



UNITED NATIONS DISPUTE TRIBUNAL

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Case No.: UNDT/NY/2009/010/  
JAB/2007/110  
Judgment No.: UNDT/2009/034  
Date: 13 October 2009  
Original: English

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**Before:** Judge Coral Shaw  
**Registry:** New York  
**Registrar:** Hafida Lahiouel

SHASHAA

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for applicant:**  
George Irving

**Counsel for respondent:**  
Thomas Elftmann, UNDP

## **Introduction**

1. The applicant's 200 series post as a finance officer with the United Nations Development Programme (UNDP) in northern Iraq was abolished effective 1 May 2007. He was separated from service without recognition that when he had been assigned to Iraq approximately nine years earlier he had retained his original status with UNDP office in Amman, Jordan, as a permanent staff member under the 100 series of the Staff Rules.

2. The applicant requested administrative review of the decision to separate him from service. Following this review UNDP acknowledged an error had been made and decided to compensate the applicant for termination entitlements due to him from the 100 series appointment. Unsatisfied with the outcome of the review and with UNDP's handling of the matter, the applicant appealed the decision to separate him from service. On 1 July 2009 his case was transferred from the Joint Appeals Board (JAB) to the United Nations Dispute Tribunal for hearing and decision. The parties agreed that the matter could be dealt with on the papers filed with the JAB and declined the opportunity to provide any further evidence or submissions.

## **The issues**

3. The issues in this case are:
- a. Did UNDP act in accordance with its obligations pursuant to Staff Rule 109.1(c) when it terminated the applicant's 100 series appointment?
  - b. Did UNDP breach its obligations of good faith and fair dealing?
  - c. Is the applicant entitled to any remedies arising from the termination of his 100 series appointment and, if so, what is the nature of those remedies?

## **The facts**

4. The applicant entered the service of UNDP in Jordan in 1978 as a locally recruited general service staff member. In 1985 he was granted a 100 series permanent appointment.

5. In 1999, at the request of UNDP office in Iraq, he was assigned to a temporary two-year 200 series post as an L-4 level finance officer with UNDP's Electricity Network Rehabilitation Programme (ENRP) in northern Iraq. His local post in Jordan was protected by a lien for two years.

6. Two years later he was asked by UNDP and agreed to stay on in northern Iraq. At that time he forfeited the lien on his post in Jordan. He remained in northern Iraq for the next eight years. His employment there was never converted to a 100 series appointment.

7. In 2004 the applicant's ENRP contract came to an end. In a letter dated 9 March 2004 from Office of Human Resources (OHR) he was advised of some matters concerning the ending of his contract which are relevant to his later separation from service and his present claim. The letter said:

“We also wish to clarify your status at the end of your ENRP contract on 4 July 2004. International project posts are by their nature temporary and at the end of your contract, you revert to your local staff status in Amman, Jordan. You will recall that when you accepted the assignment to Erbil/Iraq, you did not retain a lien on a specific post in UNDP/Amman, nor could such a lien have been maintained during the 5 years you have been away. Hence your return to active service in the Country Office is conditional upon the availability of a suitable post.

In light of the notification you received in October, we trust that you are already engaged in such search for alternate placements. You are expected and indeed obliged to apply for suitable UNDP or UN system opportunities. In this connection we understand that you were informed of the Job Fair held in the Jordan Office in mid-2003 but the [Country Office] did not hear from you.

If by 4 July 2004 you have not identified an alternate placement, you can be placed on Special Leave Without Pay (SLWOP) for up to one year, during which time you would be expected to continue your active search. Before going on SLWOP, you could also avail of any annual leave that you may have left in escrow on leaving UNDP/Amman against Jordan salary. This would give you a further period in which to search while on payroll at your last level and step in Jordan. During SLWOP should you wish to continue Pension Fund and medical/dental Insurance coverage, you will be responsible for full contributions (your own and the Organization's shares) calculated at the level of your salary in Jordan at the time you left on assignment to Erbil/Iraq. You will not receive any emoluments during the period of SLWOP.

Should your documented job search during SLWOP prove unsuccessful, the [O]rganization would need to move to your separation from service. Depending on the conditions set by the Jordan office when you took up your temporary ENRP assignment, the [Country Office] management may wish to take up with UNDP Headquarters . . . your possible eligibility for separation indemnities against your locally recruited conditions”.

8. Following that letter, the applicant was assigned to another 200 series appointment in Iraq with UNDP with an expiry date of 30 April 2007. In February 2007 he was notified that his 200 series post in Iraq would be abolished on 1 May 2007.

9. On 7 April 2007 the applicant was advised he would be separated from service on 30 April 2007. In taking this step UNDP did not recognise the permanent nature of his initial appointment in Jordan. It treated him as though his only appointment with UNDP was the temporary 200 series appointment which had expired on 30 April 2007 and had not been extended beyond that date. He therefore only received termination payments in accord with separation from his temporary appointment.

10. The applicant sought administrative review of this decision. On 6 July 2007 UNDP recognised that he had never resigned from his permanent 100 series post in Jordan and accepted that it had erred by not taking that appointment into account. It decided that he was entitled to the maximum termination indemnity payable under the

current salary scale applicable to local staff of UNDP Jordan at the grade and step he held at the time he left his local post for his international assignment. UNDP also acknowledged that the applicant was entitled to three months' salary in lieu of termination notice, in addition to compensation for any unused annual leave. According to the applicant, UNDP has not yet paid these entitlements to him since the terms of the separation are still in dispute. By the end of his service he had completed approximately 29 years of service with the United Nations and was 55 years old.

11. The applicant appealed the decision to terminate his permanent appointment, contesting the manner in which the separation from service was carried out and requesting entitlements in addition to those UNDP had decided to give him.

### **Applicant's submissions**

12. The original statement of appeal on behalf of the applicant raised the issue of whether his project post in Iraq should have been converted into a 100 series appointment. The JAB panel found that this was not within the proper scope of the appeal. Based on this, as well as on the applicant's subsequent submissions, the present case is therefore confined to the reasons for and the manner of the termination of his 100 series employment with UNDP.

13. In his claim the applicant alleges that:

- a. UNDP failed in its obligation to afford him the good faith and fair treatment that is due to all staff members under the staff regulations and rules which applied at the time, including Staff Regulation 9.1(a) and Staff Rule 109.1(c).
- b. The way in which he was advised of the termination of his appointment without respecting the requirements of due process and

misrepresenting his entitlements suggest an abuse of discretionary authority by UNDP.

- c. He is entitled to certain contractual rights upon the ending of his service with UNDP apart from those entitlements he received upon the abolition of the temporary position in Iraq.
- d. UNDP's initial failure to give him three months' notice of termination of his permanent appointment is in breach of its legal obligations under Staff Rule 109.3.
- e. He had no opportunity to exercise his right to apply for a new post because UNDP acted at all times up to his termination as though he were a 200 series staff member and had no intention of affording him the rights he was properly entitled to.

14. The applicant seeks reinstatement in service until the date of mandatory separation on full retirement or alternatively three years' net base pay and payment of properly calculated entitlements based on his final pay and duty station.

### **Respondent's submissions**

15. In summary, the respondent makes the following submissions:

- a. The respondent does not contest the applicant's main argument that as a holder of a permanent appointment he was entitled under Staff Rule 109.1(c) to priority consideration for available and suitable posts in which his services could be effectively utilised.
- b. It denies any violation of any staff regulations and rules. The respondent submits that the applicant's permanent appointment is linked to his status as a locally recruited staff member and the provisions of clause (i) of Staff Rule 109.1(c) are deemed to be

satisfied if locally recruited staff receive consideration for suitable posts available at their duty station. There were no suitable posts available and, in any event, when notified of the abolition of the 200 series post the applicant did not apply for the three vacant posts in the UNDP Jordan country office. He did not raise the possibility of returning to a locally recruited position in UNDP's office in Jordan until the filing of his statement of appeal. The respondent refers to the letter from OHR of 9 March 2004 as evidence that the applicant was aware of his obligations in this regard.

- c. The respondent notes that Staff Rule 109.1(c) is not applicable to 200 series staff members. Their appointments do not carry the same employment and career development guarantees as those enjoyed by the 100 series staff members. As the applicant was a 200 series staff member, UNDP was not obliged to give him priority consideration for a suitable alternative to that post. Upon expiry of the 200 series position he would have been obliged to return to his status as the locally recruited staff member in Jordan.
- d. The respondent nevertheless acknowledges that there had been an oversight on the part of the country office in relation to the applicant's status when he was treated as having resigned from his permanent appointment in Jordan. This caused confusion and it was only as a result of the applicant's request for administrative review that a comprehensive analysis was undertaken and the situation rectified.

### **Relevant rules and regulations**

16. Permanent and other 100 series appointments may be terminated only on conditions set by the staff regulations and rules. The following regulations and rules were applicable at the time of the events discussed in this judgment.

17. Staff Regulation 9.1(a) provides:

“(a) The Secretary-General may terminate the appointment of a staff member who holds a permanent appointment and whose probationary period has been completed, if the necessities of the service require abolition of the post or reduction of the staff, if the services of the individual concerned proved unsatisfactory or if he or she is, for reasons of health, incapacitated for further service;

...

[T]he Secretary-General may terminate the appointment of a staff member who holds a permanent appointment if such action would be in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned”.

18. Staff Regulation 9.3 empowers the Secretary-General, if circumstances warrant it and if he or she considers it justified, to pay a staff member terminated under the final paragraph of Staff Regulation 9.1(a) a termination indemnity payment of more than 50 percent higher than that which would otherwise be payable under the staff regulations.

19. Staff Regulation 9.5 concerns retirement age and states that staff members appointed before 1990 shall not be retained beyond the age of 60 years unless the Secretary-General extends this age limit in exceptional cases.

20. Staff Rule 109.1(c) deals with the definition of termination and abolition of posts and reduction of staff. Clause (i) provides that if the necessities of service require abolition of the post or reduction of the staff, and subject to the availability of suitable posts, staff members with permanent appointments shall be retained in preference to those on other types of appointments, provided that due regard is given to relative competence, integrity and length of service.

21. Clause (ii) of Staff Rule 109.1(c) provides that the provisions of clause (i) shall be deemed to have been satisfied in so far as they relate to locally recruited staff



members if such locally recruited staff members have received consideration for suitable posts available at their duty stations.

22. Under Staff Rule 109.3 a staff member whose permanent appointment is to be terminated shall be given not less than three months' written termination notice. In lieu of the notice period the Secretary-General may authorise compensation equivalent to salary, applicable post adjustment and allowances corresponding to the relevant notice period, at the rate in effect on the last day of service.

23. Staff Rule 109.4(d) deals with the situation of a staff member who is to be separated as a result of an agreed termination of appointment because of abolition of the post or reduction in staff and who is within two years of reaching the age of 55 years and reaching 25 years of contributory service in the United Nations Joint Staff Pension Fund. Such a person, upon his or her application, may be placed on special leave without pay for pension purposes for a period of two years for the sole purpose of enabling the staff member to remain a participant in the Pension Fund during this period.

## **Discussion**

24. The staff regulations and rules referred to above significantly limit the circumstances under which a permanent staff member may be terminated before the mandatory retirement age (60 years in the case of the applicant). Such employment is subject to particular safeguards. Further, where such a person is nearing retirement there are additional mechanisms allowing him or her to continue making contributions to the Pension Fund.

25. The protections enjoyed by permanent staff have been discussed in a number of judgments of the United Nations Administrative Tribunal. In *Fagan* (1994), the Administrative Tribunal noted the importance of respecting the rights of permanent staff members under Staff Rule 109.1(c).<sup>1</sup> It described this as being vital to the

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<sup>1</sup> United Nations Administrative Tribunal, Judgment No. 679, *Fagan*, para. XIII (1994).

security of staff who, having acquired permanent status, must be presumed to meet the Organization's qualification requirements. The Administrative Tribunal went on to say that while efforts to find alternative employment cannot be unduly prolonged and the staff member concerned is required to cooperate fully, such efforts must be conducted in good faith with a view to avoiding, to the greatest possible extent, a situation in which permanent staff members with a significant record of service with the Organization are dismissed and forced to undergo belated and uncertain professional relocation.

26. In *Carson* (1962), the Administrative Tribunal stated that a good faith effort must be made by the Organization to find alternative posts for permanent staff members whose posts are abolished. The respondent must show that the staff member was considered for available posts and was not found suitable for any of them before termination.<sup>2</sup> The Administrative Tribunal also found that where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the administration to prove that such consideration was given.<sup>3</sup>

27. The March 2004 letter to the applicant is cited by the respondent as evidence of UNDP's policy concerning the responsibility for staff members in the applicant's situation to identify suitable alternative placements. However, I find that that policy is not entirely in accord with the staff rules. For example, it overlooks the positive requirement of clause (i) of Staff Rule 109.1(c) for the employer to retain staff members with permanent appointments in preference to all other types of appointments, as well as the requirement in clause (ii) to give local staff consideration for suitable posts available at their duty stations. Those rules place the onus on the employer to be protective of the permanent staff member. Although the employer can expect reasonable cooperation from a staff member, the entire responsibility for searching out and finding a position should not rest with the staff member as suggested in the March 2004 letter.

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<sup>2</sup> United Nations Administrative Tribunal, Judgment No. 85, *Carson*, paras. 8–11 (1962).

<sup>3</sup> United Nations Administrative Tribunal, Judgment No. 447, *Abbas*, para. VII (1989); United Nations Administrative Tribunal, Judgment No. 910, *Soares*, para. IV (1998).

28. There is no evidence or even suggestion that UNDP had any reason to terminate the applicant's service for reasons of performance or because he was not deemed suitable for service in any part of United Nations system. Rather, he was initially deemed to be separated from service solely because of the abolition of the 200 series post. He was given three months' notice of the end of the temporary appointment but no proper notice of UNDP's intention to separate him entirely from service with the Organization by terminating his 100 series appointment.

29. It is to the credit of UNDP that once the error was brought to its attention it quickly accepted that the applicant was entitled to allowances for the termination of his permanent appointment including the payment in lieu of the three months' notice.

30. Did these allowances—and the procedure followed by UNDP—fully meet UNDP's responsibilities to the applicant as a permanent staff member being separated from service, in view of its over-riding obligation to protect such staff members?

31. Before deciding to separate him entirely from service with the Organization it had to consider whether any of the preconditions of Article IX of the Staff Regulations and Chapter IX of the Staff Rules for termination of a permanent appointment had been met.

32. First, there had to be an enquiry into whether any of the preconditions of Staff Regulation 9(1) for separation of a permanent staff member had been met. No such enquiry was made at the time of the decision to terminate the applicant's 100 series appointment. This was a breach of the required process.

33. Second, if any of the preconditions of Staff Regulation 9.1 had been met, Staff Rule 109.3 obliged UNDP to give the applicant three months' notice of the intended separation. Such notice is not a mere formality. Although payment in lieu may be given, such payment is a secondary option. Three months' notice would have given both parties the opportunity to take reasonable steps to ascertain if there were any

suitable positions available for the applicant to be employed as a permanent staff member elsewhere in the Organization.

34. UNDP's communications with the applicant prior to his separation failed to satisfy the requirement of Staff Rule 109.3. UNDP's notice dated 1 February 2007 concerned only his 200 series post in Iraq, not his 100 series permanent appointment. The second communication, informing the applicant of the termination of his permanent appointment, was provided to him on 7 April 2007—only three weeks prior to the date of his separation from service.

35. Therefore, I find that UNDP failed to give the required three months' notice to the applicant in breach of Staff Rule 109.3. Its subsequent offer to pay three months' salary in lieu of this notice does not fully recompense the applicant for all of the losses he sustained by this failure, including the loss of the opportunity to take advantage of the additional protections he was entitled to when searching for alternative employment.

