

UNITED NATIONS  
GENERAL  
ASSEMBLY



Distr.  
GENERAL

A/3629  
8 August 1957

ORIGINAL: ENGLISH

velfth session

PROPOSAL TO AMEND ARTICLE 9 OF THE STATUTE OF  
THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

Report of the Secretary-General

I. INTRODUCTION

The present report has been prepared in accordance with the request of the Fifth Committee made at the tenth session of the General Assembly. The Fifth Committee decided (A/3016, para. 38)<sup>1/</sup> that an Australian draft resolution (A/C.5/L.337)<sup>2/</sup> relating to the award of compensation by the Administrative Tribunal should be referred to the Secretary-General and to the Advisory Committee on Administrative and Budgetary Questions for consideration and report at the twelfth session of the General Assembly in connexion with the item to be considered at that session: "Review of the Staff Regulations and of the principles and standards progressively applied in their implementation".

The text of the Australian draft resolution is as follows:

"The General Assembly

"Decides to amend article 9 of the statute of the United Nations Administrative Tribunal as follows:

"(a) Insert after the words 'provided that such compensation' in the second sentence of paragraph 1, the words 'including normal termination indemnities'.

Official Records of the General Assembly, Tenth Session, Annexes,  
agenda item 49, p. 38.

Ibid. p. 42.

"(b) Delete the last two sentences in paragraph 1 commencing 'The Tribunal may, however, in exceptional cases ...'."

"(c) Insert the following at the end of paragraph 1:

"In fixing the amount of compensation to be paid in any case, the Administrative Tribunal shall have regard to the following principles:

"(i) Where employment is for an indeterminate period, the amount of compensation should be related to the period which might be regarded as reasonable notice of termination of employment and,

"(ii) Where employment is for a determinate period, compensation should not exceed the applicant's salary for the unexpired portion of such period."

## II. PREVIOUS DISCUSSIONS IN UNITED NATIONS ORGANS

### A. Special Committee on Review of Administrative Tribunal Judgements

3. The Australian proposals relating to the award of compensation by the Administrative Tribunal were first introduced before the Special Committee on Review of Administrative Tribunal Judgements which met in April and May of 1955 (see Report of the Special Committee, A/2909, paras. 65 and 66 and annex 1(D)III).<sup>3/</sup>
4. The representative of Australia explained that the proposed addition to the second sentence of paragraph 1 of article 9 of the statute of the Administrative Tribunal was intended to make clear the intention of the General Assembly when it amended article 9 by resolution 782 B (VIII) of 9 December 1953. The deletion of the sentences at the end of the paragraph was intended to remove the illusory effect of that amendment, and the purpose of the additional final sentence was to define some of the principles which should be applied in fixing the amount of compensation. The Australian proposal was supported by the representative of Iraq. On the other hand, the representatives of Belgium, France, India, Syria and the United Kingdom stated that the Committee, in view of its terms of reference, had no competence to decide that question.
5. The Special Committee voted on the Australian proposals and rejected them. Paragraph (a) was rejected by 6 votes to 5, with 5 abstentions; paragraph (b) by 6 votes to 4, with 6 abstentions, and paragraph (c) by 7 votes to 3, with 7 abstentions (A/2909 para. 115).

<sup>3/</sup> Ibid. pp. 10 and 17.

6. In a note verbale to the Secretary-General dated 29 July 1955, the Permanent Representative of Australia, "in response to the request of the General Assembly for Member States to make 'any suggestions which they may consider useful'", drew attention to the proposals submitted to the Special Committee and reserved the right to present them to the General Assembly for consideration at its tenth session (A/2917/Add.1).<sup>4/</sup> The note stated that the Government of Australia believed that adoption by the Assembly of the amendments to article 9 of the statute of the Administrative Tribunal proposed by the representative of Australia in the Special Committee would, by defining clearly the discretion of the Tribunal in regard to awards of compensation, reduce the likelihood that awards might be made which were manifestly excessive.

B. Fifth Committee - Tenth session of the General Assembly

7. At the tenth session of the General Assembly in 1955, Australia submitted to the Fifth Committee a draft resolution containing the proposed amendments (A/C.5/L.337) (see report of the Fifth Committee, A/3016, paras. 36 - 38). This proposal was discussed by the Fifth Committee at its 494th meeting (A/C.5/SR.494, para. 25), 500th meeting (A/C.5/SR.500, paras. 1 - 24) and 501st meeting (A/C.5/SR.501, para. 1). The representative of Australia explained that paragraph (a) was proposed as a clarification of the intent of the General Assembly in adopting the present text of article 9 of the statute of the Administrative Tribunal. Paragraph (b) was intended to give full effect to the limitation of compensation to the equivalent of two years' net base salary. Finally, paragraph (c) was intended to specify principles to be observed by the Tribunal in assessing awards of compensation (A/3016, para. 37).

8. The Fifth Committee did not consider the substance of the proposals but inserted the following paragraph in its report to the General Assembly:

"During the discussion of the Australian proposal, the question was raised whether the Committee could consider the matter under its agenda. This question was not settled, but it was agreed that the Australian draft resolution should be referred to the Secretary-General and to the Advisory Committee on Administrative and Budgetary Questions for consideration and report at the twelfth session of the General Assembly in connexion with

<sup>4/</sup> Ibid. p. 34.

the item to be considered at that session: 'Review of the Staff Regulations and of the principles and standards progressively applied in their implementation'". (A/3016, para. 38)

### III. CONSIDERATION OF THE AUSTRALIAN DRAFT AMENDMENTS

#### A. Paragraph (a) of the Australian draft resolution (A/C.5/L.337)

9. Paragraph (a) of the Australian draft resolution is as follows:

"(a) Insert after the words 'provided that such compensation' in the second sentence of paragraph 1, the words 'including normal termination indemnities'".

10. The present text of the second sentence of paragraph 1 of article 9 of the statute of the Administrative Tribunal is:

"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." (resolution 782B(VIII), Annex).

11. The Secretary-General believes that the view expressed by the Australian representative that this amendment represents the intent of the General Assembly in adopting the present text of article 9 is correct. The report of the Fifth Committee on personnel policy made to the Assembly at its eighth session in 1953 contained the following:

"It was explained by the representative of the Secretary-General that, in accordance with the practice of the Administrative Tribunal, it was intended that the amount would be less any indemnities paid at the time of termination." (A/2615, para. 49; see also para. 50).<sup>5/</sup>

12. It is doubtful, however, if this amendment is necessary. The legislative history appears to make the intent of the Assembly quite clear and this intent

---

<sup>5/</sup> Official Records of the General Assembly, Eighth Session, Annexes, agenda item 51, p. 43.

is also consistent with the practice which had been previously followed by the Administrative Tribunal. There has been no case in which the application of this provision of the statute has arisen since the adoption of the present text in 1953. On the other hand, the Secretary-General has no objection to this amendment.

B. Paragraph (b) of the Australian draft resolution

13. Paragraph (b) of the Australian draft resolution is as follows:

"(b) Delete the last two sentences in paragraph 1 commencing  
'The Tribunal may, however, in exceptional cases ...'"

14. The full text of the last two sentences of article 9, paragraph 1, is  
"... The Tribunal may, however, in exceptional cases, when it considers it justified, order the payment of a higher indemnity. A statement of the reasons for the Tribunal's decision shall accompany each such order."

15. This provision which the draft amendment seeks to delete was not contained in the original text proposed to the General Assembly by the Secretary-General in 1953 although he had suggested that in exceptional cases the Administrative Tribunal should be free to recommend the payment of higher compensation (report of the Secretary-General, A/2533, para. 83;<sup>6/</sup> report of the Fifth Committee, A/2615, para. 49). The present text was introduced jointly by Brazil, Egypt, France, India, Indonesia, Lebanon, the Netherlands and Syria (A/2615, para. 50) and was approved by the Fifth Committee by 33 votes to 17, with 4 abstentions (A/2615, para. 53).

16. There has been no case before the Administrative Tribunal in which the question of the application of this provision has arisen. There is, therefore, no experience on which the Secretary-General may base any judgement or comments.

C. Paragraph (c) of the Australian draft resolution

17. Paragraph (c) of the Australian draft resolution is as follows:

"(c) Insert the following at the end of paragraph 1:

"'In fixing the amount of compensation to be paid in any case, the Administrative Tribunal shall have regard to the following principles:

---

<sup>6/</sup> Ibid., p. 10.

"(i) Where employment is for an indeterminate period, the amount of compensation should be related to the period which might be regarded as reasonable notice of termination of employment and,

"(ii) Where employment is for a determinate period, compensation should not exceed the applicant's salary for the unexpired portion of such period."

18. The only discussion of the substance of the Australian proposal during the tenth session of the General Assembly was on 25 October 1955. The representative of Australia, in introducing his draft resolution at the 500th meeting of the Fifth Committee, said that, after a careful study of the Tribunal judgements, his delegation had been unable to ascertain what principles, if any, the Tribunal had followed in assessing the amount of compensation to be awarded. He believed that some past awards could be explained only on the assumption that the Tribunal had taken into account considerations extraneous to the judicial assessment of compensation. His delegation, therefore, considered it desirable to limit the Tribunal's discretion in the matter and to lay down guiding principles for it to follow. Paragraph (c) of the draft resolution laid down principles to be observed by the Tribunal in assessing awards of compensation. First, Australia proposed the introduction of the principle of "reasonable notice": compensation should be related to the period which might be regarded as reasonable notice for termination of a contract. The two-years' maximum should be ample to cover any conceivable situation. Secondly, in the case of a contract of employment for a specific period, compensation should not exceed the salary for the unexpired portion of such period (see A/C.5/SR.500, paras. 1, 4 and 5).

19. The representative of Belgium, on the other hand, considered that it would be a mistake for a purely judicial body to commit itself in advance to a rigid procedure. Judicial principles, he believed, were best developed in the light of experience and every case presented a different problem (A/C.5/SR.500, para. 8).

20. Sub-paragraph (i) of paragraph (c) of the Australian draft resolution would apply to permanent and regular appointments (staff rule 104.13) and to temporary appointments not for a fixed-term (probationary or indefinite) (staff rule 104.12(a) and (c)). Sub-paragraph (ii) would apply to fixed-term appointments (staff rule 104.12(b)).

/...

21. As regards sub-paragraph (i) of paragraph (c) of the Australian draft resolution, the Secretary-General wishes to point out that periods of notice are already provided under the Staff Regulations and Staff Rules, and that these periods can hardly be regarded as other than "reasonable". The application of sub-paragraph (i), which would relate the amount of compensation to a period of "reasonable notice", would necessarily result in confusion and would give rise to difficult problems of interpretation. Either two different concepts of "reasonable notice" would exist side by side, or if the periods were to be considered the same, then the distinction between a termination properly accorded under the Staff Regulations and Rules and a termination which the Administrative Tribunal considered irregular would be removed.

22. Moreover, if the criteria of reasonable notice is adopted the Tribunal might, in certain cases, consider itself under an obligation to make awards which would be higher than the damage actually suffered by the applicant. This might, for example, happen in the case of a staff member who, after separation from the United Nations, has immediately found a more gainful employment and, therefore, sustained little or no actual loss. In such case, under sub-paragraph (i) of paragraph (c) the Tribunal would be found to make an award of compensation in accordance with the formula proposed, i.e., the principle of reasonable notice. On the other hand, under the existing provisions of article 9, the Tribunal would be able to take into account relevant factors in mitigation of damages.

23. With reference to sub-paragraph (ii) of paragraph (c) of the Australian draft resolution, the representative of Australia stated:

"It was Australia's contention that a staff member's rights were limited to those he enjoyed under the terms of his contract. The award by the ILO Tribunal to UNESCO staff members of damages in respect of the non-renewal of fixed-term contracts meant that those employees had been given rights over and above those acquired under their contracts, a proceeding not justified by any rules of jurisprudence. Furthermore, such a practice abolished the different in status between permanent employees and those on fixed-term contracts and would, if it became general, prevent the Secretary-General from engaging employees for fixed periods with the assurance that his responsibility towards them would end with the expiration of the agreed period." (A/C.5/SR.500, para. 5).

/...

24. The Secretary-General does not believe, however, that the UNESCO cases can be considered a precedent applicable to the United Nations fixed-term appointment, since the existing United Nations Staff Regulations and Rules, unlike those of UNESCO, expressly state that "the fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment" (staff rule 104.12(b)). A clear distinction is, therefore, made between career and non-career appointments. Moreover, the opinions in the UNESCO cases were based at least in part upon the interpretation of a memorandum of the Director General of 6 July 1954 announcing his intention that all holders of fixed-term contracts expiring at the end of 1954 or at the beginning of 1955, who had achieved the required standards of efficiency, competence and integrity, would be offered renewals of their appointments. There is, therefore, no reason to believe that the decisions of the UNESCO cases would be applied as precedents to the United Nations fixed-term appointment under the present Staff Regulations and Rules, which carries no expectancy and is not a career appointment.

25. In view of the foregoing considerations, the Secretary-General believes that it might be preferable for the precise amount of compensation payable under article 9 of the statute to be left to the discretion of the Administrative Tribunal within the limits set in the present text of that article.

-----