
ADMINISTRATIVE TRIBUNAL

Judgement No. 465

Case No. 422: SAFAVI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Arnold Kean, President; Mr. Jerome Ackerman,
Vice-President; Mr. Ioan Voicu;

Whereas at the request of Hadi Safavi, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended until 6 December 1986 and 6 March 1987 the time-limit for the filing of an application to the Tribunal;

Whereas, on 27 February 1987, the Applicant filed an application in which he asked the Tribunal for the production of a series of documents and the examination of witnesses;

Whereas the Respondent filed his answer on 1 April 1987;

Whereas the Applicant filed written observations on 18 April 1987;

Whereas, on 14 August 1987, the Executive Secretary of the Tribunal informed the Applicant that the President of the Tribunal instructed him to file an application addressing not only procedural questions, but also the merits of the case;

Whereas, on 23 October 1987, the Executive Secretary of the Tribunal, pursuant to article 10, paragraph 2 of the Rules of the Tribunal, made available to the Applicant his personnel files, communicated by the Respondent to the Tribunal;

Whereas, on 27 November 1987, the Applicant requested the Respondent to produce a series of documents related to his appeal which were not contained in his personnel files;

Whereas the President of the Tribunal extended the time-limit in which to file an application until 30 April 1988;

Whereas, on 13 April 1988, the Respondent transmitted to the Tribunal correspondence related to the Applicant's employment, made available by the United Nations Development Programme (UNDP) and noted that the United Nations Centre for Human Settlements (UNCHS) had a Project File which contained confidential communications between the Government and the United Nations but if the Tribunal requested "specific documents or specific classes of documents", the Respondent would consider their release;

Whereas, at the request of the Applicant, the President of the Tribunal further extended the time-limit in which to file an application until 31 July 1988;

Whereas, on 1 June 1988, the Executive Secretary of the Tribunal informed the Applicant that the Tribunal had instructed him to "file [his] application within the time-limits set by the President of the Tribunal or within a reasonable extension thereof, using documentation contained in the personnel files that [had] been communicated to [him]. Any requests for further production of documents by the Respondent should be made in [his] application, in accordance with article 7, paragraph 3 (a) of the Rules of the Tribunal."

Whereas, at the request of the Applicant, the President of the Tribunal, further extended the time-limit in which to file an application until 30 September 1988;

Whereas, on 19 September 1988, the Applicant filed an application, the pleas of which read as follows:

"II. PLEAS

(a) Preliminary Measures

The Applicant prays that the Tribunal order the following

preliminary measures.

1. Production by Respondent of undermentioned documents for submission to the Tribunal with copies to the Applicant.

- (i) All material on National Physical Planning Project (NPPP) Phase I and Phase II files maintained at United Nations Development Programme (UNDP) office at Dhaka, Bangladesh, relating to the award, renewal and non-renewal of all UN Experts' and United Nations Volunteers' (UNV's) contracts since July 1982 to the present date.
- (ii) All material on NPPP Phase I and Phase II files maintained at United Nations Centre for Human Settlements (UNCHS) office at Nairobi, Kenya relating to:
 - The award, renewal and non-renewal of all U.N. Experts' and U.N. Volunteers' contracts since July 1982 to the present date.
 - All project progress reports, including in particular reports filed at various stages of the project's progress by the Project Manager, Dr. John B. Urner and the three reports filed by the Project Consultant, Mr. Francis J.C. Amos, dated respectively December 1983, May 1984 and October 1984.
- (iii) Applicant's personnel file maintained at UNDP, Dhaka, in entirety.
- (iv) Applicant's personnel file maintained at UNCHS, Nairobi, in entirety.
- (v) Applicant's personnel file maintained at U.N. Headquarters in New York, in entirety.
- (vi) Title, reference number, brief scope, location, cost and executing agency of all projects funded by UNDP, world-wide, in the fields of national/regional planning, city/urban or physical planning, in low cost housing and in physical infrastructure development during 1983, 1984 and 1985.
- (vii) Title, reference number, brief scope, location,

cost and funding agency of all projects executed by UNCHS world-wide during 1982, 1983, 1984, 1985 and 1986.

(viii) Salary level and step of all international experts and U.N. volunteers in Applicant's project (...) at three-month intervals from 15 March, 1984 to 15 December, 1986.

