

Judgement No. 99*(Original : English)***Case No. 98 :
Mr. A****Against : The Secretary-General
of the United Nations**

Claim for compensation for damage suffered by a member of the staff of the United Nations Special Fund as a result of measures taken by the Medical Director of the United Nations Health Service and other officials.

Objections against the Tribunal's competence.—Refutation of contention that the allegedly wrongful acts were not violations of the Applicant's terms of appointment.—The conditions under which sick leave can be imposed constitute an element of the contractual relationship between the employee and the employer.—Staff Rule 106.2.—Refutation of contention that the allegedly wrongful acts were not decided upon by the Secretary-General but were the decisions of other officials.—Consent of the Director of the Special Fund's Bureau of Operations to the imposition of sick leave and to the commitment of the Applicant to a mental institution.—Suggestion of the Managing Director of the Special Fund concerning the Applicant's "repatriation" to his home country.—Respondent's liability for the consequence of the acts of these two officials.—Objections rejected.

Respondent's right to impose sick leave upon a staff member unfit for work.—The Medical Director's competence to determine physical fitness for work.—The staff member's right to contest the findings of the Medical Director in accordance with a procedure such as prescribed by Staff Rule 106.2 (a) (viii).

Choice imposed upon Applicant of either being taken to a public mental hospital by force or agreeing to go to a private mental institution.—Interference in the Applicant's freedom and private life in violation of his contractual rights.

"Repatriation" of the Applicant to his home country.—Applicant's agreement to this measure.

Applicant's contention that his contractual rights were violated by the Medical Director's transmission to the Applicant's superiors of certain medical information rejected.

Award to the Applicant of compensation of \$1,000 as damages for the moral prejudice caused by reason of the conditions under which his commitment to a private mental institution took place.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President ; the Lord Crook, Vice-President ; Mr. Sture Petré ;

Whereas, on 9 June 1962, Mr. A, a former Principal Officer in the secretariat of the United Nations Special Fund and the Applicant herein, filed an application directed against a decision by the Managing Director of the Fund not to extend beyond 3 January 1962 his fixed-term appointment with the Organization ;

Whereas, by Judgement No. 86 delivered on 14 September 1962, the Tribunal rejected that application ;

Whereas Judgement No. 86 noted that the Applicant had informed the Tribunal that he had additional claims against the United Nations on which no administrative decision had yet been taken ;

Whereas, on 21 May 1965, the Secretary-General took an administrative decision on the Applicant's additional claims after consideration of the matter by the Joint Appeals Board ;

Whereas, on 18 August 1965, the Applicant filed an application relating to the additional claims in question ;

Whereas the application requests the Tribunal :

1. To find that the Respondent had violated the contractual and statutory rights of the Applicant by :

(a) Permitting the Medical Director of the United Nations Health Service to divulge and to use to the Applicant's detriment confidential information obtained by the Medical Director in his capacity as a physician consulted by the Applicant ;

(b) Tolerating and abetting gross abuse of authority by the Medical Director in cajoling and threatening the Applicant and imposing upon him, without due process, quasi-disciplinary measures, such as forbidding him, contrary to Staff Regulations and Rules, to come to work in his office ;

2. To find also that the Respondent had caused the Applicant, while the latter was under contract to him, grievous harm inasmuch as he permitted his agents, such as the Director of Operations of the Special Fund, the Medical Director and certain United Nations guards, to perform on behalf of the Organization actions which were not within their authority or purview as United Nations officials, and which brought about the forcible commitment of the Applicant to a mental institution and his subsequent virtual deportation, *ultra vires*, to his home country ;

3. To find further that, despite the fact that the actions of his agents were contrary to United Nations Regulations and Rules, the Respondent interposed United Nations immunities to protect those agents against a test of the legality of their actions, and eventual retribution in United States courts ;

4. Finally, in view of the above, to order the Respondent to pay the Applicant 45,000 dollars as a partial and largely symbolic retribution for the grievous harm and losses caused him by the above-mentioned actions, and 5,000 dollars as exemplary damages ;

Whereas, on 24 November 1965, the Respondent filed his answer to the application ;

Whereas the answer requests the Tribunal :

1. To decide, as a preliminary measure, in pursuance of article 2, paragraph 3, of its Statute, that the allegations contained in the application are not allegations of non-observance of the Applicant's employment contract and are, therefore, outside the competence of the Tribunal as described in article 2, paragraph 1, of the Statute ;

2. In the event that the Tribunal should decide the dispute as to its competence in favour of its ability to consider the application, to reject the application as unfounded and to deny the pleas contained therein ;

3. In the event that the Tribunal should reach consideration of the Applicant's pleas, to find that the pleas must be denied as outside the Tribunal's power under article 9 of its Statute ;

