
ADMINISTRATIVE TRIBUNAL

Judgement No. 501

Case No. 520: LAVALLE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman,
Vice-President; Mr. Francisco A. Forteza;

Whereas, on 5 September 1989, Roberto Lavalle, a former staff member of the United Nations Environment Programme, hereinafter referred to as UNEP, filed an application, containing the following pleas:

"II. PLEAS

4. Applicant respectfully requests the Tribunal to declare the decision contested illegal, order its rescission and fix the compensation due to him, should Respondent decide that he is to be compensated without further action being taken, at three years net base salary."

Whereas the Respondent filed his answer on 24 January 1990;

Whereas the Applicant filed written observations on
9 February 1990;

Whereas, on 24 September 1990, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 2 October 1990, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 24 October 1968. He was initially offered a probationary appointment at the P-3 level, as Assistant Secretary of the Economic and Social Council. On 1 September 1970, the Applicant was transferred to the General Legal Division of the Office of Legal Affairs (OLA) as a Legal Officer. On 1 October 1970, he was granted a permanent appointment. On 1 April 1972, he was promoted to the P-4 level. On 1 September 1977, he was assigned to the Buenos Aires Office of the United Nations High Commissioner for Refugees until 31 March 1978, when he returned to the General Legal Division, OLA.

On 1 September 1979, he was transferred to UNEP, where he worked as Legal Liaison Officer, until his separation from service on 21 May 1986. During his period of service with UNEP, the Applicant was designated Deputy Secretary of the UNEP Governing Council with effect from 29 June 1981.

On 5 March 1985, the Executive Director informed the Governing Council of UNEP, in UNEP/G.C.13/12, on "Proposed Budget for Programme and Programme Support Costs of the Environment Fund for the Biennium 1986-1987", that in reviewing "the distribution of posts between the regular budget and the programme and programme support costs budget", he had decided to "make a further effort to rectify [the] situation in which the Environment Fund bears part of costs which should normally be financed from the regular [U.N.] budget". He was therefore proposing to transfer six posts (one D-1, one P-5, one P-4 encumbered by the Applicant and three local level posts) from UNEP's programme support budget to the U.N. regular budget. The Executive Director did not ask for an additional contingency appropriation to absorb the cost resulting from the possible non-approval of his proposal. Instead, he suggested that any additional costs resulting from non-approval of the transfer of those posts to the U.N. regular budget, be absorbed within the approved appropriations.

On 13 May 1985, the Executive director advised the Governing Council in UNEP/G.C.13/L.5, that the Advisory Committee on Administrative and Budgetary Questions had approved the transfer to

the U.N. regular budget of only one P-5 post. Consequently, and in order to be able to absorb the additional costs resulting from the non-approval of the transfer of the other five posts, the Executive Director informed the Governing Council that he planned to abolish the P-4 post of Legal Liaison Officer encumbered by the Applicant.

On 18 May 1985, the Applicant wrote to the Assistant Executive Director, Environment Fund and Administration, stating that he had just learned from reading document UNEP/G.C.13/L.5 of 13 May 1985, that the Executive Director planned to abolish his post, action which he found "surprising". He stated he was confident that the Executive Director would respect the requirements of staff rule 109.1(c)(i) concerning the Secretary-General's obligations to staff serving on permanent appointments in cases of abolition of posts and asked to be considered for the post of Head of the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals, which was to become vacant.

The Governing Council, at its 13th session held on 23 May 1985, approved the Executive Director's budget proposal in its decision 13/35.

In a memorandum dated 11 June 1985, copied to the Applicant, the Assistant Executive Director of UNEP informed the Assistant Secretary-General for Personnel Services (OPS) that the UNEP Governing Council, at its thirteenth session, had endorsed the Executive Director's proposal "not to reinstate the post of Legal Officer in the Office of the Executive Director" and that the post would be abolished effective 1 January 1986. He sought his assistance to find a position for the Applicant in the Secretariat, in accordance with staff rule 109.1(c)(i).

According to a statement by the Respondent, "in order to provide further time to find a post for Applicant, UNEP maintained him in service against two 'borrowed posts' until 21 August 1986, i.e., for a period of almost eight months after abolition of his post... During that time, UNEP and the Office of Personnel Services at Headquarters unsuccessfully tried to find an alternate position

for Applicant". The Applicant himself applied for a series of posts.

On 30 April 1986, the Under-Secretary-General for Administration and Management approved the termination of the Applicant's appointment under staff regulation 9.1(a) with effect from 30 April 1986.

On 5 May 1986, a Personnel Officer at Headquarters asked the Chief of Personnel Section at UNEP, to inform the Applicant that the Secretary-General had approved the termination of his permanent appointment for abolition of post under staff regulation 9.1; and that he would be paid a termination indemnity and three months' compensation in lieu of notice, in accordance with Annex III of the Staff Regulations and staff rule 109.3(c).