(ix) All UNCHS 'job vacancy lists' and UNCHS 'lists of experts serving at duty stations and those proposed for vacant situations' produced during the four-year period 1983-1986, inclusive.

(x) All correspondence during 1985 between United Nations Capital Development Fund, (UNCDF), New York; the UNDP, Dhaka and the Government of Bangladesh relative to the putting up by UNCDF of Applicant's candidature for a short term expert's position on their Mirpur Resettlement Programme (...) in Dhaka.

(xi) All correspondence in 1985 between United Nations Department of Technical Cooperation for Development, (UNDTCD), New York, UNDP, Dhaka and the Applicant relative to the putting up by UNDTCD of Applicant's candidature for the post of Urban and Regional Planner in the United Arab Emirates. (...)

(xii) Dates of annual leave, home leave, special leave and sick leave taken by Mr. John Jones, Physical Planner and subsequently Officer-in-Charge in the National Physical Planning Project, Dhaka, during the years 1984 and 1985.

(xiii) Copy of memo from Dhaka UNDP Res[ident]. Rep.[resentative] Walter Holzhausen to UNDP Headquarters in New York, dated 19 March 1985 recommending that the National Physical Planning Project in Dhaka be closed with effect from 31 December 1985.

(xiv) Itemized telephone bill of UNDP, Dhaka, for December 1985.

2. Procurement of Testimonies

(i) Oral or written 'similar act' testimony of former

Bangladeshi Minister of Finance and ex-officio principal Government liaison with the United Nations: Mr. Saifur Rahman of Rahman, Rahman and Haq, Public Accountants, 52 Motijheel, Dhaka, Bangladesh. The questionnaire prepared for this testimony is appended at the end of this application, preceding the ANNEXES.

(ii) Oral or written 'similar act' testimony of the Director of Personnel, UNDP, New York. The questionnaire prepared for this testimony is appended at the end of this application, preceding the ANNEXES.

(iii) Oral or written 'similar act' testimony of the Head of the UNDP Ombudsman Panel in New York. The questionnaire prepared for this testimony is appended at the end of this application, preceding the ANNEXES.

(iv) Oral or written testimony of Applicant's immediate supervisor and Project Manager of the National Physical Planning Project, Dr. John B. Urner. Present address: c/o Department of Education, Royal Bhutan Government, Thimpu, Bhutan. The questionnaire prepared for this testimony is appended at the end of this application, preceding the ANNEXES.

(v) Oral or written testimony of Applicant's senior colleague and Co-Team Leader in the Project's Town Planning Team, Dr. Jan Jakobsche. Present address: Stupecka 4 M 50, 02-309 Warszawa, Poland. The questionnaire prepared for this testimony is appended at the end of this application, preceding the ANNEXES.

(b) Decision Contested

The decision which the Applicant is contesting is the non-renewal of his fixed-term contract when not only did the project the Applicant worked for as a technical expert continued but there was need in it for his services.

(c) Obligations Invoked

When the appeal was originally filed with the Panel on Discrimination and Grievances (the Panel) in August 1985 the Applicant, though just separated from the Project, was still in Bangladesh. Hence an immediate temporary

extension of previous contract and following that a normal one-year renewal was sought.

The Panel's decision to request a temporary reinstatement pending further investigation was ignored by Respondent.

The same appeal was then forwarded to the Joint Appeals Board (JAB) as appellant was still in Bangladesh and the deadline for filing that appeal was imminent. However, a supplementary statement of appeal was submitted to JAB in March 1986 upon Applicant's arrival in New York to pursue the case more closely.

In it, Applicant requested that the decision not to renew contract be found prejudicial and that in view of the length of his meritorious service with the UN he be considered for a career appointment within the UN system. Until such time that this could be effectuated, the appellant implored, he be reinstated, with all privileges and emoluments restored, to his rightful place in the project where vacancies still existed.

That Project has since ended and the Applicant prays that the Administrative Tribunal may now be pleased to:

1. Adjudge that by denying him successful contract renewals without reason in the National Physical Planning Project of Bangladesh the Respondent acted inequitably and thereby caused the Applicant to lose emoluments from August 1985 to the conclusion of this Project on April 30, 1987.
2. To find that this adverse decision also injured Applicant's professional standing that had been established over a lifetime of meritorious service in developing and developed countries, within the UN system and outside it.
3. To adjudicate that his qualifications and experience having remained the same, if not enhanced, since he separated from service with UNCHS, the Applicant be found an alternative assignment with an agency of the UN system.

Further, such assignment be to a position substantially similar to the one Applicant previously held and that it be without prejudice to rights or privileges he formerly enjoyed including that of continuity in the UN Joint Staff Pension Fund.

4. To determine that Respondent's decision to not renew

contract and inaction on Applicant's several appeals and requests for interim measures caused grievous emotional distress.

d) Amount of Compensation Claimed

In the event the Secretary-General decides, in the interest of the United Nations, to pay compensation for the injuries sustained the Applicant pleads that such compensation be equivalent to:

1. Twenty-two months' salary and other allowances and emoluments (including pension contributions to the UN Joint Staff Pension Fund without loss of continuity) which Applicant would have received or benefitted from had he remained in the Project from the time of his separation in early August 1985 until the project concluded on April 30, 1987.
2. One year's net base salary for injury to his professional standing.
3. One year's net base salary in case of Respondent's inability or unwillingness to find suitable alternate employment should the Tribunal grant Applicant's request for Respondent to find Applicant employment within the UN system, commensurate with his qualifications and experience.
4. Beginning with the verbal notification from the Project Manager in December 1984 Applicant has, with his family suffered grievous emotional damage in this sad episode. This included the distress caused by unexplained loss of employment and the anxiety about reinstatement or the securing of alternate employment.

This uncertainty also precluded the placing by Applicant of one of his children in her former Dhaka school for the whole of the first semester in the 1985-86 academic year since admission there was contingent upon the payment of a whole year's fees in advance.

Assessment of commensurate compensation for such sustained emotional distress, as this is not within the Applicant's competence. It is left to the greater insight and better judgement of the Administrative Tribunal to determine an adequate amount to compensate Applicant on this account.

e) Other Relief Requested - Costs

Costs incurred in this case to date inclusive of those associated with filing the present application are as follows:

Typing	\$323
Photocopying	\$165
Telex (International)	\$120
Telephones (International, long distance and local)	\$460
Mail and Courier Service	\$190

Lodging in New York hotel to pursue appeal and to prevent case being transferred to the newly established office of the Joint Appeals Board in Nairobi; where its executive secretary was a subordinate of UNCHS' A.P.A. [Asian Pacific Americas] Unit Coordinator. Cost of presenting at JAB hearing in New York as witness, former Project Manager Dr. John B. Urner from Florida. Daily travel to and from U.N. Headquarters. \$793"

Whereas the Respondent filed his answer on 24 January 1989;
Whereas the Applicant filed written observations on 20 March 1989;

Whereas, on 25 September 1989, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas, on 19 October 1989, the Tribunal requested the Respondent to produce a series of documents;

Whereas, on 24 October, 30 October and 6 November 1989, the Respondent submitted additional documents.

Whereas the facts in the case are as follows:

The Applicant, an Indian national, was originally recruited by the United Nations on 16 July 1978 as an Urban Planner at the L-4 level at the Office of Technical Co-operation in Riyadh, Saudi

Arabia. He served in that capacity, on a succession of fixed-term project personnel appointments and subsequently, as Local Physical Planning Expert until completion of the project on 31 July 1983. The Applicant's performance during his assignment in Riyadh was evaluated by the Resident Representative in an evaluation report dated 4 July 1983, in which he noted that "on completion of his assignment with the project, the Government has paid tributes to him [the Applicant] for his excellent services." He further recommended the Applicant's re-employment "without reservation" and rated his overall performance "very good".

On 5 February 1984, the Applicant re-entered the service of the United Nations to work on a UNCHS/UNDP National Physical Planning Project BGD/81/005 of assistance to the Government of Bangladesh (the "Project"). He was offered a project personnel appointment for one year at the L-5, step II level as a Physical Planner at Dhaka, Bangladesh.

In a confidential letter dated 3 September 1984, the Resident Representative informed the Co-ordinator, Asia, Pacific and Americas Unit, UNCHS, that he was not satisfied with the progress of the Project. He stated in this regard: "It lacks direction both on the side of the National Director, Mr. Das [Director, Urban Development Directorate], and your Project Manager (Mr. Urner)". As regards the Applicant, he noted: "I understand that there are doubts whether he is capable of performing at the expected level". On the same date, he wrote to an official at the Ministry of Works, a government office involved with the Project, concerning the Applicant's and Mr. Urner's contractual status, asking the Government to "review the work of the two experts and inform [UNDP] whether they wish them to continue in Bangladesh or rather be replaced by new experts."

On 3 September 1984, Mr. Urner, the Project Manager, who was also the Applicant's supervisor, asked the Applicant whether he would be interested in "spending a second year with the Project". He discussed informally a series of possible tasks that the Applicant would probably be discharging and asked him for "the exact

date of [his] contract's expiration."

According to the record of the case, a meeting was held in October 1984 between various experts, consultants, government and U.N. officials involved with the Project. It appears that a disagreement arose between the Applicant and Mr. Urner and the rest of the personnel concerning the Project, its objectives and the staffing required to achieve those objectives.

On 10 December 1984, the Co-ordinator of the Asia, Pacific and Americas Unit, UNCHS, asked the UNDP Resident Representative what were the Government's intentions with respect to the extension of the appointments of all the experts in the Project. He also asked for UNDP's views on the matter.

In a memorandum dated 12 December 1984, an official at the Ministry of Works, notified the Secretary of the External Resources Division at the Ministry of Finance and Planning, another government office involved in the Project, that it was "essential" to extend the contracts of the Project Manager and the other experts for a further year. The names of all the experts serving in the Project, including the Applicant's, were listed in that memorandum.

In a confidential cable Misc 3803 dated 13 December 1984, the UNDP Resident Representative informed the Co-ordinator of the Asia, Pacific and Americas Unit, UNCHS, that the Government concurred with him on the extension of all the experts. In the Applicant's case, although the Government would "officially" agree to a one year extension, Mr Das, the National Director, had informed him that he would accept a six months extension.

In a cable dated 4 January 1985, the Co-ordinator of the Asia, Pacific and Americas Unit, UNCHS at Nairobi, informed the Applicant that, after reviewing his input to the Project, UNCHS had found "HIS PERFORMANCE [...] BELOW EXPECTATIONS", that his appointment would be extended for six months only, period during which his output would be closely monitored, and that any further extension of his appointment would depend upon his performance during that period.

On 8 January 1985, an official at the Ministry of Finance and Planning, External Resources Division, acting on the Ministry of Works' request, wrote to the UNDP Acting Resident Representative proposing to extend the appointments of the experts working on the Project for a further year. The Applicant was one of those experts.

In a cable dated 16 January 1985, the Acting Resident Representative informed the Co-ordinator of the Asia, Pacific and Americas Unit, UNCHS, that the Government had confirmed its agreement to the extension of the Applicant's appointment for a further year until 4 February 1986. However, in a reply dated 16 January 1985, the Co-ordinator, Asia, Pacific and Americas Unit, UNCHS, informed the Acting Resident Representative that "IN ACCORDANCE HOLZHAUSEN'S MISC 3803 WE PROCESSING CONTRACT EXTENSION SAFAVI FOR SIX MONTHS ONLY AND HAVE INFORMED HIM ACCORDINGLY."

The Applicant's appointment was extended for a further fixed-term period of six months and he was paid a within-grade salary increment.

According to the record of the case, the Project Manager's appointment was not extended. On 11 April 1985, he wrote a letter of recommendation, praising the Applicant's contributions to the Project, under what he described as difficult working conditions.

In a letter of 22 April 1985, addressed to the Co-ordinator of the Asia, Pacific and Americas Unit, UNCHS, the Applicant objected to the six month extension of his appointment and to the evaluation of his performance. In addition, he described in detail the problems he had encountered in the implementation of the Project.

On 5 June 1985, the Co-ordinator of the Asia, Pacific and Americas Unit, UNCHS, informed the Applicant that his appointment, due to expire on 4 August, would not be extended.

On 3 August 1985, the Applicant wrote to the UNDP Resident Representative in Bangladesh, explaining the difficulties in implementing the Project and complaining that the work he had recently completed had not been given due recognition. He concluded

his letter by asking for an appointment with the Resident Representative to discuss his situation.

The Applicant was separated from the Organization at the expiration of his appointment on 4 August 1985.

On 4 August 1985, the Applicant filed a complaint with the Panel on Discrimination and other Grievances (the Panel on Discrimination) and requested that his appointment be extended for two further months. On 7 August 1985, the Applicant asked the Secretary-General to review the administrative decision not to renew his appointment. On 31 August 1985, the Applicant filed a letter of appeal with the Headquarters Joint Appeals Board (JAB) but was advised by the Alternate Secretary of the Board on 6 September 1985, that his appeal was premature.

In a cable dated 26 September 1985, the Applicant was advised by the Acting Co-ordinator, Panel on Discrimination, that the Panel was not competent to deal with his request for an investigation because he had filed the request after the expiration of his appointment.

Not having received a reply from the Secretary-General to his request for administrative review, in a cable dated 8 October 1985, the Applicant filed a statement of appeal with the JAB in which he requested, in accordance with staff rule 111.2(f), suspension of the decision not to renew his appointment. The JAB concluded in its report dated 13 November 1985 that it was unable to support the Applicant's requests for suspension of action and extension of his appointment. On 20 December 1985, the Assistant Secretary-General for Personnel Services advised the Applicant that his request for suspension of the administrative action under staff rule 111.2(f) had been rejected by the Secretary-General.

The JAB adopted its report on the merits of the case on 6 May 1986. Its conclusions and recommendations read as follows:

"Conclusions and recommendations of the Panel

90. The Panel finds that according to the appellant's terms of employment as spelt out in the relevant Staff Rules and the

appellant's letters of appointment, UNCHS acted within its administrative prerogative when it separated the appellant on the expiration of his temporary appointment.

91. The Panel finds that the appellant has not proven to the Panel's satisfaction that he possessed a legal expectancy of contract renewal.
92. The Panel finds that after a thorough examination of all the available documentary and circumstantial evidence, there were several contradictions in this appeal which did not exclude the possibility that UNCHS' decision not to extend the appellant's appointment was not based solely on performance considerations. However the Panel finds that, this notwithstanding, the appellant had not proven to its satisfaction that these contradictions were caused by prejudice resulting in the non-renewal of the appellant's contract.
93. The Panel finds that regardless of the type of contract under which a staff member serves, he can always expect fair treatment from his employer and that since this standard has not been met in this case, he should be accordingly compensated for the actual and potential damage which the non-renewal of his appointment and the resulting appeal has caused to his professional reputation.
94. The Panel accordingly recommends that the appellant be compensated by a sum equivalent to three months of his last net base salary.
95. Since the appellant's employment was based on fixed-term contracts, the Panel cannot uphold the appellant's request for reinstatement. However, the Panel recommends that, in view of his excellent employment record with the United Nations prior to the period of employment which is the subject of this appeal, the Panel's findings and recommendations together with the appellant's file be transmitted to the relevant appointment and promotion body which may wish to consider him for any suitable position within the United Nations system."

On 10 July 1986, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General, having re-examined his case in light of the Board's report, had decided to maintain the contested decision and not to accept the JAB's recommendation to pay the Applicant compensation. He added:

"With regard to the Board's recommendation contained in paragraph 95 of the Report, the Secretary-General has decided that, subject to [the Applicant's] agreement, the Board's report be included in [his] official status file jointly with his decision on the Board's recommendation, for their placement before the appointment and promotion bodies should [the Applicant] apply for a suitable opening in the United Nations Secretariat."

On 3 March 1987, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had a legal expectancy of renewal of his fixed-term appointment until the end of the Project.
2. The JAB report contained a number of factual errors.
3. The UNDP Resident Representative's behaviour vis-à-vis the Applicant was tainted by prejudice.
4. The Applicant's professional reputation was severely damaged by the actions of the Respondent.

Whereas the Respondent's principal contentions are:

1. The Applicant's requests for the production of extensive documentation and the examination of certain witnesses are unnecessary as the granting of them would not produce any relevant information required for the case's adjudication.
2. The Applicant has produced no evidence to show that the decision not to renew his fixed-term appointment was vitiated by prejudice.
3. The circumstances of the case show that the Applicant could not reasonably have had an expectancy that his appointment would be renewed until the end of the Project.
4. The Applicant has produced no evidence to show that the Respondent's actions damaged his professional reputation.

The Tribunal, having deliberated from 25 October to

15 November 1989, now pronounces the following judgement:

I. The issues before the Tribunal in this case are whether the Respondent's decision not to renew the Applicant's fixed-term appointment was flawed by prejudice or other extraneous considerations as alleged by the Applicant, and whether other conduct of the Administration relating to the procedures followed, and to employment opportunities for which the Applicant was being considered, was improper. The Applicant has requested an oral proceeding and written testimony. The Tribunal has rejected his requests because it considers them to be unnecessary in this case.

II. The Applicant claims that he had a legal expectancy for a one year renewal of his fixed-term appointment. To establish this, he appears to rely on: (i) a communication from his immediate superior, Mr. Urner, several months before his fixed-term appointment was to expire, regarding the Applicant's interest in an extension; (ii) indications early in the course of the Project that he might expect to be in Bangladesh for three years; and (iii) a written request dated 8 January 1985 from the Government of Bangladesh to UNDP that his contract be extended for one year from 5 February 1985.

III. The Tribunal does not consider that the foregoing points, considered singly or together, or any other evidence in the case, are sufficient to establish the claimed legal expectancy. The Applicant's immediate superior neither had the authority to commit the Administration to an extension, nor purported to do so. The written communication from him to the Applicant which is in question, is viewed by the Tribunal as merely an inquiry. The written request by the Government of Bangladesh was also insufficient to establish a legal expectancy. It was not for the Government unilaterally to make any commitment regarding an extension. This was a matter that required UNCHS and UNDP concurrence, and although there was some ambiguity connected with

their response to the request of the Government of Bangladesh, the Tribunal does not find that any legal expectancy of a one year renewal was ever created. Indications that the Applicant might be in Bangladesh for three years did not have the effect of creating a legal expectancy beyond the fixed-term specified in his contract. Nor did the fact that aspects of the Project on which the Applicant had been working were unfinished at the time of his separation.

IV. Although the Tribunal is unable to conclude that the Administration violated the Applicant's terms of employment, or the relevant Staff Rules, when it separated the Applicant on the expiration of his fixed-term appointment, the Tribunal, as did the Joint Appeals Board (JAB), has found troubling inconsistencies in the manner in which the Administration proceeded. These were not satisfactorily resolved by the post facto documentation produced by the Administration following the Applicant's appeal. For example, the Tribunal has difficulty understanding why, if the Applicant's performance was as unsatisfactory as later asserted by the Administration, he was given a within-grade salary increment with respect to his first year. No explanation for this was forthcoming from the Administration when the Respondent's representative before the JAB asked a question about it. The Tribunal also has difficulty in understanding why on 4 January 1985, when the Applicant received a six months, rather than a one year, extension of his contract, he was informed by the Administration merely that his performance was "below expectations" (with no detailed explanation), while the Administration later claimed, after he filed his appeal, that his performance was "far below minimum standards" from almost the beginning. There is, of course, a vast difference in the inferences to be drawn from two such disparate assessments. Finally, the Tribunal is concerned about the absence of adequate documentation prior to 4 January 1985, supporting the post facto contentions of the UNDP Resident Representative with regard to the reasons for not complying with the 8 January 1985 request of the Government of

Bangladesh that the Applicant's contract be extended for one year, particularly since this request was made after the Resident Representative allegedly was informed of dissatisfaction by the Government of Bangladesh with the Applicant's performance.

V. Despite the foregoing and other concerns arising from the record of this case, if there had been no action by the Administration beyond permitting the Applicant's fixed-term contract to expire, a matter within its discretion, the Tribunal would be hesitant to sustain the application based on allegations of prejudice or extraneous factors. Under the Tribunal's consistent jurisprudence, the burden of proving prejudice or other improper motivation rests with the Applicant, and he has not demonstrated to the satisfaction of the Tribunal that the non-renewal of his contract for one year was tainted by prejudice or improper motivation. The Applicant's claim that his treatment reflected retaliation against him by the UNDP Resident Representative for having successfully appealed with respect to a subsistence allowance matter, while raising suspicions, is not considered by the Tribunal sufficient to sustain the Applicant's burden of proof because other staff members who also were involved in the subsistence allowance appeal do not appear to have suffered any adverse consequence. Nor do the personality eccentricities of the Resident Representative alleged by the Applicant establish prejudice or improper motivation.

VI. However, the Administration did more than decline to renew the Applicant's contract. It intervened in efforts by the Applicant to secure other U.N. employment. Since the Respondent cited unsatisfactory performance by the Applicant in an attempt to influence negatively potential employment opportunities for him, the Tribunal must consider whether the Respondent was, for that reason, obliged to have followed a fair procedure in arriving at its conclusion of unsatisfactory performance. In other words, basic notions of due process would suggest that the Respondent should have

given the Applicant: (i) a reasonably detailed specification of his alleged performance shortcomings in January 1985, or earlier, instead of the simple conclusory statement that he received; (ii) an opportunity to respond, and (iii) then given fair consideration to his response. Had such a procedure been followed, it should have established, one way or the other, with reasonably clear evidence the situation as to the Applicant's performance. Because this was not done, the Tribunal is faced with the Respondent trying to justify his position on the basis of post-appeal factual assertions and arguments. Some, including a favourable assessment by the Project Manager, and a request that the Applicant continue in his post for an additional 30 days in lieu of taking accrued leave, are not in accordance with such assertions and arguments.

VII. The record shows that the Applicant, in April 1985, took issue with the "below expectations" remark made in the 4 January 1985 communication to him. But there is no showing of what, if any, consideration prior to the appeal was given by the Administration to what he had to say, other than the conclusory statement of unsatisfactory performance. Moreover, in the process of his appeal, the Applicant submitted detailed rebuttals with regard to virtually all of the contentions spelled out for the first time by the Respondent in documents created after the appeal. The Tribunal has no way of knowing what the reaction to this might have been, had the Administration given the Applicant adequate advance notice of his alleged deficiencies and then given fair consideration to his rebuttal before pronouncing his performance unsatisfactory and making apparently successful efforts to block his attempts at further U.N. employment.

VIII. The Tribunal finds that the Applicant was not treated fairly in that the personnel files reveal no meaningful analysis or evaluation of the things he had to say on his own behalf before adverse action was taken against him. Procedural due process

protections are designed to assure, in so far as possible, that the Administration will fairly consider a staff member's point of view and, having done so, will presumably arrive at a fair and reasoned decision. This was not done before the Applicant was considered to have been an unsatisfactory performer and his future employment opportunities with the U.N. were unfairly prejudiced on that basis.

If the Applicant seeks employment with the U.N. in the future, he should be considered for it without reference to his alleged unsatisfactory performance on the Bangladesh Project.

IX. With respect to the Applicant's requests for the production of documents, those deemed relevant were sought from the Respondent by the Tribunal, and some were furnished. The Tribunal regrets, however, that other documentation it requested from the Respondent which might have thrown light on evaluations of the Applicant's performance before the decision to separate him was, for one reason or another, not made available to the Tribunal. Post facto presentations in the context of an appeal are not normally an adequate substitute for contemporaneous performance records or evaluation procedures.

X. Notwithstanding the lack of proof of prejudice or improper motivation in the present case, the Tribunal finds that no serious attempts were made by the Administration to observe the obligation of due and fair process vis-à-vis the Applicant. As a result of this failure, the Applicant was denied a timely opportunity to have his views considered regarding the Administration's action on the renewal of his appointment which was requested by the Government of Bangladesh. What may prove even more damaging in the long run, he also had no such opportunity with respect to entry in his personnel files of an unsatisfactory performance rating which, as a practical matter, seems to have prevented him from being considered for other assignments by the U.N. and any of its agencies. No justification for this has been established, and it could not but injure his

professional reputation. Accordingly, the Applicant is entitled to compensation.

XI. For the foregoing reasons, the Tribunal orders that:

1. The Respondent shall pay to the Applicant compensation for the injury sustained by him equivalent to five months of his net base salary at the time of his separation from service and that a copy of this judgement be included in his official status file.

2. Except as provided in paragraph XII below, other pleas of the Applicant are rejected.

XII. The Applicant has requested payment of US\$2,051 as costs on the basis set out in his pleas. Taking all the above factors into consideration, and in keeping with the Tribunal's jurisprudence in Judgement No. 237, Powell (1979), the Tribunal awards the Applicant US\$2,000 as costs.

(Signatures)

Arnold KEAN
President

Jerome ACKERMAN
Vice-President

Ioan VOICU
Member

New York, 15 November 1989

R. Maria VICIEN-MILBURN
Executive Secretary