

1978. The Tribunal therefore considers that all other claims in this respect must fail.

X. For these reasons, the application is rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Endre USTOR
Member

New York, 4 November 1985

Luis de POSADAS MONTERO
Member

R. Maria VICIEN-MILBURN
Executive Secretary

Judgement No. 356

(Original: English)

Case No. 344:
Giscombe

Against: The Secretary-General
of the United Nations

Request by a former staff member of the United Nations for the rescission of the decision refusing to accept the recommendation of the Joint Appeals Board to rescind the Applicant's termination for unsatisfactory service and to reinstate him; request for compensation.

Conclusion of the Joint Appeals Board that the recommendation of the Appointment and Promotion Board to terminate the Applicant's appointment was vitiated by various inconsistencies and erroneous findings of its Review Group.—Recommendation that the Applicant be reinstated.—Recommendation rejected.—Secretary-General's decision to pay to the Applicant six months' net base salary as final settlement.

Applicant's request to rescind the Respondent's decision refusing to accept the recommendation of the Joint Appeals Board.—The Tribunal reiterates that acceptance or refusal of the recommendations of the Board is within the authority of the Secretary-General who is not bound to give reasons.—Refusal to agree to the direct submission of the application to the Tribunal does not estop the Respondent from rejecting the recommendations of the Board.—Question of the validity of the Applicant's termination for unsatisfactory service.—Tribunal's jurisprudence that evaluation of a staff member's performance lies within the discretionary authority of the Secretary-General (Judgement No. 257: Rosbach), on the basis of a decision to be reached by means of a complete, fair and reasonable procedure (Judgement No. 184: Mila)—Decision of termination can be vitiated by procedural defect (Judgement No. 299: Moser) or by prejudice or other extraneous factor.—Consideration of various elements which may influence the validity of the decision.—Applicant's contention concerning improper actions and procedures of the Medical Board convened to examine the Medical Director's refusal to certify the Applicant's sick leave.—Finding that this contention is not connected with the question of the validity of termination.—Relevance of the medical history to the Applicant's plea for compensation for injuries sustained in service and for disability pension.—Conclusion that these pleas were not dealt with by the Joint Appeals Board and are therefore not receivable.—The Tribunal notes that the Respondent is ready to consider the Applicant's application under appendix D of the Staff Rules, if it is made, though normally it would be time-barred.—Applicant's contentions that the decision was motivated by prejudice and that there was lack of due process in the termination procedures.—Consideration of the various elements submitted by the Applicant.—Contentions rejected.—Applicant's complaint that he was unable to avail himself of counsel in the proceedings of the Review Group.—Respondent's contention that the presence of counsel is mandatory only in an appeal or disciplinary case, but not in staff member's meetings with administrative officials.—

Staff rules 110.5 and 111.2 (i).—Contention accepted.—Applicant's contention that the rules applicable to disciplinary proceedings are also applicable to proceedings before the Review Group.—Contention rejected.—Applicant's reference to "unwarranted interference into his private and personal life".—Finding that no proof was submitted.—Tribunal's disapproval of the absence of any investigation of facts which might have shown misconduct under staff rule 101.6 (c).—Consideration of the alleged shortcomings of the termination procedure.—The Tribunal holds that before termination proceedings take place both a standard performance evaluation report and a special report must be prepared.—Failure to do so constitutes a serious irregularity in the proceedings.—Conclusion that there is no evidence of prejudice or extraneous motivation.—Validity of the Respondent's decision, including the promise of payment, maintained.

Without prejudice to the procedure relating to compensation under appendix D, application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. T. Mutuale, President; Mr. Endre Ustor; Mr. Roger Pinto;

Whereas, at the request of Mr. Fitzgerald Giscombe, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 6 September 1984, 22 October 1984 and 17 December 1984 the time-limit for the filing of an application;

Whereas on 17 December 1984 the Applicant filed an application in which he requested the Tribunal

"1. To overrule the decision of the Secretary-General to maintain the contested decision.

"2. To reject the Joint Appeals Board's conclusion, as contained in paragraph 187 of its report, that: 'the procedures followed by the Medical Board has satisfied the requirements of due process and that the medical opinions issued under these proceedings had provided sufficient information to the respondent as to cause him to reach the opinion that the appellant was fit for work and to adopt the measures taken to encourage his return to duty.'

"3. To uphold the Joint Appeals Board's recommendation that 'the decision to terminate the appellant's permanent appointment be rescinded and that the appellant be restored to the *status quo ante*.'

"(a) reinstatement of the Applicant with effect from 18 September 1981;

"(b) payment of back salaries retroactive from 24 April 1979 to the present with interest, if reinstated;

"(c) payment of salaries retroactive from 24 April 1979 to his sixtieth (60th) birthday, if (b) above is not adhered to;

"(d) compensation for accumulated annual leave from 24 April 1979 to end of pay period or age sixty (60) minimum; also accumulated annual leave before the incident;

"(e) compensation for dependency allowance from 24 April 1979 to age sixty (60) minimum for wife and children;

"(f) compensation for medical, dental and life insurance from 24 April 1979 to age eighty (80);

“(g) compensation for money spent for paying someone to assist Applicant from 24 April 1979 to present.

“4. To compensate the Applicant for wrongful termination—

“(a) a minimum of six (6) years salary as compensation for the unjust treatment and the suffering that he has endured as well as to cover for damages caused to Applicant’s family;

“(b) compensation for hardship caused to Applicant and Applicant’s family (Article 18 (a) of Appendix D to Staff Rules);

“(c) compensation for damage to Applicant’s reputation;

“(d) compensation for lack of due process in Applicant’s case;

“(e) payment of three (3) months salary as compensation for procedural delay.

“5. To compensate the Applicant for injuries sustained in connection with his employment by the United Nations—

“(a) disability compensation and disability pension for Applicant with effect from 24 April 1979;

“(b) retraining for new function (Article 11.4 (b) of Appendix D to Staff Rules);

“(c) compensation for special leave benefits (Staff Rule 105.2 and Article 18 (a) of Appendix D to Staff Rules) from 24 April 1979 to present;

“(d) compensation for someone to assist Applicant (Article 11.4 (a) of Appendix D to Staff Rules);

“(e) compensation for permanent loss of consortium of Applicant to his wife’s needs (Article 11.3 (a) and (b) of Appendix D to Staff Rules);

“(f) compensation for money spent for medical and dental insurance from date of termination to present;

“(g) compensation for money spent for taxi fares to and from doctors from 24 April 1979 to end of pay period;

“(h) compensation for money spent for drugs and other medical products from 24 April 1979 to present.

“6. To hold oral hearing on the case.”;

Whereas the Respondent filed his answer on 13 May 1985;

Whereas the Applicant filed written observations on 15 July 1985;

Whereas the Tribunal heard the parties at a public hearing on 17 October 1985;

Whereas on 18 October 1985, the Applicant submitted written answers to questions which had been posed by the Tribunal at the public session;

Whereas on 21 October 1985, the Respondent filed additional documents;

Whereas on 22 October 1985, the Respondent submitted a written reply to a question which had been posed by the Tribunal at the oral hearing, and on 26 October 1985 and 28 October 1985, the Applicant submitted comments thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 25 May 1965. He was initially offered a three-month fixed-term appointment at the M-1, step I level, as a Gardener at the Maintenance and Engineering Section of the Buildings Management Service (BMS), Office of General Services (OGS). On 10 August 1965 his appointment was converted to a probationary appointment and

on 1 May 1967 to a permanent appointment. On 8 December 1969 he was reassigned to the Upholstery Shop, and on 1 January 1971 he was promoted to the M-2 level as an Upholsterer and Drapery Man. On 16 June 1976 he was reassigned to the paint shop and his functional title was changed to House Painter.

On 24 April 1979, while the Applicant was performing his official functions, he was injured in an incident which resulted in the adoption of disciplinary proceedings against another staff member. The Applicant was granted sick leave and according to the Medical Director, on 3 May 1979 his doctor submitted a certificate stating that the date of his return to work was "indeterminate".

In a cable dated 21 May 1979 the Applicant was informed by the Administrative Officer, OGS that the Medical Director of the United Nations had advised her that on the basis of the report submitted by the Applicant's physician, the Medical Director was unable to certify sick leave beyond 21 May 1979. Accordingly, he was requested to return to work "or report to the Medical Service immediately" so that the Medical Director could evaluate his condition. In the absence of a reply, on 25 May 1979 he was advised in a further cable that if he did not report at work by 31 May 1979, administrative action would be initiated to terminate his permanent appointment for abandonment of post.

On 1 June 1979 the Medical Director informed the Administrative Officer, OGS that on the basis of an independent report from an orthopaedic specialist who had confirmed the Applicant's doctor's opinion, the Applicant would "probably need to be admitted to the hospital" and he would not likely return to work before the end of June 1979. In fact, the Applicant did not do so for a much longer period of time.

In a memorandum dated 2 November 1979 addressed to the Chief, Staff Services, OPS [Office of Personnel Services] the Medical Director stated that he had interviewed the Applicant who was on sick leave since 24 April 1979 and that "[b]ased on the last medical certificate received from his doctor dated 30 October 1979, sick leave may be certified up to 31 October 1979." He added: "However, no more sick leave can be certified without satisfactory medical evidence being received which would justify this. I explained this to Mr. Giscombe on 31 October 1979."

In a cable dated 19 November 1979 a Personnel Officer requested the Applicant to report to the Chief, Staff Services, OPS on Monday 19 November 1979. On 19 November 1979 a Personnel Officer informed the Medical Director that the Applicant had not returned to work.

On 20 December 1979 the Applicant filed a claim with the Advisory Board on Compensation Claims in which he requested compensation under Appendix D to the Staff Rules for the injury sustained by him on 24 April 1979 during the performance of his official duties.

On 25 January 1980 the Medical Director informed the Assistant Secretary-General for the Office of Personnel Services that he had examined the Applicant "in detail on 23 January 1980" and was "not convinced of the diagnosis or of his incapacity." He therefore proposed that the Applicant be requested to undergo an examination by a medical specialist nominated by the Medical Director under Staff Rule 106.2 (viii). On the same date he asked the Applicant to attend the Office of Dr. Arthur Blieden, a New York orthopaedic specialist, on Tuesday, January 29th.

In a memorandum dated 31 January 1980 addressed to the Chief of Staff Services, OPS the Medical Director stated in part:

"2. I have not yet received a written report from Dr. Blieden, but he has informed me of his opinion orally. As a result of my own examination and that of Dr. Blieden, I recommend that if possible information be obtained on this staff member's present daily activities. It is by no means certain that he is incapacitated."

On 5 February 1980 Dr. Blieden submitted a report on the Applicant's medical condition which concluded:

"In my opinion, Mr. Fitzgerald Giscombe, at this time is grossly exaggerating his complaints. The posture assumed is bizarre. I believe that he should be referred to a Neurologist for a Neurological examination."

"On the basis of the status that he assumes and his complaints alone he is disabled. Orthopaedically he does not allow an examination to be adequately performed."

On 6 February 1980 the Medical Director informed the Executive Officer, OGS that

"Having reviewed this case in detail again, and having received a medical report from Dr. Blieden of the examination of the [Applicant] on 29 January 1980, sick leave can not be certified any further."

In a cable dated 12 February 1980 from the Acting Executive Officer, OGS the Applicant was advised that the Medical Director had certified sick leave "through 29 January 1980 only" and that unless he submitted a "detailed medical report acceptable to the Medical Service" or unless he returned to work no later than 19 February 1980, the Office of General Services would refer his case to the Office of Personnel Services for administrative action. Since the Applicant did not return to work, on 28 February 1980 the Acting Executive Officer, OGS asked a Personnel Officer to take steps to resolve the case "i.e. to terminate [the Applicant's] services for abandonment of post or to grant him a disability benefit at the exhaustion of his leave entitlements at the end of May 1980." On 17 March 1980 the Acting Executive Officer, OGS addressed a further memorandum to the Personnel Officer in which she summarized the Applicant's employment record, noted that the Applicant had not returned to work in spite of requests made by the Department and urged "that immediate action be taken in this case." In a cable dated 18 March 1980, the Personnel Officer advised the Applicant that he should "RETURN TO WORK NO LATER THAN 21 MARCH 1980, FAILING WHICH APPROPRIATE ACTION WILL BE TAKEN SEPARATE YOU FOR ABANDONMENT OF POST."

In a memorandum dated 25 March 1980 the Personnel Officer recommended to the Assistant Secretary-General for Personnel Services that the Applicant be separated from the Organization on the grounds of abandonment of post, effective 30 January 1980.

On 28 March 1980 the Secretary of the Advisory Board on Compensation Claims, where the Applicant had filed a claim for compensation under Appendix D to the Staff Rules, in connection with the injury sustained by him on 24 April 1979, informed the Applicant that the Board had recommended to the Secretary-General that the injury sustained be accepted as attributable to the performance of official duties. In addition, she stated:

"[The Board] further decided that for the period of your incapacitation any absences certified by the Medical Director to be the result of these

injuries should be covered by sick leave and/or special leave in accordance with Articles 11 and 18 of Appendix D to the Staff Rules, subject to Article 6 thereof, if applicable."

On 28 March 1980 the Secretary of the ABCC informed the Acting Executive Officer, OGS that the Secretary-General had accepted the Board's recommendation and had further decided that "full payment of salary and allowances and restoration of sick leave entitlement should be made for the period of the claimant's incapacitation."

The Applicant returned to work on 31 March 1980. On 2 April 1980 the Medical Director asked the Executive Officer, OGS to arrange for the Applicant "to have light duties of a sedentary nature for the next three weeks." The Medical Director expressed the wish to see the Applicant in the Medical Service each week and stated that the Applicant could attend the Medical Service at any time should he require "attention or a period of rest." In a further memorandum dated 3 April 1980 addressed to the Executive Officer, OGS the Medical Director reiterated his recommendation that the Applicant "be given light duties" and "that his hours of work should be from 8 a.m. to 4 p.m.". The Applicant returned to work until 7 April 1980 when he notified his supervisor that he was sick. On 10 April 1980 he notified his supervisor that he was going into the hospital. On 22 April 1980, the Medical Director informed the Executive Officer, OGS that sick leave for the Applicant could be certified "from 11 April 1980 for three weeks."

On 25 April 1980 an Administrative Officer, OGS asked the Medical Director to determine what portion of the Applicant's sick leave was attributable to the injury sustained on 24 April 1979, which the Secretary-General, on the ABCC's recommendation had determined was attributable to the performance of official duties by the Applicant, in order that the Applicant's salary and allowances for that period be restored. In a reply dated 14 May 1980 the Medical Director stated that on the basis of Dr. Blieden's report, the period of sick leave attributable to the accident of 24 April 1979 ended on 29 January 1980. In addition, he stated that he did not know when the Applicant was likely to return to work because he had not yet received a medical certificate or medical report on the result of the Applicant's most recent hospital treatment.

In a memorandum dated 20 May 1980, at the request of the Assistant Secretary-General, OPS a Personnel Officer submitted a detailed explanation of the Applicant's "sick leave status".

On 23 May 1980 the Medical Director informed the Chief, Staff Services, OPS that he had received a medical report from the Applicant's doctor dated 14 May 1980 stating that the Applicant had been hospitalized, was "totally disabled and continues to be under my medical care". The U.N. Medical Director added:

"Whereas sick leave has been certified already from 11 April to 2 May 1980 to cover his hospital admission, there is insufficient medical information to justify any further sick leave. As stated previously in view of the opinion expressed by Dr. Blieden as a result of his examination of Mr. Giscombe on 29 January 1980, sick leave cannot be certified beyond that date apart from the period of his hospitalisation in April 1980."

On 12 June 1980 the Applicant's doctor submitted a further medical report on the Applicant's condition in which he stated that "the prognosis is guarded". On 17 June 1980 the Senior Medical Officer in charge of the Medical Service informed the Chief, Staff Services, OPS of the report, indicated that it did not

add any new information; stated that the Applicant had failed to attend two medical examinations set up by the Medical Service and recommended that "a decisive administrative solution . . . be sought".

In a memorandum dated 20 June 1980 addressed to the Chief, Staff Services, OPS, the Acting Executive Officer, OGS reiterated her request that "definite administrative action be taken to separate Mr. Giscombe from the Organization". In addition, she noted:

"It would be pertinent to state that as a result of his extended absence, the Department has incurred considerable expense to replace Mr. Giscombe against its Temporary Assistance funds."

On 1 July 1980 the Applicant's counsel requested the Deputy Chief, Staff Services, OPS to convene a "medical board in accordance with the applicable staff rules and regulations" in the light of the Medical Director's refusal to certify sick leave for the Applicant beyond 29 January 1980. The request was transmitted to the Medical Director who addressed a letter to Dr. Ernesto Lee, the Applicant's doctor, on 17 July 1980 explaining the procedure to be followed to convene a Medical Board. The Board would be comprised of a doctor representing the patient, a doctor representing the United Nations and a third doctor to act as chairman who should be acceptable to both sides.

On 25 August 1980 the Applicant's doctor suggested the names of two doctors to serve on the Medical Board. In a reply dated 9 September 1980 the Medical Director emphasized the need to select

"an orthopaedic specialist who would be regarded as being completely impartial, and who if possible should be attached to a major teaching hospital centre"

and to that effect proposed two names. It appears that the composition of the Medical Board was agreed as follows: Dr. Ernesto Lee would act for the Applicant, Dr. Peter Gatenby would act for the UN and Dr. Marvin Shelton would act as the third independent orthopaedic specialist.

In a letter dated 5 November 1980 the Medical Director asked Dr. Ernesto Lee to meet with Dr. Marvin Shelton, who had examined the Applicant on 21 October 1980, "as a medical board" on a date to be confirmed.

Dr. Marvin Shelton submitted a report to the Medical Director on 4 December 1980 and concluded:

"After talking with this patient and reviewing the alleged injury incident, and the subsequent reports of examining physicians including the report of an EMG [Electro Biographic Examination of the Muscles] done which was normal. I conclude [sic] with reasonable medical certainty that this patient did not sustain a serious injury to his back and that the prolongation of his recovery is most likely on the basis of his post traumatic neurosis and that this can only be identified with psychiatric evaluation and psychological testing"

On 17 December 1980 the Medical Director transmitted to the Director, Division of Personnel Administration, OPS a report of the Medical Board that had considered the Applicant's case. The report read in part as follows:

"Dr. Gatenby and Dr. Lee had met on 24 November 1980 and fully discussed the case of Mr. Giscombe. They also agreed that Mr. Giscombe's condition is complicated by psychological factors and that psychiatric evaluation is now indicated. Therefore in order to decide whether Mr. Giscombe is truly incapacitated for work or not, the unanimous opinion of

the Medical Board is that an independent psychiatric evaluation is required. This is because his incapacity can no longer be explained entirely on a physical basis."

Accordingly, the Medical Director informed the Director, Division of Personnel Administration, OPS that he had made arrangements with Dr. Ernesto Lee for the Applicant to be referred to a psychiatrist for an examination and that based on this report he would decide whether sick leave could be granted to the Applicant from 29 January 1980 or not.

On 21 January 1981 Dr. J. Trevor Lindo, a psychiatrist, submitted a report on the Applicant's psychiatric condition and concluded that it was his "considered impression that the patient suffered a post-traumatic neurosis severe and that his prognosis remains guarded".

On 29 January 1981 the Medical Director asked Dr. Ernesto Lee for his comments on the psychiatric report. The letter read in part as follows:

"You will note that Mr. Lindo does not state that Mr. Giscombe is unable to work. Also I have heard indirectly that Mr. Giscombe has travelled to Jamaica at least once in recent months, and that he is conducting a private business. It is my opinion that there is no sufficient medical reason shown to prevent Mr. Giscombe from returning to work, and that therefore he cannot be certified as on sick leave."

On 30 January 1981 the Medical Director asked Dr. Marvin Shelton for his comments on the psychiatric report. The letter read in part as follows:

"You will note Dr. Lindo states that Mr. Giscombe 'suffered a post traumatic neurosis severe and that his prognosis remains guarded'. He does not refer to his capacity to work. I have been informed indirectly that Mr. Giscombe has travelled at least once to Jamaica in recent months and is conducting a private business. It is my opinion that there is now no sufficient medical reason to prevent Mr. Giscombe from returning to work."

In a memorandum dated 11 February 1981 the Medical Director informed the Director, Division of Personnel Administration, OPS of the medical status of the Applicant's case and again recommended "that a private investigation should now be conducted to determine Mr. Giscombe's daily activities."

In a letter dated 20 March 1981, Dr. Ernesto Lee informed the Medical Director that it was "impossible" for him to comment on the psychiatrist's report since his specialty was orthopaedics.

In a letter dated 27 March 1981, Dr. Marvin Shelton stated:

"I agree that this man suffers from a post traumatic neurosis, but feel that physically, there is no impairment that would not allow him to be gainfully employed. I think that a change of job would be indicated for psychological reasons, but that every effort should be made to get this man back to some gainful employment."

On 30 March 1981 the Medical Director transmitted to the Director, Division of Personnel Administration, OPS Dr. Lee's report and stated:

"I note that Dr. Lee does not state that Mr. Giscombe is unable to work. Therefore I still maintain my previous opinion that Mr. Giscombe is fit for work."

On 1 April 1981 the Medical Director transmitted to the Director, Division of Personnel Administration, OPS Dr. Shelton's report and in addition informed him that the Applicant had reported to the Medical Service on 30

March 1981 with the intention of returning to work. He recommended that the Applicant be permitted to attend work from 10 a.m. to 4 p.m. for a period of two weeks and emphasized that this concession was made "in order to encourage his return to employment and not because it is considered he is truly disabled."

On 8 April 1981 the Personnel Officer informed the Applicant of the Medical Director's recommendation. On 28 April 1981 the Personnel Officer informed the Chief, Maintenance and Operations Section, OGS that the Applicant had refused to observe regular working hours from that date.

In a memorandum dated 18 May 1981 addressed to the Executive Officer, OGS the Chief, Maintenance and Operations Section, OGS who supervised the Applicant, informed her that after the Applicant had returned to work, the record of his attendance showed that he never met the working hours assigned to him and that he was absent for ten days on sick leave. Furthermore, when the Applicant was asked to submit the result of his assignment "he showed [the Chief, Maintenance and Operations Section] one sheet with about four lines." The supervisor added:

"The Maintenance and Operations Section has in the past had to accommodate staff members who were placed on light duty by the Health Service. It has even, on occasion, reassigned staff members with permanent disabilities and has done so successfully. In the case of Mr. Giscombe, I believe that we have made a real effort to accommodate him but I do not think that an effort has been made by Mr. Giscombe to be productive. I cannot allow the situation to continue because Mr. Giscombe's behavior is already affecting the morale of staff in the Maintenance and Operations Section. I see no use in continuing these ad hoc arrangements for Mr. Giscombe nor in his continued employment with the UN. I therefore recommend that action be taken to terminate his services with the United Nations."

On 26 May 1981 the Executive Officer, OGS transmitted to the Personnel Officer the memorandum from the Chief, Maintenance and Operations Service, OGS; summarized the events that took place after the Applicant's return to work; the Applicant's attendance and punctuality problems during the course of his employment and requested that the Applicant's permanent appointment be terminated for unsatisfactory service under Staff Regulation 9.1 (a).

In a memorandum dated 28 May 1981 addressed to the Medical Director, the Applicant asserted that the Medical Board that had determined he was not incapacitated had "not yet met in the proper sense of the word and according to the requirements of the Staff Rules" because the three members had not discussed the case *in camera*. He requested that a "Medical Board . . . be convened as soon as possible as required under the provisions of Article 17 (b) of Appendix D to the Staff Rules."

In a reply dated 4 June 1981 the Medical Director rejected the request to reconvene the Medical Board on the following grounds: although he acknowledged that Dr. Marvin Shelton had been unable to meet with Dr. Ernesto Lee and himself, it was "not necessary that all members of the Board meet at the same time." A "formal meeting is only essential in cases where there is a disagreement, or where medical issues have to be clarified and discussion is necessary between the doctors." In the Applicant's case there was "complete unanimity" of opinion as was evidenced by the statement dated 10 December 1980 which had been signed by all three members of the Board.

On 9 June 1981 the Personnel Officer submitted a written presentation to the Working Group No. III of the Appointment and Promotion Panel supporting the recommendation of the Office of General Services to terminate the Applicant's appointment. In the presentation he summarized the Applicant's employment history, and the circumstances that had led the Office of General Services to take that action. A copy of the presentation was made available to the Applicant on the same date.

In a memorandum dated 17 July 1981, the Chairman of the Joint Review Group, Working Group III of the Appointment and Promotion Panel informed the Assistant Secretary-General for Personnel Services that "upon reviewing all the oral and written evidence submitted to it, the Group was convinced that the proposal to terminate Mr. Giscombe's permanent appointment was well founded and not prompted by improper motive" and decided

"to recommend approval of the joint recommendation of OGS and OPS for the separation of Mr. Giscombe from the service of the United Nations for unsatisfactory service, under Staff Regulation 9.1 (a)."

On 20 July 1981 the Vice-Chairman of the Appointment and Promotion Board transmitted to the Secretary-General a copy of the report dated 17 July 1981 from the Working Group III of the Appointment and Promotion Panel and informed the Secretary-General that the Appointment and Promotion Board had decided to endorse the Group's report and to recommend to the Secretary-General that the Applicant's appointment be terminated for unsatisfactory service, under Staff Regulation 9.1 (a). The Assistant Secretary-General for Personnel Services so informed the Applicant in a letter dated 14 September 1981 which constituted formal notice of termination as required by Staff Rule 109.3 (a).

On 18 September 1981 the Applicant requested the Assistant Secretary-General for Personnel Services to stay the decision concerning his termination "until *all* the facts have been properly investigated to the satisfaction of the Staff Union." On 28 September 1981 his request was denied. On 15 October 1981 the Applicant requested the Secretary-General's agreement for direct submission of his appeal to the Administrative Tribunal. On 30 October 1981 his request was denied and he was informed that his letter of 15 October 1981 had been treated as a request for review of the administrative decision to terminate his permanent appointment for unsatisfactory services. On 30 November 1981 the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 26 March 1984. Its unanimous conclusions and recommendations read as follows:

"Conclusions and Recommendations

"187. The Panel concludes that the procedures followed by the Medical Board had satisfied the requirements of due process and that the medical opinions issued under these proceedings had provided sufficient information to the respondent as to cause him to reach the opinion that the appellant was fit for work and to adopt the measures taken to encourage his return to duty.

"188. In addition the Panel finds:

"(a) That the first finding of the Review Group namely that 'the staff member, since he joined the Organization, had never been able to correct his pattern of tardiness and it expressed concern that no action had been taken by the Administration to withhold [the appellant's] within grade increment in view of the fact that punctuality was an important requisite in

BMS', was inaccurate, in view of the existing performance evaluation reports, and was also inconsistent with the Appointment and Promotion Board's own past recommendations.

"(b) That, according to the appellant's files, the second finding of the Review Group, namely that 'based on the knowledge of the staff member's financial difficulties, OGS was reluctant to resort to the procedure of withholding increments', was also inaccurate and misleading of the true situation.

"(c) That the third finding of the Review Group, namely that 'while the past record of [the appellant] was not clearly conclusive of what kind of staff member he was, the total leave taken by him since he joined the United Nations and the repeated visits to the Medical Service, since the accident, was indicative that the potential of the actual situation was clear', was inadmissible in that (i) it had taken into account the appellant's certified sick leave and the leave permitted under the Staff Rules as a factor for unsatisfactory services, (ii) it was inconsistent with another finding that the medical case of the appellant had not been taken into account for reaching its conclusions, and (iii) the conclusion reached was ambiguous and unacceptable as a finding of fact.

"(d) That the first part of the fourth finding of the Review Group, namely that 'his total period of service showed that his performance was barely average', was not borne out from the documented evaluations.

"(e) That the second part of the fourth finding of the Review Group, namely that 'his performance since he returned to work was nil', (i) had not taken into account relevant facts, and (ii) was based on conflicting testimony. Therefore, was based on incomplete information.

"(f) That the fifth finding of the Review Group, namely that 'the staff member by his own admission, confirmed that the job assigned to him was not beyond his capabilities and that he claimed only his physical condition prevented him from doing it', could not provide a basis for a conclusion of fact.

"189. In addition the Panel finds that the Review Group had failed to bring to light (a) that the appellant's assignment after his return to work was essentially different from the type of manual skills he was expected to possess, (b) that his performance under these new functions was assessed on a period of six weeks only, (c) that there was no evidence of written or oral warnings of dissatisfaction during that period.

"190. The Panel therefore concludes that the Working Group before reaching its conclusions had not taken into account relevant facts and these conclusions were based on incomplete, inaccurate and inconsistent findings.

"191. Accordingly, the Panel concludes that the respondent's decision to terminate the appellant's permanent appointment for unsatisfactory services adopted on the basis of the conclusions and recommendations of the Appointment and Promotion Board which in turn had endorsed in full those of the Review Group, was invalid since it had not been reached in accordance with the principles laid out by the United Nations Administrative Tribunal.

"192. The Panel therefore recommends that the decision to terminate the appellant's permanent appointment be rescinded and that the appellant be restored to the *status quo ante* and payment be limited to back salaries less the moneys received as termination indemnity and less any occupa-

tional earnings and/or allowances received by the appellant after his termination from non-United Nations sources. It further recommends that the relevant administrative action to follow on the appellant's status with the United Nations, should take into account all the facts of the case."

On 11 September 1984 the Assistant Secretary-General for Personnel Services informed the Applicant of the Joint Appeals Board's report and stated in addition:

"The Secretary-General, having re-examined your case in the light of the Board's report, has decided:

"(a) to maintain the contested decision; and

"(b) to pay you, in light of the particular circumstances of your case, an amount equivalent to six months' net base salary at the rate prevailing today for a staff member at the level and step which you had at the time of your separation from service, in full and final settlement of your claim."

On 17 December 1984 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Medical Board that was convened on 24 November 1980 by the Medical Director of the United Nations to determine whether further sick leave should be certified for the Applicant beyond 29 January 1980 violated the provisions of Article 17 (b) of Appendix D to the Staff Rules and denied him due process of law.

2. After the Applicant's psychiatrist submitted a report on the Applicant's medical condition, the Medical Board was legally required to convene a meeting to consider the psychiatric opinion and to make a final determination on the Applicant's physical and psychological fitness to work, in accordance with the provisions of Article 17 (b) of Appendix D to the Staff Rules. There was no agreement among all three members of the Medical Board on the psychiatric evaluation of the Applicant.

3. The Medical Service of the United Nations, the Office of General Services and the Office of Personnel Services participated in a scheme designed to terminate the Applicant's permanent appointment on the pretexts of "abandonment of post" and "unsatisfactory service" in order to deny him the disability benefits provided for under Appendix D to the Staff Rules.

4. The procedure that led to the termination of the Applicant's appointment was vitiated by procedural errors.

5. The Secretary-General's decision to reject the unanimous recommendation of the Joint Appeals Board to reinstate him in the Office of General Services was apparently based on the fact that he was and still remains psychologically disabled to resume his normal duties at the United Nations.

Whereas the Respondent's principal contentions are:

1. Termination of the Applicant's permanent appointment is legally valid, within the Secretary-General's discretion and was taken with full regard to the Applicant's procedural rights.

2. The Applicant's request for extended sick leave was properly rejected following certification by the Medical Director that he was not incapacitated for further service.

3. The Secretary-General's determination that the Applicant's services were unsatisfactory is final and not appealable.

4. The Applicant's request for disability compensation and disability pension is not receivable.

5. The Applicant has not established any right to further compensation.

The Tribunal, having deliberated from 16 October to 5 November 1985, now pronounces the following judgement:

I. The main request of the Applicant is that the Administrative Tribunal rescind the decision of the Respondent by which he refused to accept the recommendation of the Joint Appeals Board and maintained his earlier decision to terminate the Applicant's appointment.

According to the application, the Applicant acted "arbitrarily and capriciously" when he decided to maintain the contested decision and rejected the unanimous recommendation of the Joint Appeals Board "without offering any explanation or justification" thus "rendering the entire JAB procedure a 'mockery of justice'".

Again, the Applicant in his written observations on Respondent's answer, states that because the Respondent refused his request to submit his case directly to the Administrative Tribunal and held "that prior examination of . . . [the] case by the Joint Appeals Board will serve a useful purpose"—"it is therefore improper for the Respondent to argue now that the findings of the Joint Appeals Board should be disregarded".

II. The view that the Respondent was in any way bound by the recommendation—though unanimous—of the Joint Appeals Board is erroneous. This follows from the very notion of "recommendation".

The acceptance or refusal of the Joint Appeals Board's recommendation is completely within the scope of authority of the Secretary-General who is not bound to give reasons for such a decision. The fact that the Respondent did not agree to the direct submission of the application to the Tribunal, but held that the prior examination of the case by the Joint Appeals Board would serve a useful purpose—as it evidently did—does not estop the Respondent from arguing against the findings of the Board.

While all this is obvious and commonplace, the Tribunal felt that in view of the Applicant's allegations this clarification was not superfluous.

III. The permanent appointment of the Applicant was terminated under Regulation 9.1 (a) for unsatisfactory services.

The Tribunal has repeatedly held that it cannot substitute its judgement for that of the Secretary-General concerning the evaluation of the performance of a staff member and that this matter lies within the Secretary-General's discretionary authority (Judgement No. 257: *Rosbasch*, para. XII).

It has stated also that

"In view of the 'rights given by the General Assembly to those individuals who hold permanent appointments in the United Nations Secretariat . . . such permanent appointments can be terminated only upon a decision which has been reached by means of a complete, fair and reasonable procedure which must be carried out prior to such decision'." (Judgement No. 184: *Mila*, para. III).

Hence procedural defect can vitiate the decision of termination (Judgement No. 295: *Moser*) and also the fact that the decision was motivated by prejudice or by some other extraneous factor.

Having said this, the Tribunal therefore proceeds to examine the different elements which—according to the Applicant or the Joint Appeals Board—may influence the validity of the decision to terminate the Applicant's appointment.

IV. The Explanatory Statement—attached to the Application—consists of some 71 paragraphs (numbered from 8 to 78). Out of these some 65 deal with para. 187 of the Joint Appeals Board's report and try lengthily to rebut its contents. This paragraph reads as follows:

"187. The Panel concludes that the procedures followed by the Medical Board had satisfied the requirements of due process and that the medical opinions issued under these proceedings had provided sufficient information to the respondent as to cause him to reach the opinion that the appellant was fit for work and to adopt the measures taken to encourage his return to duty."

According to the Applicant, this conclusion of the Board must be resolutely rejected. In his view the "so called" Medical Board deliberately denied him due process; Dr. Gatenby, Director of the UN Medical Service wilfully failed to follow proper procedures in the composition and in the proceedings of the so called Medical Board; it was beyond the terms of reference of the members of the medical profession to recommend that an investigation be conducted into the Applicant's daily activities and consequently, their improper actions clearly constitute unwarranted interferences into the private and personal life of a staff member of the United Nations; the Administration considered such investigation to be highly improper under the laws of the United Nations; Dr. Shelton's opinion was tainted with prejudice and was apparently designed to sustain Dr. Gatenby's repeated arbitrary and capricious decisions; Dr. Gatenby's arbitrary and capricious actions were clearly contrary to the relevant provisions of the Universal Declaration of Human Rights.

V. The Tribunal notes that these allegations of the Applicant are not, or are very remotely connected with the question whether the termination of his appointment was valid or not. Indeed, whatever the Medical Director and his colleagues have done or have not done, the Applicant—after a long absence—returned to work on 30 March 1981 on his own volition and he—with short interruptions—worked until mid-September. The joint review group of the Appointment and Promotion Panel which examined the presentation concerning the termination of the Applicant's appointment reported—*inter alia*—"that although the medical history was explained at length by all those who appeared before it, only the unsatisfactory performance of Mr. Giscombe was taken into consideration in reaching a decision". This part of the group's report was expressly quoted in the letter of 14 September 1981 constituting formal notice of termination.

Hence the Tribunal holds that for the purpose of judging upon the validity of the termination of the Applicant's appointment for unsatisfactory service it does not need to examine the sequence of events called "medical history".

VI. The "medical history", however, may have some relevance regarding another plea of the Applicant, namely that "for compensation for injuries sustained in connection with his employment by the United Nations" and also for a "disability pension".

Concerning these pleas the Respondent contended that they were not dealt with by the Joint Appeals Board and were consequently not receivable by the Tribunal in view of Article 7 of its Statute.

The Tribunal notes in this connection that according to the report of the Joint Appeals Board:

“186. The Panel observed however that the circumstances under which the appellant had been injured were fully considered by the Joint Disciplinary Committee as the result of which disciplinary measures had been adopted against another staff member. The Panel further observed that the United Nations law and practice did not provide for *ex parte* action in disciplinary matters. Moreover, the appellant's injuries had been considered by the Advisory Board on Compensation Claims to be service incurred and thus the appellant's civil claim for compensation had been adjudicated in accordance with United Nations law. In the light of the foregoing, the Panel considered that the circumstances of the appellant's injury had been dealt with by the respondent and there [sic] were not a proper issue before the Joint Appeals Board in connection with the present appeal. Regarding the appellant's claim for compensation, in connection with his injury, without prejudging any action, claim or review before any Board or Tribunal to which the appellant might be still entitled under the United Nations law, the Panel had considered only these aspects and issues within its purview.”

Hence the Tribunal under Article 7 of its Statute is bound to reject this claim of the Applicant as not receivable in the present procedure.

The Tribunal notes, however, that in the course of the oral proceedings the representative of the Respondent made the following statement:

“According to the exact provision of Article 17 [of Appendix D to the Staff Rules], he [the Applicant] would now be time-barred, but the Secretary-General has the discretion in exceptional circumstances to accept a request that is made later. I would be prepared to recommend that in view of the unfortunate circumstances of this case his earlier request for empanelling a medical board—the request required under Article 17 (a)—be considered to be within time.

“I mentioned to Counsel for the Applicant yesterday that because of my concern that something went wrong—somebody advising him did not quite advise him correctly—if he wishes to pursue his rights under Appendix D we will recommend that these be pursued.”

The Tribunal considers that on the foregoing grounds, the Applicant may, within reasonable time, avail himself of the possibility given to him by the Respondent.

VII. The application generally concurs with the recommendations of the Joint Appeals Board and holds that the Respondent was virtually misled in taking the contested decision to terminate his permanent appointment.

The Respondent in this regard contends that the Joint Appeals Board transgressed the limits of its tasks set in Staff Rule 111.2 (k) which reads:

“In case of termination or other action on grounds of inefficiency or relative efficiency, the panel shall not consider the substantive question of efficiency but only evidence that the decision was motivated by prejudice or by some other extraneous factor.”

In the Respondent's view, as the Joint Appeals Board found that the contested decision was not motivated by prejudice or by some other extraneous factor, the Board was not entitled to subject that decision to further review.

VIII. As the Applicant insists that the contested decision was tainted by prejudice, the Tribunal wishes first to examine this side of the matter.

In his observations to the Respondent's answer the Applicant under the title "Decision motivated by prejudice" alleges "that improper motivation has been evident since the first attempts were made to terminate him in 1979" when the OGS and OPS "agreed to proceed to the termination of the Applicant's permanent appointment on grounds of abandonment of post" and "the [OGS] was still seeking the separation of the Applicant on the grounds of abandonment of post a year later".

This allegation was examined by the Joint Appeals Board which reported on this matter in detail. It found that the Applicant was twice reminded that his negligent attitude may be considered as abandonment of post. The Board, however, did not find that these actions revealed any prejudice on behalf of the Administration nor does the Tribunal.

IX. Another point made by the Applicant is as follows: "[the] evident attitude of the Medical Director (suspicion that the Applicant was malingering) since almost immediately after the accident indicates manifest prejudice against the Applicant". In this connection the Tribunal notes that the Applicant's accident occurred on 24 April 1979 and the Doctor's remark on the Applicant's alleged "malingering" is contained in his letter of 11 February 1981. In the same connection the Tribunal refers to para. 187 of the Joint Appeals Board's report quoted above under IV, and states that it concurs with that finding of the Joint Appeals Board.

X. The Applicant complains about lack of due process in the termination procedures. He alleges that the Respondent has not established that the Special Report, i.e., the memorandum of 18 May of Mr. Hunter [Chief, Maintenance and Operations Service, OGS] and its attachments, were ever given to him to rebut.

The full truth in this respect seems to be as follows: On 9 June 1981 a copy of the presentation of the Applicant's case by the Personnel Officer to the Vice-Chairman of the Working Group No. III of the Appointment and Promotion Panel was transmitted to the Applicant by a covering memorandum. According to the first paragraph of this presentation, dated also 9 June 1981, a copy of the Office of General Services recommendation of 26 May 1981 *with attachments* (emphasis added) was attached. It appears from the text of that recommendation that its attachments consisted of a copy of the memorandum of Mr. Hunter dated 18 May 1981 as well as details showing that the Applicant [during the period from 30 March 1981 to 18 May 1981] "was never able to report for work before at least 10:30 a.m."

XI. On 10 June 1981, the Applicant—obviously by the pen of his counsel—submitted to the Assistant Secretary-General for Personnel Services a rebuttal of the presentation dated 9 June 1981 together with five annexes. As the presentation referred to the recommendation of 26 May 1981, which in turn referred to Mr. Hunter's report of 18 May 1981, it is difficult to accept the contention that the Applicant was never given an opportunity to rebut Mr. Hunter's special report, to which he also made oral comments before the Review Group.

The same applies to the attachments to Mr. Hunter's report. The attendance records of the Applicant (Attachments A) which the Applicant in his written observations denies to have ever seen, are word for word embodied in the presentation dated 9 June 1981, which the Applicant received and rebutted

on 10 June 1981. The accuracy of the records in question was confirmed by the Applicant before the Review Group—as stated in the report of the Group.

It is difficult to understand on what ground the Applicant “strongly objects” to the presentation of these attachments to the Tribunal “particularly Attachments B and C which are undated and unsigned”. (Attachment B consists of 3 pages entitled “sequence of events in the Giscombe case”, Attachment C of half a page is entitled “Record of periodic reports”.)

The Applicant’s contention that “the Respondent has not provided a copy of the OPS recommendation for termination” is obviously mistaken if it refers to the paper of 9 June 1981 which—as shown above—was rebutted in detail by the Applicant on 10 June 1981.

XII. The Applicant complains that in the proceedings before the Review Group in June 1981 he was unable to avail himself of counsel, question witnesses and examine evidence. He refers in this connection to correspondence between the President of the Staff Committee and the Assistant Secretary-General for Personnel Services in November 1979/January 1980. In the course of this exchange of letters, the Assistant Secretary-General for Personnel Services stated—*inter alia*—that “the United Nations provides a Panel of Legal Counsel from which a staff member may select one to represent him or her in an appeal or disciplinary case. When no such action is involved, a staff member is not accompanied by a Counsel in meetings with administration officials which may be for the purpose of clarifying an administrative situation only . . .”. This view is correct, conforms to Staff Rules 110.5 and 111.2 (i) and was seemingly not challenged by the President of the Staff Committee.

The Applicant alleges that the proceedings of the Review Group amounted to disciplinary proceedings and therefore the rules applicable to these proceedings should have been followed. The Tribunal is unable to share this view as it does not possess the authority to extend the application of Staff Rules to situations which the given rule is not meant to govern.

XIII. The Medical Director recommended in his letter of 31 January 1980 “that if possible information be obtained on this staff member’s present daily activities. It is by no means certain that he is incapacitated”.

The Medical Director repeated his suggestion in a memorandum of 11 February 1981 addressed to the Director, Division of Personnel Administration, OPS.

According to the Applicant

“it was beyond the terms of reference of the members of the medical profession, namely Dr. Blieden and Dr. Gatenby, to recommend to the Administration to conduct an investigation into the daily activities of the Applicant and that consequently, their improper actions clearly constituted unwarranted interferences into the private and personal life of a staff member of the United Nations.”

However—as reported by the Joint Appeals Board

“52. In a note for the file dated 6 August 1980, Mr. Iregbulen [Personnel Officer] wrote the following:

“On Monday 4 August 1980 at 4:45 p.m., I called phone number (212) 282-8300 to speak with [the appellant] regarding the delay by his personal physician in responding to Dr. Gatenby’s letter about the convening of the Medical Board. A voice responded that [the appellant] was not available since he had gone shopping with his wife

for the store. At this point I became curious and decided to press the issue. I was informed that [the appellant] owned the store called "TASTE ME" which caters for parties and other social events. Upon further questioning, the voice informed me that the store was located at 629 Rogers Ave., Brooklyn N.Y. and that the phone is located in this store. I was also informed that [the appellant] is already at this place of business. According to our files, [the appellant's] home address is 619 Rogers Ave., Brooklyn. He has been absent from work for several months claiming illness as his excuse. When asked to identify himself, the voice mentioned that he was an employee at the store."

In the course of the meeting of the Review Group, Mr. Iregbulen informed the group of his experience. Upon the inquiry of some members of the group whether an investigation of this information had taken place, he replied—according to the report of the group—"that both Assistant Secretaries-General for OPS and OGS felt uncomfortable with that practice, and that, given the unfortunate accident, they did not wish to proceed with an investigation. He added that it was another indication of the many opportunities which were given to Mr. Giscombe to shape up and return to work. For the record Mr. Iregbulen indicated that Mr. Giscombe never returned his call."

In this connection the Tribunal feels bound to make two observations:

First, that the Applicant in his submissions, while expressing his indignation over the "unwarranted interference into his private and personal life" did not offer any explanation of the matter, nor had he expressly denied the accusation implicit in the report of Mr. Iregbulen. In the course of the oral procedure the Applicant replied to a question addressed to him, that the business certificate was made out for his wife but—although asked—did not submit any proof to this effect.

Second, the Tribunal strongly disapproves of the absence of an investigation of facts, which if established, would have proven a serious misconduct violating Staff Rule 101.6 (c).

XIV. The application—without going into details—supports the findings of the Joint Appeals Board which point to the shortcomings in the procedure leading to the termination of the Applicant's appointment.

The Board noted that no performance evaluation report had been prepared in accordance with para. 5 (a) of Administrative Instruction ST/AI/240. The prescription contained in this paragraph, namely to prepare performance evaluation reports "(a) upon expiration of a fixed term appointment or upon separation from service for other reasons" might seem at first sight an unnecessary duplication in view of the obligation to prepare a special report according to paragraph 16 of the same instruction "when there is a recommendation involving . . . termination". The Tribunal is of the view that this is not the case.

The requirement that before termination proceedings the Department concerned must prepare both a performance evaluation report on the standard report form and a brief special report relating to the facts requiring action (not on the standard report form), seems to be intended to serve as a guarantee for the staff members in question.

The Tribunal considers that the lack of the said report constitutes a serious irregularity in the procedure.

XV. The situation is different in respect of other conclusions of the Joint Appeals Board. As to the first finding of the Review Group, namely that

“the staff member, since he joined the Organization, had never been able to correct his pattern of tardiness and it expressed concern that no action had been taken by the Administration to withhold [the appellant’s] within grade increment in view of the fact that punctuality was an important requisite in BMS”

the Board found that it was

“inaccurate, in view of the existing performance evaluation reports, and was also inconsistent with the Appointment and Promotion Board’s own past recommendations.”

To this, the Tribunal observes that the Applicant’s insufficient punctuality was objected to in his second (1966-67), third (1967-69), sixth (1972-74) and seventh (1974-76) periodic reports. The Applicant’s rebuttals against these reports were only once successful, in 1967, when the rating was changed from “insufficiently punctual” to “punctuality meets the minimum standard required”. In his eighth report (1976-1978) his punctuality was found adequate. No periodic report had been prepared after 1978.

The gloomiest picture of the Applicant’s punctuality is painted in the presentation of the Applicant’s case to the Review Group where his attendance record is shown in the period from 30 March 1981 to 5 June 1981. While he was permitted to observe working hours from 10:00 a.m. to 4:00 p.m. in the first two weeks only, he arrived to work during the whole period—with two exceptions—between 10:30 a.m. and 11:00 a.m. although he was supposed to appear at 8:00 a.m.

He was deadily punctual in leaving. Except on 30 March 1981 (4:45 p.m.) he signed out every day at 4:00 p.m. (on some days earlier).

In his rebuttal to the presentation of his case to the Review Group, the Applicant had nothing more to say than: “I am doing my very best to readjust to a normal work routine; it is a fact that from the physical point of view I have not as yet fully recovered from the effect of the accident of 24 April 1979”.

His own notion of punctuality is reflected by the fact that before the Review Group, he expressed the view that punctuality was not to be taken into account while considering performance on the job.

It follows from the foregoing that even if the word “never” was perhaps mathematically incorrect, the fact remains that the Applicant was not able to correct his pattern of tardiness.

XVI. The Tribunal is also unable to share the criticism of the Board regarding the Review group’s finding

“that, based on the knowledge of the staff member’s financial difficulties, OGS was reluctant to resort to the procedure of withholding increments.”

According to the Board’s report

“the Panel had only been able to find on record one instance in May 1969 in which OGS, after considering withholding the appellant’s salary increments due to his tardiness, decided afterwards not to pursue it in view of his financial difficulties. In these circumstances, and given also the length of the appellant’s service, the Panel considered that this finding was misleading of the true situation and inaccurate.”

The Tribunal does not find any contradiction between the general statement of the Review Group and the fact that only in one instance was OGS’s reluctance recorded. It may very well be, that in other years the OGS continued not to resort to withholding the yearly within-grade salary increment, not

because of its satisfaction with the Applicant's work, but only to avoid a detrimental effect on the Applicant's financial situation.

XVII. The Joint Appeals Board's reproach goes next against the finding of the Review Group

"that while the past record of Mr. Giscombe was not clearly conclusive of what kind of staff member he was, the total leave taken by him since he joined the U.N. and the repeated visits to the Medical Service, since the accident, was indicative that the potential of the actual situation was clear."

The finding is, according to the Board

"inadmissible in that (i) it had taken into account the appellant's certified sick leave and the leave permitted under the Staff Rules as a factor for unsatisfactory services, (ii) it was inconsistent with another finding that the medical case of the appellant had not been taken into account for reaching its conclusions, and (iii) the conclusion reached was ambiguous and unacceptable as a finding of fact."

In the Tribunal's view this reproach is not unfounded. The Review Group's finding is, however, not untrue. It rounds up the picture of the Applicant but it is obviously not too important and certainly not decisive.

XVIII. The finding of the Review Group "that [the Applicant's] total period of service showed that his performance was barely average" is according to the Board "not borne out from the documented evaluation". The Board bases this statement on its examination of the performance evaluation reports of the Applicant: "The existing reports showed that except for the period from 1967 to 1969 the appellant had constantly been rated as a staff member who maintained good standard of efficiency and the overwhelming majority of the individual ratings were above the minimum required"—the Board reports. This part of the report by itself justifies the Review Group's finding. Barely average means "not more than average" but this is obviously not the same as "above the minimum".

XIX. The Board takes exception to the finding of the Review Group that "his performance since he returned was nil". This finding of the Group "(i) had not taken into account relevant facts (ii) was based on conflicting testimony"—reported the Board.

An extract from the Board's report:

"The Panel noted that the negative comments on the appellant's performance made by the appellant's supervisor both orally and in writing, had been rebutted by the appellant and, in particular, Mr. Hunter's contention that the appellant had produced only four lines of written work in six weeks had been answered by the appellant with the observation that he had not been asked to produce anything in writing."

Whoever was right in this dispute, the fact remains that there is no proof that the Applicant has accomplished anything during the period in question. Even if it was true that the Applicant was assigned essentially different duties from those he was until then expected to perform, he should have been able to accomplish something or to report his inability to do so. He—however—told the Review Group that his new assignment was not beyond his capabilities.

The Panel was surprised to observe that

"the Review Group would give total credit to the appellant's observation on his ability to work and no credit at all to his claim that his physical condition had prevented him from doing the job".

It is indeed difficult to believe that the Applicant's physical condition had prevented him from doing a job which did not require manual skills or any physical work.

The Board reported that in this matter the Review Group should have sought the views of other witnesses with direct knowledge of the matter. However, no such proposal was made by the Applicant before the Review Group or in the application to this Tribunal nor had the Joint Appeals Board on its own initiative heard witnesses.

XX. The Joint Appeals Board did not object to the following findings of the Review Group:

“—that the Medical Service confirmed that Mr. Giscombe was fit for work;

“—that Mr. Giscombe confirmed the accuracy of the record kept of his attendance as listed in the memorandum from the Office of Personnel Services;

“—that Mr. Giscombe was given the benefit of the doubt when the information concerning a possible outside activity was not investigated.”

XXI. Having thus reviewed the case, the Tribunal has come to the conclusion that there is no evidence of prejudice or extraneous motivation vitiating the termination decision and that the decision is not vitiated by lack of due process. The Applicant's performance was carefully reviewed by the Office of Personnel Services and the Review Group before which he gave evidence and this was considered by the Appointment and Promotion Board. The Applicant's case was further considered in great detail by the Joint Appeals Board which pointed to certain weaknesses in the procedure of the termination which—however—in the Tribunal's view did not constitute sufficient ground for rescinding the decision to terminate the appointment. In any event, the Secretary-General was furnished with a wealth of information reached by a highly complete, fair and reasonable procedure which has given him a broad basis to rule on the question whether or not the Applicant's services were satisfactory. Since his appraisal in this respect is final, the Tribunal cannot but reject the request of the Applicant (i) to rescind the decision to terminate his appointment and (ii) to reinstate him to his former position.

XXII. The rejection of the request of the Applicant according to the previous paragraph has the effect of maintaining the validity of the decision of the Respondent dated 11 September 1984 including the promise of payment foreseen in that decision.

XXIII. In view of the above, all other claims for compensation of the Applicant are equally rejected without prejudice, however, to the eventual outcome of the procedure envisaged in para. VI of this judgement.

(Signatures)

T. MUTUALE
President

Endre USTOR
Member

New York, 5 November 1985

Roger PINTO
Member

R. Maria VICIEN-MILBURN
Executive Secretary