In a letter dated 6 May 1986, the Assistant Secretary-General, OPS, communicated to the Applicant the Secretary-General's decision, stating his regret that "the necessities of the service required the abolition of [his] post and all efforts to place [him] elsewhere in the Secretariat as well as the U.N. system were negative".

On 21 May 1986, the Applicant separated from the service of UNEP.

On 27 June 1986, the Applicant asked the Secretary-General to review the administrative decision to terminate his appointment. On 18 September 1986, the Applicant lodged an appeal with the Nairobi Joint Appeals Board (JAB).

The Applicant was then offered a series of short-term appointments: he served from 1 December 1987 to 20 May 1988 with the OLA at Headquarters and from 23 January to 23 March 1989 with the Registry of the International Court of Justice at the Hague. Then, on 27 March 1989, the Applicant accepted a one-year fixed-term appointment as Senior Legal Liaison Officer at the U.N. Office at Vienna. He resigned voluntarily from this post for personal reasons, effective 31 August 1989.

In the meantime, on 31 March 1988, the Applicant submitted a further statement of appeal which replaced in its entirety, the initial appeal before the JAB.

The Board adopted its report on 14 March 1989. Its conclusion and recommendation read as follows:

Conclusion

35. Based on the information presented, the Panel was not satisfied with the efforts by the Administration, and in particular the then OPS, to consider the Appellant fairly and objectively against alternative suitable positions within the United Nations Secretariat and throughout the United Nations system, [sic] were carried out adequately as regards the Administration's special responsibility to retain a permanent staff member in preference to those with other forms of contractual status.
36. The Panel's dissatisfaction was confirmed when it learned that the Appellant, barely one and a half year after the termination of his permanent appointment, received a contract by the U.N. Secretariat for almost six months service with the Office of Legal Affairs [OLA]. While considering his case, the Panel was informed by the Appellant that he was, at the time of Panel proceedings, working on a two months assignment with the Registry of the International Court of Justice (ICJ) and that he had accepted another six-months contract for service with the Office of Legal Affairs which he was offered in January 1989 and which he intends to start immediately after his assignment with the ICJ. The Panel had to conclude from this information that the Appellant's qualifications in legal matters are recognized by the U.N. and that his skills and competence in that specific field are considered valuable.

Recommendation

37. Based on the above, the Panel recommends (a) that the Appellant's present retirement status be suspended and (b) that the Office of Human Resources Management [Successor of OPS] undertakes all efforts to re-employ the Appellant and consider him as an internal candidate, preferably by extending his assignment with OLA beyond the six-months limit for retired employees until he reaches the full retirement age of 60."

On 8 August 1989, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the

Secretary-General had, in the light of the Board's report, decided to maintain the contested decisions and to take no further action in his case on the following grounds:

"... The Secretary-General has noted the Board's finding that the abolition of your post was due to purely economic considerations -- a justifiable cause -- and that the post remains abolished to date (...). With regard to the doubts expressed by the Board as to whether the efforts undertaken by OPS ... to find a post for you were adequate in the light of staff rule 109.1(c)(i), the Secretary-General is of the view that good faith efforts were made to find a position for you following the abolition of your post, as manifested by your being granted a number of short-term assignments. The fact that your skills and competence were found appropriate for these short-term appointments subsequent to your termination does not mean that, at the time of the efforts to find you a position, a post was available to which your skills and competence were appropriate. At any rate, any obligations that existed in regard to you under staff rule 109.1(c)(i) were discharged when a one-year appointment in Vienna was given to you in March 1989 - a position from which you later decided to resign."

On 5 September 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Far from having discharged his obligation to indicate to the Applicant explicitly and specifically the facts which constituted the grounds for the termination of his contract, the Respondent has, in effecting that termination, shown a blatant lack of objectivity and seriousness.

2. As a result of a very large gap in the Applicant's performance record, the Administration's obligation to consider him fairly and objectively for alternative posts was not properly fulfilled.

3. The Applicant was not demonstrably considered at all for another UNEP post for which he was by no means prima facie unqualified.

4. An analysis of the background to the termination of the Applicant's appointment shows no justifiable cause for that

termination, which corroborates the Applicant's charge that it was carried out in bad faith.

Whereas the Respondent's principal contentions are:

1. The decision of the Secretary-General to terminate the Applicant's permanent appointment for abolition of post under staff regulation 9.1(a) was a valid exercise of his authority which did not violate the Applicant's rights.

2. Motivation for abolition of the Applicant's post was proper.

3. The Administration made good faith efforts to find the Applicant another position.

The Tribunal, having deliberated from 18 October to 9 November 1990, now pronounces the following judgement:

I. In this case, the Tribunal must decide whether the separation from service of the Applicant, a staff member holding a permanent appointment, on the ground of the abolition of the post he occupied, was in conformity with the Staff Regulations and Rules (i.e. staff rule 109.1) and whether the Respondent made genuine efforts to effectively utilize the staff member's services in another suitable post, in accordance with staff rule 109.1(c), in particular by retaining him in preference to staff on all other appointments.

II. The Applicant alleges that the abolition of his post as Legal Liaison Officer with UNEP at Nairobi by the UNEP Executive Director, which, he was told, resulted from a decision by the UNEP Governing Council, and the termination of his appointment with effect from 21 May 1986, were in fact not based on a decision by the Governing Council, as the Council took no such decision. Instead, the Applicant claims that the decision to abolish his post and the reason therefor, cast serious doubts on the good faith of the Administration. Moreover, he alleges, the decision was procedurally flawed because the Administration failed to discharge its obligation

to inform him explicitly and specifically on the grounds for the termination, an omission which, the Applicant claims, rendered his termination invalid.

III. The Respondent contends that the abolition of the post encumbered by the Applicant was entirely proper, motivated solely by objective considerations of economic and budgetary requirements, of which he was fully advised.

IV. As regards alternative employment, the Respondent contends that the requirements of staff rule 109.1(c) were fully met, as he had considered the Applicant for numerous vacant positions, but had been unable to find a suitable one, which he could fill. He further contends that the mere fact that the Applicant was subsequently employed on short-term contracts, by the U.N. and by some of its organs is no proof to the contrary. Moreover, the Respondent observes that the Applicant was given a one year fixed-term appointment at the P-5 level, effective 27 March 1989, as Senior Legal Liaison Officer for the U.N. Office in Vienna, from which he resigned some five months later.

V. The Tribunal finds, in the light of the evidence submitted by the parties, that the reason given for the termination of the Applicant's permanent contract, namely the abolition of the post of Legal Liaison Officer at UNEP, was genuine. The Tribunal cannot find any evidence of an attempt by the Respondent to improperly rid the Organization of the services of the Applicant.

VI. The Tribunal takes note, in this context, of the finding by the Nairobi Joint Appeals Board (JAB), to the effect that it "was unable to find evidence supporting [the Applicant's] contention that the Administration's statements of fact which constituted the grounds for termination were arbitrary, demonstrated lack of objectivity or seriousness or were tainted with bad faith".

VII. The Tribunal now turns to the question whether genuine efforts were made by the Respondent to find a suitable alternative post for the Applicant, in conformity with staff rule 109.1(c). The Tribunal finds that such efforts were made. The mere fact that they were not successful is not evidence to the contrary, nor will the Tribunal retroactively impose its own view concerning the suitability of any candidate for a vacancy, upon the view expressed by the Secretary-General in the exercise of his duty and authority to do so, provided it finds no improper motive or bias in that exercise.

VIII. On the other hand, the Tribunal will examine if there was a lack of due process in the consideration of the Applicant for any of the vacancies which seemed suitable.

IX. The procedures for such consideration involve the examination of the Performance Evaluation Report (performance report) of the candidate for any post, which, in the words of the JAB, is of "crucial importance in enabling a fair and objective evaluation of qualifications for [an] alternative post".

X. The Tribunal finds, in this case, that there was a considerable gap in the performance record evaluating the Applicant's services during the period January 1983 to September 1984. Also, there was doubt on the accuracy of the performance report evaluating the Applicant's services during the period running from 1 July 1980 to 14 February 1983, due to questions concerning the authority of the officers signing the report. The gap and the uncertainty were due to actions by officials of UNEP's Personnel Services and other administrators who declined to sign the required reports, claiming that it was not their responsibility, but someone else's responsibility to do so.

XI. While there is, of course, no guarantee that had there been no lacunae in the Applicant's performance record, a suitable post

would have been found for him, the Tribunal agrees with the JAB's findings that "it was incumbent upon the Administration to make every effort in completing the performance evaluation record".

XII. Failure by the Administration to do so, amounts to a denial of due process and the Tribunal concludes that the Applicant is entitled to an indemnity as compensation for the injury he has sustained. The Tribunal assesses this compensation at an amount equivalent to three months of the Applicant's net base salary at the time of his separation from the service of UNEP.

XIII. For the reasons set forth above, the Tribunal orders the Respondent to pay to the Applicant an amount equivalent to three months of the Applicant's net base salary at the time of his separation from the service of UNEP.

XIV. All other claims are rejected.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Francisco A. FORTEZA
Member

New York, 9 November 1990

R. Maria VICIEN-MILBURN
Executive Secretary