
ADMINISTRATIVE TRIBUNAL

Judgement No. 440

Case No. 461: SHANKAR

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Roger Pinto, Vice-President, presiding;

Mr. Ahmed Osman; Mr. Ioan Voicu;

Whereas at the request of P. Ravi Shankar, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 March 1988 the time-limit for the filing of an application to the Tribunal;

Whereas, on 29 March 1988, the Applicant filed an application the pleas of which read as follows:

- "1. Rescind the decision of the Joint Appeals Board and the Secretary-General in regard to the compensation clause and retain only the reinstatement clause.
2. Two Senior United Nations officials may be commissioned from headquarters preferably from the Tribunal to visit APCTT [Asian and Pacific Centre for Transfer of Technology], Bangalore, India personally to ascertain and determine the misuse of official United Nations property and abuse of official power.
3. Applicant be paid salary from 1st January 1986 until the date of reinstatement.

4. Reinstatement of applicant in United Nations service from 1st January 1986 with all benefits until reinstatement such as:
 - a. Salary as given in (3) above
 - b. Pension fund entitlements
 - c. Leave
 - d. Within grade salary increments
 - e. Promotion
 - f. Change in designation
5. Payment of damages of 10,000 by Dr. M.N. Sharif, Director, APCTT or from the Centre/ESCAP [Economic and Social Commission for Asia and the Pacific] to the appellant.
6. Declare that acts of the Director and the Administrative officer in relation to the Applicant were with malafide intention;
7. The Director and the Administrative Officer be suitably punished for their misdeeds;
8. The Director and the other officials be prevented from misrepresenting about continuing expectancy of renewals of appointments to new prospective employees;
9. Order prosecution of any penalty to Director, Administrative Officer and other official concerned for their misuse of official United Nations property and abuse of official powers and cover costs of such misuse.
10. Order removal of all those documents, which were fabricated and confidential from the applicant's personal file;
11. Order payment of compensation in an amount equivalent to salary benefits as mentioned in (3) above from 1.1.86 until the date on which the applicant would retire in addition to damage at (4) above, in case Secretary-General wishes to exercise the option given to him under article 9, paragraph 1 of the Statute, as the action is prejudicial and without any fault of the Applicant, Mr. P. Ravi Shankar.
12. Probe into the fact that Dr. M.N. Sharif (Bangladesh) appointment was made, though inexperienced, as he is related to the Executive Secretary of ESCAP, Mr. S.A.M.S. Kibria.

13. Any other relief the Administrative Tribunal may think fit, in the interests of justice."

Whereas the Respondent filed his answer on 28 November 1988;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 January 1983 under a fixed-term appointment for three months as a File Clerk with the Asian and Pacific Centre for Transfer of Technology (APCTT) at Bangalore, India, an organ of the Economic and Social Commission for Asia and the Pacific (ESCAP). On 1 April 1983 his appointment was extended for nine months. On 1 January 1984 the Applicant's appointment was extended for one year and he received a within-grade salary increment. On 1 January 1985 the appointment was further extended for one year and the Applicant again received a salary increment.

On 31 October 1985, in a confidential memorandum addressed to the Director of the Centre, the Assistant Administrative Officer of the Centre evaluated the Applicant's performance as follows:

"Mr. Ravi: lacks initiatives, enthusiasm, and does not give importance to his duties. According to previous records and information, he had been assigned and changed to various types of duties due to complaints in his performance. During the last seven months, he has been placed to take charge of the Registry. The recent event of sending important materials for TAC meeting by surface mail instead of airmail has caused a lot of troubles."

On 4 November 1985 the Director of the Centre advised the Chief of the Personnel Section of ESCAP that

"The performance of Mr. P. Ravi Shankar has been below satisfactory level for two consecutive years (1984 and 1985). Therefore, extension of his contract beyond 31 December 1985 is not recommended. Mr. Shankar has already been informed verbally. By the end of November 1985 a written notice (of his contract coming to an end effective 31 December 1985) may be sent by ESCAP to Mr. Shankar."

On 26 November 1985 the Officer-in-Charge of the Personnel Section of ESCAP sent the following cable to the Director of the Centre:

"10084 SHARIF. YOUR MEMO 4 NOVEMBER 1985. AAA PLS CONVEY FOLLOWING MESSAGE TO PPP RAVI SHANKAR QUOTE THIS SERVES TO

INFORM YOU YOUR APPOINTMENT WILL NOT BE EXTENDED BEYOND 31 DECEMBER 1985 WHEN IT IS DUE TO EXPIRE. PLEASE CONTACT MR. THANYAVIMOL FOR SEPARATION FORMALITIES, UPDATING OF ATTENDANCE RECORDS AND SIGNING OF PART ONE OF PPP35 (BEING MAILED). EYE TAKE THIS OPPORTUNITY TO EXPRESS OUR APPRECIATION FOR THE SERVICES YOU HAVE RENDERED TO APCTT. EYE JOIN OUR COLLEAGUES IN WISHING YOU EVERY SUCCESS IN YOUR FUTURE ENDEAVOURS. UNQUOTE. ..."

In a memorandum to the Applicant dated 3 December 1985, the Assistant Administrative Officer of the Centre referred to "oral information" he had given to the Applicant in September 1985 "concerning non-renewal of [his] appointment beyond December 1985" and then reproduced the text of the cable quoted above.

On 2 January 1986 the Applicant wrote to the Secretary-General requesting a review of the decision not to extend his appointment and asking to be reinstated without break in service. On 2 April 1986, not having received a reply, he lodged an appeal with the Joint Appeals Board. The Board adopted its report on 21 May 1987. The Board's conclusions and recommendations read as follows:

"Conclusions and recommendations

24. Although, as a general rule, fixed-term appointments do not carry a right of renewal, the Panel finds that in terms of the Administrative Tribunal's ruling including Judgement No. 142, expectancy for future employment by holders of fixed-term appointments should be decided not entirely by the wording of the Staff Regulations and Rules and of the letters of appointment, but by the totality of circumstances existing at the time of the staff members separation from service.

25. The Panel finds that ESCAP Administration did not renew the fixed-term appointment of the appellant because of the adverse comments of the Director, APCTT, on the performance of the appellant which comments were not shown to the appellant.

26. The Panel finds that at no time was the appellant advised either orally or in writing that his performance was found to be below satisfactory level. Nor was any performance evaluation report on the appellant prepared at any time during his three years of service with APCTT, completely disregarding the requirements of administrative instruction ST/AI/240/Rev.2 dated 28 November 1984, paragraph 4. The Panel suggests that

the Office of Human Resources Management issue appropriate instructions to ESCAP to observe the requirements of ST/AI/240/Rev.2 paragraph 4, in the rendering of performance evaluation reports on its staff members.

27. The Panel further finds that the adverse comments of the Assistant Administrative Officer, APCTT, on the appellant, contained in his confidential memorandum dated 31 October 1985, to the Director, APCTT, were not disclosed to the appellant, thus denying him an opportunity to rebut or comment on them. As these adverse comments, in the opinion of the Panel, formed the basis for the non-renewal of his fixed-term appointment, the Panel observes that the appellant was denied due process. The Panel therefore finds that the separation of the appellant was vitiated by lack of good faith and lack of due process.

28. As the inclusion of any adverse material in the official status file of a staff member unless it has been shown to the person concerned is against the decision of the Secretary-General and the guidelines announced in administrative instruction ST/AI/292 dated 15 July 1982, the Panel is of the firm opinion that the confidential memorandum dated 31 October 1985 from Mr. Thanyavimol to Mr. M.N. Sharif, Director, APCTT, and the letter of 4 November 1985 from the Director APCTT to Mr. Makhoul, Chief Personnel Section, ESCAP, should be removed from his official status files maintained by ESCAP and APCTT respectively, since they had never been shown to the appellant for comment or rebuttal and subsequently had not been examined and appraised and thus do not constitute complete documents and have no place in any of the staff member's official status files. Any confidential files should be abolished in compliance with the procedures introduced by information circular ST/IC/87/77/Rev.1 and since the prohibition of confidential files effective 3 December 1982.

29. For the reasons explained in the above paragraphs, and as the non-extension of the appellant's fixed-term appointment is vitiated by lack of due process, lack of good faith and procedural irregularities, the Panel recommends that the appellant should be reinstated in his post or in a position commensurate with his qualifications and experience. A G-3 is not an elevated level and it should not therefore be difficult for the Centre to find a post within the context of its manning table resources. In the event of the Centre not being able to reinstate the appellant the Panel recommends that the appellant be granted compensation equivalent to one year net salary at the level and step he held at the time of his separation.

30. The Panel makes no further recommendation in respect of the appeal."

On 23 July 1987 the Assistant Secretary-General for Human Resources Management advised the Applicant that:

"The Secretary-General, having re-examined your case in the light of the Board's report, has decided to maintain the contested decision.

The Secretary-General's decision is based on his conclusion that you had no legal expectancy for the renewal of your fixed-term appointment which expired automatically as provided in staff rules 104.12(b) and 109.7(a).

At the same time, bearing in mind that there were procedural deficiencies in the handling of your case, the Secretary-General has decided to grant you, in an attempt to settle this case, compensation in an amount equivalent to one year of your last base salary."

On 29 March 1988 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had an expectancy for renewal of his appointment. All staff had been told that such renewal depended mainly on performance and the Centre's finance. The Applicant's performance had been good, he had received salary increments and there was no record of poor performance at all.

2. The administrative guidelines were wilfully disregarded and violated.

3. In the absence of due process, the Applicant was denied any opportunity to represent himself.

4. The various documents involved were fabricated or confidential.

5. The acts of the Director of the Centre were vitiated by lack of good faith and lack of due process.

6. The Applicant has exceeded the Indian Government's maximum age limit for appointments while serving the United Nations.

Whereas the Respondent's principal contentions are:

1. The decision of the Secretary-General not to accept the recommendation of the Joint Appeals Board to reinstate the Applicant but to accept the alternative recommendation to compensate him was within the Respondent's authority.

2. The Applicant had no right of continued employment with the United Nations beyond the expiry of his fixed-term appointment.

3. The Applicant already received ample compensation for those claims considered by the Joint Appeals Board to be justified.

4. Claims which have not been previously submitted to the Joint Appeals Board may not be presented to the Tribunal, except where the Secretary-General and the Applicant have so agreed.

The Tribunal, having deliberated from 8 to 17 May 1989, now pronounces the following judgement:

I. In his pleas, the Applicant requests the Tribunal to order his reinstatement in APCTT, where he held a fixed-term appointment whose renewal was wrongfully denied by the Respondent. To substantiate his claim, the Applicant put forward two distinct arguments.

II. In his first argument, the Applicant alleged the existence of an expectancy of renewal on the ground that all staff members had been told that the renewal of their appointments depended mainly on two things - performance of the staff member and finance of the Centre - and that his performance had been good.

III. With regard to that argument, the Tribunal notes that the Applicant signed the standard United Nations fixed-term "Letter of appointment" in which the conditions of tenure are formulated in accordance with the relevant Staff Regulations and Rules. According to staff rule 104.12(b), "The fixed-term appointment does not carry

any expectancy of renewal or of conversion to any other type of appointment." Moreover, a provision regarding non-expectancy of renewal was expressly included in all fixed-term appointments of the Applicant.

IV. In accordance with those provisions, the Tribunal has held that employment with the United Nations ceases on the expiration date of a fixed-term appointment and that a legal expectancy of renewal would not be created by efficient or even by outstanding performance (see Judgement No. 173, Papaleontiou, para. II; Judgement No. 205, El-Naggar, para. IV; Judgement No. 368, Roy, paras. XIX to XXII; Judgement No. 427, Raj, para. XI).

V. Therefore, a claim to renewal, to be valid, must be based not on mere verbal assertions unsubstantiated by conclusive proof, but on a firm commitment to renewal revealed by the circumstances of the case. Such a commitment is lacking in the present case.

VI. The Tribunal accordingly finds that the Applicant had no legal expectancy of continued employment and that his first argument must fail.

VII. In his second argument, the Applicant states that the decision not to renew his appointment was due to the faults of ESCAP and the Director of the Center who made false and malicious allegations about the Applicant's performance and conduct and disregarded due process to be followed in such circumstances.

After reviewing the circumstances of the case, the Tribunal agrees with the Joint Appeals Board's finding that the non-renewal of the Applicant's fixed-term appointment was vitiated by lack of due process, lack of good faith and procedural irregularities.

The Tribunal notes that the Respondent in his letter dated 23 July 1987 communicating to the Applicant the report of the Joint Appeals Board on his appeal has also acknowledged that there were

procedural deficiencies in the handling of the Applicant's case.

VIII. The remedy recommended by the Joint Appeals Board was the following: either to reinstate the Applicant in his post or in a position commensurate with his qualifications and experience or to grant him compensation equivalent to one year's net salary at the level and step he held at the time of his separation.

IX. The Respondent on his part chose to grant the Applicant compensation in the amount fixed by the Joint Appeals Board rather than reinstating him in his post.

In his pleas, the Applicant requests the Tribunal to rescind the decision of the Secretary-General with regard to the compensation clause and retain only the reinstatement clause.

X. The issue before the Tribunal is therefore to decide if the decision of the Secretary-General not to reinstate the Applicant but to opt to compensate the Applicant is a valid exercise of his discretionary power and does not infringe upon the rights of the Applicant.

XI. Before deciding that issue, the Tribunal recalls paragraph 1 of article 9 of its Statute which states:

"1. If the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked. At the same time the Tribunal shall fix the amount of compensation to be paid to the Applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in his case; provided that such compensation shall not exceed the equivalent of two years' net base salary of the Applicant. ...".

XII. Having concluded in paragraph VII that the contested decision was illegal, the Tribunal, in accordance with article 9,

paragraph 1 of its Statute, should normally do two things:

(a) order the rescission of the contested decision of non-renewal of the Applicant's fixed-term appointment which expired on 31 December 1985, and

(b) at the same time, fix the amount of compensation to be paid to the Applicant for the injury sustained should the Secretary-General decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in his case.

XIII. The Tribunal notes that article 9, paragraph 1 has expressly recognized the right of the Secretary-General to compensate the Applicant without further action being taken in his case. What happened in this case was that the Secretary-General, by acquiescing to the recommendation of the Joint Appeals Board to compensate the Applicant instead of reinstating him, in effect anticipated the exercise of the option accorded to him by the Statute. The Applicant's request that the Tribunal confine the choice of the Secretary-General to reinstatement runs counter to the provisions of article 9, paragraph 1 and therefore must fail.

XIV. In considering the pecuniary assessment of the damage suffered by the Applicant, the Tribunal notes that the Applicant in his pleas has requested the Tribunal to compensate him as follows:

(a) In case the Secretary-General wishes to exercise the option given to him under article 9, paragraph 1 of the Statute, to order payment of compensation equivalent to the Applicant's salary with all benefits from 1 January 1986 until the date on which he would retire;

(b) To order payment of damages of \$10,000 by Mr. M.N. Sharif, Director, APCTT or from the Centre/ESCAP to the Applicant.

The amount of compensation recommended by the Joint Appeals Board and accepted by the Secretary-General is one year's net salary at the level and step the Applicant held at the time of his

separation.

XV. The Tribunal notes that in his last three years of employment the Applicant was offered a fixed-term appointment for three months which was successively extended for nine months and twice for one year.

On this basis, the Applicant, if his contract had been renewed, would in all likelihood have received a further extension of one year. To presume an extension beyond that point would be a matter of mere speculation.

XVI. Therefore, the Tribunal finds that the amount of compensation recommended by the Joint Appeals Board and paid by the Respondent is adequate. Accordingly, the Tribunal makes no additional award in this respect.

XVII. In his pleas, the Applicant requests the Tribunal to "order removal of all those documents, which were fabricated and confidential, from the Applicant's personal file."

In its examination of these documents, the Joint Appeals Board found that the adverse material which had been included in the official status files of the Applicant had not been shown to him for comment or rebuttal, in disregard of the decision of the Secretary-General and the guidelines announced in administrative instruction ST/AI/292 dated 15 July 1982, and therefore should be removed from the official status files of the Applicant maintained by ESCAP and APCTT respectively.

The Tribunal concurs with the opinion expressed by the Joint Appeals Board in this respect.

XVIII. In addition to his claims for reinstatement and compensation, the Applicant requests that the Tribunal address itself to a number of pleas which were not submitted to nor considered by the Joint Appeals Board. These pleas concern

questions which relate to internal matters of the Administration and therefore fall beyond the jurisdiction of the Tribunal.

XIX. For the foregoing reasons, the Tribunal:

(a) Orders that the confidential memorandum dated 31 October 1985 from Mr. Thanyavimol to Mr. M.N. Sharif, Director of APCTT, and the memorandum dated 4 November 1985 from the Director of APCTT to Mr. Makhoulf, Chief of the Personnel Section of ESCAP, be removed from the official status files of the Applicant maintained by ESCAP and APCTT respectively;

(b) Orders that a copy of this judgement be included in the official status files of the Applicant;

(c) Rejects all other pleas.

(Signatures)

Roger PINTO
Vice-President, presiding

Ahmed OSMAN
Member

Ioan VOICU
Member

Geneva, 17 May 1989

Jean HARDY
Acting Executive Secretary