United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC1007
26 July 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1007

Case No. 1108: WILSON

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Ms. Brigitte Stern; Mr. Spyridon Flogaitis;

Whereas at the request of David Eugène Wilson, a former staff member of the United Nations), the President of the Tribunal, with the agreement of the Respondent, extended to 31 October 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 17 November 1999, the Applicant filed an Application containing pleas which read as follows:

"...

1. ..., the Applicant respectfully requests the Tribunal to recommend ...:

- The quashing of the impugned decision of the Administration to abolish the Applicant's post, as well as any subsequent decision thereto to transfer or reassign the Applicant outside the JIU [Joint Inspection Unit], or to otherwise terminate the Applicant's permanent career appointment;

- The immediate reintegration of the Applicant in the JIU work programme, encompassing duties and responsibilities commensurate with his qualifications and experience;

- A written instruction to [the JIU's Executive Secretary, the Director, Division of Administration, the Chief of Personnel], or any other Administration official working with or on behalf of such staff members to cease and desist any and all efforts to impugn the Applicant's personal or professional character, or to otherwise expel him from the JIU;

- [That] the Geneva JAB [Joint Appeals Board] [be reprimanded] for its misfeasance in considering the Applicant's case;

- Referral of the allegations raised by the Applicant above to an independent and *ad hoc* investigative and disciplinary committee (...), in particular to consider the malfeasance at the JIU as well as the apparent misconduct of [the JIU's Executive Secretary, the Director, Division of Administration, and the Under-Secretary-General for Internal Oversight Services] towards the Applicant, including the seeming major violations of the requirements (and application of the associated sanctions) identified in General Assembly resolutions 48/218 A, 548/218 B, and 51/226;

- The award of the sum of one million (USD 1,000,000) dollars as compensation for the actual and consequential damages the Applicant has suffered as a result of the foregoing actions of the Administration, including the injury to the Applicant's physical and mental health;

- The award of the sum of five hundred thousand (USD 500,000) dollars as compensation for the moral injury and damage to his reputation that the Applicant suffered as a result of the above referenced actions of the Administration;

- The award of thirty thousand (USD 30,000) [dollars] in respect of costs, expert, and legal fees incurred by the Applicant through the present date;

- The award of three months' salary to the Applicant for the Administration's unjustified delays and other procedural irregularities committed in the course of this appeal;

- Interest at the rate of ten percent per annum on any and all of the above amounts so recommended to be awarded by the Tribunal, from the date of [the] Applicant's request for administrative review (19 February 1998) through the date any amounts awarded hereunder are finally and fully paid to the Applicant; and

- Such other relief as the Tribunal feels just, fair and equitable under the foregoing circumstances.

...

6. ..., the Applicant respectfully requests the Tribunal to order the Administration to produce for both the Tribunal and the Applicant the following information or items or documents, ...

...

7. ..., the Applicant respectfully requests that the Tribunal allow the Applicant and the Administration to appear before it to answer any questions or provide such factual details as the Tribunal might find necessary, and to orally render closing arguments in the case. ..."

Whereas the Respondent filed his Answer on 15 November 2000;

Whereas, on 2 July 2001, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant joined the Joint Inspection Unit (JIU), United Nations Office at Geneva, as a Research Officer at the P-4, step X level, on a two-year fixed-term appointment on secondment from the United States Government, on 28 February 1978. Promoted to the P-5 level as Senior Research Officer effective 1 January 1980, his appointment was made permanent on 1 July 1982. Effective 1 January 1998, the Applicant's P-5 post was abolished. The Applicant was thereafter assigned to posts in Geneva commensurate with his level and experience until his statutory retirement on 30 November 1999.

From 1978 to 1987, the Applicant's performance was consistently rated as excellent or outstanding. The Applicant successfully rebutted his performance evaluation report (PER) covering 1 September 1987 to 31 May 1991 and it was deleted from his file. No PER was prepared for the Applicant thereafter.

On 11 June 1996, the Applicant sent to the Executive Secretary and the "Troika" of Inspectors at JIU, a four-page memorandum complaining that three "key guideline directives" received scant attention in the JIU.

In a memorandum dated 24 June 1996, the Chairman of the JIU sent to the Inspectors the "Proposals for cost-saving and strengthening of the JIU Secretariat" noting that "The Troika

considered the questions of both responding in a positive way to the request of projected savings for 1997 made by [the Administrator] and to the need for concrete measures to strengthen the Secretariat as mandated by several General Assembly resolutions [...], while solving certain difficulties the Unit is facing with some individual staff members". The first of the proposals reads as follows: The Unit wishes to effect the lateral transfer, preferably by exchange of staff of two P-5 Senior Research Officers within the UN system. One of the two P-5 posts would then be frozen for 12 months in 1997, generating cost-savings of US$ 174,000".

By memorandum dated 18 July 1996, the Chairman of the JIU submitted these proposals to the Under-Secretary-General for Administration and Management, adding that "there is another staff-related issue which indeed forms an integral part of the above- mentioned written proposal, but which, due to its serious nature, the Inspectors would prefer to discuss with you personally".

On 22 July 1996, by memorandum, the Executive Secretary of the JIU informed the Applicant that the Inspectors had decided "to request [his] transfer, preferably through an exchange of staff." The following day, in a memorandum to the Executive Secretary, copied to the Inspectors, the Applicant advised them that the transfer request was unacceptable.

Also on 23 July, in a memorandum to the Executive Secretary, copied to the Applicant, the Chairman of the JIU stated: "The Inspectors decided that the unsubstantiated allegations in particular of criminal activities contained in [the Applicant's memorandum of June 11] just cannot be accepted. Any staff member has the right and obligation to raise his/her concerns, but this was not the case in the above-mentioned memorandum."

On 22 August 1996, the Applicant submitted a forty-page report alleging waste, fraud, mismanagement and abuse in the JIU to the Investigation Section of the Office of Internal Oversight Services (IS/OIOS).

On 7 November 1996, a five-page anonymous memorandum was sent –"From present and former staff members of the Joint Inspection Unit" to the Executive Secretary of the JIU with copies to the Chairman of JIU, the Under-Secretary-General for Administration and Management, the Assistant Secretary-General, OHRM, and the Under-Secretary-General for Internal Oversight Services. On 8 November 1996, the Applicant wrote to the IS/OIOS urging that an investigation be undertaken and stating that a five-page memorandum had been sent

detailing the non-observance of policies and procedures, mismanagement and concern at staff harassment. On 6 December, eight JIU staff members wrote to the Executive Secretary disassociating themselves from the 7 November declaration.

On 17 January 1997, the budget proposals for 1998-1999 sent to all Inspectors and JIU staff included a proposal to abolish one P-5 post among the Senior Research Officers, all of which were encumbered by permanent staff members.

On 20 February 1997, the Applicant filed an harassment grievance against the JIU Executive Secretary with the New York Panel on Discrimination and other Grievances.

On 10 April 1997, the Applicant was notified that a fact-finding panel had been created to investigate charges contained in the JIU staff memoranda addressed to the Administration and the OIOS. The Applicant was invited to address the panel.

On 18 April 1997, the Executive Secretary of the JIU advised the Applicant that he had decided to end their exchange of correspondence.

On 21 July 1997, the Executive Secretary notified the Applicant of his new assignment for 1997-1998 advising him that a suitable post for his transfer had not as yet been identified.

On 3 October 1997, the Advisory Committee on Administrative Budgetary Questions recommended abolition of one P-5 Research Officer post in the JIU. On 6 October 1997, the three Senior Research Officers were notified of the impending post abolition, which was awaiting General Assembly approval and were asked whether redeployment, early retirement or termination with compensation was of interest to them. The Applicant replied the following day, stating that he had no preference among the options.

In a memorandum dated 13 October 1997, the Under-Secretary-General for Administration and Management requested that all Heads of Departments and Offices inform him of the action they would take in the event they had staff-encumbered positions that were to be abolished. On 24 October, the Executive Secretary JIU sent to the Director of Administration a list which provided for, *inter alia*, the abolition of the P-5 post. On 3 November, the Applicant met with the Director of Administration, UNOG, to discuss his options.

On 2 December 1997, the Under-Secretary-General for Administration and Management sent a memorandum ordering a comparative review of all staff at the same level by

a departmental panel for completion by 22 December, for departments unable to accommodate staff encumbering posts to be abolished.

On 12 December 1997, the Executive Secretary of the JIU sent the Applicant a memorandum reminding him of his previous discussions with the Director of Administration, UNOG. On 16 December, the Applicant replied that these discussions were hypothetical and that no reason existed at present to make any drastic career decisions.

On 22 December 1997, the Fifth Committee recommended that the General Assembly approve the JIU budget proposal without change, thereby eliminating one P-5 post.

On 23 December 1997, the Executive Secretary, JIU, informed the Applicant by memorandum as follows: "... I have identified the P-5 post encumbered by you for abolition and I recommended that you be offered either a transfer or early retirement ... I am exploring the possibility of offering you to stay with the Unit against the newly created P-4 post without affecting your salary and other entitlements."

The Executive Secretary, JIU, informed the Applicant on 9 February 1998 that, effective 1 January 1998, his post had been abolished and asked him whether he would accept an assignment through the end of the year to complete an on-going report. The Applicant replied on 11 February that he had to concentrate on his plans for the future and rejected the offer.

On 19 February 1998, the Applicant requested the Secretary-General to review the decision to abolish his post, and on 23 February 1998 lodged an appeal with the Geneva Joint Appeals Board (JAB) requesting a suspension of action.

On 3 and 4 March 1997, the Applicant met with the Director of Administration to discuss an agreed termination. However on March 11, the Applicant informed the Chief of Personnel that he would not sign the Memorandum of Understanding regarding his agreed termination due to the United States income tax consequences.

On 26 March 1998, the Geneva JAB concluded that the condition for suspension of action, i.e. non-implementation of the contested decision, had not been met and recommended that the Applicant's request be denied. The Under-Secretary-General for Administration and Management informed the Applicant of the Secretary-General's decision not to accept his request for suspension of action on 3 April 1998.

On 10 July 1998, the Applicant lodged an appeal with the Geneva JAB. on the merits. The Geneva JAB adopted its report on 26 March 1999. Its conclusions and recommendations read as follows:

"**Conclusions and Recommendations**

149. Taking into account all the circumstances of the case, including the particularities of the JIU and the state of the working relations within the Unit, the Panel concludes that the decision to abolish the Appellant's post was properly arrived at.

150. The Panel also concludes that the available evidence and documentation did not support the Appellant's contentions that the abolition of his post was tainted by prejudice or other improper motives.

151. The Panel further concludes that, although the Appellant's attitude did not help, the Administration failed to make every possible effort to settle the Appellant's administrative situation in conformity with the Staff Rules. While the Appellant's statutory rights were safeguarded, the interest of the Organization was disregarded.

152. In view of the aforesaid, the Panel **recommends** that the Administration find, *without further delay*, a special assignment for the Appellant until his statutory retirement. Given the Appellant's statutory retirement in only eight months, this assignment should be searched for in Geneva and it should be commensurate with the Appellant's level and experience.

153. Should the Administration fail to propose such an assignment by 31 May 1999, the Panel **recommends** that the Appellant be compensated in the amount of $30,000.00 (thirty thousands dollars) for lack of action on the part of the Administration.

154. The Panel further **recommends** that, in the meantime, the administrative situation of the Appellant be regularized as a matter of urgency by placing him on special leave with full pay as per staff rule 105.2 which provides that 'In exceptional cases, the Secretary-General may, at his initiative, place a staff member on special leave with full pay if he considers such leave to be in the interest of the Organization."

On 26 May 1999, the Under-Secretary-General for Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"...

The Secretary-General is in agreement with the recommendation of the Panel and has taken steps to see that it is implemented. In memoranda to you dated 19 April and 21 May 1999, the Director of the Division of Administration in Geneva has set forth in detail your assignments in Geneva which are commensurate with your level and experience. As this action was promptly taken, there is no need to address the Panel's recommendation regarding special leave with full pay.

..."

On 17 November 1999, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The impugned decision of the Administration to abolish the Applicant's post was taken in retaliation and direct retribution for the Applicant's report to OIOS, and was illusory, procedurally irregular and tainted by malice, ill-will, and prejudice.

2. The failure of the OIOS to investigate seriously the allegations of impropriety made by the Applicant, its failure to protect the Applicant's anonymity, and its intentional disclosure of the Applicant's identity to his superiors within the JIU violated General Assembly resolution 48/218 B, Administrative Instruction ST/SGB/273, and OIOS internal rules and procedures. The decision to abolish the Applicant's post, the attempt to transfer the Applicant out of the JIU, and the failure to assign the Applicant any work were in fact disguised disciplinary measures intended to punish the Applicant.

3. The denial of the Applicant's request to be represented before the JAB by competent, external counsel of his own choosing on an extraordinary *pro hac vice* basis, is in direct contravention of Article 2, 8, 10, 11, 12 and 19 of the Universal Declaration on Human Rights, Articles 14, 19 and 26 of the International Covenant on Political and Civil Rights, and Article 6 of the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power. Such violations must therefore render UN staff rules 110.4 and 111.2 (i) null and void.

4. The failure of the Administration to advise the Applicant of its reasons for seeking the Applicant's transfer, and selecting the Applicant's post (from a total of three P-5 posts within the JIU) for abolition violated his rights of due process.

5. His personal and professional reputation was severely harmed by the incessant defamation of the JIU Executive Secretary.

6. The recommendation of the JAB was tainted by prejudice, mistakes of fact, errors of law, procedural irregularities, defamatory statements against the Applicant, and erroneous conclusions, and has caused him great mental and physical injury.

Whereas the Respondent's principal contentions are:

1. The decision to abolish the P-5 post encumbered by the Applicant was not flawed by procedural irregularities.

2. The abolition of the Applicant's post was neither motivated by prejudice on the part of the Executive Secretary nor constituted a disguised disciplinary measure or retaliation for the Applicant's report to OIOS.

3. The Administration complied with the JAB's recommendation that it find a special assignment for the Applicant until the date of his statutory retirement.

4. The bulk of the Applicant's arguments and pleas are not properly before the Tribunal and should therefore not be considered.

The Tribunal, having deliberated from 2 to 26 July 2001, now pronounces the following judgement:

I. In this case, the main issue for consideration is whether the administrative decision to abolish the post held by the Applicant violated his rights.

II. The Tribunal finds no adequate evidence that the decision to abolish the P-5 post held by the Applicant was a disguised disciplinary measure of any kind. Although the Applicant makes many allegations about the treatment he received from the Administration, he fails to substantiate such allegations.

In a memorandum dated 24 June 1996, the Chairman of the JIU sent the "Report of the Troika" to the Inspectors. He noted that the Troika had considered the questions of "both

responding in a positive way to the request [for] projected savings for 1997 ... and to the need for concrete measures to strengthen the JIU secretariat as mandated by several General Assembly resolutions ..., while solving certain difficulties the Unit [was] facing with some individual staff members". Attached to the memorandum were a number of proposals, including "the lateral transfer, preferably by exchange of staff of two P-5 Senior Research Officers within the UN system."

The Tribunal notes that this appears to be the only document in which "difficulties" in the Unit are mentioned, but that this does not constitute sufficient evidence to substantiate the Applicant's case. In that memorandum, it is clearly stated that the projected savings were mandated by the General Assembly, and that this was the overriding consideration. Further, the fact that the implementation of this organizational measure would incidentally help in problem-solving elsewhere within the service is not supportive of the Applicant's case. The nature of the "difficulties" within the Unit is never elaborated upon, nor explicitly connected in any way with the Applicant or any other particular person. Finally, in identifying a P-5 post for abolition, as is evident from the memorandum of the Executive Secretary of 6 October 1997, the Administration conducted discussions with all three P-5 staff members in the Unit, not only with the Applicant.

III. The Tribunal also finds that the Applicant failed to provide evidence that the abolition of his post was in retaliation for his having sent a report to OIOS, given that the attempts to transfer him predated the submission of that report. Moreover there is no evidence that that report was disclosed by the Under-Secretary-General for Internal Oversight Services to the Executive Secretary of the JIU.

In addition, an anonymous five-page memorandum was sent to the Executive Secretary of the JIU, and copied to several other UN officials, on 7 November 1996. It is reasonable to assume that the Applicant was the author of this memorandum as, the following day, he cited it in his letter to the Investigation Section, OIOS. However, the Tribunal notes that no action was taken against the Applicant in this regard.

IV. In accordance with the cost-saving proposals, one P-5 post had to be abolished. The Tribunal notes that, in carrying out this cost-saving, the Administration respected all the

pertinent rules and procedures. No matter what the motives underlying the decision to abolish the post might have been, the decision was upheld by a series of collegial bodies. Thus the procedure followed by the Administration safeguarded the objectivity of the decision. It is noteworthy that the JAB concluded that "[w]hile the Appellant's statutory rights were safeguarded, the interest of the Organization was disregarded".

As for the decision by the Administration to abolish the Applicant's post, this fell entirely within its discretionary powers. The Applicant has not adduced any satisfactory evidence that this decision was motivated by prejudice or other extraneous factors.

V. The Tribunal finds that the Administration made every possible effort to find another suitable post for the Applicant in accordance with the Staff Rules. There is evidence that the Applicant was offered various options: transfers; early retirement; or, a P-4 post with grade and salary protection. The Applicant rejected all the offers made.

Ultimately, the Secretary-General agreed with the recommendation of the JAB and offered the Applicant a special assignment until his statutory retirement. Pursuant to the recommendations of the JAB, the Director, Division of Administration, UNOG, proposed to the Applicant various assignments in Geneva, which were commensurate with his level and experience.

Thus, the Tribunal is satisfied that the Administration fulfilled its obligations towards the Applicant in this regard.

VI. Finally, the Tribunal finds no evidence that the Applicant's rights of due process were violated. In particular, it finds that the decision to abolish the post encumbered by the Applicant was properly arrived at despite the fact that the Administration did not conduct a comparative review by departmental panel in accordance with the provisions of the Under-Secretary-General for Management's memorandum of 2 December 1997. This is self-evident, as the decision to abolish the specific P-5 post predated this memorandum, it having been identified as early as 24 October 1997, in a memorandum from the Executive Secretary, JIU, to the Director of Administration, UNOG.

VII. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Brigitte STERN
Member

Spyridon FLOGAITIS
Member

Geneva, 26 July 2001

Maritza STRUYVENBERG
Executive Secretary