36. Finally, if UNDP had no alternative other than to terminate the applicant's permanent appointment, it had another obligation under the regulations and rules as described in the March 2004 letter to the applicant. This was the possibility for the applicant to have taken special leave without pay pursuant to Staff Rule 109.4(d). In the absence of evidence to the contrary, I take such leave to have been available in 2007. This would have enabled him to at least continue making contributions to the Pension Fund and take advantage of other staff benefits, albeit solely at his own expense. It would have given the applicant a chance, as UNDP mentioned in its March 2004 letter, to take advantage of any employment opportunities which may have arisen after he had been separated.

37. Although not raised by the applicant in his submissions, he was not given the chance of being considered for the additional discretionary 50 percent termination payment referred to in Staff Regulation 9.3.

## **Conclusions on the issues**

*Issue 1: Did UNDP act in accordance with its obligations in Staff Rule 109.1(c) in relation to the termination of the applicant's 100 series appointment?*

38. It is an undisputed fact that the administration failed to comply with the relevant rules and regulations because of its misunderstanding of the applicant's status. The respondent's submission that there were no positions available at the time is a justification made after the event and does not relieve it of its obligation to have taken steps to protect the applicant's employment at the time it was in jeopardy.

39. The respondent's allegation that the applicant is responsible for his own situation because he did nothing to find alternative employment is misguided. He was not given the required period of notice in which to do so.

40. I conclude that UNDP did not fully meet its obligations towards the applicant as defined by the staff rules and regulations when it separated him from service. The absence of any effort by UNDP to protect his status as a permanent staff member significantly reduced his chances for continuing permanent employment with the United Nations until he reached the age of 60.

41. UNDP's subsequent attempts to rectify this were not sufficient to afford him all of the entitlements and opportunities he would have had if the respondent had taken the correct approach to his separation at the time it occurred.

42. There is no direct evidence before the Tribunal from which a finding can be made as to the likelihood of the applicant continuing with the Organization until the mandatory retirement age of 60 years. However, the applicant asserted that he was forced to take early retirement. It may reasonably be inferred from this that he wanted and intended to remain employed by the Organization. I find that he is entitled to compensation for the loss of opportunity to do this and to make further contributions to the Pension Fund.

*Issue 2: Did UNDP act in breach of its obligations of good faith and fair dealing?*

43. As this Tribunal found in *James* (2009), the universal obligation of both employee and employer to act in good faith towards each other includes acting rationally, fairly, honestly and in accordance with the obligations of due process.<sup>4</sup>

44. Although UNDP did not act in accordance with its obligations to the applicant, this was because of its misunderstanding of his employment status rather than because of a dishonest and unfair process as alleged by the applicant. As soon as the error was brought to UNDP's attention it acted in good faith to rectify the situation in a manner which it may have believed was adequate but which I conclude was not. However, UNDP's initial misunderstanding of the applicant's status had a negative effect on the applicant's situation.

*Issue 3: Is the applicant entitled to any remedies?*

45. Although the consequence of this judgment is that the applicant is entitled to remedies, these cannot be properly assessed without more evidence and submissions. For example, one matter which needs clarification is whether the opportunity for special leave without pay was an option available to the applicant at the time he was separated. Another matter is whether and to what extent UNDP has already compensated the applicant for any loss arising from its failure to recognize his permanent status.

46. The parties are invited to attempt to resolve the issue of remedies between themselves in the light of this judgment. If they are unable to reach a resolution I propose to the parties that the case be referred to mediation for this purpose.

**Order**

47. The parties are to advise the Tribunal within 30 days of the date of this judgment whether (a) the parties have reached an agreement on the remedies to be

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<sup>4</sup> United Nations Dispute Tribunal, Judgment No. 25, *James*, para. 28 (30 September 2009).

provided to the applicant, (b) the parties wish to pursue mediation on the issue of remedies, or (c) a further hearing and decision by the Tribunal to determine appropriate remedies will be required.

*(Signed)*

Judge Coral Shaw

Dated this 13<sup>th</sup> day of October 2009

Entered in the Register on this 13<sup>th</sup> day of October 2009

*(Signed)*

Hafida Lahiouel, Registrar, UNDT, New York