
ADMINISTRATIVE TRIBUNAL

Judgement No. 861

Case No. 937: KURTULMAZ

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Samar Sen, Vice-President, presiding;
Ms. Deborah Taylor Ashford; Mr. Julio Barboza;

Whereas, on 6 August 1996, Elsa Kurtulmaz, a former staff member of the United Nations, filed an application containing pleas in which, inter alia, she requested,:

"[The production of certain documents]

...

Pursuant to article 7, paragraph 2(a) of the Statute of the Administrative Tribunal of the United Nations, [the rescission of] the administrative decision of the Secretary-General to terminate her permanent contract as of 1 July 1996 for reason of abolition of post, ...

...

(d) [To order]:

(i) ... the Secretary-General to retain the services of [the] Applicant in preference to candidates with other types of appointments, as required by staff rule 109.1; and

(ii) ... that the Applicant be considered for priority placement in available suitable posts at the United Nations Office at Vienna.

...

In the event that the Secretary-General decides that in the interest of the United Nations, the Applicant should be compensated without further action being taken in this case, the Applicant seeks an order that she should be paid the equivalent of four years' net base salary.

...

The Applicant also requests an order requiring the Respondent to place her against a non-permanent post and/or a lower grade post, pending the availability of a suitable permanent post should such a permanent post not be immediately available. "

Whereas the Respondent filed his answer on 30 May 1997;
Whereas the Applicant filed written observations on
12 September 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Industrial Development Organization on 15 April 1981, as a Clerk/Typist at the G-4 level, on a short-term appointment which was successively extended until 1 January 1982, when it was converted to fixed-term, at the Centre for Social Development and Humanitarian Affairs, Crime Prevention and Criminal Justice Branch. With effect from 1 February 1982, she worked in the Office of the Assistant Secretary-General. On 1 October 1985, the Applicant's appointment, which had been extended for further fixed terms, became probationary. On 1 July 1986, the Applicant was given a permanent appointment. On 1 January 1990, the Applicant was promoted to the G-5 level. On 20 June 1990, she was reassigned to the Social Development Division, International Year of the Family (IYF). On 1 January 1996, the Applicant was assigned as a Secretary to the International Narcotics Control Board of the United Nations

International Drug Control Programme (UNDCP) on a temporary basis. This assignment was extended until 28 June 1996, when the Applicant was separated from the Organization due to the abolition of her post.

The Applicant received ratings of "very good" in her performance evaluation reports (PERs) for the following periods: 15 June 1981 - 30 June 1982; 1 July 1982 - 28 February 1983; 1 March 1983 - 31 October 1984; 1 November 1984 - 31 May 1986 and 6 June 1988 - 19 June 1990.

The Applicant's last PER, covering the period 20 June 1990 until 31 March 1994, rated her performance as "good". It contained, inter alia, the following comments: "Generally tends to be erratic and inconsistent in terms of quantity" (Section III, 3: quantity of work accomplished); "frequently demonstrates disregard towards colleagues, displeasure to comply with work-specific requests, refuses to cooperate with GS [General Service] colleagues" (Section III, 7: effectiveness in maintaining harmonious working relations). The Applicant rebutted the PER, but was unsuccessful in changing her overall rating, although the rating for Section III, 3: "quantity of work accomplished" was upgraded from "D" to "C".

On 16 May 1994, the Applicant wrote to her Personnel Officer, Personnel Service, UNOV, stating that "[i]n view of the fact that the International Year of the Family (IYF) will conclude at the end of 1994, I would like to be considered for any post at [the] G-4 level or above." On 9 May 1995, the Personnel Officer wrote to the Chief, Programme Support Section, UNDCP, forwarding the names of UNOV staff members, including the Applicant, whose posts were abolished and "with regard to whom the UNOV Administration has a commitment to accommodate ... against any suitable position." On 12 September 1995, the Personnel Officer wrote to the Chief, Translation and Editorial Service, forwarding the names of three internal candidates, including the Applicant, who were eligible for the post of Language Reference Assistant at the G-5 level. On the same date, the Personnel Officer also transmitted to the Chief,

United Nations Postal Administration (UNPA), Europe, the names of nine internal candidates who were eligible for the post of Secretary at UNPA, at the G-4 level.

On 31 October 1995, the Officer-in-Charge, Personnel Service/DACS wrote to the Applicant, advising her of his intention to terminate her permanent appointment since "30 November 1995 has been established as the date for the closure of the IYF Secretariat in Vienna. The efforts of Personnel Service to place you in other programmes have so far been unsuccessful."

On 15 December 1995, the Officer-in-Charge, Personnel Service, DACS, submitted to the Director-General of UNOV the Applicant's case for consideration with respect to the termination of her permanent appointment. In that letter, the Officer-in-Charge noted that "[the Applicant's] candidature has been considered for several posts; however, it should be mentioned that the possibilities have been limited due to the additional need to place approximately 16 UNDCP staff members as well as four other IYF Secretariat staff whose posts were also marked for abolition. Unfortunately, it appears that the outcome of [the Applicant's] rebuttal to her latest PER has not contributed to enhancing her competitiveness vis-a-vis other candidates. In an effort to support the staff member and facilitate placement, the Officer-in-Charge of the IYF Secretariat has agreed to the loan of her services to another organizational unit ... Personnel Services is continuing its endeavors to find a suitable position for [the Applicant]".

On 19 March 1996, the Assistant Secretary-General for Human Resources Management wrote to the Applicant, informing her that the Secretary-General had decided to terminate her permanent appointment under the provisions of staff regulation 9.1(a), with effect from 31 March 1996. He advised her that she would receive three months' salary in lieu of notice.

On 28 March 1996, the Applicant filed with the Vienna Joint Appeals Board (JAB) a request for the suspension of action on the

decision to terminate her permanent appointment as of 31 March 1996.

The JAB report adopted on 29 March 1996 stated that the Panel had decided:

"to recommend to the Secretary-General suspension of the termination of the permanent contract of the staff member as provided in staff rule 111.2(c)(ii), until the matter had a chance to be reviewed following a request for administrative review or an appeal, or until time-limits had passed without an appeal having been filed."

On 29 March 1996, the Under-Secretary-General for Administration and Management approved the JAB recommendation, in the following terms:

"The Secretary-General has examined your request in the light of the Board's report and has noted its unanimous finding that the Panel did not have the possibility to conduct a normal hearing on your request, in particular an analysis of the steps which are required from the Administration in compliance with staff rule 109.1(c)(i) [and] (ii). It was therefore not possible for the Panel to determine to what extent the Administration has endeavoured to place you on another post at the duty station, as required by staff rule 109.1, nor did it obtain any evidence from the Administration establishing that such efforts were made to place you elsewhere.

For the above reasons, the Secretary-General accepts the Panel's unanimous recommendation and has decided to postpone until 30 April 1996 your termination date, thus enabling the JAB Panel to meet again and submit a complete report on your request on or before 20 April 1996."

The JAB adopted its second report on the request for suspension of action on 18 April 1996. Its unanimous recommendations read as follows:

"15. The Panel concludes that the decision of the Administration to terminate the permanent appointment of the staff member has not been implemented; that its implementation would result in irreparable injury to the staff member; and that its preliminary findings indicate that the Administration did not give all practical effect to the relevant Staff Regulations and Rules.

16. The Panel therefore recommends to the Secretary-General that the decision to terminate the permanent appointment of the staff member be suspended as provided in staff rule 111.2(c)(ii) until the time-limits specified in subparagraph (a)(i) or (ii) of rule 111.1 have passed without an appeal having been filed, or if an appeal is filed, until a decision on the appeal taken."

On 24 April 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB's second report and informed her as follows:

"The Secretary-General has decided to accept, in principle, the Panel's unanimous recommendation and to postpone until 31 May 1996 your termination date, thus enabling the Joint Appeals Board to consider and provide a recommendation to him on the merits of your appeal. The Secretary-General waives his right to reply to your request for administrative review, allowing you to submit your appeal to the Board. In order for the Board to submit a report prior to your new termination date, it is anticipated that you will file your appeal with the Board by 6 May, that the Respondent will reply 10 days after receipt of a copy of your appeal and that the Board will submit its recommendation to the Secretary-General by 24 May 1996."

On 30 April 1996, the Applicant lodged an appeal with the JAB. On 24 May 1996, the JAB adopted its report on the merits of the case. Its conclusions read as follows:

- "8. The Panel therefore concludes that staff rule 109.1(c) has not been adequately complied with by the Administration in dealing with the case of the appellant. It recommends that the termination of the appellant's permanent appointment not be implemented and that the necessary steps be taken to give full effect to rule 109.1(c), with appropriate weight being given to the permanent contractual status of the appellant."

On 27 June 1996, the Officer-in-Charge, Department of Administration and Management, transmitted to the Applicant a copy of the JAB's report and advised her as follows:

"... The Secretary-General is not in agreement with the

conclusions of the Panel and has decided not to accept its recommendation as he has determined that the UNOV Administration has fulfilled its obligations under staff rule 109.1(c).

Staff rule 109.1(c) is relevant to your case, providing that a staff member with a permanent appointment whose post has been abolished shall be retained on a priority basis. However the rule also provides that due regard shall be had to relative competence, to integrity and to length of service. This means, in your case, that due regard would be given to your recent performance evaluation report which was not of high quality and which was unsuccessfully rebutted, and to your record as a whole. The documented file reflects that efforts were made by the UNOV Administration to retain your services on other posts but that, after fair and objective consideration, you were not a selected candidate. The record also reflects that the Administration offered you termination packages, as it did to other permanent staff members involved in the present downsizing and early separation programs, and that you did not accept them.

The Secretary-General disagrees with the Panel's conclusion that appropriate weight was not given to your permanent contractual status during the process of considering you for posts. Your contractual status was appropriately addressed as possibilities for alternative posts were explored. However, during the process of considering you for specific posts, due regard was also given to your entire record as it compared to that of other candidates.

In the light of the above, the Secretary-General has decided to maintain the contested decision that your appointment be terminated for reasons of abolition of post."

On 6 August 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent did not comply with his obligation to retain the Applicant, who held a permanent contract, in preference to those on other types of appointment. The Respondent merely went through the motions of fulfilling his legal obligations to her.

2. In assessing her candidacy for posts for which the Applicant applied, the Respondent did not give due regard to her competence, integrity and length of service.

Whereas the Respondent's principal contentions are:

1. Adequate efforts were made to reassign the Applicant and she received proper consideration for all suitable posts available .

2. Due regard was given to Applicant's competence, integrity and length of service.

The Tribunal, having deliberated from 29 October to 26 November 1997, now pronounces the following judgement:

I. The Applicant requests the Tribunal to rescind the decision of the Secretary-General to terminate her permanent appointment due to abolition of her post and to uphold the recommendation of the Joint Appeals Board (JAB) that proper weight be given to her status as the holder of a permanent contract.

II. At issue in this case is the implementation of staff rule 109.1, which provides that:

"... if the necessities of the service require abolition of a post or reduction of the staff, and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent or regular appointments shall be retained in preference to those on all

other types of appointments ..., provided that due regard shall be had in all cases to relative competence, to integrity and to length of service."

III. The Respondent maintains that following the abolition of her post, the Applicant received proper consideration for all suitable posts available at her duty station. In considering the Applicant for available posts, the Respondent took into account all of the Applicant's record, including a performance evaluation report that resulted in a "good" rating but that also indicated some difficulties, specifically her inability to work with others and her failure to meet her workload demands consistently. The Applicant's record regarding "integrity" was also considered. The Applicant's files reflect that she was reprimanded several times for irregularities in completing personnel forms and for improper conduct at the office.

IV. The Respondent relied on the requirement that in granting priority to staff on permanent appointments, "due regard shall be had in all cases to relative competence, to integrity and to length of service." The Respondent concluded that the JAB had not given due regard to the Applicant's record as a whole as it related to her competence and integrity. He therefore decided not to accept the JAB's recommendation.

V. The Tribunal takes note of the fact that staff rule 109.1 requires that, in cases where the abolition of the post of a permanent staff member becomes necessary, that staff member should be retained in service by being assigned to another post in preference to staff members holding other types of appointments who might be eligible to fill that post. However, such preference is not absolute but is qualified by staff rule 109.1, which requires that "due regard" be given to the staff member's "relative competence ... integrity and to length of service" as compared to those of other eligible candidates. In this case, the Tribunal

finds that the Respondent did so and made efforts to place the Applicant in another post. However, the Applicant's record clearly included sufficient indications of difficulties with her performance, which the Respondent was entitled to take into account when assessing her suitability for posts. In the light of the foregoing, the Tribunal finds that the Respondent gave due regard to her status as a permanent staff member and thus acted within the scope of his discretion.

VI. For the foregoing reasons, the Tribunal rejects the Applicant's pleas in their entirety.

(Signatures)

Samar SEN
Vice-President, presiding

Deborah Taylor ASHFORD
Member

Julio BARBOZA
Member

New York, 26 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary