

VII. The application is therefore rejected.

(Signatures)

R. VENKATARAMAN

President

Suzanne BASTID

Vice-President

Endre USTOR

Member

Geneva, 15 May 1979

T. MUTUALE

Alternate Member

Jean HARDY

Executive Secretary

Judgement No. 241

(Original: English)

Case No. 224:

Fürst

Against: The Secretary-General
of the United Nations

Request for compensation for allegedly unlawful transfer and reassignment.

The Applicant contests the decision to appoint him to a post in Senegal in 1973.—Judgement No. 134.—The Applicant repeats the same arguments that were found unacceptable at that time.—Absence of any new and conclusive evidence.—The post classification system introduced by UNDP in 1973 is irrelevant, since it placed no obligation whatever on the Administration to promote automatically any staff member graded lower than the level of the post to which he is appointed.—The Tribunal concludes that the appointment of the Applicant at the P-3 level involved a valid exercise of authority by the Administration.—The Applicant contests the decision to transfer him to a post of area officer in New York in 1975.—Applicant's contention that the Administration exceeded its powers in assigning him to a post demonstrably to his detriment.—Staff members have an obligation to accept assignments to a specified duty station at a given time.—Judgement No. 165.—Judgement No. 92 is irrelevant.—The contention is rejected.—Applicant's contention that the transfer was to his detriment because it deprived him of the opportunity of promotion.—Contention rejected.—The Tribunal concludes that the two decisions contested by the Applicant represented a valid exercise of authority on the part of the Respondent.

Broader scope of the application.—Applicant's allegations that, in all his dealings with him, the Respondent was motivated throughout by prejudice.—Consideration of the allegations by the Tribunal.—The Tribunal concludes that there was no prejudice, improper motivation or abuse of power on the part of the Respondent.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. H. Venkataraman, President; Mr. Francisco A. Forteza; Sir Roger Stevens;

Whereas, on 17 April 1978, Ewald Viktor Fürst, a former staff member of the United

Nations Development Programme, hereinafter called UNDP, filed an application the pleas of which read:

- “(a) No preliminary or provisional measures are requested;
- “(b) Decisions contested:
 - “(i) the UNDP Administration’s decision of 14 September 1973 to appoint the Applicant, at the P-3 level, to the post of Deputy Resident Representative in Senegal, classified at the P-4/P-5 level;
 - “(ii) the Administration’s decision of 19 May 1975 to transfer the Applicant from his post of Deputy Resident Representative in Senegal to a post of Area Officer at New York;

“(c) the Applicant being almost 59 years of age, it would be unrealistic to request this Tribunal to order the rescission of these decisions or invoke the specific performance of any obligations;

“(d) in formulating, therefore, his plea to this Tribunal to order the award of compensation, the Applicant has been guided by the *dicta* of its Judgements Nos. 67 and 85, to the effect that ‘compensation is fixed in the light of personal circumstances . . . and . . . intended to repair a wrong’.

“In regard to his personal circumstances, the Applicant prays this Tribunal to consider that:

- “(i) since his first engagement in United Nations technical assistance activities dating back to 1958, he has spent some seventeen years of his life in a field of work and in the exercise of functions which have virtually no relevance to other sectors of remunerative employment;
- “(ii) when separated from the service, he was more than 56 years of age which factor, among others, was responsible for the failure of his attempt to secure alternative employment where his extensive experience of assistance to developing countries could be utilized, i.e. his national technical co-operation administration;
- “(iii) the termination of his service before normal retirement age, and the impossibility of securing alternative suitable employment in Europe, after almost fourteen years’ service overseas, compelled the Applicant to opt for an early retirement benefit which, on reaching the age of 57, and as a consequence of his irregular grading status, amounted to \$517.18 per month;

In regard to ‘repairing a wrong’, this application will seek to demonstrate the UNDP Administration’s:

- “(i) non-observance of the Applicant’s terms of appointment, of applicable Staff Regulations and Rules, and of established administrative procedures;
- “(ii) administrative actions and decisions, irrespective of whether reversed or maintained, which were improper or illegal, of which the effect was, or would have been, to the Applicant’s detriment and prejudice;
- “(iii) distortions of his personnel records, by misrepresentation and omission of salient and pertinent facts, by which his future appointments and career were jeopardized;

- “(iv) misuse of the power of transfer conferred by Staff Regulation 1.2, to the Applicant’s detriment and prejudice, to evade an obligation incurred, and having the effect of destroying his legitimate career advancement expectations.

“In accordance with the provisions of this Tribunal’s Statute, and within the powers of discretion conferred upon it, the Applicant thus prays an order for the award of compensation composed of the following:

- “(i) a sum corresponding to the difference between the salary and allowances he received (and Pension Fund contributions made) between 30 November 1973 and 30 September 1975, and the salary, allowances and applicable increments he would have received (and Pension Fund contributions made), had he been re-classified to the P-5 level on assuming his appointment as Deputy Resident Representative in Senegal on 30 November 1973;
- “(ii) a sum equivalent to the salary and annual increments (and Pension Fund contributions applicable) at the P-5 level for the period from his separation from the service on 30 September 1975 until his normal retirement age, i.e. 2 May 1979;
- “(iii) a sum corresponding to the difference between the repatriation grant he received, on being separated from the service, at the P-4 level, after thirteen years and ten months’ service, and the repatriation grant he would have received on leaving the service, at the P-5 level, at normal retirement age, after seventeen years and six months’ service;
- “(iv) a sum corresponding to daily subsistence allowance at the rate established for Austria in 1973, for the period 1 January 1973-14 October 1973, for himself and for his dependent wife, in consequence of the Administration’s refusal to allow the Applicant to remain in his post of Deputy Resident Representative in Ethiopia, its subsequent improper failure to reassign him and maintaining him on special leave with full pay, while depriving him of his domestic effects, thus compelling him to live in hotels and furnished accommodations during that period;
- “(v) compensation in respect of the loss of Swiss francs 7,000 incurred as a direct result of the Administration’s decision of 11 July 1973 to place the Applicant on special leave without pay for an indeterminate period;
- “(vi) from which sums, if awarded, be deducted the amount of \$555.00 representing installation grant at the rate established for New York, on the payment of which the Administration improperly and illegally insisted; and the *ex gratia* payment of \$2,150 made to the Applicant on his separation from the service, on the Administrator’s initiative and at his discretion;

or such sums which, in this Tribunal’s judgement on the evidence and merits of this application, represent a fair and equitable compensation for the moral and material damage, the distress and anguish, and the grievous injury which the Administration’s actions and decisions caused the Applicant.

“(e) no other relief is requested.”

Whereas, on 7 May 1978, the Applicant requested that Mrs. Louise O’Reagan, a

staff member (in 1972) of the Recruitment and Placement Section of the Personnel Division of UNDP, and Mr. John M. Saunders, Deputy Director (in 1973) of the Regional Bureau for Africa of UNDP, be heard as witnesses;

Whereas the Respondent filed his answer on 7 July 1978;

Whereas the Applicant filed written observations on 28 August and 5 September 1978;

Whereas, on 15 March 1979, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case subsequent to those stated in Judgement No. 134 are as follows:

In a letter dated 16 January 1969 the Director of the Bureau of Administrative Management and Budget of UNDP, referring to the last sentence of the letter of 25 November 1968 from the Under-Secretary-General for Administration and Management, advised the Applicant that his claims both for promotion and for permanent appointment would be examined at the next general review of professional staff. On 9 May 1969 the Director of the Bureau of Administrative Management and Budget informed the Applicant of the outcome of the Appointment and Promotion Board review in a letter reading in part:

“ . . .

“With regard to their deliberations on whether a recommendation could be made for your promotion to P-4, I must tell you that the Board did not consider that there were sufficient grounds for recommending any change in your level at this time.

“In considering your claims for permanent appointment, the Board did not feel that a favourable recommendation could be made as, in the Board's view, your record did not show the high and consistent level of performance to which the granting of a permanent appointment gives recognition. The Board did, however, recognize that a measure of continuity of employment was something which your seven and a half years of service with the Programme might reasonably lead you to expect and accordingly suggested to the Administrator that consideration be given to the extension of your appointment for a further fixed term of five years.

“The Administrator has accepted the Board's suggestion and, subject to your agreement and medical clearance, if necessary, a five-year extension will be processed. Thereafter, the possibility exists for a further extension to the normal retirement age of 60 years depending on continued satisfactory performance.

“ . . . ”

On 1 September 1969 the Applicant's appointment was extended for five years and he was reassigned to the UNDP Office in Malawi as Deputy Resident Representative. His performance from September 1969 to February 1971 was evaluated in a periodic report in which he was rated as “a staff member who maintains a good standard of efficiency”. On 24 May and 15 November 1971 the Applicant questioned the fairness of the periodic report. From 1 June to 1 November 1971, a period during which he acted as Resident Representative, the Applicant was paid a special post allowance to the P-4 level. On 11 August 1971, while still Resident Representative a.i., in a letter to the Director of the Bureau of Administrative Management and Budget he requested a change of duty station

on both personal (but not health) and policy grounds. On 24 August 1971 the Director replied that in principle he saw no objection to considering a reassignment for him. On 14 October 1971 the newly arrived Resident Representative of UNDP in Malawi supported the Applicant's wishes for early reassignment. On 14 February 1972 the Chief of the Personnel Division assured the Applicant that the question of his move was under active consideration. On 13 March 1972, in a note for the file, an official of the Recruitment and Placement Section of the Personnel Division stated, *inter alia*:

"The RR [Resident Representative] in Malawi and the SM [staff member] himself have strongly recommended his immediate reassignment from Malawi, to a place with good climate and medical facilities (the SM is still in delicate health). During the course of the past six months we have proposed the following: Liberia, Egypt, Sudan, Iraq, Aden—all of which he either turned down (for health reasons) or for which his candidature was not found acceptable.

" . . . The RR in Malawi is anxious that he depart as soon as possible, and RR is prepared to wait for replacement."

On 25 April 1972 the Applicant left Malawi on home leave without having been advised on his next assignment. On 24 May 1972 the Chief of the Personnel Division proposed to the Applicant a temporary assignment as Special Assistant to the Resident Representative of UNDP in Greece from 15 June to 15 August 1972. The Applicant accepted the offer and was assigned to Greece effective 19 June 1972. In a performance review report dated 17 August 1972 the Resident Representative in Greece rated the Applicant as a staff member whose performance results are in line with those expected of an experienced job incumbent. On 28 August 1972 the Assistant Resident Representative in Greece stated in a cable to the Personnel Division that the Applicant, if his assignment could not be extended, would appreciate confirmation of a possibility that he might be placed on special leave with full pay. On 31 August 1972 the Chief of the Personnel Division replied that the Applicant should return to Austria and would be placed on special leave with full pay pending determination of his reassignment. Effective 1 September 1972 the Applicant was placed on special leave with full pay and post adjustment at the Vienna rate. On 3 October 1972 the Chief of the Personnel Division notified the Applicant that pending determination of his final reassignment he was temporarily assigned to Ethiopia as Deputy Resident Representative until 31 December 1972. The Applicant's assignment in Ethiopia began on 17 October 1972. On 24 November 1972 the Resident Representative in Ethiopia wrote to the Chief of the Recruitment and Placement Section that he would be happy to retain the Applicant in the post of Deputy Resident Representative unless medical considerations precluded his being posted to Addis Ababa on a long-term basis. In a follow-up cable dated 15 December 1972 the Resident Representative stated:

" . . . WISH REPEAT THAT IN INTEREST THIS OFFICE DESIRABLE KEEP FURST IN PRESENT FUNCTION UP TO MIDDLE 1973. HIS PERFORMANCE IN MY VIEW VERY SATISFACTORY. . . . "

On 20 December 1972 the Chief of the Recruitment and Placement Section informed the Resident Representative in Ethiopia that the Applicant's assignment had been extended until the end of January 1973. On 5 May 1973 the Applicant asked the Division of Personnel for confirmation that he was placed on special leave pending reassignment. On 25 May 1973 the Division of Personnel sent him confirmation that he had been placed on special leave with full pay and post adjustment at the Vienna rate effective 30 December

1972. On 18 June 1973 the Applicant saw an Assistant Administrator of UNDP in Geneva and according to his own account heard for the first time that his name had been greeted with a certain lack of enthusiasm when assignment to other field posts was discussed, together with suggestions about possible transfer to another United Nations agency, and to the effect that an agreed termination might provide a solution to the present situation. On 20 June 1973 the Assistant Administrator in question sent the following cable to Headquarters:

“ . . . SINCE IT IS OBVIOUS THIS CASE MUST NOT DRIFT LONGER HAVE SECURED AGREEMENT ADMINISTRATOR FOR FURST VISIT HEAD-QUARTERS IMMEDIATELY IN ORDER ARRIVE AT MUTUALLY AGREED SOLUTION HIS FUTURE. FURST AGREEABLE AND READY DEPART ANY TIME. . . . ”

Before this visit could be arranged, however, the Chief of the Recruitment and Placement Section cabled the Applicant, on 27 June 1973, that he had been assigned to Headquarters for one year as the UNDP contribution to the secretariat of the Joint Appeals Board and that, while the Chairman of the Board welcomed his assignment, the initial stage, as customary, would be considered as a trial period. On 3 July 1973 the Applicant replied that the Joint Appeals Board post was irreconcilable with his functional title and the responsibilities entrusted to him over the past 11 years in seven assignments and that he preferred to await a proposal of a field post in conformity with his contractual title and commensurate with his experience despite the personal inconvenience and expenditures entailed. On 5 July 1973, in a further cable to the Applicant, the Chief of the Recruitment and Placement Section stated that the functional title of the Joint Appeals Board post fully corresponded to the Applicant's existing grade and past experience and responsibilities and that the post had been specially secured for him since all attempts to find a field post during the past eight months had been unsuccessful. On 10 July 1973 the Applicant replied that he proposed to appeal against his transfer to the Joint Appeals Board secretariat. By return cable of 11 July 1973 the Applicant was notified that since an administrative decision was not suspended during the appeals procedure, he was being placed on annual leave as from 10 July 1973 to be followed if necessary by leave without pay until the Joint Appeals Board proceedings were completed. By two letters dated 18 July 1973 the Applicant requested the Secretary-General to review the decision to assign him to a post in the Joint Appeals Board secretariat on a probationary basis and the decision to place him on annual leave as from 10 July 1973 to be followed if necessary by leave without pay until the appeals proceedings were completed. Having received no reply from the Secretary-General, the Applicant lodged an appeal with the Joint Appeals Board on 21 August 1973. On 14 September 1973 the Officer-in-Charge of the Regional Bureau for Africa addressed the following letter to the Resident Representative of UNDP in Senegal:

“I am writing in relation to the Deputy Resident Representative post which will soon become vacant in the Dakar Office with Mr. Apollonio's departure and to propose to you the candidature of Mr. Viktor Furst.

“Since this candidature calls for special consideration and attention on your part, I would like to acquaint you with the full background of the proposal.

“As you know the Administrator has requested that an in-depth review be made of our professional staff resources in the light of the more stringent requirements of

the Programme. In the course of this exercise, Mr. Furst's performance was carefully reviewed and although, as you can see from the attached Fact Sheet, there has never been any clear negative evaluation of his work, there are uncertainties about the quality of his performance. As a result, it has been decided to put Mr. Furst on trial for a year under the supervision of an experienced and Senior Resident Representative.

"It is against this background that, during the last Senior Staff Meeting chaired by Mr. Peterson, it was proposed to assign Mr. Furst as Deputy Resident Representative to your Office. During this trial period, you would be requested to closely and carefully follow and evaluate Mr. Furst's performance and report to me confidentially on a quarterly basis. This would enable us to make a fair decision concerning Mr. Furst's future association with our Organization. I wish to add that Mr. Furst, who is available immediately, would be fully informed of this arrangement.

"We all here fully realize that this request is contrary to the discussions in Addis where it was agreed that Mr. Challons should be reassigned to the Dakar office. You are justified to be disappointed at this new development. However, you will appreciate that it is on the Senior Resident Representative that the Organization has to rely in special situations where final decisions have to be made regarding the future of staff members whose performance is not clearly satisfactory.

" . . . "

On 22 September 1973 the Applicant informed the Chief of the Recruitment and Placement Section that in view of the decision to place him on leave without pay he had sold his car in Geneva at a net loss of 7,000 Swiss francs, shortly before receiving the cable of 14 September 1973 indicating that the decision was being reconsidered. On 10 October 1973 the Chief of the Recruitment and Placement Section, following a telephone conversation with the Applicant, cabled him that he was assigned as Deputy Resident Representative in Senegal and that, in accordance with the Applicant's wish to finalize his personal affairs, the Resident Representative in Senegal was being advised that he would arrive in approximately six weeks' time. On 15 October 1973 the Applicant confirmed by cable his acceptance of the assignment to Senegal. On 17 October 1973 he asked the Division of Personnel for confirmation that he had remained on special leave with full pay pending reassignment since 11 July 1973. By a letter of 29 October 1973 the Division of Personnel advised the Applicant that the decision communicated to him in the cable of 11 July 1973 had been rescinded, that he would thus be continued on special leave with full pay until 14 October 1973 and that effective 15 October 1973, the date of his acceptance for reassignment to Senegal, he would be placed on annual leave until the date of his arrival at Dakar. On 30 October 1973 the Applicant informed the Chief of the Recruitment and Placement Section that he had asked the Secretary of the Joint Appeals Board to hold his appeal in abeyance for the following reasons:

" . . . firstly, the offer of reassignment satisfactorily disposes of the main issue with which my appeal was concerned; secondly, however, it does not, *ipso facto*, dispose of the related issues on which I was seeking the Board's recommendations. In principle, I have no wish whatever to continue the appeals proceedings, and therefore felt that the best way of trying to reach an equitable solution would be to approach you to ascertain how Headquarters intended to deal with the three further issues raised in my appeal (i.e. the question of my grading, my leave status, and compensation in respect of material losses incurred by the inordinate delay in being reassigned), to which I need to add the question of my entitlements (already raised

in my letter of 25 May to you) and the related point of the proposed duration of my assignment to Senegal.”

On 10 December 1973 the Division of Personnel responded to an enquiry by the Applicant that the Administration was not in a position to alter the decision concerning annual leave, which was “based on the fact that staff members are not allowed to take time off in order to prepare for reassignment”. In a letter to the Division of Personnel dated 19 December 1973, the Applicant observed that, since it had been decided to place him on annual leave as from 15 October 1973, he assumed that his entitlement to the payment of assignment allowance would recommence from that date. On 3 January 1974 the Division of Personnel replied that under Staff Rule 103.22 assignment allowance was paid to a staff member who “is appointed or assigned to a duty station outside his home country” and that, since he was technically residing in his home country and was not assigned to any specific country, assignment allowance commenced only on the date of his actual assignment to Senegal, i.e. 29 November 1973. On 17 January 1974 the Resident Representative in Senegal was recalled to Headquarters for consultations and the Applicant became Resident Representative a.i. On 19 January 1974 the Applicant addressed to the Secretary-General a letter in which, after relating a conversation held three days earlier during which he had been advised of the trial nature of his new assignment by the Resident Representative in Senegal, he requested a review of the decision to assign him at his P-3 grade to a post classified at the P-4/P-5 level under the imposition of special conditions of which he had not been informed. In a note for the file dated 25 January 1974 and a memorandum dated 1 March 1974 the Resident Representative in Senegal made favourable assessments of the Applicant’s performance in Senegal. In a periodic report covering the period November 1973–March 1974 the Applicant was rated as “an efficient staff member giving complete satisfaction”. On 15 March 1974, according to a note for the file prepared by the Chief of the Recruitment and Placement Section, the Secretary-General, upon his return from a trip to Africa, advised a Deputy Administrator of UNDP that during his stay in Dakar he had met the Applicant and had been quite impressed with his performance; the Secretary-General having enquired whether the Applicant could not be assigned to a country with a small programme as Resident Representative, the Deputy Administrator advised him that while the record showed that the Applicant might be good in programme matters, he was not the ideal candidate for a Resident Representative post, but could be considered for programme work at Headquarters upon completion of his assignment in Africa. The Applicant having asked for an indication of how long he might expect his assignment to Senegal to last, the Director of the Division of Personnel informed him on 21 March 1974 that the Administrator of UNDP had approved the extension of his appointment for two years but that the exact duration of his assignment in Senegal could not be predicted at that time; he added that the Appointment and Promotion Board would be meeting shortly and that naturally consideration would be given to his case. On 4 April 1974 the Director of the Regional Bureau for Africa informed the Applicant that a two-year extension of his appointment had been recommended. On 15 April 1974 the Applicant was advised that the Appointment and Promotion Board had made the following recommendation to the Administrator of UNDP:

“The Board discussed thoroughly the case of Mr. E. V. Furst and felt that in view of the short period of his present assignment in Senegal the staff member’s performance should be carefully evaluated by the Regional Bureau for Africa and, on the basis of such evaluation, his case be resubmitted to the Board for consideration

in the second half of 1974. The Board was informed of the comments of the Secretary-General during his recent visit to Senegal.”

On 18 May 1974, having received no reply to his letter of 19 January 1974, the Applicant lodged with the Joint Appeals Board at Geneva—to which his appeal of 21 August 1973 had been referred at his request—a statement in which he commented on the remaining issues of that appeal and submitted his appeal concerning the issues raised in his letter of 19 January 1974. On 18 July 1974 he was informed that the Appointment and Promotion Board had recommended his promotion to the P-4 level and that the Administrator of UNDP had approved that recommendation effective 1 March 1974. On 23 July 1974 the Chief of the Recruitment and Development Branch asked the Applicant whether he intended to withdraw his appeal. On 1 August 1974 the Applicant replied that promotion to the P-4 level at that stage did not appear to him an adequate response to what he considered to be justified claims and that consequently he had no option but to continue the appeals proceedings. On 5 August 1974 the Division of Personnel confirmed the Administration’s negative answer to the Applicant’s claim for an assignment allowance for the period prior to 29 November 1973. On 19 August 1974 the Applicant replied that the matter would be “tested in court” since a claim for compensation in respect of assignment allowance was included in his submission to the Joint Appeals Board. On the same day the Applicant returned to the Division of Personnel a signed copy of his letter of appointment for a further two years with the remark that his acceptance of the extension “should be defined as without prejudice to the appeal and its supplementary statement now before the Joint Appeals Board in Geneva”. In mid-September 1974 a new Resident Representative took charge of the UNDP Office in Senegal. On 4 October 1974, in a letter to Headquarters describing the ceremony in which he had presented his credentials to the Government of Senegal, he wrote that the Minister for Foreign Affairs had expressed his satisfaction at the way in which the Applicant had directed the mission during the interim period. In a performance review report covering the period 3 March–15 September 1974 the first reporting officer wrote in part 4:

“My comments refer only to the Staff Member’s performance as RR a.i.

“The S/M assumed his responsibilities as RR a.i. under difficult conditions: relations with the Government were very strained because of the President’s request that the RR in post be removed; morale in the office was, as a result, at a low end; and finally the various factors which had led to the crisis with the Government (chief of which were the objections of some long-established experts close to the Presidency to the RR doing a proper monitoring job of project activities as well as attempting to bring to an end rather unproductive but long-lasting small-scale projects) created a climate where:

“(a) the programming of new activities came to a virtual stand-still; and

“(b) the monitoring of on-going ones had to be handled with particular caution.

“Given this generally negative/static environment and our concern not to allow our relationship with the Government to deteriorate further, I believe that the S/M performed adequately during the period when he acted as RR a.i. He utilized the staff of the bureau efficiently so that information on on-going activities kept arriving punctually; the administration of the office continued normally. Indeed, the S/M began putting into effect, despite the above-mentioned conditions, some of the recommendations put forward by Mr. Vaidyanathan’s Unit. Our relationship with

the Government did not deteriorate further and indeed improved somewhat.

"I would have to reserve judgement on the S/M's ability and initiative in programming matters, should he face an active programme where important and rapid decisions were needed and where actions, discussions or priorities were required with the Government.

"The S/M speaks and writes English and French perfectly."

He rated the Applicant as "among those whose performance results usually show achievement of planned objectives", adding: "I feel uneasy about rating the S/M on this scale for the reasons explained in part 4 of this report". The third reporting officer commented on 27 May 1975:

"I have discussed with the present Resident Representative in Senegal his assessment of the performance of the staff member since Mr. Borna's arrival, subsequent to which the programme development and management returned to normalcy. Mr. Borna believes that the staff member's performance is too weak to permit him to be a Resident Representative. The staff member was unable to act responsibly during Mr. Borna's absence. He tends to create problems where there are none, and does not find solutions to problems that exist.

"In view of this and of the fact that we consider Deputy Resident Representatives as potential Resident Representatives, one may wonder whether the staff member is in the right job.

"These remarks should not overshadow that fact that the staff member is a very pleasant person who can entertain excellent and cordial relations with his colleagues and with Government officials, which he did during the period that he was acting after Mr. Jaeger's departure and Mr. Borna's arrival."

Meanwhile on 19 May 1975 the Chief of the Recruitment and Development Branch had sent the following cable for the Applicant:

"PURSUANT UNDP'S DECENTRALIZATION POLICY WHEREBY STAFF WITH EXTENSIVE FIELD EXPERIENCE NOW ASSIGNED TO HEADQUARTERS, THE ADMINISTRATOR AT YESTERDAYS QUARTERLY SENIOR STAFF MEETING DECIDED TRANSFER YOU HEADQUARTERS AS AREA OFFICER BUREAU FOR EUROPE MEDITERRANEAN AND MIDDLE EAST. THIS ASSIGNMENT TO COMMENCE IMMEDIATELY AFTER YOUR HOME LEAVE. GRATEFUL CABLED CONCURRENCE APPROXIMATE ETA AND HOTEL REQUIREMENTS."

The Applicant, who was returning to Senegal from home leave, received the cable on 2 June 1975 and replied on the following day by requesting the vacancy notice and information on his entitlements. On 6 June 1975 the Chief of the Recruitment and Development Branch responded by the following cable:

"HAVE AIRMAILED SET OF STANDARD UNDP JOB DESCRIPTIONS C/O YOUR TEMPORARY ADDRESS BUT WISH TO STRESS YOUR TRANSFER HEADQUARTERS ADMINISTRATORS DECISION THUS NO PARTICULAR VACANCY ANNOUNCEMENT APPLICABLE."

On 20 June 1975, in a cable to the Director of the Division of Personnel, the Applicant stated:

“AAA . . . REGRET UNWILLING ACCEPT TRANSFER HEADQUARTERS EXPLANATIONS FOLLOW NEXT POUCH BBB SURPRISED LEARN ON RETURN DAKAR TODAY THAT WITHOUT AWAITING MY REQUESTED CONCURRENCE TRANSFER SUCCESSOR DRR DAKAR ALREADY DESIGNATED CCC INSTRUCTED BY RESREP NOT TO RESUME FUNCTIONS AS OF TODAY DDD GRATEFUL CLARIFICATION MY PRESENT POSITION.”

On 23 June 1975 the Applicant wrote to the Director of the Division of Personnel to offer his explanations for not concurring with the proposed reassignment to Headquarters. On 24 June 1975, in a cable to the Chief of the Recruitment and Development Branch, the Resident Representative stated that after consultations with the Senior Management Auditor, who was in Senegal, he had agreed that the Applicant should resume his duties, and asked to be advised of the effective date of the Applicant's transfer. On 25 June 1975 the Resident Representative issued instructions to his staff redistributing their duties in view of the imminent departure of the Applicant and other staff members. On 26 June 1975 the Director of the Division of Personnel sent the following cable to the Applicant:

“ . . . DECISION TRANSFER YOU TO HEADQUARTERS AS AREA OFFICER BUREAU FOR EUROPE MEDITERRANEAN AND MIDDLE EAST WAS TAKEN BY ADMINISTRATOR AT QUARTERLY SENIOR STAFF MEETING FOURTEEN MAY. THIS DECISION STANDS AND YOU SHOULD MAKE ARRANGEMENTS REPORT HEADQUARTERS FOURTEEN JULY CABLING NEWYORK ETA AND HOTEL REQUIREMENTS. MEANWHILE YOU REMAIN DEPUTY RESREP. IF TIMING PRESENTS SPECIAL FINANCIAL PROBLEMS WE PREPARED DISCUSS THESE IN NEWYORK TOGETHER WITH YOUR QUOTE EXPLANATIONS UNQUOTE WHICH WE EXPECTED IN POUCH BUT STILL NOT RECEIVED.”

On 27 June 1975 the Applicant noted in a letter to the Director of the Division of Personnel that the Resident Representative on 24 June had instructed him to resume his functions as Deputy Resident Representative and on 25 June had transferred to other hands the functions he had fulfilled before his departure on home leave. On 30 June 1975 the Applicant requested the Secretary-General to review the decision to transfer him to a post at Headquarters. On 1 July 1975 he suggested in a cable to the Director of the Division of Personnel that the implementation of the Administrator's decision be deferred until his claim for promotion to P-5 pending before the Joint Appeals Board had been resolved. On 2 July 1975 the Director of the Division of Personnel replied that the appeal was a separate issue which would be resolved in due course through the Joint Appeals Board machinery and which did not affect the Administrator's decision to assign the Applicant to Headquarters. By cable of 8 July 1975 the Applicant requested the Director of the Division of Personnel to grant him annual local leave as from 14 July, adding that he was requesting the Secretary-General to grant him special leave without pay until the end of the appeals proceedings. On 11 July 1975 the Director of the Division of Personnel replied that the Administrator's decision was maintained and that the Applicant should report to Headquarters on 14 July. On the same day the Applicant cabled to the Director of the Division of Personnel that he would arrive in New York on 14 July under the strongest protest, pointing out that this departure from Dakar was not to be construed as acceptance of the illegal suspension from duties effected and maintained by the Resident Representative and that his reporting to New York was not to be construed as acceptance of the illegal and improper downgrading and infringement of acquired right which his

transfer would entail. On the same day also the Resident Representative denied, in a cable to the Director of the Division of Personnel, that the Applicant had been suspended from duty. On 14 July 1975 the Officer-in-Charge of Personnel Services advised the Applicant that the Secretary-General had decided to maintain the transfer decision and that UNDP was unwilling to authorize special leave. On 16 July 1975 the personnel action form recording the Applicant's reassignment to Headquarters as of 14 July 1975 was issued. On 17 July 1975, in a memorandum to the Applicant, the Director of the Division of Personnel confirmed his reassignment and instructed him to take up his new functions immediately. On 21 July 1975 the Applicant signed a certificate to the effect that he would not contest the termination of his fixed-term appointment under the provisions of Staff Regulation 9.1(b), subject to the payment of the termination indemnity specified in Staff Regulation 9.3(a) and Annex III to the Staff Regulations. On 23 July 1975 the Applicant sent the certificate to the Director of the Division of Personnel under cover of a letter in which he specified *inter alia* that his decision not to contest termination was not to be interpreted as affecting in any way any of the substantive issues which were then, or might yet be, submitted for the consideration of the Joint Appeals Board. On the same day the Director recorded his agreement in the margin of the letter. On 23 July 1975 also the Applicant addressed to the Director of the Division of Personnel another letter reading in part:

"I would like to confirm my understanding that you envisage my separation from the service in the following manner:

"(a) my being placed on special leave with full pay, at the rate applicable in New York, until 31 August 1975; to be followed by thirty days' notice of termination, at the same rate, as per Staff Rule 109.3(b), expiring on 30 September 1975;

"(b) the issuance of a repatriation travel authorization to me, it being at the Administration's discretion whether such travel may be authorized by way of Dakar, and hence by air or by sea and road;

"(c) the issuance to the UNDP Office in Dakar of a repatriation travel authorization for my wife, by air or by sea and road, and an authorization to cover the cost of packing and transporting to my home country of my personal and domestic effects, in the amount of my entitlement."

On the same day the Director similarly recorded his agreement to those points and on 24 July 1975 he sent a formal notice of termination to the Applicant. On 25 July 1975 the Officer-in-Charge of UNDP approved an *ex-gratia* payment of 2150 dollars to the Applicant; the Assistant Administrator for Administration and Finance approved travel authorizations for the Applicant and his wife as discretionary decisions under Staff Rule 107.9(b)(i); and the Director of the Division of Personnel approved a discretionary decision under Staff Rule 105.2(a) placing the Applicant on special leave with full pay from 22 July 1975 through 31 August 1975, a discretionary decision under Staff Rule 107.4(a) waiving the six-month requirement for payment of return travel expenses, and an exception to Staff Rules 107.1(a)(iii) and 107.20(a) so that UNDP would absorb the costs of the Applicant's travel from Dakar to New York and recovery action would not be taken for the installation grant to which the Applicant had become entitled upon his reassignment to New York. On 28 July 1975 the Division of Personnel decided that the Applicant would be considered as being on duty from 14 to 21 July 1975, during which period he had been in continuous consultations with officials of the Division. On 30 July 1975 the Division of Personnel sent to the Applicant a cheque in the sum of 555 dollars representing

15 days' installation grant at the rate applicable to New York. On 14 August 1975 the Applicant lodged with the Joint Appeals Board an appeal against the decision to transfer him to the Headquarters post, suggesting that his three appeals might be considered by the Board at New York. On 16 August 1975 the Applicant returned the cheque for 555 dollars to the Division of Personnel, contending that since he had refused transfer to Headquarters and had never installed himself in New York he had no entitlement to an installation grant. On 24 August 1975 the Applicant submitted a rebuttal to his performance review report for the period 3 March-15 September 1974. On 5 September 1975 the Division of Personnel again insisted that there was no basis for amending or cancelling the personnel action representing the situation on 14 July 1975 when the Applicant's reassignment to Headquarters had become effective, and again enclosed the cheque for 555 dollars which the Applicant finally accepted. The Joint Appeals Board submitted its report on the Applicant's appeals on 6 September 1977. The concluding section of the report read as follows:

"Conclusions and recommendations

"138. The Board finds that the appellant has submitted no evidence to sustain his charge that the UNDP acted in bad faith in its dealings with him and that the contested decisions were motivated by prejudice and discrimination.

"139. The Board finds that the appellant is not entitled to any compensation for losses allegedly sustained as a result of the UNDP's failure to reassign him within a reasonable period of time to a post consistent with his terms of appointment, that any loss that the appellant suffered from the sale of the automobile he purchased in April 1972 was too remotely related to the decision placing him on annual leave as of 10 July 1973 to call for reparation by the UNDP, and that the appellant had no entitlement to assignment allowance for the period from 15 October 1973 through 29 November 1973 since he did not fulfil the conditions of Staff Rule 103.22.

"140. The Board finds further that there was no legal obligation binding the Administrator to promote the appellant to the P-4 level as of 20 November 1968 or to the P-5 level as of 30 November 1973.

"141. The Board finds lastly that the decision transferring the appellant to an Area Officer post at Headquarters as of 14 July 1975 was a valid exercise of the Administrator's authority under Staff Regulation 1.2.

"142. The Board accordingly makes no recommendation in support of these appeals."

On 4 January 1978 the Assistant Secretary-General for Personnel Services advised the Applicant that the Secretary-General had decided to accept the conclusions of the Joint Appeals Board's decision to make no recommendation in support of the appeals. On 17 April 1978 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant could legitimately expect continued service and advancement to higher levels of responsibility commensurate with his increasing seniority and length of experience.

2. The Administration persistently and without legitimate cause sought to remove the Applicant from its service and acted illegally or improperly to achieve that objective.

3. In order to obtain a cause justifying the Applicant's removal from the service,

the Administration falsified and distorted his personnel records, omitted to place thereon appraisals favourable to him, allowed uncorrected evaluations to be placed on his record and failed to observe established procedures in regard to the rebuttals thereof; it attempted to transfer him to other United Nations organisms without his knowledge or consent and attempted to place him on leave without pay contrary to the provisions of Staff Rule 105.2(a).

4. The Administration failed to accord the Applicant due process in failing to inform or consult him on the alleged difficulties in reassigning him.

5. The Administration denied the Applicant's right to work under the terms of his appointment by improperly maintaining him on special leave with full pay for extended periods when proven possibilities of his employment, consonant with the terms of his appointment, existed.

6. The Administration failed to observe the terms of the Applicant's appointment in Senegal by failing to advance him to the level to which the classification and established criteria of that post entitled him, and it deceived the Applicant on the conditions attached to that appointment.

7. The Administrator misused the power of transfer vested in him by Staff Regulation 1.2 so as to evade the obligation of advancing the Applicant to the level to which his appointment in Senegal entitled him, thus violating the right he had acquired by virtue of his occupation and fulfilment of functions of that post, and to the Applicant's grievous detriment, in having the effect of relegating and demoting him to a lesser functional and hierarchical level than he had hitherto occupied.

8. By renewing the Applicant's appointment on terms inconsistent with a prior recognition of his legitimate expectancy of security of tenure, and by placing on his record a wholly unfavourable appraisal, improper and manifestly tainted by extraneous factors, the Administration sought to create a justifying cause for a non-renewal of the Applicant's contract.

9. The Administration failed to observe the requirement of Staff Rule 112.2 by failing to obtain the Applicant's agreement to make an exception to Staff Rule 107.20(a) for the apparent purpose of evoking from him an action construable as his acceptance of the transfer being enforced upon him.

Whereas the Respondent's principal contentions are:

1. There was no obligation on the Administrator of UNDP to promote or advance the Applicant to the P-5 level on assigning him to the post of Deputy Resident Representative in Senegal. Appointments and promotions are within the discretion of the Secretary-General and unless there is a legal obligation binding on him, the Tribunal cannot enter into the merits of the same. In the Applicant's case there was no such legal obligation. Although the Applicant was assigned to a post classified at a higher level than his own, this does not conclusively establish that he was in fact performing at the higher level of responsibilities or entitle the Applicant to an automatic promotion.

2. The Applicant's reassignment to the post of Area Officer at Headquarters was a proper exercise of the Administrator's discretion under Staff Regulation 1.2. The Applicant has failed to show affirmatively that such discretion was improperly exercised. The Applicant's reassignment was decided in implementation of a policy of rotation between Headquarters and the Field. It is clear from the Applicant's last letter of appointment that changes in the functional title and duty station during the period of his

appointment were specifically envisaged. As to the Applicant's concurrence with the transfer, no Staff Rule or other statutory provision required it. The Administrator's right to transfer the Applicant was exercised in a reasonable manner, and the policy of UNDP to take into account only objections based on health factors and educational needs, discounting financial considerations or reasons of personal convenience, is perfectly legitimate.

3. The Applicant has failed to establish affirmatively that any of UNDP's actions and decisions in his regard were improperly motivated by bad faith, prejudice or other extraneous factors or that he suffered a wrong as a result of a violation of any applicable element of proper procedures. On the contrary, the evidence shows that UNDP went well beyond legal requirements in its efforts to satisfy the Applicant's claims and preferences.

The Tribunal, having deliberated from 7 May to 17 May 1979, now pronounces the following judgement:

I. The Tribunal, while recognizing the wide scope of the application and its relationship to that from the same Applicant which formed the subject of Judgement No. 134, made its first task an examination of the two decisions contested, relating to the Applicant's appointments to Senegal in 1973 and to a post of Area Officer in New York in 1975.

II. With regard to the first of these decisions, it is the Applicant's contention that, since the post of Deputy Resident Representative in Senegal was classified at the P-4/P-5 level, the decision of the Administration to appoint him to that post, for which he had not applied, at the P-3 level constituted a violation, *inter alia*, of Staff Regulation 2.1 requiring the classification of posts and staff according to the duties and responsibilities required. The Applicant contends further that the introduction in 1973 of a comprehensive and consistent system of classification of Headquarters and field posts and of vacancy notices by UNDP giving effect to Staff Regulation 2.1 has brought a new element into the situation which was not present when the Tribunal in its Judgement No. 134 ruled that a document entitled "Policy Governing the Use of Titles in UNDP Field Offices" did not provide that all Deputy Resident Representatives should be assigned to P-4 level, and accordingly rejected the Applicant's claim.

III. Ten years later, despite this rejection, the Applicant is in effect repeating the same arguments that were found unacceptable, but now reinforced with what he claims to regard as new and conclusive evidence. The Tribunal is unable to share his views as to the relevance of the 1973 classification system to the decision which he is contesting. The system was introduced with the intention of defining the qualifications and experience called for in each post. It is a necessary corollary to the use of vacancy notices inviting applications and serves as a guide for applicants. But it is not intended to lay down that posts classified at a certain level cannot in any circumstances be occupied by officers below that level, and it places no obligation whatever on the Administration to promote automatically any officer graded lower than the level of the post to which he is appointed. The Applicant's view that "applicants meeting the qualifications required . . . have an unassailable right to the grading level set by that post's classification and criteria" and that the system "imposes on the Administration the obligation to grade the appointee in conformity with the post's classification and criteria" is a purely personal one, unsupported by any evidence or documentation and in the opinion of the Tribunal it is without validity. The Respondent is correct in claiming that the Applicant's assignment to a post classified at a higher level than that which he was in did not entitle him to an automatic promotion.

Apart from this general consideration, the Tribunal is of the view that complaints about the level of the post found for him come ill from an Applicant who had been urging for nearly a year that he should be given a permanent post, who had been warned orally a few months before that he was difficult to place and that agreed termination was a possibility, who received an assignment allowance of \$1200 per annum (the rate appropriate to both P-3 and P-4) from the time of his arrival in Dakar and who was subsequently promoted to P-4 with effect from 1 March 1974. The Tribunal is aware that administrative errors were committed in connexion with the Applicant's appointment to Senegal and more will be said on the subject in paragraph XIV below, but his appointment at P-3 level in no way contravened United Nations Staff Regulations or the established practice and involved a valid exercise of authority by the Administration.

IV. In contesting the Respondent's decision to transfer him to a post of Area Officer in New York in 1975, the Applicant appears to be arguing that while Staff Regulation 1.2 confers a power of transfer on the Administration, this power is abused if, as alleged in the present case, it requires a staff member to accept a transfer which is demonstrably to his detriment; and he quotes the Tribunal's Judgement No. 92 (*Higgins*) as establishing the principle that a staff member's transfer on secondment to another United Nations organism cannot be effected without his consent. He goes on to argue in effect that the transfer was demonstrably to his detriment because it would effectively block his prospects of promotion to P-5, his claim for which was before the Joint Appeals Board. There are thus two points which invite comment.

V. Concerning the alleged abuse of power, the Tribunal observes that a UNDP circular of 1968 interprets Staff Regulation 1.2 as laying an obligation on staff members to accept assignments to a specified duty station at a given time, and it adds that in all such cases the Administration will take into account all relevant considerations as far as possible. The obligation, in short, is on the staff member but the Administration is ready, at its discretion and allowing for the exigencies of the service, to take his personal situation and wishes into account. In its Judgement No. 165 (*Kahale*) the Tribunal, referring to Staff Regulation 1.2, declared:

"Thus it is obvious that the Secretary-General may relieve a staff member of certain duties or invest the staff member with other duties according to the exigencies of the service, of which he is the sole judge."

These considerations have equal validity in the case of the present application and the Tribunal finds that, in assigning the Applicant to a UNDP post at Headquarters, the Respondent was acting fully within the terms of the Staff Regulations and Rules. The Judgement No. 92 quoted by the Applicant is irrelevant to the case, since it concerned secondment of staff between different organizations in the United Nations common system and the decision contested in that case was not a transfer but premature termination by the seconding organization. The Tribunal also observes that the Applicant had been informed, in a letter of 21 March 1974 from the Director of the Division of Personnel, that while his appointment had been extended for two years, the exact duration of his assignment in Senegal could not be predicted. He therefore had no ground for maintaining, as he does in his letter of 30 June 1975 to the Secretary-General, that his contract as Deputy Resident Representative had been extended for a further two years, less than a year ago, so that he could reasonably expect to continue in these functions, at least until the expiry of the contract in 1976.

VI. As to the Applicant's second point, it will be clear from the preceding paragraph

that the Tribunal does not accept the premise on which the Applicant bases his argument that the Administration exceeded its powers in assigning him to a post demonstrably to his detriment. Even had it done so, the Applicant's contention that the transfer was to his detriment because it deprived him of the opportunity of promotion to P-5 would be without validity. The Tribunal fully accepts the Respondent's statement on this subject to the Joint Appeals Board, reading as follows:

"105. The respondent asserts that the appellant's chances of promotion to the P-5 level would have been unaffected by transfer to Headquarters. The Appointment and Promotion Board would have considered the appellant with other suitable staff members at the P-4 level for promotion to the P-5 level as a Senior Area Officer, subject to satisfactory performance. The appellant's arguments based on length of service could have been put forward in support of a claim for reclassification to the P-5 level as a Senior Area Officer, since the job descriptions for Area Officer and Deputy Resident Representative are drafted in that respect in similar terms.

"106. The respondent denies any link between the appellant's claim for promotion to the P-5 level and the decision to reassign him to Headquarters."

VII. The Tribunal accordingly concludes that both the decisions contested by the Applicant, that relating to his appointment at P-3 level to the post of Deputy Resident Representative in Senegal and that relating to his transfer to a UNDP post in New York, represented a valid exercise of authority on the part of the Respondent, and that, in so far as the application is directed against these two decisions, it is devoid of substance.

VIII. As stated at the outset of this judgement, however, the scope of the application is wide and there are a number of contentions by the Applicant which relate to matters prior to or not immediately connected with the two contested decisions. Underlying these contentions there is the constantly reiterated theme that the Respondent, in all his dealings with the Applicant, whether relating to promotion, transfer, leave or the handling of reports, failed to appreciate the Applicant's merits, disregarded favourable ratings and was throughout motivated by prejudice, even to the point at the end of manoeuvring his postings improperly with the deliberate intention of securing his separation from the service. In view of the sweeping nature of these allegations and the importance of the matters to which they relate, it is necessary for the Tribunal to examine them with some care and to determine by reference to a number of instances quoted whether the charge of improper motivation can be sustained. The principal contentions of the Applicant, as listed in the earlier part of this judgement, provide a convenient and sufficiently comprehensive framework for this examination.

IX. The Applicant contends that he could legitimately expect continued service and advancement to higher levels of responsibility commensurate with his increasing seniority and length of service. The Tribunal observes that promotion depends on performance as well as length of service. Inasmuch as the UNDP Appointment and Promotion Board reviewed the Applicant's record each year since he completed, on 1 November 1965, the minimum period of service required at P-3 level, the proper procedures were followed and, if it was not until 12 July 1974 that the Board recommended the Applicant's promotion, it was not because his claims to promotion on merit had not been fully considered over the intervening nine years. As to continued service the Tribunal would merely observe that the second of the decisions contested by the Applicant represented an endeavour on the part of the Respondent to provide further employment for him, and

that this offer of continued service was in the event refused by the Applicant himself.

X. The Applicant further contends that the Administration persistently and without cause sought to remove him from its service and acted illegally or improperly to achieve that objective. He produces no solid evidence in support of this contention which, in the Tribunal's view, is manifestly without foundation. Despite uneven performance reports on the Applicant, the Respondent went to considerable lengths to keep him in service by securing suitable posts for him; in some cases he was, on his record, considered unsuitable, but other posts, including two at Headquarters, he turned down himself. Having regard to the doubts expressed, even in the more favourable of the performance reports since 1969, about the Applicant's administrative capabilities, limited experience in development work and hence suitability for an independent field post, the Administration, in the Tribunal's view, so far from seeking to remove him illegally or improperly, tried hard to find suitable postings for him, difficult though this proved in practice.

XI. The Respondent is further charged with falsifying and distorting the Applicant's personnel records, failing to observe established procedures regarding rebuttals, attempting to transfer him to other "organisms of the United Nations" without his consent and attempting to place him on leave without pay contrary to the provisions of Staff Rule 105.2(a). Having examined the facts to which these charges relate, the Tribunal's comments are as follows:

- (i) It is true that the Applicant's rebuttals dated 24 May and 15 November 1971 of his periodic report for the period September 1969 to February 1971 were not investigated or appraised as they should have been under Administrative Instruction DP/AI/6, paragraph 7. It is also true that the note for the file of 13 March 1972, quoted in the earlier part of this judgement, contained misleading information in so far that it stated that the recommendation both by the Resident Representative and by the Applicant himself that he should be transferred from Malawi rested on health grounds, whereas in neither case had such grounds for transfer been adduced. However, since the Applicant himself stated on 21 January 1972 that medical tests disclosed increased blood pressure 90 per cent attributable to tension and overwork, the note for the file cannot be said seriously to misrepresent the Applicant's state of health; and in any event the evidence suggests that his candidature for various field posts in the ensuing 18 months was rejected by the Regional Bureaux for reasons unconnected with his health and concerned only with his record and past performance.
- (ii) It is also true that the "Personnel Record" sent to Dakar under cover of a letter dated 14 September 1973 by the Officer-in-Charge of the Regional Bureau for Africa contained reprehensible omissions in that it failed to record or appraise the Applicant's service as Resident Representative a.i. in Malawi and neglected to place on record the performance report on his service at Athens and such information as was available relating to his period at Addis Ababa. However, the Resident Representative was at any rate informed of the fact of the Applicant's rebuttals of the September 1969-February 1971 periodic report, if not of their content. In any event, despite the omissions described, the proposal that the Applicant should be appointed to Senegal was accepted by the Resident Representative and took effect. The Tribunal does not therefore consider that the omissions had adverse consequences for the Applicant.

- (iii) The Joint Appeals Board in its report of 6 September 1977 commented adversely on the fact that the Applicant's rebuttal dated 24 August 1975 of the performance review report covering the period March-September 1974 had not been investigated or appraised. In view of the substantial nature of the rebuttal—notwithstanding that it post-dated the Applicant's decision not to contest termination—the Tribunal is compelled to comment adversely on the failure of the Respondent to comply with current administrative instructions. At the same time it must be added that the adverse comments of the Joint Appeals Board on this matter relate not only to administrative failure but also to the fact that "the appellant alleged that the Third Reporting Officer's endorsement on that report had been the cause of the abrupt termination of his assignment to Senegal, and the failure to investigate and appraise his rebuttal to the report must naturally have seemed to confirm his suspicion that the Administration was acting in bad faith". While in no way dissenting from these comments, the Tribunal must point out that the presumed causal relationship between the Third Reporting Officer's report and the termination of the Applicant's assignment to Senegal is not borne out by the evidence. This shows that the proposal that the Applicant should be considered for programme work at Headquarters was mooted as early as 15 March 1974 and that the actual decision to transfer him was taken at a quarterly senior staff meeting on 14 May 1975, whereas the Third Reporting Officer's report is dated 27 May 1975. The Tribunal concludes therefore that the Applicant's contention that his proposed transfer to New York was motivated by prejudice derived from the performance report in question cannot be sustained.
- (iv) As to the charge that the Respondent attempted to transfer the Applicant to other "organisms of the United Nations" without his consent, the Applicant is presumably referring to correspondence which took place in March 1972 between UNDP and UNIDO. Since the Applicant's candidature was never considered by the latter, the question of transfer and the conditions under which it might be effected never arose.
- (v) As to the "attempt to place the Applicant on leave without pay contrary to the provisions of Staff Rule 105.2(a)", the Tribunal observes that the Rule cited authorizes the Respondent to grant "special leave . . . without pay . . . for . . . important reasons for such period as the Secretary-General may prescribe". In any event, at the time to which he refers, namely 1973, the Applicant was not placed on leave without pay; he was appointed to Senegal instead. Moreover on 8 July 1975 the Applicant, recalling the Respondent's proposal of 1973, himself requested special leave without pay during the appeals proceedings in order to avoid immediate transfer to New York.

XII. The Applicant maintains that the Administration failed to accord him due process in failing to inform him or consult him on the alleged difficulties in reassigning him. The Tribunal, having examined the relevant evidence, finds that the Respondent kept the Applicant adequately informed about such information concerning his future as became available.

XIII. The Applicant complains that he was denied the right to work by being improperly maintained on special leave with full pay. It was admittedly unfortunate that so much difficulty was encountered in finding a post for him; the reasons for this have

already been discussed. It is, however, in the Tribunal's view, preposterous for the Applicant to imply that being on special leave with full pay was the cause, and not being assigned to a job, the effect. He himself had proposed that he should be granted special leave with full pay after his temporary assignments in Greece and Ethiopia and was accorded post adjustment at the Vienna rate, which was higher than the Malawi rate. The Tribunal considers that, far from being "improperly" treated, the Applicant was in all the circumstances generously dealt with.

XIV. The Applicant's plea that the Administration failed to observe the terms of his appointment to Senegal has already been dealt with in paragraphs II and III above. His allegation that the Administration deceived him on the conditions attached to that appointment has much substance. It was indeed, in the opinion of the Tribunal, a deplorable lapse on the part of the Respondent to tell the Resident Representative at Dakar that the Applicant was being sent on trial for a year and would be fully informed of this arrangement, but then fail to inform him and allow him to discover it almost by chance six weeks after his arrival. This omission, taken in conjunction with his resentment over grading, helped to feed the Applicant's suspicions that he had been tricked into accepting the Senegal appointment and that the Administration had not acted in this instance—and he may well have thought in other instances as well—in good faith. Taking the evidence as a whole, however, the Tribunal is convinced that these suspicions are baseless, that the error was an administrative one and unintentional and that no improper motive can be attributed to the Administration. Nor, apart from the shock of discovery, did it have any adverse consequence for the Applicant's posting to Senegal or in relation to his subsequent career.

XV. The Applicant claims that his appointment to Senegal entitled him to advance to the level of P-5 and that he was deprived of that entitlement by being transferred to New York. The Tribunal has earlier held that both these propositions are unacceptable.

XVI. The Applicant suggests further that various actions of the Respondent taken together—giving him a two-year appointment and then removing him from Senegal; appointing him to another post within those two years; producing an unfavourable performance report at the moment of transfer—were designed to justify non-renewal of the Applicant's contract. For reasons which have already been made clear in the course of this judgement, the Tribunal does not accept the causal relationship, implied by the Applicant, between the various actions of the Respondent. It finds no ground for suggesting that the attitudes of the Respondent towards the Applicant were improperly motivated, but on the contrary a good deal of evidence to suggest that they were based on careful and dispassionate examination of the Applicant's performance at every stage in his United Nations career.

XVII. The Applicant's final contention is in effect that because the Administration insisted on paying him an installation grant on transfer to New York—a grant which he first refused and later accepted—they were trying to force him to accept transfer. The Tribunal finds this argument irreconcilable with the Applicant's contention that the Administration "sought to create a justifying cause for a non-renewal of [his] contract". Both theses cannot be true; in the Tribunal's view, neither has any validity. The thesis that the installation grant was intended as an inducement to him to accept transfer is palpably absurd when it is considered that the Respondent insisted on his retaining the grant even after accepting his resignation.

XVIII. The Tribunal concludes that for the reasons given in the preceding para-

graphs there was no prejudice, improper motivation or abuse of power on the part of the Respondent.

XIX. The Tribunal concludes further that, both in reaching the decisions contested and with respect to all other matters to which the application relates, the Respondent acted throughout *bona fide* and within his rights.

XX. The Tribunal accordingly rejects the application and the question of compensation does not therefore arise.

(Signatures)

R. VENKATARAMAN
President

Roger STEVENS
Member

Francisco A. FORTEZA
Member

Jean HARDY
Executive Secretary

Geneva, 17 May 1979

Judgement No. 242

(Original: French)

Case No. 236:
Klee

Against: The Secretary-General
of the United Nations

Non-renewal of a fixed-term appointment.

The Applicant contests the decision taken by the Respondent to grant him an ex gratia payment amounting to three months' net base salary.—The Respondent acknowledges that the Applicant had a legitimate expectancy of extension of his appointment.—Question of the duration of the appointment on which the Applicant could reasonably count.—Consideration of the circumstances in which the Applicant's expectancy originated.—Authorization of removal is linked to the Applicant's prospect of employment.—The Tribunal concludes that the Applicant could count on an appointment for two years.—Question of the injury sustained by the Applicant as a result of the premature termination of the contractual bond.—Formula used by the Respondent to evaluate the injury sustained.—The Tribunal concludes that the way in which the Respondent determined the amount of the ex gratia compensation was not justified.—Previous decisions of the Tribunal regarding the determination of the amount of compensation due for failure to fulfil a legitimate expectancy of extension of contract.—The Applicant is awarded 15 months' salary.—Request for compensation for the Applicant's inability to claim any pension from the Pension Fund.—The principle that damages may not be remote or indirect.—Request rejected.—The Applicant is awarded \$1,000 for costs.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

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