ADMINISTRATIVE TRIBUNAL

Judgement No. 385

Case No. 398: SOBEL

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Arnold Kean, Vice-President, presiding; Mr. Roger Pinto; Mr. Ahmed Osman;

Whereas at the request of Herschel J. Sobel, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal until 15 July 1986;

Whereas on 14 July 1986, the Applicant filed an application in which he requested the Tribunal:

> "... to find that the administrative decision not to extend his fixed-term appointment beyond 19 December 1984 was arrived at unfairly;
>
> To recognize that the Applicant endured cruel, unfair and prejudicial treatment at the hands of administrative personnel charged with his training and proper utilization of his abilities;
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> To order the rescission of the administrative decision not to extend his fixed-term appointment beyond 19 December 1984;
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> To order the Respondent in the event that he exercises the option provided under article 9.1 of the Statute of the Tribunal to pay to the Applicant one week's net base salary for each month of his service in the United Nations Secretariat from 16 August 1982 through 17 December 1984 as compensation for the loss of continued employment and for the injury sustained thereby; and

To order the payment to the Applicant of a further sum of one week's net base salary for each month of his service as compensation for cruel, unfair and prejudicial treatment he endured."

Whereas the Respondent filed his answer on 16 January 1987;

Whereas the Applicant filed written observations on 31 March 1987;

Whereas the facts in the case are as follows:

Herschel J. Sobel applied for a job with the United Nations on 5 May 1982. In a memorandum dated 23 June 1982 addressed to the Chief, General Recruitment Section, Office of Personnel Services (OPS), the Executive Officer of the Department of Conference Services (DCS), recommended the Applicant's recruitment at the G-3 level to fill a vacant clerical post in the Library. Since the Applicant is the holder of a Master's degree in Library Science, the Executive Officer, DCS, requested that an exception be made to the practice not to recruit persons with Master's degrees for General Service posts because the Applicant was a disabled person. The Applicant suffers from static encephalopathy which affects his manual co-ordination and, to a degree, his speech. The Executive Officer, DCS, noted that the Applicant's disability did not "interfere with his capacity to work in a library" and that the Department felt that one year after the International Year of the Disabled, it was "still incumbent on the United Nations to take the lead in employing qualified disabled people".

The Applicant entered the service of the United Nations on 16 August 1982. He was initially offered a three-month fixed-term appointment as an English Clerk at the G-2, step III level. He was assigned to the Library/Users' Service/Collection Maintenance and Circulation Section at the Dag Hammarskjöld Library, DCS. On 1 September 1982, his title was changed to Clerk, English/French,

after he passed the French clerical examination. His entrance level was reclassified at the G-3, step I level.

On 1 November 1982, he was reassigned to TOPS (Technical Operations and Publication Service) Processing and Publications Section/UN Materials Processing Unit, and his appointment was extended for a further fixed-term period of one month.

On 30 November 1982, the Executive Officer, DCS, wrote to the Director of the Dag Hammarskjöld Library, DCS, concerning the Director's request to reassign the Applicant to a different Department. The Executive Officer, DCS, expressed his dissatisfaction regarding the manner in which the Applicant's assignment was being handled by the Library and stated in part:

> "... We will investigate the possibilities of placing him elsewhere, should the Medical Service confirm that his disability interferes with his capacity to work in the Library. We feel, and are proceeding on that basis, that it would be fair to grant Mr. Sobel a three-month extension of his current fixed-term contract so that all possibilities may be explored ..."

In a memorandum dated 14 December 1982, the Director, Dag Hammarskjöld Library, DCS, suggested to the Executive Officer, DCS, that the Applicant's appointment be extended only through 31 December 1982 "on his present position, until the problem of his reassignment is solved". The Library was unable to retain the Applicant's services beyond that date unless the Division borrowed a post. In a reply dated 15 December 1982, the Executive Officer, DCS, reiterated his concern and his dissatisfaction regarding the Applicant's employment situation. The memorandum read in part as follows:

> "... In addition to the Medical Director, I have discussed this case with Mr. Cure, [Personnel Officer] Mr. Sobel and other members of the Dag Hammarskjöld Library staff. You and I have discussed it on several occasions, both before and after his appointment. I regret that I must express my shock

> and surprise about the present situation. We were all informed in advance as to Mr. Sobel's antecedents, his university training and his disability; in full knowledge of these, you recommended his appointment at the P-1 level. I find it hard to believe that when the decision was made to recruit him at the General Service level, the Dag Hammarskjöld Library could have unwittingly placed him 'against the post of mail room clerk which entailed work of considerable manual dexterity and stress'..."

The Applicant's appointment was extended for a further fixed-term period of three months.

In a memorandum dated 14 March 1983 addressed to the Chief, General Recruitment Section, OPS, the Administrative Officer, DCS, summarized the contents of different performance evaluation reports prepared by the Applicant's supervisors during his assignment to the Library. These reports contained an average of low ratings. She noted that the latest report evaluating the Applicant's performance by yet a different super- visor failed to reveal that "Mr. Sobel, although intellectually capable, has showed potential to be at least an adequate clerical staff member". She recommended that his appointment be allowed to expire, but noted that it was that "Office's view that Mr. Sobel's adaptation was complicated by the fact that his father had served there for many years ...". The Applicant would be granted a further one-month extension and unless the Office of Personnel Services were able to transfer him to another clerical position elsewhere in the Secretariat, DCS would not extend his appointment beyond 14 April 1983. The Applicant was so informed on 15 March 1983.

On 24 March 1983, the Chief, General Recruitment Section, OPS, asked the Executive Officer, DCS, whether the Applicant could be assigned to another section of the Department since all concerned agreed "that certain special circumstances in the Library" might have contributed to the difficulties encountered by the Applicant. In a reply dated 7 April 1983, the Assistant Administrative Officer,

DCS, stated that they could be of no further assistance in placing the Applicant.

The Applicant's appointment was however extended for a further fixed-term period of three months. On 16 April 1983, he was transferred to the Department of Public Information, DPI, and temporarily assigned to the Audio Materials Library, Radio and Visual Services Division. During this period, his performance was evaluated as a "good performance" and the Chief of the Division recommended that the Applicant be reemployed at the same level. The Applicant's appointment was thus extended for further fixed-term periods of five months and sixteen days, six months, and two months and sixteen days. The Applicant's performance during his assignment at the Department of Public Information was evaluated in two performance evaluation reports. In both reports, his overall performance was rated as a "good performance".

Effective 18 September 1984, the Applicant was transferred back to the Department of Conference Services. He was granted a further fixed-term appointment of three months and three days, until 19 December 1984, and was assigned to the Distribution Section against a temporary General Assembly post. This was the final extension of his appointment.

On 9 January 1985, the Applicant requested the Secretary-General to review the decision not to extend his appointment beyond 19 December 1984. On 10 September 1985, he lodged an appeal with the Joint Appeals Board. The Board adopted its report on 31 December 1985. Its conclusions and recommendations read as follows:

> "Conclusions and Recommendations
>
> 43. The Panel concludes that the appellant did not have a legitimate expectancy of continued employment with the Organization and that the decision not to extend the appellant's appointment was not taken on the basis of extraneous factors.

> 44. The Panel concludes further that efforts to place and train the appellant in the appropriate type of post and to follow-up on such placement and adjustment, proved to be inadequate on the part of the Organization.
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> 45. The Panel concludes also that the Administration misjudged at the outset its capacity to assess the appellant's disability and abilities vis-à-vis the workplace within the Organization and its own capacity to make proper placement and adequate follow-up in the situation.
>
> 46. Accordingly, the Panel recommends that the appellant be awarded one month's net base pay.
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> 47. The Panel makes no further recommendation in support of the appeal."

On 20 February 1986, the Secretary-General informed the Applicant that he had "taken note of the Board's report, and in the light of the Board's report [had] decided to maintain the contested decision and to award [him] an amount equivalent to one month's net base salary."

On 14 July 1986, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Applicant was employed as a disabled person to fulfil the objectives of the UN General Assembly in its resolutions concerning the International Year of Disabled Persons and the UN Decade of Disabled Persons.

2. The Applicant was employed after medical and administrative consultations in which the Respondent was informed about his disability, education and previous work experience. The Respondent thus assumed special obligations towards the Applicant and the United Nations for his proper treatment.

3. The Respondent did not observe his responsibility of training and developing the services of the Applicant as a staff member with a specific disability.

4. The Applicant had an expectancy of continued employment since his performance at the Department of Public Information was rated as a good performance.

Whereas the Respondent's principal contentions are:

1. The Applicant's separation from service was as a result of the expiration of his fixed-term appointment and, therefore, did not violate his rights.

2. A disabled person recruited with the Respondent's knowledge of his disability is entitled to the Respondent making reasonable efforts to assign him suitable duties, but not to continued employment irrespective of performance of assigned duties.

The Tribunal, having deliberated from 12 May 1987 to 29 May 1987, now pronounces the following judgement:

I. In his first plea, the Applicant requested the Tribunal "to find that the administrative decision not to extend his fixed-term appointment beyond 19 December 1984, was arrived at unfairly". The Tribunal observes that the Applicant was employed on the basis of a series of fixed-term appointments which were extended during the period running from 16 August 1982 to 19 December 1984. According to staff rule 104.12(b), fixed-term appointments carry no right of renewal or of conversion to any other type of appointment. Moreover, this provision was incorporated verbatim in all of the Applicant's contracts. According to staff rule 109.7(a) such appointments expire automatically and without prior notice.

II. Nevertheless, the Applicant, invoking Judgement No. 142, Bhattacharyya (1971), claims that there are particular circumstances in his case which militated in favour of his continued employment.

In paragraph V of that Judgement, the Tribunal, while noting the general rule that fixed-term appointments do not carry any right of renewal, stated that:

> "... nevertheless, the Tribunal is competent to examine the surrounding facts in which the letter of appointment was signed. The Tribunal has to consider the contract as a whole, not only by reference to the letter of appointment but also in relation to the circumstances in which the contract was concluded."

Secondly, in the same judgement, the Tribunal cites its Judgement No. 95, Sikand (1965) where it stated:

> "... that the terms and conditions of employment of a staff member with the United Nations may be expressed or implied and may be gathered from correspondence and surrounding facts and circumstances".

The Applicant cited the following circumstances as creating a legitimate expectancy for continued employment:

(a) Discussions held prior to his appointment concerning his proper assignment and training;

(b) His series of contracts over a period of two and a half years;

(c) His good performance reports during his service with the Department of Public Information;

(d) Assurances made to him of administrative efforts at alternate placements;

(e) The fact that he had been employed as a handicapped person during the International Year of Disabled Persons 1981-1982.

III. The Tribunal will now examine each of these contentions.

(a) With regard to his first contention, the Tribunal observes that in paragraph 4 of his application, the Applicant states the following:

> "These facts concerning the Applicant's disability were discussed with the UN Medical Director (then Dr. Gatenby) in a consultation on the Applicant's behalf before he was employed. They were also discussed with the Executive Officer of the Department of Conference Services, Mr. M. Schlaff, and with the Director of the Dag Hammarskjöld Library, Mr. Orlov ... The positive and cooperative attitude expressed by these officials was the essential factor in the Applicant's employment".

In paragraph 19 of the application, the Applicant states also the following:

> "The Applicant was employed after medical and administrative consultations that were supplied with medical information concerning his disability as well as with information concerning his education and previous work experience. The Administration thus assumed special obligations to the Organization as well as to the Applicant for his proper treatment and assignment".

The Tribunal considers that all these extensive consultations prior to the Applicant's employment were centered around his initial employment and the necessity of finding a suitable assignment for him, and not directed to his continued employment in the service of the United Nations.

The fact is, that after all these consultations prior and during the extension of his fixed-term contracts, the Applicant confirmed his acceptance of the conditions specified in the successive letters of appointment, including the provision that a fixed-term appointment does not carry any expectation of renewal or conversion to any other type of appointment.

(b) With regard to his second contention, the Tribunal emphasizes that if these consultations referred to in the preceding paragraph had meant to lead to permanent employment, a special clause to that effect would have been inserted in the contract, or another type of appointment would have been offered to the Applicant. On the contrary, the short duration of the extensions of

the appointments granted to the Applicant during his period of service is another proof that there was no certainty that his services would be required on a long-term basis.

(c) With regard to his third contention concerning the fact that some of his reports have been satisfactory, the Tribunal considers that this fact in itself is not enough to impose an obligation on the part of the Respondent to extend his appointment. The Tribunal recalls in this connection its Judgement No. 205, El Naggar (1975), paragraph IV, in which it stated that:

> "... under Article 101 of the Charter, the power of appointment rests with the Secretary-General. The type of appointment to be offered to a staff member is within the discretion of the Secretary-General. Neither the exceptional competence of a staff member nor favourable recommendations for a particular type of appointment by themselves create an entitlement to such an appointment."

(d) With regard to his fourth contention that assurances were made to him of administrative efforts at alternate placements as demonstrated in written memoranda by administrative officials, the Tribunal views such assurances as showing good faith on the part of the Administration in seeking for the Applicant a suitable assignment within the Secretariat and not as a firm commitment by the Respondent for continued employment.

(e) With regard to his fifth contention, the Applicant invokes a very special circumstance to support his claims to legitimate expectation of continued employment after the expiry of his last fixed-term appointment. He advances the fact that, with the full knowledge of the Respondent, he was employed on 16 August 1982, as a disabled person to fulfil the objectives of the UN, expressed by General Assembly Resolutions on the International Year of Disabled Persons 1981-1982 and the UN Decade of Disabled Persons 1983-1992. In order for the Tribunal to assess the nature and the extent of the responsibility of the Secretary-General towards the

Applicant, in the light of the above-mentioned objectives, the Tribunal must examine what could be precisely required from the Respondent according to pertinent resolutions of the General Assembly. In resolution 37/53 concerning implementation of the World Programme of Action concerning Disabled Persons adopted on 3 December 1982, paragraph 8 states the following:

> "8. Again urges all organs, organizations and agencies of the United Nations system to undertake new measures or expedite those already under way to improve employment opportunities for disabled persons within those bodies at all levels ...".

This paragraph limits the responsibility of the Secretary-General as an organ of the United Nations to improving employment opportunities for disabled persons. Improving employment opportunities could not be interpreted as implying necessarily granting permanent appointment. Such an interpretation, in any case would run counter to the authority recognized by the Charter in Article 101 for the Secretary-General to appoint staff members.

Thus, by recruiting and appointing the Applicant in a suitable post in the Secretariat, the Secretary-General is considered as having complied with paragraph 8 of General Assembly resolution 37/53.

This is more so, since in the report of the Third Inter-Agency Meeting of the UN Decade of Disabled Persons (11-13 March 1985) two considerations were suggested which might have tilted the balance perhaps in favour of a more durable appointment for disabled persons in the United Nations Secretariat. These two considerations are the principle of a quota system and the concept of occupations that are designated "as suitable for disabled persons". But these two principles were rejected as being considered divisive and discriminatory by disabled persons themselves and by many organizations concerned with disabled

persons.

For the above reasons, the Tribunal finds that all the particular circumstances surrounding the case and invoked by the Applicant do not create in his favor a legitimate expectancy for continued employment in the service of the United Nations beyond 19 December 1984, and therefore all his preceding contentions in this regard must fail.

IV. With regard to the Applicant's second plea, concerning claim for alleged cruel, unfair and prejudiced treatment suffered by the Applicant at the hands of the Administration, the Tribunal will endeavour to examine the Administration's attitude towards the Applicant during the various phases of his service.

(a) The Tribunal notes first that during his stay in the Audio Materials Library of the Department of Public Information, which is characterized by the fact that it constituted the greater portion of his work in the Secretariat, i.e. 17 months from 16 April 1983 to 16 September 1984, the Applicant admits that he had no complaint during this period and indeed he achieved good reports and received two within-grade step increases in the period covered by these reports. The Tribunal also observes in this regard that the fact that he was able to remain for seventeen months in the Department of Public Information is evidence of the good will of the Administration to keep him in a suitable post as long as possible. The Applicant has stated in his application that he was removed from this post for budgetary reasons;

(b) With regard to his recruitment and his first assignment, the Tribunal notes that in view of his academic background and previous work experience in library service, the Administration naturally sought to find a suitable assignment for the Applicant in the Dag Hammarskjöld Library. It is no doubt a favourable environment where he could exploit his potential to the utmost. The

only opening was a position in the General Service Category at the G-3 level in the Library. Being a holder of a Master's degree, he could not be recruited to posts in the General Service category. But on 8 July 1982, the Assistant Secretary-General, Office of Personnel Services, approved a recommendation made by the Department of Conference Services for the Applicant's appointment in a General Service post as an exception to Office of Personnel Services policy in this regard. The facts surrounding his recruitment and the choice of his initial assignment in the Library show that the Administration acted in good faith;

Unfortunately, the Applicant encountered during his service at the Library from 16 August 1982 to 15 April 1983, some difficulties which prompted the Library to request his assignment to a different department. These difficulties are mentioned in the memorandum of 14 March 1983 addressed to the Chief, General Recruitment Section, OPS, by the Administrative Officer, DCS, and referred to in the preliminary part of the Judgement;

What should be noted here is the fact that before his transfer from the Library, the Administration, to explore all possibilities, granted the Applicant first a three months extension and then another one month extension. In the meantime, efforts were made to assign him elsewhere. And this, the Tribunal notes, was done, not haphazardly or in a hasty way, but after lengthy discussions between the Executive Officer of the Department of Conference Services, the Office of Personnel Services and the Medical Director. The result was that he was reassigned on 12 April 1983 to the Audio Materials Library of the Department of Public Information where he stayed for 17 months as mentioned in paragraph IV (a) above;

(c) With regard to his last assignment in the United Nations Secretariat, which was in the Department of Conference Services from 17 September 1984 to 19 December 1984, the Tribunal notes the

following:

(i) When the Department of Public Information was unable, for budgetary reasons, to make further use of the Applicant's services, the Department of Conference Services agreed to place him against a temporary General Assembly post in the Distribution Service, in order to enable him to remain in the United Nations Service, but without a guarantee that he would be maintained beyond the General Assembly;

(ii) In a memorandum dated 8 March 1985, the Acting Executive Officer, DCS, describes the attempt made by the Administration to extend the Applicant's appointment in the Distribution Service beyond the period of the General Assembly, which was the only section where he could have been placed at the time. Unfortunately, his below-average performance was an obstacle to such an extension.

V. The Tribunal emphasizes in this respect, that fulfilling the aims of the General Assembly in the International Year for Disabled Persons, noble as they are, could not by themselves absolve the Secretary-General from respecting the requirement of securing the highest standards of efficiency in the staff under his supervision in accordance with Article 101 of the Charter.

VI. In the light of the foregoing considerations, the Tribunal finds:

(a) That the administrative decision not to extend the Applicant's fixed-term appointment beyond 19 December 1984, was not arrived at unfairly or on the basis of prejudice or vitiated by extraneous factors, but it was a valid exercise of the authority of the Respondent;

(b) That the Respondent had made reasonable efforts to find the Applicant, as a handicapped person, a suitable assignment and that the general attitude of the Respondent towards the Applicant

during his period of service was characterized by good will, good faith and fairness, within the limits and constraints contained in the rules in force governing the conditions of service in the United Nations Secretariat. Therefore, the Applicant's allegations of cruel, unfair and prejudicial treatment at the hands of the Administration are not well founded;

(c) The Respondent has accepted the conclusion of the JAB that the Administration misjudged at the outset its capacity to assess the Applicant's disability and abilities vis-à-vis the workplace within the Organization and, in consequence, paid the Applicant one month's net base salary as compensation, which amount the Tribunal does not consider sufficient in the circumstances.

For these reasons, the Tribunal orders:

(a) That the Respondent pay the Applicant an additional amount equivalent to two months net base salary;

(b) All other pleas are rejected.

(Signatures)

Arnold KEAN
Vice-President, presiding

Roger PINTO
Member

Ahmed OSMAN
Member

Geneva, 29 May 1987

R. Maria VICIEN-MILBURN
Executive Secretary