

Judgement No. 92

(Original : English)

**Case No. 91 :
Higgins****Against : The Secretary-General of
the Inter-Governmental
Maritime Consultative
Organization**

Request for rescission of a decision of the Secretary-General of IMCO terminating the secondment of a United Nations staff member to IMCO before its date of expiration.

No rules of law dealing specifically with the rights and obligations of members of the staff of the United Nations and its specialized agencies who take up service with an organization different from the one to which they belong, whether by "loan", "transfer", or "secondment".—Legal effect of the agreement (CO-ORDINATION/R.430) and the Memorandum of Understanding (CO-ORD/CC/SO/91) of the Consultative Committee on Administrative Questions.

Legal definition of "secondment".—Distinguished from "transfer" and "loan".—Existence of three parties to a contract of secondment, namely, the releasing organization, the receiving organization and the staff member concerned.—Consent of staff member required to secondment, its duration, and the terms and conditions of employment in the receiving organization.—Terms and conditions of secondment cannot be varied unilaterally or simply by agreement between the two organizations to the detriment of the staff member.—Inapplicability of Staff Regulation 1.2 of the United Nations.—Existence of a contract of employment between IMCO and the Applicant and applicability to the Applicant of the Staff Regulations and Rules of IMCO, including IMCO Staff Regulation 9, despite the absence of a letter of appointment from IMCO.—Non-observance by the Respondent of the due process to which the Applicant was entitled before termination of secondment.—Contested decision cannot be sustained.

Impossibility of ordering the rescinding of the decision contested or the specific performance of the obligation invoked.—Award to the Applicant of compensation of \$1,000 for the injury sustained as a result of non-reinstatement.—Claim for damages which are remote and contingent rejected.—Award of travel expenses and subsistence of the Applicant's counsel.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President ; the Honourable Mr. R. Venkataraman, Vice-President ; Mr. James W. Barco ;

Whereas, on 13 July 1964, Michael Harold Higgins, former Director of Administration and External Relations of the Inter-Governmental Maritime Consultative Organization, hereinafter called IMCO, filed an application with the Tribunal ;

Whereas, on 27 July 1964, the application was transmitted to the Secretary-General of the United Nations in pursuance of article 21 of the Rules of the Tribunal ;

Whereas, on 3 August 1964, the Secretary-General of the United Nations informed the Tribunal that he was not giving notice of intention to intervene under article 20 of the Rules of the Tribunal ;

Whereas the Respondent filed his answer on 14 September 1964 and additional written statements and requests on 28 and 29 September 1964 and 1, 10, 12, 20, 27 and 29 October 1964 ;

Whereas the Applicant filed written observations, documents, additional statements and requests on 10, 16, 28 and 29 September 1964, 9, 12, 13, 14, 16, 22, 26, 27 and 28 October 1964 and 6 and 7 November 1964 ;

Whereas, at Applicant's request, the deposition of Mr. Roger Grosclaude, IMCO staff member on loan to the Economic Commission for Asia and the Far East, was taken in Bangkok on 21 October 1964 by a United Nations staff member designated by the President of the Tribunal under article 10, paragraph 3, of the Rules of the Tribunal ;

Whereas, on 26 October 1964, the Respondent requested the Tribunal to hear as a witness Mr. Antonius A. Wempe, Head of the Finance, Personnel and Miscellaneous Services of IMCO ;

Whereas, on 5 November 1964, the Tribunal invited the parties to file written statements setting forth their final pleas ;

Whereas, on 5 November 1964, the Applicant filed the requested statement which he amended on 7 November 1964 ;

Whereas the final pleas of the Applicant as amended request the Tribunal :

1. *As to measures of inquiry :*

(a) To decide in its wisdom and discretion under article 16, paragraph 3, of its Rules, whether or not the witness Wempe should be examined with respect to the extension in 1962 of Applicant's secondment to IMCO since the matter is neither relevant nor germane to the issue ;

(b) To decide, in its wisdom and discretion, under article 6, paragraph 2 (c) of its Statute, whether it should regard as admissible evidence the summary and verbatim records of two telephone conversations which took place on 10 and 12 June 1963 between the Applicant and the Director of Personnel of the United Nations ;

2. *As to the production of documents :*

(a) To call upon the Respondent to inform the Secretary-General of the United Nations that he agrees that the United Nations should place at the disposal of the Tribunal and of the parties all the documents included in the Applicant's privileged confidential file at the United Nations which are relevant to the present dispute, or to the events that gave rise thereto, and which were prior to the application instituting proceedings ; and, should the Respondent refuse or fail to take this step, to draw from his refusal or failure the appropriate inferences and assumptions ;

(b) To request the Respondent to produce the text of the following documents :

(i) memorandum addressed to the Applicant by Mr. Wempe on 28 May 1963,

(ii) memorandum addressed to the Applicant by the Respondent on 28 May 1963,

(iii) memorandum addressed to the Applicant by Mr. Wempe on 29 May 1963,

and any other documents relating to the discussion or application of the budgetary resolution adopted by the IMCO Council on 22 May 1963 with respect to the

implementation in the first half of 1963 of certain parts of Section II of the 1964-65 budget ;

(c) To continue the examination of the present case, if necessary by means of written procedure, depositions or any other means, if the parties should be unable, in the course of oral proceedings, to submit their observations, rebuttals or contrary evidence on the documents or testimony referred to in paragraphs 1 (a) and 2 (a) and (b) above ;

3. *As to the substance :*

(a) To rescind the Respondent's decision of 1 and 4 June 1963 to terminate the two-year appointment which the Applicant should have continued to hold until 30 June 1964 ;

(b) To direct the Respondent to reassign the Applicant for a period of thirteen months to a post equivalent in rank, responsibilities and salary to the one he held before the contested decision ;

(c) And, should the Respondent refuse to reassign the Applicant, to order the payment of compensation equivalent to one year's salary plus allowances in respect of the breaches of contract and serious wrongs committed by the Respondent and in reparation of the harm done to the Applicant's honour and reputation ;

(d) To direct, in addition, that the Respondent address to each of the States members of IMCO and of the international and non-governmental organizations with which IMCO maintains relations, an individual letter stating that the Applicant had at all times shown loyalty, competence, efficiency and integrity during the period of his employment with IMCO and that the decision to terminate his appointment more than a year before the expiry of its term was not justified either in fact or in law ;

(e) To order the payment of additional compensation, in the amount of dollars 15,000, for the various financial losses sustained by the Applicant in consequence of the contested decision ;

(f) To order the reimbursement to the Applicant of a sum of dollars 610, representing the travel and subsistence expenses of his Counsel ;

Whereas, on 6 November 1964, the Respondent filed final pleas requesting the Tribunal :

1. *As to measures of inquiry :*

To hear the testimony of Mr. Wempe concerning (i) the circumstances surrounding his sending of the letter dated 25 April 1962 concerning the renewal of the Applicant's secondment for a period not exceeding two years ; (ii) the discussions in which he personally participated and at which there was a confrontation between the Respondent and the Applicant in connexion with the submission of the budget to the IMCO Council ;

2. *As to the production of documents :*

To reject the plea of the Applicant concerning the continuation of the examination of the case ;

3. *As to the substance :*

To reject the application ;

Whereas the Respondent stated that he was prepared to submit to the Tribunal's decision as regards the other pleas of the Applicant relating to measures of inquiry and production of documents ;

Whereas, on 6 and 7 November 1964, the Tribunal held oral proceedings in the course of which Mr. Wempe was heard as a witness and the parties submitted additional arguments and replied to questions put by members of the Tribunal ;

Whereas the facts in the case are as follows :

The Applicant joined the United Nations Secretariat in 1949 and received in 1951 a permanent contract which is still in force. On 1 July 1959 the Applicant was seconded to IMCO, for a period of one year, by an exchange of letters between the Director of Personnel of the United Nations and the Secretary-General of IMCO. In that specialized agency he retained the grade he had reached in the United Nations Secretariat, namely, P-5 step 9, and was appointed Director of Administration and External Relations. In 1960, by a further exchange of letters between the United Nations Office of Personnel and the Secretary-General of IMCO, the Applicant's secondment was extended "for a period of two years, that is, until 30 June 1962". Before the expiry of that period, Mr. Wempe, in his capacity as Head of the Personnel Service of IMCO, asked the Director of Personnel of the United Nations, by a letter dated 25 April 1962, to agree to the "continued secondment [of the Applicant] for a period not exceeding two years". On 15 May 1962 the Director of Personnel of the United Nations informed Mr. Wempe that "the United Nations has no objection to the extension of [the Applicant's] secondment to IMCO for another two years until 30 June 1964". By a letter dated 21 May 1962, Mr. Wempe expressed the agreement of IMCO to the "extension of [the Applicant's] services for another two years". After the death of the first Secretary-General of IMCO on 20 November 1961, the Applicant exercised, in addition to his functions as Director of Administration and External Relations, the duties of Deputy to the Acting Secretary-General. The latter accordingly granted him, on 30 October 1962, a post allowance at the D-1 level. It was specified that that allowance would be paid "until the date on which the new Secretary-General takes up his duties". On 1 March 1963 the Respondent, having been elected the new Secretary-General of IMCO, took office. At its eighth session, held from 21 to 24 May 1963, the Council of IMCO examined the budget estimates for 1964-1965 and took several decisions on the subject. The Applicant, who had played an important part in the preparation of the budget estimates, assisted the Respondent in presenting the estimates to the Council. On 1 June 1963 the Respondent sent to the Secretary-General of the United Nations the following cable :

"Services Mr. Higgins no longer desired stop Higgins is free to return to United Nations immediately."

(Signed)

" Roullier Secretary General IMCO "

On 4 June 1963 he addressed the following letter to the Applicant :

" Dear Mr. Higgins,

" I have decided to ask the United Nations to recall you to New York.

" This is not a decision which gives me any pleasure—particularly since Mrs. Higgins has informed me that you are unwell—but I could not wait any longer, in view of the atmosphere in which the discussion of the budget proceeded in the Council and the many difficulties which I have since encountered in administering the Secretariat.

"I earnestly hope that you will regain your health ; please convey my kindest regards to Mrs. Higgins.

Yours sincerely,
(Signed) J. Roullier "

On 6 June 1963 the Applicant wrote to the Respondent expressing his surprise at the decision taken concerning him and pointing out that he was entitled to three months' notice. After an exchange between the Respondent and the Director of Personnel of the United Nations, the Respondent addressed the following communication to the Director of Personnel on 27 June 1963 :

" Dear Sir Alexander,

" As I wrote to you on 12 June, and pursuant to your cable of 19 June, I have the honour to request you to terminate the secondment of Mr. Higgins as from 30 September next. The United Nations made Mr. Higgins available to IMCO for a period which would normally end on 30 June 1964. If I have understood your cable correctly, you feel that it will be possible to take Mr. Higgins back at the United Nations as from the first of those two dates.

" I earnestly hope that you can offer Mr. Higgins a post suited to his qualifications, his personal qualities and his experience in United Nations administration.

" My request for termination of the secondment ahead of time has no doubt caused you some administrative inconvenience, and for this I offer my apologies. In these circumstances I feel that I should explain at somewhat greater length the considerations which led me to arrive at this decision.

" Mr. Higgins has rendered exceptional service to IMCO in the years since the agency was set up. It is he who has given our agency a sound system of organization, modelled on that of the United Nations and of other specialized agencies with which he was previously familiar. Mr. Nielsen [the first Secretary-General of IMCO], on behalf of the agency as a whole, and Mr. Graham, on behalf of the Technical Division, have turned to him for advice. The Administration and External Relations Division is entirely the result of his work.

" Although very sharp differences of opinion [*divergences de vues brutales*] have developed between Mr. Higgins and myself, they do not reflect on his capacity for work, his clear understanding of international affairs, his lofty conception of his duties as an international civil servant, or his integrity and loyalty. I feel that it is urgently necessary to make certain important changes in the functioning of our agency and that I should set about this task now, i.e. as soon as possible after my assumption of my post. As you know, I assumed this post following a protracted crisis, IMCO having been without a Secretary-General for more than fifteen months. This should reflect no discredit upon Mr. Higgins. For my part, I earnestly hope that his career can now continue within the broader framework of the United Nations and can afford him the satisfaction which he deserves.

" I should be most obliged if you would be good enough to confirm to me your agreement on the specific point of the return of Mr. Higgins to United Nations' service on 1 October 1963 ; Mr. Higgins has asked for this confirmation to be communicated to him as soon as I receive your letter. "

On the same date the Respondent sent the Applicant a copy of the above communication, adding :

“ . . . I have decided to grant you special leave with full pay from 1 July to 30 September, insofar as that period is not covered by your 1963 annual leave. ”

By a letter of 11 July 1963, the Director of Personnel of the United Nations expressed to the Respondent his agreement to the proposal that the Applicant's “ secondment to the IMCO should end on 30 September 1963 ”. On 26 September 1963 the Applicant expressed his intention to bring action before the United Nations Administrative Tribunal and requested the Respondent “ to take the necessary steps to implement as soon as possible [IMCO] Staff Regulation 11 (2) and to conclude with the Secretary-General of the United Nations the special agreement provided for in article 14 of the Tribunal's Statute ”. On 1 October 1963 the Applicant was posted by the United Nations to Geneva in grade P-5, step 10. On 11 and 20 February 1964 respectively, the Respondent and the Secretary-General of the United Nations signed the special agreement extending the competence of the United Nations Administrative Tribunal to IMCO. On 24 April 1964 the Respondent gave his consent to the submission of the case direct to the Tribunal under article 7 of the Statute of the Tribunal. On 13 July 1964 the Applicant filed the application referred to above.

Whereas the Applicant's principal contentions are as follows :

1. Although there was no formal instrument, the meeting of minds between the parties gave rise to a fixed-term contract of employment between the Applicant and IMCO. This contract satisfied all the requirements of IMCO Staff Regulations and was implemented by the parties until the Respondent terminated it unilaterally. Furthermore the Applicant's contractual rights in the United Nations were suspended while he was with IMCO. They were, therefore, necessarily replaced by contractual rights in IMCO, since the Staff Regulations and Rules of IMCO do not provide for a purely statutory type of employment.

