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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 596

Case No. 651: DOUVILLE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 10 February 1992, Suzanne Douville, a staff member of the United Nations, filed an application containing pleas which read, in part, as follows:

"(a) To order rescission of the Secretary-General's decision of 18 November 1991 (...) confirmed in principle on 18 December 1991 (...);

(b) To order as a result the uninterrupted specific performance by the Secretary-General of the obligations arising for the Organization from the Applicant's international recruitment ...;

(c) To find and rule that the Secretary-General has exceeded his competence in depriving the Applicant of the entitlements granted her under the Staff Rules, ... by virtue of her international recruitment ...;

(d) To find and rule further that the Secretary-General then compounded his initial fault by refusing to apply to the Applicant the implications of the interpretation of the relevant Staff Rules given by the Tribunal in its Judgement No. 508 (Rosetti) of 27 February 1991; ...;

(e) To order in consequence the payment by the Secretary-General to the Applicant of compensation

in an exemplary amount equal to two years' salary because of the grave fault of the Secretary-General in the Applicant's case ...".

Whereas the Respondent filed his answer on 27 July 1992;

Whereas the Applicant filed written observations on 13 August 1992;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 14 July 1982, on a probationary appointment at the G-2, step VII level, as a non-locally recruited French Conference Typist in the Department of Conference Services, Editorial and Official Records Division, Stenographic Section, French Word Processing Unit. The Personnel Action Form implementing her appointment stated, under the sections regarding places of "Recruitment" and "Home Leave", "Laval, Quebec, Canada". Under the heading "Remarks - Observations", it is stated: "Non-local recruit ... entitled to installation grant at the single rate. Entitled to removal of personal goods and household effects ..." The Applicant was promoted to the G-3 level with effect from 1 January 1983 and was then given a permanent appointment with effect from 1 July 1984. On 1 January 1985, the Applicant was promoted to the G-4 level and her functional title was changed to "Editorial Clerk".

On 1 August 1986, the Applicant was reassigned to the Office of the Director, Department of Conference Services, Editorial and Official Records Division, with the functional title of "Clerk-Typist". The P-5 Action Form implementing the reassignment, dated 2 July 1986, included the following observations: "Discontinuance of entitlements to international recruitment benefits, salary differential and non-resident allowance".

In a memorandum dated 16 July 1986, the Applicant sought confirmation by the Personnel Officer for the Department of Conference Services of the international benefits which would be discontinued. In its reply dated 28 July 1986, the Office of Personnel Services stated as follows:

"Qualifying service for the purpose of international entitlements is only for the period served in a post open to international recruitment. Accordingly, as of the date of your transfer, you will cease to accrue service credits towards international entitlements such as non-resident's allowances, salary differential and home leave.

However, rights which can be considered as having been acquired and derived from the past international status shall be preserved, i.e., return transportation, shipment of personal effects on separation and payment of repatriation grant accrued during that period."

On 1 August 1988, the Applicant was transferred to the post of Secretary to the Director of the Staff Administration and Training Division, Office of Human Resources Management. On 1 October 1990, she was reassigned within the same office without a change of appointment status, and was promoted to the G-5 level. On 9 May 1993, the Applicant informed the Director of the Office of Human Resources Management that she wished to submit her resignation with effect from 16 July 1993.

On 27 February 1991, the Administrative Tribunal rendered its Judgement No. 508, Rosetti, in which it held that a General Service staff member who had been recruited internationally and who, like the Applicant in this case, had been transferred to a post that did not carry international status, was entitled to international benefits on the ground that "the decision by the Administration concerning the allowances and benefits that [Ms. Rosetti] has been denied is not based on any rule and is of an arbitrary nature" (para. XII), and that "whether or not a staff member is entitled to the allowances or benefits in question is determined by the staff member's place of recruitment and not by the post occupied by him or her" (para. XIV). The acceptance by the Applicant of a transfer to the post in question "could not have the effect of depriving the Applicant of the allowances and benefits to which she was entitled under the Staff Rules" and "therefore had no legal effect" (para. XV).

On 7 June 1991, the Applicant wrote to the Assistant Secretary-General for Human Resources Management, requesting a review of the decision notified in the P-5 Action Form N6E-095, discontinuing international benefits and seeking retroactive restoration of such benefits from 1 August 1986.

In a reply dated 17 September 1991, a personnel officer informed the Applicant that the Office of Human Resources Management was "currently reviewing [her] case with a view to reinstating [her] entitlement to benefits arising from international recruitment status", and that for the moment, if she so wished, she could exercise her entitlement to home leave in 1991.

On 18 October 1991, the Applicant asked the Secretary-General to consent, in accordance with article 7, paragraph 1, of the Statute of the Administrative Tribunal, to her direct submission of the case to the Tribunal. On 18 November 1991, the Director of the Staff Administration and Training Division informed the Applicant that the Secretary-General consented to her direct submission of her appeal to the Administrative Tribunal in accordance with article 7 of its Statute. The Director also informed the Applicant that the benefits arising from her international recruitment status would be reinstated as of 7 June 1991, pending a review of the implications of the Rosetti judgement which could entail a retroactive reinstatement of those benefits as of 1 March 1991, i.e., the date of the first salary period following that judgement.

On 13 November 1991, a Working Group set up by the Assistant Secretary-General for Human Resources Management to examine the implications of Judgement No. 508, Rosetti, recommended that the effective date of reinstatement of international benefits should be the date of the judgement. The Assistant Secretary-General for Human Resources Management endorsed this recommendation.

On 18 December 1991, the Applicant was informed that her international benefits would be reinstated with effect from 1 March 1991.

On 10 February 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision arbitrarily depriving the Applicant of her entitlements as an internationally recruited staff member is null and void.

2. The Respondent has exceeded his authority under the Staff Rules and the contract of employment concluded between the Organization and the Applicant in seeking, in July 1986, to deprive the Applicant of her entitlements under the contract and the provisions of the Staff Rules.

3. The Respondent has aggravated the injury thus caused the Applicant by depriving her of her right to appeal against the decision taken in July 1986 when the personnel officer for her department informed her that this administrative measure could not be challenged.

4. The decision of the Respondent refusing to apply Administrative Tribunal Judgement No. 508 to the Applicant and confirmed in principle on 18 December 1991 violates the Applicant's terms and conditions of employment and entails the responsibility of the Administration.

Whereas the Respondent's principal contentions are:

1. The Applicant's appeal against the original decision to discontinue her entitlement to international allowances and benefits is subject to the time-limits in staff rule 111.2(a) and staff rule 103.15.

2. The Applicant's rights to international benefits are statutory rights dependent upon the terms of the Staff Regulations and Rules. They are not independent contract rights set out in the Letter of Appointment and cannot be varied except by consent of the Applicant.

The Tribunal, having deliberated from 9 June to 29 June 1993, now pronounces the following judgement:

I. The Secretary-General has agreed that the Applicant's request should be submitted directly to the Tribunal. Accordingly, under article 7 of its Statute, the Tribunal is called upon to exercise its jurisdiction in this case.

II. The facts are simple and are not disputed by either of the parties. The Applicant, of Canadian nationality, residing at Laval, Canada, was recruited "internationally" on 14 July 1982, in accordance with the terms of staff rule 104.7, for a post as conference typist in the Department of Conference Services at United Nations Headquarters, New York. Until 1986, she received the allowances and benefits normally deriving from the status of an internationally recruited staff member. However, when she was transferred in 1986 to a post normally assigned to a locally recruited staff member, she was deprived of the allowances and benefits attaching to the status of an internationally recruited staff member. Such was the practice followed by the Administration during this period prior to Judgement No. 508 (Rosetti), which the Tribunal rendered on 27 February 1991.

III. The Rosetti case also involved an internationally recruited staff member who had been deprived of the allowances and benefits attaching to such recruitment upon her transfer to a post intended to be filled by a locally recruited staff member. The Tribunal, basing its decision on staff rule 104.6 (Local recruitment) and staff rule 104.7 (International recruitment), stated that: "the necessary and sufficient condition for international recruitment of a staff member in the General Service category is that 'they have been recruited from outside the area of the duty station'" (Judgement No. 508, para. XI). The Tribunal also considered that: "whether or not a staff member is entitled to the allowances or benefits in question is determined by the staff member's place of recruitment and not by the post occupied by him or her" (para. XIV). Accordingly, the Tribunal rescinded the decision depriving the

Applicant of the allowances and benefits attaching to the status of an internationally recruited staff member.

IV. The Respondent in this case does not challenge the jurisprudence of the Tribunal as it was set out in Judgement No. 508. He states in his reply: "Respondent does not question the terms of the Tribunal's judgement".

However, following this Judgement, a Working Group was set up to examine the implications of the Tribunal's decision for the Administration's practice in similar cases. On 13 November 1991, this group recommended that the allowances and benefits attaching to the status of an internationally recruited staff member should be restored to staff members who had been deprived of them, but only as from the date of Judgement No. 508 and non-retroactively.

This solution was adopted by the Administration. The allowances and benefits attaching to the status of an internationally recruited staff member were restored to the Applicant as from 1 March 1991, the date immediately following the judgement rendered on 27 February. The Applicant was informed of this decision by a letter dated 18 December 1991.

V. This decision is challenged by the Applicant who requests its rescission on the grounds that she is entitled, under the Tribunal's jurisprudence, to the reinstatement of the allowances and benefits attaching to the status of an internationally recruited staff member not only as from the date of the present judgement, but retroactively, for the period 1986-1991, during which she was deprived of them.

VI. The Respondent does not question that, in accordance with the Rosetti jurisprudence, internationally recruited staff members, including the Applicant, are entitled in principle to restoration of the entitlements of which they were deprived by the Administration's practice prior to Judgement No. 508. He believes, however, that this judgement did not have the effect of releasing internationally

recruited staff members from the obligations arising under staff rules 111.2(a) and 103.15 in respect of the time-limits for the filing of appeals against administrative decisions and claims for retroactive payments.

VII. The Tribunal believes that its Judgement No. 508 correctly applied staff rules 104.6 and 104.7, but that it was not for the Tribunal to release staff members from the obligations deriving from staff rule 111.2(a), and that its judgement did not have the effect of doing so. Staff rule 103.15, cited by the Respondent, is not applicable in the present instance.

VIII. For the purposes of this judgement, it is not necessary to dwell upon the arguments of the parties relating to the elements, whether contractual or statutory, of the juridical relationship between staff members and the Organization. (Cf. Judgement No. 19, Kaplan (1953)). The Tribunal believes that, in the Respondent's words, the totality of the Staff Rules are applicable to staff members, and not simply those Staff Rules dealing with local and international recruitment. Accordingly, the Tribunal believes that to hold that staff rule 111.2(a), the only one relevant in this instance, is applicable to internationally recruited staff members who were wrongly deprived of the allowances and benefits attaching to such recruitment, is not contrary to Judgement No. 508. In point of fact, the Applicant in the Rosetti case had filed an appeal within the time-limit stipulated in staff rule 111.2(a), against the decision depriving her of her entitlements.

IX. In the present case, the Applicant had been concerned about her entitlements prior to her transfer. The evidence submitted to the Tribunal shows that the information provided to her had been based on the administrative practice in effect during the period prior to the Rosetti judgement. However, the Applicant, who could have filed an appeal on the date of the decision depriving her of her entitlements, did not do so. The appeal which she filed only on

7 June 1991, following the Rosetti decision, is therefore incompatible with the provisions of staff rule 111.2(a).

The Tribunal recalls, in this connection, its jurisprudence in the Han case (Judgement No. 527 (1991)) and the Renninger case (Judgement No. 549 (1992)): "The Tribunal notes that ordinarily, when timely efforts to vindicate a claim are of importance because of potential prejudice resulting from delay, logic suggests that the starting point for measurement of the delay is the point at which one knows, or should have known, of the existence of the claim, not the time when a potentially favourable decision in another case is rendered."

X. For the foregoing reasons, the application is rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 29 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary