Translated from French

ADMINISTRATIVE TRIBUNAL

Judgement No. 855

Case No. 950: LOMBARDI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay; Mr. Julio Barboza;

Whereas, on 12 August 1996, Antonio Lombardi, a staff member of the United Nations, filed an application which did not fulfil the conditions as to form laid down in article 7 of the rules of the Tribunal;

Whereas, on 16 October 1996, the Applicant filed a revised application in which he requested the Tribunal to:

"...

(c) Revoke the decision, taken on 24 August 1995 by ..., Assistant Secretary-General for Human Resources Management, and maintained by the Secretary-General, to give the Applicant a written reprimand;

(d) Order the Secretary-General to pay compensation for the moral injury sustained by the Applicant, in an amount to be determined by the Tribunal but which shall be no less than the symbolic amount of one franc and may also be no more than that amount;

(e) Award the Applicant 5,000 Swiss francs in costs".

Whereas, on 24 January 1997, the Executive Secretary of the International Civil Service Commission (ICSC) requested the Tribunal's authorization to intervene in this case, and whereas this authorization was granted on 6 February 1997;

Whereas the Respondent filed his answer on 11 February 1997;

Whereas ICSC filed written observations on 28 February 1997;

Whereas the Applicant filed written observations on 18 April 1997;

Whereas, on 28 July 1997, Nasr Ishak, a staff member of the Office of the United Nations High Commissioner for Refugees, filed an application to intervene in this case;

Whereas, on 16 October 1997, the Respondent filed comments on the application for intervention;

Whereas, on 17 October 1997, the Applicant filed with the Tribunal comments on the application for intervention;

Whereas, on 5 November 1997, Nasr Ishak filed an additional document with the Tribunal;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations Office at Geneva on 27 January 1966 as a messenger on a two-month contract. His appointment was subsequently renewed for short-term periods. On 1 June 1968, he became a clerk, and on 1 July 1969, he was given a one-year fixed-term appointment in this capacity at the G-1 level, step II, in the Documents Division (Conference Services). This appointment was subsequently renewed and, on 1 July 1970, the Applicant was promoted to the G-2 level. On 1 July 1972, the Applicant was given a permanent appointment. On 1 July 1973, the Applicant was promoted to the G-3 level; on 1 July 1976, to the G-4 level; and on 1 April 1979, to the G-5 level. On 1 January 1984, the Applicant was promoted to the G-6 level and became Deputy Chief of the Distribution Subunit in the Conference Services Division. On 1 April 1984, the Applicant became Chief of the distribution team. On 1 January 1992, he became Chief of the Distribution Subunit, and on 1 July 1992, he was promoted to the G-7 level.

On 6 March 1989, the Administrator in charge of the Division of Administration informed the Chief of the Publishing Service that the staff had recently elected the Applicant as representative on the Coordinating Council.

On 1 October 1990, the Director of the Division of Administration informed the Chief of the Publishing Service that the staff representatives of the Geneva-based organizations had appointed the Applicant to serve on the data collection team for the General Service salary survey. In January 1992, the Applicant was appointed to serve as staff representative on the working group on the General Service salary survey methodology. The Applicant was also elected as staff representative on the Coordinating Council for 1992 and again appointed to serve as staff representative on the working groups on the General Service salary and pension survey methodologies. In 1993, the Applicant was re-elected as staff representative on the Coordinating Council. In 1995, the Applicant was appointed to serve on the classification committee for the General Service staff of the United Nations Office at Geneva (UNOG).

On 2 June 1995, the Applicant signed a letter addressed to Proctor & Gamble AG under the letterhead "Staff unions and associations of the Geneva-based international organizations of the common system", which read as follows:

> "You have just received a letter from the International Civil Service Commission (ICSC) inviting you to participate in a salary survey.
>
> Normally, the staff representatives of the international organizations take part in this survey and are present when data are collected in firms. On this occasion, the staff unions and associations have decided not to participate, since the criteria drawn up unilaterally by ICSC will not afford an accurate picture of the Geneva employment market.
>
> These criteria are already the subject of an appeal which will very probably be heard by the Administrative Tribunal of the International Labour Organization.
>
> ICSC has decided to proceed with the survey over the objections of the staff representatives and despite the reservations of some associations. The results of the survey are bound to cause a serious industrial dispute in Geneva. In these circumstances, the staff unions and associations of the international organizations in Geneva wonder whether it is advisable

for you to respond to the survey.

Furthermore, the staff unions and associations of the international organizations are already considering lodging an appeal, when the time comes, should the survey results turn out to be unfavourable. We should like to inform you that these results will be checked very carefully and that any anomaly will necessarily be made public.

...

[Signed]
Ita Marquet
International Labour Office

[Signed]
Mary-Jane Watson
WHO

[Signed]
Jean-Pierre Lapalme
WTO

[Signed]
Antonio Lombardi
United Nations

[Signed]
Fernando Guzman
WMO

[Signed]
George Turnbull
ITU

[Signed]
Salvatore Di Palma
WIPO

[Signed]
Nasser Ishak
UNHCR

[Signed]
Eugenio Ambrosi
IOM"

On 13 July 1995, the Chairman of ICSC wrote to the Secretary-General as follows:

"I am writing to draw your attention to a matter of grave importance involving staff members of the United Nations and other organizations of the common system headquartered in Geneva.

As part of its statutory mandate under article 12 (a) of the ICSC

Statute, the Commission is currently carrying out a survey of best prevailing conditions of employment for the General Service and related categories of staff of the United Nations family of organizations in Geneva. The methodology approved by the Commission to conduct such surveys emphasizes the involvement of staff representatives in the survey process in conjunction with the organizations and the ICSC secretariat. In accordance with this, the Commission and its secretariat have endeavoured to involve the representatives of the organizations and staff of the Geneva-based organizations from the beginning of the survey exercise. At its May 1995 session, the Commission was informed of the decision of the staff representatives in Geneva not to participate in the survey. In view of the importance attached by the Commission to the participation by staff in, inter alia, the General Service salary survey process, I thereupon wrote to the representatives of staff at Geneva urging them to participate in the survey, which they refused to do.

The ICSC secretariat continued with the survey in close cooperation and consultation with the representatives of the executive heads. In accordance with the usual procedure, I wrote to the selected employers from the Geneva labour market to participate in the survey. I was concerned to find out that the representatives of staff in their letter dated 2 June 1995 (copy attached) urged those employers to refrain from participating in the survey. They also threatened employers that the staff intended to appeal the results of the survey, should these turn out to be unfavourable, and that in such an appeal any anomalous situations would be made public, thus breaching the confidentiality of the data provided by the participating employers. This was in direct contravention of my promise to employers to respect the confidentiality of the data provided. The attached letter from one of the selected employers in Geneva (International Metal Workers' Federation) confirms our suspicion that a number of employers decided against participating in the survey as a result of the above communications from the staff representatives.

In spite of the above action by the staff, the Commission has proceeded with the salary survey at Geneva. In this regard, it is important to bear in mind that the General Assembly by its resolution 49/223, section IV, para. 1, requested the Commission to proceed with the current round of surveys at headquarters duty stations as planned on the basis of the current General Service salary survey methodology. Furthermore, it may be recalled that the Assembly in its resolution 47/216, section III, para. 3, called upon all organizations to ensure that interim

adjustments to salaries are not resumed until the recommendations from the Commission based on the comprehensive General Service salary survey are acted upon by the organizations.

I am sure you will appreciate that the above action by the staff representatives at Geneva is tantamount to obstructing the work of the Commission mandated under its Statute and is a serious breach of the code of conduct for international civil servants. The action by the staff is also contrary to the decision of the executive heads of the Geneva-based organizations to participate in the survey.

I am bringing the above facts to your attention as you might wish to discuss this matter with the executive heads of the other Geneva-based organizations with the view to taking appropriate action. It would be my intention to report this matter to the Commission at its forthcoming session with a recommendation that it be brought to the attention of the General Assembly."

On 24 August 1995, the Assistant Secretary-General for Human Resources Management wrote to the Applicant as follows:

"The Secretary-General has been informed by the Chairman of the International Civil Service Commission of certain activities in which you and eight other individuals engaged on behalf of staff associations from international organizations based in Geneva. Attached is a copy of Mr. Bel Hadj Amor's letter of 13 July 1995.

The letter you sent on 2 June 1995 to Procter & Gamble AG, one of the local employers surveyed by the Commission to establish the best prevailing conditions of employment in Geneva, shows that you sought to discourage that employer from participating in the salary survey. I understand that similar letters were sent to the other employers surveyed by the Commission. One of those employers - the International Metal Workers' Federation - cited objections from 'the unions involved in the UN system' as one of the grounds for declining to provide information to the Commission. This establishes that you and your colleagues actively engaged in obstructing the work of the Commission as mandated by its Statute.

The General Assembly has repeatedly affirmed the role of the

Commission as the technical body responsible to the Assembly for the regulation and coordination of conditions of service for the common system. You are no doubt aware that, on 23 December 1994, General Assembly resolution 49/223 (IV) requested the Commission to proceed with the current round of surveys at headquarters duty stations as planned on the basis of the current General Service salary survey methodology, and urged all parties concerned to participate in the surveys.

I wish to remind you that staff representatives are bound by the same duties and obligations as all other staff members, and must exercise their representational activities within the applicable regulations and rules. I find that your obstruction to the proper functioning of a mechanism established by the General Assembly is at variance with your obligation under your oath of office and staff regulation 1.1 to regulate your conduct with the interests of the United Nations only in view.

Your conduct is also at variance with staff regulation 1.4, under which staff have the duty to conduct themselves at all times in a manner befitting their status as international civil servants, and must not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. As a staff representative, it was your duty to act within the constraints of the applicable rules. You did not do so.

Moreover, your conduct is inconsistent with staff regulation 1.5, which places on all staff members the obligation to exercise the utmost discretion in regard to all matters of official business, which the setting of salary scales for General Service staff unquestionably is.

Accordingly, I have decided to address to you this letter of strong reprimand, which will be made part of your official status file.

You are instructed not to engage in any similar conduct in the future. Failure to comply with this instruction would be seen as insubordination and a violation of staff regulation 1.2 amounting to serious misconduct."

On 13 October 1995, the Under-Secretary-General for Administration and Management wrote a note for the file indicating that the Administration was to meet with the Applicant and the Staff Committee to give them an opportunity to

explain their action and to attempt to show that it was consistent with the Staff Rules and Regulations. The note stated that, in the meantime, the right of appeal would be held in abeyance.

On 25 October 1995, the Applicant addressed to the Assistant Secretary-General for Human Resources Management a detailed letter explaining why, in his opinion, a reprimand was a violation of his right to freedom of association and requesting that the reprimand be withdrawn.

On 22 January 1996, the Assistant Secretary-General for Human Resources Management replied as follows to the Applicant's letter of 25 October:

> "...
>
> You mention that reform of the International Civil Service Commission has been requested. However, until a reform is adopted by the General Assembly and carried out, the Secretary-General and the staff at large are bound by the decision of the Assembly to rely on the Commission's advice. This was made particularly clear by resolution 49/223 (IV) of 23 December 1994, in which the Assembly requested the Commission to proceed with the then current round of salary surveys at headquarters duty stations on the basis of the current General Service salary survey methodology. The Assembly specifically urged all parties concerned to participate in the surveys. The General Assembly, therefore, explicitly reaffirmed its will to have the 1995 salary surveys conducted by the Commission in a defined manner. Neither the Commission, nor the Secretary-General, nor the staff, were at liberty to disregard such a clear expression of intent and substitute their own sense of what would best serve the interest of the Organization if they disagreed with the Assembly's decision or the Commission's conclusions on a given survey.
>
> I was alarmed to read in your letter that UN staff representatives in Geneva have for years routinely recommended to staff members not to provide the information requested by the Commission. I am informed, however, that such recommendations, although regrettable, had never amounted to a possible threat to the work of the Commission.
>
> Writing to the employers contacted by the Commission in the discharge of its mandate in order to actively dissuade them from participating in the

salary survey went much further than prior calls for non-participation. The employers had been asked by the Commission to provide confidential information which could not be obtained or verified by other means. You sought to dissuade the employers from complying with that request, informing them that any "anomaly" in the results of the survey would necessarily be made public. At a minimum, this raised doubts on the extent to which the confidentiality of the information to be provided by the employers would be protected. Moreover, you brought a conflict internal to the UN to the attention of outside parties, and asked them to take sides by not providing the information requested by the Commission. All this was in clear violation of the obligation of every UN staff member to exercise the utmost discretion in regard to matters of official United Nations business.

The fact that you acted in concert with staff representatives of other organizations does not decrease or dilute your own duties and obligations as a UN staff member. Nor does the fact that your actions appear motivated by the belief that they would serve the interest of the General Service staff in Geneva justify the application of any means to achieve that end.

Accordingly, I find no alternative but to let the reprimand stand."

On 4 April 1996, the Applicant wrote to the Secretary-General requesting a review of this decision. On 26 April 1996, the Executive Secretary of the Staff Coordinating Council wrote to the Secretary-General asking him to revoke the reprimand or, if the decision stood, requesting his permission, on behalf of the Applicant, to bring the case directly to the Tribunal.

On 6 May 1996, the Assistant Secretary-General for Human Resources Management wrote to the Applicant informing him that the Secretary-General had decided to maintain the reprimand. He also informed him that the Secretary-General had agreed to the request made by the Staff Coordinating Council on the Applicant's behalf and that, should he wish to contest the decision, he could submit an appeal directly to the Administrative Tribunal.

On 16 October 1996, the Applicant filed with the Tribunal the application mentioned above.

Whereas the Applicant's principal contentions are:

1. The decision to give the Applicant a reprimand violates his rights because the Respondent did not follow the procedure laid down in rule 110.4 (a) of the Staff Rules; in particular, the Respondent did not notify the Applicant of the allegations against him before informing him of the reprimand.

2. The reprimand was irregular in that: (i) a reprimand can be given only by a supervisory official and the Assistant Secretary-General for Human Resources Management did not act in that capacity towards the Applicant; and (ii) the Assistant Secretary-General for Human Resources Management had been unduly influenced by the views of the ICSC Chairman.

3. The Respondent, in addressing a reprimand to the Applicant, violated the latter's right to freedom of association.

Whereas the Respondent's principal contentions are:

1. A reprimand is not a disciplinary measure within the meaning of the Staff Rules and Regulations, with the result that the due process provided for in rule 110.4 of the Staff Rules does not apply in the present case. It is the procedures provided for in rule 111.2 of the Staff Rules that apply in the case of reprimands, and these procedures were observed.

2. The reprimand was given by an authorized staff member and was an appropriate response to the Applicant's action.

3. The principle of freedom of association does not authorize staff representatives to obstruct official activities stipulated by the General Assembly.

The Tribunal, having deliberated from 3 to 25 November 1997, now pronounces the following judgement:

I. The International Civil Service Commission (ICSC) is required by its statute to conduct surveys to determine the salary scales for General Service and other locally recruited staff. These surveys are necessary in order to facilitate the application of the Flemming principle, whereby General Service and other locally recruited staff must enjoy the best prevailing conditions of employment accorded by local employers to their employees. The representatives of the organizations concerned, as well as the representatives of the staff of those organizations, are statutorily required to take part in these surveys, which must in theory stem from cooperation between the parties concerned.

In recent years, however, serious disagreements have arisen between ICSC and the organizations' staff representatives concerning the survey methodology. The staff representatives felt that the 1992 revisions to the pre-existing general methodology were disadvantageous to the staff. Accordingly, they decided to discontinue their participation in the surveys and to end their cooperation with ICSC. A survey was to be conducted in Geneva in the first half of 1995, but the staff representatives of the Geneva-based organizations presented a joint statement on 13 September 1994 announcing that they would not participate. What is more, on 2 June 1995, these representatives, including the Applicant in his capacity as Executive Secretary of the United Nations Staff Coordinating Council in Geneva, addressed a letter to the Director of Personnel of a firm with an office in Geneva (Procter & Gamble) in which they said that they wondered whether it was advisable for the firm to participate in the survey. The letter also said that the staff representatives were considering lodging an appeal, when the time came, should the survey results turn out to be unfavourable, and that the results would be checked very carefully and any anomaly would necessarily be made public.

Upon learning of this letter, which he saw as an attempt to prevent the

Commission from performing one of the important tasks entrusted to it by its statute, the ICSC Chairman notified the Secretary-General of the United Nations. As a result, on 24 August 1995 the Assistant Secretary-General for Human Resources Management addressed to the Applicant a letter of strong reprimand which, he said, "will be made part of your official status file".

According to the Assistant Secretary-General, this measure was justified by the fact that the staff representatives' action was at variance with their obligations under regulations 1.4 and 1.5 of the Staff Regulations, in that they had obstructed the Commission's work and threatened the confidentiality of the information provided by employers. It is on the validity of this reprimand to the Applicant that the Tribunal must rule. The Applicant is requesting that this measure be revoked and that the Tribunal order the Secretary-General to award him a symbolic amount of one franc as compensation for the moral injury sustained.

II. The Tribunal considers that, in approaching a Geneva firm directly to voice doubts about the advisability of that firm's participation in the ICSC survey, the staff representatives may have overstepped the bounds of the legitimate exercise of freedom of association. They may also have been wrong to more or less explicitly threaten the confidentiality of the information provided by employers. The Tribunal therefore considers that the Administration may have been entitled to react, and even to react strongly, to the action taken by the staff representatives.

III. On the other hand, the Tribunal considers that the measure taken against the Applicant by the Assistant Secretary-General for Human Resources Management was not an appropriate response to the conduct of the staff associations, particularly the association which the Applicant represents and on whose behalf

he acted in this case. The Tribunal is quite aware that, in discharging their functions, staff representatives remain bound by the obligations incumbent upon all staff members of international organizations. However, the reprimand addressed to the Applicant and made part of his official status file ignores the collective nature of the action taken by the staff associations and the fact that the Applicant was acting in his capacity as staff representative and not in the normal discharge of his duties in the distribution unit. It would be unfair for the Applicant to be the only one to suffer the consequences of a collective action for which all the staff unions, not just the Executive Secretary of the United Nations Staff Coordinating Council in Geneva, were responsible.

It should be noted that, of the staff representatives who signed the 2 June 1995 letter, only the Applicant was given a reprimand, and that, although rule 110.3 (b) of the Staff Rules does not consider a reprimand to be a disciplinary measure, it is a punitive measure (the English word "reprimand" conveys this more clearly than the French word "avertissement").

These considerations lead the Tribunal to order the revocation of the reprimand addressed to the Applicant and its removal from his official status file, without the Tribunal having to rule on the issues raised by the parties concerning either the authority of the Assistant Secretary-General for Human Resources Management or the procedure followed in this case.

The Tribunal considers it inadvisable to award the Applicant a symbolic amount of one franc in damages, this judgement being itself adequate satisfaction.

IV. The Tribunal declares admissible Mr. Nasr Ishak's application to intervene, in that it meets the requirements of article 19 of the rules of the Tribunal, but considers it groundless since the intervener, acting in his capacity as staff representative of the Office of the United Nations High Commissioner for

Refugees (UNHCR), was not subject to any administrative or disciplinary measures, as can be seen from the wording of the letter addressed to him on 22 September 1995 by the UNHCR Director of Human Resources Management. That letter makes no mention of any measure taken against the intervener, but simply expresses disapproval of his conduct and calls on him to conform to the obligations incumbent upon international civil servants.

V. For the foregoing reasons, the Tribunal orders:

(a) The revocation of the reprimand addressed to the Applicant;

(b) The removal of the reprimand from the Applicant's official status file.

VI. All other applications are rejected, including the application for costs.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Member

Julio BARBOZA
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Secretary
