Judgement No. 123

(Original: French)

Case No. 115: Roy

Against: **The Secretary General of the International Civil Aviation Organization**

Discharge for misconduct of an ICAO staff member holding a permanent appointment.

Request that the Tribunal order implementation of the recommendations of the Advisory Joint Appeals Board to the effect that the Applicant be granted the indemnity payable in case of termination of a permanent appointment by mutual agreement between the Secretary General and the staff member concerned.—Competence of the Board.—The Board does not confine itself to considering the legality of the contested decision but may propose a different course of action.—The application of the recommendation in question would require certain actions which are within the discretionary powers of the Respondent.—The Tribunal cannot give binding force to such a recommendation.—The request is rejected.

Request for the rescission of the decision to discharge the Applicant.—Article IX and article V, paragraph 6, of part III of the Service Code.—Conditions of notice, investigation and report applicable to discharge.—Obligation to conform strictly to the provisions of the Code and to respect the rights of the defence.—Giving a staff member an opportunity to make representations on the report of his superior an essential part of due process.—The investigating officer did not wait for the Applicant's representations.—In any disciplinary proceedings the staff member must be given a reasonable opportunity to defend himself.—A decision to discharge a staff member, based on an investigation which was not properly conducted, is not justified by the fact that the requirements of due process were met in the Advisory Joint Appeals Board.—The Tribunal concludes that the safeguards provided for in disciplinary proceedings were not afforded the Applicant and that the requirements of due process were not met prior to the decision to discharge her.—The Tribunal remands the case for correction of the procedure.—Award to the Applicant of compensation equivalent to two months' net base salary for all loss caused to her by procedural delay.

Award to the Applicant of $400 as costs.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; Mr. Héctor Gros Espiell; Mr. Francis T. P. Plimpton;

Whereas, on 29 May 1967, Mrs. Irene Lois B. Roy, a former staff member of the International Civil Aviation Organization, hereinafter called ICAO, filed an application to the Tribunal contesting a decision by the Respondent to discharge her from service as a disciplinary measure;

Whereas the application did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, under paragraph 10 of that article, the Executive Secretary of the Tribunal returned it to the Applicant and called upon the Applicant to make the necessary corrections within a period of seventy-five days;

Whereas the Applicant, after making the necessary corrections, again filed the application on 15 August 1967;

Whereas the pleas of the application read:

"The Applicant respectfully requests that the United Nations Administrative Tribunal order and/or take the following measures and decisions, to wit:

"(*a*) No preliminary or provisional measures are requested with respect to the production of additional documents or the hearing of witnesses since the Applicant intends to rely on the documents herewith produced and the findings of fact as reported at length in the judgement of the Advisory Joint Appeals Board. The Applicant requests, however, that an oral hearing be granted in order that she and her counsel may be given an opportunity to present oral arguments and to comment on the evidence adduced before the Tribunal. The Applicant further requests that it be ordered that a sufficient amount of money be advanced to her to meet the necessary expenses for travel and sustenance for herself and her counsel which will be incurred in connection with their appearance before the United Nations Administrative Tribunal in New York for the purposes of this Appeal.

"(*b*) The Applicant is contesting the decision of the Secretary General of the International Civil Aviation Organization rejecting the recommendations of the Advisory Joint Appeals Board. The Applicant also contests the Secretary General's decision to summarily dismiss her for 'misconduct' despite the recommendations made by the Advisory Joint Appeals Board. The Applicant requests that the United Nations Administrative Tribunal rescind the said decision of the Secretary General of the International Civil Aviation Organization and order that the recommendations of the Advisory Joint Appeals Board be implemented, to wit:

(i) The Applicant's contract of employment be terminated by 'mutual agreement', and

(ii) The Secretary General compensate the Applicant for the 'oversevere' action in summarily dismissing her for 'misconduct' by granting her an indemnity at the rate permissible under the ICAO Service Code for a permanent staff member, as prescribed in paragraphs 10.1 and 12, Article V, Part III of the Code, as if the termination had been effected by 'mutual agreement' and not on grounds of 'misconduct'.

"(*c*) The Applicant invokes her status as permanent staff member of the International Civil Aviation Organization and the findings of fact of the Advisory Joint Appeals Board.

"(*d*) The Applicant respectfully requests the following action and compensation:

(i) Rescission of the order of the Secretary General of the International Civil Aviation Organization terminating her contract of employment for 'misconduct' and to authorize the termination of her contract of employment by 'mutual agreement' effective on the date of the United Nations Administrative Tribunal's decision herein;

(ii) Payment of indemnity of nine months' salary as provided for in paragraph 10.1, Article V, Part III of the ICAO Service Code, amounting to $5,010;

(iii) Payment of a further indemnity of an additional 50 per cent provided for in paragraph 12, Article V, Part III of the ICAO Service Code in cases of termination by 'mutual agreement' between the Secretary General and the staff member concerned in the case of a staff member holding a permanent appointment, amounting to $2,505;

(iv) Payment of full salary from the effective date of her dismissal, to wit: 22 July 1966 to the date on which the United Nations Administrative Tribunal hands down its decision authorizing termination on the basis of 'mutual agreement';

(v) An *ex gratia* payment to compensate the Applicant for damages suffered to her reputation by being dismissed improperly for 'misconduct' and to compensate her for future loss of earnings due to being unable to procure other employment. Also to compensate her for losses to be sustained in pension rights due to not being able to complete her service until the date on which she would be entitled to a full retirement pension. The Applicant respectfully requests that this *ex gratia* payment be set at an amount equivalent to two years' salary, that is, the sum of $13,724;

(vi) The Applicant respectfully requests that a reasonable amount be granted to cover her expenses in prosecuting this Appeal; that is to say, expenses incurred in retaining counsel, preparing the documentation, travel expenses of counsel and herself to New York to present the Appeal, as well as sustenance costs while in New York of the Applicant and her counsel in connection with the proceedings. The Applicant requests that the sum to be granted to cover such expenses and legal costs be set at $2,000."

Whereas the Respondent filed his answer on 30 October 1967;

Whereas the Applicant filed written observations on 27 November 1967;

Whereas the Respondent submitted an additional document on 8 October 1968;

Whereas the Tribunal heard the parties and a witness proposed by the Respondent at a public session held on 18 October 1968;

Whereas, at the public session, counsel for Applicant filed an additional document and declared, with regard to the request for costs, that he left it to the Tribunal to fix in its discretion the amount to be granted;

Whereas, on 23 October 1968, the Tribunal informed the parties, pursuant to article 18 of the Rules, that it was considering the possibility of remanding the case in accordance with article 9, paragraph 2, of the Statute of the Tribunal, in order that the required procedure should be instituted or corrected;

Whereas, on 25 October 1968, the Respondent requested that the case be remanded in accordance with article 9, paragraph 2, of the Statute of the Tribunal;

Whereas the facts in the case are as follows:

The Applicant joined ICAO as a stenographer on 26 October 1949 and continued in service until discharged by the Secretary General on the grounds of misconduct with effect from 22 July 1966. By a contract dated 31 July 1958 and governed by the provisions of the ICAO Service Code she was granted a permanent appointment at the G-4 level which was later assimilated to the G-6 level from 1 October 1958. At the time of her discharge from service she was

at step VI of the G-6 level. On 6 June 1966, while performing her duties in the transcript typing unit of the English Section, she was involved in an incident which her supervisor reported as follows in a memorandum of 7 June 1966 addressed to the Chief of the English Section, Language Branch:

"1. I wish to bring to your attention the following brief account of the behaviour of Mrs. Roy, a member of the transcript typing unit on Monday, 6 June 1966. The transcript of an important part of the Council meeting . . . was delayed because of the incidents described below.

"2. Mrs. Roy returned from lunch at 3.00 p.m. although she was perfectly aware that she was due to start her coverage of the Council meeting at 2.30. She appeared late for her second 'take' and addressed the senior transcript typist, Miss Purvis, as a 'lousy . . . pig'. When Miss Purvis came downstairs, immediately after this incident, Miss Simpson showed her how much typing she had done, less than a quarter of a page, and said it had been impossible to do any more owing to Mrs. Roy's outbursts, use of filthy language, saying insulting things about Mrs. Major's appearance, and among other things calling Miss Simpson and Miss Purvis 'shitting whores'. Mrs. Roy was due to cover the meeting again at 5.15 but did not appear.

"3. It should be obvious from the above, and also from her past record, that Mrs. Roy's presence in the transcript typing unit is detrimental to the efficient accomplishment of the work. I am therefore requesting you to bring this report to the urgent attention of C/LAN and Personnel [Chiefs, Language Branch and Personnel Branch], with a view to her immediate release from these duties.

"4. Before the transcript typists were placed in my charge, about one month ago, three other language officers had been successively appointed by you to supervise them. Each of these three, after periods of a few weeks, requested to be relieved of this task. I regret to inform you, in my turn, that I can accept no responsibility for the quality or speed of production of transcripts unless the action described in para. 3 above—in my opinion long overdue—is immediately taken, as a first step towards the organization of the transcript typing unit as an efficient and harmonious team."

On 9 June 1966, the Secretary General communicated a copy of the above report to the Applicant and informed her that he had decided, under paragraph 6, article V and article IX of part III of the Service Code, that an investigation should be conducted in relation to the subject-matter of the report. The inquiry would be conducted by Mr. van Diest, through whom the Applicant would be given an opportunity to make representations to the Secretary General if she so desired on the report. The Secretary General added that under the provisions of paragraph 2, article IX, part III of the Service Code, he had further decided that the Applicant would be suspended from the service while the inquiry was in progress. Mr. van Diest carried out the investigation and submitted his report on 15 June 1966. The section of the report entitled "Findings of the investigation", "Conclusion", and "Recommendations" read as follows:

"*Findings of the investigation*

"7. It is clear that Mrs. Roy bears considerable ill feelings regarding

"(*a*) The physical working conditions of the transcription typists;

"(*b*) Her inability to obtain a transfer;

"(*c*) The so-called 'unfairness' of the adverse reports and the 'unsporting' attitude of her superiors; and

"(*d*) The resentment of the designation of a staff member with less seniority as leader of the team of transcription typists.

"8. Having heard the testimony of the staff members either directly or indirectly involved, it is believed that Mrs. Roy lost her temper and in her manner of speech used the defamatory expressions of 'lousy . . . pig' and 'shitting whores'.

"9. In my opinion, the incident as described in paragraph 2 of Mr. Bidmade's report of 7 June 1966 is factual.

"10. Although Mrs. Roy categorically denies the usage of defamatory expressions, it should be noted that during the interview on 10 June 1966, she referred to Miss Purvis as 'that little fart'. At the time that the remark was made, Mrs. Roy was emotionally composed and perfectly aware of the gravity of the situation resulting from her alleged use of coarse language.

"*Conclusion*

"11. Upon basis of the evidence heard regarding the incident of 7 June 1966 and—upon personal experience—it is believed that Mrs. Roy used expressions which are offensive, improper and indecent and it is my opinion that they cannot be adjudged otherwise by any generally accepted standards and precepts of propriety. It is therefore concluded that Mrs. Roy should be disciplined.

"*Recommendations*

"12. Three months prior to the incident of 7 June 1966, the disciplinary measure of admonition was imposed upon Mrs. Roy 'on the grounds that the general tone of her comments in [a] memorandum addressed to Chief, Personnel on 28 June 1965 is offensive, disrespectful and entirely improper'.

"13. The decision to impose the disciplinary measure of admonition was based on the investigation conducted by Mr. A. D. Hayward and his report of 8 February 1966 deals with the matter. In this report a resumé is given of Mrs. Roy's service history, together with a commentary on the three adverse reports on Mrs. Roy, her efforts to obtain a transfer and the general working conditions associated with verbatim reporting in ICAO. The findings of Mr. Hayward remain valid. However, the undersigned finds that.

"(*a*) The use of defamatory language coupled with

"(*b*) Mrs. Roy's reported unco-operativeness and unsuitability for teamwork, together with

"(*c*) Her inability to qualify for an alternative assignment in the Secretariat

are sufficient grounds for the termination of Mrs. Roy's appointment.

"14. In considering my recommendation for disciplinary action and in restricting my recommendations to the incident of 7 June 1966, I would have been inclined to suggest the imposition of a written censure. However, this incident is not an isolated case but in reality a culmination of a generally unsatisfactory service record resulting in three adverse reports and an

admonition. The incident of 7 June 1966 is also a repetition of the misdemeanor for which an admonition was imposed on 3 March 1966. In view of

"(*a*) The seriousness of the case and

"(*b*) Mrs. Roy's flagrant disregard of the propriety of speech it is recommended that the disciplinary measure of DISCHARGE be imposed under the provisions of Articles V and IX, Part III of the Service Code and with reference to General Secretariat Instruction 1.4.5, para. 2 (*d*)."

On 17 June 1966, in a letter addressed to the Secretary General, the Applicant replied to the allegations made in the report of her supervisor dated 7 June 1966 and denied having used the expressions attributed to her. She also suggested that if, in the Secretary General's opinion, the interests of the Organization would best be served if she were to leave the Organization, she might do so by mutual agreement with the Secretary General and subject to the indemnities under paragraphs 10.1 and 12 of article V, part III, of the Service Code, namely, nine months' salary under paragraph 10.1 plus any further indemnity the Secretary General might wish to grant, at his discretion, after giving due consideration to her case, in view of the fact that she had a permanent contract, had been with the Organization seventeen years, and also the fact that she was innocent of using the impolite expressions as charged. On 22 June 1966, however, the Secretary General advised the Applicant that, pursuant to the investigation which had been conducted and after having considered the representations made by her in her letter dated 17 June 1966, he had decided, under paragraph 6, article V, part III and article IX, part III of the Service Code, to impose upon her the disciplinary measure of discharge from the service for misconduct, effective on 22 July 1966, and that he had further decided that up to the effective date of such discharge the Applicant would be relieved from active duty and placed on special leave with pay. The Applicant having requested on 5 July 1966 a review of that decision, the Secretary General informed her on 8 July 1966 that he had reviewed the matter and had found no grounds to alter his original decision. On 19 July 1966 the Applicant filed an appeal with the Advisory Joint Appeals Board, which gave its Opinion (No. 30) on 22 February 1967. The sections of the Opinion entitled "Findings", "Conclusions" and "Recommendation" read as follows:

"*Findings*

"23. From an examination of the written material and the oral evidence given by the Appellant, and Misses I. K. Purvis and J. Simpson, the Board arrived at the following findings of fact:

"(1) Verbatim reporting, or transcript typing (a later designation) which essentially remains the same, involves considerable tension and working under pressure during periods when meetings of the Council and its subsidiary bodies are in progress.

"(2) The physical conditions under which such personnel work, such as in open cubicles in close proximity with each other, had an effect in setting up irritations which are not very helpful in promoting a spirit of co-operation and team-work so essential to the work of this type.

"(3) There was an absence of a true hierarchical set up within the circle of the verbatim reporters in that there was no person amongst them who had been given the full responsibility to maintain discipline, to direct how the work was to be carried out, etc.

"(4) Outbursts of temper amongst members of the Unit were not uncommon.

"(5) The work-load seemed to have increased in the last few years.

"(6) The Appellant had a forthright, unrepressed and garrulous personality which was specially evident under stress and excitement, and she was admittedly temperamentally unsuitable for the type of work in which she was engaged.

"(7) No serious attempt had been made by the administration over a period of years to find an alternative assignment for the Appellant in spite of the many and persistent requests made by the latter, and the very clear suggestion in this regard made by Mr. Hayward in paragraph 20 of his report and repeated in the last paragraph of his covering memorandum to the said report.

"(8) At the time of the incident of 6 June 1966, the verbatim reporters had been suffering from exceptional pressure of work.

"(9) There was a misunderstanding in regard to the Appellant's place in the roster for the day, the evidence being conflicting on this point.

"(10) The Appellant had an altercation with Miss Purvis on the afternoon of the day in question, and felt unjustly treated.

"(11) The Appellant did use certain words in argument with Miss Purvis which could not be determined with any exactitude, but which were apparently said in temper and were offensive to a degree.

"(12) The Appellant uttered some words in the presence of Miss Simpson, which were not addressed to anyone in particular but the nature of which could not be definitely ascertained due to conflicting testimony, Miss Simpson recalling, before the Board, that they were 'shitty whores' while the Appellant denied the assertion saying that she had used the term 'horrors'.

"*Conclusions*

"24. From the findings of facts recorded above, it clearly emerges that the blame for all that happened on 6 June 1966 could not be squarely and fairly laid solely on the Appellant, but that a great part of it must be borne by the administration which:

"(*a*) Should have been perfectly aware of the over-wrought and tense conditions prevailing amongst the verbatim reporters (or transcript typists) due to the physical conditions in which they worked, the tempo and nature of their work, etc.;

"(*b*) Turned a blind eye to the fact of unsuitability of the Appellant for the work she had been assigned since 1958 in spite of having received many reminders by way of annual reports, memoranda, etc.;

"(*c*) Failed to take any effective action on the many requests made by the Appellant to have herself transferred from the English Section to other duties;

"(*d*) Took no measures to remedy the situation, including the possibility of termination of the Appellant's services by mutual agreement as permitted under paragraph 12, article V, of the Service Code; and

"(*e*) Ignored the clear and unambiguous recommendation made by Mr. Hayward a few months before the events of 6 June 1966 which precipitated the final crisis.

"25. Furthermore, there is no completely clear picture of the events that happened on 6 June 1966, which led to the Appellant being dismissed at a later date. The testimony is conflicting, of interested parties, and it has not been established beyond doubt that the terms of abuse had been used exactly as alleged.

"26. The Board further concludes that some offensive words were spoken on the day in question by the Appellant who undoubtedly lost her temper under circumstances in which she felt to have been unjustly treated. These words, however, were uttered amongst colleagues, the less offensive term having been employed in the presence of Miss Purvis, who, moreover, the Board does not consider to be the 'superior' of the Appellant, but only as the transcript typist who had been delegated very limited responsibility for organizing the work of the Unit by the true 'superior', namely, Mr. R. Bidmade. The Board therefore considers that no insubordination was involved.

"27. Taking into account (i) the tense atmosphere in which the transcript typists normally worked under trying conditions; (ii) the special pressure of meetings in the weeks previous to the incident; (iii) the acknowledged temperamental unsuitability of the Appellant for the type of work she was doing; (iv) the absence of a proper roster in respect of the duties assigned for the day in question, or the late publication of the same; and (v) the probability of provocation during an exchange of hot words between the Appellant and Miss Purvis, the Board concludes that the words attributed to the Appellant, although well-justifying disciplinary action, did not amount to such a serious breach of decorum or propriety as to have validly attracted the extreme penalty of discharge of the Appellant for misconduct with all its concomitants such as loss of employability, and deprivation of full indemnity and right to draw a pension after about seventeen years of service, of which at least nine years were considered to be satisfactory, and the rest also 'generally satisfactory' (please see the certificate of service dated 6 February 1967 given to the Appellant: Enc. 198 of the Personal File), apart from the stigma attached to a discharge from service for misconduct. The penalty awarded to the Appellant is therefore considered to be quite disproportionate to the lapse which really amounted to letting off pent-up emotions while under great stress and an abiding long-standing sense of frustration.

"28. In respect of the preceding conclusion, the Board finds it pertinent to observe that apart from the over-severity of the penalty recommended by the Investigating Officer, Mr. van Diest, in his report of 15 June 1966, it seemed questionable to the Board that an investigation of the nature visualized in paragraph 4, article V, part III, or under article IX, part III, of the Service Code, should be deemed to include an authorization to the Investigating Officer to give administrative recommendations in matters of such serious import. Normally an investigation in such matters should be confined to an inquiry into the facts of the case, resulting in a finding of facts to be submitted to the Secretary General who may thereby be enabled to decide on the measure of punishment or penalty that such a finding may call for. Unless the Secretary General specifically asks in a particular case, a gratuitous recom-

mendation is, in the view of the Board, quite uncalled for, especially since a person making the recommendation, however fair and discriminating in reaching a finding of facts, may be quite without high and adequate administrative experience in personnel management which alone could give validity and force to his recommendation. The recommendation made by Mr. A. D. Hayward in the earlier incident was quite another matter because there he had been specially asked by the Secretary General to make recommendations, after due investigation, as to what disciplinary measure should be taken in respect of Mrs. I. Roy.

"*Recommendation*

"29. In view of the findings and conclusions stated above, the Board recommends that the Secretary General should rescind his decision of 22 June 1966 discharging the Appellant from service. Should this recommendation be unacceptable for administrative reasons, the Board recommends that the Secretary General should compensate the Appellant for the over-severe action taken against her by granting her indemnity at the rate permissible under the Code for a permanent staff member as prescribed in paragraphs 10.1 and 12, article V, part III of the Code, as if the termination had been effected by 'mutual agreement' and not on grounds of misconduct."

On 1 March 1967 the Secretary General rejected the Board's recommendation and on 29 May 1967 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision of the Secretary General is unfounded in fact and in law and the procedure employed by him and his delegates is irregular and in violation of the Staff Rules and the basic principles of natural justice, particularly in view of the following:

(*a*) No "due investigation" was conducted by Mr. van Diest;

(*b*) The investigation was conducted in the absence of the Applicant;

(*c*) The Secretary General improperly ignored the findings of fact made by the Advisory Joint Appeals Board;

(*d*) The punishment meted out by the Secretary General is unwarranted by the facts adduced and their evaluation by the Advisory Joint Appeals Board;

(*e*) The investigating officer improperly went beyond his jurisdiction and terms of reference when he recommended certain disciplinary action; he introduced improperly into his report a subjective note which evidenced personal bias against the Applicant, and he was unqualified for the task assigned to him;

(*f*) The Applicant's permanent contract could not be terminated except for the specific grounds contained in the Service Code.

2. The contested decision is also an infringement of many of the rights set forth in the Universal Declaration of Human Rights, more particularly in that:

(*a*) The punishment meted out to the Applicant shocks the conscience, is contrary to that spirit of brotherhood referred to in the Declaration and must be considered cruel, inhuman and degrading;

(*b*) The Applicant can only be dismissed for a breach of the regulations or a cause specified in the Service Code;

(*c*) The Secretary General has not exercised his discretionary powers reasonably and within the bounds laid down by the regulations and principles of fundamental justice;

(*d*) The investigating officer did not conduct his inquiry fairly and properly;

(*e*) Everyone has the right to be presumed innocent until proved guilty, and the Board found that the charge of using filthy language was not proven;

(*f*) The alleged use of improper language does not constitute an offence under the regulations; nor does it constitute a misconduct in the exercise of one's duties or service;

(*g*) The arbitrary dismissal results in a substantial financial loss; therefore, the Applicant is arbitrarily deprived of her property;

(*h*) The organization disregarded the Declaration by imposing upon its staff members uncomfortable conditions of work and unusual periods of overtime.

3. "Misconduct" obviously means conduct of a flagrant and reprehensible nature or a deliberate breach of specific obligations.

4. The alleged "misconduct" has nothing to do with the Applicant's duties as a verbatim reporter.

5. In weighing the gravity of the alleged misdemeanour, the Secretary General overlooked all the extenuating factors referred to by the Board as well as the Applicant's long and generally satisfactory service.

Whereas the Respondent's principal contentions are:

1. The incident of 6 June 1966 cannot be considered in isolation. The Applicant's unbecoming behaviour had been a source of difficulties for several years and adversely affected the working relationships with her colleagues. The Organization was aware that she was unsuited for team-work, but all efforts to reassign her to other duties were unsuccessful.

2. The Applicant was given full opportunity to make any representations she might wish to make.

3. The investigating officer was appointed by the Secretary General under paragraph 6, article V, part III of the Service Code. He was asked by the Secretary General to *investigate* and *report* on the conduct of the Applicant. Thus, it was perfectly within his jurisdiction to make a recommendation without which his report would have been incomplete, and no extraneous matters or personal bias were introduced into the report by the conclusion that the incident of 6 June 1966 was a culmination of a generally unsatisfactory service record.

4. The Applicant's contention that she never used the filthy terms of abuse is in flat contradiction of testimony given before the Advisory Joint Appeals Board by a third party.

5. The provisions of the Universal Declaration of Human Rights invoked by the Applicant are mostly quoted out of any logical context and reference to them is irrelevant.

6. The Applicant was discharged for misconduct in accordance with paragraph 6, article V, part III, and article IX, part III, of the Service Code after due investigation and evaluation of her conduct on the occasion in question as well as over several years. She had been reminded several times in the past that her unbecoming behaviour, quarrelsomeness and attitude towards others created difficulties for the smooth running of the work. The incident of 6 June 1966 was a culmination of her generally unsatisfactory service record. The Secretary General is responsible for the smooth running of the work of the Secretariat and harmonious working relationships are a basic condition for efficient work. The use of coarse and filthy language cannot be tolerated in the Secretariat and is inconsistent with the standard of conduct to be observed by international civil servants.

The Tribunal, having deliberated until 31 October 1968, now pronounces the following judgement:

I. The Applicant requests that the Tribunal rescind the Respondent's decision of 1 March 1967 confirming his decision of 22 June 1966 to terminate her permanent appointment by discharge under article V, paragraph 6, and article IX of part III of the Service Code.

She further requests that the Tribunal order implementation of the recommendations of the Advisory Joint Appeals Board essentially to the effect that she be granted the indemnity payable under article V, paragraph 12, of part III of the Service Code in case of termination of a permanent appointment by mutual agreement between the Secretary General and the staff member concerned.

The Tribunal notes that the Board, under article X of part III of the Service Code, has specific competence to consider an order of discharge following an investigation conducted in accordance with article V, paragraph 5. The Board must submit its findings and recommendations to the Secretary General. The Board does not confine itself to considering the legality of the decision; it examines all aspects of the situation and inquires into the circumstances in which the events leading to the discharge arose and may propose a course of action different from that originally adopted by the Respondent, for reasons which may be legal but also for reasons of administrative policy.

In the present case the Board's first recommendation was that the contested decision should be rescinded but it also proposed an alternative solution which would take into account its own findings in the case. This solution would not be a necessary consequence of rescission: its application would require certain actions which are within the discretionary powers of the Respondent. The Tribunal cannot, within the competence assigned to it by its Statute, give binding force to such a recommendation of the Advisory Joint Appeals Board.

The requests to this effect must be rejected. The Tribunal will confine itself to considering the requests concerning the legality of the decision to discharge the Applicant.

II. The discharge of the Applicant was decided upon in application of article IX and article V, paragraph 6, of part III of the Service Code. Article IX provides:

> "Disciplinary measures deemed to be necessary for the good functioning of the Organization may be imposed on any staff member by the Secretary General."

This article states that "discharge" is to be imposed "in accordance with conditions detailed in these regulations".

The article applied in the Applicant's case was article V, paragraph 6, concerning discharge.

The Tribunal notes that in the French text of the Service Code (fourth edition, effective 1 January 1965) article V, paragraph 6, concerning discharge, refers to "*faute grave ou . . . négligence dans son service*", whereas article V, paragraph 7, concerning summary dismissal, refers to "*faute grave*".

The English text of these provisions uses the following expressions: "misconduct or inattention to duties" (article V, paragraph 6) and "serious misconduct" (article V, paragraph 7).

There are other discrepancies between the two texts of article V, paragraph 5.

The Tribunal, having regard to the explanations furnished at its request by the Respondent, considers that the Respondent based his decision on the English text and that the application must be considered on the basis of that text.

III. Under article V, paragraph 6, of part III of the Service Code, the imposition by the Secretary General of discharge is subject to the conditions of notice, investigation and report applicable to discharge for unsatisfactory service under paragraphs 4 and 5 of that article.

Those paragraphs provide that the Secretary General's decision is to be made after due investigation. The investigation must be conducted on the basis of a written report by the immediate superior or superiors of the staff member concerned, who is to be given an opportunity to see the report and to make representations thereon to the Secretary General. The English text of article V, paragraph 5, reads as follows:

> "The investigation required by paragraph 4 shall be conducted on the basis of a written report by the immediate superior or superiors of the staff member concerned, who shall be given an opportunity to see the report and to make representations thereon to the Secretary General."

IV. The Tribunal notes that the Service Code does not specify by whom the investigation is to be conducted and the conclusion to be drawn is that the Respondent has wide discretion in the matter. He may, as he did in this case, choose a staff member of long service to conduct the investigation.

The Applicant has disputed the qualifications of the person chosen to conduct the investigation. The Tribunal considers that no tenable objection has been advanced.

The Applicant further contends that the investigating officer exceeded his powers by recommending a specific disciplinary measure. The Tribunal observes that a recommendation which is not binding on the Secretary General may be considered as a natural conclusion to the investigation.

V. The Tribunal finds that the procedure laid down by the Service Code for discharge as a disciplinary measure constitutes an essential safeguard for staff members having a permanent appointment. This procedure must conform strictly to the provisions of the Code. Moreover, even in the absence of a specific provision, such procedure, to constitute due process, must respect the rights of the defence.

VI. The Tribunal notes that article V, paragraph 5, provides that the investigation shall be conducted on the basis of a written report by the immediate superior of the staff member concerned, who shall be given an opportunity to see the report and to make representations thereon to the Secretary General.

In the present case, the report made on 7 June 1966 by the Applicant's superior dealt mainly with the incidents of 6 June 1966; reference was made in it, however, to the past record of the Applicant. The report requested "her immediate release from these duties" [in the transcript typing unit].

This report was communicated by the Respondent to the Applicant with the letter notifying her of the investigation. The Respondent stated that the investigation would be conducted by Mr. van Diest, through whom the Applicant could communicate to the Secretary General any representations she wished to make on the report.

Whether the representations of the staff member concerned on the report of his superior should be made to the Secretary General before he orders an investigation is open to question. It would seem reasonable that the Secretary

General should not be able to take the decision to carry out an investigation which might lead to discharge until he has received the representations of the staff member concerned.

In any event, there is no doubt that giving a staff member an opportunity to make representations on the report of his superior is an essential part of due process. This opportunity should be given to him under reasonable conditions concerning the form of the representations and the period within which they are to be made.

VII. On 9 June 1966 Mr. van Diest wrote to the Applicant informing her that the investigation would begin on the following day and requesting her to present herself on that day.

The Applicant was accordingly interviewed by Mr. van Diest on 10 June.

The report of the investigation states that the Applicant expressed the wish to submit a written reply "to the accusations" and that it was agreed that the Applicant would be interviewed again on 13 June at 9.30 a.m.

The investigation report states that she telephoned to apologize for not having come and that towards the end of the afternoon on 13 June, the Applicant having told Mr. van Diest on the telephone that she was not able to prepare herself immediately, "it was agreed that she would be ready within a few days".

The Tribunal considers that the investigating officer, by this action, undertook to wait for a reasonable period for the Applicant to make her representations, as provided by the Service Code.

What is meant by a period of "a few days" is open to question. In any case, the Tribunal considers that, as the report was signed on 15 June, the agreement reached in the late afternoon of 13 June was not fulfilled. The report was drawn up and discharge recommended without the Applicant's having made representations to the person appointed by the Respondent to receive them.

The Applicant's representations were sent to the Respondent on 17 June. The decision to discharge her was taken on 22 June; it explicitly mentions those representations.

The Tribunal notes that the recommendation concerning discharge in the investigation report was followed by the Respondent. However, as stated earlier, the haste with which the investigation report was drawn up was such that the requirement in article V, paragraph 5, concerning the representations to be made by the staff member concerned on the report of her superior could not be fully met.

In any disciplinary proceedings the staff member must be given a reasonable opportunity to defend himself. In this case, the Applicant knew that Mr. van Diest had before him not only the report on the incident of 6 June but her entire service record, including the report made on her on 8 February 1966 by Mr. Hayward, which recommended a disciplinary measure—admonition—for the offensive, disrespectful and entirely improper tone employed in her memorandum addressed to Chief, Personnel Branch, on 28 June 1965 on the subject of her periodic reports.

In fact, the investigating officer's recommendations were based not only on the report of the Applicant's superior, who confined himself to requesting that the Applicant should be transferred, but on her entire service record. In these circumstances, the investigation should have been conducted in such a way as

to give the Applicant an opportunity of giving a full explanation, orally and in writing, since she had expressed a wish to do so.

VIII. The Applicant has made other criticisms of the investigation. The Tribunal will confine itself to observing that neither in the investigation report nor in the report of her superior was any effort made to clarify the circumstances in which the events of 6 June took place or to ascertain whether or not the Applicant's statements concerning the reasons for her lateness were true. The Advisory Joint Appeals Board found that in this matter the testimony of those concerned was conflicting and that it had not been established beyond doubt that the terms of abuse had been used exactly as alleged.

The question of the language used by the Applicant was, however, one on which the investigating officer concentrated; he also saw fit to mention an expression used by the Applicant during the investigation itself. Moreover, the offensive language used by the Applicant was specifically mentioned, as a ground for his action, in the Respondent's decision of 1 March 1967 to reject the recommendation of the Board; in fact, it was the only ground mentioned by him, since the decision of 22 June 1966 to discharge her makes no reference to the ground or grounds on which it was based.

IX. The Tribunal recognizes that the Respondent must necessarily have wide discretionary powers in determining in a specific case whether there has been misconduct.

In this case, the report of the investigating officer was not confined to considering the conduct of the staff member; her service record was mentioned, either in a general way or in connexion with the impossibility of transferring her to another department.

By finally asserting the decisive role of the offensive language in justifying his decision, the Respondent disregarded the report of the investigating officer, which expressed the view that the incident of 6 June, in isolation, did not justify discharge.

The Tribunal recognizes, however, that, under the Service Code, the report of the investigating officer is not binding on the Respondent, who retains his discretionary powers and may use the conclusions submitted to him in accordance with his own judgement.

On the other hand, it is the right of the staff member concerned that the investigation report should not be drawn up until his right to make representations concerning the complaints made against him has been scrupulously respected.

The Tribunal finds that this was not the case and concludes that the procedure laid down by the Service Code was not correctly followed.

X. The Tribunal recognizes that the Applicant was afforded due process before the Advisory Joint Appeals Board. She was able to explain her case fully, in person and through her counsel, and to confront the witnesses called by the Respondent.

As a result of this procedure, the Board found, *inter alia*, that certain facts had not been established beyond doubt and it submitted a recommendation that

the decision made following the investigation should be rescinded or an indemnity granted. The Respondent, however, maintained the decision to discharge the Applicant.

The decision to discharge the Applicant, based on an investigation which was not properly conducted under the provisions of the Service Code, cannot be justified by the fact that the requirements of due process were met in the Advisory Joint Appeals Board, inasmuch as the decision maintaining the discharge was not in accordance with the Board's conclusions.

The Tribunal observes that the Board, while noting the violations of the rights of the defence during the investigation, devoted itself mainly to considering the complaints made against the Applicant and gave its own judgement on them.

The Tribunal is not called upon to judge the conduct of the Applicant, the degree of gravity to be attributed to her offensive language or any explanations which may be given in that respect.

The Tribunal does, however, conclude that the safeguards provided by the Service Code in disciplinary proceedings were not afforded the Applicant and that the requirements of due process were not met prior to the decision to discharge her.

XI. The Tribunal having taken action under article 18 of its Rules, the Respondent requested that the case be remanded for correction of the procedure. Without determining the ultimate merits of the case, the Tribunal remands the case for correction of the procedure provided for in article V, paragraph 5, of part III of the Service Code.

XII. Under paragraph 2 of article 9 of the Statute, should the Tribunal order the case remanded for correction of the required procedure, it may order payment to the Applicant of compensation not to exceed the equivalent of three months' net base salary. Having regard to its conclusions, the Tribunal awards to the Applicant compensation equivalent to two months' net base salary for all loss caused to her by procedural delay.

XIII. The Applicant has requested that she be granted $2,000 for costs. The Tribunal notes that the Respondent has paid the travel expenses and subsistence costs of the Applicant and her counsel incurred in connexion with the oral proceedings requested by the Applicant.

The Tribunal notes that it was open to the Applicant to be represented by a staff member of the Organization acting as counsel.

The Tribunal, having regard to its resolution of 14 December 1950, and considering the nature and circumstances of the case, orders the Respondent to pay the sum of $400 as costs.

XIV. The Tribunal, without deciding the merits of the case, orders that:

(1) The case be remanded for correction of the procedure in accordance with article 9, paragraph 2, of the Statute of the Tribunal;

(2) The Applicant be paid as compensation a sum equivalent to two months of her net base salary for the loss caused to her by the procedural delay; and

(3) The Applicant be paid $400 as costs;

(4) All other pleas are rejected.

(*Signatures*)

Suzanne BASTID
President

Francis T. P. PLIMPTON
Member

H. GROS ESPIELL
Member

Jean HARDY
Executive Secretary

New York, 31 October 1968.

Judgement No. 124

(*Original: English*)

Case No. 111: Kahale

Against: **The Secretary-General of the United Nations**

Request for the rescission of a decision discontinuing an assignment allowance retroactively.

Argument drawn by analogy with Staff Rule 103.15.—Absence of rules providing prescriptive limitations on claims by the Respondent against staff members.—Considerations of equity.—Contention that the proceedings of the Joint Appeals Board were invalid.—No illegality found.

Examination of the merits of the case.—Entitlement to the assignment allowance was contingent on the family's remaining at the duty station.—Staff Rule 103.21 (a).*—Question whether, having temporarily left the duty station to join the Applicant on mission, his family should be considered as having continued to reside there.—By continuing to pay the allowance without objection, the Administration admitted that the family of the Applicant had not really left the duty station in any substantive sense.—Underlying purpose of assignment allowances.*

Rescission of the contested decision.—Restitution to the Applicant of the amount deducted from his salary as a result of the contested decision.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; Mr. Louis Ignacio-Pinto; Mr. Francis T. P. Plimpton; the Lord Crook, Vice-President, alternate member;

Whereas, on 16 February 1967, Georges Kahale, a staff member of the United Nations, filed an application to the Tribunal concerning payment of an assignment allowance;

Whereas the application did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, under paragraph 10 of that article, the Executive Secretary of the Tribunal returned it to the Applicant and called upon the Applicant to make the necessary corrections not later than 10 March 1967;