

18. It should be observed that the Administration had at no stage refused or declined to give access to the documents mentioned by the Applicant in his letter dated 9 April 1958. The Respondent only insisted on the Joint Disciplinary Committee looking into the relevance, of the documents requested, to the charges framed against the Applicant. The Tribunal is not aware of a *due process* which gives an applicant the right to call for any document from the opposite party regardless of its relevance to the issue under consideration.

19. It is regrettable that the Applicant has put himself in a difficult position by his own conduct. The Applicant remained *ex parte* in the proceedings before the Joint Disciplinary Committee on the ground that the documents requested were not made available to him. The Applicant has thereby denied himself an opportunity for his defence being considered on its merits by the Joint Disciplinary Committee and also by appropriate appeal authorities in due course.

20. In conclusion, the Tribunal finds that the plea of lack of due process at various stages of the disciplinary proceedings against him is not substantiated.

21. The application is hereby dismissed.

(Signatures)

Suzanne BASTID  
President

CROOK  
Vice-President

R. VENKATARAMAN  
Member

Omar LOUTFI  
Alternate Member

Mani SANASEN  
Executive Secretary

New York, 5 December 1958.

### Judgement No. 75

(Original: English)

Case No. 79:  
Davidian

Against: The Secretary-General  
of the United Nations

*Termination of the temporary-indefinite contract of a staff member of the United Nations Children's Fund.*

*Application received after expiration of time-limit prescribed in article 7, paragraph 4, of the Statute of the Tribunal.—Decision to regard application as receivable by application of article 7, paragraph 5, of the Statute, proof having been provided that the application had been posted before the expiration of the time-limit.*

*Request for rescission of the UNICEF Personnel Contracts Review Board's recommendation that the Applicant should not be granted a permanent appointment.—Request for rescission of the Joint Appeals Board's conclusion that termination of the Applicant's employment was not contrary to Staff Regulations.—Neither of Applicant's requests receivable in view of advisory nature of the bodies in question.*

*Request for damages for faulty dismissal considered as an appeal against the termination decision.—Absence of any proof that the decision was based on prejudice.*

*Complaint of an alleged violation of the provisions of the staff rules relating to periodic reports.—Finding by the Tribunal that Applicant had been kept informed of criticisms made against him and had had an opportunity to discuss them with the responsible officers.—Tribunal not competent to go into administrative questions regarding the system of periodic reports.*

*Absence of any proof that the Review Board acted hastily and without due consideration of the Applicant's case.*

*Complaint that the Review Board gave an opinion on the possibility of finding a post corresponding to the Applicant's ability.—In view of the nature of UNICEF, Review Board cannot be held to have exceeded its powers in considering the availability of posts in certain areas.*

*Application rejected.*

#### THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS

Composed of Madame Paul Bastid, President ; the Lord Crook, Vice-President ; the Honourable Mr. R. Venkataraman ;

Whereas Zaven N. Davidian, former Resident Representative of the United Nations International Children's Fund at Cairo, filed an application to the Tribunal on 30 June 1958 requesting:

(a) rescission of the decision of the UNICEF Personnel Contracts Review Board not to offer the Applicant a permanent appointment ;

(b) rescission of the Joint Appeals Board's conclusion of 27 January 1958 that the termination was not contrary to Staff Regulations ;

(c) and/or payment of damages for faulty dismissal ;

(d) rescission of the Joint Appeals Board's decision not to recommend payment of the Applicant's travel expenses in connexion with his appearance before the Board ;

(e) alternatively, in the event that the Secretary-General avails himself of the option given to him under article 9.1 of the Statute of the Tribunal, the award of five years' salary plus expenses as compensation ;

Whereas the Respondent filed his answer to the application on 2 September 1958 ;

Whereas in application of article 13.1 of the Rules of the Tribunal no oral procedure was granted to the Applicant ;

Whereas the Applicant filed a second written statement with the Tribunal on 12 November 1958 ;

Whereas certain information concerning the practice of the Review Board was supplied by the Respondent at the request of the Tribunal on 28 November 1958 ;

Whereas the facts as to the case are as follows :

The Applicant entered the service of the United Nations on 11 October 1951, when he received a one-year fixed-term appointment as Field Representative of the United Nations International Children's Fund at Beirut. On 15 December 1951 he was designated Deputy to the Chief Representative of the Eastern Mediterranean Area Office of UNICEF. On 11 October 1952, the Applicant received a temporary-indefinite appointment and on 1 May 1954 he was promoted and transferred to Cairo, first as UNICEF Country Officer and from 1 April 1955

as Resident Representative. The Applicant's employment position was reviewed on 29 December 1955 by the UNICEF Personnel Review Committee which made "no recommendation for permanent or probationary contract because his termination effective 30 June 1956 is contemplated." On 27 February 1956 the Applicant, having been verbally notified of the Review Committee's recommendation, protested in writing. On 26 March 1956, the UNICEF Personnel Review Board decided that Applicant should be given a fixed-term appointment up to 31 December 1956 on which date he was to receive termination indemnity. By letter of 25 April 1956, the Applicant was given formal notice of the termination of the temporary appointment to become effective on 31 December 1956. The Applicant's request for reconsideration of 16 May 1956 was acknowledged by UNICEF on 24 May 1956. On 26 November 1956, the UNICEF Review Board reconsidered Applicant's case and recommended that his appointment should be extended up to 31 December 1957. The Applicant was notified verbally early in December 1956 and in writing on 12 February 1957 when he was informed that his position would be reviewed again to determine whether his services would be required after 31 December 1957. On 26 April 1957, the UNICEF Review Board discussed the Applicant's case without reaching a decision. On 17 September 1957, the UNICEF Review Board found that the Applicant did not "have the necessary qualifications to have complete responsibility for a Country Office himself. Since there is no vacancy for a second man, except possibly in Egypt and Mr. Davidian should not be asked to step down to fill the second post there, it is not possible to offer Mr. Davidian a permanent appointment" and recommended termination of his appointment. On 2 October 1957, the Applicant was given formal notice of the termination of his temporary appointment to become effective on 1 March 1958. He was also informed that his last day on duty would be 30 November 1957 and that he would receive pay in lieu of notice for the period 1 December 1957 to March 1958. The effective date of termination was later changed to 31 March 1958. On 30 November 1957, the applicant submitted his appeal to the Joint Appeals Board. In January 1958, having obtained permission to attend the meeting of the Joint Appeals Board, the Applicant came to Headquarters at his own expense. On 27 January 1958, the Board found that "the decision to terminate Appellant's contract of appointment was not contrary to Staff Regulations and Rules" but suggested "the possibility of granting Appellant a further year of employment in an appropriate capacity." On the question of the Applicant's travel expenses to Headquarters, the Board decided not to recommend their refund since his appearance had not contributed any factors decisive to the case. By letter of 14 February 1958, the Applicant was informed that the decision of termination as previously notified to him would stand. By letter of 12 June 1958, the Applicant informed the Executive Secretary of the Tribunal that he had addressed an application to the Tribunal from Beirut on 11 May 1958. The Executive Secretary replied by cable, on 20 June 1958, that he was unable to trace the application in question. The Applicant filed an application with the Tribunal on 30 June 1958 and submitted a receipt (Annex 17), on 25 July 1958, for postage charges allegedly incurred by him on 11 May 1958 for despatch of the original application.

Whereas the Applicant's principal contentions are:

(a) The decision of termination was motivated by prejudice and other extraneous factors at Headquarters. Lack of motivation for the termination of Applicant's appointment presupposes the existence of prejudice on the part of

UNICEF ; the Applicant's contention in this respect was not properly investigated by the Joint Appeals Board. Proof of prejudice towards the Applicant is found, *inter alia*, in the attitude of UNICEF Headquarters, in the Deputy Executive Director's letter of 20 August 1952, in the strong criticism of Applicant's action in proceeding to Beirut on 24 January 1957 and in UNICEF's refusal to employ Applicant for a further year in accordance with the Joint Appeals Board's recommendation.

(b) UNICEF failed to observe Staff Rule 112.6 by not making any reports on the Applicant's performance after 1954 and by not giving him proper notice, during his last three years of service, of his shortcomings or the inadequacy of his performance.

(c) The action of UNICEF in denying the Applicant a permanent appointment and terminating his temporary appointment was contrary to the terms of Staff Regulation 4.2 and Staff Rule 104.13 which provide that permanent appointments may be granted to staff members who demonstrate their general "suitability as international civil servants". UNICEF's decision to terminate the Applicant's appointment was based, not upon his efficiency in the post which he accepted on entering the service nor upon his general efficiency but upon his alleged unsuitability in a post to which he was transferred and for which he "did not contract". UNICEF displayed an error of judgement in transferring the Applicant from the post for which he had contracted to one from which he was subsequently dismissed.

(d) The Joint Appeals Board decision not to recommend the reimbursement of Applicant's travel expenses from Cairo to New York was unjustified since the Board devoted considerable time to an oral examination of the Applicant and itself admitted that his personal appearance had expedited the hearing of the case.

Whereas the Respondent's principal contentions are:

(a) The decision of termination was proper under the terms of Staff Regulation 9.1 (c) whereby the Secretary-General may at any time terminate temporary appointments "if, in his opinion, such action would be in the interest of the United Nations". The Tribunal has consistently refused, in the absence of improper motive, to substitute its judgement for that of the Secretary-General in the exercise of his discretionary power to terminate temporary appointments (see Judgements Nos. 26 *et al.*).

(b) The record shows that the decision to terminate was reached after a thorough appraisal of the Applicant's performance over a period of two years. The decision was not based upon unsatisfactory service but upon an over-all judgement that the Applicant did not measure up to the standards required for permanent appointment.

(c) The Applicant's contention that UNICEF violated Staff Rule 112.6 by not issuing any periodic reports on his performance after 1954 is untenable ; the frequency of such reports is not prescribed in the Rule. Nor can the Applicant claim, in view of the record, that he was not properly notified of his shortcomings during the last three years of his employment.

(d) Far from being motivated by prejudice, UNICEF showed special consideration for the Applicant. For example, after the first decision to terminate his appointment was made, at the end of 1955, the date of termination was

postponed for about one year so as to enable the Applicant to be eligible for pension benefits ; at the time of the first termination notice, in April 1956, the Applicant was offered the choice of resigning without losing termination indemnities ; subsequently, before his notice of termination took effect, *i.e.* 31 December 1956, he was given a further extension of one year ; efforts were made to place him in a post at a lower level, but no suitable vacancy was found ; upon final termination the Applicant was paid three month's salary beyond his last day of service with UNICEF.

(e) There is no foundation for Applicant's claim that UNICEF violated Staff Regulation 4.2 or Staff Rule 104.13 concerning the selection of staff for permanent appointment. He cannot contend that his termination was based solely upon his performance as Resident Representative, a post for which he alleges he had not "contracted". The record shows that he was terminated on the basis of an over-all evaluation of his suitability for permanent appointment.

(f) As regards the Applicant's claim for the refund of travel expenses to attend the Joint Appeals Board's proceedings, the Board's decision not to recommend the refund was taken in the exercise of its discretion after a thorough consideration of the circumstances of the case.

The Tribunal, having deliberated until 5 December 1958, now pronounces the following judgement :

1. The application in this case reached the Executive Secretary of the Tribunal on 30 June 1958, more than ninety days after the decision taken by the Respondent on 14 February 1958, following the recommendation of the Joint Appeals Board.

The Applicant has, however, stated that the application was despatched from Beirut on 11 May 1958 and furnished proof thereof. In these circumstances and in application of article 7, paragraph 5, of its Statute, the Tribunal decides that the application is receivable.

2. The Applicant's principal request to the Tribunal is for the rescission of the decision of the UNICEF Personnel Contracts Review Board not to offer the Applicant a permanent post and the consequent recommendation of the Joint Appeals Board, namely, that the decision to terminate the Applicant's contract of appointment was not contrary to Staff Regulations.

Staff Rule 104.13 (o) (ii) (c) operative when the final opinion of the Review Board was reached, was in the following terms :

"The Executive Director of the United Nations Children's Fund and the Executive Chairman of the Technical Assistance Board shall appoint boards whose composition and functions shall be generally comparable to those of the Review Board provided under (c) above to advise them in the case of staff members recruited specifically for service with the UN Children's Fund or with the Technical Assistance Board."

The Board was therefore required to consider whether officials satisfy the necessary conditions for permanent appointment and to make recommendations to this effect.

In these circumstances, the recommendation of the Board as such cannot be submitted to the Tribunal. Only the decision taken after this recommendation can be contested under article 7 of the Statute.

The Joint Appeals Board is required to give advice to the Secretary-General on any appeal which an official makes against an administrative decision (Staff Regulation 11.1). When, as in this case, the Board's opinion has been followed by a decision of the Respondent, the opinion as such cannot be submitted to the Tribunal since it does not in itself constitute a decision.

The decision to terminate the Applicant's temporary contract without offering him a permanent appointment was taken on 20 October 1957 and, following the Board's opinion, the Respondent decided to confirm the decision of termination on 14 February 1958. Only the latter decision can be submitted to the Tribunal. The Tribunal therefore finds that the principal request as presented by the Applicant is not receivable.

It may, however, be deduced from the subsidiary requests for compensation for wrongful termination that the Applicant intends to contest the decision for termination of which he was notified on 20 October 1957 and which was confirmed on 14 February 1958.

The Tribunal will now proceed to deal with the application on the above basis.

3. The Applicant contests the decision to terminate his services on the ground that it was based on prejudice since there was no adequate justification.

The Tribunal notes that the Review Board's opinion of 17 September 1957, which recommended termination, is based upon a review of the general over-all results and effectiveness of the Applicant's work. The same consideration is to be found in the memorandum of the meeting of the Executive and Deputy Executive Directors of UNICEF of 31 January 1958 which took place after the Appeals Board's suggestion of the possibility of granting a further year of employment to the Applicant in an appropriate capacity.

Although favourable opinions have been expressed on different occasions as to the Applicant's work and capacity, the file equally contains other unfavourable comments. It is not for the Tribunal to express any views on the facts on which the Board reaches its final decision. The Tribunal observes, however, that the Board has given some reasons for not granting a permanent appointment.

4. The Applicant bases his allegations of prejudice on certain discriminatory remarks made by his superior officer in a letter dated 20 August 1952 addressed to the Executive Director of UNICEF. The Tribunal finds that the text itself does not bear the significance which the Applicant attaches to it. The Tribunal observes that, moreover, the Applicant was promoted and, in 1955, was designated as Resident Representative in Cairo.

5. The Applicant contends that the provisions of the Staff Rules relating to periodic reports have not been observed, as the last report in his case was dated 10 May 1954.

The Tribunal notes that Staff Rule 112.6 does not prescribe regular intervals for periodic reports. As previously stated (Judgement No. 17, de Pojidaeff, paragraph 8), it is not for the Tribunal to enter into administrative questions relating to the system of periodic reports. It should be observed, *inter alia*, that on 23 February 1956, the Chief of the Administrative Division discussed with the Applicant the criticisms which had been made against him by the Deputy Director of UNICEF. Thus, the Applicant was well aware of the

criticism against him and had an opportunity to discuss it with the responsible officers.

6. The Applicant complains that although the Review Board proposed on 26 November 1956 that the Applicant's services should be extended up to 31 December 1957, to allow the Chief Area Officer to evaluate his services, the latter was asked to give his opinion as early as 26 April 1957. Furthermore, the Applicant complains that a member of the Headquarters' programme staff had written to the Chief Area Officer saying that he should "terminate the services" of the Applicant. It may be argued whether, in such circumstances, a fair evaluation of the Applicant's services was made. It must, however, be noted that, in this case, the Review Board did not take a final decision until 17 September 1957. Besides, according to Staff Regulation 9.1 (c), a probationary appointment may be terminated at any time. It is therefore not possible to find that the final opinion of the Board had been taken in haste and without due consideration to the case of the Applicant.

7. Finally, the Applicant alleges that the Review Board should have taken its decision on the basis of his suitability as an international civil servant and not on his ability to perform certain specific functions nor on the possibility of finding him a post corresponding to his ability.

The Tribunal notes that the Staff Rules require the Board to consider the official's "suitability for permanent . . . appointment". It is clear that the question of such appointment cannot be considered without taking into consideration the grade of the official in question.

Though the Rules do not state that the Review Board is competent to enter into the question whether a post suitable for the official's abilities is available, it must be noted that the Board in question was created to deal with staff "recruited specifically" for service with UNICEF. In view of the nature of UNICEF, it is reasonable for the Board to consider the availability of posts in certain areas along with the suitability of a given official for permanent appointment. Accordingly, the Review Board cannot be held to have exceeded its powers nor can the consequent decision to terminate the employment be vitiated.

8. For these reasons, the Tribunal rejects the claim.

9. As to the request for rescission of the refusal of the Appeals Board to recommend the refund of the Applicant's travelling expenses, the Tribunal notes that no rule or regulation provides for such refund, that there was no agreement binding the Respondent in this matter and that no administrative practice was invoked to this effect.

*(Signatures)*

Suzanne BASTID  
*President*

CROOK  
*Vice-President*

R. VENKATARAMAN  
*Member*

Mani SANASEN  
*Executive Secretary*

*New York, 5 December 1958.*

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