
ADMINISTRATIVE TRIBUNAL

Judgement No. 863

Case No. 924: PALERMO

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Hubert Thierry, President; Mr. Samar Sen,
Vice-President; Mr. Julio Barboza;

Whereas, at the request of Amanda Palermo Rebon, a former staff member of the United Nations, the President of the Tribunal with the agreement of the Respondent, extended to 31 March 1996 the deadline for filing an application with the Tribunal;

Whereas, on 29 March 1996, the Applicant filed an application that did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 12 June 1996, the Applicant filed a corrected application in which she requested the implementation of Judgement No. 580, rendered by the Tribunal on 18 November 1992;

Whereas the application contained pleas which read, in part, as follows:

"[In Judgement No. 580, the United Nations Administrative Tribunal expressed its agreement with the Joint Appeals Board's view that] re-employment in the case of a staff member holding an indefinite appointment should not be viewed as an a priori impossibility ...

[It instructed UNHCR to] further pursue its efforts to ensure that, to the extent possible, the Applicant's career continues along the path which she could reasonably expect it to have taken.

The Tribunal therefore ordered 'that steps be taken by the Respondent ... aimed at securing an indefinite appointment for the Applicant, provided that a post suited to her qualifications can be found ...'

... [The Applicant asserts that three years later nothing has been done to implement that Judgement].

I therefore request that the Tribunal order that I be reinstated at the United Nations, either in the Information Officer (LNO-B) post, now vacant at the United Nations Information Centre for Argentina and Uruguay, in Buenos Aires, or in any other post already in existence or to be established, in keeping with my experience and background.

...

On the assumption that I am awarded only compensation for the injury I have suffered as a result of the failure of the United Nations to regularize my status, the calculation of such compensation must take into account the losses I have suffered: no contributions to the Pension Fund for almost 10 years following my separation from service with UNHCR; non-implementation of my promotion to the level of Information Officer LNO-A, with retroactive effect from January 1986; in the case of UNDP, non-implementation of my promotion to the LNO-B level with effect from 1 November 1992; and recently to the LNO-C level, with effect from 1995 with UNHCR. No career development over the same period of almost 10 years, with no appropriate advancement, either within grade or to a higher grade, at an age at which such an interruption is almost impossible to make up for, which means that the harm caused will continue to have effects until I retire in the second half of the year 2000.

The calculation of compensation should also take account of the fact that I have had no medical insurance, and no statutory leave or other benefits to which I was entitled under my indefinite contract with the United Nations, during the period under consideration, as a result of the decision to terminate unjustly my appointment with UNHCR in 1986 and subsequently not to regularize my status at the UNDP Office in Buenos Aires, which I am now appealing, as well as the decision not to appoint me to the Associate Public

Information Officer post at UNHCR in 1995.

All of this is in addition to the moral harm I have suffered as a result of the foregoing.

I therefore believe that the compensation for the harm I have suffered should amount to US\$500,000, plus expenses and fees for legal assistance incurred as a result of the situation described above, in an amount of US\$20,000."

Whereas the Respondent filed his answer on 13 June 1997;

Whereas the Applicant filed written observations on 16 June 1997;

Whereas, on 13 October 1997, the Applicant submitted additional comments;

Whereas, on 5 November 1997, the Tribunal requested the Respondent to provide it with answers to certain questions;

Whereas, on 6 November 1997, the Applicant submitted additional comments;

Whereas, on 14 November 1997, the Respondent provided the Tribunal with answers to the questions posed on 5 November 1997;

Whereas, on 17 November 1997, the Applicant filed additional comments with the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Regional Office for Southern Latin America of the United Nations High Commissioner for Refugees (UNHCR) in Buenos Aires on 13 March 1975, as a local Secretary under a short-term appointment. She served thereafter intermittently on further short-term appointments until 1 August 1979, when she was offered a one year fixed-term appointment at the GL-5, step II level as a Senior Secretary. Her appointment was successively extended for further fixed-term periods until 1 May 1981, when she was offered an indefinite appointment as a Junior Administrative Assistant at the GL-6, step I level. On 1 October 1982, the Applicant was promoted to the GL-7 level as a Secretary

and Assistant to the Regional Representative. On 1 July 1985, she became a Public Information Assistant. By July 1985, the Applicant had become a Public Information Assistant at the National Professional Officer level. Her post was abolished and she was terminated with effect from 31 December 1986.

In March 1987, the Applicant began working for the United Nations Development Programme (UNDP) Office in Buenos Aires, Argentina, on a Special Service Agreement (SSA) as a Public Information Assistant for one month. On 9 October 1987, she received a short-term appointment from 16 October to 9 November 1987. On 1 October 1988, the Applicant was offered a short-term SSA until the end of December 1988; thereafter, she received two one-year SSAs covering the period between 1 January 1989 and 31 December 1990. Between January 1991 and May 1993, the Applicant served on twelve short-term SSAs varying in length from one month to six months. The Applicant appealed the decision to terminate her appointment with UNHCR to the Tribunal.

On 18 November 1992, the Tribunal rendered Judgement No. 580, in which it ordered the Respondent:

"1. That steps be taken by the Respondent with UNDP and other organs, aimed at securing an indefinite appointment for the Applicant, provided that a post suited to her qualifications can be found.

2. That the compensation to the Applicant, recommended by the JAB, to which the Secretary-General has agreed, be increased to six months of the net salary which was payable on the date of her separation from service, at its US dollar equivalent calculated on the basis of the exchange rate in effect on 31 December 1986."

In a facsimile dated 23 December 1991, the Resident Representative of UNDP in Buenos Aires, requested UNDP Headquarters to classify the Applicant's Information Officer post. The new classification was approved by Headquarters on 18 July 1992 and confirmed as a Public Information Officer at the National Officer-B

(LNO-B) level on 26 October 1992.

In a 15 December 1992 letter to the then Resident Representative of UNDP in Buenos Aires, the Director of the Division of Public Affairs referred to the Applicant as an "invaluable resource in promoting the image of UNDP in Argentina." In his response dated 16 December 1992, the Resident Representative stated that although it had been UNDP's intention to "fund a National Information Officer on a full-time basis", since resources were not available to fund both this post and a Programme Officer post, he concluded "with reluctance, that [he had to] give priority to the Programme Officer post". He further explained that he would not be able to finance the Applicant's continuation beyond May 1993.

In another facsimile dated 5 March 1993, to the Division of Personnel (DOP), the Resident Representative indicated that he had arrived at his post in August 1992 and, "over the ... next few months [had] evaluated the needs of the office ... [and] reach[ed] the conclusion that [the Information Officer] post was not justified". In addition, he stated that he had been "strongly encouraged" to proceed with recruitment due to the "personal situation" of the Applicant. He proposed to give the Applicant a one-year fixed-term contract with effect from 1 March 1993 "to regularize her contractual status". At the same time, he would reiterate to the Applicant that he had did "not expect th[e] extra-budgetary post to continue beyond early 1994, and that she should therefore not expect a continuation of service beyond that date".

In a facsimile dated 6 May 1993, to DOP, UNDP, the Resident Representative stated that due to the "precarious budget situation" he had decided against the continuation of a Public Information Post. Instead, UNDP should use the services of the Office of the United Nations Information Center in Argentina.

On 17 June 1993, the Applicant and the Resident Representative met to discuss the Applicant's employment situation. The Resident Representative informed the Applicant during the

meeting that the Public Information post had been abolished in accordance with the budget strategy plan and that, "in view of her expectation and to allow her time to make arrangements", she would be offered "a further and last [SSA] until 31 December 1993". He further indicated that the Applicant had accepted such proposal, "in an understanding that it would not affect her legal position vis-à-vis the Administrative Tribunal's decision of 18 November 1992".

On 29 June 1993, the Applicant received a Letter of Appointment for a short term of seven months, effective 1 June 1993, with the functional title of Information Officer. On 10 September 1993, the Resident Representative requested from the Chief, Budget Section, Division of Finance, UNDP, the abolition of the post of Public Information Officer. The abolition was confirmed by the Chief of the Budget Section by a facsimile dated 27 September 1993.

On 23 February 1994, the Applicant wrote to the Secretary-General, requesting a review of the decision to separate her from service with UNDP. On 27 May 1994, she was informed by the Chief, Legal Section, DOP, that the decision would be maintained. On 10 June 1994, she lodged an appeal with the Joint Appeals Board (JAB).

On 22 August 1995, the JAB adopted its report. Its considerations and recommendation read, inter alia, as follows:

"...

31. In the subject appeal, the Panel observed that, prior to working with UNDP, the Appellant had served in UNHCR for more than ten years. The Panel therefore considered her an experienced staff member who was familiar with the staff rules and regulations and was fully aware of her status as an independent contractor upon signing the SSAs. The Panel noted that, as in the Teixeira case, the Appellant 'was free to refrain from entering into those agreements' and 'did not raise any objections until [her] last contract has expired'. The Panel thus found that the Appellant was not entitled to the status of a staff member while serving under the SSAs and, accordingly, was not entitled to participate in the UNJSPF during the approximately five years she provided

services under such agreements. The Panel further found that the Appellant's final contract, a Letter of Appointment, contained an express exclusion from participation in [the] UNJSPF.

32. The Panel also found that, prior to signing her final Letter of Appointment on 29 June 1993, the Appellant knew that it would be her last appointment and, therefore, had no expectancy of renewal nor conversion to another type of appointment. Prior to signing the Letter of Appointment on 29 June 1993, the Appellant was advised by the UNDP Resident Representative (...) that the Public Information post had been abolished in accordance with the budget strategy plan and that she would be offered 'a further and last [SSA] until 31 December 1993'. The Resident Representative wrote that the Appellant had accepted such proposal, 'in the understanding that it would not affect her legal position vis-a-vis the Administrative Tribunal's decision of 18 November 1992'.

33. Notwithstanding the foregoing, the Panel observed that, in a memorandum of 18 February 1993, to the UNDP Resident Representative, the Executive Officer, RBLAC [Regional Bureau for Latin America and the Caribbean], 'underline[d] that staff serving under a (SSA) special service agreement can only be recruited for a maximum repeat maximum period of six months; the contractual status of the staff member in question should, therefore, be regularized and the SSA should be discounted.' ... UNDP's maintenance of the Appellant on SSAs for five years therefore was inconsistent with UNDP's procedures and the spirit of SSAs. The Panel found it 'inherently contradictory for the administration to enter repeatedly into an [SSA] with an individual for services as a contractor where the agreement itself specifies work on a full-time basis, where this work is preformed over a period of years, and where this work is without break'. UNAT Judgement No. 281 (Hernandez de Vittorioso). In such cases, the Panel would caution, as did the Tribunal, that '[t]he facts ... are likely to comport more fully with the status of staff member than with that of independent contractor' and 'may produce unintended consequences where work performed is full-time, continuous and in other important respects indistinguishable from the work of individuals in the same office who have the status of staff members.'

34. With respect to Appellant's contentions that the decision to discontinue her service with UNDP violated her 'acquired rights' arising from UNAT Judgement No. 580 (Palermo), the Panel observed that, in November 1992, the

Administrative Tribunal had ordered 'steps [to] be taken by the Respondent with UNDP and other organs, aimed at securing an indefinite appointment for the [Appellant], provided that a post suited for her qualifications can be found'. Although UNDP made efforts to satisfy the intent of the Administrative Tribunal, the Panel did not consider the Appellant to have derived any particular rights within UNDP as a result of this Judgement, which arose from the termination of her indefinite appointment with UNHCR in 1986. The Panel further considered that, having served within UNDP for more than five years, the Appellant received all that she might expect, particularly given the above language used by the Tribunal. Nevertheless, the Panel observed that, in April 1995, the Appellant applied for the vacant post of Public Information Officer at the Regional Office for Southern Latin America within UNHCR. Inasmuch as the Appellant has an 'excellent' performance record and appears to possess the requisite skills and qualifications for the vacant post, and given that the vacant post appears to be similar to the post in which the Appellant was serving in UNHCR when her indefinite appointment was terminated for abolition of post, the Panel hopes the Secretary-General will bring such information to the attention of UNHCR and urge them to give the Appellant's candidature every consideration.

35. With respect to the Appellant's contention that she has been 'discriminated [against] through concrete actions and omissions', the Panel found no evidence that the Appellant's continued maintenance on SSAs, the decision not to implement the Public Information Officer post, or the decision not to continue the Appellant's services for UNDP was based on discrimination or any other improper motivation.

(a) Although, as discussed above, the Panel considered UNDP's use of SSAs continuously for five years to be inconsistent with UNDP procedures and the nature of such agreements, the Panel found no evidence that the use of the SSAs was based on discrimination or any other improper motivation.

(b) The Panel noted that, in December 1991, the former UNDP Resident Representative in Buenos Aires requested UNDP Headquarters to classify the post of Information Officer so as 'to regularize [the Appellant's] situation' on a full-time basis with extra-budgetary resources. The current UNDP Resident Representative arrived in Buenos Aires in late August 1992 and, following his evaluation of the needs of the office, concluded that the Information Post was not justified. In several communications, the UNDP Resident

Representative explained the reasons for his decision, i.e., budget constraints and his decision to use the services of UNIC[United Nations Information Centre]-Buenos Aires, of which he was serving as Acting Director. The Panel recognized that the Appellant had anticipated receiving a full-time post and therefore was extremely disappointed with the decision not to implement the Information Officer post; the Panel, however, also appreciated the financial uncertainties and difficulties faced by all UNDP offices and the specific reasons cited by the UNDP Resident Representative. The Panel thus found no evidence of discrimination or improper motivation in connection with the UNDP Resident Representative's decisions not to implement the post and not to continue the Appellant's services with UNDP."

