

(Signatures)

R. VENKATARAMAN

President

Francis T. P. PLIMPTON

Vice-President

New York, 7 October 1975

Roger STEVENS

Member

Jean HARDY

Executive Secretary

## Judgement No. 204

(Original: French)

Case No. 180:  
Mila

Against: The Secretary-General  
of the United Nations

*Termination of the employment of a staff member holding a permanent appointment on the ground of unsatisfactory service.*

*Correction of the procedure in application of Judgement No. 184.*

*Preliminary consideration of the Applicant's requests concerning the production of various documents.—Request for the production of the typed transcript of the tape recording made during the meetings of the Appointment and Promotion Panel.—The practice of the Tribunal when it is called upon to consider in a given case the advisory procedure which preceded the contested decision is to do so on the basis of the report of the advisory body concerned.—No ground for the Tribunal to hear the tape recording.—Request rejected.—Request for the production of the Applicant's personal history form and fact-sheet communicated by the Respondent to the specialized agencies.—Request rejected, the production of those documents not being directly related to the pleas filed with the Tribunal.—Request for production of the note communicated to the Joint Appeals Board by the Applicant's counsel concerning the Board's competence.—Request rejected because it is without purpose.*

*Consideration of the complaints of the Applicant concerning the procedure followed subsequent to Judgement No. 184.—Complaints concerning the composition of the Panel.—Fact that the Respondent included among the five members of the 1974 Panel four members of the 1972 Panel.—In the absence of legal provisions, the composition of an administrative body whose task is to advise the Secretary-General falls within the competence of the latter.—In this case, no general legal principle compelled the Secretary-General to exclude a given person, at least in so far as the procedural defects noted were not related to the conduct of that person.—Complaints concerning the decision of the Joint Appeals Board stating that it was not competent.—Since the Applicant does not request that the case be remanded to the Board and the Respondent has accepted direct recourse to the Tribunal, there is no need for the Tribunal to take a decision on the legality of the conduct of the Board.—Complaints concerning the proceedings before the Panel.—Consideration of the Panel's report.—Conclusion of the Tribunal that the Panel carried out a thorough, searching and balanced review of the Applicant's standards.*

*Consideration of the decision taken by the Respondent consequent upon the Panel's report.—The system of five-year review of permanent contracts.—Cases in which a permanent contract may be terminated.—Complexity of the Applicant's case in the light of the recommendations of the Panel.—Consideration of the legality of the decision.—It cannot be said that the decision draws clearly mistaken conclusions from the dossier.—A decision cannot be rescinded on the basis of an equivocal formula.—Contention of the Applicant that the procedure of reviewing his contract concealed a disciplinary measure so that it would be subject to less strict rules.—Distinction between "services" and "conduct".—No misuse of procedure can be imputed to the Respondent.—Lapses in procedure and administrative short-comings*

*in the handling of the case.—Conclusion of the Tribunal that even if the Respondent was entitled to take his decision, the treatment of the Applicant in the period preceding his termination was not in conformity with the administrative rules in force or the basic principles of good administration.*

*Impossibility of restoring the status quo ante.—Award to the Applicant of compensation in the amount of 15,000 Swiss francs for the damage sustained by him as a result of the irregularities committed by the Respondent.—Award to the Applicant of \$700 as costs.*

#### THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Francisco A. Forteza; Sir Roger Stevens;

Whereas, on 8 January 1974, Giovanni Mila, a former staff member of the United Nations, filed with the Tribunal an application contesting the Respondent's decision to terminate his permanent appointment;

Whereas, without pronouncing on the merits of the case, the Tribunal decided, by its Judgement No. 184, of 24 April 1974 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 compensation equivalent to three months' net base salary for the loss caused him by the procedural delay;

(3) The Applicant be paid \$800 as costs;

Whereas, on 8 May 1975, the Applicant filed an application the pleas of which read:

"A. The Applicant respectfully requests the President of the Administrative Tribunal to order oral proceedings, in view of the complexity of the developments relating to this case and the highly contestable character of the evidence submitted by the Respondent.

"B. The Applicant also requests the Administrative Tribunal to order the Respondent to produce during the proceedings the typed transcript of the tape recordings of the testimony of the witnesses heard by the Appointment and Promotion Panel during the course of its last inquiry.

"C. The Applicant respectfully requests the Administrative Tribunal to order the rescission of the contested decisions of the Respondent of 1 November 1973 and 1 November 1974 terminating the Applicant's permanent contract and to condemn the Respondent to pay the Applicant the salary to which he would have been entitled if he had remained without interruption in the service of the United Nations from the date of his termination until the date when the future judgement is pronounced, at a net rate of 1,926.13 Swiss francs per month, minus the compensation in an amount equivalent to seven months' salary (i.e. 13,482.91 Swiss francs) already paid and the wages earned by the Applicant in his new employment from the date of his recruitment to the date of the future judgement [these amounts will be calculated in detail in the near future]; to condemn the Respondent also to pay the Applicant, as damages for the unjustified breach of his permanent contract, the equivalent of three years' net salary, i.e.  $(1,926.13 \text{ Swiss francs} \times 12) = 23,113.56 \text{ Swiss francs} \times 3 = 69,340.68 \text{ Swiss francs}$  (sixty-nine thousand three hundred and forty point 68 Swiss francs); plus moratory interest at the rate of 7 per cent on the aforementioned amounts from the date on which the judgement is pronounced; to condemn the Respondent also to reimburse to the Applicant the honoraria and expenses of his counsel and representative, evaluated, subject to modification, at 4,000 Swiss francs.";

Whereas the Respondent filed his answer on 25 June 1975;

Whereas the presiding member decided on 5 September 1975 that no new oral proceedings would be held in connexion with the case;

Whereas, on 8 September 1975, the Applicant filed written observations including the following pleas:

“... the Applicant requests the Tribunal

“(i) to order the Respondent to produce the typed transcript of the tape recording of the second five-year review carried out by the Panel;

“(ii) to order the Respondent to produce the certified copies of the Applicant's personal history form and fact sheet communicated by the administrative services of the Respondent to the specialized agencies;

“(iii) to order the Respondent to arrange for the secretariat of the Geneva Joint Appeals Board to produce the note communicated on two occasions to that secretariat (the second time by registered mail) on the question of the competence of the Joint Appeals Board to consider the Mila case (see Annex 37 (a));

“(iv) In any event, to order oral proceedings for the presentation of oral arguments.

“The Applicant also requests that he be allowed to prove, by all legal means including oral testimony:

“(i) That the Geneva Appointment and Promotion Panel was subject to the preponderant influence of the Geneva Administration, especially during the two five-year reviews of the Applicant's permanent contract;

“(ii) That certain members of the 1974 Panel were unduly influenced and induced to accept the conclusions proposed by the President and the two members representing the Respondent because they were certain that the Respondent would reinstate the Applicant;

“(iii) That since October 1974 the Respondent has had several opportunities to reinstate the Applicant in posts corresponding to his grade and aptitudes and has not done so, contrary to his affirmations.

“Lastly, the Applicant requests the Tribunal to rescind the contested decision of 10 August 1972, to order the reinstatement of the Applicant and, if the Respondent fails to reinstate him, to grant the Applicant compensation in the amounts indicated in paragraph 46 (i) to (v).”

\*This paragraph reads as follows:

“46. The rescission of the contested decision to terminate necessarily implies the reinstatement of the Applicant and the reconstitution of his administrative career. Since the Respondent has already shown without any possible doubt that he refuses to reinstate or re-employ the Applicant, it is necessary to determine the amount of compensation he should receive for the injury sustained.

“(i) The first element of this injury consists in the salary in Swiss francs which the Applicant would have received in the period between his termination and the date of the judgement to be pronounced, taking into account annual within-grade increments and changes in the salary scale, minus the termination indemnity already paid and the wages earned by the Applicant with other employers since the date of his termination by the Respondent.

“(ii) The second element of the injury consists in the contributions which the Respondent should have paid to the United Nations Joint Staff Pension Fund in the period between the termination and the date of the judgement to be pronounced, it being understood that the Respondent would be obliged also to pay to the Pension Fund any difference between the amount of his own contributions and those of the Applicant and the actuarial value required by the Pension Fund to re-establish retroactively the Applicant's rights.

“(iii) Compensation equivalent to three years' salary, on the basis of the current salary scale in Swiss francs. There are in this case exceptional elements justifying the grant of such compensation.

Whereas, on 16 September 1975, the Applicant filed additional written observations in which he quantified the injury he had sustained, which he evaluated at 41,172 Swiss francs, and claimed reimbursement of miscellaneous expenses, including 250 Swiss francs for postage;

Whereas the facts in the case, subsequent to Judgement No. 184, are as follows:

The Applicant's case was resubmitted to the Appointment and Promotion Panel on 22 May 1974. The Panel considered it at 20 meetings held in July, August and September 1974. In its report, the Panel formulated the following conclusions and recommendations:

*"Conclusions*

"15. The Panel conducted a full, fair and exhaustive enquiry into all the issues raised at the time of the initial review in 1972, in the report of the Joint Appeals Board, in Judgement No. 184 of the Administrative Tribunal, and heard statements made by 39 witnesses at all grades and belonging to different services, of which 18 were direct colleagues of Mr. Mila, in addition to statements made by Mr. Mila himself. The Panel could not help realizing the extreme fragility and the indecisive nature of some of the testimonies, either because the facts referred to were remote in time or because some witnesses on both sides could not overcome their preconceived views of the case. The Panel, in making this report, could only interpret the evidence to the best of its ability, without entering into the judicial aspects of the question. However, certain issues became clear:

"(a) There were clearly lapses in procedure and administrative shortcomings in the handling of the case prior to the initial review in 1972.

"(b)

(i) Mr. Mila's performance was not as satisfactory as could have been desired.

"(ii) The majority of the Panel was convinced that the staff member had certainly received verbal remarks and warnings on several occasions, but no formal or written statements had been made between the issuance of the 1970 periodic report and the last periodic report prepared in January 1972.

"(iii) There were doubts that the criticisms expressed regarding the staff member's performance would have been sufficient to have justified a recommendation for termination in 1972 had the case not been due for the five-year review of a permanent appointment.

*"Recommendations*

"16. (a) The Panel considered that although there were clearly lapses in procedure and irregularities in the administrative handling of the case, it was realized that at this late stage, no correction could be made retroactively of the failure to record formally any warnings given to the staff member, nor the failure to institute a correct investigation of the staff member's rebuttal of the periodic report.

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"(iv) Compensation in the amount of 3,000 Swiss francs as a contribution to the Applicant's legal expenses.

"(v) Moratory interest at the rate of 7 per cent per annum from 1 January 1975 on the amount specified in subparagraph 46 (i), and from the date of termination, i.e., 10 August 1972, the date on which the injury was caused, on the amount specified in subparagraph 46 (iii)."

“(b) The Panel agreed that the staff member’s performance and attitude had been less satisfactory than earlier, and the Panel recognized that Mr. Mila had not, in the strict sense, met the full standards for a permanent appointment as indicated in Staff Rule 104.13 (c) (i), and Staff Rule 104.14 (f) (ii) (B).

“(c) The Panel considered, however, that the administrative decision not to renew the staff member’s permanent appointment, and in consequence to separate him from service, was too drastic.

“(d) The Panel nevertheless felt that it was not in the interest of the Organization to consider reinstating Mr. Mila in the same functions which he had held up to August 1972, but recommended that every effort should be made to facilitate the re-employment of Mr. Mila within the United Nations system.”

On 1 November 1974, the Assistant Secretary-General for Personnel Services sent the Applicant the following communication:

“... ”

“In accordance with the advice of the Appointment and Promotion Panel, the Secretary-General has decided to maintain the original decision to terminate your employment with the United Nations Secretariat.

“In the report it prepared on the basis of its in-depth review of the case, the Appointment and Promotion Panel made observations and recommendations to which the Secretary-General attaches importance. However, the question of your possible re-employment within the United Nations system is a separate matter, not related to the contested decision which is the subject of your appeal to the Administrative Tribunal. The Secretary-General has accordingly confined himself to taking note of the Panel’s recommendation to that effect.

“... ”

On 13 November 1974 the Chief of Staff Services sent the Chief of the Division of Personnel of the United Nations Office at Geneva a letter concerning the application of the Panel’s recommendation concerning the re-employment of the Applicant and the implications of the report with regard to personnel practices and procedures. On 9 December 1974, the Applicant informed the Secretary-General of his intention to appeal the decision, at the same time criticizing the provision of the Staff Rules which prevents the person concerned from being represented before the Joint Appeals Board by a person who is not a member of the Secretariat. On 7 January 1975, the Assistant Secretary-General for Personnel Services replied that, since the contested decision had been taken further to the remand of the case ordered in Judgement No. 184, any contestation of that decision could be submitted directly to the Tribunal, in which case the Applicant could continue to be represented by his counsel. As the Applicant had in the meantime submitted an appeal to the Joint Appeals Board, the latter decided by a majority vote that it was not competent to accept and consider the Applicant’s appeal. On 8 May 1975 the Applicant filed the application mentioned above.

Whereas the Applicant’s principle contentions are:

1. The procedure followed since April 1974 is vitiated by serious defects:

(a) The composition of the Appointment and Promotion Panel offered no guarantee of impartiality, since four of its five members had already considered the case and expressed their views in 1972, and three had recommended termination of the Applicant’s appointment;

(b) The Joint Appeals Board violated the right of defence: its majority refusal to accept competence is the outcome of a unilateral procedure in which the Applicant was not heard.

2. The contested measure must be rescinded for errors of fact and of law:

(a) The evaluation of the quality of the Applicant's services was vitiated by prejudice;

(b) Despite its severity, the termination was carried out hastily and the Applicant's rights were deliberately violated because he was a staff member in a lower category;

(c) The Respondent tried to re-evaluate retroactively the Applicant's services prior to 1970;

(d) A document produced by the Respondent himself shows that the Applicant's services were considered satisfactory until September 1970;

(e) The allegations in the periodic report for the period 1970-1972 are vitiated by deliberate errors, prejudice and animosity against the Applicant and hence cannot serve as a valid basis for a decision to terminate;

(f) The termination of a permanent contract for unsatisfactory services is subject to certain conditions, none of which were fulfilled in the present case.

3. The contested measure should be rescinded on the grounds of misuse of power: the Respondent used a termination for unsatisfactory services to conceal a disciplinary dismissal.

Whereas the Respondent's principal contentions are:

1. The composition of the Appointment and Promotion Panel was proper. According to a generally accepted principle of administrative law, it is the same organ which committed the error or violation of procedure which is called upon to rectify in remand proceedings.

2. The requirements of article 7, paragraph 1, of the Statute of the Tribunal have been fulfilled, since the principal application was preceded by a detailed and thorough examination of the merits by the Joint Appeals Board.

3. No motive unrelated to the Applicant's quality of service has been established, and the evaluation of his services was clearly devoid of any punitive or disciplinary character.

4. The Appointment and Promotion Panel made a full, fair and reasonable review of the Applicant's standards of efficiency, competence and integrity.

5. The comprehensive, deep and detailed re-examination of the Applicant's case by the Appointment and Promotion Panel operated a general and satisfactory correction of procedure, in accordance with Judgement No. 184.

6. The decision to terminate the Applicant's contract was properly grounded under Staff Regulation 9.1 (a) and was not an arbitrary exercise of discretion. The question whether that legally justified decision was, in the Panel's words, "too drastic" is a question entirely within the area of the Secretary-General's discretion and exercise of responsibility in the interest of the United Nations.

The Tribunal, having deliberated from 25 September to 8 October 1975, now pronounces the following judgement:

I. The Tribunal having ordered in Judgement No. 184 that the case be remanded for correction of the procedure in accordance with article 9, paragraph 2, of its Statute, the Appointment and Promotion Panel responsible for the five-year review of permanent contracts re-examined the Applicant's case. Following that re-examination by the Panel and the submission of its recommendations to the Secretary-General, the Respondent decided on 1 November 1974 to maintain the original decision concerning the Applicant, namely to terminate his employment with the United Nations Secretariat.

That decision, together with the original decision, is the subject of the present request for rescission. Essentially, the Applicant requests the Tribunal to order his reinstatement, or, failing that, to grant him payment of the salary he would have

received from the United Nations in the period between his termination and the date of the present judgement, minus amounts paid to him for various purposes. He also requests the equivalent of three years' net salary for damages for unjustified breach of his permanent contract.

II. The Applicant contends that the procedure followed since the judgement pronounced on 24 April 1974 is vitiated by serious defects, that the contested measure is grounded on errors of fact and of law and must be rescinded on that ground and on the ground of misuse of power. The Tribunal must therefore consider the conditions in which the Appointment and Promotion Panel reconsidered the Applicant's case, the basis for the conclusions of its report and the decision taken by the Respondent following that new report, taking into account the provisions of the Staff Regulations and Rules relating to the five-year review of permanent contracts.

III. The Tribunal must first pronounce on the Applicant's requests concerning the production of various documents.

The Applicant first requests the Tribunal to order the production of the typed transcript of the tape recording made during the Panel's meetings. The Tribunal notes that the pleas of the Applicant's application concern the recording of testimony by witnesses heard by the Panel. However, in the pleas accompanying his written observations, the Applicant refers to the tape recording of the second five-year review carried out by the Panel. The latter request therefore concerns all tape recordings made during the work of the Panel and not only the testimony of the witnesses.

The Tribunal observes that, according to established practice, the deliberations of advisory administrative bodies form the subject of a report which summarizes their tenor and draws conclusions therefrom. This report is prepared under the responsibility of the members of the body concerned. When the Tribunal is called upon to consider in a given case the advisory procedure which preceded the contested decision, it does so on the basis of the report. In the light of the conclusions set out below which the Tribunal has reached concerning the Panel's report, there is no ground for hearing a tape recording which might be useful for the work of the Panel itself in a complex case, calling for numerous meetings, but does not itself need to be considered by the Tribunal or the parties.

The Applicant's request is therefore rejected.

IV. The Applicant also requests the Tribunal to order the Respondent to produce the certified copies of the Applicant's personal history form and fact sheet communicated by the administrative services of the Respondent to the specialized agencies.

The Tribunal notes that in the pleas mentioned above the Applicant does not request the enforcement of an obligation on the part of the Respondent to ensure his re-employment. The production of the aforementioned documents cannot be ordered because it is not directly related to the pleas filed with the Tribunal.

The Applicant's request is therefore rejected.

V. Lastly, the Applicant requests the Tribunal to order the Respondent to arrange for the secretariat of the Geneva Joint Appeals Board to produce the note communicated on two occasions to that secretariat on the question of the Board's competence.

While acknowledging that it would have been in keeping with the normal practice of the Joint Appeals Board to mention in its decision of 12 March 1975 the note from the Applicant's counsel concerning the Board's competence, the Tribunal notes that a decision along the lines requested by the Applicant would be completely irrelevant at a time when the Tribunal is considering the merits of the case. Moreover, the Applicant, while criticizing the decision of the Joint Appeals Board to declare itself incompetent, submits no plea in that connexion. That being so, the request for produc-

tion submitted by the Applicant is without purpose and the Tribunal decides to reject it.

VI. The Tribunal must first consider the complaints of the Applicant concerning the procedure followed subsequent to Judgement No. 184.

These complaints concern, first, the composition of the Panel. According to the Applicant, the Respondent ignored an elementary and basic rule concerning disqualification by including among the five members of the 1974 Panel four members of the 1972 Panel, especially a member against whom the Applicant's counsel apparently had certain grievances dating back about 20 years.

The Tribunal notes that the Applicant does not claim that the members of the Panel were appointed contrary to the provisions of the Staff Rules or the relevant administrative instructions. He seeks rather to show that a rule analogous to that applicable to the disqualification of judges would be applicable to a purely administrative body whose task is to advise the Secretary-General.

The Tribunal considers that in the absence of legal provisions the composition of such a body falls within the competence of the Secretary-General. In the case of the Panel responsible for correction of the procedure pursuant to the application by the Tribunal of article 9, paragraph 2, of its Statute, no general legal principle compelled the Secretary-General to exclude a given person, at least in so far as the procedural defects noted were not related to the conduct of that person.

In the current case, the Tribunal admittedly considered that the 1972 Panel did not make "a sufficiently thorough, searching and balanced review of the Applicant's standards of efficiency, competence and integrity", but it did not attribute those shortcomings to reasons peculiar to the members of the Panel. That being so, the fact that a Panel comprising four members of the 1972 Panel was entrusted with the task of carrying out a review of the Applicant's situation pursuant to the very precise instructions given in Judgement No. 184 cannot affect the validity of the decision taken by the Respondent pursuant to the report of the 1974 Panel.

VII. The Applicant also contends that the decision of the Joint Appeals Board of 12 March 1975 stating that it was not competent to accept and consider the Applicant's appeal against the Respondent's decision of 1 November 1974 confirming the previous decision to terminate constitutes a clear violation of the right of defence and of the rules governing adversary proceedings. The Applicant observes that receipt of a note sent by his counsel concerning representation of the Applicant and a note on the competence of the Board was not acknowledged and that those documents are not mentioned in the Board's decision on its competence. He also observes that he was not informed about the meeting of the Board or invited to be represented at that meeting.

Whatever may be thought of the procedure followed and the decision taken by the Joint Appeals Board in a case which the Tribunal had ordered remanded in accordance with article 9, paragraph 2, of its Statute, the Tribunal observes that the Applicant sees in the facts recalled above the expression of prejudice against him but does not request that the case be remanded to the Board. Since the Respondent has, moreover, accepted direct recourse to the Tribunal, there is no need to take a decision on the legality of the conduct of the Joint Appeals Board.

VIII. The Applicant contends that the contested decision should be rescinded for errors of fact and of law. At the current stage of the proceedings, the Tribunal must first determine whether the report of the 1974 Panel remedied the shortcomings of the earlier report mentioned in Judgement No. 184.

First, it is necessary to consider the Applicant's complaints. The Tribunal observes that some of them present a synthetic view of the case, although the Applicant does not criticize the Panel's report in any way: for example, the complaint that the decision



to terminate was taken hastily. Concerning the retroactive re-evaluation of the Applicant's services prior to 1970, the Applicant, far from criticizing the precise terms of the 1974 report, confines himself to repeating the grounds of his own argument, departing only slightly from the content of the report. With regard to the allegations contained in the periodic report for the period 1970–1972, the Applicant makes certain critical comments concerning the Panel, whose efforts were supposedly aimed at creating the impression that relations within the cleaners' team were "fairly good" and which allegedly carried out "a veritable whitewashing". However, the Applicant does not establish precisely the points on which the Panel's report was so inadequate as to permit the statement that its review did not represent the "complete, fair and reasonable procedure which must be carried out prior to the termination of a permanent appointment".

IX. The Tribunal examined the Panel's report carefully, in the light of its own findings in the case and the questions it had deemed necessary to have elucidated. It found that as regards the questions put in paragraph XIII of Judgement No. 184, the Panel, which heard witnesses in greater number and of more varied origins than in 1972, had provided complete, detailed and systematically arranged information concerning the work and conduct of the Applicant, the administrative handling of his case and the general conditions of work in his unit. The Tribunal noted, moreover, that the Panel had found that section I of the periodic report requested by the Division of Personnel on 7 January 1972 on the occasion of the five-year review of the Applicant's permanent contract had not been signed by his immediate supervisor, Mr. Fournier, and that the same was true for all his other periodic reports except that of 1966.

Moreover, the Panel examined carefully the circumstances in which the annual within-grade increment the Applicant was due to receive on 1 January 1972 was withheld. It noted that the provisions of circular ST/AI/115 had not been respected and that the administrative notification regarding the withholding of the increment had been issued on the same date—4 May 1972—on which the Chief of the Personnel Administration Section had informed the Applicant that he had 10 days to present his statement.

The Tribunal also notes that the Panel indicated in its conclusions that there were doubts that the criticism expressed regarding the staff member's performance would have been sufficient to have justified the recommendation for termination in 1972 had the case not been due for the five-year review of a permanent appointment.

Lastly, the Panel stated that it could not help feeling that, in some respects and at certain stages in the proceedings, the departments concerned had failed to exercise the care which they would probably have taken in the case of a staff member in a higher category.

On all those points the Panel did not hesitate to go beyond the guidelines given in Judgement No. 184 in order to produce as complete a report as possible on the occasion of the five-year review of the Applicant's contract.

X. The final findings and recommendations submitted by the Panel are much more complete and detailed than those reached by the 1972 Panel. These recommendations concern:

(1) The administrative decision not to renew the staff member's permanent appointment, and in consequence to separate him from service: it "was too drastic";

(2) Evaluation of the Applicant's performance and attitude: the Panel "recognized that Mr. Mila had not, in the strict sense, met the full standards for a permanent appointment as indicated in Staff Rule 104.13 (c) (i), and Staff Rule 104.14 (f) (ii) (B)";

(3) Reinstatement of the Applicant: the Panel felt that it was not in the interest of the Organization to consider reinstating the Applicant in the same functions which

he had held up to August 1972, but recommended that every effort should be made to facilitate the re-employment of the Applicant within the United Nations system;

(4) The lapses in procedure and irregularities in the administrative handling of the case, which could not be retroactively corrected at so late a stage.

In the light of this report, the Tribunal considers that the proceedings before the Panel, which heard the Applicant on several occasions, enabled it to carry out a thorough, searching and balanced review of the Applicant's standards during the five-year review of his permanent contract.

XI. The Tribunal must now consider the decision taken by the Respondent consequent upon the Panel's report.

The Applicant considers that it should be rescinded:

(1) For error of fact: it was allegedly based on evaluations distorted by erroneous assumptions and the prejudice of his immediate superiors; and

(2) For error of law, because of the obvious disproportion between a fact, supposing that it had been proved, and the action taken, whether disciplinary or not.

Lastly, the Applicant contends that this decision in fact constitutes a disciplinary measure but that the procedure of termination for unsatisfactory services was preferred, and that this misuse of power should entail the rescission of the decision.

XII. The Tribunal notes that the decision of 1 November 1974 was taken following the review of the Applicant's permanent contract, which according to the Staff Rules is to be carried out five years after the date of appointment. The purpose of the review is to determine whether the person concerned has maintained "the high standards of efficiency, competence and integrity established in the Charter".

The system of five-year reviews of permanent contracts has existed since the Organization was established. It was originally foreseen that it would take place every five years, but in 1955 the Secretary-General decided that such a review would be carried out only once, five years after the date of appointment. On that occasion it was clearly indicated, both by the Secretary-General (document A/2996, 14 October 1955, para. 24) and by the Advisory Committee on Administrative and Budgetary Questions (document A/3036, 21 November 1955, para. 12), that the purpose of the five-year review is to provide the Organization with a safeguard, but that other procedures exist and that the periodic reports may be relied on "to bring to the Secretary-General's attention any dereliction of efficiency or conduct sufficiently serious to warrant termination of a career staff member".

Moreover, the Secretary-General stated in his report:

"The occasion of a formal five-yearly review provides no basis for termination of career staff which is not otherwise available to the Administration."  
He also stated:

"The Secretary-General would still be free to utilize the Review Board to consider the cases of permanent staff members subsequent to the first five-yearly review should he feel that the Board's advice would be especially helpful in resolving doubts regarding the efficiency or conduct of a staff member."  
Although the Secretary-General also stated:

"The principle of a formal review every five years during a career staff member's service is not consistent with the concept of a permanent appointment", the retention of the review after the first five years of service was not questioned, and this system was mentioned as one of the necessary safeguards for the Organization.

XIII. Staff Regulation 9.1 (a) contains an exhaustive list of the cases in which a permanent contract may be terminated. If the five-year review provided for in the Staff Rules leads to the conclusion that there is no ground for confirming a permanent

contract, the contract can only be terminated for one of the reasons set out in Staff Regulation 9.1 (a), including the fact that the "services of the individual concerned prove unsatisfactory" if it appears, in the terms of Staff Rules 104.13 and 104.14, that the person concerned has not maintained the "requisite standards of suitability", that is, the "standards of efficiency, competence and integrity established in the Charter".

XIV. The recommendations of the Panel reveal the complexity of the present case. On the one hand, it "agreed that the staff member's performance and attitude had been less satisfactory than earlier, and the Panel recognized that Mr. Mila had not, in the strict sense, met the full standards for a permanent appointment as indicated in Staff Rule 104.13 (c) (i), and Staff Rule 104.14 (f) (ii) (B)".

On the other hand, it considered that "the administrative decision not to renew the staff member's permanent appointment, and in consequence to separate him from service, was too drastic".

Lastly, the Panel envisaged certain arrangements for the Applicant's re-employment within the United Nations system.

XV. It is not for the Tribunal to seek to determine whether an administrative solution taking these diverse considerations into account has been envisaged by the Respondent. The Tribunal must confine itself to considering whether the decision taken by the Respondent on 1 November 1974 is legally founded.

This decision reads as follows:

"In accordance with the advice of the Appointment and Promotion Panel, the Secretary-General has decided to maintain the original decision to terminate your employment with the United Nations Secretariat".

The Respondent thus refers to the decision taken on 10 August 1972 and confirmed on 1 November 1973 which is based on Staff Regulation 9.1 (a).

The Tribunal observes that the aforementioned decision is presented by the Respondent as being "in accordance with the advice of the Appointment and Promotion Panel". The Tribunal examined at length the question whether that decision could be considered as being "in accordance with the advice of the Panel" when the latter expressly declared that the decision to terminate the Applicant's service was "too drastic". However, it cannot be said that the decision draws clearly mistaken conclusions from the dossier, for the latter also contains the finding that the Applicant had not "in the strict sense, met the full standards for a permanent appointment". In exercising his power to evaluate the Applicant's services, the Respondent gave greater weight to the latter consideration than to the former. No doubt the formula "in accordance with" does not correspond exactly to the actual conduct of the Respondent, since he made a choice among the recommendations submitted by the Panel, but in view of the power of evaluation which the Respondent must be recognized to possess, the Tribunal cannot order the rescission of a decision on the basis of an equivocal formula.

XVI. The Applicant claimed that the procedure of reviewing his permanent contract concealed a disciplinary measure so that it would be subject to less strict rules. He bases his argument in particular on certain terms used in Judgement No. 184 concerning the atmosphere prevailing in the cleaners' team and the role of ringleader attributed to him.

The Tribunal indicated in its Judgement No. 38 (*Glaser*) that the term "services" as used in the Staff Regulations and Rules applies to "a staff member's professional activities" and "the carrying out of the tasks entrusted to [staff members] . . . in the Secretariat", that Staff Regulation 9.1 (a) permits the termination of an appointment only when a staff member's professional activities within the United Nations itself prove unsatisfactory, and that, on the other hand, it is the breach of obligations concerning the conduct of staff members—whether the alleged acts were committed in carrying

out professional duties or outside the Organization—which permits the taking of disciplinary measures on the basis of article X of the Staff Regulations.

In the present case, the Applicant does not base his argument on any precise fact that could justify a disciplinary measure against him. It is the way in which he performed his duties which gave rise to criticism. The purpose of the arguments based on the atmosphere prevailing in the team is essentially to explain the difficulties encountered in seeking to improve the situation.

In these circumstances, the Tribunal considers that no misuse of procedure that could entail the rescission of the contested decision can be imputed to the Respondent.

XVII. The Tribunal notes, on the other hand, that the Panel found that there were clearly lapses in procedure and administrative shortcomings in the handling of the case prior to the initial review in 1972. The Panel drew attention to some of these irregularities, either in its recommendations or in the body of its report: the Tribunal notes in particular the fact that none of the warnings given to the Applicant were formally recorded, the Panel's feeling that the case of a staff member in a higher category would probably have been treated more carefully, the failure to comply with the instructions contained in circular ST/AI/115, especially the lack of a correct inquiry regarding the rebuttal of the periodic report and the errors contained in the tardy note by Mr. Kirkbride, and the fact that section I of the Applicant's periodic reports was not, with one exception, completed and signed by the Applicant's immediate superior, and lastly, the irregular circumstances in which the within-grade increment which the Applicant was entitled to expect was withheld.

The Tribunal finds, in the light of the conclusions of the 1974 Panel's report, that the 1972 report had serious defects, as the Tribunal showed in its Judgement No. 184, and did not correspond to what could normally be expected as a result of an administrative procedure of that type.

The Tribunal concludes that even if the Respondent was entitled to take his decision of 1 November 1974, the treatment of the Applicant in the period preceding his termination was not in conformity with the administrative rules in force or the basic principles of good administration.

Nothing in the decision of 1 November 1974 indicates that the Respondent contested the views on that subject expressed by the Panel in its report. Moreover, the letter addressed to the Chief of the Division of Personnel of the United Nations Office at Geneva by the Chief of Staff Services on 13 November 1974 shows that in future the Respondent is prepared to conform with the views expressed in the report, thus implicitly recognizing that the findings relating to the administrative shortcomings concerning the Applicant are well founded.

XVIII. The Tribunal recognizes that the administrative shortcomings whose effects the Applicant suffered cannot be remedied retroactively. Since the *status quo ante* cannot be restored, the Tribunal can only grant compensation for the damage suffered on that score. The evaluation of that damage poses complex problems, for it is difficult to determine what the Applicant's fate would have been if the Respondent had respected the rules in force.

The Tribunal considers that the amount of compensation due should be established taking into account the Applicant's last base salary, the wages he has earned since he left the United Nations and the compensation granted in Judgement No. 184 for procedural delay.

According to the administrative notification of 17 August 1972 issued at the time of his termination, the Applicant's base salary was 23,656 Swiss francs and his dependency allowances amounted to 4,100 Swiss francs. A certificate from the Applicant's current employer dated 4 September 1975 annexed to his additional written observa-

tions indicates that the Applicant received gross wages of 24,880.05 Swiss francs for 2,082½ hours of work in 1973 and gross wages of 19,449.15 Swiss francs for 1,456 hours of work in 1974, and that in 1975 he is receiving a gross wage of 13.10 Swiss francs per hour, plus 8 per cent for the "thirteenth month".

In those circumstances, the grant to the Applicant of a sum of 15,000 Swiss francs constitutes, in the Tribunal's view, adequate compensation for the damage sustained by the Applicant as a result of the irregularities committed by the Administration.

XIX. The Applicant has referred to the Panel's recommendation concerning his possible re-employment within the United Nations system, which the Secretary-General saw fit merely to note in his communication of 1 November 1974. Since the Applicant has filed no plea on this subject, the Tribunal is not required to pronounce on the Respondent's interpretation of the Panel's recommendation or on the action taken with regard to that recommendation.

XX. The Applicant requests compensation in the amount of 3,000 Swiss francs as a contribution to his legal expenses and the reimbursement of miscellaneous expenditures incurred since April 1974 in the amount of 250 Swiss francs.

The Tribunal decides to grant the Applicant the sum of 700 dollars as costs.

XXI. For these reasons the Tribunal decides that:

(1) The Applicant be paid compensation in the amount of 15,000 Swiss francs for the damage he sustained as a result of the irregularities committed by the Respondent in connexion with his case;

(2) The Applicant be paid 700 dollars as costs;

(3) All other claims are rejected.

*(Signatures)*

Suzanne BASTID

*Vice-President, presiding*

Francisco A. FORTEZA

*Member*

*New York, 8 October 1975*

Roger STEVENS

*Member*

Jean HARDY

*Executive Secretary*

## Judgement No. 205

*(Original: English)*

**Case No. 196:**  
**El-Naggar**

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

*Non-renewal of a fixed-term appointment.*

*Request of the Applicant for access to his confidential file.—Request met, the Respondent having made the file available to the Tribunal and the latter having disclosed relevant documents to the Applicant.*

*Points for determination by the Tribunal.—Contention of the Applicant that he had an expectancy of continued service with the United Nations.—Argument based on the Respondent's recognition of the*