2. A fixed-term contract can be validly terminated by IMCO before its date of expiration only by a decision based on one of the grounds listed in Staff Regulations 9.1 (a) and (b). Furthermore the grounds must be specified to the staff member concerned when he is notified of the decision.

3. Since the contested decision fails to mention any of the grounds listed in Staff Regulations 9.1 (a) and (b), it is null and void.

4. The reasons invoked by the Respondent before the Tribunal to support the action taken with respect to the Applicant clearly show that in the Respondent's mind the contested decision was in the nature of a disciplinary measure. Such reasons did not fall within the provisions for termination under Staff Regulations 9.1 (a) and (b). Furthermore, since the Applicant did not receive, before the contested decision, an opportunity to express his views on the reasons therefor, the decision is vitiated by the lack of an essential element of due process of law.

5. The contested decision lacking any legal and factual justification must be regarded as motivated by considerations foreign to the interests of the service. There are strong reasons to believe that these considerations were of a political and personal nature.

6. The Respondent has by no means established that, in the absence of a contract of employment, an international organization would enjoy a discretionary

power, subject to no judicial review, to revoke at any time the secondment of an official placed at its service by another organization.

7. The attacks made by the Respondent upon the honour and reputation of the Applicant have done him an injury which should be taken into account in the assessment of the compensation provided for in article 9, paragraph 1, of the Statute of the Tribunal. To this injury should be added the loss of earnings sustained by the Applicant, whose post had been upgraded to the D-1 level in the IMCO budget for 1964-65; the lack of normal prospects of promotion in the United Nations; and the losses he sustained through the sale of his apartment in London and the transfer of his children to other schools and colleges. The effect of all those elements has been aggravated by the age of the Applicant, who will have to retire in 1968.

Whereas the Respondent's principal contentions are as follows:

1. No fixed-term contract was concluded between IMCO and the Applicant, and the provisions of Staff Regulations 9.1 (a) and (b) cited by the Applicant do not apply to this case.

2. The secondment of the Applicant was arranged by an agreement concluded between the releasing organization—the United Nations—and the receiving organization—IMCO. The agreement could be revoked at any time without the consent of the Applicant who was not a party thereto. The question whether a secondment to IMCO should be terminated or not is a matter for the Secretary-General alone to decide, and his decision in this respect is purely within his discretion.

3. The Applicant's secondment was terminated by an agreement concluded between the releasing and the receiving organizations. The Respondent was obliged to take the initiative in the matter because, owing to a basic disagreement between the Applicant and himself regarding the implementation of the budgetary decisions taken by the Council of IMCO, he considered that the Applicant's presence in the Secretariat could only hinder him in the performance of his task. The contested decision was thus taken solely for reasons of sound and efficient administration, and the Respondent made every effort to prevent it from reflecting any discredit upon the Applicant. It was never in the nature of a disciplinary measure.

4. No statutory or contractual right deriving from the Applicant's appointment with the United Nations, nor any provision of the Staff Rules and Regulations of the United Nations or of IMCO, has been violated by the return of the Applicant by IMCO to the United Nations one year prior to the expiration of the term envisaged by the two organizations.

5. Since the Applicant has failed to establish that any right was violated, he has no ground whatsoever for claiming that his secondment status should have continued until the end of the period contemplated, or that he should be granted compensation in the event of non-reinstatement in IMCO.

6. Moreover, the Applicant has provided no evidence of any material of moral injury resulting from the termination of his secondment to IMCO. After taking special leave with pay granted by IMCO, followed by a month's ordinary leave, the Applicant was reinstated by the releasing organization without loss of salary. Moreover he can claim no loss of earnings, for the proposal to upgrade the post he occupied at IMCO to D-1 was not adopted, having failed to secure the approval of the Assembly.

The Tribunal, having deliberated from 5 to 16 November 1964, now pronounces the following judgement :

I. This case raises questions of great importance to the staffing of international organizations. There are no rules of law dealing specifically with the rights and obligations of members of the staff of the United Nations and its specialized agencies who take up service with an organization different from the one to which they belong, whether by "loan", "transfer", or "secondment". Nor are there any clear precedents to guide the Tribunal.

The Tribunal notes that both parties referred to :

- (i) the agreement concerning the transfer, secondment and loan of staff between organizations in the United Nations common system of conditions of service (United Nations document CO-ORDINATION/R.430) ;
- (ii) the Memorandum of Understanding among organizations applying the United Nations common system of salaries and allowances concerning inter-organization transfer, secondment or loan of staff (United Nations document CO-ORD/CC/SO/91, of 2 May 1964).

The parties have discussed the legal effect of these documents and in particular the extent to which they applied to IMCO on the date when the action complained of was taken.