Whereas, on 14 January 1966, the Applicant filed written observations on the Respondent's answer ;

Whereas, on 28 January 1966, the President requested the Respondent to

submit an additional written statement under article 10 of the Rules of the Tribunal ;

Whereas, on 4 February 1966, the Respondent submitted the statement requested by the President and filed additional documents ;

Whereas, on 14 and 15 February 1966, the Applicant submitted comments on the Respondent's statement and additional documents and himself filed additional documents ;

Whereas the Tribunal heard the parties at two public sessions held on 25 February 1966 ;

Whereas, during the public sessions, the parties answered questions put by the President and members of the Tribunal and filed additional documents ;

Whereas, on 28 February 1966, the Tribunal requested the Applicant to submit an additional written statement ;

Whereas, on 2 March 1966, the Applicant submitted the statement requested by the Tribunal ;

Whereas, on 7 March 1966, the Respondent submitted comments on the Applicant's statement and filed an additional document ;

Whereas, on 8 March 1966, the Applicant filed observations on the Respondent's comments ;

Whereas the facts in the case are as follows :

The Applicant entered the service of the United Nations on 4 January 1960 as a Principal Officer in the secretariat of the Special Fund. He had previously completed various questionnaires required from candidates to posts in the United Nations Secretariat and, in particular, the Medical History Form and Supplementary Questionnaire which he signed in his home country on 8 November 1959. In completing this form, the Applicant answered in the negative question (k) which read : " Have you consulted a neurologist, a psychiatrist or a psycho-analyst ? " In completing the Supplementary Questionnaire, the Applicant indicated no hospitalization for a nervous or mental disorder in his reply to question (7) which read : " Have you ever been in a hospital, sanatorium, rest home or spa for any physical, nervous or mental disorder ? Specify. " He answered in the negative question (8) which read : " Have you ever been treated outside a hospital, sanatorium, rest home or spa for any physical, nervous or mental disorder ? Specify. " At the bottom of the form the Applicant signed the following declaration :

" I certify that the statements made by me in answers to the foregoing, as well as the attached supplementary, questions are true, complete and correct to the best of my knowledge and belief. I understand that any misrepresentation or material omission made on a Medical History form or other documents requested by the Organization renders a staff member of the United Nations liable to termination or dismissal. "

On 20 January 1960 the Applicant received a fixed-term appointment for the period of 4 January 1960 to 3 January 1962 at the D-1 level. On 22 June 1961—more than six months before the date of expiration of the appointment—the Applicant (following earlier verbal intimation) was informed in writing by the Director of the Joint Administrative Services Division of the Special Fund that :

" The Special Fund will offer you a one-year fixed-term extension of your present appointment dating from 4 January 1962. The formalities will be completed in due course in the normal way by the Office of Personnel,

but you may take this as a final communication of the intentions of the Special Fund."

In July 1961 the Applicant was examined by the Resident Physician of the United Nations Health Clinic at the request of the Director of the Bureau of Operations of the Special Fund who had expressed concern about the state of the Applicant's health and behaviour. On 13 September 1961, the Applicant had an interview with the Medical Director of the United Nations Health Service. In the course of the interview he agreed to take a week's vacation at the Medical Director's suggestion. He also indicated that he had recently consulted Dr. B., a psychiatrist, member of the New York Office of the Public Health Service of the Applicant's home country. In a subsequent memorandum to the Deputy Director of Personnel, dated 28 December 1961, the Medical Director explained that, after his interview with the Applicant :

"I [the Medical Director] spent the next few days checking with as many doctors and colleagues as possible who might provide information regarding [the Applicant's] past and present health. It seemed to be generally known that [the Applicant] had a past history of two or three previous nervous breakdowns going back some 8 to 10 years ; he had been a patient in the psychiatric ward of Hospital No. 1* and the treatment had included electro-shock therapy ; he had also been under the care of an American psychiatrist in Washington "

when he was attached to his country's Embassy eight years ago. The Medical Director added that both he and Dr. B. had tried without success to persuade the Applicant to go on sick leave to his home country for further medical treatment. On 27 September 1961, the Medical Director informed the Applicant in writing that he was faced with the following two alternatives :

"The first alternative is that I will have to recommend immediate termination, based on the fact that on your pre-employment medical examination you omitted medical information material which, according to your signed statement on the forms at that examination, would render a staff member of the United Nations liable to termination or dismissal.

