

Suzanne BASTID
Vice-President
Geneva, 14 May 1982

Jean HARDY
Executive Secretary

Judgement No. 291

(Original: French)

Case No. 279:
Estabial

Against: The Secretary-General
of the United Nations

Application to submit a case directly to the Tribunal because of a delay in proceedings before the Joint Appeals Board ascribable to the Respondent.

Article 7, paragraph 1, of the Statute of the Tribunal.—Since the second condition for an application to be receivable was not met, the application is not receivable by the Tribunal.—The Administration's answer to the Joint Appeals Board was delayed far too long.—Since the Administration's answer eventually reached the Board, the standard procedure is available to the Applicant.—Question of any damage which the Applicant may have sustained as a result of the excessive delay in submitting an answer.—No decision can be made by the Tribunal concerning the existence of such damage until a ruling is made on the merits of the appeal.—The application is not receivable.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mrs. Paul Bastid, Vice-President, presiding; Mr. Arnold Kean; Mr. Luis de Posadas Montero;

Whereas, on 29 April 1982, Jacques J. Estabial, a staff member of the United Nations, filed an application the pleas of which read as follows:

“ . . . Applicant respectfully requests the Administrative Tribunal to *hold* that Respondent has failed to implement Staff Rule 111.3 with respect to Applicant and that Respondent's failure to meet his obligation under that Rule is such a default that Applicant's appeal may be received by the Administrative Tribunal; to *find* that Respondent has violated Staff Regulation 4 by not considering Applicant for appointment to the post of Director of the Division of Recruitment; and to *order* that appropriate redress be made”.

Whereas the Respondent filed his answer on 18 June 1982;

Whereas the Applicant filed written observations on 11 August 1982;

Whereas the facts in the case are as follows:

The Applicant, a French national, entered the service of the United Nations in May 1953 as a Translator-trainee in the French Translation Section at the P-1 level. After

being promoted to the P-2 level in 1953 and to the P-3 level in 1955, the Applicant was lent in July 1962 to the Technical Assistance Recruitment Service of the Office of Personnel.

On 1 February 1963, the Applicant was officially transferred from the Office of Conference Services to the Office of Personnel Services. He was promoted to the First Officer (P-4) level in April 1964 and to the Senior Officer (P-5) level in January 1970. In January 1972, the Applicant was appointed Deputy Chief of the Technical Assistance Recruitment Service, under the direct supervision of the Director of the Division of Recruitment.

Because of administrative restructuring within the Secretariat, the Technical Assistance Recruitment Service had become part of the newly created Division of Recruitment. On 1 August 1974, the Applicant was promoted to the Principal Officer (D-1) level and was also appointed Chief of the Technical Assistance Recruitment Service. In October 1977, the Applicant was appointed Chief of the Secretariat Recruitment Service of the Office of Personnel Services.

After serving almost three years in that post, the Applicant, on 15 October 1980, sent a memorandum to Mr. James O. C. Jonah, Assistant Secretary-General for Personnel Services, informing him that he was applying for the post of Director of the Division of Recruitment, which the Applicant understood would become available. On 3 November 1980, the Assistant Secretary-General for Personnel Services sent a memorandum to "All Heads of Departments/Offices" entitled "*Designation of Officer-in-Charge of the Division of Recruitment*", which stated:

"Following the transfer of Mr. W. Tarzi to Geneva, Mr. J. Estabial has been designated, with immediate effect, Officer-in-Charge of the Division of Recruitment."

On 6 November 1980, the Assistant Secretary-General for Personnel Services sent the Applicant a memorandum entitled "Post of Director of the Division of Recruitment, OPS" which read:

"With reference to your memorandum of 15 October 1980, by which you applied for the above vacancy, I attach hereto a copy of a self-explanatory letter which I am despatching to all the Francophone African Member States.

"Having carefully examined your application, and in view of the above circumstances, I deeply regret that it cannot be given favourable consideration. In any event, I want to assure you that your contribution to the work of the Division of Recruitment continues to be highly appreciated."

The above-mentioned letter, dated 30 October 1980, read in part as follows:

"I have the honour to inform you that the post of Director of the Division of Recruitment, Office of Personnel Services, will shortly fall vacant with the reassignment of the incumbent.

"As you know, the General Assembly has on several occasions referred to the need to ensure a linguistic balance within the Secretariat, notably in resolution 2480 B (XXIII). The Assembly's intention was therefore to affirm through that resolution the importance of French as a working language of the Secretariat.

"The General Assembly has more than once requested the Secretary-General to take further steps to increase the representation of developing countries at senior

and policy-making levels of the Secretariat. It explicitly made that request in its resolution 33/143 of 20 December 1978.

“In view of these directives, the Secretary-General has decided that, for the post of Director of the Division of Recruitment, priority will be accorded to candidates from French-speaking African countries. I therefore have the honour to transmit to you the relevant job description and to request you to recommend candidates for the post.

“As you will see, it is highly desirable that candidates should have a thorough knowledge of the United Nations or other international organizations and substantial experience of the Administration, either as Administrators or as participants in the work of such committees as the Fifth Committee or the Advisory Committee on Administrative and Budgetary Questions of the General Assembly.

“As the post is important for the proper functioning of the Secretariat, it is essential for it to be filled as soon as possible. I should therefore be grateful if you would send me your recommendations by 12 December 1980.”

In a memorandum dated 3 December 1980, the Applicant requested the Secretary-General to review his decision pertaining to the appointment to the post of Director of the Division of Recruitment. On 14 January 1981, before he had answered the Applicant, the Secretary-General had approved the recommendation of the Assistant Secretary-General for Personnel Services to appoint Mr. Louis Pascal Negre (Mali) to the post of Director of the Division of Recruitment.

On 29 January 1981, having still not received a reply from the Secretary-General, the Applicant filed an appeal before the Joint Appeals Board pursuant to staff rule 111.3, *inter alia* on the grounds that the Secretary-General's decision violated the principle that the appointment of a staff member cannot be denied on the basis of nationality and that the decision violated staff regulation 4.4.

On 3 February 1981, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had decided to maintain the contested decision.

On 13 February 1981, an Alternate Secretary of the Joint Appeals Board acknowledged receipt of the Applicant's appeal, notifying him of the procedure that was going to be followed and informing him that the Respondent had been requested to provide a written answer. The communication to the Respondent specified that the answer should be submitted by 13 March 1981.

On 23 October 1981, the Applicant wrote a further memorandum to the Secretary-General relating the chronology of facts described above and stating that:

“ . . .

“4. I have fulfilled all the required formalities and scrupulously met the deadlines established by the Staff Rules governing appeals, and for more than eight months I have been awaiting Respondent's answer. Yet as of today I have received no response whatsoever from the Administration. I submit that such a lengthy delay in answering my appeal is unfair and unreasonable, and results in denial of due process of law. Allowing the Administration to indefinitely defer its reply to my statement of appeal, thereby unilaterally controlling the pace of proceedings, is tantamount to allowing the Administration not to implement Staff Regulation 11.1 and Staff Rule 111.3 (h), which reads,

“(h) In considering an appeal, the Joint Appeals Board shall act with the maximum of dispatch consistent with a fair review of the issues before it. Normally, proceedings before the Board shall be limited to the original written presentation of the case, together with brief statements and rebuttals, which may be made orally or in writing, in one of the working languages.’

“5. I am particularly concerned about the delay because I am informed that the Board has a considerable backlog of cases and might not consider my case until a minimum of eighteen months after an answer is received from the Administration.

“6. Since I am eligible to retire on 31 January 1984, the combination of the above-mentioned delays is highly likely to result not only in the case coming before the Joint Appeals Board too late for it to be able to make any meaningful recommendation thereon, but also, should the final decision taken on recommendation of the Board be a negative one, in my being deprived of the possibility to have the case usefully adjudicated by the Administrative Tribunal.

“7. In view of the above and in the light of the serious concern repeatedly expressed by the Administrative Tribunal over the slowness of proceedings before the Joint Appeals Board, I respectfully request your agreement to bring my case directly to the Tribunal.”

On 3 December 1981, the Assistant Secretary-General for Personnel Services replied to that letter as follows:

“The request to submit your case directly to the Administrative Tribunal contained in your memorandum of 23 October 1981 addressed to the Secretary-General has been carefully considered.

“After consultations with the Office of Legal Affairs, it has been determined that the Joint Appeals Board’s advice would be useful in your case, which does not fall within the limited category of exceptional cases appropriate for direct submission to the Administrative Tribunal.

“However, the special situation mentioned in paragraph 6 of your memorandum (see annex XI) has also been taken into consideration. The reply to your appeal will be submitted promptly to the Joint Appeals Board which might, at your request, give priority to the consideration of your case, as has been done in other instances where there appeared to be cogent reasons for dealing with an appeal on an urgent basis.”

On 29 April 1982, the Applicant filed the aforementioned application before the Tribunal. The Respondent filed his answer before the Joint Appeals Board with a covering memorandum dated 17 June 1982. The Applicant responded to it on 11 August 1982 and, on 7 September 1982, submitted additional annexes. To date, the Joint Appeals Board has not made a ruling.

Whereas the Applicant’s principal contentions before the Tribunal are:

1. The Respondent’s failure to implement staff rule 111.3 (h) denied the Applicant due process of law, causing him damage which can be redressed only by direct recourse to the Administrative Tribunal.

2. The Administrative Tribunal has the right to take jurisdiction in this case, inasmuch as the Respondent has neither complied with the procedures prescribed by staff rule 111.3 nor agreed to direct submission of the case to the Administrative Tribunal.

3. The Respondent's decision has violated staff regulations 4.2, 4.3 and 4.4. The Respondent has not respected the following principles: that the paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity for securing the highest standards of efficiency, competence and integrity; that no staff member should be denied an appointment on the basis of nationality; and that the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations.

Whereas the Respondent's principal contentions are:

1. In so far as there has been no communication of the opinion of the Joint Appeals Board to the Secretary-General and as the Secretary-General and the Applicant have not agreed to submit the dispute directly to the Tribunal, the application is not receivable by the Tribunal pursuant to article 7.1 of its Statute.

2. The decision of the Secretary-General not to consent to the Applicant's request to submit the dispute directly to the Tribunal was not improperly motivated as the Respondent is entitled to be able to consider the findings of fact and recommendations of the Joint Appeals Board.

The Tribunal, having deliberated from 20 to 28 September 1982, now pronounces the following judgement:

I. The Tribunal notes, first of all, that article 7 of its Statute lays down the conditions to be met for an application to be receivable: the dispute must have been submitted "to the joint appeals body provided for in the staff regulations" and that body must have "communicated its opinion to the Secretary-General".

In the present case, only the first of these two conditions has been met. Consequently, the application is not receivable by the Tribunal.

The Applicant contends that it was impossible for the second condition to be met because the Administration's failure to answer the notification from the Joint Appeals Board concerning the filing of the appeal prevented the Board from considering the appeal. The answer, which the Board had expected by 13 March 1981, according to its note of 13 February 1981, was not received until 18 June 1982, after the Applicant had decided to refer the case directly to the Tribunal on 29 April 1982.

II. The Tribunal, while recognizing that the Administration's answer to the Joint Appeals Board was delayed far too long and that this fact has so far prevented the Board from communicating its opinion, notes that, under article 7 of its Statute, the condition regarding prior communication of the Board's opinion may be waived only by agreement between the parties; there is no such agreement in this case.

Moreover, the Tribunal notes that the Administration's answer eventually reached the Board, before which proceedings may now be resumed.

The fact that the answer was sent after the Applicant had referred the case directly to the Tribunal is merely presumptive evidence that his action may have been a determining factor in inducing the Administration to stop procrastinating, but does not alter the fact that the Board eventually received the answer and is in a position to act.

The standard procedure is therefore available to the Applicant, who cannot claim to have been denied due process so far as the Joint Appeals Board is concerned.

III. As to any damage which the Applicant may have sustained as a result of the Administration's excessive delay in submitting the answer to the Joint Appeals Board,

the Tribunal considers that no decision can be made concerning the existence of such damage until a ruling is made on the merits of the appeal.

IV. For these reasons the Tribunal decides that the application is not receivable.

(Signatures)

Suzanne BASTID

Vice-President, presiding

Arnold KEAN

Member

New York, 28 September 1982

Luis de POSADAS MONTERO

Member

Nicholas TESLENKO

Acting Executive Secretary

Judgement No. 292

(Original: French)

Case No. 257:
Mortished

Against: **The Secretary-General
of the United Nations**

Confirmation of Judgement No. 273 following the advisory opinion given by the International Court of Justice.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Endre Ustor, President; Madame Paul Bastid, Vice-President; Mr. Herbert Reis; Mr. Luis de Posadas Montero, alternate member;

Whereas, by a letter dated 23 July 1981, the Secretary-General of the United Nations informed the International Court of Justice that the Committee on Applications for Review of Administrative Tribunal Judgements established under General Assembly resolution 957 (X) had, pursuant to article 11 of the Statute of the United Nations Administrative Tribunal, decided on 13 July 1981 that there was a substantial basis for an application for review of judgement No. 273;

Whereas the Committee had requested an advisory opinion of the International Court of Justice on the following question:

“Is the judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished v. the Secretary-General*, warranted in determining that General Assembly resolution 34/165 of 17 December 1979 could not be given immediate effect in requiring, for the payment of repatriation grants, evidence of relocation to a country other than the country of the staff member’s last duty station?”