The Memorandum of Understanding, which is the more recent of these documents, reproduces the tenor of the main provisions of the agreement. Its significance is explained in part I ("General") where it is stated :

"It simply sets forth what the organizations will normally do, within the limit of their own Staff Regulations or Rules and personnel policies. It is important therefore that before being transferred, seconded or loaned from one organization to another, the staff member himself should ascertain, through the Personnel Office of his organization, the extent to which the *two* organizations concerned will apply the various clauses of the understanding..."

It is obvious from the foregoing that these two documents, which originate from the Consultative Committee on Administrative Questions (CCAQ), do not of themselves establish the law applicable to the relationship between the Applicant and the Respondent.

II. The Tribunal considers that the points for determination in this case are as follows :

- (i) What are the legal elements of "secondment" and who are the parties to such a "secondment" ?
- (ii) Can the terms and conditions, including the period of "secondment", be varied unilaterally by one organization or by the agreement between two organizations without the consent of the staff member concerned ?
- (iii) Does the absence of a letter of appointment from IMCO to the Applicant imply the absence of a contract of service and preclude the application of the Staff Regulations and Rules of IMCO to the Applicant ?
- (iv) Has the Applicant been denied due process before the termination of his secondment ?
- (v) To what relief is the Applicant entitled ?

III. It is common ground that the Applicant was seconded by the United Nations to IMCO initially for a period of one year and that this secondment was

extended for a further period of two years and again, for another period of two years ending 30 June 1964. The terms and conditions of the secondment were set forth in a letter dated 27 May 1959 from the United Nations Director of Personnel to the Secretary-General of IMCO. The letter provided, *inter alia*, that the Applicant would be taken off the United Nations payroll on 30 June 1959 and picked up by the IMCO payroll on 1 July 1959, and that leave, transportation and other allowances would be governed as mentioned in the said letter. It is also accepted between the parties that the assignment of the Applicant to IMCO was a "secondment" of the Applicant's services for a specified period, as mentioned above.

IV. There is no legal definition of the term "secondment" in the Staff Regulations and Rules of either IMCO or the United Nations. Nevertheless, the term "secondment" is well-known in administrative law. It implies that the staff member is posted away from his establishment of origin but has the right to revert to employment in that establishment at the end of the period of secondment and retains his right to promotion and to retirement benefits. In the "Memorandum of Understanding" referred to earlier, "secondment" has been defined as "the assignment of a staff member from one organization to another for a limited period, during which he will normally be paid by and, except as otherwise provided hereafter, be subject to the staff regulations and rules of the receiving organization, but will retain his rights of employment in the releasing organization". In distinguishing "secondment" from "transfer" and "loan" of staff, the said "Memorandum" defines "transfer" as "the movement of a staff member from one organization to another, with the agreement of both organizations, and the staff member concerned, on the understanding that the releasing organization will be under no obligation to accept his return to it" and "loan" as "the assignment of a staff member from one organization to another for a limited period, during which he will be subject to the administrative supervision of the receiving organization but will continue to be subject to the staff regulations and rules of the releasing organization". It will be observed, from the above definitions, that, in the case of transfer, the severance of the staff member from the establishment of origin is complete whereas, in the case of secondment, there is a temporary suspension of his rights in the establishment of origin limited to the period of the secondment. In the case of loan of staff, the staff member is subject to the regulations and rules of the establishment of origin even during the period during which the staff member is loaned to another organization, while in the case of secondment, the staff member will be subject to the regulations and rules of the receiving organization during the period of his secondment.

V. The definitions set out in the "Memorandum of Understanding" help to clarify the administrative situations in which "loan", "transfer" and "secondment" of staff members take place. But this "Memorandum" was drawn up only in May 1964 and IMCO is not a party thereto. It is therefore pointed out by the Respondent that the definition of secondment contained in the "Memorandum" is not, *per se*, applicable to the case under consideration and is not binding on IMCO. The Respondent argues that the terms and conditions under which the Applicant was seconded should be limited to those contained in the letter of 27 May 1959 from the United Nations to IMCO and to general principles of law applicable to the case. According to the Respondent, there was a request by IMCO to the United Nations for the services of the Applicant and an acceptance by the United Nations of the request on the terms and conditions mentioned *supra*; there

was therefore a contract between two parties only, namely, the releasing organization and the receiving organization ; and the Applicant, though he accepted the secondment, was not a party to the contract.

VI. But the Tribunal considers that, if the transaction of secondment is analysed, it will be observed that there are really three parties to the arrangement, namely, the releasing organization, the receiving organization and the staff member concerned whose consent to the period of secondment, as well as to the terms and conditions of employment in the receiving organization, is a condition precedent for such a secondment. Under United Nations Staff Regulation 1.2, it is open to the Secretary-General to deploy the members of his staff in any assignment, to any of the activities or offices of the United Nations. The staff member is bound to accept any office or assignment he may be called upon to undertake within the United Nations, but the Administration cannot transfer or second a staff member to any other organization without his consent. To illustrate the point further, the Secretary-General of the United Nations may assign a staff member to any United Nations conference, without his consent, but he cannot assign a staff member to a specialized agency such as the World Health Organization, without the consent of the staff member concerned. The "Memorandum of Understanding" only reiterates the existing legal situation when it states : " The understanding, as such, does not give any organization the right to transfer, second or loan a staff member to another organization without his consent." The consent is given by a staff member to (a) secondment to the organization in question, (b) the duration of such secondment and (c) the terms and conditions of employment in the receiving organization.

VII. It follows from the foregoing analysis that there are three parties to a contract of secondment, namely, the releasing organization, the receiving organization and the staff member concerned and that this establishes a contractual relationship between the three. The Tribunal therefore rejects the contention of the Respondent that there were in this case only two parties to the secondment, namely, the releasing organization and the receiving organization, and that the acceptance of the staff member was only consequential to his obligations to the releasing organization.

From the conclusion reached above, it follows that the terms and conditions of secondment cannot be varied unilaterally or simply by agreement between the releasing organization and the receiving organization to the detriment of the staff member concerned.

VIII. The Tribunal asked the Respondent whether, if one assumed that there was between the two interested organizations a contract of secondment to which the staff member had agreed, the duration of the secondment could be modified :

(a) By unilateral decision of one of the parties ;

(b) By agreement between the organizations without the consent of the staff member, who *ex hypothesi* consented to his secondment.

The Respondent answered as follows (verbatim record : AT/PV.91, page 51) :

" Reply to (a) : Yes, by either of the two organizations. It cannot be modified by the staff member.

" Reply to (b) : Yes."

IX. The Respondent's reply quoted above, that the duration of secondment can be modified by unilateral decision of either of the two organizations or by agreement between the organizations, without the consent of the official concerned, appears to be based on a misreading of Staff Regulation 1.2 of the United Nations. Whereas Staff Regulation 1.2 pertains only to the posting of assignments within the United Nations, in which case the Secretary-General has discretion to assign or withdraw a staff member from any office in the United Nations, Staff Regulation 1.2 does not apply to assignment of staff transferred or seconded to another organization or specialized agency, such as IMCO.

The Tribunal is fortified in the view it takes by the telegram sent by the United Nations Director of Personnel to IMCO on 19 June 1963, which, *inter alia*, states that: "If Higgins accepted your order Unations would then proceed as already agreed to take him over from 1 October 1963... If Higgins refused to accept... we would expect you formally to request an immediate termination of secondment. We would hope you would record reasons for terminating secondment fully and frankly...". This definitely implies that the consent of a staff member is necessary for varying the conditions of secondment and that, if such consent is not forthcoming, then appropriate procedures for a valid termination of the secondment should be applied.

The Tribunal holds therefore that the termination of a secondment does not lie within the sole discretion of the organizations concerned.

X. The Respondent argues that, since the Applicant had no letter of appointment from IMCO, he had no contract of employment with IMCO and that he cannot claim any of the rights and privileges accruing to a staff member under the Staff Regulations and Rules of that agency. The Respondent further asserts that, since the Applicant had a letter of appointment with the United Nations, he had only rights and privileges available under the Staff Regulations and Rules of the United Nations. It is true that no letter of appointment was issued by the Respondent to the Applicant. Staff Rule 104.3 (b) of IMCO reads as follows:

"(b) *Fixed-term Appointment*

"The Fixed-Term Appointment, having an expiration date specified in the letter of appointment, may be granted for a period not exceeding five years to persons recruited for service of a prescribed duration, including persons temporarily seconded by national governments or institutions for service with IMCO. The Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment."

Since the Applicant was a seconded official from the United Nations for a prescribed duration, he fell within the category of staff eligible for a fixed-term appointment entitled to receive a letter of appointment under Staff Rule 104.3 (b) quoted above. The point for determination is whether the absence of such a letter of appointment negates the existence of a contract and deprives the Applicant of his rights and privileges in IMCO. In its earlier Judgement No. 68 (Bulsara), the Tribunal held that the existence of a contract may be established on the basis of correspondence and conduct of parties. The Tribunal is informed that in cases of secondment in international organizations, letters of appointment are sometimes issued, and sometimes not, and that there is no uniform practice in this respect. Considering that the Respondent sought, and obtained the services of the Applicant, considering further that the Applicant was working within the adminis-

