



UNITED NATIONS DISPUTE TRIBUNAL

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

**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



**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. Upon his return to Jordan, he was assigned to a local post in Jordan. His local post in Jordan was protected by a lien for two years.



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



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).

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).







**Issue 2: Did UNDP act in breach of 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