United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1030
21 November 2001

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1030

Case No. 1056: JENSEN

Against: The Secretary-General of the United Nations

THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL,

Composed of: Mr. Julio Barboza, First Vice-President, presiding; Mr. Kevin Haugh, Second Vice-President; Ms. Brigitte Stern;

Whereas, on 22 December 1998, Hans P.C. Jensen, a former staff member of the United Nations, filed an Application containing pleas which read as follows:

"...

15. Regarding *merits*, the Applicant respectfully requests [the United Nations Administrative Tribunal]:

a. *To find* that the Administration did not fulfil [its] obligations in accordance with Article 101, paragraph 1 of the Charter; General Assembly resolutions 37/126 ... and 38/232 ..., and [staff] rule 114.12 (b) (iii);

b. *To find that* the Applicant's fixed-term contract on long term status should be considered as a permanent or an indefinite appointment, or as a fixed-term appointment expiring at his age of retirement;

c. *To find that* the Applicant was the incumbent of a regular budgeted post at Nairobi, and blocked for duration of his assignment;

d. *To find that* the blocked post encumbered by the Applicant at Nairobi was not abolished;

e. *To find that* the Applicant had the right to be reinstalled in his blocked post at Nairobi;

f. *To find that* the Administration argues contradictorily;

g. *To find that* the administrative actions of not reinstalling the Applicant in his blocked post, and that of non-renewal [of] his fixed[-term] contract, was an arbitrary action;

h. *To find that* the Applicant had a reasonable expectation of continuity;

i. *To find that* that the Applicant had suffered a grave monetary [loss] in salary caused by the arbitrariness of the administrative action of downgrading him from an L-6 to a P-4 level; and by the same reason;

j. *To find that* the Applicant had suffered a grave monetary [loss] in his future pension benefit;

k. *To order* the Respondent to reinstall the Applicant in his blocked post at Nairobi, retroactive to the date of non-renewal of his fixed-term contract; or alternatively

l. *To order* the Respondent [to pay] indemnities as follows:

   i. The equivalent to two years of net salary;

   ii. To pay that indemnity according to the salary scale in force at the date of the UNAT recommendation;

   iii. To pay a lump-sum of US$ 348,300 as reparation for salary and pension lost;

   iv. To pay ... compensation equivalent to five months of net salary for the damages caused by the negligence of the Administration in processing the separation from service documentation;

   v. To pay ... compensation, to be determined by the Tribunal, for the dilatory and casual way ... the appeal [was considered]."

Whereas, at the request of the Respondent, the President of the Tribunal granted an extension of the time limits for filing a Respondent's answer until 23 June 1999 and periodically thereafter until 31 March 2001;

Whereas the Respondent filed his Answer on 5 February 2001;

Whereas the Applicant filed Written Observations on 28 February 2001; and on 23 May 2001, the Respondent submitted his comments thereon;

Whereas, on 16 July 2001, the Tribunal decided to postpone consideration of this case until its autumn session;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization in Lima, Peru, on 15 January 1972, on a one-year, intermediate term appointment as an Architect (Associate Expert) at the L-1 level.

On 13 July 1981, the Applicant was granted a two-year, fixed-term appointment with the United Nations Center for Human Settlements (UNCHS) in Nairobi as a Human Settlements Advisor at the P-4 level under the 100 Series of the Staff Regulations and Rules. His contract was subsequently extended until 12 July 1985, however on 22 February 1984, he was assigned to Bogota, Colombia, as a Project Coordinator at the L–5 level under the 200 Series of the Staff Regulations and Rules. The cable from Headquarters approving his reassignment stated:

> "[P]leased inform you ... approved on 30 January 1984 staff member's assignment to Col[o]mbia at L-5 step V level for one year under 200 [S]eries Staff Rules but on understanding his post under 100 [S]eries in Nairobi will be blocked for duration his assignment".

The Applicant's assignment in Bogota was subsequently extended a number of times, in the course of which his title was changed to Chief Technical Advisor on 2 October 1989, and he was upgraded to the L-6 level on 1 May 1990.

On 29 April 1992, in response to an inquiry from the Applicant, the Chief, Division of Technical Cooperation, UNCHS, advised him that there was "no possibility to absorb [him] against a Headquarter's post ... [and that] ... the only option [was] to explore possibilities in the field". This was reitereated in a fax to the Applicant from the Executive Director, UNCHS, on 14 December 1992.

On 1 February 1993, the Applicant was assigned to UNCHS, Economic Commission for Latin America and the Caribbean (ECLAC), in Santiago, Chile, on a one-year, fixed-term

appointment as a Human Settlements Officer at the P-4 level under the 100 Series. His fixed-term contract was extended several times until 31 July 1997 when he separated from service upon the expiration of his final contract.

On 27 October 1995, a Human Resources Officer, Operational Services Division, Headquarters, wrote to the Applicant concerning his eligibility for promotion, and reminding him that 100 Series staff members who are promoted during secondment to a 200 Series post resume their former grade upon return to their 100 Series post. In the course of this letter she noted, "I would like to remind you that, upon your assignment to the 200 Series, the condition stipulated in the approval of such assignment was that a regular post (100 Series) was to be blocked for your eventual return to it".

On 10 April 1997, the Chief, Human Resources Management Service (HRMS), Nairobi, informed the Applicant that his fixed-term contract due to expire 31 July 1997 would not be extended. On 1 June 1997, the Applicant wrote to the Secretary-General requesting that the decision not to renew his contract be reviewed and that he be moved to his "blocked post" in Nairobi or, in the alternative, that he be granted an indemnity payment. In the event that both administrative review and indemnity payment be denied, the Applicant requested permission to submit his case directly to the Administrative Tribunal. On 25 June 1997, his request was denied.

On 7 July 1997, the Applicant submitted an appeal to the Joint Appeals Board in New York (JAB, New York) requesting that he be moved to his "blocked post" in Nairobi and suspension of the administrative action not to renew his fixed-term contract.

In its report of 28 July 1997, the JAB, New York, concluded that "should the [Applicant's] request for suspension of action be denied [his] rights would be directly and irreparably harmed" and recommended that the request for suspension of action be approved until the merits of the case could be determined. On 30 July 1997, the Officer-in-Charge, Department for Administration and Management, advised the Applicant that the Secretary-General did not accept this recommendation but requested that the JAB consider the "substance of [the Applicant's] appeal" and "submit its report thereon ... within ten weeks".

On 21 July 1997, HRMS, Nairobi, authorized the Applicant's repatriation and shipment of his personal effects. On 1 August, the Chief, Division of Administration, ECLAC, Santiago, advised the Chief, Division of Administrative Services (DAS), Nairobi,

that he had authorized a one month extension of the Applicant's laissez passer "in order to facilitate his repatriation". On 6 August 1997, ECLAC advised HRMS, Nairobi, that the Applicant "[wished] to be repatriated as soon as possible". Also on 6 August, the Applicant wrote to the Secretary-General requesting his intervention in order to accelerate the process and the payment of daily subsistence allowance until departure from the duty station.

The Applicant filed "a complete statement of appeal" with the JAB, New York, on 10 August 1997. Apparently unaware that the Applicant had filed an appeal with the JAB, New York, on 12 August 1997, the Chief, DAS, Nairobi, advised the Applicant by fax that, in accordance with staff rule 111.1 (a) he should address any appeal to the Joint Appeals Board in Nairobi (JAB, Nairobi).

On 13 August 1997, the Travel Unit, Nairobi, confirmed the authorization of the Applicant's repatriation and shipment of his personal effects. On 16 October 1997, ECLAC forwarded "a document submitted by [the Applicant] for the payment of his repatriation grant" to HRMS, Nairobi. On 7 November 1997, HRMS, Nairobi, replied, requesting "prove [sic] of relocation".

On 18 November 1997, in response to a request from the Chief, Office of the Under-Secretary-General for Management, the Chief, DAS, Nairobi, provided the former with a chronology of events relating to the Applicant's appeal to the JAB and "administrative actions taken in connection with [his] separation from service".

After an exchange of correspondence between the New York and Nairobi JABs, on 7 May 1998, the Secretary, JAB, Nairobi, informed the Applicant that he had received the appeal from the JAB, New York, on 27 April 1998 and that the case would be considered in sequential order.

The JAB, Nairobi, adopted its report on the merits on 16 October 1998. Its recommendation reads as follows:

> "***Recommendation:***
>
> ***On the basis of full and complete information made available to the Panel, after thorough review of [the] case, the Panel recommends to the Secretary-General that all of the Appellant's pleas be rejected, considering them to be groundless."***

On 22 December 1998, the Applicant, having not received a decision from the Secretary-General regarding his appeal to the JAB, filed the above-referenced Application with the Tribunal.

On 12 April 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General agreed with the JAB's findings and conclusions and had decided to accept the JAB's unanimous recommendation and to take no further action on his appeal.

Whereas the Applicant's principal contentions are:

1. The Respondent did not fulfil his legal obligations.

2. The Applicant suffered grave damage due to the Administration's negligence.

3. The Applicant was the incumbent of a regular budget post which was "blocked" for him and was not abolished.

4. The Applicant had a reasonable expectancy of continuity.

5. The Applicant suffered financial injury as a result of the Respondent's arbitrary actions.

6. The Nairobi Administration was negligent in processing the Applicant's entitlements on separation from service.

Whereas the Respondent's principal contentions are:

1. The Respondent acted within his statutory powers.

2. The Respondent made serious efforts to keep the Applicant in employment.

3. The Respondent maintained the Applicant against posts commensurate with his level of appointment thus fully discharging his obligation to the Applicant.

4. No post was blocked for the Applicant, and he had no entitlement to re-absorption at Nairobi after 31 July 1985.

5. The Applicant's contracts all stated that his appointment had no expectancy or entitlement of renewal.

6. The Applicant's contentions with regard to his alleged financial injury are contradictory and time-barred.

7. There was neither negligence nor undue delay on the part of the Respondent in processing the Applicant's final entitlements.

The Tribunal, having deliberated from 29 June to 16 July 2001 in Geneva, and from 26 October to 21 November 2001 in New York, now pronounces the following Judgement:

I. Throughout his long career with the Organization, the Applicant served on a series of fixed-term and temporary contracts both under the 100 and 200 Series of the Staff Regulations and Rules, all of which expressly provided and recited that they were without expectancy/ entitlement of renewal and each of which was signed by the Applicant. His service with the Organization ultimately ended as of 31 July 1997.

II. The Applicant first contends that, notwithstanding the clear and unambiguous language of these appointments, because of his long-term status, his appointment should be considered as a permanent or an indefinite appointment, or as a fixed-term appointment expiring at his age of retirement. He also contends that, because of promises made to him and an understanding reached, he had a reasonable expectation of continuity. The Tribunal is satisfied that even if the Applicant could establish that he genuinely entertained such an expectation, it would not bind or create any obligation on the part of the Respondent to so retain the Applicant unless the Applicant could establish first, that such an expectation was reasonably entertained, and second that it resulted from some promise made by or on behalf of the Respondent by someone who had actual, or at least ostensible, authority to make such a promise, so that it would become legally binding upon him. The Tribunal has consistently held that "[t]he decision whether or not to renew a fixed-term appointment is within the discretion of the Secretary-General and, in the absence of countervailing circumstances, non-renewal will not give rise to any rights on the part of the staff member". (See Judgement No. 422, *Sawhney* (1988) citing Judgement No. 199, *Fracyon* (1975).) Such circumstances may be deemed to exist if there was some promise or action made by the Respondent or by

someone who had the authority to make such a promise, so that it would become legally binding upon him.

III. Temporary appointments under the 200 Series of the Staff Regulations and Rules, carry even less expectancy of renewal than fixed-term appointments under the 100 Series, because of their specific nature. These appointments are entirely dependent on contingencies such as the requests of Governments and the availability of funds. (Cf. Judgements No. 614, *Hunde* (1993); and No. 885, *Handelsman* (1998).) An expectancy of renewal may be created by surrounding circumstances, however, the Tribunal has repeatedly held that neither excellence of performance nor series of renewals of appointments create such an expectancy. Such circumstances may include an abuse of discretion in not extending the appointment or, an express promise by the Administration that gives a staff member an expectancy that his or her appointment will be extended. (See Judgements No. 205, *El-Naggar* (1975); No. 839, *Noyen* (1997); and *Handelsman, ibid.*)

IV. The Applicant submits that the principal or main evidence to support his claim of legitimate or legal expectation is to be found in a cable date-stamped as "Received 3 February, 1984, UNCHS Personnel Section" which was issued confirming approval of the Applicant's "assignment to Col[o]mbia ... for one year under 200 Staff Rules **but on [the] understanding [that] his post under 100 [S]eries in Nairobi will be blocked for [the] duration [of] his assignment**". (Emphasis added.) The Applicant argues that this cable accurately reflects or recites the understanding or the terms of the agreement under which he was assigned to Colombia, and that this created a genuine expectation on his part that a position would be held for him in Nairobi on cessation of that assignment or any continuation thereof, no matter how long it might last.

The Tribunal notes that in the words of the said cable the post was to be blocked "**for the duration of the assignment**" and not "for your eventual return to it" (meaning his return to the post which he had occupied in Nairobi immediately before he was assigned to Colombia) this being the gloss put on the cable in the letter from the Human Resources Officer dated 27 October 1995 on which the Applicant further relies and which is dealt with later in this Judgement.

V. The Applicant simply interprets the text as if the words "for one year" did not exist, and submits that it was the obligation of the Administration to block his post in Nairobi for an indefinite period of time, until he decided to come back to Nairobi.

However, assignment of staff members to other posts in the field - useful though it may be for the service and for the staff members - must be regulated in certain detail, since the system may be disruptive of the work in the releasing organizational units that see themselves deprived of some of their staff members' services. In fact, Personnel Directive PD/3/81/Rev.1 of 4 April 1984, was in force at the moment the Applicant was reassigned to Colombia and continued to be in force until 19 May 1995, when it was replaced by administrative instruction ST/AI/404 entitled "Assignment to and return from mission detail" of 19 May 1995. The former, then, covers a period of time which is important for the understanding of the legal meaning of the parties to this case's conduct.

VI. That Personnel Directive must be presumed to have been perfectly well known both to the Applicant and the Respondent, and it established a formal procedure for cases such as this. In paragraph 3, the Directive reads:

> "Professional and General Service staff are selected for assignment to United Nations missions for a **limited period** as dictated by the exigencies of service. The releasing organizational unit is under the obligation **to block a post for the return of the staff member**. Prior to departure, the organizational unit concerned in consultation with the Office of Personnel Services and the staff member shall determine the post which will be blocked." (Emphasis added.)

This paragraph was complied with in reassigning the Applicant to Colombia: his period of assignment was clearly limited to one year and it was expressly stated that the post which was to be blocked for his return was his post in the 100 Series. There is no other possible interpretation of that text, particularly in light of the terms of the Directive, which required a limited period for reassignment and the consequent obligation of the releasing unit to block the staff member's post for also a limited period.

VII. Another paragraph which is instrumental in interpreting the conduct of the parties to this case is paragraph 7 of the Directive, which is applicable to extensions of the initial assignment:

> "An extension of the initial assignment will be granted if the following conditions are met: (a) the head of the mission formally requests the extension; (b) the staff member is willing to continue in the mission assignment and (c) the releasing organization unit agrees to the further extension and to the continued blocking for the return of the staff member of the post which has been determined in accordance with paragraph 3 above. This provision applies to all staff members regardless of their category and level".

Paragraph 9 of the Directive completes the procedure, by stating that:

> "In cases where the releasing unit agrees to a further extension, the Assistant Secretary-General for Personnel Services, after receiving a request for extension from the head of the mission and the recommendation thereon of the Office of Field Operational and External Support Activities, will decide on the granting of the extension. The decision will then be notified to the staff member through his or her Personnel Officer and communicated to the Offices concerned."

This provision is an essential one, which contemplates the interests of all the interested parties, for which reason it must be rigorously complied with. It constitutes an elaborated procedure and a rather formal one. The Applicant never referred to or implied that such a procedure ever took place so authorizing the presumption that it did not, that the Applicant never consulted UNCHS, Nairobi, regarding the continuation of his assignment in Bogota. Not surprisingly, the latter must have understood that it had no longer any obligation to continue blocking the Applicant's P-4 post in Nairobi, and the fact that it ceased to be blocked by the Respondent seems to confirm that presumption.

VIII. At the time when the Applicant was assigned to Colombia he was employed on a two-year temporary contract which was due to expire on 12 July 1985. His assignment to UNCHS, Bogota, was for a one-year period so that latter term would have expired well before 12 July 1985. The Tribunal is satisfied that the cable in question meant, and could only reasonably have been understood to mean, that the Applicant's post in Nairobi was to be blocked so that

when the Applicant's one year assignment to UNCHS, Bogota, expired his job would be available for him in Nairobi. The Tribunal is satisfied that it is not reasonable to construe the cable as meaning that the Nairobi post was to be blocked indefinitely or until the Applicant's "eventual return". It did not use those words nor was it phrased to suggest an open-ended obligation. It clearly stated otherwise.

IX. Regarding the Applicant's "Notification of Mobility and Hardship Determination" of 31 January 1997, covering the whole of the Applicant's assignment, it is to be remarked that the periods in which he worked under contracts with UNCHS, Bogota, are separated from the others, beginning with the heading "new appointment" for his assignment in Bogota. The extensions were granted not by UNCHS, Nairobi, but by UNCHS, Bogota, and were a continuation of the Applicant's new legal relationship with UNCHS, Bogota. The obligation of UNCHS, Nairobi, to prolong the blocking of the Applicant's post in Nairobi depended on the agreement required by personnel directive PD/3/81/Rev.1 of 4 April 1984. That agreement never took place, or at least the Applicant did not bring any evidence in that respect or even mentioned it at all in this litigation. Not unnaturally, UNCHS, Nairobi, never consulted on its disposition to permit a continuation of a situation which deprived it of one of its posts, discontinued the blockage of the P-4 position.

It appears probable to the Tribunal that, when the Applicant's initial assignment to UNCHS, Bogota, for a period of one year came to expire, and when thereafter he was offered a project personnel appointment in Colombia, neither UNCHS, Nairobi, nor the Applicant considered this to be an extension of his original assignment; rather he then became employed by and the responsibility of UNCHS, Bogota, so that the responsibilities of UNCHS, Nairobi, ceased.

This would explain why on that occasion neither UNCHS nor the Applicant ever sought compliance with PD/3/81/Rev.1. This Directive would have involved a very formal consultation procedure and the consent of all to the continued blocking of the post.

X. As the JAB, Nairobi, put it when dealing with this ground in its report of 16 October 1998:

"The Panel thoroughly reviewed all the documents and considered that the Appellant's expectation for a blocked post for over twelve years is neither realistic nor reasonable, especially when the Appellant was advised officially in good time as early as in 1992. Mr. Hildebrand, Chief of Technical Cooperation Division, UNCHS (Habitat) very clearly stated in his letter dated 29 April 1992 that there was no possibility to absorb him against a Headquarters' post. The only option left was to explore possibilities in the field, and in order to find out the possibilities in [the] field UNCHS extended his contract in project COL/89/003 for another two months up to 31 January 1993. On 14 December 1992, the then Executive Director of UNCHS reconfirmed that there was no post available at UNCHS Headquarters, therefore it was imperative that the staff member remain in his present project in COL/89/003 while discussions with ECLAC were in progress. Knowing that there was no P-4 post blocked for him (contrary to what he now claims), the Appellant accepted a P-4 post on 1 February 1993 in Santiago, Chile, and never enquired about salary or pension loss at that time. If his statement of 'blocked P-4 post' was correct, why [did] he ... not raise this question with UNCHS Administration? When he applied for [a] D-1 post in ECLAC in February 1995, OHRM informed him that he [could not] apply for a D-1 post while ... still a P-4 according to the Staff Rules. Based on his query why he was not eligible to apply for this post when he already worked at L-[6] level, Ms. Celine Michaud, [Human Resources] Officer, OHRM, New York, explained (letter dated 27 October 1995, ...) the general procedure of 100 and 200 Series posts. Nowhere in this letter did she create any expectancy that a P-4 post was still blocked for the Appellant. The Appellant then enquired in his e-mail note dated 17 April 1996 to Mr. Hundzsalz, OIC [Officer-in-Charge], Research and Development Division, about a blocked P-4 post ... On 23 April 1996, Mr. Hundzsalz reconfirmed to the Appellant in his e-mail that there was no regular budget post at [the] P-4 level blocked for the Appellant, (as stated by the Appellant) and he was placed against a fund post and there had been no regular budget post in the Research and Development Division for several years. The Panel considered that the Appellant's assumption that he was reassigned to his blocked P-4 post was incorrect.

Since the assumption that there was a blocked post is incorrect, the Panel concluded that his request to reinstall him in his blocked post or request for salary indemnity for two years and reparation of pension lost is unjustified."

The Tribunal agrees with the JAB's analysis and findings, and with its conclusions. The Tribunal does not accept that the Applicant has satisfied it that he, at all material times, genuinely enjoyed an expectation of the sort which he now claims he had, as had he done so the Tribunal is satisfied that he would have reacted to the letter from the Chief, Division of Technical Cooperation, UNCHS, dated 29 April 1992 and to the fax from the Executive Director, UNCHS, of 14 December 1992, each informing him that there was no post for him at Headquarters, by asserting or protesting his right or his entitlement to be restored to his

post in Nairobi (the one which he says he believed had been still blocked for him) rather than by accepting the P-4 post on 1 February 1993 in Santiago, Chile, and not then raising the question of the salary or pension allegedly lost by him at that time.

XI. As to the letter from the Human Resources Officer dated 27 October 1995, which the Applicant claims reinforced his already mentioned expectation, the Tribunal is again satisfied that this aspect has not been established. Firstly, the said letter misstated the nature and term of the condition or understanding from that which had been set out in the cable of 3 February 1984 by importing the words "for your eventual return to it" when neither these words nor words to like effect had been contained in the said cable. Secondly, the letter of 27 October 1995 had not been written from a sector with actual or ostensible authority to bind the Administration in a way which would have overridden or varied the terms of the contract under which the Applicant had then been employed. Nor does the Tribunal find that it intended to do so as it was written in relation to a query on promotion or grading and did not purport to deal with other matters material to the issues which arise in this Application. Further and perhaps most importantly, the Tribunal is satisfied that there is no evidence to support the contention that the Applicant understood this letter as amounting to an offer to restore him to his post at Headquarters whenever his assignment to Colombia might end, for if he had understood the letter to create such an obligation or to acknowledge such an obligation on the part of the Respondent, the Tribunal is satisfied that he would have asserted such a right there and then. The Tribunal is satisfied that, had the Applicant genuinely believed that he had a legal entitlement to return to his blocked job in Nairobi, he would have speedily asserted this belief and would not, as of July 1997, have been canvassing his then superior to intercede with the Respondent to have his contract extended and renewed.

XII. All in all, the Tribunal is not satisfied that the Applicant entertained at any appropriate time a true belief or expectation that his old job in Nairobi was effectively being held for him until his assignments elsewhere might cease, no matter when it might be, or that it was being held for him for upwards of 12 years so that he was entitled after such a lapse of time to be re-assimilated back into that post. If the Applicant ever entertained such a notion, the Tribunal is satisfied that it was not a reasonable expectation in the circumstances or that it

had been inspired by any act or promise made by someone with actual or ostensible authority to so bind the Administration.

In light of the Tribunal's aforesaid findings, the Applicant's claims for indemnities allegedly due and for loss of pension and for the alleged loss resulting in the assignment of the Applicant from an L-6 to a P-4 level post are rejected.

XIII. The Applicant further claims that the Respondent breached General Assembly resolutions 37/126 and 38/232 and staff rule 104.12 (b) (mistakenly cited as rule 112.12 (b) (iii)) by failing to give the Applicant every reasonable consideration for a career appointment. The Tribunal is satisfied that this contention must be rejected as the Applicant never served on a series of fixed-term appointments under the 100 Series for a continuous period of more than five years, as stipulated in staff rule 104.12 (b) (iii), thereby meriting "every reasonable consideration" for a permanent appointment, taking into account the interests of the Organization.

XIV. As to the claim for compensation for the allegedly inexplicable or inexcusable delays on the part of the Respondent in processing the Applicant's separation and which caused the Applicant to suffer significant delays in his repatriation, what purports to be an accurate chronology of the salient events is set out in the letter from the Chief, DAS, Nairobi, to the Chief, Office of the Under-Secretary-General for Management, dated 18 November 1997. Even this chronology of events paints an unhappy picture of excessive delays. Furthermore, other documents give instances of bureaucratic errors in the processing of the Applicant's repatriation, such as the mistake made when his tickets were firstly issued giving the name of his divorced former wife rather than the correct name. The Tribunal is satisfied that the delay and inefficiencies apparent from the documentation are quite unacceptable and warrant an award of compensation, which the Tribunal assesses in the sum of one month's net base salary for the delays.

XV. For the foregoing reasons, the Tribunal:

(a) Orders the Respondent to pay the Applicant one month net base salary at the rate in effect at the date of his separation from service; and

(b) Rejects all other pleas.

(Signatures)

Julio BARBOZA
First Vice-President, presiding

Kevin HAUGH
Second Vice-President

New York, 21 November 2001

Maritza STRUYVENBERG
Executive Secretary

* * *

DISSENTING OPINION OF MS BRIGITTE STERN

I. I fully agree with the analysis of the applicable law made by the majority. However, I cannot, to my regret, accept the interpretation of the relevant facts of the case and the respective duties and obligations of the Administration and the staff member, and therefore the conclusions arrived at in the majority opinion.

II. The applicable law is stated in PD/3/81/Rev.1 which was applicable to the situation of the Applicant throughout his assignment to Colombia, from 1984 to 1993. In paragraph 3, which is applicable to his *initial assignment* to Colombia, the Personnel Directive reads:

> "Professional and General Service staff are selected for assignment to United Nations missions for a limited period as dictated by the exigencies of service. The releasing organizational unit is under **the obligation to block a post for the return of the staff member.** Prior to departure, the organizational unit concerned in consultation with the Office of Personnel Services and the staff member shall determine the post which will be blocked." (Emphasis added.)

Furthermore, paragraph 7 of the same Personnel Directive, which applies to the *extension of his assignment* in Colombia, reads:

> "An extension of the initial assignment will be granted **if the following conditions are met**: (a) the head of the mission formally requests the extension; (b) the staff member is willing to continue in the mission assignment and (c) the releasing organization unit agrees to the further extension and **to the continued blocking for the return of the staff member of the post** which has been determined in accordance with paragraph 3 above. This provision applies to all staff members regardless of their category and level." (Emphasis added.)

It is interesting to point out that ST/AI/404, which came into force in 1995 replacing the Personnel Directive under discussion, specifies that "[i]f it is proposed that the mission be extended beyond two years, it will not be possible to grant any extension unless there is a specific written agreement to continue blocking the post in the parent department". This means, of course, that prior to 1995, this agreement to continue blocking the post did not have to be in writing and could thus be implied.

In other words, it is clear from the first rule, paragraph 3, that when a staff member is sent on mission, the Administration is obliged to block the post for his return, and it is difficult for me to understand, in this respect, the statement of the majority to the effect that

> "(t)he Tribunal notes that ... the post was to be blocked '**for the duration of the assignment**' and not 'for your eventual return to it' (meaning his return to the post which he had occupied in Nairobi immediately before he was assigned to Colombia) this being the gloss put on the cable in the letter from the Human Resources Officer dated 27 October 1995."

I cannot see the purpose of blocking a post if it is not for the return of the staff member on that post.

It is equally clear from the second rule, paragraph 7, that three conditions must necessarily be met for an extension of an assignment in the field, one of which is that the releasing organization agrees to the continued blocking of the post. In other words, if all three conditions are not present, the extension cannot be granted. *A contrario*, although no formal procedure was followed for that purpose (but, as mentioned, it did not have to be formalized in writing before 1995), it must be implied that if the extension is indeed granted,

all the conditions necessary for such extension have been fulfilled: in other words, **the extension cannot be granted without the blocking of the post**.

III. As far as the facts are concerned, it is not contested by the Respondent that the Applicant was on a fixed-term contract in Nairobi on a 100 Series post in 1984 and that his assignment to a 200 Series post in Colombia was on the special understanding that his post would be blocked. This is stated in a cable dated 3 February 1984 confirming "approval of the Applicant's assignment to Columbia for one year under 200 Staff Rules but on the understanding that his post under 100 Series in Nairobi will be blocked for the duration of his assignment".

IV. It is on the interpretation of the commitment contained in this cable that I diverge from the majority opinion, the question being the meaning and scope of the expression "for the duration of the assignment".

V. It is quite clear that at the time the cable was written, the budgeted post was expected to be blocked for one year. It is apparent, however, from the file that, at the request of the Administration, the Applicant's contract was extended many times. Although it appears to the Tribunal that, in view of the existing obligation to block a post in cases of assignment to the field, such extensions should be limited in time, in order not to disrupt the management of posts in the releasing unit, the Tribunal must take notice of the fact that these repeated extensions were granted. Therefore, the situation which arose from the several extensions of the Applicant's initial assignment must be appraised according to the rule set forth above.

VI. It is my understanding of the rule that, because the extensions were repeatedly granted, it must be considered that the blocking of the post – a necessary condition of such extension – was also repeatedly granted, or at least should have been repeatedly granted, to the Applicant. In order to set aside this conclusion, which flows naturally from the applicable rule, the majority considers on the one hand that the obligation to ascertain that the post was blocked continuously rested with the Applicant and on the other hand that the

renewal of the assignment in Colombia was a new contract. I must disagree with both analyses.

VII. First, the majority opinion puts the burden of following the administrative procedures adopted for the protection of the staff members on the Applicant rather than on the Administration, as is apparent in the following quote:

> "The Applicant never referred to or implied that such a procedure ever took place so authorizing the presumption that it did not, that the Applicant never consulted UNCHS, Nairobi, regarding the continuation of his assignment in Bogota. Not surprisingly, the latter must have understood that it had no longer any obligation to continue blocking the Applicant's P-4 post in Nairobi, and the fact that it ceased to be blocked by the Respondent seems to confirm that presumption."

It appears to me, on the contrary, that it is essentially the duty of the Respondent to follow the required administrative procedures as they are stated in paragraph 9 of ST/AI/404:

> "In cases where the releasing unit agrees to a further extension, the Assistant Secretary-General for Personnel Services, after receiving a request for extension from the head of the mission and the recommendation thereon of the Office of Field Operational and External Support Activities, will decide on the granting of the extension. The decision will then be notified to the staff member through his or her Personnel Officer and communicated to the Offices concerned."

Clearly the staff member has no role to play in this procedure, other than as its beneficiary. The responsibility lies with the Assistant Secretary-General for Personnel Services, the head of the mission, the Office of Field Operational and External Support Activities and, finally, the Personnel Officer of the staff member who has to notify him or her of the decision taken. The Administration is obliged to follow the procedures and to fulfill the required conditions, and ultimately if it does not do so, there remains at least an obligation on the Administration to inform the staff member that it has not followed the required procedures and that this might jeopardize the rights of the staff member.

VIII. Secondly, the majority considers the various contracts following the Applicant's first assignment to Colombia as new contracts and not as extensions of the initial contract. This is set forth in paragraph IX:

> "It appears probable to the Tribunal that, when the Applicant's initial assignment to UNCHS, Bogota, for a period of one year came to expire, and when thereafter he was offered a project personnel appointment in Colombia, neither UNCHS, Nairobi, nor the Applicant considered this to be an extension of his original assignment; rather that he then became employed by and the responsibility of UNCHS, Bogota, so that the responsibilities of UNCHS, Nairobi, ceased".

IX. Unfortunately, I can not share this analysis as the evidence in the file points undoubtedly – in my mind – to a contrary interpretation. It appears that, at all times, both the Applicant and the Respondent considered the fixed-term contracts in Colombia as extensions of the Applicant's first assignment there: this is stated in *all* the letters sent to him continuing his contract, which stated "I have the pleasure in enclosing the Letter of Appointment covering the extension of your appointment". Quite logically, it is also mentioned in *all* of the Personnel Action Forms of the Applicant. Finally, it is furthermore evidenced by the Applicant's "Notification of Mobility and Hardship Determination" dated 31 January 1997, which restates the whole "career" of the Applicant with the Organization and reads:

"Bogota, Colombia	1 Mar 84 - 28 Feb 85	New appointment
Bogota, Colombia	1 Mar 85 - 28 Feb 86	Extension of appointment
Bogota, Colombia	1 Mar 86 - 28 Feb 87	Extension of appointment
Bogota, Colombia	1 Mar 87 - 28 Feb 88	Extension of appointment
Bogota, Colombia	1 Mar 88 - 28 Feb 89	Extension of appointment
Bogota, Colombia	1 Mar 89 - 31 Dec 89	Extension of appointment
Bogota, Colombia	1 Jan 90 - 31 Dec 90	Extension of appointment
Bogota, Colombia	1 Jan 91 - 31 Dec 91	Extension of appointment
Bogota, Colombia	1 Jan 92 - 31 Dec 92	Extension of appointment
Bogota, Colombia	1 Jan 93 - 31 Jan 93	Extension of appointment
Santiago, Chile	1 Feb 93 - 31 Jan 94	Re-assignment to P-4 Post"

X. In the Respondent's Answer, it is never denied that the different contracts in Bogota were extensions of the initial contract: in paragraph 5 of his Answer, the Respondent states that "the Applicant remained in Bogota and his employment under the 200 Series of the Staff Rules was *extended* for varying periods of time, until 31 January 1993". (Emphasis added.) From this accumulation of evidence, I can only conclude that all nine contracts the Applicant held in Bogota after his first assignment were extensions of that initial assignment and thus had to follow the rule set forth in the afore-mentioned paragraph 7.

XI. In consequence, as long as the Applicant was assigned to Bogota he had a right to come back to a blocked post, as stated in the cable of 3 February 1984, such post also being a budgeted post. I consider that this cable accurately reflects the understanding under which the Applicant was assigned to Colombia, and recites the commitment of the Administration to block his post until the end of his assignment, or at least to be capable of offering him such a budgeted post. This created a genuine expectation on his part that a position would be held for him on cessation of that assignment or any continuation thereof, no matter how long it might last. As a matter of fact, this was the understanding of the Applicant and the Respondent.

XII. The Applicant first mentioned his blocked post as early as 1987. In a letter to Habitat, dated 20 January 1987, the Applicant requested repatriation to Nairobi, mentioning his blocked post in UNCHS, Nairobi. The Administration added a handwritten annotation to the letter stating: "the above is correct". In other words, in 1987, both the Applicant and the Respondent were in agreement as to the existence of the blocked post in Nairobi.

XIII. This understanding of the Administration is also evident from many other documents enacted during the whole period.

Of course, in *1984*, the Administration was quite aware of the existence of an obligation to block a post for the Applicant, as is clear in a letter dated 14 December 1984 from the Chief of Personnel, UNCHS, to the Executive Director, UNCHS. In this letter it was stated that there was an obligation to block a post; that such a post was indeed initially blocked; but that it could no longer be blocked due to transfer of personnel. It is clearly stated in this letter that "[w]e therefore need to find an alternative post to block for [the Applicant]".

In *1987*, as stated above, the Administration still acknowledged the existence of the blocked post, or at least of the obligation to block a post.

On 27 October *1995*, a letter from the Human Resources Officer denied a promotion to the Applicant because he was on a budgeted post, confirming the understanding of the Administration that the Applicant was in his initial budgeted post in the following words: "the condition stipulated in the approval of such assignment was that a regular post (100 Series) was to be blocked for your eventual return to it". If the majority opinion is

correct in determining that, as early as the end of 1995 the Administration no longer considered that there was a blocked post, this letter, and the action thereupon, is impossible to explain.

Finally, in the 31 January *1997* document, the Administration again mentions that, after his mission to Bogota, the Applicant was re-assigned to his previous post, outposted to the UNCHS, ECLAC, office in Santiago, this implying that he was put back on a P-4 post while he was at the L-6 level. In his Application, the Applicant explains, quite convincingly, that "the fact of downgrading him from L-6 to P-4 confirmed in the mind of the Applicant, that his post in Nairobi was used for reassignment in ECLAC. This is why the Applicant accepted a loss of salary, as this was the price to pay for being reassigned in a budgeted post."

XIV. Considering the fact that there was a clear commitment from the Administration to put the Applicant on a budgeted post when he returned from his assignment to Colombia, regardless of how this was to be achieved, the situation at the time of the non-renewal of his fixed-term contract for lack of financial resources was as follows:

- either the Applicant was indeed on a budgeted post, as he ought to have been, and the reason given to him by the Respondent for not extending his contract – the lack of financial funding – was *false*, which the Tribunal has to condemn;
- or, as it seems from the file, he was not on a budgeted post and this can only mean that the Administration *acted improperly at a former time without informing the Applicant* that the budgeted post due to him was no longer available, and this must also be censured by the Tribunal.

XV. It appears from the file that the Respondent is quite conscious of the many discrepancies and the mismanagement in the Applicant's case. For example, a fax dated 9 June 1997 from the Office of Human Resources, ECLAC, explains that the Administration had not handled the Applicant's case with the due process to which he was entitled:

> "My understanding is that the staff member who had initially been selected through formal process to fill a regular budget post was never advised that he had been removed from that post. It further appears that it was in the interest of UNCHS to

assign him to the field at the time and it was incumbent upon UHCHS, before action was taken, to keep him informed of any implications which an extended stay on assignment might have on his status. Furthermore, it is one thing not to have to block a particular post for the staff member – but quite another to switch him from a regular budget post to extra-budgetary fund where the stability of such funding is uncertain".

XVI. For all these reasons, I would have compensated the Applicant for the manner in which the Administration dealt with its obligation to guarantee him a budgeted post. I concur, however, with the majority opinion that the Applicant was at least entitled to be compensated for the inexplicable delays in dealing with his separation from service.

(Signatures)

Brigitte STERN
Member

New York, 21 November 2001

Maritza STRUYVENBERG
Executive Secretary