"The second alternative is that, after having studied any reports which we can get regarding the treatment you received on previous episodes of mental illness, you should be put on sick leave to undergo such further treatment as may be necessary to restore your health. "

In the memorandum of 28 December 1961, referred to above, the Medical Director explained that, in the meantime, the Applicant's condition of health was rapidly deteriorating and that :

"In order to avoid any further deterioration in the situation wherein he [the Applicant] might become a danger either to himself or to others, we decided to effect his repatriation to [the Applicant's home country] for treatment, by first committing him to a hospital for observation and treatment. This decision was taken in consultation with and on the advice both of Dr. Torre, the United Nations psychiatric consultant, and of Dr. B., his own psychiatrist. Faced with the alternative of being taken to Hospital

* A hospital in the Applicant's home country.

No. 2,* he agreed to go to a private hospital, Hospital No. 3,* on 5 October.

He went willingly and no physical force at all was used."

While the Applicant was in Hospital No. 3, he received a letter dated 18 October 1961 in which the Managing Director of the Special Fund stated that he had accepted the Medical Director's opinion that the Applicant was not fit to resume his work with the Fund. The Managing Director also informed the Applicant that :

"In completing your medical history questionnaire at the time of your employment, you failed to include information of a material nature concerning your medical history, and, according to the certification which you signed on the questionnaire, omission of material information can be grounds for dismissal. The Director of the United Nations Health Service indicated that had you provided full information you would have been classified by that Service as 'unemployable', and would not in fact have been offered an appointment with the Special Fund."

The Managing Director went on to say that, having weighed all the circumstances of the case, and after discussions with officials of the United Nations Office of Personnel, he had decided not to terminate the Applicant's present appointment, if the Applicant returned to his home country for further medical treatment and accepted full treatment by approved physicians in that country. "In this event,"—the Managing Director continued—"you will be carried on sick leave with full pay throughout the period of your appointment, which expires on 3 January 1962. Your appointment will expire on that date." The Managing Director added that, since the Fund had previously expressed the intention of extending the Applicant's appointment for a period of one year, he would receive on his separation from service, in addition to the benefits provided for in the Staff Rules, a sum equal "to an amount which would have been payable had you received a one year fixed-term appointment as from 4 January 1962 and been terminated immediately thereafter." The Managing Director specified, however, that these arrangements were contingent upon the Applicant agreeing to return to his home country at an early date to receive further medical treatment. On 19 October 1961, the Applicant was permitted to leave Hospital No. 3. Four days later he travelled by air to his home country at United Nations expense. Dr. B. accompanied him on the journey, also at United Nations expense. On 5 December 1961 the Applicant returned to New York. On 8 December 1961, after further correspondence on the matter, he requested in writing the Managing Director of the Fund "to reconsider the whole case". On 13 December 1961, he addressed under Staff Rule 111.3 (a) a communication to the Secretary-General requesting a review of the decision conveyed to him by the letter of the Managing Director dated 18 October 1961. In reply to the letter of 8 December 1961 to the Managing Director, the Officer-in-Charge of the Special Fund informed the Applicant on 22 December 1961 that :

"The Managing Director has... decided to confirm the decision conveyed to you in his letter of 18 October 1961 that your present appointment will not be extended. The reason for this decision is that it is considered

* Hospital No. 2 is a public hospital and Hospital No. 3 is a private hospital. Both are in New York City.

that your conduct of work and behaviour for some time after June and before your departure in October were unsatisfactory. Another factor in this decision is the state of your health to which we have been advised the problems which have arisen at work may largely be attributed. The Managing Director is also aware that you have refused to give certain information bearing upon your previous medical history or to permit the Medical Director to obtain such information although it has been brought to your attention that this information bears directly upon the truthfulness of your representations on your medical history form."

On 27 December 1961 the Deputy Director of the Office of Personnel acknowledged on behalf of the Secretary-General the Applicant's communication of 13 December and waived the time-limits provided in Staff Rule 111.3 in order to permit the Applicant to submit further information or statements. On 12 January 1962, the Applicant submitted through counsel a written statement on his case. On 8 February 1962, at the Applicant's suggestion, the Deputy Director of Personnel requested Dr. Hugh McHugh, a Diplomate of the American Board of Psychiatry and Neurology, to give his "professional assistance with respect to a determination to be made by the Secretary-General on the question of [the Applicant's] capacity or incapacity for reasons of health for further service" in his post. On 27 February 1962, Dr. McHugh submitted a psychiatric report on the Applicant. On 12 March 1962, the Director of Personnel informed the Applicant that, after reviewing the decision of the Managing Director of the Special Fund, the Secretary-General "has determined that the expiry of your appointment on 3 January 1962 did not violate the terms of your appointment including the Staff Regulations and Rules". On 28 March 1962, the Acting Director of Personnel informed the Applicant that the Secretary-General agreed that the Applicant's case should be submitted directly to the Administrative Tribunal. In a letter dated 18 May 1962, the Applicant submitted to the Managing Director of the Special Fund the following "additional claims against the Organization":

"(a) A claim for compensation and damages for the well-known action which was taken against [the Applicant] by officers of the Secretariat on behalf of the United Nations in October-November 1961 and

"(b) A claim for subsistence (per diem) for a period of forty days which [the Applicant] was ordered to spend and did spend away from United Nations Headquarters in October-November 1961."

On 9 June 1962, the Applicant filed with the Tribunal the application directed against the decision by the Managing Director of the Special Fund not to extend beyond 3 January 1962 his fixed-term appointment with the Organization. On 30 July 1962 the Applicant addressed to the United Nations Deputy Director of Personnel a statement in support of his claim to compensation and damages. In a covering letter the Applicant stated, *inter alia*:

"I hope that this claim will be disposed of by the Administration by admitting the justice of my claim and by the payment of appropriate compensation and damages, so that it will not be necessary or desirable to seize the Joint Appeals Board or the Administrative Tribunal of this claim. I only wish to add, at this stage, that in case no agreement on the payment of appropriate compensation and damages should be reached, I would, without prejudice to my proposition that the incidents arose out of my appointment and that

therefore the appeals procedure is the appropriate channel for adjudication, be prepared to agree to a different mode of settlement. One alternative arrangement could be to submit the claim for compensation and damages to arbitration. Another would be for the Secretary-General to waive the immunity of the United Nations officials concerned without prejudice, of course, to the vicarious liability of the United Nations for the injury and wrong they inflicted upon me. Under section 20 of the Convention on the Privileges and Immunities of the United Nations, the Secretary-General has the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations."

On 27 August 1962 the Tribunal was informed in writing that the Applicant had resumed employment in the Civil Service of his home country as from 1 June 1962. On 14 September 1962 the Tribunal delivered its Judgement No. 86 rejecting the application filed on 9 June 1962. In December 1962, the claim referred to under (b) in the Applicant's letter of 18 May 1962 was settled by the payment of the subsistence allowance requested. As regards the claim referred to under (a), the Director of Personnel, after further correspondence, informed the Applicant on 26 April 1963 that "your claim for compensation for damage suffered as a result of wrongful acts by United Nations officials has been denied after careful consideration of its grounds and full review of the circumstances". On 19 May 1963 the Applicant requested the Secretary-General to review the decision notified to him by the Director of Personnel. On 11 June 1963 the latter informed the Applicant that "after a re-examination of your claim for compensation, there appears to be no grounds for changing the decision conveyed to you in my letter of 26 April 1963". On 21 June 1963 the Applicant requested the Respondent's concurrence for a direct submission of the matter to the Tribunal. Following the refusal of that request, the Applicant instituted proceedings before the Joint Appeals Board. After considering the case from 27 October 1964 to 28 April 1965, the Board found "that the Appellant's claim to compensation and damages is not sustained under his terms of appointment, including the pertinent regulations and rules" and decided unanimously "to make no recommendation in support of the appeal". It included, however, in its report to the Secretary-General, dated 30 April 1965, the following "General Recommendations":

"While the Joint Appeals Board remains unable to find that the Appellant's rights under his terms of appointment were violated in the present case, the proceedings of the case have convinced the Board of the need for a more precise definition of the responsibilities of the Health Service and other authorities of the United Nations in dealing with circumstances such as those under consideration in the present case. The Board recommends to the Secretary-General that a study be made of the lessons to be drawn from this and similar cases and that appropriate action be taken for the future. The Board remains at the disposal of the Secretary-General for further elaboration of its views on this question."

On 21 May 1965 the Acting Director of Personnel informed the Applicant that "the Secretary-General has agreed to accept the decision of the Joint Appeals Board to make no recommendation in support of your appeal". On 18 August 1965 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are :

As to competence

1. The application seeks redress for grievous harm and losses caused to the Applicant by gross abuse of authority and violations of United Nations rules on the part of United Nations officials acting in their official capacity and as agents of the Respondent. It alleges non-observance of the Applicant's contract of employment and terms of appointment and the non-fulfilment by the Respondent of his obligation to compensate a staff member for damage caused by such non-observance. The application therefore falls entirely within the competence of the Tribunal as defined in article 2 of its Statute.

2. In Judgement No. 86, the Tribunal dealt with an entirely different issue, i.e., the non-renewal of the Applicant's fixed-term contract. It was in that context that the Tribunal referred to the financial arrangements made by the Respondent for the benefit of the Applicant and denied any additional compensation. That decision does not prejudice the issues arising in the present case.

3. The application also comes within the terms of article 9 of the Tribunal's Statute since it requests payment of compensation in a situation where the *status quo ante* cannot be restored.

As to the merits of the case

1. In violation of the applicable Staff Regulations and Rules, the Applicant was removed from the service of the United Nations by a decision taken by the Medical Director of the Health Service, who had no administrative authority or competence in the matter and who was motivated by the desire to break the Applicant's contract or to make it inoperative.

2. In carrying out that decision, the Medical Director committed the following unethical and illegal acts :

(a) Using information obtained in his capacity as a physician, the Medical Director tried to apply administrative pressure on the Applicant by threatening to disclose that he had concealed a past psychiatric history.

(b) The Medical Director divulged to third parties confidential medical information concerning the Applicant without the latter's consent.

(c) In violation of the Staff Regulations and Rules, the Medical Director ordered the Applicant to take sick leave and instructed United Nations guards to detain him if he entered the premises of the Organization.

(d) By signing a misleading petition in which he inaccurately stated that the Applicant did not object to care and treatment in an institution for the mentally ill, the Medical Director caused the Applicant to be committed to such an institution by a procedure which was devoid of the essential guarantees of due process.

(e) The Medical Director failed to notify the Applicant's wife of his decision to commit her husband to an institution for the mentally ill, and contacted her only after the Applicant had been confined to the institution.

(f) The Medical Director repatriated the Applicant to his home country by a procedure which amounted to a virtual extra-legal deportation.

3. Whether or not the Applicant was aware at the time of his rights and whether or not he then lodged formal protests, cannot in any way affect the illegality of the actions which, taken together, form the subject matter of the application.

4. By not agreeing to waive immunity from legal process in respect of the officials responsible for the harm caused to the Applicant, the Respondent con-

firmed that the issue was one of official conduct and that it affected the contractual status of the applicant.

Whereas the Respondent's principal contentions are :

As to competence

1. The administrative decision contested in the present case is the rejection by the Secretary-General of a claim for damages suffered as a result of allegedly wrongful acts by United Nations officials. The Applicant's allegations of abuse of power, improper motive or non-observance of terms of appointment cannot be put forward as grounds for the rescission of the contested decision since they refer not to that decision but to certain acts of United Nations officials. The application therefore does not fall within the competence of the Tribunal under article 2 of its Statute.

2. The only allegation of improper action by the Secretary-General is the assertion that he interposed the immunities enjoyed by the staff of the United Nations to shield the officials concerned from legal proceedings in national courts. Since, however, the Applicant instituted no lawsuit against any United Nations official, no administrative decision was taken in the matter from which an appeal could be made to the Tribunal. Moreover, even if the assertion were well-founded, it could not constitute a basis for extending the Tribunal's competence beyond the limits defined in its Statute.

3. In the present case there is no appeal against an administrative decision relating to the use by the Medical Director of confidential information. The decision taken after the discovery of that confidential information—i.e., the non-renewal of the Applicant's fixed-term appointment—was contested in 1962 and its validity was upheld by the Tribunal in Judgement No. 86.

4. No appeal was made by the Applicant under chapter XI of the Staff Regulations and Rules against the decision forbidding him to come to work.

5. With respect to his admission to an institution for the mentally ill and to his subsequent repatriation, the Applicant alleges legal wrongs which, even if his allegations were substantiated, would not fall within the competence of the Tribunal since they would not constitute non-observance of his contract of employment or of his terms of appointment. The General Assembly did not intend the Tribunal's Statute to be read as giving the Tribunal jurisdiction not only over cases involving allegations of non-observance of the staff members' contract of employment, including all relevant rules and regulations, but also as granting jurisdiction with respect to allegations of wrongful acts by United Nations officials in the course of their official duties engaging the responsibility of the Organization.

6. The Secretary-General is obligated to compensate for non-observance of a contract of employment when the Tribunal finds such non-observance and if specific performance or rescission is impossible. The application, however, does not request compensation in lieu of rescission or specific performance. It has, therefore, no basis in the Tribunal's powers under article 9 of the Statute. Moreover, the Tribunal found in Judgement No. 86 that, in the light of all the circumstances, the financial arrangements made by the Respondent for the benefit of the Applicant were such that no additional compensation was required.

As to the merits of the case

1. The contested administrative decision was in conformity with the Appli-

cant's substantive and procedural rights under his contract of employment and terms of appointment and was not vitiated by any improper motive.

2. The Applicant was instructed to take sick leave by the Medical Director and told not to return to work until further notice. That instruction was given to him by the Medical Director in the presence and with the consent of the Director of the Bureau of Operations of the Special Fund and of the Acting Officer in charge of the Special Fund. It violated none of the Applicant's conditions of employment or terms of appointment and was an implicit power in the Chief Administrative Officer as a matter of ordinary safety and authority.

3. Three doctors agreed that the hospitalization of the Applicant in an institution for the mentally ill was necessary. Faced with the alternative of being taken to a public hospital, the Applicant chose to go to a private institution. The petition signed by the Medical Director for the admission of the Applicant to that institution was therefore legal and the statement contained therein that the Applicant did not object to care and treatment in an institution for the mentally ill was correct.

