
ADMINISTRATIVE TRIBUNAL

Judgement No. 625

Case No. 674: BERLINER

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Samar Sen, Vice-President, presiding:

Mr. Hubert Thierry; Mr. Francis Spain;

Whereas at the request of Ruth Lori L. Berliner, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 15 July 1992 the time-limit for the filing of an application to the Tribunal;

Whereas, on 17 June 1992, the Applicant filed an application requesting the Tribunal:

- "(a) To declare her application receivable;
- (b) To find that the Applicant officially devoted her time since 1982 up to her retirement from the service in November 1991 to the Committee on the Security and Independence of International Civil Servants;
- (c) To find that, in doing so, the Applicant served the purposes of the Organization;
- (d) To find that the Secretary-General had an obligation, under staff regulation 2.1, to make appropriate provision for the classification of the Applicant according to the nature of her actual duties and responsibilities;
- (e) To find that these duties were professional in nature;
- (f) To find that the Secretary-General's unwillingness to meet this obligation has violated the Applicant's rights,

unnecessarily restricted her career prospects, and caused considerable moral injury;

(g) To order that appropriate compensation be paid to the Applicant for the violation of her rights, for the damage to her career prospects and for the moral injury sustained by her."

Whereas the Respondent filed his answer on 31 July 1992;

Whereas the Applicant filed written observations on 29 October 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 3 December 1956. She served on a series of short-term appointments at the G-2 level, as an English Clerk, in the Department of Conference Services (DCS) and was granted a probationary appointment with effect from 8 March 1957. On 1 December 1958, the Applicant was given a permanent appointment and was promoted to the G-3 level.

On 1 July 1960, the Applicant was transferred to the Research and Publications Section of the Bureau of Social Affairs of the Department of Economic and Social Affairs. Her functional title was changed to Research Clerk, with effect from 1 January 1963, and she was promoted to the G-4 level, with effect from 1 November 1965. On 1 November 1975, the Applicant was promoted to the G-5 level, as a Research Assistant at the newly established Centre for Social Development and Humanitarian Affairs (CSDHA).

In 1978, the Administration decided to transfer CSDHA to Vienna. The post encumbered by the Applicant, being part of the Centre's manning table, would be transferred to Vienna, as would the Applicant. The Applicant, for personal reasons relating to her family's experiences in Europe during the Second World War, did not wish to be transferred to Vienna, and the Administration made efforts to place her in other G-5 posts for which she was qualified.

On 30 April 1981, the Director, Division of Personnel Administration, Office of Personnel Services (OPS), wrote to the Assistant Secretary-General for Financial Services concerning the

Applicant's assignment to another department. He proposed a temporary budgetary solution, which was accepted, as an "interim solution" because of "the humanitarian aspects of the case", on the understanding that it would not create a precedent. Pursuant to this proposal, on 18 September 1981, the Applicant was assigned to the Documentation and Terminology Section, DCS, with effect from 16 October 1981.

In May 1982, the Secretary-General "appointed a task force to make recommendations regarding the security, safety and independence of the international civil service". The Applicant was a member of the Task Force and continued to discharge functions for the Task Force and the Staff Union Committee on the Security and Independence of the International Civil Service.

On 12 September 1983, the Applicant was assigned to the Office of General Services (OGS).

On 26 March 1985, the Executive Officer, OGS, wrote to the Personnel Officer stating that there was no OGS "work assignment appropriate to [the Applicant's] background and skills either now or in the foreseeable future". He asked for the Applicant's reassignment since OGS "cannot make productive use of her expertise". In a communication dated 10 April 1985, the Director, Communications, Records and Buildings Services Division, informed the Chief, Communications Service, where the Applicant worked, that OPS could not place the Applicant in another department. Accordingly, he should not prepare a performance report on the Applicant since she was "not performing any task" for the Service.

On 6 June 1985, the Executive Officer, OGS, wrote to the Director, Division of Personnel Administration, confirming that the Applicant had "no assignments in respect of OGS work and that none are likely in the future". He suggested that OPS should place the Applicant in another department or separate her from the Organization.

On 23 May 1988, the Applicant's counsel wrote to the Executive Office of the Department of Administration and Management (DAM) in relation to a dispute as to whether the Applicant was

entitled to a long-service step. He referred to the absence from her file of any "indication ... concerning the nature of her activities", which created "the erroneous impression" that the Applicant had "been idle since she joined OGS and that OGS has failed in providing her with useful and appropriate work", when in fact "the opposite is the case". He stated: "Ms. Berliner has, since she joined OGS, devoted most, if not all, of her resources to the work of the Staff Union Committee on the Security and Independence of the International Civil Service. In her capacity of Vice-Chairperson, then Chairperson, she has de facto provided the Committee with a standing Secretariat." He concluded by affirming that it was "the Organization's responsibility to assign work to staff and to evaluate it". He suggested that the Applicant should "be given an appropriate job description reflecting her de facto duties and that the President of the Staff Committee be asked to act as supervisor for reporting purposes".

On 13 November 1989, the Applicant was informed by the Assistant Secretary-General, Office of Human Resources Management (OHRM), that the post she encumbered was slated for abolition. She was advised to apply for other positions under the vacancy management system.

An exchange of correspondence ensued between the Applicant and OPS concerning an offer by the Administration to grant the Applicant an agreed termination. On 6 February 1990, the President of the Staff Committee wrote to the Acting Under-Secretary-General for Administration and Management, referring to the Applicant's "tireless ... efforts" to obtain the release of detained staff and to ensure the protection of staff facing other forms of human rights abuses, a "role essential for the Staff Union and for the well-being of the Organization". He suggested that the Applicant should be retained as Chairperson of the Staff Council Committee on the Security and Independence of the International Civil Service and that the Administration should assign a post to her, within OHRM, "with the understanding that she would be free to pursue her security and independence duties from the staff perspective".

On 28 March 1990, the Executive Officer, DAM, informed the Applicant that they had "been able to identify a suitable assignment" for her with the Department.

On 6 August 1990, the Applicant requested the Assistant Secretary-General, OHRM, to classify, at the appropriate level, the duties assigned to her by the President of the Staff Union. She noted that although there were "no budgetary provisions" for her functions, her post had "de facto existed for more than a decade" and had uninterruptedly been encumbered by her.

In a reply dated 20 September 1990, the Executive Officer, DAM, advised the Applicant that no post had been created for the Staff Union Committee activity assigned to her by the President of the Staff Union. However, he asked her to fill out a job description form "to progress toward regularizing your situation".

On 31 January 1991, the Applicant submitted her request for classification of her post as a "Human Rights Officer".

On 15 July 1991, the Applicant requested the Secretary-General to review the decision not to classify her post.

On 22 August 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 6 December 1991. Its conclusion and recommendation read as follows:

"The Panel concludes that, the Administration, in authorizing the Appellant to work full-time on the security and independence of the international civil servants for a period of more than 10 years and then failing to classify those functions, when it had indicated that it would do so, deprived the Appellant of the opportunity to be properly considered for promotion. Such deprivation was a violation of the Appellant's rights which merits redress.

Accordingly, the Panel unanimously recommends that the Appellant receives a financial compensation of six months net base salary at the date of her separation from service."

On 10 January 1992, the Director, Office of the Under-Secretary-General for Administration and Management, transmitted to the Applicant a copy of the JAB report and informed her as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has concluded that there is no legal basis for the recognition of the purported rights for which the Board recommended payment of six months's compensation. The classification exercise relates only to established posts in the programme budget. The fact that you were allowed to perform functions in the Staff Union did not derogate from the fact that your status in the Organization derived from your appointment to the post of Research Assistant at the G-5 level in the Office of General Services.

Therefore, failure to classify the functions you performed in the Staff Union Committee on the Security and Independence of the International Civil Service did not violate any of your rights as staff member. Accordingly, the Secretary-General has decided not to accept the recommendation of the Board and that no further action be taken in your case."

On 17 June 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's release to perform full-time functions for the Staff Union entailed on the part of the Organization not only an obligation to pay her salary during such release but also an obligation to classify the duties assigned to her by the Staff Union and to pay her at a rate in keeping with those classified duties.

2. The duties performed by the Applicant were professional in nature, and the fact that they were not recognized as professional violated her rights and harmed her career prospects.

Whereas the Respondent's principal contentions are:

1. The Secretary-General is not obligated to release staff for Union activities but has done so on the basis that released staff would be paid their salary at the rate of their officially assigned duties. There has never been any express or implied agreement that released staff would be paid based on the classification of the functions performed as staff representatives.

2. Staff regulation 2.1 has been implemented by the General Assembly so that classification of posts and duties relates to posts

created in the Secretariat and the duties associated with those posts.

The Tribunal, having deliberated from 28 October to 12 November 1993, now pronounces the following judgement:

I. From 1982 until the date of her retirement in November 1991, the Applicant, who entered the service of the United Nations in 1956, devoted tireless efforts to the cause of the security and independence of the international civil service. She concerned herself primarily with the fate of United Nations staff arbitrarily detained in various countries. Her activities in the Committee on the Security and Independence of the International Civil Service gave rise to numerous expressions of appreciation and acknowledgement. The Tribunal finds no difficulty in associating itself with such praise of the Applicant.

II. However, the Applicant's employment situation in the period from 1982 to 1991 was peculiar. The Applicant, who was promoted to the G-5 level in 1975, and held a permanent appointment, was assigned to the Department of Conference Services as a Research Assistant from 16 October 1981 and to the Office of General Services from 7 July 1983 until the end of 1990. Her post having been abolished and the Applicant having rejected an offer of agreed termination, she was assigned to the Department of Administration and Management until her retirement.

During this entire period, the Administration de facto relieved the Applicant of any tasks connected with the jobs in the divisions to which she was formally assigned in order to permit her to discharge her functions in the Committee on the Security and Independence of the International Civil Service, which is a Staff Union organ. However, the Applicant received a salary paid by the Administration corresponding to her G-5 level, which remained unchanged.

The Applicant's job on the Committee was never considered a job forming part of the Administration and was not classified. The Applicant maintains that this should not have been so and that her job should have been classified in the Professional category since the tasks she discharged were professional in nature. The Applicant considers that the failure to classify her job violated her rights.

In support of her contention, she cites staff regulation 2.1, which reads: "In conformity with principles laid down by the General Assembly, the Secretary-General shall make appropriate provision for the classification of posts and staff according to the nature of the duties and responsibilities required."

The Respondent maintains that this provision applies only to Secretariat posts within the regular budget and not to posts in the Union.

The Tribunal finds it unnecessary to pronounce in abstracto on the interpretation of staff regulation 2.1. It notes that, in accordance with the practice established by General Assembly resolution 35/214 of 17 December 1980, under which administrative instruction ST/AI/277 of 10 November 1980 was adopted, only posts within the regular budget can be classified and not posts in the Union. The Tribunal considers that it is not within its competence to decide whether posts in the Union should be classified. Such a decision is within the competence of the General Assembly. If the Tribunal were to find in favour of the Applicant's pleas, it would be encroaching on the Assembly's competence. Accordingly, it cannot determine that the Applicant's rights have been violated by the non-classification of her post in the Union.

III. Various attempts were made to regularize the Applicant's administrative situation. In a letter she received from an officer in the Department of Administration and Management, she was asked to fill out a job description form and propose a possible supervisor. The Tribunal considers that this initiative, which was never followed up, does not create any rights for the Applicant.

IV. However, the Tribunal notes that for many years, with the agreement of the Administration but without advancement or promotion, the Applicant performed useful work from which the United Nations benefited, since the situations with which the Applicant dealt were a matter of grave concern to the Secretary-General and the General Assembly.

V. The Tribunal therefore suggests to the Secretary-General that he should award the Applicant an appropriate ex gratia payment, accompanied by a formal acknowledgement of the value of her services.

VI. For the reasons set out in paragraphs I to V, the Tribunal rejects the application.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 12 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary