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Administrative Tribunal **UN/DA COLLECTION**

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ADMINISTRATIVE TRIBUNAL

Judgement No. 414

Case No. 436: APETE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Arnold Kean, Vice-President, presiding; Mr. Francisco A. Forteza; Mr. Ioan Voicu;

Whereas, on 30 June 1987 Koffi Prosper Apete, a staff member of the United Nations Development Programme, hereinafter referred to as UNDP, filed an application, the pleas of which read as follows:

"II. PLEAS

The Administrative Tribunal is respectfully requested:

- (A) To set aside the decision of the Secretary-General; and
- (B) To properly compensate the Applicant for his mission assignment; and
- (C) To grant an award for delays caused by the Respondent."

Whereas the Respondent filed his answer on 30 October 1987;

Whereas the facts in the case are as follows:

Koffi Prosper Apete, a national of Togo, entered the service of UNDP on 16 June 1969 as a locally recruited staff member in the UNDP Office at

Bangui, Central African Republic. He was initially offered a three month fixed-term appointment as an accountant at the G-3, Step I level. He served on a series of successive fixed-term appointments until 25 August 1978, on which date he resigned from UNDP. During the course of his employment in Bangui, he was promoted to the G-4 level on 1 November 1971, and to the G-5 level on 1 November 1973.

The Applicant resumed service with UNDP on 1 September 1978, at the UNDP Office in Lome, Togo. He was initially offered a three month fixed-term appointment as an Administrative Assistant at the G-6 level. His appointment was renewed for further fixed-term periods of three months, one year, and one year until 30 November 1981.

Meanwhile in late 1981, the UNDP Office in Mauritania required the assistance of an accountant to dispose of a backlog of financial work. In a cable dated 14 October 1981, the Chief, Staff Development and Placement Section, Division of Personnel, DOP, Headquarters, sought the agreement of the Resident Representative in Togo to detail the Applicant "... FOR THREE MONTHS INITIALLY ..." to Mauritania to "... ASSIST WITH CRITICAL FINANCIAL BACKLOG ..." pending the selection of an internationally recruited staff member. In a cable dated 21 October 1981 the Resident Representative conveyed both his, and the Applicant's agreement to the assignment, and proposed that the Applicant be considered for international recruitment. In a cable dated 23 October 1981, the Chief, Staff Development and Placement Section, DOP replied that it was not feasible to assign the Applicant to Mauritania as an international recruit due to UNDP's financial crisis and the recruitment freeze.

The Applicant was detailed to Mauritania on 1 December 1981. He was paid a Daily Subsistence Allowance (DSA) for Mauritania and was advised that he could receive his monthly salary in the local currency of Mauritania or Togo.

In a cable dated 20 January 1982, the Resident Representative in Mauritania informed Headquarters that he was very pleased with the Applicant's performance and wished to know what were the prospects of the Applicant continuing in Mauritania "... ON [A] REGULAR FSL [FIELD SERVICE LEVEL] ASSIGNMENT ...". In a reply dated 22 January 1982, the Chief, Staff

Development and Placement Section, DOP reiterated that he was unable to consider a field service assignment because of the recruitment freeze.

In a cable dated 9 February 1982, the Resident Representative in Mauritania requested the concurrence of Headquarters and of the Resident Representative in Togo to extend the Applicant's detail "... ON TEMPO.[RARE] ASSIGNMENT NOUAKCHOTT AT TOGO SALARY EQUIVALENT PLUS DSA UNTIL FREEZE SITUATION PERMITS FSL RECRUITMENT FOR WHICH HE WOULD BE CONSIDERED AMONG ANY OTHER CANDIDATES ...". On 23 February 1982 the Resident Representative in Togo agreed to a six months extension.

On 7 September 1982 the Chief, Staff Development and Placement Section, DOP at Headquarters requested the Resident Representative in Mauritania to arrange for the Applicant's return to his local post in Lome. In a reply dated 13 September 1982, the Resident Representative strongly urged that the Applicant's detail be extended. He noted that the Applicant, a "capable and responsible" Finance Administrative Assistant, was settling to his great satisfaction the heavy backlog of work at the administrative section of his office. He therefore proposed that "... IF AT ALL POSSIBLE [THE APPLICANT] FILL FSL VACANT POST FINANCE ASSISTANT ...". If not, he requested that the Applicant remain on mission until his assignment could be converted to an international assignment, or at the very least, that the Applicant remain on mission for sufficient time to ensure the smooth and proper hand-over of his work to the new administrative officer to be recruited for Mauritania.

An exchange of cables ensued on the subject between Headquarters and the Resident Representative in Mauritania. Headquarters agreed to extend the Applicant's detail for a further six months until 28 February 1983.

In a letter dated 22 October 1982, the Applicant asked the Personnel Office at Headquarters for payment of education grant for his children, education travel expenses and family visit travel expenses. In a cable dated 18 November 1982 a Personnel Officer informed the Applicant that in view of his contractual status as a local recruit, he was not entitled to payment of these allowances.

In a cable dated 10 January 1983, the Resident Representative in Mauritania proposed to Headquarters that the Applicant be considered "... AS FINANCE ASSIST.[ANT] (FSL) IF AT ALL POSSIBLE ...". If not, he requested a further extension of the Applicant's detail in order to ensure a substantial overlap with the new administrative officer to be assigned to Mauritania. In a cable dated 25 January 1983 the Chief, Staff Development and Placement Section, DOP agreed to a further three month extension. The Applicant's detail was eventually extended until 31 August 1983, date on which he was asked to return to Lome and resume his local post. The Office of Personnel Services at Headquarters maintained its decision not to convert the Applicant's status from local to international.

On 18 April 1983 the Applicant requested the Secretary-General to review the administrative decision by UNDP not to convert his local status to international status, not to pay him a special rate of DSA, as well as not to pay him education grant, education travel expenses and family visit travel expenses. On 10 May 1983 the Acting Chief, Administrative Review Unit at the Office of Personnel Services of the United Nations Secretariat informed the Applicant that his request for administrative review had been referred to that Office and that if he did not receive a reply to his letter within one month, he could submit his appeal directly to the Joint Appeals Board (JAB).

In a letter dated 6 July 1983, the Director, Division of Personnel, UNDP informed the Applicant that in connexion with his request for administrative review of decisions taken by UNDP concerning his detail to Mauritania, the Office of Personnel Services had reconsidered his case and had decided that:

(i) It was not possible to convert the Applicant's local status to international status and he would be required to return to Lome upon completion of his detail on 31 August 1983;

(ii) His detail would be exceptionally assimilated to a mission assignment and he would be paid a Monthly Mission Allowance for Nouakchott at the dependency rate established for a detailed General Service (New York) staff member at Level 4, Step 1, payable from 1 December 1981 to 30 June 1983; similarly, he would also be entitled to a Monthly Mission Allowance for July and August 1983 at the applicable rates;

(iii) He would be paid an education grant on an exceptional basis for the school years 1981/1982 and 1982/1983;

(iv) He would not be paid education grant travel expenses as his children had not travelled to Mauritania; and,

(v) As an exception, he would be reimbursed for the round-trip travel costs of his wife from Lome/Nouakchott/Lome undertaken from 13 December 1982 to 7 April 1983;

(vi) He would also receive, upon his return to Lome, an installation grant for himself, consisting of 30 days DSA at full Lome rate plus a lump sum of US\$600.00.

In a letter dated 1 August 1983 the Applicant requested the Acting Chief, Administrative Review Unit, OPS, that an administrative review be undertaken concerning UNDP's decision not to adjust his salary and status to that of FSL-4, in particular because the exceptionally granted Monthly Mission Allowance did not include a rental subsidy. On 6 September 1983 the Assistant Secretary-General for Personnel Services notified the Applicant that the Secretary-General found "... no grounds for rescinding the decision that [his] status should not be converted to Field Service Level (FSL) or for changing the Monthly Mission Allowance paid to [him]". On 16 November 1983 the Applicant lodged an appeal with the JAB. During the course of the JAB proceedings the Applicant was granted a probationary appointment effective 1 December 1984 and a permanent appointment in June 1985. The Board adopted its report on 19 March 1987. Its conclusions and recommendations read as follows:

"CONCLUSIONS AND RECOMMENDATIONS"

44. The Panel concludes that the appellant was not entitled to have his status converted to the FSL category and that he was not entitled to a rental subsidy.

45. The Panel also concludes that there were no grounds to grant compensation for delays in procedure.

46. Accordingly, the Panel makes no recommendation in support of the appeal.

47. However the Panel is of the opinion that the situation of locally recruited staff on detail in the region of their recruitment should be reviewed on a case by case basis to insure fair treatment.

48. The Panel wishes also to reiterate the need to reduce delays in processing appeals."

On 23 April 1987 the Assistant Secretary-General for Human Resources Management* informed the Applicant that the Secretary-General had taken note of the Panel's report and had decided to maintain the contested decision.

Whereas the Applicant's principal contentions are:

1. The Joint Appeals Board failed to consider that a locally recruited general service staff member from Headquarters detailed to the Mauritania Office was granted international status during her assignment and was paid all allowances and benefits to which internationally recruited staff members are entitled.

2. The policy espoused by UNDP to treat locally recruited Headquarters staff on detail differently from locally recruited field service staff on detail is discriminatory.

3. The Applicant had a legitimate expectation based upon the exchange of cables between Headquarters and the Mauritania office, that upon termination of UNDP's recruitment freeze, he would be recruited at the FSL.

4. The Applicant is entitled to damages on account of the Respondent's delay of 34 months to file his answer before the JAB.

Whereas the Respondent's principal contentions are:

1. The Applicant was not entitled to have his Local Staff status converted to the FSL during his detail, even though such conversion had previously been granted to a Headquarters General Service category staff member, since the situation of such other staff member was different.

2. The Respondent's long delay in replying to Applicant's JAB appeal, by itself, does not warrant an award of punitive damages.

* Successor of OPS

The Tribunal, having deliberated from 20 April 1988 to 20 May 1988, now pronounces the following judgement:

I. The Applicant seeks in substance:

- 1) Rescission of the Secretary-General's decision not to convert his local status to the Field Service Level (FSL) during his detail to Mauritania; and
- 2) Payment of compensation for the injury sustained.

II. The Tribunal must determine whether a factual situation - the Applicant's detail to Mauritania - entitled him to claim the temporary conversion of his local status to international status.

III. The Applicant asserts that a general service staff member locally recruited at Headquarters, detailed to the Mauritania Office sometime prior to the Applicant, was granted the benefits requested by the Applicant. In other words, the Applicant contends that there was unequal treatment by UNDP of general service locally recruited staff coming from Headquarters and locally recruited staff coming from the field.

IV. The Tribunal notes that paragraph 1.6 of the "Statement of Basic UNDP Personnel Policies and Practices" UNDP/ADM/HQTRS/296 and UNDP/ADM/FIELD/491 reads as follows:

"The present staff of UNDP consists of categories established by the United Nations: internationally-recruited professional officers, a General Service (the majority being locally-recruited with a small minority having international status), and a Field Service internationally recruited, as well as Local Staff recruited from among nationals of the countries concerned to provide support to the Field Offices similar to that provided at Headquarters by the General Service".

The Tribunal takes note of the Respondent's view that "... UNDP distinguishes between Headquarters General Service category staff and its Local Staff category in the field offices." and that:

"The basis for Respondent's dissimilar treatment of Applicant rests on the fact that he was a member of a field office's Local Staff category, whereas the staff member who he contends was similarly situated was a member of the Headquarters General Service category."

In this connexion, the Tribunal also notes the statement by the Representative of the Respondent before the JAB:

"... As a matter of UNDP policy, which became effective in December 1980, Headquarters General Service category staff members detailed to a field duty station are placed in FSL category for the duration of the detail. In the case of locally-recruited staff members who are from time to time requested to render assistance to another UNDP office in the region for a limited period of time, the policy remained the same and no change in category to Field Service Level took place."

V. The Tribunal considers this policy to take legitimate account of different circumstances, and not to suffer from the vice of inequality.

"The principle of equality means that those in like case should be treated alike, and that those who are not in like case should not be treated alike. It is not violated if officials in different circumstances are treated differently". In re. de Los Cobos and Wenger, Judgement No. 391, ILOAT, (1980).

For this reason, the Tribunal concurs with the JAB that the policy followed by UNDP "is not discriminatory in nature".

VI. The Tribunal further notes that on his appointment to the post in Mauritania and during the duration of his detail, the question concerning his appointment at the Field Service category level was raised on numerous occasions. Even though the Applicant received the support of his supervisors in the field, Headquarters consistently denied the request to grant him international status. The Applicant was therefore on notice of UNDP's intentions in this regard and could not reasonably have had a legitimate expectation that his status would be converted to FSL.

VII. Furthermore, the Tribunal notes that after the Applicant raised his case with the Secretary-General, on 6 July 1983 UNDP informed the Applicant that the Administration had exceptionally decided to pay him Monthly Mission Allowance from 1 December 1981, education grant for the years 1981/1982 and 1982/1983, family visit travel expenses and upon his return to Lome an installation grant plus a lump sum of US\$600.00. In these circumstances, the Tribunal considers that the Applicant is not entitled to claim that he sustained any damage because of his mission assignment to Mauritania.

VIII. For the above reasons, the Tribunal concludes that the Applicant's claims requesting the Tribunal "to set aside the decision of the Secretary-General" and "to properly compensate the Applicant for his mission assignment" cannot be sustained.

IX. In view of the length of the period during which the Respondent delayed his answer to the JAB, the Applicant further requests the Tribunal "to grant an award for delays caused by the Respondent."

The Tribunal has often held that instances of great delay in the disposal of cases, however brought about, are not only regrettable in themselves, but can lead to denial of justice. In deciding if any award should be given in any specific instance, this consideration is kept in mind and each claim is examined on its merits. In exceptional circumstances, even if the Applicant's position on the merits is not sustained, the Tribunal may decide that an award for delay is appropriate.

X. It appears from the record of the case that on 6 December 1983, the Alternate Secretary of the JAB addressed a memorandum to the Representative of the Secretary-General, informing him that:

- 1) The Applicant had filed an appeal with the JAB and that a copy of the statement of appeal dated 16 November 1983 was attached thereto; and
- 2) The Presiding Officer of the Board "expects to have by 5 February 1984 your reply to this statement of appeal".

The Tribunal notes that the date set in the above-mentioned memorandum is in conformity with staff rule 111.2(g) which reads as follows:

"At the duty station where the appeal is considered, the designated Representative of the Secretary-General shall submit a written reply within two months following the date of receipt of the appeal". (Emphasis added).

XI. The Tribunal further notes that the Representative of the Secretary General recognized in his comments on the Applicant's observations to the JAB, that upon receipt - sometime during March 1984 - of the Applicant's official status file "the Respondent was in a position to commence preparation of the relevant reply".

XII. The Tribunal finds, however, that the Respondent did not submit his rebuttal within the time-limit set in staff rule 111.2(g) nor within a reasonable length of time after receiving the Applicant's official status file. On the contrary, for one reason or another, the Respondent handled the Applicant's appeal in the most casual and dilatory way, persistently disregarding the provisions of the relevant Staff Rule quoted above. Finally, he produced his answer on 29 September 1986. In other words, in this case, more than thirty-four months elapsed between the filing by the Applicant of his appeal to the JAB and the submission of the Respondent's answer.

XIII. The Tribunal considers that no extreme burden of work sustained by the representative of the Respondent can excuse such an unconscionable delay of almost three years, merely for the preparation of a rebuttal. Nor can the Tribunal subscribe to the contention that there is no proof of fault on the part of UNDP in causing the delay.

XIV. The Applicant argues that for a long period of time he experienced frustration and anxiety at not knowing the outcome of his appeal. In this connection, the Tribunal emphasizes, as it did in Judgement No. 353 (El-Bolkany) (1985), that an inordinate delay "not only adversely affects

the administration of justice but on occasions can inflict unnecessary anxiety and suffering to an Applicant". This being the case, the Tribunal decides that the Applicant is entitled to an award for delays caused by the Respondent and fixes the amount thereof at US\$1,000.00.

XV. All other pleas are rejected.

(Signatures)

Arnold KEAN
Vice-President

Francisco A. FORTEZA
Member

Ioan VOICU
Member

Geneva, 20 May 1988

R. Maria VICIEN-MILBURN
Executive Secretary