UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 547

Case No. 581: MCFADDEN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen; Mr. Hubert Thierry;

Whereas at the request of Richard N. McFadden, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended until 15 February 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 14 February 1991, the Applicant filed an application containing the following pleas:

"II. PLEAS

Applicant respectfully requests the Tribunal to take the following action in his case:

(a) to adjudge and declare that the decision to abolish his post was capricious, and the failure to submit his name for potential redeployment within the Office of General Services constituted a lack of due process and was therefore illegal. The procedures set forth in ST/AI/353 (...) were not adhered to:

(i) no ad hoc joint departmental advisory panel was established according to paragraph 2 to ensure that staff reassignments were undertaken in a fair and objective manner:

(ii) Applicant was not offered an opportunity to submit to the panel information relating to his case, an opportunity which might have resulted in the clarification of incorrect information regarding his functions and arguably altered the decision not to reassign him within the Office - a decision which resulted in the untimely termination of his career at the United Nations; and

(iii) Applicant was not informed in a timely manner by the head of office, in accordance with paragraph 6, that he was on a non-core post identified for abolition, thus minimizing the possibility that a post could ever be identified suitable for either his level or specialized background (...);

(b) to adjudge that the failure of the Administration to follow the guidelines stipulated in ST/AI/353 in the Applicant's case cannot be remedied by remanding the decision not to place him against a vacant core post within the Office to an appropriate authority, that is, to the ad hoc joint departmental advisory panel for the Office of General Services, and therefore he requests that the Tribunal decide to award damages commensurate with the harm done to the Applicant in terminating his career appointment;

(c) to adjudge that the separation package offered to the Applicant was only normal compensation for those whose posts were abolished in full accordance with the provisions of ST/AI/353, and therefore not adequate compensation for damage done to the career of the Applicant by the failure to follow the provisions of that circular;

(d) to adjudge that the Applicant's appeal is not estopped by the qualified acceptance of an agreed termination, as he had written on the face of the contract setting out the terms of the agreed termination: (...) 'I understand that none of the above relates to my ongoing appeal.' The Applicant contends that as the title of Chapter XI of the Staff Rules is 'Appeals', and staff rule 111.2 is entitled 'Appeals' as well, it is apparent that a request for administrative review made under 111.2 should have been understood as the appeal referred to in the reservation placed by the Applicant on the agreed termination;

(e) that the Applicant's appeal is not estopped because he fully intended his words to be relied upon by the Organization. He did not accept the offer made by the Administration, he accepted the offer as he modified it. He expected that if the Administration did not wish to accept the counter-offer, it would have communicated that to him, and asked him to sign the agreed termination without adding

his proviso. Had the Administration done so, the Applicant would have preferred to maintain his right to appeal rather than accept the agreed termination package as offered him."

Whereas the Respondent filed his answer on 2 July 1991;

Whereas the Applicant filed written observations on 26 February 1992;

Whereas the facts in the case are as follows:

Richard N. McFadden entered the service of the United Nations on 1 August 1977. He was initially offered a one year fixed-term appointment at the P-2, step VI level as an Associate Administrative Officer in the Catering Service Management of the Commercial Management Service, Office of General Services (OGS). On 4 May 1978, the Applicant's appointment was converted to a probationary appointment and on 1 August 1979, to a permanent appointment. During the course of his employment with the United Nations, the Applicant was promoted to the P-3 level with effect from 1 April 1980 and to the P-4 level with effect from 1 April 1985. The Applicant's functional title was changed to Contracts Officer.

At its fortieth session in 1985, the General Assembly, in its resolution 40/237, decided to "establish a Group of High-Level Intergovernmental Experts to Review the Efficiency of the Administrative and Financial Functioning of the United Nations" (the Group of 18). In its report to the General Assembly dated 15 August 1986 (A/41/49, GAOR 41st Session, Supplement No. 49 (1986)), the Group of 18 recommended: "a substantial reduction in the number of staff members at all levels, but particularly in the higher echelons..." to be undertaken "in a relatively short period of time without causing any negative impact on the current level of programme activities..." and that: "The overall number of regular budget posts should be reduced by 15 per cent within a period of three years". (Recommendation No. 15). The General Assembly approved this recommendation in its resolution 41/213 of 19 December 1986 and directed the Secretary-General to conduct the reform.

On 15 July 1988, the Chief, Commercial Purchase and Transportation Service, OGS, wrote to the Applicant to confirm that, as a result of a "recent

restructuring" in OGS, the functions of two services had been combined into a new "Commercial Purchase and Transportation Service". As of 18 July 1988, the Applicant would "be given additional duties involving procurement and contracts". These duties would constitute approximately 50 per cent of the Applicant's total assignments.

On 20 July 1988, the Assistant Secretary-General for Human Resources Management (OHRM) issued administrative instruction ST/AI/353, entitled: "Internal Reassignment of Staff: Guidelines for Ad hoc Joint Departmental Advisory Panels" to regulate the manner in which heads of departments and offices would complete their review of programme requirements and plan the internal reassignment of their staff in carrying out the retrenchment exercise mandated by the General Assembly. Ad hoc joint departmental advisory panels would be established to advise heads of departments and offices on such internal reassignment and to ensure that it was "undertaken in a fair and objective manner". The panels would "determine a preliminary list of staff members who should be reassigned when one or more posts among a group of similar posts at the same level [had] been slated for abolition", and conduct a review of vacancies up to 31 December 1989, to determine what staff could be reassigned within the department. In order to expedite the panel's work, the department should distinguish between "core posts" to continue after 31 December 1989 and "non-core posts" to be abolished. Staff members on "non-core posts" identified for abolition should be so informed by the head of the department or office concerned and be offered an opportunity to submit to the panels pertinent information relating to their case, if they so wished.

The Executive Officer, OGS, convened a retrenchment panel, pursuant to administrative instruction ST/AI/353. On 13 October 1989, the Assistant Secretary-General, OGS, informed the Assistant Secretary-General, OHRM, that the retrenchment panel had provided its views orally on the situation in general. The panel had not produced recommendations, listing the names of staff to be placed on non-core posts. Consequently, the Assistant Secretary-General, OGS, had prepared a list with names of staff from his department, for OHRM "to use in initiating placement or other appropriate administrative action". The Applicant's name was on this list.

In a letter dated 25 October 1989, the Assistant Secretary-General, OHRM, advised the Applicant that OGS had informed OHRM that he encumbered "a transitional post slated to be abolished by 31 December 1989". OHRM had therefore placed his name "on a list of staff to receive priority placement under the vacancy management and staff redeployment system". The Applicant was "urged to make [his] own efforts to identify suitable advertised vacancies [matching his] qualifications, professional experience and level and to apply for them".

In a further letter dated 7 December 1989, the Assistant Secretary-General, OHRM, informed the Applicant that for staff members holding permanent appointments, every effort would be made to find other assignments for which they were qualified. Staff for whom other assignments could not be found "[might] be eligible for the separation benefits recommended by the Working Group of the Staff Management Consultative Committee at its 1988 session, and approved by the Secretary-General." These generally consisted of the payment of "the indemnity provided for in the Staff Rules plus 50 per cent, and an additional compensation in lieu of notice".

On 5 January 1990, the Applicant requested the Secretary-General to review the administrative decision to abolish his post. He argued essentially that OGS had not properly followed the guidelines established in administrative instruction ST/AI/353. He referred, in particular, to paragraphs 2 and 6 of the administrative instruction, which provided for the establishment of ad hoc joint departmental advisory panels to ensure fair and objective reassignment of staff and for notice to staff whose posts were identified for abolition, providing the opportunity to submit to the panel pertinent information relating to their case.

On 25 January 1990, the Assistant Secretary-General, OGS, met with the Applicant to discuss his future placement. The Respondent asserts that the Assistant Secretary-General, OGS, although not specifying what post, offered the Applicant to find a post outside New York in procurement or travel, if the Applicant wished to remain with the Organization. According to the Respondent, the Applicant did not respond to this offer. According to the Applicant, the Respondent's offer was only "a vague offer of some post somewhere without any real commitment".

On 31 January 1990, the Applicant informed the Executive Officer, Department of Administration and Management, OGS, that since no alternative post was offered to him, he was "obliged to accept the separation package being offered to staff members whose posts [had] been abolished". He also asked for a letter from the Administration attesting to the fact that his separation from the Organization resulted "solely" from the retrenchment exercise and in no way reflected on his performance.

In a letter dated 9 February 1990, the Director, Staff Administration and Training Division, OHRM, informed the Applicant, on behalf of the Secretary-General, that the administrative decision to abolish his post would be maintained.

On 14 February 1990, the Assistant Secretary-General, OHRM, informed the Applicant that the Secretary-General had decided to terminate his appointment in accordance with the final paragraph of staff regulation 9.1(a). He added:

> "...
>
> You have already indicated in writing that you would not contest such a decision. The termination is effective 28 February 1990, c.o.b. [close of business]. This letter constitutes formal notice of termination of your permanent appointment.
>
> You will receive the termination indemnity specified in annex III(a) to the Staff Regulations, increased by 50 per cent in accordance with staff regulation 9.3.(b). The Secretary-General has decided to pay you three months' compensation in lieu of notice as stipulated in staff rule 109.3(c)."

On 21 February 1990, the Applicant signed a standard letter, indicating his acceptance of the agreed termination in accordance with annex III to the Staff Regulations, plus 50 per cent additional payment, and three months salary and allowances in lieu of notice. The Applicant also undertook "not [to] contest such decision or any decision related to [the] termination action". In a hand-written note at the bottom of the document, the Applicant stated: "I understand that none of the above relates to my ongoing appeal".

On 5 March 1990, the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 21 September 1990. The conclusion and recommendation from the majority of the Board reads as follows:

"Conclusion and Recommendation

35. The Panel has examined this case very carefully and the majority could find no legitimate grounds for appeal. The majority of the Panel considers that the termination agreement was freely accepted by the appellant and its acceptance has totally nullified any preceding complaints he may have had regarding the decision to abolish his post.

36. In view of the aforesaid, the majority of the Panel makes no recommendation in this case."

In a Dissenting Opinion, the Member of the Board elected by the staff, concluded as follows:

"...

2. On account of the failure of the Administration to abolish the appellant's post since 1985 and give him six weeks' prior notice of this action, appellant was put in an awkward situation than he would have been since it took the Administration five years to come to terms with this action, which would have given appellant ample time to secure a position within the UN system.

3. Serious attention should have absolutely been paid to the notation added by the appellant when he signed his termination offer on 21 February 1990, which in fact constituted an 'on-going' appeal and which of course is the bone of contention in this case. The significance of this notation should have been questioned by the Administration before processing the appellant's separation.

4. Furthermore, there is no evidence that an 'ad hoc joint departmental advisory panel' had been established in this case to ensure that such staff members' cases are reviewed in a fair and objective manner.

5. As stated above, the conditions and circumstances regarding the appellant's post abolition and subsequent termination were arbitrary and capricious and indeed constituted a non-observance of his terms of appointment.

6. The appellant indeed has legitimate grounds for appeal. He should, therefore, be contacted and offered to be reinstated in the Organization. Every effort should then be made on the part of the Administration to secure a core post for the appellant if he so desires."

On 8 October 1990, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the Joint Appeals Board report and informed him that:

> "The Secretary-General has taken note of the Board's report, including the dissenting opinion of one member of the Board. In the light of the Board's report and taking into account also:
>
> (a) that, while no specific post was offered to you, on 25 January 1990, the Assistant Secretary-General for General Services offered, if you wanted to remain with the Organization, to find you a post outside New York in procurement or travel, an offer to which you did not respond, and
>
> (b) that, following your acceptance on 31 January 1990, of the special separation package, a legally binding agreement was concluded on 12 February 1990, when the Acting Under-Secretary-General for Administration and Management approved, on behalf of the Secretary-General, termination of your appointment under the last paragraph of staff regulation 9.1(a), an agreement whereby you are estopped from contesting any decision relating to your termination,
>
> the Secretary-General has decided to maintain the contested decision.
>
> At the same time, the Secretary-General has decided to grant you, in view of the procedural irregularities in your case, compensation in an amount equivalent to one month's net base salary, in full and final settlement of your case."

On 14 February 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The ad hoc joint departmental advisory panel established pursuant to administrative instruction ST/AI/353 did not conduct a proper review of the vacancies and projected vacancies in the department, in accordance with the guidelines set forth in the instruction.

2. The Applicant was not given the opportunity to submit to the panel pertinent information related to his case.

3. The Respondent's vague offer of a post was not tantamount to a genuine and reasonable effort to find an alternative post.

4. The Applicant did not waive his right to appeal his separation from service on accepting the terms of the agreed termination because the contract was modified by the Applicant's specific reference to his on-going appeal.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's permanent appointment on account of abolition of post was within the Secretary-General's authority and was properly motivated.

2. By accepting an agreed termination with increased indemnity over those payable in cases of involuntary termination of appointment, the Applicant waived his right to appeal in any way his separation from service.

The Tribunal, having deliberated from 3 to 16 June 1992, now pronounces the following judgement:

I. The Applicant in this case asks that the Tribunal determine that the decision to abolish his post was capricious, that the failure to submit his name for potential redeployment within the Office of General Services constituted a lack of due process, and that the procedures set forth in administrative instruction ST/AI/353 were not adhered to, thus causing him injury that can only be remedied by awarding damages. The Applicant also asks the Tribunal to determine that the separation payment offered to and received by him was not adequate compensation for the damage he suffered and to find that the Applicant's appeal is not precluded by what he describes as a "qualified acceptance of an agreed termination".

II. Under staff regulation 9.1(a), "the Secretary-General may terminate the appointment of a staff member who holds a permanent appointment ... if the necessities of the service require abolition of the post or reduction of the staff ...". The final paragraph of staff regulation 9.1(a) provides:

"Finally, the Secretary-General may terminate the appointment of a staff member who holds a permanent appointment if such action would be in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned;" (Emphasis added).

Staff regulation 9.3(b) provides:

"The Secretary-General may, where the circumstances warrant and he considers it justified, pay to a staff member terminated under the final paragraph of staff regulation 9.1(a) a termination indemnity payment not more than 50 per cent higher than that which would otherwise be payable under the Staff Regulations." (Emphasis added.)

III. The Applicant received a termination indemnity payment pursuant to the provisions of staff regulation 9.3(b). That termination payment resulted from the abolition of the Applicant's post as part of the retrenchment mandated by General Assembly resolution 41/213 dated 19 December 1986. The payment was in accordance with recommendations made by the staff regarding the termination package to be offered to staff members in connection with the retrenchment and, as indicated above, the offer was permissible under the Staff Regulations.

IV. The Applicant was made aware in general terms of the termination package by a letter dated 7 December 1989, from the then Assistant Secretary-General, OHRM, (inaccurately later referred to by the Applicant as a letter dated 2 December 1989). This letter informed the Applicant that, if he wished to avail himself of such a separation arrangement, he should indicate this to his Executive Officer in writing by 31 January 1990, at the latest. By letter dated 31 January 1990, to his Executive Officer, the Applicant indicated his acceptance of the separation package. He also requested a letter from the Administration stating that his separation resulted solely from a retrenchment programme and that his performance as a staff member had been most satisfactory. Finally, the Applicant, in his letter of 31 January 1990, noted with regret that the untimely termination of his career was a consequence of the Administration's failure to adhere to procedures established for the retrenchment of staff.

V. Prior to the 31 January 1990 letter, referred to above, the Applicant had, by a letter dated 5 January 1990, requested the Secretary-General to review the administrative decision informing him that his post was slated to be abolished on 31 December 1989. In his letter of 5 January 1990, requesting review, the Applicant set forth his views as to irregularities involved in the administrative decision and other action taken with respect to him. In a reply dated 9 February 1990, the Applicant was informed, on behalf of the Secretary-General, that the administrative decision which he challenged would be maintained.

VI. Before appealing the decision contained in the letter dated 9 February 1990, the Applicant, on 21 February 1990, signed a document accepting an agreed termination. That document stated inter alia "that should the Secretary-General decide to terminate my appointment under the provisions of staff regulation 9.1, I will not contest such decision or any decision related to this termination action ...". It further stated that "the Organization has no further obligation, financial or otherwise upon separation." In addition, the document contained a hand-written note by the Applicant stating that "I understand that none of the above relates to my ongoing appeal." The Tribunal considers that there was no appeal by the Applicant pending at the time; his letter dated 5 January 1990, to the Secretary-General requesting review does not constitute an appeal. Not until 5 March 1990, following the 28 February effective date of the Applicant's agreed termination, did the Applicant submit an appeal with respect to the letter dated 9 February 1990, maintaining the administrative decision about which the Applicant had complained in his letter dated 5 January 1990.

VII. The Tribunal in Judgement No. 506, Bhandari (1991), on different facts was nonetheless faced with a situation somewhat similar to this case, in which an applicant sought to condition acceptance of a permissible recruitment offer on an appeal with respect to the proper level of the post. In that case, the Tribunal concluded that the applicant was not entitled to accept conditionally the offer of employment and it regarded the condition as being ineffective. (Cf. Judgement No. 506, para. VI).

VIII. In this case, the Applicant was necessarily on notice of and bound by staff regulations 9.1(a) and 9.3(b), the effect of which is to make the Secretary-General's authority to pay the termination indemnity received by the Applicant dependent on an uncontested termination of the Applicant's appointment. Accordingly, the Applicant could not, at the same time, accept benefits under staff regulations 9.1 and 9.3 and institute or maintain an appeal as he has sought to do. If he wished to pursue the latter course, he should have refrained from accepting the termination package. He was not at liberty to do both. In these circumstances, the Tribunal considers that the hand-written note on the document dated 21 February 1990, signed by the Applicant, is incompatible with the contents of the document to which it was appended, and is, moreover, null and void because of the overriding effect of the Staff Regulations cited above.

IX. The Tribunal notes that the Applicant's letter of 31 January 1990, following his letter of 5 January 1990, requesting review of the administrative decision, accepted the Administration's proposed termination package before he received a response to his letter dated 5 January 1990, a step which might well be taken as abandonment of any intention to appeal. But even attaching no weight to that acceptance, the Applicant cannot renounce his undertaking in the document signed by him on 21 February 1990, not to contest the termination of his appointment on 28 February 1990, or any decision related to it, because of his acceptance of benefits under that document and his agreement therein that the Organization had no further obligation, financial or otherwise, to him upon separation.

X. The Tribunal therefore finds no valid basis for consideration of the Applicant's other contentions regarding the alleged irregularities associated with the decision to abolish his post. As the Joint Appeals Board majority aptly pointed out in its report, the procedure followed by the Applicant was tantamount to "having the cake and eating it, too," a course of action which the Tribunal finds unattractive and declines to sanction.

XI. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Jerome ACKERMAN
President

Samar SEN
Member

Hubert THIERRY
Member

Geneva, 16 June 1992

R. Maria VICIEN-MILBURN
Executive Secretary