



Administrative Tribunal

Distr.: Limited

Seventy-seventh panel session

159th and 160th meetings

English

Wednesday, 27 October 1999, at 10.15 a.m. and 3 p.m.

New York

*President:*Mr. Hubert **Thierry***Second Vice-President:*Mr. Julio **Barboza***Member:*Mr. Kevin **Haugh***Executive Secretary:*Ms. Maritza **Struyvenberg***Case No. 1039:*Salama against the Secretary-General
of the United Nations*Applicant:*

Mr. Amin H. Salama

Counsel for Respondent:

Mr. Luke Mhlaba

Counsel for Applicant:

Mr. Shukri Salameh

The hearing was called to order at 10.15 a.m.

Mr. Thierry (President) (*spoke in French*): I declare open the oral proceedings in case No. 1039: **Salama**.

(spoke in English)

I would now like to invite the parties to make their opening statements, which should not exceed 30 minutes.

It may be recalled that at yesterday's preliminary meeting of the parties, it was agreed to focus on certain points. I therefore request the parties, to the extent possible, not to deviate from these main points.

I would also like to remind the parties that under article 8 of its statute, the oral proceedings of the Tribunal shall be held in public. There are no special circumstances requiring that they be held in private.

We will now proceed with our hearing. I will first call on Counsel for the Applicant to make his statement. Then I will ask Counsel for the Respondent to do the same. Thereafter the Tribunal will put questions to the parties and after that the parties will have 30 minutes each to make concluding statements in the reverse order. I will decide thereafter whether to entertain rebuttal statements, if so desired. I now invite Counsel for the Applicant to make his statement.

Mr. Salameh (Counsel for Applicant): I respectfully submit that this is a case of grave injustice inflicted on the Applicant. The Applicant was a highly qualified medical officer who worked in Addis Ababa with ECA for a number of years. He had seniority. He was at the ceiling of his grade. He expressed interest in coming to Headquarters. He saw a vacancy announcement and he applied for the post. He was within the time limit and was advised by Mr. Halliday that he was selected for that post. Now the Respondent claims, or Mr. Connor claims, that Mr. Halliday made a mistake. He should have told him that this was a P-5 post and not a D-1 post.

The announcement for the post was a D-1 post, Deputy Medical Director. He applied for a D-1 post, Deputy Medical Director. The approval came from the Secretary-General for a Deputy Medical Director. There are no two sides to a Deputy Medical Director. A Deputy Medical Director is a D-1 post, period. Now, this play on words that he is appointed against the D-1 post but he is at the P-5 level was something that was concocted at a later stage because of internal vacancy circulations, because of the plan — I respectfully submit that this was a devious plan on the part of the Medical Services and particularly on the part of Dr. Laux — to remove that post from the Medical Services for the time being so as to have a fait accompli.



The Applicant comes over for a post that does not exist. Therefore they said Dr. Pumpalov is in the post. When he leaves you will have it. When Dr. Pumpalov left they cooked up a plan to loan the post to the Economic Commission for Latin America and the Caribbean (ECLAC).

In my submission I respectfully say that the post of D-1 did not have to go to ECLAC at all. A staff member going to ECLAC to occupy the post of Chief of Personnel from Headquarters could easily have been accommodated by a post at the D-1 level in ECLAC temporarily for the duration of the assignment of Ms. Kolodny. This was not done.

I respectfully submit that this was a plan to deny the Applicant his entitlement to the D-1 post, specifically because at that time he had just been recruited and therefore he could not get a D-1 post. I mean — I am sorry — he had just been recruited and his alternate, the other staff member, who was in the planning for the D-1 post, Dr. Narula, could not get the D-1 post. Therefore, it was a very easy plan to remove the D-1 post from the Medical Services on a temporary basis for two years and when the post comes back, somebody else, who is Dr. Narula, would then become eligible for that post. The Respondent denies that there was any plan at all; this was all in good faith; the post was simply loaned because it was a routine matter.

Mr. Presiding Officer, my submission is that here was a contract, a valid contract, between the United Nations administration and the Applicant. He was advised that he was accepted at the D-1 level, that he was approved by the Secretary-General for employment. He resigned. He left his post. He did not resign, but he left his post in Addis Ababa. He liquidated his assets. He left his apartment there. He rented an apartment in New York by that time. He took out his children from school. He sold his furniture and he sold his cars and he was ready to come here. He arrives in New York with the full belief that a promise is a promise, that what he saw in writing to be an appointment at the D-1 level was what it was. On the eve of his departure at his farewell party at Addis Ababa he received the letter from Mr. Halliday.

Now can you imagine, if I were in that position, what would I do? Cancel everything I have done in Addis Ababa? Decide that I do not want to go to Headquarters if this was not going to be the post for which I was appointed? It is totally impossible. I

cannot do it. So, he took his chance and came over, but firmly believing that the reference to P-5 was only a temporary thing and that his appointment was, as confirmed to him by Mr. Halliday, as a D-1 Deputy.

Who in this Secretariat can say that a post of Deputy Medical Director can be at the P-5 level? It cannot be. They never removed the title of Deputy. They never changed the title of Deputy. The Deputy continues until today. It is peculiar, but in the Medical Services there are four doctors. There is the Medical Director and there are three Deputies. I have never heard of a department having three Deputies; a division which consists of how many doctors? Seven medical officers, three of them are Deputy Medical Director. There is a Director and three Deputies.

Now, I do not wish to go out of the orbit of this case, but in my concept I have had enough experience, I think, in the Secretariat to say the following. This is a situation where a Secretary-General was on his way out. That Secretary-General had taken the decision to appoint the Applicant to that post. As he was on his way out, then some people found that this would be an opportunity to postpone this matter. A new Secretary-General supported by a super-Power was highly supported, and he was appointed as Secretary-General. This Secretary-General rose from the ranks and he owes many, many obligations and favours to different staff when he was at different levels of the Secretariat.

The incoming Secretary-General was more prone to accede to an intrigue by the Medical Director. The Medical Director had, it is a well-known fact, special clout with the current Secretary-General. She felt that she could implement whatever she wanted and she did. She went ahead without even consulting the new Secretary-General and appointed Dr. Oleinikov as Acting Deputy Medical Director. When the Applicant arrived, she received him very coldly. She gave him a small office and did not introduce him to the rest of the staff. Nobody saw him. She closed him in that office and told him what his duties would be and that he would take instructions from her from day to day. When he tried to use his title of Deputy, for which he was appointed, the secretary told him, I am sorry; the Medical Director told me you cannot use the title of Deputy. You are a senior Medical Officer, period. Now here begins a series of humiliating acts which the Applicant had no reason to tolerate. It took until March 1998 for that thing to be corrected. He had to go to the current Assistant Secretary-General of the Office of

Human Resources Management (OHRM), complaining that for the last two years he was denied even the use of his title to which he was appointed.

In other words, Mr. Presiding Officer, I can understand if the reaction of the Medical Director was on the basis of testing the Applicant and finding out whether he was a competent person or not, whether he deserved the grade. It was right from the date of arrival. Here is a qualified person who was almost at the ceiling of his level, at the P-5 level, with an appointment, a formal appointment, from the Secretary-General. He comes over and he is told, no, I am not going to treat you as Deputy Medical Director; you are a senior Medical Officer.

Then Mr. Dennis Halliday — who is a very honourable man — could not understand why this was going on. So he told Dr. Laux, Dr. Salama is a Deputy Medical Director and he should be designated as such and given the functions of Deputy Medical Director. She said, no, if you want to give him the title of Deputy Medical Director, you might as well give that title to two other people: Dr. Narula and Dr. Pasquier, who was still at the P-4 level. The Applicant wrote to the Secretary-General formally and then he went to Joint Appeals Board. You have the report of the Joint Appeals Board, which is very, very clear and includes findings of fact which cannot be contested.

Before reaching that, I would like to call the attention of the presiding officer to annexes A/7, A/8 and A/9, where the title of Deputy Medical Director was confirmed to the Applicant. His letter of appointment from the administration, when he came over, was for Deputy Medical Director. His travel authorization was Deputy Medical Director. This argument that the title of Deputy Medical Director did not have to carry the level of D-1 is totally ridiculous, totally unfair and incredible.

The recommendation of the Joint Appeals Board states the following. (We first went to the Joint Appeals Board for an interim decision against announcing the post and against giving it to someone else.)

“The Panel agreed that should another person be chosen as Deputy Medical Director at the D-1 level following the recirculation of a vacancy announcement, Appellant would suffer irreparable harm; should he be chosen, Appellant would be granted nothing more than that to which he believes himself entitled. Circulation would

therefore put in question the validity of his sole claim, as well as putting in jeopardy the promotion to which he lays claim in his appeal.

“The Panel unanimously recommends that the D-1 post of Deputy Medical Director not be the subject of a new vacancy announcement until the subject appeal has been considered and decided upon.”

What was the reaction of Mr. Connor? Mr. Connor receives that and he states the following to the Applicant in a letter dated 29 May 1998, annex 17.

“The Secretary-General does not agree that irreparable harm will occur if the first stages of the vacancy announcement process are set in motion pending a consideration of your appeal on the merits. Therefore, the Secretary-General has decided not to grant your request for suspension of action.

“I have been advised that your case is ready for consideration by the Panel and that a recommendation to the Secretary-General concerning the merits of your appeal will be forthcoming shortly. Please rest assured that the report of the Panel will be promptly and carefully considered.”

I do not know what Mr. Connor meant by that, but he seems to have been quite friendly there and in a good mood.

Next, the report of the Joint Appeals Board, the full report of the Joint Appeals Board, is submitted to the Secretary-General and the Joint Appeals Board finds the following. First of all, the Joint Appeals Board was extremely surprised that the Respondent in this case had raised the question of time limits and they said the Appellant was out of time with his submission. The Appellant himself, or the Applicant now, responded to that by saying that, to the contrary, it was the Respondent who was delaying his submissions unreasonably for an appeal.

Anyway, the Panel first dealt with the two parties' contentions that the other's submission was time barred. The Panel found no merit in the Respondent's claim of time barred, which seems to be based on a misunderstanding of the appeal. Appellant is not appealing the decision to select him for the post of Deputy Director, as Respondent argues, but the decision to recirculate the post as if it was vacant. The

Panel found considerably more substance in Appellant's claim of time bar. Respondent's reply, as set out in Rule 111.2 (g), was due on 29 December 1997. It was not received by the Joint Appeals Board until 25 May 1998. Even here there was procrastination on the part of the administration. A reply to an appeal before the Joint Appeals Board due on 29 December was only submitted on 25 May 1998.

The Panel then turned to consideration of the appeal itself. On the basis of the documents put at its disposal by Mr. Desai, the Panel was able to confirm that paragraph 5 of Respondent's reply was factually correct. The decision was made clearly, at least to those immediately involved, to place Appellant in the D-1 Deputy Director post at his current level, P-5. As that decision was not a decision to promote, argues Respondent, there is no basis for an appeal. The Panel was not persuaded by that argument. The Panel noted that the information was provided to Appellant not by a journeyman human resources officer, but by the official designated by the Secretary-General as his representative in all personnel matters, and that means Mr. Halliday.

On the basis of the information the Panel received, Appellant had every right to conclude that he had been chosen for the D-1 post and that, for the time being, he need only wait until the post reverted to the Medical Services Division. On that basis he accepted his transfer to Headquarters. The Panel felt there was a parallel in this acceptance by an individual of an offer of appointment. Even if no further validating document is issued, a contractual obligation exists.

The recommendation: the Panel recommends that no vacancy announcement be issued for the post of Deputy Director of the Medical Services Division or if it has been issued, that it be cancelled and that Appellant be confirmed as Deputy Director at the D-1 level. If the Secretary-General decides not to accept the recommendation above, *et cetera, et cetera*.

What does Mr. Connor say? It is not unexpected by me. It is always a negative answer. The Secretary-General has found that Mr. Halliday's letter of 23 January 1996, stating that the Secretary-General had approved your selection for Deputy Director, was incomplete. The Secretary-General had decided that you will be selected for the post, but that you will be placed against it at the P-5 level, and this should have been — should have been — stated clearly in

Mr. Halliday's letter. Now he is putting the blame on Mr. Halliday — a seasoned administrator.

The record reflects that the APB, the Appointment and Promotion Board, following its normal procedure in such cases, took note of the Secretary-General's decision and implemented it, specifying in the information circular on placement and promotion, placement on the D-1 post at the P-5 level.

Clearly, Mr. Connor says, the Secretary-General did not recommend that you be promoted to the D-1 level. Nobody had alleged that this was a promotion procedure; this was an appointment. So Mr. Connor — whether he understood it or not, I do not know — says that the Secretary-General did not recommend that you be promoted to the D-1 level. No promotion exercise took place, and you were not promoted to the D-1 level.

It is incredible how much lack of knowledge or play on words there was on the part of Mr. Connor. I cannot understand it. However, the Secretary-General acknowledges and regrets that Mr. Halliday's letter of 23 January 1996, although later clarified, did not convey the entirety of the decision that had been made by the Secretary-General. In other words, Mr. Connor is saying that Mr. Halliday made a mistake. The Appointment and Promotion Board made a mistake. They appointed you as Deputy Medical Director, but Deputy Medical Director could be at the P-5 level, and you then have to wait for a promotion and compete with others in order to go up to the true level.

In other words, he is negating the fact that the Applicant was recruited as Deputy Medical Director. He cannot be Deputy Medical Director at the P-5 level. He was recruited as Deputy Medical Director, which automatically implies that the level was a D-1 level. The fact that at a later stage Mr. Halliday was compelled to lend the post to someone else and then apologize to the Applicant does not mean that Mr. Halliday made a mistake when he communicated the decision of the Appointment and Promotion Board, or the Secretary-General, that the appointment was to Deputy Medical Director at the D-1 level.

The Applicant asks the Administrative Tribunal to give a clear decision — an unequivocal judgement confirming the fact that the Applicant was legitimately recruited as Deputy Medical Director at the D-1 level. This was confirmed in every document that was issued to him at the time of recruitment and in the months

following that recruitment. What he was faced with in the Medical Service was definitely a breach of contract — not only that, but also systematic actions or measures of humiliation, as well as an endeavour on the part of the Medical Service, or the head of the Medical Service at that time, to undermine the appointment, which was given by an outgoing Secretary-General and with whom she did not have the same clout that she apparently has with the current Secretary-General.

There are currently two D-1 posts in the Department of Management. Not in the Medical Service, but in administration. We have an example here of how the administration can lend a post or finance a post at a higher level whenever they want — if they have the will to do it. There are two D-1 posts currently available. One is that of Chaim Ouziel, who occupied the D-1 post in the Department of Management, and the other that of Keith Walton, who was assigned to Kosovo and left the post vacant here. They are looking for a candidate.

If justice were to be served, the Secretary-General can — they can have three Deputies in the Medical Service, despite the miscarriage of justice in this case, despite the accelerated appointment of Dr. Narula, who has had only two years at the P-5 level and no seniority. If that cannot be reversed, at least the Secretary-General can assign a D-1 post now to the Applicant. If the Secretary-General persists in his negative attitude and refuses to acknowledge the mistake made and to give a D-1 to the Applicant, then my prayer is that the Administrative Tribunal will award compensation far in excess of the two years mentioned in the Statute of the Tribunal, which is within the discretion of the Administrative Tribunal.

I think that this is a case which is quite similar to one that I handled in Administrative Tribunal Judgement Number 807, where a staff member at the D-1 level was terminated on the basis of disability, without the case being presented to the Pension Fund Committee — terminated by Mr. Connor himself, with the approval of Dr. Laux, who is the Medical Director. The staff member at the D-1 level was terminated for reasons of health — disability. The Pension Fund regulations and the staff rules stipulate most clearly that no staff member can be terminated for disability without the case being presented to the Pension Fund Committee to determine the disability benefit that should be paid to the staff member.

They ignored that, because the concept, I think, in the Department of Management, is corporate law in America. Corporate law in America allows any company to give a pink slip to a staff member and say goodbye. Mr. Connor is a corporate man. He is an accountant who came from a corporation. He does not realize that, but if we were to follow the example of corporate law, it allows employees to go to court, and it enables juries to award millions of dollars in compensation where there has been an injustice. And I think an injustice similar to this case would justify compensation in a court of law in the millions.

However, despite Mr. Connor's concept of corporate law, we are here within the Secretariat. We are subject to the staff rules and regulations. I respectfully submit that the Applicant has suffered gravely in this case. Apart from the financial loss, he has suffered personally — moral injuries. He has also suffered financially, because he is still at the P-5 level, exactly as he was in Addis Ababa. He has gained no seniority. Had he been promoted to the D-1 level or given a D-1 post in accordance with the decision of the Secretary-General, he would have gained seniority at the D-1 level of at least three years.

Mr. Thierry (President): Your time to speak is very nearly ended. Please conclude now.

Mr. Salameh (Counsel for Applicant): This is my conclusion. If the Secretary-General should obstinately refuse to rectify the situation by giving the Applicant the D-1 post to which he is entitled, I ask the Administrative Tribunal to award him compensation which would set an example and at least tell the Secretary-General that one cannot take arbitrary decisions without paying the price, as happened in the case of that judgement where Mr. Connor had to reinstate the staff member.

Mr. Thierry (President): I invite the Counsel for Respondent to make his statement.

Mr. Mhlaba (Counsel for Respondent): I would like to start off by indicating that, as we all realize, this is a case in which the facts are complicated and difficult. Therefore what I propose to do is, as much as possible, try to simplify things, and, in order to clarify these facts, present them in a manner that will enable them to be better understood, so that the Tribunal is not put in the position of having to deal with facts that may be irrelevant to the issues that are in dispute in this case.

As a starting point, I would like just to mention that following yesterday's informal meeting, as we had agreed, after having consulted with the Counsel for Respondent, I prepared a chronology of events which I sent by fax to the Counsel for Respondent for his comments. We have received some comments. I believe that the draft that we have prepared will be very helpful to the Tribunal, so I would suggest that, at the Tribunal's discretion, that the draft be submitted to it.

Going back to the case, I would like to indicate that there have been presentations in writing, which are before the Tribunal. I will therefore not go into any great detail in recounting what is already on record. I will confine my remarks only to what I consider the salient points, and I think the salient points in this case are to establish the truth about what was actually done and what actually happened in this case. What did the Respondent decide in relation to this case?

I think the starting point is the vacancy announcement that was issued in October 1995. That vacancy announcement, as the Respondent has no difficulty admitting, is an advertisement for a D-1 post. There were applications filed by several individuals, and, in this connection, I would like to point out — because the Tribunal has raised this issue — that the Respondent would like to put it on record, with supporting documentation, that in fact there were two other internal candidates who applied for the post, including Dr. Narula. In addition to the letter that was sent to Dr. Narula informing her about the cancellation of the vacancy announcement, we have taken from her personal record a copy of the cover sheet to her application. But we do have in fact the whole record of the application.

The issue is not whether she was eligible for appointment to the post. It is whether she applied. And the simple fact is, yes, she applied. It is a fact that Mr. Halliday wrote to the Appointment and Promotion Board to inform it of the decision, not his own decision, but that of the Secretary-General, to appoint the Applicant at his current level, which at that time was P-5. And it is also a fact that the two internal candidates, Dr. Oleinikov and Dr. Salama, were informed by letter by the Office of Human Resources Management that the vacancy announcement had been cancelled. Now it is also a fact that the Appointment and Promotion Board did not sit to consider the candidates that had applied for the position. It simply took note of the decision of the Secretary-General.

That is all supported by evidence, and I think that this is what we ought to focus on, because it is factual, it is not speculative.

It is also true that the letter that went to Dr. Salama on 23 January 1996 unfortunately did not specify the level at which he was being appointed. That is obviously a matter that is of concern in this case. It is of concern to the administration because the letter to Dr. Salama should have been more specific. It should have indicated that the Secretary-General had decided that he should serve in that post at the P-5 level.

I should point out here that — as the Counsel for Applicant knows, for he is a man of great experience with the Organization — the Tribunal sits to consider applications by people in relation to a breach, or allegations of a breach, of their terms of employment, including all of the relevant rules and regulations. Now whatever procedure might have led to a complaint, an appeal and finally an application must be one that is based on an alleged breach of the contract of employment, as governed by the applicable rules and regulations.

It is a known fact that for a person who is within the United Nations Secretariat to move from one level to another, there must be a promotion process. Hence in this particular case the Respondent has indicated that in fact there was no promotion process. There was no promotion process in accordance with the rules. There was a cancellation of the vacancy announcement. If indeed there had been a continuation of the selection process and the applicant had been the successful candidate, that would have entailed a promotion.

Just to clarify this issue further, I know that it can be argued that the Secretary-General can decide anything he wants. My submission is no. The Secretary-General can decide only in accordance with the rules. Now this argument has been confirmed, in fact, subsequently by a General Assembly resolution — 51/226 of 1997. That resolution restricted the authority of the Secretary-General to recruit and promote people outside the level of the Assistant Secretary-General, Under-Secretary-General, Special Representative of the Secretary-General and his immediate Office. Now what this implies is that in every case of promotion, there has to be observance of the applicable rules and regulations — in other words, passing by the Appointment and Promotion Board. There cannot be a

mere noting by that Board of a decision already taken by the Secretary-General.

That is why, it seems to me, the Secretary-General could not have been properly exercising the discretion that he has if he had proceeded to promote a staff member without going through the Appointment and Promotion Board. In this case, he in fact did not do so. He maintained the level at P-5.

The letter sent to the Applicant by Mr. Halliday is therefore of concern. It is inconsistent with Mr. Halliday's own memorandum to the Appointment and Promotion Board. And the Respondent therefore can only say that this was a mistake. Now how did that mistake come about? We do not know, but we do know that it certainly did not reflect the decision of the Secretary-General.

We also acknowledge that it was not until June 1996 that the Applicant became aware that he would not be getting this post at the D-1 level and that he would stay at the P-5 level. I believe that the allegations that the decision not to grant the Applicant a D-1 can be explained only by intrigue have no basis, because we have not been told that anybody got into an intrigue with the then Secretary-General to say, well, appoint him but keep him at P-5. Because the fact that he remains at the P-5 level is not a decision of anybody but the Secretary-General.

I would like to take this opportunity also to clarify a number of other issues that were raised by the Tribunal in this case. By this I refer to the memorandum of 15 July 1999. There was a question that was raised yesterday regarding the decision to move the D-1 post from the Medical Service to ECLAC. What we have in fact established thus far is that already by February 1996 there had been some discussion about this post's being used in ECLAC. There is a memorandum to that effect from Mr. Denis Halliday addressed to Mr. Johannes Wortel, stating that three months from about February, that post would be sent to ECLAC to support Miss Sheila Kolodny. This decision, I submit, had nothing to do with the Applicant's projected arrival in New York. It had nothing to do with the Applicant's arrival in New York because that particular post had not been reserved for the Applicant. He had not been promoted to the D-1 level, and the only obligation that the Respondent had with regard to the Applicant's transfer to New York

was to ensure that he had a post at the level at which he was being appointed, and that is the P-5 level.

I would also like to make a remark concerning what was stated by the Counsel for Applicant in relation to the issue of seniority. The question of the Applicant's seniority in the Economic Commission for Africa (ECA) has never been disputed by the administration. However, we would like to point out that in fact respect for seniority applies as much to this Applicant as to anybody else — any member of the Secretariat — occupying a position. I should say, in relation to the criticism that has been made by the Applicant of the conduct of Dr. Laux in proposing the designation of Dr. Oleinikov as Acting Deputy Medical Director, that in fact Dr. Oleinikov was senior at the time of the outbreak of these events. He was known to have seniority over Dr. Salama because both were already in the system. I must point out the risk that was inherent in promoting any other candidate, jumping over other members of the Secretariat. We already have some experience — I believe there have been cases where the Tribunal has stated that it is not proper to impose upon the Organization certain candidates who did not have seniority over other candidates and that there has to be transparency in the selection process.

I do admit that people may have different views with regard to whether or not Dr. Narula, who has now been promoted, ought to have been promoted. But there is ample legislative authority for the recent appointment of Dr. Narula, who at that time was junior in rank to the other two colleagues — that is, the Applicant and Dr. Oleinikov.

I do not think, at any rate, that this particular point is relevant to the issue of whether or not the Applicant was promoted to D-1, because we continue to maintain that he was never promoted and that in order for him to occupy the D-1 post he would have had to be appointed through the normal selection process.

The Respondent has already acknowledged the administrative error that was committed in this case, hence the decision to award some compensation following the recommendation of the Joint Appeals Board (JAB). The Respondent considers that the compensation offered was indeed adequate, and in particular would like to point out that, especially in relation to the arguments that have been made for the amount of compensation to be given to the Applicant,

that we are not talking about an Applicant who is out of work because he has been dismissed or because his terms of employment have somehow been violated. We are talking of somebody who in fact continues in his career with the United Nations, and therefore the compensation that was in fact awarded by the administration, I submit, was adequate.

I would like, as a closing remark, to say that I have some difficulty in listening to the Counsel for the Applicant. Some of the remarks he made, which I find unfortunate, tend, I believe, to be of a personal nature. Especially with a Tribunal of this nature, where I do not know whether I should object, or I should not object, I feel that I must request the Tribunal to disregard the remarks that were made in relation to the current Secretary-General, the manner in which he was appointed, the allegation that what happened can be explained only by whatever intrigue, by a desire on his part to award favours — I think that is totally irrelevant. It does not find any support in the documents before us, and therefore I would respectfully request the Tribunal to disregard these remarks as being unfortunate and uncalled for.

The Respondent will remain at the disposal of the Tribunal to provide as much information as possible in the light of the Tribunal's memorandum of 15 July 1999, which I referred to, and the questions that were asked. In that connection, we think it would be helpful after the questioning session for the Tribunal to indicate what additional documents may be needed. I have already forwarded some documents which the Executive Secretary, I believe, will make available to the Tribunal. I believe at this point I would rest the Respondent's case and would then be prepared to answer any further questions that the Tribunal may have.

Mr. Thierry (President): I think we can start with the questions now. We will just break for five minutes, if you do not mind, and we will start the questions just after.

[Break]

Mr. Thierry (President): ... If any members of the Tribunal wish to ask questions, I will give them the floor. The Vice-President, Mr. Julio Barboza, will put questions to the parties.

Mr. Barboza (Second Vice-President): This is a question for the Respondent. You mentioned the fact

that you have provided us with certain documents and you were disposed to provide all the documents we wanted. There is a memorandum from Mr. Denis Halliday to the Chairperson of the Appointment and Promotion Board, Mr. Desai, dated 22 December 1995. There are two attachments to that memo which are mentioned there: a classified job description, and a P.11 and a PPS.2 form of Dr. Salama. They are mentioned, but they are not accompanied. May I ask you the reason why they are not accompanied, and if we can have those two attachments.

Mr. Thierry (President): You may answer immediately.

Mr. Mhlaba (Counsel for Respondent): Yes, I would like to answer immediately. In trying to answer the Tribunal's questions, as you will understand, we are dealing with different offices in the United Nations. It has sometimes taken a long time to find the appropriate office with the documents. But there have also been some questions raised as to the number of documents that we can make available, given the fact that some of them may be perceived as being not directly related to the case. However, the Respondent's position now is that, even if every specific document requested by the Tribunal is not available immediately, we will make every effort to obtain it. That is why I have Mr. Saint Louis here with me. In fact, he probably will have some of these documents right here.

Mr. Barboza (Second Vice-President): Thank you. The reason for my request is that these two documents were attached to the memorandum of 22 December, and that is a rather important date. I did not know the reason why they were not accompanied. But of course, if you could have them for us, it would be all right.

Mr. Mhlaba (Counsel for Respondent): We do have them for the Tribunal, and will make them available. In fact, we do have them here.

Mr. Barboza (Second Vice-President): There is another question I would like to pose. The vacancy announcement of the D-1 Medical Service Director was cancelled. I could not find anywhere in the dossier the reason why that vacancy announcement was actually cancelled. Why was it that the nature of the whole exercise was changed from a competition to provide for a post into a designation of a Medical Officer, as was done? That is my question. If it is not clear, I would like to enlarge on it.

Mr. Mhlaba (Counsel for Respondent): The question is very clear. I have asked the question myself many times. Unfortunately, as with a lot of these decisions, it is not always clear why certain things happen. For example, what I have been told is that we are operating in an environment where the administration was under pressure to make savings. And I can only present this as a general answer, that the administration would find that it was under pressure to make a provision, or make posts available to people who had already gone through the promotion process. In order to do that, they would use available other posts, instead of immediately filling them by making new appointments or promotions, as can be seen in the present case. That may be an inference, but, as you can see, in this particular case, as soon as the D-1 post was vacated by Dr. Pumpalov, it was made available elsewhere.

I cannot say exactly what the basis or the reason for cancelling the vacancy announcement was, but I can only infer from the action that was taken in relation to the post, to make it available to meet other requirements. I do know that, at the same time, for example, another post, which was a D-1 post, was projected to be frozen in order to make a saving. So I think this was really within the context of the Respondent exercising its discretion to maintain flexibility and thus to apply existing posts for the various exigencies that obtained in the Organization.

Mr. Haugh (Member of the Tribunal): Can I just ask for clarification on that? You are surmising that a decision had been made for economic reasons, or reasons of economy, to try to fill the Deputy Director post at a P-5 level, and that that is why competition was cancelled.

Mr. Mhlaba (Counsel for Respondent): That is what I think. Unfortunately for the Respondent, as you will appreciate, the decision-making takes place in various offices among different individuals. It is not always possible to pinpoint a particular source of a particular decision, although you may see its consequences. What I am surmising is based on my conversations with various actors at that time, including lower-level officers who were present. But they cannot say with any degree of certainty that this is, indeed, the determinant reason — that this was the predominant reason why the cancellation was made.

What I would suggest, if it would be useful to the Tribunal, is just to show something that I found on file: a handwritten note by Mr. Halliday, which must have been his aide-mémoire. He wrote it, and it is dated 17 November 1995. It says:

“Deputy Director, Medical. Doctor. The Secretary-General has appointed Salama Amin. Lateral transfer. P.5. Please advise me how to withdraw the vacancy announcement”.

Now, one could make inferences from this, but I am concerned that I may be making too many inferences which are not backed by fact. Is it being suggested here that the Secretary-General’s decision pre-empted the selection process, or made it redundant? That is one possibility, but I think it is important for the Tribunal to know that this is one element that is there. But we cannot say, unfortunately, what it was — what was the predominant reason why the cancellation took place.

Mr. Thierry (President): Could we have a copy of that document?

Mr. Mhlaba (Counsel for Respondent): Yes, we will make it available.

Mr. Thierry (President): Mr. Barboza, do you have other questions?

Mr. Barboza (Second Vice-President): There is a phrase in the memorandum of 22 December that we have just been commenting upon. The first paragraph reads: “The Secretary-General has decided that a staff member, Dr. Amin H. Salama, P-5 in ECA, is the candidate most suitable to serve on the above post at his current level.”

This question is for both the Applicant and the Respondent. The Applicant suggests something which I, personally, did not quite understand, and I would like for him to enlarge on that. In his letter to the Tribunal of 18 October 1999, he says, at the end of the first page, “Consequently, the expression ‘at its present level’ carried the implication that service at his current level was in reference to the interim period.” I could not very well understand that. Perhaps the Applicant is ready to enlarge on that and explain it perhaps better so that I can understand.

Mr. Salameh (Counsel for Applicant): Yes, indeed. The answer to that is in paragraph 2 of the memorandum which you have just cited, which is

annex 25; it should have been annex 27, I think, but it is annex 25. It states:

“The Secretary-General has decided that a staff member, Dr. Amin H. Salama, a P-5, in ECA, is the candidate most suitable to serve on the above post at his current level. Following his decision, the vacancy announcement for the post was cancelled.”

Paragraph 2 states:

“The post of Deputy Director of the Medical and Employee Assistance Division will be vacant as of 1 February 1996.”

So in December 1995, he would be at his current level, but in anticipation of the vacancy which will occur on 1 February 1996. So they could not immediately give him the post as long as it was occupied by the predecessor. As soon as he moves, he walks into it. And it goes without promotion. There is no promotion procedure. It is an appointment already approved.

Mr. Mhlaba (Counsel for Respondent): I would like to thank the Tribunal for giving me the opportunity to comment on this. First, I would like to say that if the idea was to have the Applicant serve on this post, and the post was occupied by somebody, there could be no interim period during which the Applicant could serve, because the post was occupied. So they would have had to find another post to accommodate him. I would also like to say that this implication is to me not totally supported by the text of the letter. I do not think that there is any indication of an interim period. I think the correct position is the position that we have advanced, namely, that when the post became available there would be a competitive selection process.

Mr. Thierry (President): I would like to pose this question to the Respondent, just to have it clear in my mind: what is this idea of having a D-1 post given to anyone? Is it possible for Mr. Halliday to create the post of deputy medical assistant and give it to Dr. Oleinikov? The D-1 post has a qualification; it is for deputy medical — whatever — it is in the budget, is it not? You cannot go about giving that post to two or three people at the same time, or calling Dr. Oleinikov a deputy medical assistant when somebody else has already been appointed to the job. I cannot understand very well the idea of having two or three officers having the same title, when there is only one post, and that is in the budget.

Mr. Mhlaba (Counsel for Respondent): I think one has to be as candid as possible to try to assist the Tribunal in focusing on the application that is before it. There are two issues. There is the issue of the manner in which the administration generally handled this matter. There is no doubt that mistakes were made. The fact that there were two or three people carrying the title of Deputy Medical Director certainly was an anomaly, and the administration — the Respondent — has said that this is something that would be corrected; it is just not normal that everybody should carry this title. So far as I have been informed by the Respondent, none of these individuals is actually being remunerated at the D-1 level. They are not getting anything financially. What they have got is just a title. Therefore, it is acknowledged that this is an anomaly.

But with regard to the specific case of Dr. Oleinikov, the answer that we can provide to the Tribunal is that it was anticipated that until the post of D-1 was filled there would be a need for somebody with the requisite seniority in that division, in the Medical Service Division, to act as an assistant to the Director — as a Deputy to the Director. At that time the Director made the recommendation — based on her knowledge of the respective levels of the P-5s, the senior Medical Officers in the division — that Dr. Oleinikov would be the Deputy. She made that recommendation on 29 March 1996. The post fell vacant on 31 March 1996, and the approval for Dr. Oleinikov to be Deputy Medical Director was made on 30 March. I probably need to check to see if the documents that the Tribunal has include that memorandum with the approval of Mr. Halliday for Dr. Oleinikov to be Acting Deputy Medical Director.

I acknowledge that there might be confusion, because there is a memo of 1 November 1996 in which Mr. Halliday says he is appointing Dr. Oleinikov as one of two Deputy Medical Directors. That, to me, is the action that defies explanation. It was inappropriate. But the memo of 29 March — the recommendation from Dr. Laux — and the approval on 30 March can, I think, be easily explained.

Mr. Salameh (Counsel for Applicant): In the memorandum from Mr. Halliday to Dr. Oleinikov in annex A/10, he says:

“In consultation with Dr. Laux, I have decided to designate you as one of the two Deputy Medical Directors within the Medical

Services Division. The other Deputy Medical Director is Dr. Amin Salama. A Personnel Action reflecting the change in your functional title will be issued shortly.”

This was never issued. The memorandum continues:

“I have asked Dr. Laux to review and discuss with you and Dr. Salama the division of responsibilities between the two of you.”

In a memorandum from Dr. Laux to Mr. Halliday, in annex A/11, she says:

“As you know, the Deputy Medical Director is a D-1 post and this post has temporarily been loaned to ECLAC. As soon as the D-1 post is made available to the Medical Services Division, it will be filled through proper vacancy management procedures.”

It is Dr. Laux who is saying that. She continues:

“Since you have already designated the two P-5 Senior Medical Officers, Dr. Oleinikov and Dr. Salama as Deputy Medical Directors, the third P-5 Senior Medical Officer, Dr. Sudershan Narula” —

that is not true; she was not a Senior Medical Officer, but a Medical Officer —

“should also be given the same title and a Personnel Action should be issued for her as well. Dr. Narula deputizes for me in all peacekeeping-related decisions and all budgetary matters.

“Moreover, you are well aware of the fact that Dr. Agnes Pasquier-Castro has submitted an appeal for her promotion to P-5 level. Hopefully, she will get her P-5 as soon as her appeal is resolved, and she will then be the fourth Deputy Medical Director.”

I think this goes without word. I do not have to make any comment on that. She continued:

“I would like that all Medical Officers get treated fairly in view of your recent decision.”

I wonder what has happened to Dr. Oleinikov at the present time.

Mr. Haugh (Member of the Tribunal): I see in a note from Mr. Connor that Dr. Laux was available to you as an assistant to help you file your submissions.

Mr. Mhlaba (Counsel for Respondent): Yes.

Mr. Haugh (Member of the Tribunal): Well I see that her state of mind is set out ... [*recording problem*] ... under the heading, “Question 4 (a)”, in your letter to us of 26 October 1999. And in that, she seeks to explain why she would not accord Dr. Salama the title to which he had been appointed, on the basis that she did not know why he was coming. Is that what she wishes us to accept, that when Dr. Salama came out, she did not know what he was coming out for, what post he was filling?

Mr. Mhlaba (Counsel for Respondent): She believed he was coming here on a lateral transfer.

Mr. Haugh (Member of the Tribunal): Yes. To what post?

Mr. Mhlaba (Counsel for Respondent): He —

Mr. Haugh (Member of the Tribunal): To replace whom?

Mr. Mhlaba (Counsel for Respondent): Well, that is something that she can answer. It is a question of fact. Now, her explanation, her account, is that she knew he was coming, she knew that he was not senior —

Mr. Haugh (Member of the Tribunal): To replace the retiring Deputy Director.

Mr. Mhlaba (Counsel for Respondent): If one of the internal candidates was appointed to the position of Deputy Director, there would have been an opening.

Mr. Haugh (Member of the Tribunal): Did she understand he was coming out to replace the retiring Deputy Director?

Mr. Mhlaba (Counsel for Respondent): No.

Mr. Haugh (Member of the Tribunal): She just thought that he was arriving coincident with his retirement?

Mr. Mhlaba (Counsel for Respondent): Yes.

Mr. Haugh (Member of the Tribunal): And she did not know why he was coming, what he was to do or the name of his post?

Mr. Mhlaba (Counsel for Respondent): You know, I cannot go into her mind.

Mr. Haugh (Member of the Tribunal): Well, you can, because she is available to you, and she is

recorded in the answer to question 4 (a) as not knowing what was going on. Perhaps you could ask her to explain what her state of mind was.

Mr. Mhlaba (Counsel for Respondent): Yes, I will.

Mr. Haugh (Member of the Tribunal): And to explain why she denied Dr. Salama the right to use the title to which he had been appointed, and sought to allow somebody else to use his title instead, prefaced by “Acting”.

Mr. Mhlaba (Counsel for Respondent): I think she has actually answered the latter part of that question, and I can communicate that. The question that I would put to her is, “What post was he going to occupy in New York?” What she has stated is that she knew he was coming. He could not have been Acting Deputy or Deputy Medical Director, because she has stated categorically that she was unaware of Mr. Halliday’s letter of 23 January 1996, and she says that she had in fact recruited Dr. Salama when he first joined the United Nations. She was aware of his level at that time; she was aware of the level of Dr. Oleinikov. Therefore, in her mind, if there was to be an acting Deputy Medical Director, it could only have been Dr. Oleinikov at that time.

Mr. Haugh (Member of the Tribunal): What she says in that paragraph is that she was not aware that he would use the title, “Deputy Medical Director”. She is now claiming, is she, that she did not realize that he was entitled to use it? She is claiming that she did not know he had been appointed as the Deputy Medical Director and she did not know what he had been appointed for?

Mr. Mhlaba (Counsel for Respondent): Yes. She did not know that.

Mr. Haugh (Member of the Tribunal): Well, if she could confirm that to us as her state of mind, I would be obliged.

Mr. Salameh (Counsel for Applicant): Actually, Mr. Halliday knew that Dr. Salama had been appointed to the post of Deputy Medical Director, and he actually appointed a new Deputy Medical Director. That is a different point. Dr. Laux might not have known, but Mr. Halliday did know. Nevertheless, he acted upon that requirement.

Mr. Mhlaba (Counsel for Respondent): I think it depends on whether one is talking about the memorandum of — I think — 1 November 1996, or his endorsement on 30 March 1996 of the appointment of the Acting Deputy Medical Director. The reason I am making this distinction is that the question that was raised by the Tribunal and the written question in July related to the recommendation made by Dr. Laux on 29 March, which was, in fact, endorsed on 30 March. We know that Dr. Salama did not get to New York until July. Therefore, there would have been nothing inconsistent with the appointment of an Acting Deputy Medical Director for the period until Dr. Salama arrived, if it is accepted and agreed that in fact he was coming as Deputy Medical Director. The question is why, on 1 November, a second Deputy Medical Director was designated by the same Mr. Halliday who had written to Dr. Salama. That is what is problematic.

Mr. Haugh (Member of the Tribunal): Mr. Salameh, do I understand it as part of your case that Mr. Halliday’s memorandum of 22 December 1995 misstates his understanding of the Secretary-General’s decision? Are you suggesting that the Secretary-General decided that there was to be an appointment of Dr. Salama to the post at a D-1 level, and that the document of 22 December is either a forgery or a misstatement of his true understanding?

Mr. Salameh (Counsel for Applicant): Absolutely not. The letter of 22 December was confirming the appointment of Dr. Salama as Deputy Medical Director at P-5 level because the post of Deputy was still encumbered by Dr. Pumpalov; this is mentioned in paragraph 2 of the letter in annex 25, which was submitted by the Respondent.

Mr. Haugh (Member of the Tribunal): Well you now have — you only just recently learned of it — the memorandum of 15 November, which records the Secretary-General’s decision as being a lateral transfer. What I want to know is this: given that you say there is intrigue, are you suggesting that persons deliberately misrepresented the actual decision that was made by the then Secretary-General?

Mr. Salameh (Counsel for Applicant): No. The letter from Mr. Halliday of — what date is that?

Mr. Haugh (Member of the Tribunal): It is a memorandum. It has just been given to us a few minutes ago.

Mr. Salameh (Counsel for Applicant): Of 22 December?

Mr. Haugh (Member of the Tribunal): No, of 20 November. That is date-stamped as having been received.

Mr. Salameh (Counsel for Applicant): “The Secretary-General has appointed Salama Amin lateral transfer. Please advise how to withdraw the vacancy announcement.” This is from Mr. Halliday.

Mr. Haugh (Member of the Tribunal): I understand it is an aide-mémoire. Is that right? You told me when you handed it to us that you believed it was written on 17 November.

I want to know this from Mr. Salameh: insofar as your case is based on an intrigue or a conspiracy, do you say that that intrigue or conspiracy goes so far as to seek to misrepresent, or to not put into effect, or to deny an actual decision made by Secretary-General Boutros Boutros-Ghali that there should in fact have been an appointment of Dr. Salama as Deputy Director at a D-1 level?

Mr. Salameh (Counsel for Applicant): Sir, the post of Deputy Medical Director was encumbered at that time. When this was discussed with the Secretary-General, Mr. Halliday must have told the Secretary-General, “All right; I agree. Dr. Salama will be the Deputy Medical Director. But the post is encumbered at this time and therefore we will make an arrangement to transfer him laterally at his post pending the vacation of that post.” But the main thing is the appointment, which the Respondent has been overlooking all the time. The appointment by the Secretary-General with the knowledge of the Appointment and Promotion Board was that of Deputy Medical Director.

Mr. Haugh (Member of the Tribunal): The Respondent says he would serve against the post at P-5 level. And I want to know from you if you are suggesting that the Secretary-General had actually determined otherwise and that there is a fabrication or an intrigue that seeks to misrepresent the decision that had actually been made by the Secretary-General.

Mr. Salameh (Counsel for Applicant): This came afterwards. Yes. But at the time that Mr. Halliday wrote this note, it was very consistent with the actual situation. They were saying, “All right. We would like to appoint Dr. Salama from Addis Ababa for the post of

Deputy Medical Director. The post is currently encumbered. Therefore, how do I draft the letter to indicate that this is for the D-1 post, which is Deputy Medical Director, but it is at the same level?”

Mr. Haugh (Member of the Tribunal): But why would he then want to cancel the Advisory Board meeting?

Mr. Salameh (Counsel for Applicant): Because he had already found a candidate. In other words, it goes to the Appointment and Promotion Board if the Appointment and Promotion Board is to look into a number of candidates and compare them. The Secretary-General has the prerogative to say, “The Appointment and Promotion Board is an advisory body to me. I have decided. I will advise the Appointment and Promotion Board of my decision, but I have decided that this is the right candidate for the post.”

Mr. Haugh (Member of the Tribunal): Well, then, I just ask again. That would be inconsistent with the meaning of the note of 15 November, because that suggests that he is cancelling the Advisory Board because Dr. Salama is to go on lateral transfer rather than on promotion.

Mr. Salameh (Counsel for Applicant): How to withdraw the announcement? In other words, the Secretary-General had already taken the decision and there was Dr. Oleinikov, who had applied for it. There is no need to keep the announcement.

Mr. Haugh (Member of the Tribunal): The announcement is of a competition to fill a vacancy.

Mr. Salameh (Counsel for Applicant): Right.

Mr. Haugh (Member of the Tribunal): He is now holding no competition.

Mr. Salameh (Counsel for Applicant): There is no competition now.

Mr. Haugh (Member of the Tribunal): Because, if you look at the note and translate it, perhaps, pedantically, there is to be no competition because Dr. Salama is moving on a lateral transfer.

Mr. Salameh (Counsel for Applicant): Precisely.

Mr. Haugh (Member of the Tribunal): Sorry, but that is where I have my problem.

Mr. Salameh (Counsel for Applicant): There is to be no competition. In other words, the Secretary-

General took the decision to appoint him. The Secretary-General considered him the suitable candidate for it. Mr. Halliday agreed, and he, Mr. Halliday, was simply asking, "How do we now cancel the announcement?" And they did cancel the announcement.

Mr. Haugh (Member of the Tribunal): So your case is that the Secretary-General decided not to avail himself of the Advisory Board because he had made up his own mind and did not need advice on it.

Mr. Salameh (Counsel for Applicant): Precisely. And this is provided for in the staff rules and it has been done repeatedly by all the Secretaries-General. Even when the Appointment and Promotion Board submits a recommendation for a candidate or for a number of candidates, the Secretary-General looks at it and may say, "No, I disagree." He either remits it back to the Appointment and Promotion Board and says, "I do not agree; I want you to reconsider", or he says, "No. I have taken a different decision." The Appointment and Promotion Board is nothing but an advisory body to the Secretary-General. But the decision lies with the Secretary-General, not with the Appointment and Promotion Board.

Mr. Mhlaba (Counsel for Respondent): In connection with this question, I would like to disagree entirely with the assertion that the Secretary-General, in the proper exercise of his powers, can disregard or bypass the Appointment and Promotion Board. As I indicated in my presentation, although this may have happened in some cases, the General Assembly has subsequently confirmed that this is an improper exercise of the authority of the Secretary-General. It has specifically passed a resolution indicating in which areas such appointments may be made.

I would hope that later, especially towards the closing remarks, I can come back to this point, because I disagree entirely.

The other point I would like to make is that if, indeed, it is the contention that the appointment of the Applicant was on an interim basis, I would only think that the interpretation is accurate to the extent that it does not prejudice the competitive process when the post became available. In the first place, I do not accept that it is on an interim basis. However, if one were to make that interpretation and still acknowledge the decision to cancel the competitive process, it means that that interim period would end only by filling the

post on a competitive basis. In other words, there was no way around the competitive process.

Mr. Salameh (Counsel for Applicant): I think my learned colleague is not familiar with the procedure of appointment and promotion. I will give him an example. In his own list, which he sent me by fax, when Ms. Mayanja was appointed to the D-1 post by Mr. Kofi Annan, it was also without the approval of the Appointment and Promotion Board, and the vacancy announcement was cancelled — exactly as happened here in the case of Mr. Boutros-Ghali. This was the case of Ms. Mayanja, and it was followed by an appeal by Ms. Joan Gordon, who is the head of the administrative review unit. Ms. Mayanja was appointed at the D-1 level on 1 April 1996. The Appointment and Promotion Board was bypassed.

Mr. Mhlaba (Counsel for Respondent): I am glad that the Counsel for the Applicant specified that the appointment of Ms. Mayanja was at the D-1 level. It was not at the P-5 level, which we are dealing with in this case. It was at the D-1 level.

The second point is that as a result of the bypassing of the procedures, there were appeals brought against the Respondent, and the Appellants were successful in those appeals, which confirms the view that this bypassing of the competitive process is not a proper exercise by the Respondent of its authority.

Mr. Salameh (Counsel for Applicant): We are in agreement that the Secretary-General can disagree with the recommendation of the Appointment and Promotion Board, or completely bypass the Appointment and Promotion Board. In the case of Dr. Salama, the Appointment and Promotion Board was advised. They looked at the application, and Mr. Halliday said, "This is the choice of the Secretary-General." They took note of it, and the circular was issued with his name.

Mr. Thierry (President): It is 12.10 p.m. We must finish at 1 p.m. But if the parties are willing to make their concluding remarks now — not for half an hour each, but only for 20 minutes — then we could conclude our meeting this morning and cancel the afternoon meeting. It is for you to decide if you are ready to make your concluding remarks, of 20 minutes each, starting with the Respondent, and then by the Applicant. Would you be disposed to speak for 20

minutes? It is not necessary to speak for 20 minutes; if you can make it shorter, it is quite all right.

Mr. Mhlaba (Counsel for Respondent): I would need a few minutes to think this over. I do not think I am ready to make concluding remarks now.

The other point is that there have been questions asked by the Tribunal. I do not know how that might effect the content of my concluding remarks. It may be that such additional information might have a bearing

on how I might wish to present the concluding remarks — especially as I have to get information from Dr. Laux.

Mr. Thierry (President): So you would like to meet this afternoon?

Mr. Mhlaba (Counsel for Respondent): Yes.

Mr. Thierry (President): Then is it so decided.

The hearing rose at 12.10 p.m.

Meeting No. 160

The hearing was called to order at 3.05 p.m.

Mr. Thierry (President): Here are the concluding remarks of the parties, starting with the Counsel for the Respondent.

Mr. Mhlaba (Counsel for Respondent): If you would permit me, a question was asked before we left and I wonder whether I should answer that question now, separately from my concluding remarks, or would you prefer that I cover it during my concluding remarks?

Mr. Thierry (President): You may answer it now and then give your concluding remarks.

Mr. Mhlaba (Counsel for Respondent): The question asked was whether Dr. Laux, realizing that the Applicant was being transferred to Headquarters, knew which post at Headquarters she expected him to occupy in light of her denial of any knowledge that he was coming as Deputy Medical Director.

I have had an opportunity to speak to Dr. Laux, who has stated that in fact as far as she knew there was no date set for the Applicant's arrival in New York and that meanwhile, on 31 March, she knew that there would be no Medical Director. She made her request on that basis. She was not involved in the process of bringing the Applicant to Headquarters, and she assumed that the office that is responsible for the assignment of posts would handle that problem when he arrived. As I have stated, she was not aware of any specific date of his arrival. We do know that he did not arrive until July.

Mr. Haugh (Member of the Tribunal): What I would like to know is, did she know what he would be doing when he arrived? She might not have known when he was due to arrive, but did she know he was coming as the person appointed as the Deputy Director, be it P-5 or D-1?

Mr. Mhlaba (Counsel for Respondent): She has emphatically and consistently denied that. She has said that she understood he was coming on a lateral transfer and therefore the question of his being Deputy Medical Director or being a D-1 did not cross her mind and she has also stated that on the eve of Dr. Pumpalov's departure she became aware that the D-1 post was being transferred elsewhere.

Mr. Haugh (Member of the Tribunal): Are we to get a memorandum from her in due course as to her state of mind, or did she just wish that you convey that information and only that?

Mr. Mhlaba (Counsel for Respondent): She would be willing to write a memorandum to the Tribunal to that effect.

Mr. Salameh (Counsel for Applicant): I do not know how my colleague can testify on behalf of Dr. Laux. If Dr. Laux is credible and is telling the truth, she should come here and testify and be subject to cross examination. She tells Counsel for the Respondent what she wants to tell him, and he is conveying a message from her as though she is the Secretary-General. Dr. Laux is entirely involved in this case. She is the party that has caused all this aggravation and all this injustice, and I do not see how she can testify through someone else.

Mr. Thierry (President): The answer and reply are over. Please start your concluding statement.

Mr. Mhlaba (Counsel for Respondent): I think the essential issue in this case is whether the Applicant has an acquired right, that is, has he acquired a right, an unequivocal right, to occupy the D-1 post of Deputy Director of the Medical Service.

We do know that up to now he has not occupied that post. The issue therefore is whether the fact that he does not occupy this post is a result of any breach of the rules of the Organization or any breach of contract in relation to him.

The other issue is to determine whether the fact that he is not occupying the position has anything to do with a conspiracy or an intent to humiliate him, as has been alleged, and to unfairly deny him that post.

I think that all the evidence we have, all the documentation, relating to the decision-making processes indicates that the Secretary-General did not appoint the Applicant to a D-1 post.

Starting with the Secretary-General, we know that nowhere is it recorded that the Secretary-General had decided to appoint the Applicant at the D-1 level. There is no support for this contention. The only issue that may be subject to discussion is whether the fact that there was a reference to the title "Deputy Director" meant automatically that that title would go with the D-1 post. I submit that there is no support for the

contention that Deputy Medical Director automatically meant a D-1 position, for the simple reason that in the correspondence it is clearly stated that the Applicant is being maintained at the P-5 level and therefore there can be no inference from the Secretary-General's memorandum to the effect that the Secretary-General decided to give the Applicant a D-1 post.

The next step in the chain of events is the letter from Mr. Halliday, dated 23 January 1996, to the Applicant. We have already indicated that that letter was not complete, but it should be realized here that that letter was written by the same person who had informed the Appointment and Promotion Board that the Applicant was being transferred to New York at the P-5 level. We do admit that it was unfortunate that the letter went in the form that it did, given the fact that the vacancy announcement in October had indicated a D-1 position and thus could lead to a misunderstanding that in fact the title referred to a post at the D-1 level.

But again, if the intention was to convey the decision of the Secretary-General, the Secretary-General's decision was not to appoint the Applicant at the D-1 level, as can be seen from the letter of 1 June 1996, wherein Mr. Halliday apologized for the fact that he had referred to a D-1 post in the past. What is unfortunate about that letter is the fact that it did not state unequivocally that that was a mistake; that this is the Secretary-General's decision; it is a P-5 appointment; you are coming at the P-5 level.

Up to the point when the letter of 1 June 1996 is sent to the Applicant, one can go through all the other events and correspondence, and one will find no evidence of any conspiracy on anybody's part which explains why this happened.

The Counsel for the Applicant stated this morning that he had the highest regard for Mr. Halliday as a man of honour. I was pleased to hear that, because this meant that there was no inference from the Counsel for the Applicant that the mistake made by Mr. Halliday was made in the context of any conspiracy or with the intention of injuring Dr. Salama. Therefore, since the position in which we find ourselves with regard to the Applicant's post is a result of communications that he received from Mr. Halliday purporting to convey a decision of the Secretary-General, there cannot be any basis for believing that this situation is a result of a conspiracy on anybody's part.

I have gone through all the points that have been raised and the documents that have been provided relating to the relationship between the Applicant and Dr. Laux, especially the fact that it appears that they did not have a cordial relationship, but I have not been able to find anything in their hostility which explains why the Applicant today does not occupy the D-1 post. Therefore I think that the allegations concerning ill treatment or bias are irrelevant to this crucial issue of whether or not the Applicant should be occupying a D-1 position and whether he has an unequivocal entitlement today to be in a D-1 position.

As I have already indicated, the Respondent acknowledges the unfortunate communication which was sent to the Applicant, which created the impression in his mind that he was coming as Deputy Medical Director, and that it created the expectation that he would occupy a D-1 position. I do not wish to go back and to recount what happened as a result of the recommendation of the Joint Appeals Board, but what I would like to say is that I think by not accepting the settlement proposed by the Respondent, the Applicant obviously has opted to lay the case open and to argue that he is entitled to a D-1 position.

The point I should like to make here is that there is no basis, in my view, on which the administration or the Respondent can be compelled to grant a D-1 without a competitive process, and therefore there can be no justification for the administration accepting an injunction to a specific performance. Therefore, it is a question of what damage the Applicant has suffered. The Counsel for the Applicant has indicated that this is in the discretion of the Tribunal, and I agree. However, I do not agree with the suggestion that this damage might amount to anywhere close to the two years' net salary to which the Counsel for the Applicant had referred.

I should like to highlight here the fact that we are not talking about the case of a person who may have been promised a job and then did not get that job and remains unemployed. This was somebody who was already in the Organization, who understood what the procedures for promotion were. I think the fact that the Applicant was already in the Organization and knew that the rules of appointment and promotion applied and would apply in this case must, to some extent, mitigate or reduce his expectations as regards the award of compensation. In the event that a communication was made to him which was erroneous,

it must surely seem unrealistic to expect that the administration should be held to that communication which was in error or, failing which, that it should be required to pay a hefty amount of damages.

I would submit that we are not talking about a very significant amount of financial loss. I would also mention that the Counsel for the Applicant indicated at some point that this was not a question of money; it was a question of principle. I would say that it may be a question of principle, but if it comes to money, in my view, we are not talking of a significant amount of financial damage, given the fact that we are talking about somebody who continues to be in the employ of the Organization.

I would also like to draw attention to the fact that it would not be correct, in my view, for the administration to be punished for having attempted to apply the rules. There may have been a process of appointment which did not proceed correctly in one case. I refer here to the suggestion that was made by the Counsel for the Applicant that there have been cases in which the procedures have been by-passed or have not been properly applied. I do not think that it would be correct to argue that because you have made a mistake in one case, you must be held to that mistake in the present case and you must be required either to grant the promotion that is implied in a mistaken letter, which is not a reflection of the decision of the Secretary-General, only because you have made that communication.

I submit that if that were to be done, we would end up with a situation in which these errors would become commonplace and would result in a lot of promotions because people would expect that a responsible official can write a letter to somebody saying "I promise you this position although you have not been selected for it, and either you will be given that position or, if not, you will get a lot of money." Therefore the Tribunal in evaluating this case and looking at the evidence and considering what would be the appropriate remedy, if it indeed finds that a remedy is warranted, would have to take into account the impact that such a conclusion might have on the Organization.

I think if there is a mistake, that mistake can be remedied by awarding a reasonable amount of compensation which the Respondent had already agreed to following the Joint Appeals Board

proceedings, but I do not think that we can consider this case to be a case of corporate law whereby any slight mistake might result in a huge financial benefit to the Applicant.

Therefore I would urge the Tribunal to find that the Respondent acknowledged that a mistake was made and that that mistake was merely restricted to a communication and that the Respondent assumed its responsibility by offering to make a settlement pursuant to the JAB recommendation, that all the claims that had been made in relation to the conspiracy are totally unfounded and should play no role in determining what the measure of damage sustained by the Applicant should be.

With those remarks I would request the Tribunal to find that the Applicant's case is not founded and that he has no entitlement to a D-1 post and that the administration was correct in proceeding with the recruitment process for the D-1 post.

I would also make one final remark in response to what the Counsel for the Applicant stated this morning in connection with the availability of D-1 posts. I think those comments were irrelevant to this case because they seemed to suggest that the Respondent could somehow just award a D-1 post if one were available without going through the same process as has been gone through recently with regard to the D-1 post in the Medical Service. I refer here to the two D-1 posts that were said by the Counsel for the Applicant to be available in OHRM. I think that would be against the rules and is something that the Respondent would not be prepared to entertain.

Mr. Thierry (President): I thank the Counsel for the Respondent for his concluding remarks and I call on the Counsel for the Applicant for concluding remarks.

Mr. Salameh (Counsel for the Applicant): I have listened carefully to my learned colleague and I have considerable difficulty in following the logic of his arguments.

He claims that there was no contractual relationship with the Applicant. I respectfully submit that the documents before you and which the Applicant has submitted both to the Joint Appeals Board and to the Administrative Tribunal indicate beyond the shadow of a doubt that the post to which the Applicant was appointed was a D-1 post, Deputy Medical

Director. There is annex A/1, annex A/2, annex A/2 (i) and A/2 (ii); annex/3, a letter from Mr. Halliday which refers to “Deputy Director, Medical and Employee Assistance Division”; annex A/4, which includes the information circular, which lists Salama, Amin, ECA DAM, etc, post level D-1; annex 5; annex 8. You have the annex — I do not know if the Tribunal has a copy — to Reid Witter, Officer-in-Charge, Personnel Section, ECA, from Regina Polick, Human Resources Officer at Headquarters, dated 15 May 1996, OHRM D-1/P-5 MEAD.

How much more evidence does the Respondent expect the Applicant to tender the Tribunal to show that this was a case of recruitment, a bona fide recruitment for a D-1 and that the Applicant was selected by the Secretary-General and confirmed by the Appointment and Promotion Board for a D-1 post.

Even if we forget the D-1 post, the fact that he was given the title of Deputy Medical Director — the title is not given to a P-5; it is given to the holder of a D-1. That is the rank of the Deputy Medical Director. We cannot change that.

My colleague says that there was no breach of contract. How on earth does he reach that conclusion? Of course there was a breach of contract. This is precisely what the case is centred on. There was a commitment. What is a contract? They did not draw up an agreement signed by both parties. There was an offer and an acceptance. There was a procedure that preceded that, and this is a contractual relationship under our Staff Rules and Regulations. This is a contract; this is an obligation. There is a commitment to the Applicant for a D-1 post, for the appointment as Deputy Medical Director.

My colleague says that there was no intent to humiliate the Applicant. I do not know what more could have been done to humiliate a decent, qualified human being, a medical officer who had a rich career, high qualifications in his career. He has worked about ten years with the Organization of African Unity, with the World Health Organization and then four years with the United Nations. Then he comes here and he is received coldly, with indifference, and he is given a small office, not the office of Dr. Pumpalov, but a small office in the building. His secretary is ordered not to obey his instructions, not to use the title of Deputy Medical Director which he came here to use, but to use the title of Senior Medical Officer until 1998, when he

finally got fed up and went to see the new Assistant-Secretary-General in the Office of Human Resources Management. He complained and she must have looked into it and she then consulted Dr. Laux — I have no doubt she consulted her — and she must have asked her how can we face this. Here we have a senior medical officer who has the title of Deputy Medical Director confirmed to him by Mr. Halliday, and you are forcing him to use the title of Medical Officer. Is that not enough humiliation? How much more can a person be humiliated for it to be called humiliation?

Now I do not want to go into this again, but my colleague said that there is no support for the fact that he was appointed at the D-1 level.

My colleague puts forward another theory: that the treatment of Dr. Salama, Senior Deputy Medical Director, is irrelevant. It does not matter how much humiliation he could suffer, and that is irrelevant to the cause of action in this case. What kind of logic is this? This is a man who was recruited, who was appointed by the Secretary-General as Deputy Medical Director, and he is humiliated. We seek redress from the established procedure in the United Nations. To say that the humiliation he suffered is irrelevant — irrelevant to his contractual status, irrelevant to the extent of compensation to which the Tribunal may be willing to award! This is irrelevant? There is no logic there to my mind.

In any case, the humiliation, the mistreatment of the Applicant in this case shows a very severe degree of prejudice. What else could it be? It was prejudice, and prejudice cannot be condoned in the Secretariat of the United Nations. This is forbidden under the Staff Rules and Regulations, under the Charter, under the Universal Declaration on Human Rights. This was prejudice against him. He did not want to claim that was because he has a certain nationality; he has more dignity than to claim that. But we have tendered the evidence and the evidence clearly points to the fact that there was very serious prejudice displayed against him by Dr. Laux when he arrived here.

My colleague claims that there was no injustice. Dr. Narula was properly promoted to the status of Deputy Medical Director. The Tribunal has before it the 1996 list of the United Nations Secretariat and on page 92 Dr. Narula in August 1996 was still at the P-4 level. Dr. Laux started a big crusade for Dr. Oleinikov because she could not stand the injustice inflicted on

Dr. Oleinikov because of the appointment of the Applicant. Dr. Oleinikov had seniority over the Applicant.

All right, at that time he had seniority. Assuming that Dr. Laux is right, and that Dr. Oleinikov had some priority over the Applicant — which we deny — what about Dr. Narula? Where was Dr. Narula at that time, in August 1996? She was at the P-4 level. And what did Dr. Laux do? She forgot completely about Dr. Oleinikov. She ignored him completely. And she goes to the Appointment and Promotion Board, and she says, “This is the candidate I want to propose for Deputy Medical Director.”

All right, not Dr. Salama, who she doesn't like, but Dr. Oleinikov, whom she fought for — quite a big fight with Mr. Halliday. But this is not fair; Dr. Oleinikov has seniority. What happened to that seniority? What happened to Dr. Oleinikov? We don't hear about that. Where is the objectivity? Where are the acquired rights? No mention of that.

Now I see from a document here that Dr. Narula is not only Deputy Medical Director, over the head of the Applicant, over the head of Dr. Oleinikov, the allegedly more senior Medical Officer, but she has also the added title of Senior Deputy Medical Director.

We know why they added the “Senior”: in order to give her a higher level than the Applicant and than Dr. Oleinikov. I don't know — Dr. Oleinikov — I haven't heard any explanation from my learned colleague about the fate of Dr. Oleinikov. I feel sad for him. What happened to the man? He suddenly disappeared. No mention of him. What happened to his seniority? Where is all that struggle, all that fight defending, crusading for the underdog? What happened to the underdog?

My learned colleague talks about compensation. Compensation: there is no justification for a higher level of compensation than was negotiated. It wasn't negotiated; I think you used the word “negotiated” — than was suggested by Mr. Connor. Well, I think Mr. Connor would have liked not to — This was the cheapest way to get out of it.

But compensation by the Tribunal, in my humble submission, has to take into account the gravity of the injustice. Otherwise, what is compensation? Compensation [for] injustice is also a measure to prevent continued injustices inflicted or similar

injustices inflicted on victims like the Applicant in this case.

Here is a deliberate, calculated and, with all respect, vicious campaign against the Applicant, denying him his lawful appointment, denying his status, humiliating him. This is continuing to the present day, and we are told that this should have no influence whatsoever on the amount of compensation to be awarded?

I respectfully submit, Mr. Presiding Officer, that this theory is absolutely unacceptable. That for compensation the Tribunal will, I am sure — as happened in other cases, and I have [*unintelligible*] a number of them [where there was] awarded more compensation than the two-year statutory, because of the seriousness of the injustice that was inflicted on the staff members.

Otherwise it costs nothing for the Secretariat. It costs nothing for the bureaucracy when small bureaucrats play around in the Secretariat and inflict injustices unless they know that they are going to pay some substantial compensation for that, or damages. There will be no deterrence whatsoever for this improper conduct to continue.

I think all of us wish that these things would not happen and will not continue, because they are not becoming to the United Nations.

Now to talk about the loss. What did the Applicant lose? My learned colleague said he didn't lose anything. Compensation should be assessed on the basis of his not losing anything. Moral damage — it isn't moral damage here. In addition to the moral damage, the Applicant has lost the post, has lost the grade. He has lost since the appointment three and a half years of a higher salary. He has lost a chunk of contributions to his pension fund. He has lost his career and future. He doesn't even have seniority to go anywhere else. He is still at the P-5 which he held in Addis Ababa with the ECA, and he continues. His situation is totally volatile. It is nothing. So compensation has to take into account not only the moral issue; it has also to take into account the financial factors.

Now the Applicant has lost status, he has lost a difference in salary, he has lost seniority, he has lost contributions to the pension fund. He will continue to lose for the length of his service at the United Nations,

he will continue to suffer a loss, a sequence of losses, as long as he is at this level.

This is why, in my humble judgement, if justice were to be done for the Applicant, the only way to do it would be to rectify the error or injustice and give him the D-1 level. That is the only thing that I know that the bureaucracy will not allow. Why? Because already they put Dr. Narula there, over the head of everybody else, with less than two years' seniority at the P-5 level. And they gave her the title not only of Deputy but Senior Deputy. Now you have a Section, you have a Division with a Medical Director and a Senior Deputy Medical Director and a Deputy Medical Director and a third Deputy Medical Director. It shows you how one error, one injustice, has led to a chaotic situation. I don't think even my learned colleague would like to have an office like that with such a ridiculous situation.

My learned colleague was saying, after all, this was just a mistake, an unintended mistake. My humble submission is that the mistake was not in appointing him. This was a very, very clear case of appointing a person with adequate seniority to a post for which he was highly qualified, to a post of Deputy Medical Director. This was confirmed in a number of documents. There was no mistake.

The mistake was that Mr. Halliday, an honourable man, found that he was compelled, there were forces over his head that compelled him not to meet the obligations that he had already made to the Applicant. He had to express sorrow or regret to the Applicant. He did that on the eve of the Applicant's departure from Addis Ababa to Headquarters, when he had already vacated his home, when he had sold his furniture, when he had sold his cars, when he had taken his children out of school, and when he came here —

This is a mistake. I think if we look at it carefully we know, we can see very clearly that this was a mistake forced — forced — on Mr. Halliday, who had no authority at that stage, and — I know Mr. Halliday very well — who had left that office of his because he started to dislike what was going on. He chose to go to Iraq, to Baghdad. A man of principle, who went to Iraq to head this compensation for children there — you know, using part of the oil revenues for the children, etc. — and he found that even there he had to fight against bureaucracy, and he resigned even from there. He resigned voluntarily from there.

Mr. Thierry (President): Thank you for your concluding remarks, Mr. Counsel for Applicant. Normally our hearing is coming to an end, but if very briefly, only if you wish to, if Counsel for Respondent wants to add a very brief comment and also after that Counsel for Applicant, only a few sentences — after that I will close the hearing. Only if you wish to.

Mr. Mhlaba (Counsel for Respondent): Yes, just one remark. First to say that here with me I have a memorandum from Dr. Laux which addresses the question that was asked of me. It is a pre-existing memorandum, so I'll make it available.

Just a general closing remark that I would like to make. Again, I think it is wrong to compare the promotion exercise in 1995 with the promotion exercise in 1999. I made it clear all along that I was concentrating on the promotion exercise in 1995, which is the subject of this case. What has happened in 1999 is something that was based on existing legislation, which we are aware of. That's all I would like to say on that point.

The other point is also that I would still like to leave the Tribunal with a very clear indication that one has to look at cause and effect between the various decisions taken by the Respondent and the present situation as it affects the Applicant. Now, compare that with the arguments that have been advanced to the effect that the Applicant's present situation emanated from decisions taken by Dr. Laux. I would be the last to say she and the Applicant had a cordial relationship. But there is nothing to show that the decision of the Secretary-General in the 22 December 1995 memo reflects any input at all from Dr. Laux. I don't see anything further from her directly affecting the situation of the Applicant, except that I agree that he is unhappy about the way he is treated by her in their relations. But I don't think that is what explains the fact that he remained at P-5. That is all. I just wanted to state it as clearly as I can.

Mr. Salameh (Counsel for Applicant): We want to add a few words also in relation to the last comments here. The implication is that now this promotion of Dr. Narula should be completely divorced from what happened in 1996 and on. How can we do that?

The system of promotion is the same. This went to the Appointment and Promotion Board. You know and I know that there was considerable resistance from

the Appointment and Promotion Board, and their candidacy was pushed — rammed — down the throat of the Board in order to get Narula over the head of the Applicant and Dr. Oleinikov, because they were competitors.

To say that there was admittedly no cordial relationship is totally overlooking the prejudice, the harassment, the insult, the humiliation of the Applicant. Is the suggestion made that this was the fault of the Applicant that he was badly treated and humiliated in the Medical Service by Dr. Laux? Why? Does a person have to be of a certain shape, of a different stature, or what? What would satisfy Dr. Laux — to feel that the person deserves respect from her and deserves human, good treatment from her? Who does Dr. Laux — Dr. Laux showed every sign of prejudice, arrogance and conceit in this case, and total insensitivity to human feelings and to contractual entitlements.

There is prejudice from the beginning, and it was planned. My submission is that this was planned by

Dr. Laux, that the post would be loaned for two years. This would facilitate a time for Dr. Narula to at least accumulate two years of seniority in grade, and then she would be presented to the Appointment and Promotion Board for the Deputy. Which, she said already in her reply to Mr. Halliday, she said, Dr. Narula — I want three deputies, Dr. Narula deputizes for me in financial and etc. matters. She already had Dr. Narula as her deputy, as her concealed deputy.

Mr. Thierry (President): I now declare the hearing on case number 1039 closed. I wish to thank Counsel, both for the Applicant and for the Respondent. And I wish to thank, on behalf of the Tribunal, the interpreters and other members of the Secretariat who have assisted us in these proceedings.

The Tribunal will render its judgement in this case in due time.

The hearing rose at 4 p.m.