On 7 September 1995, 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 light of the Board's report. He has noted that the Board found no evidence in support of your contention of discrimination and improper motivation in connection with UNDP's use of Special Service Agreements or with the Resident Representative's decisions not to implement the post and not to continue your services with UNDP; the Board made no recommendation in support of your appeal. The Secretary-General has decided, accordingly, to take no further action in your case."

On 12 June 1996, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent has not fulfilled his obligations under Judgement No. 580, Palermo and has not regularized her status.
2. This failure demonstrates arbitrariness and a disregard of the facts and applicable legal principles.

Whereas the Respondent's principal arguments are:

1. The Applicant did not have a legal expectancy of

continued employment with UNDP.

2. Reorganization of an office falls within the discretionary powers of the UNDP Administrator and can only be challenged if the decision is tainted by prejudice or improper motive.

3. The Applicant was properly considered for a post in UNHCR.

The Tribunal, having deliberated from 3 to 26 November 1997, now pronounces the following judgement:

I. On 18 November 1992, the Tribunal rendered Judgement No. 580, Palermo, in which it ordered the Respondent to pay the Applicant six months of her net base salary and further ordered:

"[t]hat steps be taken by the Respondent with UNDP and other organs, aimed at securing an indefinite appointment for the Applicant, provided that a post suited to her qualifications can be found."

II. The Tribunal notes that the Respondent has paid the Applicant six months of her net base salary. It remains for the Tribunal to determine whether the Respondent has met his other obligation under Judgement No. 580, namely, to take steps to find the Applicant an indefinite appointment in a suitable post within the Organization. In this connection, the Tribunal notes that, on 21 January 1993, the Under-Secretary-General for Legal Affairs wrote to the Under-Secretary-General for Administration and Management, enclosing a copy of Judgement No. 580 and asking the latter to "please request UNDP to give full consideration to [the] Applicant's candidature for any positions that become available. If it is impossible for UNDP to continue to employ [the] Applicant, UNHCR must make good faith efforts to find her a position within UNHCR or

elsewhere and document those efforts." On 26 January 1993, the Under-Secretary-General for Administration and Management wrote to the Associate Administrator for UNDP and the Deputy High Commissioner for UNHCR, requesting UNDP to "give full consideration to [the] Applicant's candidature for any positions that become available" and requesting UNHCR that "if it is impossible for UNDP to continue to employ [the] Applicant, ... to arrange for UNHCR [to] mak[e] good faith efforts to find [the] Applicant a position within UNHCR or elsewhere. Such efforts should be documented in accordance with prior decisions of the Tribunal."

III. On 13 June 1995, the Senior Legal Officer, Division of Human Resources Management (DHRM), UNHCR, wrote to the Senior Legal Advisor, Office of the Under-Secretary-General for Administration and Management, stating that "DHRM takes the view that the judgement [No. 580] obliges the UNHCR Administration to consider [the Applicant's] application for the post of Public Information Officer and to ensure that it will be submitted to the Appointments, Promotions and Postings Board at Headquarters ... even if the Regional Office which submits its proposals to Headquarters would not include [the Applicant's] name among the most suitable candidates." On the same day, the Senior Legal Officer, DHRM, UNHCR, also wrote to the Regional Representative for Southern Latin America, in Buenos Aires, Argentina, reminding him that "the Secretary-General has been requested by the UNAT to make all efforts to obtain an indefinite appointment in UNDP or another UN organ for [the Applicant]." She noted that "[u]nfortunately, there is no trace in [the Applicant's] file proving that any such efforts have ever been made by UNHCR."

IV. The Tribunal also requested the Respondent to provide documentation to support the selection of a candidate other than the Applicant for the post of Associate Public Information Officer in

the UNHCR Regional Office for Southern Latin America. Further, the Tribunal requested the Respondent to inform it if the Applicant was considered for any other posts. The Chief, Legal Section, Office of Human Resources, UNDP, informed the Tribunal that there were no posts for an Information Officer in the UNDP Office in Argentina and that, in mid-1993, the Applicant had been invited to apply for the post of Programme Officer but had chosen not to do so. The Senior Legal Advisor, DHRM, UNHCR, informed the Tribunal that UNHCR had no records showing that the Applicant had ever applied for any other post than that of Associate Public Information Officer. With respect to the selection of another candidate for that post, the Tribunal took note of a memorandum dated 6 September 1995 from the Officer-in-Charge, Regional Bureau for the Americas and the Caribbean, UNHCR, to the Career Development Officer, Recruitment and Career Management Section, UNHCR. In this memorandum, it was stated that "[a]lthough it is true that [the Applicant] has a vast amount of UN experience in her curriculum, she has never worked as a journalist, nor does she have a journalistic academic background - both essential for the functions of the post." The memorandum went on to explain that "careful scrutiny of the selection and recommendation process undertaken by the Regional Office was deemed necessary in view of the candidature to this post of [the Applicant] ... [w]e were pleased to note that [the Applicant's] candidature was given proper consideration."

V. The Tribunal does not believe that Judgement No. 580 gave the Applicant the right to be appointed to the post of Associate Information Officer, but merely the right to receive full and fair consideration for that post. The Tribunal cannot accept the Applicant's assertion that the fact that she was expected to compete for the post of Programme Officer contravened Judgement No. 580. That Judgement did not oblige the Respondent to bypass the normal recruitment procedures in finding an indefinite appointment for the

Applicant in a suitable post.

VI. The Applicant was hired by UNDP in March 1987, on Special Service Agreements (SSAs), until December 1993. Her last contract was for a period of 7 months, and she was warned that her services would definitively end with the expiration of that contract. From October 1988, the Applicant was employed by UNDP without interruption. Her functions were not linked to any particular project and she worked regular hours. The Applicant interprets these facts as creating an uninterrupted, permanent relationship with UNDP. The Tribunal takes a different view. It is the established jurisprudence of the Tribunal that a succession of temporary appointments cannot transform the temporary status of the Applicant into a permanent one (Cf. Judgement No. 230, Teixeira (1977)).

VII. However, the Tribunal believes that there are other considerations that must be weighed in this regard. During the period in which the Applicant worked under SSAs, she received assurances from her superiors that a permanent post was to be created for her. There seemed to be a clear understanding between the Applicant and the UNDP authorities in Buenos Aires that a regular post of Information Officer was to be created for her to occupy. The Resident Representative requested UNDP Headquarters to create such a post, to be paid for with extra-budgetary funds. UNDP responded favourably to the request and authorized the Buenos Aires office to proceed accordingly. The creation of this post was then delayed and a new Resident Representative arrived. The latter examined the organization of the office and concluded that the post of Information Officer was not necessary, since the United Nations Information Centre (UNIC) could fulfil the same function. He, therefore, suppressed the post, which was created again after he was transferred to a different position. Although the Applicant could

not have a legitimate expectation of continued employment, the Tribunal finds that the fact that the post was created for her and that instead of her being assigned to it, the post was suppressed for reasons that proved to be fleeting, should be taken into account. The Tribunal also regards as significant the fact that, during the time she was employed on SSAs, the Applicant was made to work as if she had a permanent position, sometimes with only half-pay and without vacations or UN contributions to the Pension Fund.

VIII. The Tribunal believes that the Applicant's application to the newly created post in UNHCR is worthy of comment. Even if the Applicant is not correct in her assertion that this post should have been announced internally, or reserved specifically for her, she was nevertheless entitled, by virtue of Judgement No. 580, to full and fair consideration for that post. The Tribunal considers that the circumstances surrounding her application and the process by which the UNHCR authorities examined her for the post point to a certain disregard for the Applicant's personal capacities, since she was not even admitted to the aptitude examination. The Tribunal notes that her application was initially summarily rejected and was subsequently accepted, only at the insistence of the Senior Legal Officer, DHRM. Later, the Applicant applied for a similar post in the UNIC in Buenos Aires, but was also unsuccessful in that endeavour. The Tribunal can only conclude that its Judgement No. 580 was wholly disregarded since it appears that no effort was made to give the Applicant a position suitable to her aptitude and qualifications.

IX. The Tribunal finds that, in the light of the above, the Applicant is entitled to some measure of compensation, which the Tribunal assesses in the amount of one year of her net base salary, at the rate in effect on the date of her separation from service.

X. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant, one year of her net base salary at the rate in effect on the date of her separation from service.

(Signatures)

Hubert THIERRY
President

Samar SEN
Vice-President

Julio BARBOZA
Member

New York, 26 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary