

the maximum amount of the insurance compensation which could be awarded to him in the event of loss in transit was \$2,500, as provided in Rule 207.21 (b).

In the absence of an agreement by the parties on a direct evaluation procedure, the Tribunal considers it reasonable in the present case to apply this limitation of liability in respect of a loss compensation for which is recognized to be the responsibility of the Respondent.

X. The Tribunal reaches the conclusion that reasonable compensation for all the property of the Applicant removed from the United Nations warehouse at Conakry should be set at \$2,500, less the amount of \$400 already awarded to the Applicant.

XI. Since more than seven years have elapsed since the Applicant suffered the loss in question, the Tribunal deems it justified to award interest at the rate of 6 per cent as from 12 February 1972, the date on which the matter was submitted to the Joint Appeals Board following lengthy delays attributable mainly to the conduct of the Respondent.

XII. For the above reasons, the Tribunal decides:

(1) To reject the claim for compensation for the damage resulting from the burglary;

(2) To award \$2,100 as compensation for losses not yet compensated which occurred to the prejudice of the Applicant in the United Nations warehouse in Conakry;

(3) To award interest of 6 per cent on the sum referred to in paragraph (2) above, to be calculated from 12 February 1972 until the date of payment;

(4) To declare the other claims not receivable.

(Signatures)

Suzanne BASTID

Vice-President, presiding

Francis T. P. PLIMPTON

Vice-President

Geneva, 23 April 1976

Francisco FORTEZA
Member

Jean HARDY
Executive Secretary

Judgement No. 210

(Original: English)

Case No. 200:
Reid

Against: The Secretary-General
of the United Nations

Dismissal for misconduct of a staff member holding a permanent appointment.

Request for rescission of the decision to dismiss the Applicant for unsatisfactory conduct.—Contention of the Applicant that the Secretary-General did a wrongful act in deciding to dismiss him despite the unanimous recommendations of the Joint Disciplinary Committee and the Joint Appeals Board.—Staff Regulation 10.2 and Staff Rule 110.3 (b).—Wide discretion of the Secretary-General to determine and define what constitutes unsatisfactory conduct.—That view supported by the legislative history of the

provisions relating to the jurisdiction of the Tribunal.—Competence of the Tribunal to review under certain conditions the decisions of the Secretary-General in disciplinary matters.—The contested decision of the Respondent does not suffer either from non-observance of pertinent Staff Regulations or Rules or from denial of due process.—Advisory character of the reports of the Joint Disciplinary Committee and the Joint Appeals Board.—Competence of the Tribunal to review the Respondent's decision if such decision is based on a mistake of facts or is arbitrary or is motivated by prejudice or by other extraneous considerations.—Consideration of the basis for the contested decision.—Contradiction between the finding of the Joint Disciplinary Committee and the weight of the evidence, which warranted the conclusion reached by the Respondent.—Conclusion of the Tribunal that the decision to dismiss the Applicant was not arbitrary and that the Secretary-General was acting within the scope of his authority in deciding not to accept the recommendation of the Joint Disciplinary Committee although it was unanimous.—Recommendation of the Joint Appeals Board that the decision to dismiss the Applicant be rescinded and the Applicant's situation be assimilated to one of an agreed termination.—Discretion of the Secretary-General to accept or reject the recommendation of the Board that the separation of the Applicant should be treated as an agreed termination.—In the absence of legal obligations on the part of the Respondent, the Tribunal has no competence to give binding force to such a recommendation.—Statement by the Tribunal taking note of a letter from the Respondent stating that he has decided to pay the Applicant the maximum termination indemnity provided under paragraph (d) of annex III to the Staff Regulations.—Application rejected without prejudice to the payment of that indemnity.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Madame Paul Bastid, Vice-President; Mr. Francis T. P. Plimpton, Vice-President; Mr. Francisco A. Forteza, alternate member;

Whereas at the request of Neville S. Reid, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 15 January 1976 the time-limit for the filing of an application to the Tribunal;

Whereas, on 14 January 1976, the Applicant filed an application the pleas of which read:

"3. The Applicant is contesting the decision of the Secretary-General, in rejecting the recommendations of the Joint Appeals Board, as conveyed to the Applicant by the letter PRU 75 of 31 July 1975 from Mr. J. Robert Webb, Officer-in-Charge, Personnel Services, United Nations. Specifically, the Applicant submits that the Administrative Tribunal should instruct the Secretary-General of the United Nations to reinstate the Applicant in the service of the United Nations and pay the Applicant all salaries due to him from 6 October 1973 until the date of reinstatement. Further, the Applicant should receive adequate compensation for the mental agony and sufferings he has undergone as a result of not being employed since 6 October 1973.

"4. In the event of the Secretary-General deciding to pay compensation for the injuries sustained by the Applicant, it is submitted that the minimum of compensation to be awarded to the Applicant is a sum equivalent to four years salary, considering that the Applicant was only 36 years old in 1973 and he was expecting as a permanent United Nations official to serve at least a further period of 24 years with the Organization.

"5. It is also submitted that should the Applicant be not reinstated as a result of the Secretary-General exercising his option under article 9 paragraph 1 of the Statute, the separation of the Applicant should be treated as agreed termination and the records should clearly indicate that there has been no finding of misconduct, lack of integrity or similar default on the part of the Applicant. It is further submitted that after any such eventual separation, the Applicant should be fur-

nished with proper and non-discriminatory references, and there should be no reflection on the character or official performance of the Applicant.”;

Whereas in his application the Applicant requested that he “be afforded an opportunity to have the right of oral argument, presentation of facts and examination of witnesses, if such need arises”;

Whereas the Respondent filed his answer on 19 February 1976;

Whereas the Respondent filed an additional document at the request of the Applicant on 9 March 1976;

Whereas the President ruled on 11 March 1976 that no oral proceedings would be held in the case;

Whereas the Applicant filed written observations on 22 March 1976;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 2 September 1965 as a Security Officer and received a permanent appointment on 1 September 1967. On 7 February 1973 he was suspended from duty with half pay pending investigation of charges that on 10 January 1973 he had obtained refunds on guided tour tickets under false pretenses and that he was reported to have attempted to obtain a similar refund on 11 January 1973. In two letters dated 9 and 22 February 1973 respectively, the Applicant requested the Secretary-General to reconsider the decision to reduce his pay by half during his suspension from duty. On 16 February 1973 the Assistant Secretary-General for Personnel Services referred the Applicant's case to the Joint Disciplinary Committee for its advice as to the disciplinary measures, if any, which might be taken against him under Staff Rule 110.3 (b); the Assistant Secretary-General presented the facts and charges against the Applicant as follows:

“ . . .

“3. Mr. Abdel S. Dajani, Chief of Public Services, Office of Public Information, in a memorandum dated 15 January 1973, drew our attention to the following points:

- “(i) Security Officer Neville Reid has been reported to have turned in tour tickets on four occasions requesting refunds, and actually received payments on three occasions. The fourth time the refund was refused by the Cashier.
- “(ii) Most probably on 9 December 1972 (the Cashiers Miss Tinawy and Mrs. Bartholin were not absolutely sure of the date) Mr. Reid requested and received two refunds, one for five adult tickets amounting to \$7.50, and the other for one adult and one student, both amounting to \$2.00, and that both refunds were requested independently at different times of the day from each of these cashiers.
- “(iii) On 10 January 1973, Mr. Reid approached Miss Tinawy with a refund request and was advised that ticket refunds had to be authorized from the Administrative Unit of Public Services, whereupon he contacted Mr. McManus, Chief of the Administrative Unit, by telephone who, not being aware of Mr. Reid's earlier request or of the fact that the Cashiers had refused his claim, instructed that a refund of \$4.00 be effected.
- “(iv) On 11 January 1973, Mr. Reid approached Mrs. Bartholin with a request that she refund the price of two tickets and that the latter, recalling Mr. Reid's earlier request, declined payment.
- “(v) The tickets referred to are normally sold to the public in the General Assembly lobby as an admission fee to the guided tours of the United Nations Headquarters conducted by the Visitors' Section of the Office

of Public Information. Mr. Dajani had attached written statements from each of his staff members to his memorandum.

"4. A preliminary investigation of the allegations contained in Mr. Dajani's memorandum was conducted, in the presence of Mr. E. Gobena, Personnel Officer, by Mr. J. Finore, Deputy Chief, Security and Safety Section, Mr. C. Redman, Assistant Chief, Security and Safety Section and Mr. J. Hrusovsky, Senior Investigator, Security and Safety Section.

"5. In her statement, Mrs. Chantal Bartholin, guided tour Cashier, pointed out that on 9 December, a security officer on duty at the glass door (Post 113), came to the ticket desk and asked for and obtained a refund of \$7.50 for five adult tickets because his friends were unable to take the tour. Miss Anabelle Tinawy, guided tour Cashier, also in a statement indicated that sometime in the month of December, the date of which she could not recall, but definitely on a Saturday, a security officer on duty near the guided tour service—Post 113, to the best of her recollection requested and obtained a cash refund of \$2.00 for two tour tickets.

"6. Security Officer Neville Reid denied that on 9 December 1972 he requested and obtained a refund of tour tickets from either Mrs. Bartholin or Miss Tinawy.

"7. Both Miss Tinawy and Mrs. Bartholin was not absolutely sure of the date of 9 December, nor could they positively recall the identity of the security officer except the fact that he was a security officer who was on duty at Post 113 near the guided tour service and was not one of the regular security officers who were normally assigned to that post. The duty schedule of the Security and Safety Section revealed that on Saturday, 9 December 1972, three Security Officers were associated with Post 113. Security Officer John Pietronuto was on duty at Post 113 on 9 December 1972 from 9.30 a.m. to 2.30 p.m. and Security Officer Keith Walcott took over Post 113 from Security Officer Pietronuto from 2.30 p.m. to 6.00 p.m. Security Officer Neville Reid was on Post 113 as a relief man between the hours of 10.00 to 10.30 a.m., between 1.00 and 2.00 p.m., between 4.00 and 4.30 p.m. Security Officers Walcott and Pietronuto, who were interviewed, stated that at no time on 9 December 1972, or any other day, had they bought tour tickets or requested refunds.

"8. In her statement, Miss Tinawy, who is employed as a guided tour Cashier, indicated that on 10 January 1973, a security officer, whom she identified as Security Officer Neville Reid, approached the Cashier's desk and requested a refund of two adult guided tour tickets amounting to \$4.00 explaining that he had purchased the two tickets for his friends who had changed their plans. Recalling an earlier identical request which occurred in December 1972 when a security officer asked for a refund in respect of two tickets because his friends decided not to go on tour and whereupon a refund was given to him, she refused the refund and told him that his friends could use the tickets some other day or they themselves could request and obtain a refund. She said that one of her colleagues suggested that if he desired to have the refund he should have someone in the guided tour office authorize it. This he did and appropriate authorization from Mr. McManus was conveyed to her and she refunded Mr. Reid \$4.00.

"9. In a written statement, Mr. Reid admitted that he had requested and obtained a refund for two tour tickets amounting to \$4.00 on 10 January 1973 explaining that he bought these tickets on 10 January 1973 on behalf of his friends who visited the United Nations Headquarters and who later had changed their plans and abruptly decided not to go on the guided tour. However, although Mr. Reid insisted that he purchased the tickets himself, the three Cashiers on duty

(Mrs. T. Durant, Miss A. Tinawy and Miss O. Ahmed) were positive that on 10 January 1973 they had not sold any tickets to any security officer who was in uniform.

"10. Mrs. Bartholin, also a guided tour Cashier, stated that on 11 January 1973 Security Officer Reid came to her with two tickets requesting a refund "because his friends could not make it". Having been informed of the incident that happened on the previous day when her colleague who refused to refund the tickets to Mr. Reid was subsequently authorized to give the refund and recalling a similar request of 9 December 1972 when she herself gave a refund to a security officer, she told him to talk to Mr. McManus. Mrs. Bartholin also stated that at the time Mr. Reid was at her desk she had alerted Miss C. Widman, the dispatcher on duty on 11 January 1973 by telephone, and said to Miss Widman "Do you remember?" Miss Widman confirmed that she was telephonically alerted and looked towards the Cashiers' Desk and saw Security Officer Reid standing at the ticket window and talking to Mrs. Bartholin. Miss M. Rizvanbegovic, who was also on duty as a dispatcher on 11 January 1973, stated that her attention was drawn by Miss Widman about the telephone call and that she looked over to the Cashiers' Desk and saw Security Officer Reid standing at the Cashiers' Desk.

"11. Mr. Reid categorically denied that not only did he ever attempt to obtain a refund of any sort at any time on 11 January 1973, but also that he never even spoke with a cashier on that day.

"12. It is clear from the foregoing, as well as the report of the investigation, that:

"(i) Although Mr. Reid was on duty at Post 113 near the guided tour service on 9 December 1972 and the cashiers on duty on that day link the refunding of 7 tour tickets amounting to \$9.50 to a security officer on duty at Post 113, there is no clear evidence to establish Mr. Reid's complicity in the incident of 9 December 1972, because of the lack of positive identification of the security officer who requested and obtained refund on 9 December 1972.

"(ii) If Mr. Reid had purchased the tickets on 10 January 1973 and his alleged friends changed their minds, he would have been fully entitled to a refund. However, Mr. Reid's story that he bought two tickets himself on 10 January 1973 on behalf of his friends, lacks credibility on the basis of the cashiers' statements that no tickets were ever sold to a security officer on 10 January 1973. Furthermore, the veracity of Mr. Reid's statement that he bought himself the tickets lends to doubt by the fact that in his oral testimony he had clearly stated that on 10 January 1973 he had bought the tickets before the arrival of his friends and subsequently in his written statement he revised his oral testimony by stating that he bought the tickets after his friends arrived at the Visitors' Lobby. The investigating team could not establish the means under which Mr. Reid could have acquired the tour tickets if he had not bought them. The possibilities suggested are, (a) on occasion, just after the tour has started, two or three persons come in to join the tour and the security officer on duty at Post 113, which is the starting point of the tour, collects the tickets and permits them to join the tour; (b) another suggestion is that the dispatchers fail to tear the tickets before throwing them in the trash basket.

"(iii) Mr. Reid's denial of having requested refund for the tickets on 11

January 1973 is contrary to the position of the cashier on duty (Mrs. Bartholin), who clearly remembered him to have approached her at the Cashiers' Desk for a refund.

- “(iv) Mr. Reid’s denial that he ever went to the ticket window of the Cashiers’ counter or spoke with any cashier is contrary to the position of the two dispatchers, Miss Widman and Miss Rizvanbegovic, who positively stated that they saw Security Officer Reid at the ticket window for the Cashiers’ Desk, speaking to Mrs. Bartholin.

“13. I have gone through the various statements of Mr. Reid, the cashiers, the dispatchers and others involved in this case. I have also noted that the cashiers and dispatchers have had no motive to implicate Mr. Reid, who himself has stated that he had not given any basis for them to complain about him. For this reason, as well as for the inconsistent statement given by Mr. Reid leading me to question seriously his integrity which is a paramount consideration governing his employment with the Organization, the allegations are *prima facie* well founded. Having come to this conclusion, and because Mr. Reid’s action was incompatible with his continued membership in the Security and Safety Section, he was placed on suspension with half pay pending a full investigation under Staff Rule 110.4 from 7 February 1973.

“14. In view of the aforesaid and Mr. Reid’s denial of obtaining funds on guided tour tickets under false pretenses on 10 January 1973, as well as his denial of his attempt to obtain a similar refund on 11 January 1973, the Secretary-General has deemed it necessary to refer this case to the Joint Disciplinary Committee.”

The Joint Disciplinary Committee began its consideration of the case on refunds 26 March 1973, held four hearings in the course of which it heard the parties and eight witnesses, and submitted its report on 1 May 1973. The Committee’s conclusions and recommendations read as follows:

“Conclusions and Recommendations

“94. The Committee finds that it was not established beyond any doubt that Mr. Reid had not purchased the tickets for which he received a refund on 10 January. The allegation that he defrauded the Organization on 10 January accordingly fails.

“95. The Committee finds further that although Mr. Reid did speak to the cashier on 11 January in the terms described by her, it was not established beyond any doubt that he seriously attempted to obtain a refund for tickets that he had not purchased.

“96. The Committee finds, nevertheless, that Mr. Reid wrongfully denied having spoken to the cashier on 11 January and so cast an aspersion on the truthfulness of his colleagues, Mrs. Bartholin and Miss Widman. The Committee recommends that Mr. Reid should receive a written censure for his lack of truthfulness regarding the incident on 11 January. The Committee does not consider, however, that Mr. Reid has demonstrated a lack of integrity which should bar him from continued membership in the staff of the United Nations.

“97. This recommendation is made with the understanding that, upon its approval by the Secretary-General, the temporary measure of suspension, with half pay, pending investigation will be terminated and appropriate administrative action will be taken to restore Mr. Reid’s full pay status for the period from the date of suspension until the date of the decision.”

On 16 May 1973, in a memorandum addressed to the Secretary-General through the Under-Secretary-General for Administration and Management and the Legal Counsel, the Assistant Secretary-General for Personnel Services analysed the findings of the

Joint Disciplinary Committee and submitted his own recommendations; his memorandum, also signed by the Legal Counsel, read in part:

“ . . .

“Having examined the full record of this case and having read the Report of the Joint Disciplinary Committee, I find a serious inconsistency between the Committee's finding that Mr. Reid has lied about his approach to the cashier on 11 January and his exoneration from the charge of having attempted to obtain a refund of tickets according to the version of the cashier and the dispatcher. In my view, there was direct evidence against Mr. Reid concerning both incidents on 10 and 11 January. Regarding the 10 January incident, the Committee took note of the fact that the cashier did not recall having sold any tickets to Mr. Reid on that day. Nevertheless and while the Committee thought the cashier would be expected to remember selling tickets to a security officer dressed in uniform and stationed at the glass door near the cashier's desk, it felt that, particularly in considering so grave a charge, it should give the benefit of the doubt to the accused staff member and thus considered that the allegation that Mr. Reid had defrauded the Organization on 10 January had not been proven.

“Regarding the 11 January incident, Mr. Reid had no explanation whatsoever for his attempt to obtain a refund of tickets. His denial that he had approached the cashier on that day was disbelieved by the Committee which implies that the Committee attached greater weight to the version of the cashier and the dispatcher. Having believed the version of these two witnesses, it is difficult to understand why the Committee nevertheless did not consider the charge attributed to Mr. Reid as having been established. In my view and taking account of the various statements and of the credibility of the persons involved as evaluated by the Committee itself, there is no reasonable basis for accepting Mr. Reid's explanation that he had purchased the tickets. Furthermore, the conclusion by the Joint Disciplinary Committee that Mr. Reid had lied about the 11 January incident is in itself a serious reflection on his integrity and I am satisfied that his retention in the Secretariat would not be in the interest of the United Nations.

“In view of the aforesaid, I recommend that you reject the Committee's recommendation regarding the disciplinary measure. The fact that the Committee has recommended a disciplinary measure consisting of a written censure is a clear indication that the Committee was satisfied that Mr. Reid did in fact commit an act of misconduct. Considering the circumstances of the case and Mr. Reid's assignment as security officer, I disagree with the Committee's view that his action was not of such a nature as to bar him from continued membership in the staff of the United Nations. *I therefore recommend that the disciplinary measure in this case consist of a dismissal of Mr. Reid for unsatisfactory conduct in accordance with the provisions of Staff Regulation 10.2 and Staff Rule 110.3 (b). I also recommend that the dismissal take effect as of the date of notification to the staff member who will be entitled to three months notice of termination under Staff Rule 109.3 (a). Compensation will be paid to him in lieu of the notice period in accordance with paragraph (c) of the same rule. The period of suspension with half pay will be considered as suspension with full pay since that suspension was effected under Staff Rule 110.4 with the clear indication that it was without prejudice to the rights of the staff member. I intend to make no recommendation under Annex III (d) of the Staff Regulations for the payment of any termination indemnity to Mr. Reid.*”

On 27 June 1973 the Under-Secretary-General for Administration and Management approved those recommendations on behalf of the Secretary-General in a memorandum to the Assistant Secretary-General for Personnel Services reading:

“There are three incidents here involved, those relating to December 9, 1972, to January 10, 1973 and to January 11, 1973 respectively.

“As for the first, the cashiers who recall the refund of the price of 7 tickets to a security officer on two separate occasions could not be absolutely sure of the date, nor of the identity of the security officer to whom they gave refunds. The circumstantial evidence points the finger of suspicion at Reid since he was one of three officers on duty at post 113 during different times on December 9th, was a relief and not a regular officer, etc., etc. The Assistant Secretary-General, however, wrote off this incident as having no bearing on the case for lack of positive identification of Reid as the security officer who obtained the refunds.

“As for the January 10, 1973 incident we have two witnesses (friends of Reid's) testifying in support of his story. We know that Reid obtained a refund, but we do not know how he came into possession of the tickets. He claims that he bought them for his friends and that therefore he was entitled to a refund when their plans were changed. The friends support him in this. The cashiers claim that they have no recollection of having sold any tickets to a uniformed security officer that day. They are positive that they did not. Whom are we to believe? We have to decide whether to believe the cashiers or to believe Reid and his friends. They cannot both be telling the truth. In whose testimony should we place the greatest confidence?

“The answer to this question must be deferred until we consider the circumstances of the incident of January 11, 1973. Here there is no doubt: Reid is guilty of deliberate lying and his testimony is clearly and convincingly contradicted by that of the cashiers on duty. There is no doubt that on January 11 he did approach the cashier on duty and attempt to obtain a refund (although he falsely denies it). There is no doubt as to his identity (for it is confirmed by two witnesses whose truthfulness has not been called into question). There is a very obvious explanation as to why he did not pursue his request for a refund when refused by the cashier (and he would have had no reason not to insist on a refund had he legally acquired the tickets); the reason is that he knew from the previous day's experience that he would have to go down to see McManus again (the man who had authorized the refund the previous day) and he did not wish to repeat the pattern. So he abandoned the idea.

“It is clear therefore that Reid attempted unsuccessfully to obtain a refund on tickets on January 11 (tickets which he does not claim to have purchased, because he denies falsely the entire incident). It is equally clear that he lied about this incident—and lied deliberately. Unless it is argued that he was legally entitled to a refund on these tickets, and was improperly refused, the only conclusion from the incident of January 11 must be that he improperly attempted to obtain a refund to which he was not entitled.

“Returning now to the incident of January 10th and the question of the credibility of witnesses, I have no doubt in my mind as to which witnesses can be regarded as having credibility and which had not. The credibility of Reid's testimony is completely undermined by the evidence clearly showing that in respect to the January 11 incident he was deliberately lying to protect himself. If he was capable of lying on January 11, he was capable of lying on January 10; and since there is no reason for questioning the credibility of the cashiers re the January 10 incident, it must be concluded that Reid has not given a credible or satisfactory explanation as to how he came into possession of the tickets for which he successfully claimed a refund on January 10th.

“I conclude therefore that on January 10th Reid successfully obtained a

refund on tickets to which he was not properly entitled; and on January 11th he unsuccessfully attempted to obtain a refund on tickets to which he was not properly entitled. On the occasion of the January 11th incident, the evidence is clear that he deliberately lied to protect himself; and on the occasion of the January 10th incident his credibility is such that he cannot be regarded as contradicting the testimony of the cashiers who deny having sold any tickets that day to a uniformed security guard.

"I therefore join with the Assistant Secretary-General, Personnel Services, and the Legal Counsel in rejecting the conclusions and recommendations of the Joint Disciplinary Committee.

"I concur, on behalf of the Secretary-General, in the recommendation to dismiss Mr. Reid for unsatisfactory conduct in accordance with the provisions of Staff Regulation 10.2 and Staff Rule 110.3 (b) and with the other recommendations of the Assistant Secretary-General, Personnel Services, as set out in the final paragraph of his memorandum to the Secretary-General dated May 16, 1973."

On 29 June 1973 the Under-Secretary-General for Administration and Management informed the Secretary-General of the action he had taken in his name, concluding:

"It was and is my view that this justifies more severe punishment than a written censure.

"In view, however, of the *unanimous* recommendation of the Joint Disciplinary Committee, I think you should probably review the matter and let me know if you agree (since I am taking the decision in your name) or whether you take a contrary view."

On 10 July 1973 the Secretary-General agreed with the opinion of the Under-Secretary-General for Administration and Management. On 16 July 1973 the Officer-in-Charge of Personnel Services sent the following notice of dismissal to the Applicant:

"...

"The Secretary-General has carefully examined the case in the light of the Committee's report and the Committee's conclusions and recommendations. The Secretary-General has concluded that on 10 January 1973 you successfully obtained a refund on tickets to which you were not properly entitled and on 11 January 1973 you unsuccessfully attempted to obtain a refund on tickets to which you were not properly entitled. The Secretary-General has found that on the occasion of the 11 January incident, there was clear evidence that you deliberately lied to protect yourself and on the occasion of the 10 January incident, your credibility was such that it could not be given greater credence than the testimony of the cashiers who did not recall having sold any tickets that day to a uniformed Security Guard.

"In view of the aforesaid, the Secretary-General has decided to dismiss you from service with the United Nations for unsatisfactory conduct in accordance with the provisions of Staff Regulation 10.2 and Staff Rule 110.3 (b). The dismissal will take effect as of the date of its notification to you. In view of the fact that you have a permanent appointment with the United Nations, you are entitled to a three months' notice of termination under Staff Rule 109.3 (a). However, the Secretary-General has decided to pay you compensation in lieu of the three months' notice in accordance with paragraph (c) of Staff Rule 109.3.

"In accordance with the provisions of Staff Rule 110.4, the Secretary-General has decided to authorize the period of suspension with half pay which began on 7 February 1973 as suspension with full pay and you will accordingly be paid the balance of your salary for the whole period of suspension. The Secretary-General

has also decided not to grant you a termination indemnity under Annex III (d) of the Staff Regulations.

“ . . . ”

On 17 October 1973 the Applicant lodged an appeal with the Joint Appeals Board, which submitted its report on 28 March 1975. The Board's conclusions and recommendations read as follows:

“Conclusions and recommendations

“35. The Board finds that the dismissal of the appellant for misconduct was too severe a disciplinary measure in the light of the evidence set out in the Joint Disciplinary Committee report. Accordingly, the Board recommends that the Secretary-General should rescind the decision of dismissal. In view of the fact that reinstatement would be difficult as of this date, the Board feels that the appellant's situation might be assimilated to one of an agreed termination under Staff Regulation 9.1 (a), last paragraph, and that the Secretary-General should exercise the authority given to him by Staff Regulation 9.3 (b) to pay the appellant a termination indemnity payment 50 per cent higher than that which would otherwise be payable under the Staff Regulations.”

On 31 July 1975 the Officer-in-Charge of Personnel Services informed the Applicant that the Secretary-General had taken the following decisions on the appeal:

“ . . . ”

“The Secretary-General has re-examined this case in the light of the Board's Report. The Secretary-General has taken note of the Board's Report but has decided to reject its recommendation that the decision to dismiss you from service be rescinded and a settlement be made by which your position would be assimilated to one of agreed termination and a payment be made to you equivalent to 50 per cent higher than the termination indemnity normally paid under the Staff Regulations. Furthermore, the Secretary-General has decided to maintain his previous decision of your dismissal subject only to amending it in such a manner as to permit the granting to you under the discretion provided in paragraph (d) of Annex III of the Staff Regulations of a termination indemnity in the amount of the full indemnity provided for under paragraph (a) of the same Annex.

“In reaching his decision, the Secretary-General took into consideration that since your separation was for misconduct he could not accept the Board's recommendation to assimilate your situation to that of an agreed termination and thus to pay you the specially augmented termination indemnity. Nevertheless, the Secretary-General has taken account of the Board's recommendation and decided to pay you the maximum termination indemnity provided under paragraph (d) of Annex III to the Staff Regulations which states that a staff member who is dismissed for misconduct may be granted, at the Secretary-General's discretion, a termination indemnity in any amount not exceeding the full indemnity payable under the Annex.”

On 14 January 1976 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. With regard to reinstatement: The Secretary-General has done a wrongful act in deciding to dismiss the Applicant from service in spite of the unanimous findings and recommendations of the Joint Disciplinary Committee and the Joint Appeals Board. To the general knowledge of the Applicant, a number of United Nations officials had been found to have committed more serious offences and yet neither have they been separated from service nor have they been given any serious punishment comparable

to the one given to the Applicant. There is no other alternative for him except to continue his services with the United Nations.

2. With regard to compensation: Since the Applicant is not being able to secure any suitable employment, the only alternative for him is to set up self-employed business, and only a compensation from the United Nations would enable him to do so; such a compensation would be a very small measure of reparation for the great suffering and injury caused to him by the unjust and wrongful decision to terminate his services.

Whereas the Respondent's principal contentions are:

1. The dismissal of the Applicant is legally valid, within the Secretary-General's discretion on disciplinary matters, and was taken with full regard to the Applicant's procedural rights.

2. On the basis of the evidence gathered the Secretary-General has made a reasonable and final determination of facts and validly concluded that the acts attributed to the Applicant constituted misconduct.

3. The Joint Appeals Board has no competence to recommend that the Applicant's situation might be assimilated to one of an agreed termination.

The Tribunal, having deliberated from 12 to 26 April 1976, now pronounces the following judgement:

I. The Applicant seeks rescission of the administrative decision dated 16 July 1973 stating that the Secretary-General has decided to dismiss the Applicant from service with the United Nations for unsatisfactory conduct in accordance with the provisions of Staff Regulation 10.2 and Staff Rule 110.3 (*b*), and of the administrative decision dated 31 July 1975 stating that, after re-examining the case in the light of the report of the Joint Appeals Board, the Secretary-General has decided to maintain his previous decision of dismissal, subject to payment, under the discretion provided in paragraph (*d*) of Annex III of the Staff Regulations, of the full termination indemnity provided for under paragraph (*a*) of that Annex. The Applicant contends that the Secretary-General "has done a wrongful act" in deciding to dismiss the Applicant in spite of the unanimous findings and recommendations of the Joint Disciplinary Committee and the Joint Appeals Board, and requests reinstatement and other reliefs.

II. The Tribunal observes that, under Staff Regulation 10.2, the Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory. Staff Rule 110.3 (*b*) reads as follows:

"Disciplinary measures under the first paragraph of staff regulation 10.2 shall consist of written censure, suspension without pay, demotion or dismissal for misconduct, provided that suspension pending investigation under rule 110.4 shall not be considered a disciplinary measure."

That these provisions endow the Secretary-General with a wide discretion to determine and define what constitutes unsatisfactory conduct has been recognized by the Tribunal in its Judgement No. 123 (*Roy*), where it stated in paragraph IX:

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

The Tribunal further observes that the legislative history of the provisions relating to its jurisdiction fully supports the view cited above. In the report of the Secretary-General to the General Assembly at its fourth session on the establishment of an Administrative Tribunal (document A/986), it was stated in paragraph 7 that:

"... there are three areas of decision in which the Secretary-General's judgement should be final—namely, a decision as to whether a particular staff member's services are satisfactory or unsatisfactory, the decision of fact in discipli-

nary cases where non-observance of the terms of the staff member's appointment cannot reasonably be alleged, and decisions of fact in cases of serious misconduct. The authority of the Secretary-General to decide the facts in these three areas is made clear in provisional staff regulations 19 and 21. His responsibility under the Charter as Chief Administrative Officer of the Organization can be satisfactorily discharged only if his judgement on the facts in the cases indicated above is considered final. This responsibility could not be effectively discharged if an independent Administrative Tribunal were given authority to reconsider the facts in such cases, in the absence of any reasonable allegation that the terms of an appointment had been violated, and to reverse the decision of the Secretary-General."

The report of the Fifth Committee of the General Assembly (document A/1127) reiterated in paragraph 9 (iv) the position in the following terms:

"In connexion with Article 2 [of the Tribunal's draft statute], as amended, two points were made in the course of the discussion regarding the Tribunal's competence:

"(a) That the Tribunal would not have jurisdiction in disciplinary cases unless such cases came within the terms of paragraph 1 of Article 2;

" . . . "

III. While recognizing the authority of the Secretary-General to take decisions in disciplinary matters, the Tribunal has, in its jurisprudence, established its competence to review such decisions under certain conditions. For instance, cases of non-observance of the terms of appointment of staff members, including pertinent Staff Regulations and Rules, fall within the Tribunal's competence under article 2, paragraph 1 of its Statute. Similarly, as decided by the Tribunal in its Judgement No. 183 (*Lindblad*), failure to accord due process to the affected staff member before reaching a decision on disciplinary measures attracts the jurisdiction of the Tribunal. In the present case, there has been no complaint of violation of any of the Staff Regulations or Rules or of denial of due process. The charge of obtaining unauthorized refunds on visitors' tickets was made against the Applicant after a preliminary investigation by the Respondent and was later referred to the Joint Disciplinary Committee in accordance with Staff Rule 110.3 (a). The Joint Disciplinary Committee went elaborately into the evidence, examined the witnesses and afforded the fullest opportunity to the Applicant and his counsel to participate in the proceedings and present his case. In fact, the Applicant's complaint is not against any fault of procedure before the Joint Disciplinary Committee but against the rejection by the Respondent of the unanimous conclusions and recommendations of that body.

The Tribunal therefore holds that the contested decision of the Respondent does not suffer either from non-observance of pertinent Staff Regulations or Rules or from denial of due process.

IV. The Applicant contends that the rejection of the unanimous recommendations of the Joint Disciplinary Committee and of the Joint Appeals Board by the Respondent is "wrongful".

The Tribunal observes that the reports of the Joint Disciplinary Committee and of the Joint Appeals Board are advisory and that the Respondent is entitled to reach a different conclusion from that of those bodies on a consideration of all the facts and circumstances of the case. However, the Tribunal is competent to review the Respondent's decision if such decision is based on a mistake of facts or is arbitrary or is motivated by prejudice or by other extraneous considerations.

In view of the unanimous recommendations made by the Joint Disciplinary Committee and by the Joint Appeals Board in favour of the Applicant and the plea that

the contested decision is "wrongful", the Tribunal considers it necessary to examine the basis for that decision.

V. The Tribunal disregards all references to the refund of the price of seven guided tour tickets alleged to have been obtained by the Applicant on 9 December 1972 as the Under-Secretary-General for Administration and Management has, in his memorandum dated 27 June 1973, conceded that the charge failed "for lack of positive identification of Reid as the security officer who obtained the refunds".

VI. In respect of the charge that on 10 January 1973 the Applicant obtained refunds of guided tour tickets under false pretences, the report of the Joint Disciplinary Committee sets forth the Applicant's version that he had invited two friends to the United Nations and had bought tickets for them, and that they had been unable to take the tour. The Applicant's version is corroborated by his two friends. There is, however, a discrepancy in the Applicant's testimony regarding the time when he purchased the tour tickets. In his oral statement the Applicant first said that he had bought the tickets before his friends' arrival ("beforehand, which I promised them"), but later he said that he had bought them after his friends had left to make a telephone call. In reply to a question from the Chairman of the Joint Disciplinary Committee, the Applicant could not recall which cashier had sold him the tickets on 10 January 1973. The Committee observed that it had questioned "two of the three cashiers who had sold tickets on 10 January (the third, Miss Tinawy, had been on leave during the disciplinary proceedings), and it noted that they did not recall having sold any tickets to Mr. Reid on that day". The Chairman also asked Miss Ahmed, one of the cashiers selling tour tickets, "whether she recalled selling a ticket to Mr. Reid, in uniform or not, on 10 January. Miss Ahmed said that she did not." Although this somewhat ambiguous answer might mean either that the witness did not recall selling a ticket to the Applicant or that she did not sell a ticket to the Applicant, the context of the question and answer and the understanding of the Joint Disciplinary Committee which heard the witness suggest that she meant that she could not recall having sold a ticket to the Applicant, rather than that she did not sell a ticket to the Applicant. In the circumstances, the Committee found "that it was not established beyond any doubt that Mr. Reid had not purchased the tickets for which he received a refund on 10 January" and that "the allegation that he defrauded the Organization on 10 January accordingly fails".

VII. The Respondent, while rejecting the conclusion of the Joint Disciplinary Committee, observed as follows:

"As for the January 10, 1973 incident we have two witnesses (friends of Reid's) testifying in support of his story. We know that Reid obtained a refund, but we do not know how he came into possession of the tickets. He claims that he bought them for his friends and that therefore he was entitled to a refund when their plans were changed. The friends support him in this. The cashiers claim that they have no recollection of having sold any tickets to a uniformed security officer that day. *They are positive that they did not.*" [Emphasis added.]

The Tribunal notes that, while the Joint Disciplinary Committee came to the conclusion that "it was not established beyond any doubt that Mr. Reid had not purchased the tickets for which he received a refund on 10 January", the Respondent considered that the evidence clearly established that the cashiers had not sold any tickets to the Applicant on 10 January 1973. In support of his conclusion, the Respondent states in his answer before the Tribunal:

"The cashiers claim that they have no recollection of having sold any tickets to a uniformed security officer that day. They are positive they did not (last para. of memorandum of 22 January 1973 and p. 16 of Annex 8 and para. 70 of Annex 4)."

The Tribunal therefore proceeds to examine the documents mentioned by the Respondent.

The memorandum dated 22 January 1973 from the investigating officer to the Chief of the Security and Safety Section, which states:

“S/O [Security Officer] Reid had stated that he had purchased two (2) adult guided tour tickets (sometime in the morning) on Wednesday, 10 January 1973.

“However, the writer received information from Miss Tinawy, Miss Durant, Miss Ahmend [*sic*], and Mrs. Bartholin who were the only Cashiers on duty on Wednesday, 10 January and Thursday, 11 January 1973 at the GA [General Assembly] Cashier Desk, that S/O Reid or no other uniformed Security Officer purchased any guided tour tickets on 10 January 1973 or 11 January 1973 or any other day when they were on duty.”,

contains only hearsay evidence, while the Joint Disciplinary Committee, which heard two cashiers, stated that they did not recall selling tickets to a uniformed guard on 10 January 1973. The answer of another cashier, Mrs. Bartholin (at p. 16 of Annex 8), refers only to the incident on 11 January 1973; the following questions and answers in the record of her testimony clearly establish the facts:

“Q—16. On the 11 January 1973 when [the Applicant] came to you and said he bought the tickets, did you work on that morning.

“A—16. Yes.

“Q—17. Did you sell him, any tickets?

“A—17. No.”

The next material relied on by the Respondent is the answer of Miss Ahmend quoted at paragraph 70 of Annex 4—the report of the Joint Disciplinary Committee—which has already been commented upon by the Tribunal in paragraph VI above.

It follows that, so far as the incident on 10 January 1973 is concerned, no cashier has positively denied to the Joint Disciplinary Committee selling guided tour tickets to the Applicant and that the conclusion of the Joint Disciplinary Committee that it was not established beyond any doubt that the Applicant had not purchased two tickets on 10 January 1973 is sustainable. The Respondent's position on this point is not supported by direct evidence.

VIII. But the Tribunal observes that the termination decision was not based on the incident of 10 January 1973 alone and that the decision was reached on a consideration of the incident of 11 January 1973 also and of the totality of the circumstances.

IX. On the charge that the Applicant attempted to obtain a similar refund on 11 January 1973, the Joint Disciplinary Committee rejected the Applicant's version that he had not approached the cashier at all on that date, but accepted the veracity of Mrs. Bartholin and Miss Widman and the accuracy of their testimony. Mrs. Bartholin, who is a cashier, testified that “when she had come back to work on 11 January she had been told the story of Mr. Reid asking for a refund the day before. In the afternoon, when she had been alone at the cashiers' desk, Mr. Reid had come back to the desk giving her two tickets and asking for a refund”. Miss Widman, who is a dispatcher, corroborated that she was alerted by Mrs. Bartholin and that she saw the Applicant in conversation with Mrs. Bartholin. The contention of the Applicant's counsel that there was a conspiracy between the cashiers and the dispatchers who were peeved by the Applicant's having successfully secured a refund on the previous day has been rejected by the Joint Disciplinary Committee. The Committee, however, concluded that “noting that Mr. Reid had made no effort to pursue the matter of a refund after his encounter with Mrs. Bartholin and once again giving him the benefit of the doubt, found that although Mr.

Reid had undoubtedly spoken to Mrs. Bartholin on 11 January in the manner described, it was not conclusively established that he had been seriously attempting to obtain a refund for the tickets”.

The Respondent, on the other hand, argued that the evidence of the cashier was positive that the Applicant, who had not bought any tour ticket on 11 January 1973, sought refund for two tickets on that day, that he could not pursue his request for a refund with the same officer who had authorized a refund on the previous day without being discovered, and that he was guilty of telling lies. Taking the incidents of 10 and 11 January 1973 together, the Respondent reached the conclusion that, as it had been established that the Applicant was deliberately lying about the incident on 11 January, he could also have done the same regarding the events on 10 January.

The Tribunal observes that the finding of the Joint Disciplinary Committee that “it was not conclusively established that [the Applicant] had been seriously attempting to obtain a refund for the tickets” on 11 January 1973 is contrary to the weight of evidence and probability of the case. Since the Joint Disciplinary Committee accepted the testimony of the cashier and the dispatcher that the Applicant approached the cashier on 11 January 1973, and rejected the testimony of the Applicant that he did not make any such approach, the Tribunal considers that the conclusion reached by the Respondent, based on the testimony of the cashier, that the Applicant attempted to obtain an unauthorized refund when he approached her, is warranted by the evidence.

On a review of the evidence relating to the incidents on 10 and 11 January 1973 and the Applicant’s credibility as a whole, the Tribunal finds that the termination decision was not arbitrary and holds that the Secretary-General, in deciding not to accept the recommendation, though unanimous, of the Joint Disciplinary Committee, was acting within the scope of his authority. The Tribunal therefore rejects the Applicant’s plea for reinstatement. Consequently, the Applicant’s pleas for compensation for injuries also fail.

X. The Joint Appeals Board, while recognizing the final authority of the Secretary-General in matters of discipline, considered that the Joint Disciplinary Committee had been perhaps too lenient in recommending written censure but that the penalty recommended by the Secretary-General’s senior advisers, “even if their conclusions were correct”, was too harsh. The Board therefore recommended rescission of the decision of dismissal and the assimilation of the Applicant’s situation to one of an agreed termination under Staff Regulation 9.1 (a) with payment to the Applicant of a termination indemnity 50 per cent higher than that which would otherwise be payable under the Staff Regulations.

The recommendation of the Joint Appeals Board to treat the separation as an agreed termination and to pay enhanced termination indemnity to the Applicant involves the exercise of discretion vested in the Secretary-General. As decided in Judgement No. 123 (*Roy*), the Tribunal holds that, in the absence of legal obligations on the part of the Respondent, it has no competence to give binding force to such a recommendation. The Applicant’s pleas stated in paragraph 5 of the application accordingly fail.

XI. The Tribunal takes note of the Respondent’s letter dated 31 July 1975 stating that he has decided to pay the Applicant the maximum termination indemnity provided under paragraph (d) of Annex III to the Staff Regulations.

XII. For the foregoing reasons, the Tribunal rejects the application without prejudice to the payment of the termination indemnity referred to in paragraph XI above.

(Signatures)

R. VENKATARAMAN

President

Suzanne BASTID

Vice-President

Francis T. P. PLIMPTON

Vice-President

Geneva, 26 April 1976

Francisco A. FORTEZA

Alternate member

Jean HARDY

Executive Secretary

Judgement No. 211*(Original: English)***Case No. 206:****Hamo****Against: The Secretary-General
of the United Nations**

Request for the reopening of a case by the Advisory Board on Compensation Claims.

Request that the Applicant be given access to all background documents relating to the case and that the Advisory Board be requested to produce the terms of reference of the Medical Board constituted to examine the Applicant's case.—Request rejected, since it does not relate to specific additional information and the need for production of the terms of reference, if any, of the Medical Board has not been established.

Principal request.—Discretion of the Secretary-General to reopen cases relating to compensation and amend the award with respect to future payments.—Obligation of the Secretary-General not to exercise such discretion unreasonably or arbitrarily.—Consideration of the question whether the decision of the Secretary-General approving the recommendation of the Advisory Board that the request for reopening of the case be rejected is arbitrary or unreasonable.—Observation by the Advisory Board that the request for the reopening of the case contained no new element of substance which had not been taken into account by the Medical Board.—Report of the Medical Board.—Not being competent to make an assessment of the medical opinion, the Tribunal will confine its examination to the question whether the conclusions reached were vitiated by lack of due process.—Contention of the Applicant that the terms of reference of the Medical Board did not give the latter the necessary freedom to conduct an inquiry.—Contention rejected in the absence of any complaint from the medical expert selected by the Applicant.—Contention of the Applicant that the criterion of "attributability" was replaced by the concept of "the direct and the essential cause" in the terms of reference of the Medical Board.—Contention rejected, since the Board should be presumed to have considered the question in all its aspects.—Contention of the Applicant based on the unanimous view of the Medical Board concerning his current state of health.—Observation by the Tribunal that the Applicant has been awarded a disability benefit and rejection of the contention.

Alternative request that the Applicant be compensated under article 1 (b) of appendix D to the Staff Rules.—Irrelevance of that provision to the case.

Observation by the Tribunal that in any event no new material or evidence has been submitted by the Applicant.

Conclusion of the Tribunal that the recommendation of the Advisory Board is not vitiated by any irregularity of procedure and that the Secretary-General's decision approving that recommendation was within his discretionary authority.

Application rejected.