4. The Applicant was persuaded to go to his home country for treatment in his own interest since he had indicated his very grave distrust of United States psychiatrists and had consistently refused to consult or to be treated by such psychiatrists.

The Tribunal, having deliberated until 16 March 1966, now pronounces the following judgement :

As to the Tribunal's competence

I. The application is one for damages arising from a series of measures allegedly taken by the Medical Director of the United Nations Health Service and other United Nations officials in connexion with the sick leave imposed upon the Applicant in September and October 1961, his commitment to a private mental institution in New York on 5 October 1961 and his subsequent "repatriation" to his home country. The Applicant contends that these measures were contrary to Staff Regulations and Rules in force and therefore violated the Applicant's contractual rights as a holder of a fixed-term appointment in the Secretariat of the United Nations Special Fund. The Respondent having rejected the Applicant's claims for damages caused to him by the measures in question, the Applicant contends that the Tribunal is competent under article 2 of its Statute to entertain such claims.

The Respondent's main contentions as to the competence of the Tribunal are that the application does not fall within competence on either one of the following grounds :

(i) The Applicant's allegations are allegations of wrongful acts, not of violations of terms of appointment or contract of employment.

(ii) These allegations are directed against measures taken by United Nations officials, not against the decision contested in the application, i.e., the decision by which the Secretary-General rejected a claim for damages.

II. The Tribunal finds that the conditions under which sick leave can be granted to or imposed upon an employee necessarily constitute an element of the contractual relationship between him and the employer. The Tribunal also notes that provisions concerning sick leave are found in Staff Rule 106.2 Allegations that, in the case of a staff member, sick leave has been either refused or imposed

and enforced in a wrongful way (including commitment to an institution for the mentally ill), imply therefore that his terms of appointment have not been observed. As, furthermore, the Tribunal, under article 2, paragraph 1, of its Statute, is competent to hear and pass judgement upon applications alleging non-observance of the terms of appointment of staff members, the present application corresponds to this definition.

III. As to the Respondent's contention that the allegedly wrongful acts were not decided upon by the Secretary-General, but were the decisions of other United Nations officials, the Tribunal notes that, when the Medical Director on 29 September 1961 placed the Applicant on sick leave and instructed him not to come back to the office without the Medical Director's prior approval, this took place in the presence of the Director of the Special Fund's Bureau of Operations. The Tribunal further notes that, when the Applicant, on his reappearance in the United Nations premises on 5 October 1961, was taken to a private mental institution under instructions from the Medical Director, this action had been immediately preceded by an incident in which the Applicant had insisted on attending a meeting scheduled to take place in the office of the Director of the Bureau of Operations who had then sent for the Medical Director.

IV. In the light of these circumstances, the Tribunal arrives at the conclusion that the measures taken by the Medical Director on the aforesaid two occasions were covered by the consent of the Director of the Bureau of Operations. Concerning the Applicant's subsequent "repatriation" to his home country from the private mental institution, this took place in conformity with a suggestion made to the Applicant in a letter from the Managing Director of the Special Fund of 18 October 1961.

V. Being the head of the administrative unit of the Special Fund to which the Applicant belonged, the Director of the Bureau of Operations was competent to decide on questions concerning the Applicant's sick leave and related matters. The Tribunal also finds beyond question that the Managing Director of the Special Fund had competence to write the letter to the Applicant of 18 October 1961. If these two officials in dealing with the Applicant's sick leave, commitment to a mental institution or "repatriation" did not observe his contractual rights or terms of appointment, the consequence of such acts falls upon the Respondent.

VI. To the extent that the Respondent's objections against the Tribunal's competence are based upon the assertion that the Applicant did not appeal against the decisions in question under chapter XI of the Staff Regulations and Rules, the Tribunal notes that the Applicant wrote, on 21 October 1961, to the Managing Director of the United Nations Special Fund, asking for the rescission of the decision that he be carried on sick leave throughout the period of his appointment. In view of the nature of the other decisions complained of, an appeal under chapter XI would have been pointless. In these circumstances, the only remedy open to the Applicant was a claim for damages.

VII. For the reasons given above the Tribunal finds that the application falls within its competence as defined in article 2 of its Statute and does not consider it necessary to examine what the legal situation would have been in this respect, in case the allegedly wrongful acts had been committed by the Medical Director or other staff members outside their official competence.

VIII. As far as the Applicant's pleas concerning the Respondent's alleged

refusal to waive United Nations officials' immunities, the Tribunal finds that it has no competence under its Statute to deal with the matter.

As to the merits of the case

IX. The application first raises the question whether sick leave can be imposed upon a staff member against his will.

In dealing with sick leave, Staff Rule 106.2 mainly envisages the conditions under which staff members asking for sick leave can be granted such leave. Directed leave is mentioned only in Rule 106.2 (c) which relates to the question of a contagious disease occurring in a staff member's household or a quarantine measure affecting it. In such situations a staff member can be directed not to attend the office, whether or not he himself is taken ill.

X. The Tribunal, however, finds that it naturally must fall within any employer's authority to order an employee to stay away from the office, even against his will, in case of illness that makes him unfit for work. Such a decision should anyhow rely upon medical indications and, in the case of staff members of the United Nations, a natural course for the responsible official would be to act on the findings of the Medical Director to whose duties it belongs to approve sick leave and to determine physical fitness for work in case of illness.

XI. The Tribunal in its Judgement No. 83 has drawn attention to the fact that the Staff Regulations and Rules do not provide for a procedure, in case a staff member contests the findings of the Medical Director relating to termination of an appointment on health grounds. The Tribunal, however, noted the existence of Staff Rule 106.2 (a) (viii). This provision, which obviously deals with the case of a staff member who is on sick leave at his own request, or is asking for an extension of sick leave, reads as follows :

"A staff member may be required at any time to submit a medical certificate as to his condition or to undergo examination by a medical practitioner named by the Secretary-General. Further sick leave may be refused or the unused portion withdrawn if the Secretary-General is satisfied that the staff member is able to return to his duties, provided that if the staff member so requests the matter shall be referred to an independent practitioner or a medical board acceptable to both the Secretary-General and the staff member."

In its aforesaid Judgement No. 83 the Tribunal further observed that a rule similar to Staff Rule 106.2 (a) (viii) might be appropriate in relation to termination of appointment on health grounds. The Tribunal also noted that, in the same context, the Joint Appeals Board in its conclusions and recommendations had observed as follows :

"In examining this case, the Board formed the opinion that the procedure followed in cases of termination "for reasons of health" would be considerably improved for the benefit of the Administration as well as for that of staff members, if recommendations for termination on health grounds were supported by a joint presentation of the Medical Director of the United Nations Health Clinic and a doctor designated by the staff member. If both doctors are unable to agree upon the "reasons of health" under consideration, a third doctor who might be nominated jointly by the doctors concerned or, upon their request, by the New York County Medical Society, should participate in the final medical consideration of the case."

XII. Since the Tribunal's Judgement No. 83, rendered in 1961, the Staff

Rules in this respect have not been changed. The Tribunal is, however, of the opinion that the actual wording of Staff Rule 106.2 (a) (viii), though drafted only with regard to staff members whose right to sick leave is questioned by the Administration, has a bearing also on the reverse situation where a staff member opposes sick leave ordered by the Administration. While the Administration, as has already been said, cannot be denied the right, in its managing of staff, to order a staff member to stay away from his office on medical indications, it would be inconsistent with the principle of due process underlying Staff Rule 106.2 (a) (viii) if the staff member in question were not able to request that the matter be referred to an independent practitioner or a medical board acceptable to both parties.

XIII. When the Applicant, whose ill-health had led to behaviour in the service of concern to his superiors, was told on 29 September 1961 not to come back to the office without prior approval by the Medical Director, he therefore was bound to comply with the order to stay away from the office. He could, however, have challenged the medical grounds of the order in accordance with a procedure such as prescribed by Staff Rule 106.2 (a) (viii).

The Applicant, without requesting such a further medical examination of his case, chose however to return to his office on 5 October 1961. Confronted with this situation, the Applicant's superiors could have required the Applicant to leave the premises of the United Nations and, in case he did not accept the Medical Director's findings, should have advised him to be examined by his own doctor or an independent practitioner.

XIV. The action resorted to, however, was a different one. The Applicant was given the choice of either being taken to a public mental hospital by force or agreeing to go to a private mental institution. The Applicant yielded to the second alternative, whereupon he was admitted to the private mental institution upon a petition signed by the Medical Director of the United Nations in the latter's official capacity.

XV. The Tribunal observes from the evidence available that nothing in the behaviour of the Applicant, when he reappeared in the United Nations premises on 5 October 1961, indicated that he was in a violent or dangerous mood that would have necessitated such drastic measures. Nor can these measures be considered as having been warranted by the Staff Regulations and Rules. While these must be interpreted as authorizing directed sick leave under conditions which have been outlined above, they contain nothing authorizing the Administration to order a staff member to undergo any special medical treatment. The Tribunal therefore finds that the pressure exercised on the Applicant on 5 October 1961, the result of which was that the Applicant acquiesced under duress to being taken to a private mental institution, constituted an interference in his freedom and private life exceeding what was warranted by his terms of appointment.

XVI. While the Applicant's commitment to the private mental institution must therefore be considered as having violated his contractual rights, such was not the case with his subsequent "repatriation" to his home country, since the Applicant agreed to this measure which was offered to him as an alternative to termination of his appointment on the ground that, when applying for appointment with the United Nations, he had withheld certain information about past psychiatric treatments.

XVII. The Applicant's contention that his contractual rights were violated by the Medical Director's transmission to the Applicant's superiors of such previously

concealed information is of a nature that could give rise to various questions concerning the relationship between the Medical Director and staff members who have to make contact with him in his official function. In this respect, the Tribunal refers to the general recommendations contained in the Joint Appeals Board's report of 30 April 1965 which read as follows :

" While the Joint Appeals Board remains unable to find that the Appellant's rights under his terms of appointment were violated in the present case, the proceedings of the case have convinced the Board of the need for a more precise definition of the responsibilities of the Health Service and other authorities of the United Nations in dealing with circumstances such as those under consideration in the present case. The Board recommends to the Secretary-General that a study be made of the lessons to be drawn from this and similar cases and that appropriate action be taken for the future. The Board remains at the disposal of the Secretary-General for further elaboration of its views on this question. "

The Tribunal, however, in view of the special circumstances of the Applicant's case, as reflected in the Tribunal's previous Judgement No. 86, does not find that any contractual right of the Applicant can be considered to have been violated by the Medical Director's transmission of the information now in question.

XVIII. As to the Applicant's claim for damages, it follows from what has been said above that a question of damages can only arise with regard to the Applicant's commitment to the private mental institution on 5 October 1961. In this respect, the Applicant's main contention is that this action had a devastating effect on his possibilities of securing new employment yielding an income comparable to the one he lost when his appointment with the United Nations expired on 3 January 1962.

The Tribunal finds that any decrease the Applicant's expectations of high income might have undergone was caused not by his commitment to the private mental institution but by the decision not to extend his appointment with the United Nations beyond 3 January 1962. The validity of that decision was recognized by the Tribunal in its Judgement No. 86 on the ground that the Applicant, when applying for appointment with the United Nations, had knowingly given erroneous answers to certain questions concerning his health condition. The manner in which, owing to the Applicant's own conduct, his employment by the United Nations thus came to an end, is more likely to have had a detrimental effect on his future career than the episode of his commitment to the private mental institution.

XIX. Furthermore, the evidence does not allow the Tribunal to reach the conclusion that the treatment given to the Applicant in the private mental institution was wrong and the Tribunal therefore cannot find that the Applicant's stay in the institution gives rise to any damages.

XX. What remains to consider is therefore only the prejudicial effect on the Applicant of the conditions under which his commitment to the mental institution took place. According to the Tribunal's conclusions reached above, this action constituted a violation of the Applicant's contractual rights. The violation was aggravated by the surrounding circumstances, such as the calling in of United Nations guards and of New York Police, the threat to use force, and the omission to immediately inform the Applicant's wife of what was going on.

The Tribunal therefore finds that the action in question caused the Applicant injury in the form of moral prejudice.

XXI. The Tribunal, in earlier judgements, held that, where a party cannot be restored to *status quo ante*, compensation in lieu of specific performance may prove an adequate and proper relief.

This, in the Tribunal's view, applies to the situation arising through the violation of the Applicant's contractual rights now in question. As to the amount of compensation due to the Applicant on this account, the Tribunal finds a sum of one thousand dollars to be appropriate.

XXII. In conclusion, the Tribunal, rejecting all other claims by the Applicant, orders the payment to the Applicant of one thousand dollars.

XXIII. In view of the circumstances of the case, the Tribunal orders that the name of the Applicant be omitted from the published versions of the judgement.

(Signatures)

Suzanne BASTID

President

CROOK

Vice-President

Geneva, 16 March 1966.

Sture PETRÉN

Member

N. TESLENKO

Executive Secretary

Judgement No. 100

(Original : English)

Case No. 101 :

Mély

Against : The Secretary-General
of the United Nations

Termination of the employment of a staff member holding a fixed-term appointment.

Termination ill-founded because the reason of "frequent absences from work", relied upon at the time of termination, was without foundation.—No purpose in pursuing other reasons which were mentioned later and were not brought to the attention of the Applicant at the appropriate time.

Consideration of other claims for compensation.

Claim based on the Applicant's right to expect to continue in the service of the United Nations for a period until normal retirement age rejected.

Claim based on the terms of the Certificate of Service issued to the Applicant rejected.

Claim based on the consequences of withdrawal of the Applicant's residence permit rejected.

Claim based on delay in settling the case rejected.

Award to the Applicant of the total amount of base salary, dependency allowance and non-resident's allowance for the period from the date of appointment to the date of the end of the contract, less the sums already paid.