trative discipline of IMCO, it would be idle to deny that there was a contract of employment between the Applicant and the Respondent. In reply to a question from the Tribunal, the Respondent answered that, on matters of internal discipline, he could take disciplinary action against the Applicant under IMCO Staff Regulations and Rules. It is therefore conceded, though partially, by the Respondent, that even though there was no letter of appointment, and no clauses in the agreements of secondment to the specific effect that the Staff Regulations and Rules of IMCO would be applied by the Respondent, the Applicant nevertheless was subject to such Staff Regulations and Rules. For instance, as regards the non-pensionable post allowance, the Respondent specifically quoted and applied Staff Rule 103.6 with respect to the Applicant. That the Applicant was subject to the administrative discipline of IMCO is further reinforced by the telegram from the United Nations Director of Personnel quoted earlier. The telegram states, *inter alia* : " So long as secondment continues Higgins is within your administrative and disciplinary jurisdiction." It is obvious that such disciplinary jurisdiction can be exercised only in accordance with the Staff Regulations and Rules generally applicable to the staff, and not arbitrarily. Further, the Tribunal considers that the Staff Regulations and Rules should be applied in their entirety and not in parts. The Tribunal is not unaware that, in the case of secondment, the application of the regulations and rules of the receiving organization is limited to the period of secondment. Thus, while the receiving organization can take disciplinary action limited to that period, it cannot dismiss the staff member from his original employment.

The Tribunal therefore concludes that the absence of a letter of appointment does not imply the absence of a contract of service, nor preclude the application of the Staff Regulations and Rules of IMCO to the Applicant.

XI. The Respondent sought to justify the termination of the secondment on the ground that differences had arisen between the Applicant and the Respondent which made the smooth working of IMCO difficult. Evidence was also adduced to show that, in the preparation of the IMCO budget for 1964-65, the Applicant did not give full explanations to the Respondent and took up an attitude which put the Respondent in difficulties with the IMCO Council. The Applicant contests these allegations and avers that they had been brought up *ex post facto* to sustain the action taken by the Respondent.

XII. The Tribunal has not found it necessary to go into the details of the allegations and counter-allegations made by the respective parties, in view of the pleadings in this case. In paragraph 38 of the statement filed by the Respondent on 29 October 1964, the following passage occurs :

" Indeed, the Secretary-General of IMCO had no intention of imposing a disciplinary sanction on his former colleague, and quite simply, at that time there were no grounds for so doing... Nor could there be any question of disciplinary sanction, since he was not aware of any lapse which might have involved such a measure. "

The Respondent rests his case on the authority of the Secretary-General of IMCO to terminate the secondment if he felt that it was necessary to do so in the best interest of the Organization. The Tribunal, however, notes that the authority of the Secretary-General to terminate the appointment of a staff member is regulated by IMCO Staff Regulation 9. In the case of a staff member not having a permanent

or fixed-term appointment, the Secretary-General may under this provision terminate the appointment at any time, if in his opinion, such action would be in the interest of the organization. The Applicant was not within this category of staff. He is a permanent staff member of the United Nations and had been seconded to IMCO for a definite period. The legal situation was that the Applicant's position was analogous to that of a staff member with a fixed-term appointment under Staff Rule 104.3 (b) of IMCO. Therefore the provisions of Staff Regulation 9 applicable to that category of staff members should have been applied in this case. It is unnecessary for the Tribunal to examine further whether these provisions were in fact applied to this case, as it is common ground between the parties that they were not applied.

XIII. The Applicant also contends that he was denied due process before the termination of the secondment was made by the Respondent. It is in evidence that the Secretary-General of IMCO, without previously informing the Applicant, himself drafted and despatched to the United Nations at New York the following telegram :

“ Services Mr Higgins no longer desired stop Higgins is free to return to United Nations immediately. ”

The Applicant was not informed that the Respondent was seeking to terminate the secondment before the expiry of the due date. Furthermore, the Respondent produced no evidence to show that there had been prior consultations or discussions with the Applicant regarding the difficulties or the problems which gave rise to the Respondent's action. Nor was the Applicant given an opportunity to offer his explanations. Admittedly, the whole transaction was done without the knowledge of the Applicant. The Tribunal has emphasized in its previous judgements that the affected staff member is entitled to due process of law and that the absence of such due process vitiates the action taken. The Respondent avers that no question of due process arose because the Applicant was not a staff member of IMCO and that none of the principles enunciated in earlier decisions by the Tribunal would apply to his case. The Tribunal feels that the stand taken by the Respondent is based on an erroneous view of the legal consequences of an agreement of secondment. The Tribunal therefore finds that the Applicant was entitled to due process before termination of secondment and that it was denied to him.

XIV. As a result of the foregoing findings, the Tribunal comes to the conclusion that there was a contract of employment between the Applicant and the Respondent for a fixed period and that, without following the requirements of the Staff Regulations and Rules of IMCO and without following due process of law, the Respondent had terminated the Applicant's secondment before the expiry of the agreed period.

XV. The Tribunal is not unmindful of the fact that the Secretary-General of IMCO needs to have a measure of freedom in the appointment, assignment and disposition of staff on which he must rely. This is particularly true where senior officers are concerned. The Secretary-General must therefore not be rigidly prescribed in the exercise of his judgement in these matters. It would appear from the evidence, however, that the Secretary-General of IMCO has adequate powers in this respect under IMCO's Rules and Regulations.

