ADMINISTRATIVE TRIBUNAL

Judgement No. 576

Case No. 619: MAKWALI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Arnold Kean; Mr. Hubert Thierry;

Whereas, on 26 March 1991, Humphreys M. Makwali, a former staff member of the United Nations Centre for Human Settlements, hereinafter referred to as UNCHS, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 11 September 1991, the Applicant, after making the necessary corrections, again filed an application containing pleas which read, in part, as follows:

"II. PLEAS

...

12. I request the Tribunal to find and rule that:

...

(b) The Secretary-General failed to implement in good faith the unanimous recommendation by the Joint Body on the amount of compensation to be paid and that he erred in basing the said compensation on the length of my stay in the UN (...) whereas the thrust of my appeal and the findings of the Joint Body ... was based on the damage ... the Secretary-

> General's improper decision ... inflicted on both my moral and professional standing;
>
> ...

13. In view of the foregoing I hereby invite the Tribunal to...

> ...
>
> (d) Order:

(i) My reinstatement as a staff member of the United Nations in [the] same quality and capacity as that held by me on 31.12.88 [with] my seniority in service at the level where I would be now, or failing which, to find and rule that due process had not been observed in the procedural matters and ... hence order specific performance by the Respondent of the obligation incumbent upon him, in accordance with Staff Rules and Regula-tions and the consistent jurisprudence of the Tribunal, to conduct a bona fide search for a suitable post for me in the UN System following the filling of the post which I occupied...

(ii) Payment of my salary and allowances with interest covering the period from 1st January 1989 up to the end of this litigation during which time I have been compelled to remain unemployed...;

(iii) Payment to UN Joint Staff Pension Fund by the Respondent on my behalf of appropriate contributions, with interest covering the period 1.1.89 till the end of this litigation;

(iv) Appropriate compensation for moral and material injury resulting from the unjust decision...;

(v) Payment of appropriate and adequate compensation for the unreasonable and deliberate delay it took the Respondent to respond to my appeal...;

(vi) Appropriate compensation to cover the cost of filing this appeal ... in the range of $1000 to $1500.

14. That in the event the Secretary-General of the United Nations decides on the basis of fair and objective reasons, a reinstatement is not in the best interest of the United Nations, I humbly and respectfully request the Tribunal to order:

(a) Payment of the entitlements which I would have enjoyed if my fixed-term appointment had been allowed to run its full course as recommended by my supervisor...;

(b) Damages in the amount equivalent to three years net base salary at the grade and step held at the time of my last contract i.e. G7/III...;

...

(d) Appropriate compensation to cover the cost of filing this appeal ... in the range of $1000 and $1500."

Whereas the Respondent filed his answer on 24 February 1992;

Whereas the Applicant filed written observations on 24 April 1992;

Whereas, on 20 October 1992, the President of the Tribunal ruled that no oral proceedings would be held in the case.

Whereas the facts in the case are as follows:

The Applicant entered the service of UNCHS on 5 May 1986. He was initially offered a six month fixed-term appointment as a Finance Assistant at the G-7 level in the Department of Common Services. His appointment was extended first, for two interim periods of one month each, and then, for two successive periods of one year, first, through 4 November 1987 and then through 4 November 1988. The Applicant's appointment was extended for a

final fixed-term period of one month and twenty-six days, through 31 December 1988.

During the course of his employment with the UN, the Applicant's performance was evaluated in two Performance Evaluation Reports in which the Applicant's overall performance was rated "very good" and "good", respectively. On 31 October 1988, the Chief, UN Common Services, who was also the Applicant's supervisor, recommended to the Chief, Personnel, Recruitment and Administration Section (PRAS), that the Applicant's appointment be extended for a further fixed-term period of one year, through 4 November 1989.

However, in a memorandum dated 22 November 1988, the Chief, PRAS, recommended to the Executive Director, contrary to the Applicant's supervisor, that the Applicant's appointment be extended for two months only. He noted: "Although the recommendation is for a one-year extension, as an investigation is going on, I would recommend at this stage, an extension of 2 months".

On 23 November 1988, the Acting Chief, Division of Administration, advised the Executive Director that he was "unable to support the recommendation of the Chief, PRAS" as he had no knowledge of "any 'investigation' presently taking place involving [the Applicant]". The investigation to which the Chief, PRAS, referred was a "working paper recently submitted for discussion by the Internal Audit Unit and which makes mention of a number of irregularities in the payment of UNCHS invoices." He stated in this regard: "There is nothing in that document which lays any blame on [the Applicant]. Thus to single him out for a two-month extension in the face of a good performance report by his supervisor will have the inevitable effect of pointing the finger of suspicion at him. This appears to me to be discriminatory and without cause." He therefore recommended that the Administration "accept the recommendation of [the Applicant's] supervisor for a one-year extension". Should the final report of

the Internal Auditors contain any evidence of misconduct on the Applicant's part, the Applicant could then "be dealt with in accordance with applicable rules and procedures."

Nevertheless, the Executive Director decided that the Applicant's appointment would be extended through 31 December 1988 only.

In a communication dated 2 December 1988, the Applicant's supervisor expressed to the Chief, PRAS, his "utter astonishment and dismay" at learning that he had recommended to the Executive Director a two-month extension of the Applicant's appointment "based on a phantom on-going investigation." As the allegations against the Applicant were "based on mere suspicion and had not been communicated to him, he urged the Chief, PRAS, to "either bring the adverse material to the [Applicant] to give him an opportunity to comment on it or alternatively retract and expunge the adverse material from the file...". This recommendation was not accepted by the Chief, PRAS, who informed the Applicant that his appointment would not be extended beyond 31 December 1988.

In a memorandum dated 5 December 1988, the Applicant asked the Chief, PRAS, for the reasons why his appointment had been extended for one month and twenty-six days only, instead of for one year, as recommended by his supervisor. He also asked to review his official status file. In addition, he stated that he had been obliged to sign the Letter of Appointment under duress. Upon examination of his personnel files, the Applicant discovered that the administrative decision concerning his appointment had apparently been taken on the basis of an ongoing investigation concerning procurement irregularities. Therefore, on 8 December 1988, he wrote to the Chief, PRAS, to request a copy of the draft Audit Report which "apparently forms the basis of your harsh decision".

On 16 December 1988, the Applicant requested the Executive Director to reconsider the administrative decision not to extend

his appointment beyond 31 December 1988.

Not having received a reply, on 24 February 1989, the Applicant lodged an appeal with the Nairobi Joint Appeals Board (JAB). The Board adopted its report on 11 February 1991. Its conclusion and recommendation read, in part, as follows:

"Conclusion

23. The Panel concluded that the Secretary-General's prerogative of letting a fixed-term appointment expire on the date specified in the letter of appointment was not put into question by this appeal.

24. It became evident from the consideration of circumstances that led to this appeal that the appellant was granted a final extension of one month and 26 days on the basis of suspicions against his conduct in exercising his duties which were not brought to his attention and which were not investigated under staff rule 110.3 on Disciplinary Measures and staff rule 110.4 on Suspension Pending Investigation.

...

26. Because of this procedural error, the Panel did not agree with the Administration's contention that the appellant's own statements of 21 and 23 March 1989 and the supervisor's memo of 29 April 1989 retroactively justified the action taken against the appellant's interests on 23 November 1988.

27. The Panel also concluded that the delay in providing the Respondent's reply is to be attributed to an unexplained oversight and neglect on the part of UNCHS Administration.

28. In the light of the above, the Panel concludes that the appellant is owed some form of compensation, and recommends an ex-gratia payment of six months salary and related benefits to the appellant. The Panel further recommends the removal of adverse material from his personal status file.

29. The report was adopted unanimously by the Panel on 11 February 1991."

On 1 March 1991, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him that:

> "The Secretary-General, having re-examined your case in the light of the Board's report, agrees with the Board's conclusion that you should be granted compensation. He feels, however, that the amount recommended by the Board is excessive in view of the length of your service of only two and a half years. Accordingly, he has decided to maintain the contested decision and that you be paid compensation in an amount equivalent to four months' net salary and related allowances, albeit not on an ex gratia basis, as recommended by the Board, but on the basis of a legal liability on the part of the Organization.
>
> He has also decided to accept the Board's recommendation that all adverse material be removed from your file."

On 11 September 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are as follows:

1. The Respondent's decision not to extend the Applicant's appointment was tainted by prejudice, extraneous factors, procedural errors and violation of the right to a proper defence.

2. The Applicant was neither charged with misconduct nor dealt with under the proper disciplinary procedures required by the Staff Rules and PD/1/76.

3. The Secretary-General failed to implement, in good faith, the unanimous recommendation by the JAB.

Whereas the Respondent's principal contentions are as follows:

1. The Applicant had no legal expectancy of continued employment with UNCHS upon expiration of his fixed-term appointment.

2. The Applicant was granted adequate compensation for the procedural errors committed by the Administration.

The Tribunal, having deliberated from 21 October to 16 November 1992, now pronounces the following judgement:

I. The Tribunal considers that the documentation available to it is sufficient to enable this case to be decided, and that it is not necessary to require the production of further documents requested by the Applicant.

II. The Respondent admits that the Administration committed a procedural error in failing to conduct an investigation under PD/1/76 concerning the question whether the Applicant had been guilty of financial misconduct. This suspicion was not brought to the Applicant's attention, so that he had no opportunity to answer the charges brought against him in what he describes as a "phantom investigation".

III. The Applicant's fixed-term contract, due to expire on 4 November 1988, was extended only until 31 December 1988, despite the recommendation of the Applicant's supervisor (the Chief of Common Services) that it should be extended for a year. The Applicant asserts that the decision of the Executive Director of UNCHS not to extend the appointment beyond 31 December 1988, was arbitrary and motivated by prejudice and procedural errors, without due process of law. The Applicant's principal request is for rescission of the Executive Director's decision and

compensation for moral and material injury resulting from that decision.

IV. The Joint Appeals Board (JAB) has recommended that compensation should be paid to the Applicant and that the amount of compensa-tion should be the equivalent of six months net base salary. The Respondent has not denied that compensation is due, but considers that it should be the equivalent of four months net base salary.

V. The Tribunal finds that the Applicant has not discharged the burden of proof that the decision not to extend his appointment was influenced by prejudice or extraneous factors.

VI. However, the Tribunal also finds that the Administration erred in not making the charges of gross misconduct the subject of an investigation under PD/1/76. This it should have done before deciding not to extend the Applicant's contract. The Tribunal need not speculate as to the likely outcome of such proceedings; it is sufficient to establish that the Administra-tion did not follow the procedure it had itself prescribed, thereby depriving the Applicant of whatever safeguards that procedure would have afforded him. The Tribunal does not consider this omission to be a minor matter.

VII. The Tribunal accordingly finds, as did the JAB, that the Applicant was injured by the error on the part of the Adminis-tration and fixes, as compensation for the injury sustained, two months of the Applicant's net base salary at the time of his separation from service. This will result in the Applicant receiving the total amount recommended by the JAB.

VIII. In the light of the above, the Tribunal orders the Respondent:

(i) To pay to the Applicant two months of his net base salary at the time of his separation from service;

(ii) To remove from the Applicant's personnel file all adverse material arising in these circumstances, and

(iii) To provide the Applicant with a certificate that the Applicant was separated from the service of the United Nations because his fixed-term contract of employment had expired and not for any other reason.

IX. All other pleas are rejected, including the Applicant's request for the production of documents.

(Signatures)

Jerome ACKERMAN
President

Arnold KEAN
Member

Hubert THIERRY
Member

New York, 16 November 1992

R. Maria VICIEN-MILBURN
Executive Secretary