United Nations **AT**

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1057

Cases No. 1134: DA SILVA
No. 1135: DA SILVA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Ms. Marsha Echols; Ms. Brigitte Stern;

Whereas, on 8 May 2000, Alyrio da Silva, a staff member of the United Nations, filed two Applications. The pleas in the "first case" read, in part, as follows:

"II. *PLEAS*

...

WITH REGARD TO PRELIMINARY MEASURES

- To order the joinder of [the Applicant's] applications ...

...

WITH REGARD TO THE MERITS

Principally

(c) To rescind the final decision made by the Secretary-General on 24 April 2000 ...

(d) To find that [the Applicant] has shown that the functions assigned to him from 1 April 1995 within the Human Rights Field Operation in Rwanda were of a clearly recognizable higher level than his own and that he was entitled to request the re-evaluation of the latter.

(e) To find that the United Nations should therefore have taken all necessary measures to effect ... the classification of the post in question, in application of staff regulation 2.1, and then, on this basis:
- To re-evaluate [the Applicant's] personnel grade; or
- To determine whether staff rule 103.11 could be applied to him.

...

(g) To order the Secretary-General of the United Nations to compensate [the Applicant] for the injury sustained as follows:
- Payment of compensation in an amount equal to the difference between the salary paid to him from 1 April 1995 and the salary in respect of a P-5 post;
- Payment of compensation of $50,000 for the delay in responding to the legitimate requests of [the Applicant] and for the suffering caused;
- Payment of a fair award to cover ... legal costs.

In addition

(h) To order the Secretary-General to award [the Applicant], as from 1 April 1995, a special post allowance [(SPA)] ..."

Whereas the pleas in the "second case" read, in part, as follows:

"*II. PLEAS*

...

WITH REGARD TO THE MERITS

Principally

(c) To rescind the final decision made by the Secretary-General on 24 April 2000 ...

...

(f) To order the Secretary-General of the United Nations to compensate [the Applicant] for the injury sustained as follows:
- Payment of [the Applicant's] salary up to the completion of the activities of the Human Rights Field Operation in Rwanda;

- Payment ... of compensation in an amount equal to two years of his salary for the suffering caused;
- Payment of a fair award to cover ... legal costs."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing Respondent's answers in the "first case" and "second case" until 31 October 2000 and periodically thereafter until 31 July 2001;

Whereas the Respondent filed his Answer in the "first case" and his Answer in the "second case" on 19 July 2001;

Whereas the Applicant filed Written Observations in the "first case" and "second case" on 21 December 2001;

Whereas the facts in both cases are as follows:

The Applicant joined the Human Rights Field Operation in Rwanda (HRFOR or "the Mission"), in Kigali, as an Associate Human Rights Field Monitor, at the P-2, step I level, on a fixed-term appointment of three months and twenty days, on 8 November 1994. The Applicant was informed at the time that "[t]he grade and step established are solely for the purpose of this appointment" and that the "appointment would be strictly limited to service with the Human Rights in Rwanda". His fixed-term contract was successively extended for further fixed-term periods between 1995 and 1997, the final extension running until 31 December 1997, when the Applicant was separated from service.

Whereas the facts in the "first case" are as follows:

On 12 March 1995, the Applicant wrote to the Chief, Personnel Service, United Nations Office at Geneva (UNOG), requesting that his grade and step be re-evaluated to a level "concordant with my professional experience and responsibilities". On 20 March 1995, the Chief, Secretariat Recruitment Section, upon the recommendation of a Recruitment Officer, UNOG, agreed to a correction of the Applicant's entry level to P-2, step II. On 14 July 1995, the Applicant wrote to the Chief of the Mission, requesting that his level be re-evaluated.

On 30 January 1996, the Applicant wrote again to the Chief of the Mission on the same subject and asked him to confirm his entitlement for an SPA effective the date of his assignment

as Programme Manager within the Technical Cooperation Unit. On 18 March 1996, UNOG informed the Chief of the Mission that, in accordance with staff rule 103.11, a staff member who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable higher level than his or her own may be granted an SPA, and that to that end, the post must be classified in order to determine the level. He suggested that a job description be prepared and submitted to the Classification Officer. He further stated that, should the post be classified at a higher level than that of the Applicant, "an official recommendation, justifying the request for the granting of an SPA, should be made by the Chief of the Mission" but that, in the context of the financial crisis, granting of SPA's might be suspended.

On 13 June 1996, the Applicant wrote to the Chief of the Mission, referring to his earlier communications on the subject, and requested him to re-evaluate his level, according to his "university degrees and professional experience".

Following yet another request for re-evaluation of his post and an SPA of 16 September 1996, the Chief of the Mission responded to the Applicant that he did not believe that it was appropriate for non-supervisory posts within a field mission to be classified, nor that his current responsibilities were of a higher level than those of any other human rights field officer. Thus, he was not prepared to request or support a re-evaluation of his level or entitlement to an SPA.

On 21 April 1997, the new Chief, Legal Unit, requested the new Chief of the Mission to approve the creation of the new post of "Project and Technical Cooperation Officer" at the L-3/L-4 level and the recruitment of a suitably qualified person, suppressing at the same time the post occupied by the Applicant. On 15 May 1997, the Applicant wrote to the Chief of the Mission, stating that the suppression of his post without reasonable and administrative justification; the creation of the post of Project and Technical Cooperation Officer to be filled by another person recruited directly instead of offering it to him first; and, his redeployment, amounted to a "typical case of discrimination and unrespect [sic] vis-a-vis [his] person".

On 9 June 1997, the Chief of the Mission replied that he had reached the same conclusion as his predecessor and saw "no ground to support a change in [the Applicant's] grade".

On 30 June 1997, the Applicant's contract was renewed for three months, until 30 September 1997.

On 22 August 1997, the Chief of the Mission *a.i.*, wrote to a number of high level officials including the High Commissioner for Human Rights (the High Commissioner), stating

that the Applicant was "a most valuable member of the Mission" and strongly recommending a re-evaluation of his level and the assignment of an SPA.

In September 1997, the contracts of all mission staff were extended until 31 December 1997.

On 7 December 1997, the Applicant submitted to the Secretary-General his "Appeal for Review of Level and Entitlement of SPA".

On 7 April 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in the "first case".

Whereas the facts in the "second case" are as follows:

On 8 November 1997, the Applicant requested the Officer-in-Charge of the Mission permission for special leave for the period 31 December 1997 to 13 February 1998, stating that he had informed the Chief, Administrative Unit, of the reasons for his request.

In December 1997, the High Commissioner travelled to Rwanda and stated her intent to restructure the Mission. She noted, in particular, that "a certain number of HRFOR personnel will have to be released to face up to the financial consequences of the necessity to recruit to HRFOR persons whose qualifications match the more specialized functions they shall perform".

As of 29 December 1997, the Applicant went on unauthorized leave.

In a letter dated 5 January 1998, the Applicant and seven other staff members were informed that their contracts had been extended for a final period, until 31 January 1998. On 5 February 1998, the Applicant was informed that his contract would expire not on 31 January 1998, but on 28 February 1998.

On 12 February 1998, the Applicant informed the Chief, Administration Section, Office of the High Commissioner for Human Rights, that his request for special leave under staff rule 105.2 was for personal and health reasons, and requested that leave be granted, with full pay, until 28 March 1998. In the same letter, he contested the decision not to renew his contract.

On 18 March 1998, a P-35 action form was issued, indicating that the Applicant had separated from service effective 31 December 1997.

On 17 April 1998, the Applicant submitted medical expenses for February, March and April 1998. He was advised by the Health Insurance Unit on 21 April 1998 that, as he had been

separated from service as of 31 December 1997, his insurance had been terminated as of that date.

On 28 June 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in the "second case".

The JAB adopted its report on the first and the second case on 7 February 2000. Its considerations, conclusions and recommendations read [in part] as follows:

"**Considerations**

...

Re-evaluation of P-2 personnel grade

...

87. ... [T]he Panel concludes that the Secretary-General's decision to recruit the Appellant at the P-2 level was within his normal discretionary power.

Special post allowance at the P-5 level

...

97. There is no evidence in this case that the negative decisions regarding the Appellant's eligibility for a special post allowance were arbitrary, biased or motivated by any other extraneous factor that would invalidate the exercise of discretion in this area.

Non-renewal of fixed-term contract

...

100. ... In this case, the Appellant has produced no evidence - not even a hint of evidence - that the conduct towards him on the part of his supervisors in the field or the administration of the Office of the United Nations High Commissioner for Human Rights was prompted by discriminatory motives.

101. ... [T]he Panel finds nothing to justify such an expectancy. ...

...

103. ... [T]he Panel considers that the Appellant had no legal expectancy of renewal of his fixed-term contract beyond 28 February 1998.

...

106. The Panel deplores the circumstances that resulted in the Appellant's unauthorized absence. It notes that he had requested special leave as early as 8 November 1997 and had received no explicit reply. The Panel does not have to rule on the merits of the request or on its chances of success. It will merely note that the Appellant was entitled to a response, even a negative response.

107. However that may be, the Panel recognizes that the Appellant should not have left the Mission without prior authorization and that, in doing so, he was remiss.

108. In the light of the above, the Panel concludes that the decision not to renew the Appellant's fixed-term contract beyond 31 December 1997 came within the Secretary-General's normal discretionary power, and that the date that was set helped to preserve the Appellant's rights, despite the unauthorized departure.

Conclusions and recommendation

109. In the light of the above, the Panel **concludes**:

(i) ... That the administrative decisions not to re-evaluate the Appellant's P-2 personnel grade and not to award a special post allowance at the P-5 level came within the Secretary-General's normal discretionary power and were not tainted by bias or other extraneous factors; and

(ii) ... That the Appellant had no right or reason to expect renewal of his fixed-term contract, and that the Administration did not exceed its powers or violate the Appellant's rights in deciding not to renew his contract beyond 31 December 1997.

110. Accordingly, the Panel **recommends** unanimously that the Secretary-General should **dismiss** these appeals."

On 24 April 2000, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the conclusions of the JAB and had decided to take no further action on his appeal.

On 8 May 2000, the Applicant filed the above-referenced Applications with the Tribunal.

Whereas the Applicant's principal contentions in the "first case" are:

1. The Applicant maintains that the decision not to classify his post violated staff regulation 2.1, and, therefore, his rights: the Administration had an obligation to classify his post.

2. The decision not to grant the Applicant an SPA violated his rights.

Whereas the Respondent's principal contentions in the "first case" are:

1. Although it would have been preferable if the Applicant's post had been classified, the non-classification did not violate his rights, as he had a personal grade at the P-2 level which he accepted when he signed his letter of appointment.

2. The decision not to grant an SPA was within the discretion of the Secretary-General.

Whereas the Applicant's principal contentions in the "second case" are:

1. The Respondent failed to reply to the Applicant's request for special leave.

2. The Respondent did not have the right to separate the Applicant from service with effect from 31 December 1997, as he had already been notified that his contract would be extended until 28 February 1998.

Whereas the Respondent's principal contentions in the "second case" are:

1. In view of the Applicant's unauthorized absence as of 29 December 1997, the decision not to renew his contract beyond 31 December did not violate his rights.

2. The Applicant did not have a legal expectancy of renewal of his fixed-term contract.

The Tribunal, having deliberated from 27 June to 26 July 2002, now pronounces the following Judgement:

I. The Applicant has presented the Tribunal with two different cases. His first Application concerns a request for classification of his post and the payment of an SPA; the second concerns the non-renewal of his fixed-term contract. Since the Applications concern different alleged wrongs arising from different administrative decisions sufficiently related to each other to be considered jointly and without prejudice to the Applicant, the Tribunal will address them in the same Judgement.

II. The Tribunal shall first examine the issues of classification of the Applicant's post and the SPA. Insofar as the failure to classify the Applicant's post is concerned, the Tribunal notes that although the Applicant's post was unclassified, he had a personal grade of P-2. The Administration had corrected the Applicant's grade from P-2 step I, his original entry level, to P-2 step II, upon his request and in view of his university degrees and prior experience. The Applicant's insistence that he was performing P-5 functions and that his post should be classified as such did not find a favourable response from two successive supervisors, who flatly refused to request the classification of the post. The Tribunal recognizes, and the Respondent concedes, that ideally posts should be properly classified, but that classification of field mission posts is not always feasible and, sometimes, not advisable, because of the nature of such posts. The Tribunal notes that the Respondent made no such attempt in the three years the Applicant was in his post. Thus, although the Applicant had no right to classification of his post, the Tribunal feels that the Respondent could have made such an effort. In any case, the Tribunal notes that even if the post had been classified at the P-5 level, the Applicant would not have been eligible to apply for it.

III. With respect to the granting of an SPA, the Applicant basically contends that as the functions he performed were of a much higher level than his personal grade, he was entitled to such an allowance. The Applicant was recruited as Associate Human Rights Monitor at the P-2 level and accepted the grade and step offered when he signed his letter of appointment. Staff rule 103.11 stipulates in subparagraph (b) that a staff member being given all the responsibilities and obligations of a post classified manifestly higher than his or her own may, *in exceptional circumstances*, receive an SPA. The granting of such an SPA is far from being a right of the staff member; on the contrary, the text of the Regulation leaves no doubt that it is entirely within the discretion of the Administration. Furthermore, Missions like the one in question require a certain versatility of staff members, whose tasks are interchangeable and are indeed changed according to the needs of the moment. The Tribunal has recognized this in Judgement No. 336, *Maqueda Sanchez* (1984), where it held that "[s]taff employed by the United Nations are often asked to render services of a character and at a level superior to those for which they have been appointed or employed".

In the instant case, the Administration's position is clearly expressed through the opinions of two different Heads of Mission, who denied the Applicant's requests for an SPA. Only one of

the Applicant's supervisors, the Chief of Mission, *a.i.*, supported his request, in August 1997. In addition, it was the policy of the Administration at that time to curtail - or at least suspend - such extraordinary remunerations due to the economic emergency afflicting the entire United Nations system. Thus, this claim must also fail.

IV. The second case relates to the non-renewal of the Applicant's fixed-term contract. The Tribunal has consistently held that fixed-term contracts do not carry any right of renewal and that no notice of termination is necessary in such cases. Exceptions to this rule may be found in countervailing circumstances, such as an express promise or an abuse of discretion including bias, prejudice or other discrimination against the staff member, or any extraneous or improper motivation on the part of the Administration. (See Judgements No. 205, *El-Naggar* (1975); No. 614, *Hunde* (1993); and No. 885, *Handelsman* (1998).) Obviously, the *onus probandi* is on the Applicant who, in the present case, has not satisfied the Tribunal of the existence of such circumstances (see Judgement No. 839, *Noyen* (1997)). The Tribunal is satisfied that the Applicant had no legal expectancy of renewal and notes that the fact that eight staff members were in the same position undermines any argument that the non-renewal of his fixed-term contract was a measure personally and discriminatorily directed against the Applicant.

V. The Tribunal considers, however, that the attitude of the Administration in one particular respect seems totally unwarranted. The Applicant was first notified that his contract would be extended from 31 December 1997 until 31 January 1998; this was subsequently extended until the end of February of the same year. When the Respondent discovered that he had taken unauthorized leave of absence, however, the expiration of his fixed-term contract was retroactively reverted to 31 December 1997. The expiration dates of the fixed-term contracts of other staff members due to separate from service at the same time as the Applicant, and who had benefited from the same short-term extensions, were not altered.

Obviously, the Applicant acted irregularly and incorrectly when he adduced that, in the absence of an answer to his request for special leave, the response of the authorities was in the affirmative. The Administration was entitled to sanction this irregularity in accordance with the Staff Regulations and Rules, but did not have the right to change, unilaterally and retroactively, the date of termination of the Applicant's contract. The Tribunal considers the Respondent to

have imposed a *sui generis* and illegal administrative sanction which denied the Applicant his salary and entitlements for the months of January and February 1998, and holds that the Applicant should be compensated accordingly.

VI. In view of the foregoing, the Tribunal:

1. Orders the Respondent to pay the Applicant two months' net base salary and all entitlements for the months of January and February 1998, at the rate in effect at the time of separation from service, plus interest thereon; and,

2. Rejects all other pleas.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Marsha ECHOLS
Member

Brigitte STERN
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary