



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1413

Case No. 1473

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Jacqueline R. Scott, First Vice-President; Mr. Dayendra Sena Wijewardane, Second Vice-President; Ms. Brigitte Stern; Mr. Goh Joon Seng; Sir Bob Hepple; Mr. Agustín Gordillo;

Whereas, on 5 April 2006, a former staff member of the United Nations (hereinafter referred to as the Applicant) and the law firm of Baach Robinson & Lewis PLLC (hereinafter referred to as the Second Applicant) filed an Application requesting the Tribunal, inter alia:

“11. *[T]o find:*

- a. that the Respondent entered into a binding contractual commitment to pay [the Applicant’s] legal expenses incurred in connection with remaining in the United States to participate in the investigation of the Independent Inquiry Committee Into the United Nations Oil-for-Food Programme [(IIC)];
- b. that the ... Applicants relied on this contractual commitment in, respectively, incurring legal expenses and providing legal services, both in the expectation of payment by the United Nations;
- c. that the Respondent breached this contract with [the Applicant];
- d. that the Respondent breached this implicit contract with [the Second Applicant];  
and
- e. that the Respondent caused the Applicants direct damages by this breach in the sum of [US]\$ 880,300.98 plus interest.

12. [And] *to order*:
  - a. that the Respondent pay the Second Applicant [US]\$ 880,300.98 in direct damages (representing legal expenses to the present date);
  - b. that the Respondent pay the Second Applicant interest on the foregoing sum at 9% per annum through the date payment is provided; and
  - c. such further remedy as the Tribunal shall deem just.
13. The Applicants respectfully request an Oral Hearing in this matter ...”

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 19 September 2006, and once thereafter until 19 October;

Whereas the Respondent filed his Answer on 12 October 2006;

Whereas the Applicants filed Written Observations on 3 November 2006;

Whereas, on 12 July 2007, the Respondent filed additional comments;

Whereas the Applicants filed an additional communication on 10 August 2007;

Whereas, on 21 July 2008, the panel constituted to hear the Application decided to refer the case for consideration by the whole Tribunal, in accordance with article 8 of the Statute; to postpone consideration of this case until its autumn session; and, not to hold oral proceedings in the case;

Whereas the statement of facts, including the Applicant’s employment record, contained in the report of the Joint Appeals Board (JAB) reads, in part, as follows:

***“Employment history***

... [The Applicant] joined the Organization in 1965. ... He was appointed ... Under-Secretary-General and Executive Director of the United Nations Office of the Iraq Programme (OIP) on 15 October 1997, and served in that capacity until the end of the OIP on 21 November 2003 ... [He then] assisted with the closing down of the programme until ... 29 February 2004. His contract was thereafter extended for the period 1 March through 31 May 2004. [The Applicant] received a letter of appointment with a [US]\$ 1 per annum salary as an Adviser for the period 1 June 2004 through 31 May 2005, which was subsequently extended until December 2005. He resigned effective 8 August 2005.

***Summary of Facts***

... In April 2004, the Secretary-General appointed an independent, high-level inquiry committee (the IIC) to investigate the administration and management of the [OIP]. Following this, the United Nations Security Council unanimously adopted Resolution 1538 (2004), endorsing the inquiry and calling for full cooperation in the investigation by all United Nations officials and personnel, the Coalition Provisional Authority, Iraq, and all other Member States, including their national regulatory authorities.

... Over the course of the next several months, [the Applicant] consulted with the Secretary-General and [the] ... Chef de Cabinet, [Executive Office of the Secretary-General (EOSG),] to request that the Organization defray the legal expenses he would incur in his participation in interviews with the IIC investigation. On 3 September 2004, [the Applicant] received a letter from [the] Chief Legal Counsel, IIC, stating that, although the investigative guidelines set out by the IIC indicate that witnesses did not have the right to have counsel present during questioning, in light of his unique circumstance ‘- in that you are the subject of specific, serious [sic] public allegations of improper activity - the Committee has decided to exercise its discretion to allow you to have counsel present when you meet with the Committee or members of the staff of the IIC ...’.

... According to [the Applicant], at some point in the fall of 2004, [the Chef de Cabinet] gave a verbal undertaking to [the Applicant] for the Organization to cover expenses for his legal representation. [The] Respondent stipulates that such an agreement was made; however, the precise terms of that undertaking remain the focus of the present dispute.

... By a memorandum dated 3 February 2005 from [the Assistant Secretary-General] for Human Resources Management, [the Applicant] was informed that, ‘[b]ased on the Interim Report of the [IIC], it has been decided, in the interest of the Organization, to suspend you from duty pending disciplinary proceedings ...’. The suspension was extended on 2 May 2005.

... On 23 February 2005, [the newly appointed] Chef de Cabinet ... addressed a letter to [the Applicant] regarding his legal fees:

‘On a number of occasions during the past several months, you have raised ... the question of payment of the legal fees you are incurring in relation to your appearance before the ... IIC ... A decision, in principle, was taken, on this matter, and communicated orally to you to the effect that reasonable legal fees (as determined by the United Nations) for services in connection only with your appearance before the IIC, would be paid to you by the Organization. The payment of these fees was to be made on a strictly exceptional basis for the purpose of facilitating the work of the IIC.

In the meantime, the IIC issued its interim report on 3 February 2005. The conclusions and findings of the IIC contained in that report pertaining to your conduct have led the [United Nations] to bring charges against you for major breaches of the Staff Regulations and Staff Rules. The Organization, consequently, on 8 February 2005, commenced disciplinary proceedings against you.

In the light of the above and in fulfilment of the undertaking communicated to you by [the former Chef de Cabinet], the [United Nations] will reimburse you the legal fees paid by you to your lawyers for the services rendered to you in connection with the IIC inquiry during the period up to 3 February 2005. However, we are no longer prepared to reimburse the costs of your representation before the IIC or any other legal costs incurred by you after 3 February 2005, in light of the IIC’s findings.’

...

... By a letter dated 31 March 2005, [the Chef de Cabinet] informed [the Applicant] that:

...

[The] initial decision to reimburse you was premised on the assumption that in performing your functions as the head of OIP, you had acted in accordance with ... internal Regulations and Rules and that you had not engaged in any misconduct.

In the light of the adverse findings against you by the IIC in the First Interim Report which are the subject of ongoing disciplinary proceedings, I regret to inform you that the

United Nations now does not consider it appropriate to reimburse you the above-mentioned legal fees. This decision, however, will be reviewed at the end of the ongoing disciplinary proceedings and any criminal proceedings that might be instituted against you.’

... [The same day, the Applicant] ... requested that the United Nations reconsider the decision ...

... By a letter dated 21 April 2005, [the Chef de Cabinet] informed [the Applicant] that the Organization’s position ... had not changed.

...”

On 5 May 2005, the Applicant requested administrative review of this decision. On 13 July, the Applicant lodged an appeal with the JAB in New York. The JAB adopted its report on 6 February 2006. Its considerations, conclusions and recommendation read, in part, as follows:

***“Considerations***

22. The Panel initially examined [the] Respondent’s challenge to [the] Appellant’s petition to join his Counsel to his appeal as Co-Appellant. In support of this status as ‘third-party beneficiary and implicit party to the contract’ between [the] Appellant and [the] Respondent, Counsel cites article 2 of the Statute of the United Nations Administrative Tribunal (UNAT). The Panel finds that, if that Statute accords Counsel that status in proceedings before UNAT, the Staff Regulations and Rules which govern the JAB’s jurisdiction do not accord similar status before the present proceedings. Thus, even had there been a valid contract concluded between [the] Respondent and Counsel, because Counsel has no status as a staff member, staff regulation 11.1 precludes Counsel’s standing before the Panel. Therefore, as [the] Appellant is a former staff member, the Panel concentrated its deliberations on his claims only.

...

***Conclusions and recommendation***

39. ... [T]he Panel *unanimously concludes*

- (a) that a binding, albeit oral agreement was concluded by the parties under which [the] Respondent agreed to pay, on an exceptional basis, for reasonable legal fees in consideration of, and in connection with [the] Appellant’s appearance before the IIC;
- (b) that [the] Respondent acted in the best interests of the Organization when [he] decided to enter into that agreement to ensure [the] Appellant’s cooperation with the IIC;
- (c) that [the] Respondent reaped the benefit of that agreement at least up to 3 February 2005;
- (d) that the Panel, a non-party to the agreement, cannot now attach a material term to the undertaking by an implication that only one party professes to have inferred when the agreement was concluded, particularly given that both parties possessed full incentive and capacity to bind each other to such terms in writing;

- (e) that the 23 February letter by [the] Respondent - which limited payment of legal expenses up to 3 February 2005 - provided for an amendment to the terms of the original oral agreement;
- (f) that evidence shows that [the] Appellant by his conduct accepted that amendment, such that the new terms became binding on both parties, and
- (g) that [the] Respondent's further amendments to the agreement, as contained in the letter of 31 March 2005, were unequivocally rejected by [the] Appellant.

40. The Panel therefore *unanimously recommends* that [the] Appellant's legal expenses in connection with his participation in the IIC investigation be reimbursed up to 3 February 2005."

On 3 March 2006, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him of the Secretary-General's decision on the JAB recommendation, as follows:

"The Secretary-General ... regrets not being able to accept the JAB's recommendation. He maintains that the validity of the agreement to pay your legal expenses was contingent upon the absence of wrongdoing on your part and that such presumption of no wrongdoing could have been reasonably inferred as being an integral part of the agreement. The adverse findings of the IIC investigation removed such presumption, thus making it inappropriate to reimburse your legal fees."

On 5 April 2006, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicants' principal contentions are:

1. The Respondent entered into a binding contractual commitment to pay the Applicant's legal expenses incurred in connection with his participation in the IIC investigation.
2. The Respondent breached this contract with the Applicant.
3. The Respondent breached this implicit contract with the Second Applicant.
4. The First and Second Applicants relied on this contractual commitment in, respectively, incurring legal expenses and providing legal services, both in the expectation of payment by the United Nations.

Whereas the Respondent's principal contentions are:

1. The Second Applicant does not have standing.
2. The validity of the undertaking given by the Respondent to pay the Applicant's legal fees was contingent upon the presumption of no wrongdoing on the part of the Applicant.

The Tribunal, having deliberated from 1 to 25 July 2008, in Geneva, and from 7 to 26 November 2008, in New York, now pronounces the following Judgement:

I. The Applicant joined the Organization in 1965. He was appointed Under-Secretary-General and Executive Director of the OIP on 15 October 1997; served in that capacity until the end of the OIP on 21 November 2003; and, subsequently assisted with the closing down of the OIP. The Applicant then received a letter of appointment with a US\$ 1 per annum salary as an Adviser for the period 1 June 2004 through 31 May 2005, which was subsequently extended until December 2005. He resigned effective 8 August 2005.

In April 2004, the Secretary-General appointed the IIC to investigate the administration and management of the OIP. Thereafter, the Applicant consulted with the Secretary-General and the Chef de Cabinet to request that he be allowed legal representation and that the Organization pay the legal expenses he would incur in his participation in interviews with the IIC.

On 3 September 2004, the Applicant was advised that his counsel could be present during his meetings with the IIC. According to the Applicant, the Chef de Cabinet gave him a verbal undertaking that the Organization would cover the expenses of his legal representation. On 3 February 2005, the Applicant was suspended from duty pending disciplinary proceedings, pursuant to the Interim Report of the IIC.

On 23 February 2005, the newly appointed Chef de Cabinet wrote to the Applicant regarding his legal fees, informing him that the Organization would only cover the costs of his representation incurred up to 3 February 2005. However, by a letter dated 31 March 2005, the Chef de Cabinet informed the Applicant that, in the light of the findings of the IIC, the United Nations did not consider it appropriate to reimburse him for his legal fees. On 31 March 2005, the Applicant requested that the United Nations reconsider the decision, in light of the Administration's previous oral and written commitments to reimburse him. By a letter dated 21 April 2005, the Chef de Cabinet informed the Applicant that the Organization's position in respect of the 31 March 2005 letter had not changed. On 5 May 2005, the Applicant requested that the Secretary-General review and reverse this decision. On 13 July 2005, the Applicant lodged an appeal with the JAB in New York. In its report dated 6 February 2006, the JAB concluded first, as a matter of procedure, that the Applicant's counsel had no status as a staff member or former staff member and had therefore no standing before the JAB. It further held that a binding agreement had been concluded by the Respondent and the Applicant under which the Respondent agreed to pay the legal fees in consideration of, and in connection with, the Applicant's appearance before the IIC; that the letter of 23 February 2005 provided an amendment to the terms of the original agreement; that the Applicant by his conduct accepted that amendment; and, therefore, recommended that the Applicant's legal expenses be reimbursed up to 3 February 2005. On 3 March 2006, the Under-Secretary-General for Management informed the Applicant that the Secretary-General rejected the JAB's findings and recommendation.

On 5 April 2006, the Applicants submitted this Application to the Tribunal.

II. The first issue that the Tribunal must consider is whether the law firm engaged by the Applicant, which firm is listed as the "Second Applicant" in his Application, had standing before the JAB and now has

standing to be an Applicant before the Tribunal. The Tribunal notes that the agreement on reimbursement as claimed by the Applicant - and confirmed by the Respondent in his letter of 23 February 2005 - was between the Organization and the Applicant. There is no dispute that this is an agreement on reimbursement of fees paid or incurred by the Applicant. The 23 February 2005 letter specifically states that: “[i]n the light of the above and in fulfillment of the undertaking communicated to you by [the Chef de Cabinet, the United Nations] will reimburse you the legal fees paid by you to your lawyers for the services rendered to you in connection with the IIC inquiry”. Without an effective assignment, it confers no right of action or interest enforceable by the Second Applicant against the Organization. Hence, the Second Applicant has no standing under article 2 (b) of the Tribunal’s Statute. On the proceedings before the JAB, the Tribunal agrees with the JAB that the Second Applicant, not being a staff member, had no standing before the Board under staff regulation 11.1, which confers access to the JAB only on staff members.

III. The Tribunal must next determine whether there was an enforceable agreement by the Organization to reimburse the Applicant the legal fees incurred by him in the IIC inquiry and, if so, for what period of time.

IV. The Tribunal notes that Article 97 of the Charter confers on the Secretary-General the powers of chief administrator of the Organization and that the commitment to pay legal expenses was made by the Chef de Cabinet on behalf of the Secretary-General. In view of this, the Tribunal finds that there was a “promise made by or on behalf of the Respondent by someone who had actual, or at least ostensible, authority to make such a promise, so that it would become legally binding upon him” (see Judgement No. 1030, *Jensen* (2001)). Moreover, it was clearly deemed “in the interest of the Organization” that the Applicant meet with the IIC, in view of the allegations against him, as is evidenced by the Respondent’s statement that

“[t]he decision to pay the legal fees incurred by the Applicant in connection with the legal representation in his participation in the IIC inquiry was taken on an exceptional basis, in the interest of the Organization, in order to ensure that the IIC inquiry operated smoothly with the full cooperation of the Applicant”.

Thus, the Tribunal is satisfied that the Chef de Cabinet had actual or ostensible authority to give the undertaking described below.

V. According to the Applicant, the Respondent’s agreement to pay his legal fees was first conveyed to him orally in September 2004 by the Chef de Cabinet and this commitment was “absolute and unconditional”. This undertaking and the terms thereof were never put in writing; however, the Respondent acknowledged the existence of such an oral agreement in the letter of 23 February 2005 to the Applicant, albeit restricting such payment to “reasonable legal fees (as determined by the United Nations) for services in connection only with your appearance before the IIC”, incurred “up to 3 February 2005”, the

date he was suspended from duty pending disciplinary charges. Thus, the Tribunal finds that the Applicant had a reasonable expectation resulting from the promise made on behalf of the Secretary-General on which he acted, so making this a binding legal agreement.

Having determined that there was a valid and binding agreement between the parties that the Respondent would reimburse the Applicant for legal fees incurred in relation to the IIC investigation, the Tribunal is of the view that this entitlement could not be unilaterally taken away by the Respondent in the absence of an express reservation. It notes that the Respondent, in a subsequent communication dated 31 March 2005 from the Chef de Cabinet, contended that the undertaking was subject to a presumption of no wrongdoing. If that was so, it is not clear to the Tribunal why the Organization indicated as late as 23 February 2005, after it had received the report of the IIC and had suspended the Applicant, that it would pay the legal fees incurred by the Applicant up to 3 February 2005. This, together with the fact that the Applicant was required to participate in the IIC investigation precisely because of allegations of impropriety against him, contradicts the Respondent's position that the agreement by the Organization to pay legal fees incurred by the Applicant for assisting the IIC was subject to the underlying presumption of no wrongdoing on his part. The Tribunal, therefore, concludes that the agreement by the Organization to pay legal fees incurred by the Applicant for assisting the IIC was not subject to any such presumption.

VI. The Tribunal now must consider whether the Applicant is entitled to payment of legal fees beyond 3 February 2005. On that date, the Applicant was advised by the Assistant Secretary-General for Human Resources Management that “[b]ased on the Interim Report of the [IIC] into the United Nations [OIP], it has been decided, in the interest of the Organization, to suspend you from duty pending disciplinary proceedings”. Clearly, the situation changed from one in which the Applicant was assisting the IIC investigation to one in which he was facing disciplinary charges. This, in the Tribunal's opinion, warranted the letter of the Chef de Cabinet of 23 February 2005, stating that

“the [United Nations] will reimburse you the legal fees paid by you to your lawyers for the services rendered to you in connection with the IIC inquiry during the period **up to 3 February 2005**. However, we are no longer prepared to reimburse the costs of your representation before the IIC or any other legal costs incurred by you after 3 February 2005, in light of the IIC's findings.” (Emphasis added.)

The Tribunal agrees with the JAB that that a “binding, albeit oral agreement was concluded by the parties under which the Respondent agreed to pay, on an exceptional basis, for reasonable legal fees in consideration of, and in connection with the Appellant's appearance before the IIC” and that “legal expenses in connection with his participation in the IIC investigation [should] be reimbursed up to 3 February 2005”.

VII. Finally, the Tribunal has to consider what legal fees should be reimbursed. It first notices that there is no evidence on record that the Applicant has actually made any payments to his counsel. The letter



of 23 February 2005 specifically refers to reimbursement of “the legal fees paid by [the Applicant] to [his] lawyers”. Secondly, the Respondent indicated that “reasonable legal fees (as determined by the United Nations) for services in connection only with your appearance before the IIC, would be paid to you by the Organization”, without specifying what such “reasonable fees” would be.

Based on the undertaking, as confirmed in the letter of 23 February 2005, the Tribunal is of the view that the Respondent should pay to the Applicant all reasonable legal fees incurred by him up to 3 February 2005. In order to ascertain the “reasonableness” of the fees billed, an independent audit of the law firm’s invoice will be required.

VIII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay to the Applicant all reasonable legal fees incurred by him up to the date of 3 February 2005, subject to an independent audit of all invoices submitted by the Applicant for payment of fees incurred up to that date, such audit to be commenced within three months of the date of submission of the invoices and payment to be made within three months of the date of completion of the audit; and,
2. Rejects all other pleas.

*(Signatures)*



Spyridon **Flogaitis**  
President



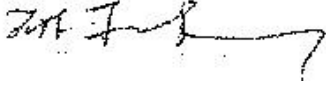
Jacqueline R. **Scott**  
First Vice-President



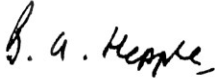
Dayendra Sena **Wijewardane**  
Second Vice-President



**Brigitte Stern**  
Member



**Goh Joon Seng**  
Member



**Bob Hepple**  
Member

New York, 26 November 2008



**Maritza Struyvenberg**  
Executive Secretary

**SEPARATE OPINION BY MR. AGUSTIN GORDILLO**

I. I respectfully concur with the majority's decision but partially dissent with its reasoning as to why it admits part of the complaint.

II. In my view, the alleged contract was not entered into, if at all, through normal procedures for the procurement of services in the public sector: no competitive bidding was performed; no consideration was clearly established; the interest of the alleged parties was not consensually established to a satisfactory degree for either alleged party; no budgetary provisions were made or invoked; no formal written contract was entered into; no general or special rule or regulation, specifically and clearly authorizing such important disbursements, was invoked; and, no commitment was made for a future "*ex gratia*" payment, nor was normal procedure followed for such payment, even if it were to be admitted that this case merited compensation. In any case, such compensation is in fact to be credited to a third party since the "expenses" have not really been incurred by the Applicant, as he did not pay his legal expenses before leaving the country.

III. If the Organization were a private company, it might reasonably be held liable for its alleged promise, as the majority well argues: as it is not, then the theory and practice of Government contracts or public sector contracts is the proper environment in which to consider the statutory *validity* of the

arrangement, which, in my respectful opinion, has not legally come into existence. According to the statutory norms, rules and regulations of the Organization, no *legally* binding promise or contract has been entered into.

IV. However, I concur with the majority's decision as to the procedure to determine the extent to which, in my view, unjust enrichment occurred to the benefit of the Organization, given that, at one time, it purported to have promised payment to the Applicant in order that he assist with the investigation of the IIC. Having had the benefit of the Applicant's legally-assisted cooperation pursuant to that promise, the Organization may, to a certain extent, as the majority determined in the operative part, have been unjustly "enriched".

*(Signature)*



Agustín **Gordillo**  
Member

New York, 26 November 2008



Maritza **Struyvenberg**  
Executive Secretary