



ADMINISTRATIVE TRIBUNAL

Judgement No. 1412

Case No. 1484

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Dayendra Sena Wijewardane, Vice-President, presiding; Ms. Brigitte Stern;
Mr. Goh Joon Seng;

Whereas at the request of a former staff member of the United Nations, the President of the Tribunal granted an extension of the time limit for filing an application with the Tribunal until 30 June 2005, and periodically thereafter until 31 March 2006;

Whereas, on 30 March 2006, the Applicant filed an application that did not fulfill all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 28 June 2006, the Applicant, after making the necessary corrections, filed an Application containing pleas which read, in part, as follows:

“II: **PLEAS**

7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

c) *to decide* to hold oral proceedings ...;

8. On the merits, the Applicant respectfully requests the Tribunal:

a) *to rescind* the decision of the Secretary-General;

- b) *to find* and rule that the Joint Appeals Board [(JAB)] erred as a matter of law and equity in failing to provide appropriate and adequate compensation for the harm done to the Applicant as a result of the Respondent's actions and lack thereof;
- c) *to award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the actual, consequential and moral damage suffered by the Applicant as a result of the Respondent's action;
- d) *to fix* pursuant article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of the specific performance at the higher indemnity the Tribunal would fix in exceptional cases;
- e) *to award* the Applicant as cost, the sum of \$10,000 in legal fees and \$1,000 in expenses."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 11 December 2006, and once thereafter until 11 January 2007;

Whereas the Respondent filed his Answer on 5 January 2007;

Whereas the Tribunal decided not to hold oral proceedings in the case on 4 July 2008;

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

"Employment History

... [The Applicant] began working with the Committee on Missing Persons (CMP), [United Nations Peace Keeping Force in Cyprus (UNFICYP)], on 1 August 1985 on a six-month special service agreement (SSA), which was continually extended thereafter for periods of six months. He received a fixed-term appointment effective 1 July 1998 ...

Summary of Facts

... By ... letter dated 9 May 1998, [the Applicant] wrote to [the] President, International Committee of the Red Cross, requesting ... intervention in regularizing his status with the United Nations after having worked at the CMP [on SSA] for over 12 years. The record reflects that, prior to this, [the Applicant] had engaged in numerous discussions on issues regarding his ... SSA.

... On 10 June 1998, [the] Chief Civilian Personnel Officer notified [the Applicant] that ... he would be offered a fixed-term appointment effective 1 July 1998.

... On 29 July 1999, [the Chief Executive Officer (CEO)], United Nations Joint Staff Pension Fund (UNJSPF), informed [the Applicant] ...:

'I acknowledge receipt of your notice of election to validate dated 30 April 1999 electing to validate the period from 1 August 1985 to 30 June 1998.

I regret to inform you that the Fund cannot accept your application because it does not meet the requirements for eligibility specified in article 23 of the Regulations in that participation had been expressly excluded by the terms of your appointment for the period in question.'

... On 28 September 1999, [the Applicant] met with [the CEO, UNJSPF] ... According to [the Applicant's] minutes of the meeting, [the CEO, UNJSPF,] advised him 'to enter into negotiation with the [United Nations] through the Panel of Counsel. ...' ...

... On 29 June 2000, [the Applicant] sent a memorandum to [the] Chief Civilian Personnel Officer. Referring to [the CEO, UNJSPF's] letter of 29 July 1999, [the Applicant] requested that she advise him on how to proceed and who to contact in New York.

... On 24 July 2000, ... UNFICYP [responded] ... that, in view of the UNJSPF's autonomy, [the Applicant] should deal directly with the Pension Fund on the matter.

...

... [Thereafter, the Applicant made repeated efforts to persuade the Organization in his favour. Finally, by] a memorandum dated 27 October 2003, ... [the Applicant was advised that]:

'...

2. As explained by the [UNJSPF] in their letter to you of 29 July 1999, it would not be possible to retroactively contribute to the Fund for the period during which you served under a [SSA]. As per the terms and conditions of your contract you were not considered a "staff member" under the Regulations of the United Nations. Accordingly, the terms of your contract excluded your participation in the Pension Fund. I regret that it is not possible for us to make an exception to the Pension Fund regulations in this regard.

3. With respect to your claim for compensation for the lack of social security and education grant benefits normally paid to eligible United Nations staff members, I would like to point out that the conditions of service of your SSA contract explicitly stated that you would be responsible for arranging your own social security including life, health and other insurance coverage. By signing your successive SSA contract you also agreed to the amount of the fees. With regard to the expenses in maintaining two separate households, it should be noted that you were paid [daily subsistence allowance] at the rate applicable to Nicosia to compensate for your living expenses at the duty station.

4. While it was not usual to have been engaged on [SSAs] for such an extended period of time, it was not possible to offer you a regular appointment with the Secretariat due to the lack of an available post until 1 July 1998 and you had agreed to and accepted both the fees and conditions of service of the SSA agreements. In light of this, I regret that we are not in a position to offer a settlement as requested.'

... On 30 October 2003, [the Applicant was advised that the United Nations would] ... not reverse the determination already made.

...''

On 27 November 2003, the Applicant requested administrative review. On 10 March 2004, he lodged an appeal with the JAB in New York. The JAB adopted its report on 20 December 2004. Its considerations, conclusions and recommendation read, in part, as follows:

“Considerations

26. The Panel first examined the question of its jurisdiction to review the case under [staff] rule 111.2 (j). The Panel agreed with the Respondent that the appeal did not fall within the jurisdiction of the JAB.

...

28. ... Examining [the] Appellant's submission, the Panel noted that, at the time he filed his appeal, [he] was serving under [a fixed-term] appointment ...; however, the contentions making up his appeal arose during a period when [his] contractual relationship was based on a special service agreement rather than a letter of appointment subject to regulations promulgated by the General Assembly. The language of that agreement is standard and explicitly states: 'Consultants are neither 'staff members' under the Staff Regulations of the United Nations nor 'officials' ...' The Panel found therefore that [the] Appellant cannot be considered a staff member for [the] purposes of Article XI and Chapter XI of the Staff Regulations and Rules. In the same vein, [the] Appellant alleges non-observance of contractual rights which may exist in his present fixed-term contract, but did not exist in the SSA contracts he signed between 1985 and 1998. Thus, the Panel considered that [the] Appellant seeks to exercise his right as a staff member to request the JAB to review certain grievances grounded in a period before he achieved his staff member status and in allegations of non-observance of terms beyond the boundaries of the letter of appointment conferring that status on him. The Panel could not find a legal basis for the JAB to do so.

...

30. Although the conclusion on the issue of competence is sufficient to reject the present appeal, the Panel nevertheless turned to the issue of delay. It considered that [the] Appellant's submission did not comply with the time limits under staff rule 111.2 (a). ...

32. [The] Appellant contends, and [the] Respondent denies that, between 29 July 1999 ... and 30 October 2003 ... [the] Appellant was persistently trying to negotiate an agreement on the issue of pension benefits. The Panel considered that, insofar as any negotiation requires at least two participants acting with knowledge that they are engaged in such efforts, [the] Appellant needed to show that [the] Respondent acted as such a participant. The Panel considered that [the] Appellant did not demonstrate that this was the case; in fact, the record would seem to indicate the opposite. ... The Panel considered that the efforts merely to initiate a negotiation did not constitute exceptional circumstances beyond [the] Appellant's control warranting the delay, and less so when those efforts encompassed several years.

...

Conclusions and Recommendations

34. In light of the foregoing, the Panel *unanimously concluded* that,

- a. Because the contested decision related to issues based in a period when [the] Appellant was not a staff member, and because those issues occurred in the context of rights other than those found in a letter of appointment and the Staff Rules, the Panel had no jurisdiction to review the case; and,
- b. [The] Appellant failed to prove exceptional circumstances warranting a waiver of the time limits under staff rule 111.2 (f), and, as such, was time barred.

35. The Panel therefore *unanimously decided* to make no recommendation with regard to the present appeal."

On 27 January 2005, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the JAB's findings and conclusions and had decided to accept its unanimous recommendation and to take no further action on his appeal.

On 28 June 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. He was never made aware of any administrative decision affecting his status; accordingly he was not aware of any time limits.
2. The JAB incorrectly determined that it was not competent to hear the case.
3. He was unfairly treated and should be adequately compensated.

Whereas the Respondent's principal contentions are:

1. The JAB was correct in deciding that it lacked competence to consider the present Application.
2. The JAB was correct in determining that the present Application was not receivable, as time-barred.
3. The Applicant is not entitled to any compensation or costs.

The Tribunal, having deliberated from 4 to 25 July 2008, now pronounces the following Judgement:

I. The Applicant joined the Committee on Missing Persons in Cyprus on 1 August 1985, on a six-month SSA, which was continuously extended for periods of six months. On 1 July 1998, he received a fixed-term appointment, which was continuously extended until he retired in January 2006.

On 30 April 1999, the Applicant sent the UNJSPF a "notice of election" requesting that his service between 1 August 1985 and 30 June 1998 be validated for pension purposes. On 29 July, the CEO of the UNJSPF informed the Applicant that the Fund could not accept his application because he did not meet the requirements for eligibility, as participation in the Fund expressly excludes periods served under SSA. On 19 August, the Applicant requested that the Pension Fund advise as to what procedures he should follow next. According to the Applicant, the CEO of the UNJSPF recommended that he enter into negotiations with the Organization through the Panel of Counsel.

From 29 June 2000 to 16 September 2003, the Applicant communicated with several offices of the United Nations, requesting advice regarding emoluments and retroactive affiliation with the Pension Fund. In his letter of 16 September, he requested "retroactive affiliation to the ... Pension Fund or a fair and final settlement of [his] personal situation", and specifically sought compensation for the lack of social security provided by the Organization for the period he had served under SSAs. On 27 October, the Director,

Administrative Support Division, Office of Mission Support, Department of Peacekeeping Operations, reiterated information cited in the Pension Fund's letter of 29 July 1999, most notably that the Applicant, during the contested period, was on SSA contract. As such, he was not considered a staff member under the regulations of the United Nations and the terms of his SSA excluded his participation in the UNJSPF. In addition, she indicated that the Organization was not in a position to pay the requested compensation.

On 27 November 2003, the Applicant wrote the Secretary-General requesting administrative review of the decision of 27 October. On 26 January 2004, the Applicant was informed that claims regarding the Pension Fund were not within the purview of requests for review under staff rule 111.2 as the Fund has its own appeal procedures. The Applicant was also notified that his request for review was not receivable as he did not file within two months of the 29 July 1999 communication.

On 10 March 2004, the Applicant submitted his statement of appeal to the JAB. The JAB found that the contested decision was not receivable as it related to the timeframe when the Applicant was under SSA contract and was, therefore, not a staff member. The Panel concluded that it had no jurisdiction to review the case and further determined that the appeal was time-barred as the Applicant had failed to prove exceptional circumstances warranting a waiver of the time limit.

II. On 28 June 2006, the Applicant filed his Application with the Tribunal, challenging the Secretary-General's decision, dated 27 January 2005, to accept the JAB's findings and conclusions, including its finding that it had no jurisdiction to review the Applicant's case "because the contested decision related to issues based in a period when [the Applicant] was not a staff member, and because those issues occurred in the context of rights other than those found in [the Applicant's] letter of appointment and the ... staff rules".

III. The Tribunal considers that the main issues involved in the present case are: (1) whether the Tribunal is competent to consider the Application; (2) whether the JAB correctly decided that it had no jurisdiction to review the Applicant's case; and (3) whether the Applicant's case was time-barred.

IV. Regarding the issue of competence, the Tribunal refers to article 2.1 of its Statute, which reads:

"The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words 'contracts' and 'terms of appointment' include all pertinent regulations and rules in force at the time of alleged non observance, including the staff pension regulations."

It is evident that the Applicant was a staff member of the United Nations at the time he requested retroactive adjustment of his status and/or compensation. Thus, he has standing, *ratione personae*. However, although the Applicant styles his case as a dispute with the Organization following his appointment on a fixed-term contract, what he is really seeking is revision of the terms and conditions

under which he served prior to his fixed-term appointment. Therefore, the Tribunal considers that his claims emanate from the period between 1985 and 1998, when the Applicant's contractual status was based on an SSA and not a letter of appointment subject to the regulations of the Organization.

The Tribunal examined the Applicant's SSA dated 1 January to 30 June 1986. It notes that the contract included a page entitled "Conditions of Service - Consultant", with a subheading entitled "Legal Status", wherein it reads that "[i]ndividuals engaged under [an SSA] as consultants serve in their personal capacity ... [and] are neither 'staff members' under the Staff Regulations of the United Nations nor officials".

The Tribunal finds that the Applicant's case cannot be construed as an application "alleging non-observance of [his contract] of employment ... or of the terms of [his] appointment" during his service as a staff member. Accordingly, the threshold requirements of article 2.1 of the Statute of the Tribunal are not satisfied, the Application is not receivable *ratione materiae*, and the Tribunal has no competence under this heading.

V. The Tribunal recalls its Judgement No. 230, *Teixeira (1977)*, in which the Tribunal declared itself competent in the case of an Applicant who had served on a series of SSAs. That case may be distinguished from the instant case, however, as the Respondent had agreed to the submission of the case to the Tribunal and the Applicant's SSAs had provided for no dispute settlement procedure. In the instant matter, the Respondent vigorously challenges the receivability of the case, and the Applicant's SSAs did include dispute settlement provisions.

The Applicant's SSA provided for arbitration in the event of dispute. Under the subheading "Arbitration", it stated "[a]ny dispute arising out of or in connexion with this agreement shall if attempts at settlement by negotiation have failed be submitted to arbitration ... [; t]he decision rendered in arbitration shall constitute the final adjudication of the dispute". Based on the foregoing, the Tribunal concludes that the only recourse available to the Applicant for the period of his SSA service would have been binding arbitration. He may not now raise a dispute in the internal justice system under the guise of a new claim against the Administration.

VI. In view of its findings in paragraph IV, the Tribunal cannot but agree with the position of the JAB that it was not competent to consider the case. The JAB recalled that under staff regulation 11.1, it is "competent to examine an appeal a) brought by a staff member against b) an administrative decision where c) that appeal alleges the non-observance of his or her terms of appointment, including all pertinent regulations and rules". The JAB found that although at the time of the submission of his appeal, the Applicant met the criterion of being a staff member, "the contentions making up his appeal arose during a period when [his] contractual relationship was based on [an SSA] rather than a letter of appointment subject to regulations promulgated by the General Assembly". The JAB concluded that the Applicant sought "to exercise his right as a staff member to request the JAB to review certain grievances grounded in

a period before he achieved his staff member status and in allegations of non-observance of terms beyond the boundaries of the letter of appointment conferring that status on him". The Tribunal agrees, and confirms the finding of the JAB on this issue.

VII. The Tribunal will next address the position of the Respondent that the Applicant commenced his appeal well beyond the time limit prescribed by staff rule 111.2 (a):

"A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing".

The Tribunal observes that the Respondent's position is premised upon the "administrative decision" in question being the decision conveyed to the Applicant by the CEO of the Pension Fund on 29 July 1999. The Tribunal simply cannot accept this reasoning. If the decision under appeal was a decision of the Pension Fund, then the Applicant would have had to bring a case against the UNJSPF, in accordance with Section K of the Regulations of the Fund. In such a case, staff rule 111.2 (a) would not be applicable and the JAB would have no jurisdiction over the dispute.

As the Applicant sought to bring a case against the United Nations, the relevant administrative decision had to be a decision emanating from the Organization. That the decision of 27 October 2003 reiterated in part the information conveyed by the Pension Fund on 29 July 1999 does not change the basic fact that the decisions were made by two separate organizations. The Applicant brought a case against the United Nations essentially on the basis of its refusal to retroactively adjust his status during his period on SSA to that of a staff member, or to pay compensation for its unwillingness or inability to make such adjustment. While the Tribunal does not have competency in this case, for the reasons set forth in paragraph IV above, the appeal was not time-barred, as the Applicant's request for administrative review was filed one month after the 27 October decision which appears to have been the formal refusal of the United Nations to accede to his petition.

VIII. Finally, the Tribunal wishes to take this opportunity to review the Organization's use of SSAs. As in Judgement No. 281, *Hernandez de Vittorioso* (1982), the Tribunal is disquieted by the inherent contradiction involved in repeatedly engaging personnel on SSAs, which provide for contractor status without the safeguard of staff rights. The Tribunal is mindful that it may not act *ex aequo et bono*. (See Judgement No. 1311, (2006) referring to Judgement No. 197, *Osman* (1975).) Nonetheless, it notes that the Applicant worked on a full-time basis for approximately 13 years, without the benefit of the rights and obligations enjoyed by regular staff members. However, the Tribunal takes note that personnel on SSAs enjoy additional remuneration and compensatory benefits, which staff members of the United Nations do not enjoy, and is aware of the fact that the Applicant entered freely and willingly into each and every one of these agreements which stated that he was not a "staff member" and that the regulations of the Organization

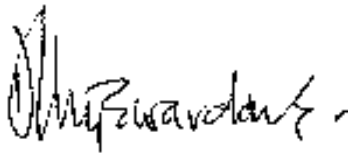
did not apply to his status as a contractor. Therefore, the Tribunal will not now seek to undo such agreements.

In this regard, the Tribunal recalls its Judgement No. 233, *Teixeira* (1978), in which it held:


“[T]he Applicant himself at least contributed to the creation and renewal of [the] situation by agreeing to conclude with the Administration, during a period of almost 10 years, [SSAs] under which he accepted the legal status of an independent contractor and expressly and unambiguously waived being ‘considered in any respect as being a staff member of the United Nations’”.

IX. Based on the foregoing, the Tribunal rejects the Application in its entirety.

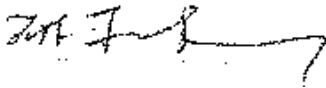
(Signatures)



Dayendra Sena Wijewardane
Vice-President




Brigitte Stern
Member



Goh Joon Seng
Member

Geneva, 25 July 2008



Maritza Struyvenberg
Executive Secretary