated on the date of such decision by the Secretary-General.

(Signatures)

Suzanne BASTID
President

CROOK
Vice-President

R. VENKATARAMAN
Member

James J. CASEY
Alternate Member

Nicholas TESLENKO
Executive Secretary

Geneva, 14 September 1962.
