

UNITED NATIONS ADMINISTRATIVE TRIBUNAL

Judgement No. 167

(Original: English)

Case No. 168:
Fernandez Rodriguez

Against: The Secretary-General
of the United Nations

Compensation claim submitted by a former staff member of the Latin American Institute for Economic and Social Planning (ILPES) for the damage allegedly suffered by him as a result of his assignment to the Economic Commission for Latin America (ECLA) and for the damage suffered by him as a result of an invalid periodic report.

Compensation claim concerning the Applicant's assignment to ECLA.—The assignment having been carried out by agreement between ILPES, ECLA and the Applicant, the Respondent cannot avail himself of his discretionary power under Staff Regulation 1.2.—In the absence of evidence of what was agreed between the parties, the Tribunal is unable to find that the assignment of duties to the Applicant by ECLA was a violation of any agreement or any specific Staff Regulation or Rule.—Consideration of duties assigned to the Applicant by ECLA.—The Tribunal endorses the conclusion of the Joint Appeals Board that the Respondent, by assigning the Applicant to work he was patently unqualified to perform, disregarded the principle of good faith in relations between the parties to an agreement.—Having completed his appointment and received remuneration for that period, the Applicant suffered no financial losses.—Vagueness of the alleged moral injury suffered by the Applicant and impossibility of quantifying it in terms of money.—Claim rejected.

Compensation claim concerning the periodic report.—Since the invalidity of the periodic report is not in dispute before the Tribunal, the only question before it is whether the Applicant suffered any injury or loss as a consequence of the invalid periodic report.—The Applicant's application for employment with ILO was rejected.—The Tribunal cannot conclude from the evidence that the rejection was directly due to the periodic report.—The existence of an unfavourable report was generally known.—The Tribunal concludes that the Applicant's employment prospects were affected to some extent by the periodic report.—Award to the Applicant of the sum of \$1,000 as compensation for the prejudice caused to his prospects of employment by the invalid periodic report.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Madame Paul Bastid, Vice-President; Mr. Francisco A. Forteza;

Whereas at the request of Francisco Fernández Rodríguez, a former staff member of the Latin American Institute for Economic and Social Planning, hereinafter called ILPES, the President of the Tribunal, with the agreement of the Respondent, extended successively to 11 June 1972 and to 31 July 1972 the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 July 1972, the Applicant filed an application which did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicant, after making the necessary corrections, again filed the application on 19 October 1972;

Whereas the pleas of the application read as follows:

"1. *Contested decisions.* The decisions against which this application is made are:

"(a) The assignment of the Applicant to the post given to him in the Economic Commission for Latin America (ECLA) and the refusal to reinstate him in his post in the Latin American Institute for Economic and Social Planning (ILPES) or to assign him in good faith to a post consistent with his seniority and experience.

"(b) The periodic report on the Applicant of 25 July [June?] 1969.

"2. *Obligations invoked.* The first of the above-mentioned decisions violates (a) section I of the Applicant's letter of appointment of 1 July 1967 and (b) the principle of good faith. The periodic report of 25 June 1969 violates (a) the provisions of Administrative Instruction ST/AI/115 and (b) the principles recognized by the Administrative Tribunal concerning the basic formalities, motivation and veracity of periodic reports (Judgements Nos. 122 and 158). Being in violation of the above-mentioned criteria and principles, the contested decisions create the subsidiary obligation to pay the Applicant compensation for the resultant damage.

"3. *Claims.* The Applicant requests the Tribunal to order the Secretary-General to compensate him for all the moral and material damages resulting from the contested decisions so as to reinstate him in the situation he would have been in if the decisions had not been taken; the total compensation claimed by the Applicant is estimated by him at two years' base net salary."

Whereas the Respondent filed his answer on 4 January 1973;

Whereas the Applicant filed written observations on 6 February 1973;

Whereas the Respondent submitted an additional statement on 20 February 1973;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 July 1966 under an intermediate-term appointment for one year at level 4 as Co-ordinator for Advisory Services in the Advisory Services Division of ILPES. On 1 July 1967 his appointment was extended for two years. On 27 October 1967, in a letter addressed to the Deputy Director-General of ILPES, the Applicant complained that his supervisor, the Director of the Advisory Services Division, was not permitting him to do his work and was trying to force him to resign. By a letter dated 29 January 1968 the Chief of the Administrative and Financial Services of ILPES informed the Applicant, upon instructions from the Office of the Director-General, that it had been decided to terminate his contract as a staff member of the Institute. On 31 January 1968, the Applicant wrote to the Secretary-General, to the President of the Administrative Tribunal and to the Secretary of the Joint Appeals Board that he wished to appeal that decision, since no grounds had been stated and he had not been accorded due process. On 20 March 1968 the Applicant informed the Secretary-General that a mutually agreed solution had been reached between ILPES and himself regarding the termination action taken against him by ILPES and that his appeal was accordingly withdrawn. On the same day, the Chief of the Division of Administration of the Economic Commission for Latin America (ECLA) informed the Acting Director of Personnel of the United Nations that "a mutually agreed solution has been reached wherein Mr. Fernández is being assigned to ECLA on a non-reimbursable basis" and that the letter addressed to the Applicant

on 29 January 1968 was therefore no longer pertinent. On 22 April 1968, the Chief of the Administrative and Financial Services of ILPES requested the Director of the Advisory Services Division to prepare a periodic report on the Applicant's performance from July 1966 to March 1968. No such report was prepared at that time, however. The Applicant had entered on duty at ECLA on 20 March 1968. On 3 May 1968 the Chief of the Division of Administration of ECLA wrote to the Chief of the Office of Personnel of ECLA that "it would be advisable to supply Mr. Fernández with his responsibilities in his new assignments with ECLA, in order to prevent any future misunderstandings". In October 1968 the Applicant's letter of appointment was cancelled and superseded by a letter of appointment for Technical Assistance project personnel subject to the Staff Regulations and to the Staff Rules governing such personnel. On 5 November 1968 the Applicant wrote to the Executive Secretary of ECLA that, since the work of preparing news bulletins to which he had been assigned was completely without importance and since he could not go on in that situation without giving free rein to those who had taken advantage of his honesty and good faith to undermine his career, he had decided to go back to the work for which he had been recruited and for which he was being paid by ILPES. In two letters to the Deputy Director-General of ILPES dated 27 March and 3 April 1969 respectively, the Applicant asked to be restored to his ILPES post on the grounds that the agreement reached on 20 March 1968 had not been fulfilled by ILPES and was void and that consequently his assignment to ECLA had ended. On 9 April 1969 the Chief of the Division of Administration of ECLA wrote to the Deputy Director-General of ILPES that it was incumbent upon him to reply to the Applicant's letters as soon as possible in order not to aggravate the situation any further. On 10 April 1969 the Applicant sent to the Secretary-General a copy of an application dated 11 April 1969 to the Administrative Tribunal. On 16 April 1969 the Acting Deputy Director-General of ILPES advised the Applicant on behalf of the Deputy Director-General that consultations had been started with Headquarters before taking a final decision on his application to resume his former post and that in the meantime the Applicant would have to continue to discharge his duties at ECLA. By letters dated 29 April and 19 May 1969 the Applicant filed an appeal with the Joint Appeals Board. The Applicant's services for the period from July 1966 to March 1968 were evaluated in a periodic report prepared on 25 June 1969 by the Director of the Advisory Services Division of ILPES as first reporting officer and by the Deputy Director-General of ILPES as second reporting officer. In that report, the Applicant was rated as, on the whole, an unsatisfactory staff member. When signing the report on 30 June 1969, the Applicant wrote the following comment: "I reject this periodic report for its lack of objectivity, the falsehoods it contains and the bad faith in which it was drawn up, as I indicate in the attached memorandum", and he appended a detailed rebuttal of the report, reserving "the right to impugn the report and to seek both moral and material compensation for the damage which its writers inflicted on me". The Applicant's appointment expired on 30 June 1969. The Joint Appeals Board submitted its report on 29 November 1971. The Board's conclusions and recommendations read as follows:

"Conclusions and Recommendations"

"38. The Board found that the respondent, by assigning the appellant to work in ECLA which he was patently unqualified to perform, had disregarded the principle of good faith in relations between the parties to an agreement. The Board found, however, that the appellant had suffered no damage from the assignment, and accordingly made no recommendation for the payment of any compensation to the appellant in respect of his assignment to ECLA.

"39. The Board found further that the periodic report of June 1969 was invalid, in view of all the defects of form mentioned in paragraph 37 above, and

recommended that the report be withdrawn from the appellant's official status files. It also concluded that any certification of service given to the appellant should not be based on the invalid periodic report of June 1969, and that no reference should be made to that report by the Organization in replying to any inquiries from third persons concerning the appellant's service with ILPES.

"40. The Board was unable to make any recommendation in favour of the appellant's other pleas . . .".

On 10 February 1972 the Director of Personnel of the United Nations informed the Applicant that, having reviewed the case in the light of the Board's report and having taken note of its recommendations, the Secretary-General had decided:

"(a) to pay no compensation to you in respect of your assignment to ECLA;

"(b) to withdraw the periodic report of June 1969 from your official status file;

"(c) to make no reference to the periodic report of 1969 in replying to inquiries from third persons concerning your performance with ILPES;

"(d) not to base any certification of your service with the United Nations on the periodic report of June 1969, and

"(e) to take note of the conclusion of the Board that it was unable to make any recommendation in favour of the other pleas submitted by you in your appeal".

On 31 July 1972 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. As a result of the contested decisions, the Applicant did not manage to find employment for 16 months after his contract expired and his professional reputation was irreparably damaged.

2. Before joining ILPES, the Applicant was a businessman of great repute. His performance in ILPES, where he took part in two important missions, one to the President of the Dominican Republic, enhanced his standing. All the information available indicates that his services were satisfactory: he was congratulated by his superiors after these two missions; his initial contract was extended for twice the original length; the fact that no reason was given in the letter of termination, and the subsequently proposed compromise solution, show that there was no reason; and on 1 July 1968 he received a within-grade increment.

3. Because of personal differences, the Applicant's superiors drew a veil over his reputation and good performance by removing him from the important functions for which he had been recruited and assigning him in bad faith to others which were unrelated to those provided for in the contract, virtually superfluous and incompatible with his experience. In view of the undeniable relationship between the work one performs and one's job potential, the change of post obviously seriously prejudiced the Applicant's career.

4. To make matters even worse, the Applicant's superiors issued a periodic report on him which was absolutely false and indefensible; as a result of that report, the Applicant lost opportunities for employment in international organizations and otherwise.

5. In conclusion, the contested decisions—which are irregular since, as the Joint Appeals Board established, they violated both the principle of good faith and the Applicant's conditions of service—caused him enormous material and moral damages.

Whereas the Respondent's principal contentions are:

1. The assignment of the Applicant to ECLA did not violate any term of his appointment. The Secretary-General's power of assignment under Staff Regulation 1.2

—a provision incorporated by reference in each of the Applicant's three letters of appointment—need not yield to any opposition on the part of the staff member affected and applies fully to ILPES and ECLA—as both are activities of the United Nations—without the requirement of consent that would apply to a secondment to another international organization. The Applicant's duties in ECLA were not at a lower level than those he discharged in ILPES and in any event the reorganization of posts or staff in the interest of economy and efficiency, along with the grading of functions, are not subject to review by the Tribunal.

2. The Applicant has produced no evidence establishing that the administrative decisions of which he complains were taken in bad faith or were improperly motivated, or that any official of ILPES or ECLA with whom he had to deal was prejudiced against him. The charges of non-compliance with Administrative Instruction ST/AI/115, in particular, are groundless since the Staff Rules of the 200 Series, which governed the Applicant's appointment, contain no provision similar to Staff Rule 112.6.

3. The Applicant has not sustained any damage as a result of the contested decisions. His assignment to ECLA did not diminish any of his rights as a staff member, and the periodic report, however inadequate, was not in substance unfair to him.

The Tribunal, having deliberated from 19 to 23 March 1973, now pronounces the following judgement:

I. The Applicant claims compensation for all the material and moral damages resulting from his assignment to ECLA in disregard of the principle of good faith and for the damage suffered by him as a result of the invalid periodic report of June 1969.

II. The Tribunal observes that the Applicant was assigned to ECLA as a result of a mutual agreement between ILPES, ECLA and the Applicant under which ILPES rescinded the order of termination of the Applicant's appointment, ECLA accepted assignment of the Applicant on a non-reimbursable basis and the Applicant withdrew his appeal. Thus, the assignment of the Applicant to ECLA was by agreement and not under Staff Regulation 1.2. Therefore, the Respondent's plea that under Staff Regulation 1.2 the Secretary-General has a wide discretion in the assignment of duties to staff members has no relevance to this case since the relationships between the parties were governed by mutual agreement.

III. There is, however, no evidence of what was mutually agreed between the parties. The Tribunal is therefore unable to find that the assignment of duties to the Applicant by ECLA was either a breach of any agreement arrived at during the compromise of his appeal or a violation of any specific staff regulation or rule applicable to him.

IV. The Applicant maintains that he had a lucrative position in private business, that his services were actually sought by the then Assistant Director of the Advisory Services Division of ILPES, that during the first year of his employment he carried out successfully two important missions for which he was complimented, that he was awarded renewal of contract for two years and that, therefore, the functions assigned him in ECLA such as gleaning from newspapers and magazines information useful to staff members were a violation of his terms of employment as well as of the agreement made at the time of the withdrawal of his appeal. A scrutiny of the functions assigned to the Applicant shows that 5 out of 13 newspapers and 4 out of 6 magazines listed for the preparation of daily news bulletins were in English, a language with which he had no familiarity. In his personnel history form the Applicant had stated that he had no knowledge of any language other than Spanish and there is nothing to show that he acquired knowledge of other languages later during his employment. When the dispute was compromised and the Applicant was assigned duties in ECLA he had every reason to expect fair treatment in the new sphere allotted to him, and the assignment

of duties which he was obviously not qualified to perform on account of language limitations cannot be justified on the ground of exercise of discretion. The Tribunal notes further that in his letter of 5 November 1968 to the Executive Secretary of ECLA the Applicant complained that the work assigned to him was "completely without importance" and that he was capable of doing "something more useful and demanding".

V. The Tribunal therefore endorses the conclusion of the Joint Appeals Board that "the respondent, by assigning the appellant to work in ECLA which he was patently unqualified to perform, had disregarded the principle of good faith in relations between the parties to an agreement". However, as the Applicant completed the full term of his appointment and received a remuneration for that period, the Tribunal finds that he suffered no financial loss as a consequence of the duties assigned to him by ECLA.

VI. As regards the Applicant's claim for moral injury allegedly suffered by him as a result of an assignment to functions not consistent with his qualifications and experience, the Tribunal observes that in its Judgement No. 92 it has held that "in awarding damages it [the Tribunal] has to be satisfied that the damages claimed follow naturally as a consequence of the action contested". The moral injury alleged to have been suffered by the Applicant is too vague and is not capable of quantification in terms of money.

VII. The Tribunal therefore rejects the Applicant's claim for damages based on his contested assignment to ECLA.

VIII. The Applicant further claims damages on the ground that his employment prospects were prejudiced by the invalid periodic report issued by ILPES in June 1969 and states in particular that he lost the chance of employment by the ILO and by a private organization.

IX. The Joint Appeals Board reached the conclusion that "the periodic report of June 1969 was invalid, in view of all the defects of form . . .", and recommended that the report be withdrawn from the Applicant's official status file. The Board also concluded that "any certification of service given to the appellant should not be based on the invalid periodic report of June 1969, and that no reference should be made to that report by the Organization in replying to any inquiries from third persons concerning the appellant's service with ILPES". By a letter dated 10 February 1972, the Director of Personnel of the United Nations informed the Applicant that, having reviewed the case in the light of the Board's report and having taken note of its recommendations, the Secretary-General had decided:

" . . .

"(b) to withdraw the periodic report of June 1969 from your official status file;

"(c) to make no reference to the periodic report of 1969 in replying to inquiries from third persons concerning your performance with ILPES;

"(d) not to base any certification of your service with the United Nations on the periodic report of June 1969;

" . . ."

Thus the invalidity of the periodic report is not in dispute before the Tribunal, and the only question before the Tribunal is whether the Applicant suffered any injury or loss as a consequence of the invalid periodic report.

X. The Applicant contends that his application for employment with ILO was strongly supported by Mr. Felipe Herrera, President of the Inter-American Development Bank, and others, and that it met with negative results because of information received about the adverse report on the Applicant's performance. But a letter dated

8 February 1973 from the Chief of the Personnel and Administrative Services Department of ILO, produced by the Respondent, while admitting that the Applicant's suitability for employment was examined by ILO, states that the Applicant was not accepted as he did not possess the requisite qualifications and that no adverse report on the Applicant was "received at the ILO".

XI. The Tribunal is unable to hold on the evidence that the rejection of the Applicant's candidacy by ILO was directly due to the adverse periodic report. But it is clear from letters produced by the Applicant that the existence of an unfavourable report on his performance was generally known. It also appears from the file that at least one eminent person felt that his supporting action on behalf of the Applicant would have been useless in view of the existence of the unfavourable periodic report. The Tribunal therefore reaches the conclusion that the Applicant's employment prospects were affected to some extent by the invalid periodic report of June 1969.

XII. It is not easy to assess in financial terms the extent of the loss suffered by the Applicant on account of the invalid periodic report. The Tribunal has to fix a fair and reasonable compensation for the injury sustained.

XIII. The Tribunal accordingly awards the Applicant a sum of \$1,000 as compensation for the prejudice caused to his prospects of employment by the invalid periodic report of June 1969.

(Signatures):

R. VENKATARAMAN
President

Suzanne BASTID
Vice-President

Geneva, 23 March 1973

F. A. FORTEZA
Member

Jean HARDY
Executive Secretary

Judgement No. 168

(Original: French)

Case No. 160:
Mariaffy

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

Termination of the employment of a staff member holding a probationary appointment.

Decision of the Secretary-General to terminate the Applicant's appointment on the recommendation of the Appointment and Promotion Board, itself adopted on the recommendation of the Office of Personnel in New York, whereas the competent authorities of the United Nations Office in Geneva had recommended extension of the probationary period for one year.—Request of the Applicant for rescission of this decision on the ground that he had reason to count on a one-year extension of his probationary service.

The two periodic reports submitted to the Appointment and Promotion Committee covered approximately 21 months during which, because of a car accident, the Applicant had effectively worked only approximately 16 months.—The Applicant refrained from drawing attention to the fact that, for reasons beyond his control, he had not in fact had the opportunity to serve a normal probationary period.—Lack of any strict rule relating to the length of service which must be taken into account.—The Respondent