

ADMINISTRATIVE TRIBUNAL

Judgement No. 392

Case No. 403: JOINER

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Arnold Kean, First Vice-President, presiding;
Mr. Luis de Posadas Montero, Second Vice-President; Mr. Ahmed Osman;

Whereas at the request of St. George Adéwolé Joiner, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit in which to file an application until 30 June 1986 and 30 November 1986;

Whereas on 9 October 1986 the Applicant filed an application in which he requested the Tribunal:

"... to direct the Respondent to pay to the Applicant, at the then appropriate rate, assignment allowance from 16 May 1980 until 31 December 1980, both dates inclusive, as recommended by the Joint Appeals Board in the 'Conclusions and Recommendations' of its unanimous Report dated 16 November 1985;"

Whereas the Respondent filed his answer on 13 March 1987;

Whereas the Applicant filed written observations on 10 April 1987;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 19 October 1973. He was initially offered a two-year fixed-term appointment with the United Nations Development Programme as a Programme Officer at the P-1, step IV level. His appointment was extended for a further fixed-term period of two years and he was

assigned to Malawi. During the course of his assignment to Malawi, on 16 November 1976, the Applicant was transferred to the United Nations Conference for Trade and Development, hereinafter referred to as UNCTAD, in Geneva. He initially served on two successive two-year fixed-term appointments as Special Assistant to the Director of the Shipping Division and as Associate Economic Affairs Officer respectively at the P-2 level. In April 1979, the Applicant was promoted to the P-3 level.

In a cable dated 9 January 1980, the Chief, Administrative Service, UNCTAD, requested the Assistant Secretary-General for Personnel Services' approval to transfer the Applicant -- who was agreeable to the transfer -- to a P-3 vacant post at the New York UNCTAD Liaison Office. In a reply dated 16 January 1980, the Chief, Staff Services, OPS, approved the transfer. On 1 February 1980, a Senior Personnel Officer, Administrative Service, UNCTAD, informed the Applicant that his "transfer to the UNCTAD Liaison Office in New York" had been approved and would be effective 1 May 1980.

On 9 May 1980, a Personnel Officer at UNCTAD prepared a Personnel/Payroll Clearance Action Form to record the Applicant's "transfer" to Headquarters. In Section 15: "Authorized Allowances" it is stated that the Applicant was entitled to a "dependency allowance" only, and in Section 21 it is stated that the Applicant was entitled to "Full Removal Expenses at the dependency rate".

In a cable dated 30 May 1980, the Senior Personnel Officer, Administrative Services, UNCTAD, informed the Personnel Officer at Headquarters that:

"ST. GEORGE JOINER'S TRANSFER TO NEW YORK OFFICE UNCTAD TO BE EFFECTIVE AS OF 16 MAY 1980 AND HE TAKEN OFF GENEVA PAYROLL COB [CLOSE OF BUSINESS] 15 MAY ... ".

A Personnel Action form was issued to record the transfer. It described the action as a "Reassignment, Change of duty station, allotment account, post number and office code". Under the section on "Remarks of Issuing Department" it is stated "Transfer from

UNCTAD Geneva approved on behalf of ASG, Personnel Services ...". (Emphasis added) Under the section on "Remarks of Office of Personnel Services" it is stated "Reassignment to UNCTAD Liaison Office approved by ... OPS ...". (Emphasis added)

The Applicant arrived at New York to assume his new functions in May 1980.

The Applicant's appointment was extended for a further fixed-term period of two months until 15 January 1981, pending the approval by the Appointment and Promotion Committee of his probationary appointment. On 1 January 1981, the Applicant was offered a probationary appointment, with retroactive effect to 16 November 1980. On 1 September 1981 his appointment became permanent.

On 2 November 1983, the Applicant wrote to the Chief, Administrative Services, UNCTAD, asking to be paid an assignment allowance retroactively. He asserted that he had raised the question earlier, approximately a month after his arrival in New York, but had been informed at the time that he was not entitled to that allowance because he "... was only moving to another office of [his] parent organization UNCTAD, at Headquarters, where [he] would technically come under the administrative jurisdiction of United Nations Headquarters where an assignment allowance was not normally payable". The Applicant also noted that two of his colleagues who had moved from Geneva to the UNCTAD New York Office had received an assignment allowance. He asserted that in view of the action taken in these two cases, the allowance should be paid to him as well.

In a reply dated 11 November 1983, the Senior Personnel Officer, Administrative Service, UNCTAD, Geneva, stated:

"With reference to your memorandum of 2 November, I am afraid you were not eligible for an assignment allowance at the time you took up your present assignment in New York. According to your file, you were assigned to the New York Office for an indefinite period. The assignment allowance is payable for assignments of a specific duration and of less than two years. Staff rule 107.27 on full removal refers, in addition of course to staff rule 103.22 on the assignment allowance

itself. The cases you refer to in your memorandum involved precisely assignments for a definite period which is not the case here."

On 11 January 1984, the Applicant sought review of the administrative decision not to grant him an assignment allowance. In a reply dated 15 March 1984, the Assistant Secretary-General for Personnel Services notified the Applicant that the contested decision would be maintained on the following grounds:

"... Since your move was for an indefinite duration, rather than for a limited, specified period of time as provided in staff rule 103.22, the requirements for payment of an assignment allowance had not been met. You were instead granted full removal of personal effects and household goods in accordance with staff rule 107.27.

In your letter, you appeared to raise an issue of possible discrimination against you by pointing to the cases of two other UNCTAD staff members who, according to your information, had received both assignment allowance and entitlement to full removal. The record, however, does not substantiate that allegation. In one of those cases, shipment of household goods under staff rule 107.21(f), rather than full removal under staff rule 107.27, was involved, since the staff member has been assigned to New York for a period of more than one year but less than two years. In the other case, assignment allowance was paid when the staff member was assigned to New York for one year, in 1976. That payment ceased, and full removal was granted, when the assignment was subsequently changed to a move of an indefinite duration.

I have noted that your request for administrative review has been filed several years after the expiry of the relevant time-limit. Therefore, should you pursue the case before the Joint Appeals Board, we would have to raise the issue of receivability under staff rule 111.2(e)."

On 10 April 1984, the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 14 November 1985. Its conclusions and recommendations read as follows:

"Conclusions and recommendations

35. In terms of the definition of 'transfer' as given in the

Inter-Organization Agreement No. ACC/1982/PER/CM/24 dated 2 November 1982, the Panel finds that the appellant was not transferred from UNCTAD, Geneva to UNCTAD, New York, but was reassigned.

36. The Panel finds that the appellant, as of the date of his reassignment to UNCTAD, New York, i.e. 16 May 1980, had a fixed-term appointment for a specific period extending through 15 November 1980, which was later extended until 15 January 1981. Hence, he had, as of the date of his reassignment, a fixed-term appointment for less than one year.
37. The Panel finds that in the absence of any written offer or letter of appointment duly signed by an authorized official of the Office of Personnel Services granting the appellant an extension of appointment beyond the expiration date of his fixed-term appointment, i.e. 15 November 1980, he as of 16 May 1980 was reassigned to UNCTAD, New York, for a specified period, namely, firstly through 15 November 1980 and later through 15 January 1981. He could not therefore logically or legally be considered to have been reassigned to UNCTAD, New York, for an indefinite period. The Panel did not find any evidence in the file that the appellant was reassigned to UNCTAD, New York, for an indefinite period nor was the representative of the Secretary-General able to produce any supportive evidence to the effect that the appellant's move to UNCTAD, New York as of 16 May 1980 was for an indefinite period.
38. The Panel finds that for staff members who are assigned to a duty station for less than one year, staff rule 103.7(d) (ii) provides for the payment of post adjustment, installation grant and assignment allowance or in lieu of the above appropriate subsistence allowance. The Panel notes that the appellant in lieu of the subsistence allowance has received post adjustment and installation grant but not assignment allowance. In terms of the above staff rule, the Panel finds that the appellant should also receive assignment allowance through 31 December 1980.
39. The Panel finds that in terms of staff rule 103.22(e), the appellant is not entitled to the payment of assignment allowance beginning 1 January 1981 on which date he has been granted a probationary appointment, in view of his entitlement as of that date to removal expenses from Geneva to New York under a probationary appointment. The Panel notes that this entitlement had been granted to the appellant earlier than 1 January 1981 and he had also exercised it. Thus, the appellant has no further entitlement to removal expenses from Geneva to New York.

40. The Panel makes no further recommendation in respect of the appeal."

On 30 May 1986, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had decided to maintain the contested decision and to take no further action in his case.

On 9 October 1986, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Applicant was not transferred but reassigned to the UNCTAD New York Office from Geneva. Since he was serving on fixed-term appointment she could not have been considered reassigned to New York for an indefinite period.

2. The Applicant is entitled to received an assignment allowance through 31 December 1980 since staff rule 103.7 (d) iii) provides that staff members who are assigned to a duty station for less than one year should be paid post adjustment, installation grant and assignment allowance or daily subsistence allowance in lieu thereof.

3. Staff rule 107.27 did not apply to the Applicant upon his re- assignment to New York because he was then serving on a fixed-term appointment of less than one year's duration.

4. The Applicant at the time of his reassignment was not given a choice between receiving an assignment allowance and removal costs. He accepted in good faith the entitlements granted to him and when he raised questions he was given wrong and misleading information.

Whereas the Respondent's principal contentions are:

1. The Applicant was granted full removal expenses and did not object to it, but on the contrary exercised his entitlement. He is therefore estopped from claiming an assignment allowance.

2. Since the claim for an assignment allowance was not made within a year following the date on which the Applicant could have been entitled to the payment of that allowance, the claim is time-barred and must be rejected.

The Tribunal, having deliberated from 12 October 1987 to 27 October 1987, now pronounces the following judgement:

I. The Tribunal notes that the Applicant arrived in New York to assume his new functions on 16 May 1980 and that, consequently, it is on this date that his alleged entitlement to an assignment allowance would have commenced.

II. The Tribunal further notes that it was not until 2 November 1983 that the Applicant submitted his claim in writing to the Administration.

III. In view of the provisions of staff rule 103.15, that staff members shall not receive retroactively allowances due unless they have made a written claim within one year, beginning on the date they would have been entitled to initial payment, the Tribunal addressed itself, in the first place, to the question whether the said staff rule was applicable in this case.

IV. The Applicant, in his written observations, submits that he did not file his claim upon his arrival in New York, because he was verbally informed by the then Senior Personnel Officer in UNCTAD that he was not eligible for an assignment allowance and that it was upon coming to know that other staff members in similar situations had received such allowance that he had filed his claim in November 1983.

V. The Tribunal notes in this respect, that staff rule 103.15 clearly requires a claim submitted in writing, as the only way of

preserving the staff member's rights beyond the one year time-limit, and as a condition precedent to his receiving payment. Consequently, the failure to file a claim in writing within the time-limit deprives the staff member of any possibility of receiving a retroactive payment, irrespective of the reasons he may have had for not complying in due time with the requirements set forth by the staff rule.

VI. The Applicant rejects the application of staff rule 103.15 on the grounds that it was only invoked by the Respondent in his answer before the Tribunal, after having invoked, without success, the applicability of the time-limits referred to in staff rule 111.2(a), (b) and (c) before the Joint Appeals Board.

The Tribunal holds that the moment in which staff rule 103.15 is invoked has no bearing on its applicability. The requirements of staff rule 103.15 are to be considered the conditions that have to be met by the staff members' claims for retroactive payment. The one year time-limit included in staff rule 103.15 is not a time-limit that can be waived or that is not applicable if it is not timely invoked; it is an essential condition of the claim.

This being the situation, the Tribunal holds that the fact that staff rule 103.15 was not timely invoked is irrelevant. Even if such rule had never been invoked by the parties, the Tribunal would have to apply it ex-officio, in order to ensure that retroactive payments are granted only in accordance with the rule. In this respect, the Tribunal recalls its Judgement No. 281 (Hernández de Vittorioso).

VII. For the above-mentioned reasons, the Tribunal finds that the Applicant's claim does not fulfil the requirements of staff rule 103.15 and consequently, the application is rejected.

(Signatures)

Arnold KEAN

First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Ahmed OSMAN
Member

New York, 27 October 1987

R. Maria VICIEN-MILBURN
Executive Secretary