XVI. The Tribunal, therefore, arrives at the conclusion that the contested decision cannot be sustained. It is not necessary, in these circumstances, to

pronounce either on the allegations of the Applicant relating to the reasons which, in his opinion, prompted the Respondent to take the contested decision or on the explanations given by the Respondent to justify his action.

XVII. Since the Tribunal is in a position to decide on the merits of the case, no ruling is required on the pleas relating to further measures of inquiry and to the production of documents.

XVIII. With respect to the pleas submitted by the Applicant as to the substance, the Tribunal notes that under article 10, paragraph 5, of its Statute, copies of its judgement shall be made available on request to interested persons. Accordingly the Tribunal rejects the Applicant's plea (d).

XIX. As regards Applicant's pleas (a) and (b), the Tribunal notes that article 9 of its Statute provides that, if the Tribunal finds that the application is well founded, it shall order the rescinding of the decision contested or the specific performance of the obligation invoked. In the circumstances of this case, the Tribunal finds that neither of these remedies can be applied as requested in Applicant's pleas (a) and (b). As the period of secondment originally envisaged had already expired on the date of the judgement, the Applicant cannot be restored to the service of IMCO by rescinding the contested decision. The Tribunal, in its Judgement No. 68, held that, where the parties cannot be restored to *status quo ante*, compensation in lieu of specific performance may prove to be adequate and proper relief.

XX. As regards Applicant's plea (c), the Tribunal notes that it follows from article 9, paragraph 1, of its Statute that the compensation referred to in that provision is to be paid for the injury sustained as a result of non-reinstatement. In the present case the Applicant was paid his salary by IMCO until 30 September 1963 and by the United Nations from 1 October 1963. The Applicant has not therefore suffered any loss of income. It should be noted however that during a substantial period of time he had reasons to doubt whether a post would be found for him in the United Nations or whether his permanent contract would be terminated. Furthermore, the premature termination of the secondment of a staff member with the Applicant's record, without reinstatement, causes inevitable injury both for the present and the future. As regards the amount of any compensation which could be due to the Applicant on this account, the Respondent stated that he would submit to a decision by the Tribunal *ex aequo et bono*. Accordingly, the Tribunal awards to the Applicant compensation in the sum of dollars one thousand.

XXI. As regards Applicant's plea (e), the Tribunal observes that in awarding damages it has to be satisfied that the damages claimed follow naturally as a consequence of the action contested. It is a well-established rule of law that damages which are remote and contingent cannot be recovered. The Applicant's claim based on his prospects of promotion to the D-1 category, appears to the Tribunal to be remote and contingent. The Tribunal held in an earlier judgement (Judgement No. 2) that the mere authorization of a post in the budget did not imply that the post should be created. Even if the D-1 post in question had been created—which appears not to have been the case—there was no certainty that the Applicant would have been promoted to it. Furthermore the Applicant adduced no evidence of the other financial losses claimed. The Tribunal therefore rejects the claim for damages of dollars 15,000 under this head.

XXII. In his plea (f) the Applicant claims the following costs and expenses of travel and subsistence of his counsel :

	Dollars
1. Air travel of counsel from New York to Geneva and return	500
2. Subsistence of counsel for seven days at dollars 14 per day	98
3. Terminal expenses	12
Total	610.00

The Tribunal accepts the claim as reasonable and awards dollars six hundred and ten accordingly.

XXIII. The Tribunal therefore orders a total payment to the Applicant of dollars one thousand six hundred and ten.

(Signatures)

Suzanne BASTID
President

R. VENKATARAMAN
Vice-President

James W. BARCO
Member

N. TESLENKO
Executive Secretary

Geneva, 16 November 1964.

Judgement No. 93

(Original : English)

Case No. 92 :
Cooperman

Against : The Secretary-General
of the United Nations

Termination of the employment of a staff member holding a probationary appointment.

Allegation of lack of due process.—Complaint that the Respondent did not refer the Applicant's case to the Appointment and Promotion Board.—Need to distinguish between Staff Rules 104.12 and 104.13, concerning the end of the period of probation when a decision about the grant of a permanent or regular appointment has to be taken, and Staff Regulation 9.1 (c) empowering the Secretary-General to terminate the probationary service of a staff member at any time if, in his opinion, such action is in the interest of the United Nations.—Complaint that the Respondent did not follow the disciplinary procedure.—The Secretary-General's right not to resort to disciplinary measures while exercising the power under Staff Regulation 9.1 (c).—Complaint that the Respondent did not follow the procedure specified in the Circular concerning staff promotion, appointment and review.—Inapplicability of this procedure.

Allegation of prejudice and improper motivation.—Not enough material submitted to sustain the charge.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of the Lord Crook, Vice-President, presiding ; the Honourable Mr. R. Venkataraman, Vice-President ; Mr. Héctor Gros Espiell ;