STATEMENT BY THE HONOURABLE MR. R. VENKATARAMAN
(Original : English)

I have participated in the discussions and read the draft English translation of the Judgement and I concur with the decision.

New York, 29 September 1965. *(Signature)*
R. VENKATARAMAN

Judgement No. 97

(Original : French)

Case No. 94 : Leak *Against :* **The Secretary-General of the United Nations**

Rescission by the Respondent of the summary dismissal for serious misconduct of a staff member holding a fixed-term appointment.

Request for a ruling that the Applicant should be deemed to have in fact held an indefinite contract.—Absence of circumstances peculiar to the Applicant's case which might have given rise to an expectancy that his contract would be renewed or that he would be granted a different contract.—Absence of evidence enabling the Tribunal to determine with certainty what would have been the Respondent's decision if the incident which led to the summary dismissal had not occurred.—Request rejected.

Request for a ruling that the Applicant should be restored to the situation in which he would have been if the summary dismissal had not occurred.—Object of the rescission of an administrative decision.—Need to make restitutio in integrum.*—Delay in taking the decision of rescission.—Tribunal's competence to rule on whether the Respondent drew all the legal inferences from the rescission and restored the* status quo. *—Difficulty which the Applicant, as a consequence of the act later rescinded, encountered in finding employment corresponding to his abilities.—Respondent, by his manner of replying to a request for information from an employer, brought about that employer's dismissal of the Applicant.—Respondent's failure to take any steps to restore the situation that existed before the disciplinary action in respect of the Applicant's possibilities of finding other employment.—Having regard to the impossibility at the present time of restoring the* status quo, *award to the Applicant of compensation of $5,000.*

Request for the issue to the Applicant of a certification of service, in accordance with Staff Rule 109.11.—Applicability of this Rule.—Mention of the rescinded decision in that certification prohibited.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President ; Mr. Héctor Gros Espiell ; Mr. Louis Ignacio-Pinto ;

Whereas Kenneth W. Leak, a former staff member of the United Nations, filed an application on 21 January 1965 and addenda on 5 February, 9 March and

10 September 1965, and amended the pleas thereof on 22 and 27 September 1965;

Whereas the pleas of the application as amended request the Tribunal:

(*a*) To rule that the decision taken by the Respondent on 20 October 1964 constitutes the "final decision" referred to in Staff Rule 111.3 (1), and that it retroactively rescinded the summary dismissal of the Applicant;

(*b*) To rule that, by reason of the non-observance of the terms of Staff Rule 104.12 (*b*), the Applicant's contract of employment was in reality an indefinite contract renewable for a period not exceeding five years;

(*c*) In the event that the Applicant's contract of employment is deemed to have been properly concluded for a fixed term, to rule that the unlawful decision of summary dismissal necessarily included a decision not to renew that contract and that the illegality of the first decision entails *ipso facto* the illegality of the second;

(d) To rule that the evidence in the case indicates that the Applicant could entertain legitimate expectations of continuation of his employment;

(*e*) To order the payment to the Applicant of his salary from 18 September 1962 until the date of the Tribunal's judgement;

(*f*) To order the payment to the Applicant of compensation of $8,000 (eight thousand dollars) for the injury which he sustained by reason of the unwarranted decision of summary dismissal for serious misconduct;

(*g*) To order the reimbursement to the Applicant of the losses sustained and the costs and expenses incurred by him as a consequence of the unlawful decision of summary dismissal, to wit:

	Dollars
(i) Travel expenses of his family from Canada to Israel	1,020.25
(ii) Loss on the sale of an automobile	300.00
(iii) Interest on a loan of $2,448	441.03
(iv) Travel costs from Montreal to New York to arrange for his legal representation	96.00
Total	1,857.28

(*h*) To rule that the rescission of the summary dismissal also entails the recission of the decisions or actions taken by the Respondent in execution or as a consequence of the unlawful decision of dismissal, and the Respondent's obligation to act as if the summary dismissal had not occurred; consequently

(i) To invite the Respondent to remove from the Applicant's personnel files all documents relating to the unlawful dismissal and to place them in a confidential file; and in particular to substitute for document 29 of the Applicant's official file a document recording simply that the salary that accrued from 15 August to 17 September 1962 was paid to the Applicant;

(ii) To invite the Respondent to give the Applicant a statement recording the quality of his work and his official conduct, in accordance with Staff Rule 109.11;

Whereas on 23 March 1965 the Applicant requested the Tribunal to hold oral proceedings;

Whereas on 21 April 1965 the Respondent filed his answer and on 9 June 1965 the Applicant filed written observations;

Whereas in response to the Applicant's request the Respondent produced as an annex to his answer the text of a letter dated 17 January 1963 in which the United Kingdom Prison Commission had asked him to furnish information concerning the Applicant whom it was employing on a temporary basis ;

Whereas the Respondent produced, in addition, excerpts from his answer to the letter of 17 January 1963 ;

Whereas on 20 August 1965 the Respondent filed, at the request of the President of the Tribunal, the complete text of his answer to the letter of 17 January 1963 ;

Whereas on the same date the Respondent informed the Tribunal that although that letter referred to a questionnaire which the United Kingdom Prison Commission stated it had sent to him on 31 October 1962, no questionnaire had been found in the Applicant's files and apparently no questionnaire had reached the United Nations Secretariat ;

Whereas on 1 September 1965 the Applicant informed the Tribunal that he could not produce the complete text of a document, excerpts from which were cited in his written observations as annex 30 (*a*), because the document in question, of which he had taken cognizance during the proceedings before the Joint Appeals Board, had later been placed in a privileged confidential file and the Respondent had refused to communicate it to him ;

Whereas on 14 September 1965 the Respondent stated that he was prepared to submit to the Tribunal the document cited as annex 30 (*a*) so that the Tribunal might rule on its relevance without communicating it to the Applicant ;

Whereas, with the consent of the Applicant as provided in article 10, paragraph 2, of the Rules, the Tribunal examined the document in question and decided that it was not relevant to the issues before the Tribunal ;

Whereas the Tribunal heard the parties in a public hearing on 21 September 1965 ;

Whereas on 23 September 1965 the Applicant filed an additional document ;

Whereas the facts in the case are as follows :

The Applicant entered the service of the United Nations on 18 September 1961 with a fixed-term appointment for one year. He was assigned as a Security Officer to the United Nations Truce Supervision Organization in Palestine and took up his post in the Middle East in October 1961. In June 1962 the Applicant was promoted to Team Leader. On 7 August 1962 the United Nations Director of Personnel sent him a letter informing him that, as the result of an investigation into an incident which had occurred on 14 July 1962, he was summarily dismissed for serious misconduct with effect from 13 August 1962. After vainly requesting the Secretary-General to reconsider the decision of summary dismissal for serious misconduct, the Applicant appealed to the Joint Appeals Board. On 31 July 1964 the Board submitted to the Secretary-General a report which concluded, *inter alia,* that : " In the oral statements and documentary evidence presented to it, the Board found no proof of any participation whatsoever of Team Leader Leak in the incident of 14 July 1962... ". Consequently, the Joint Appeals Board decided unanimously :

> " To recommend rescinding of Mr. Leak's summary dismissal. Since Mr. Leak had a fixed-term contract, this would mean clearing of his record and payment of his salary for the uncompleted service. Furthermore, since Mr. Leak was recognized as a highly satisfactory staff member who had both

general and particular grounds for expectation of further service, and since he suffered extreme hardship and grave material and moral damage as a result of the wrongful termination, the Board further recommends that:

"(i) Mr. Leak be given reimbursement for the costs of travel of his family between Canada and Israel and return;

" (ii) Mr. Leak be given an opportunity for re-employment in the United Nations in a post similar to the one he held prior to his dismissal; or, failing such re-employment,

" (iii) Mr. Leak be given appropriate compensation, in an amount to be determined by the Secretary-General, for the damage he suffered as a consequence of his wrongful dismissal. "

By a letter dated 20 October 1964, the Acting Director of Personnel transmitted a copy of the Board's report to the Applicant and communicated in the following words the Secretary-General's decision taken after examining that report:

" Attached, please find a copy of the report of the Joint Appeals Board to the Secretary-General in the appeal filed by you against the order for your summary dismissal. After examining the report, the Secretary-General decided to rescind your summary dismissal, and to grant you payment of your salary for the uncompleted period of your fixed-term appointment and reimbursement of the travel expenses from Israel to Canada incurred by you and your family.

" With regard to the travel expenses, I have been informed that these were paid to you on your initial trip to the United Kingdom from the *UNTSO* Benevolent Fund. In the circumstances, I would appreciate instructions from you for the refund of part of the travel expenses directly to the Benevolent Fund. "

After an exchange of correspondence with the Acting Director of Personnel concerning the scope and application of the decision communicated by the letter of 20 October 1964, the Applicant filed the aforementioned application on 21 January 1965.

Whereas the Applicant's principal contentions are:

1. *As to the receivability of the application*

The application fulfils the conditions for receivability set out in article 7, paragraph 2, of the Statute of the Tribunal since the Respondent failed to carry out certain recommendations of the Joint Appeals Board and rejected others. It also fulfils the conditions specified in article 2, paragraph 1, of the Statute since it alleges non-observance by the Respondent of the legal obligation to compensate for the injury which he caused to the Applicant.

2. *As to the merits of the case*

(*a*) The Respondent himself rescinded the decision by which he had summarily dismissed the Applicant for serious misconduct. This rescission took place following an adversary proceeding before the Joint Appeals Board; it is therefore *res judicata*. Like every rescission, it has retroactive effect and the misconduct imputed to the Applicant is deemed never to have existed. Furthermore, it obliges the Respondent to effect a *restitutio in integrum* and to compensate for the injury caused by the rescinded decision. Accordingly, the Respondent is obliged to reimburse all the expenses incurred by the Applicant and to compensate him for his loss of earnings during the litigation and for the injury to his career. The

Respondent should, *inter alia*, compensate the Applicant for the loss of the employment that the Applicant had found with the United Kingdom Prison Commission after his dismissal by the United Nations—employment from which he was dismissed following the communication by the Respondent of information concerning him.

(*b*) Summary dismissal for serious misconduct is the most severe disciplinary action that the Respondent can take. By taking it against the Applicant after a hasty investigation based on inadmissible forms of evidence and without having recourse to the procedure provided for in Staff Rule 110.5, the Respondent committed a serious dereliction which the Tribunal should define as gross negligence. The discretionary nature of the Secretary-General's disciplinary power does not exempt the exercise of that power from all judicial review. The Tribunal is entitled to examine the facts which were the basis of the disciplinary action, to determine their legal definition and to note the existence of any abuse of rights or misuse of power that may be imputed to the agents of the Secretary-General.

(*c*) In accordance with a universally recognized rule of law, the fact that the disciplinary action taken against the Applicant by the Respondent constitutes gross negligence extends the obligation to compensate for the injury to damage that was not foreseen or even foreseeable.

(*d*) This fact also has the effect of making inapplicable all clauses limiting responsibility, including Staff Rule 104.12 (*b*) which provides that the Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of employment.

(*e*) The application of Staff Rule 104.12 (*b*) should be set aside in the present case on two additional grounds. Firstly, this provision refers to the non-renewal of appointments which have expired and not to the termination of an appointment before the date of expiry, as in the present case. Secondly, it prescribes that fixed-term appointments are granted to " persons recruited for service of prescribed duration ". Such was not the case of the Applicant, whose appointment actually had the character of an indefinite contract renewable for a period not exceeding five years.

Whereas the Respondent's principal contentions are :

1. *As to the receivability of the application*

The application does not fulfil the conditions specified in article 2, paragraph 1, of the Statute of the Tribunal for it does not relate to non-observance of a contract of employment or of the terms of appointment. Nor does it fulfil the conditions set out in article 9, paragraph 1, of the Statute, for the compensation requested in the application is not intended to compensate for an injury caused by the Secretary-General's refusal to carry out an order of the Tribunal for the rescinding of the decision contested or the specific performance of the obligation invoked.

2. *As to the merits of the case*

(*a*) The Respondent's revocation of the decision to dismiss the Applicant summarily for serious misconduct can in no way be interpreted as an admission by the Respondent of the alleged illegality of the decision or of an error in the appreciation of the facts. The Respondent contends, on the contrary, that that decision was the proper penalty for misconduct on the part of the Applicant.

(*b*) In disciplinary matters, establishing the facts, evaluating the nature

and gravity of the breach of discipline, and the decision on the appropriate penalty are, in the final analysis, the responsibility of the Secretary-General. A disciplinary action may be brought before the Tribunal only for non-observance of a contractual or statutory obligation. In the present case, the decision by which the Applicant was summarily dismissed for serious misconduct did not violate any clause of his contract of employment or any provision of applicable Rules. The investigation which preceded that decision had not been vitiated by any irregularity and had not led to any abuse of power.

(c) The Applicant held a fixed-term appointment and not—as he wrongly contends—an indefinite contract. The nature of the work entrusted to him could not in any way change the legal classification of his appointment, and the Secretary-General is assuredly entitled to entrust to a staff member recruited for a fixed-term service tasks the duration of which is not fixed in advance and which, after the staff member's departure, may be continued by others.

(*d*) Like all fixed-term appointments, the Applicant's appointment was governed by Staff Rule 104.12 (*b*) which provides that such appointments do not carry any expectancy of renewal or of conversion to any other type of appointment. This provision, which is not—as the Applicant contends—a clause limiting responsibility, applies both to the termination of appointments before the date of expiry and to their expiration.

(*e*) The only effect of the Respondent's revocation of the decision of summary dismissal for serious misconduct was to make the parties subject once again to the contract of employment by which they were originally bound. As that contract was a fixed-term contract which had been due to expire on 17 September 1962, the only contractual or statutory obligations incumbent upon the Respondent, following the revoking of the decision of dismissal, a decision which had taken effect on 13 August 1962, consisted in the payment to the Applicant of the salary and allowances due to him for the period from 14 August to 17 September 1962. The additional payment by the Respondent to the Applicant of the return travel costs of his family was purely an *ex gratia* payment.

The Tribunal, having deliberated until 4 October 1965, now pronounces the following judgement:

I. In his final pleas the Applicant requests principally that the Tribunal rule that he should be restored to the situation in which he would have been if the summary dismissal for serious misconduct had not occured. He requests payment of certain sums in compensation for the injury sustained and performance of various acts concerning his file and the certification of service provided for in Staff Rule 109.11.

The Applicant further requests the Tribunal to rule that he should be deemed to have in fact held an indefinite contract, renewable for a period not exeeding five years, and that, at the very least, the rescission of the decision of dismissal should entail the rescission of the implicit decision not to extend the one-year contract which he had received on 18 September 1961. He consequently requests payment of his salary for the period from 18 September 1962 to the date on which the Tribunal's judgement is rendered.

II. The Tribunal notes that Staff Rule 104.12 (*b*) provides that:

"The Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment."

The Applicant based his claim to recognition as the holder of an indefinite contract principally on general considerations concerning the conditions under which, according to him, fixed-term contracts could be properly granted. He stressed the actual nature of the duties which had been entrusted to him. He did not, however, cite circumstances peculiar to his case which might have given rise to an expectancy that his contract would be renewed or that he would be granted a different contract upon the expiration of the one-year contract which he had received on 18 September 1961.

The Tribunal took into consideration the report of 17 February 1962 on the Applicant's performance and his promotion on 11 June 1962 to Team Leader. The Tribunal recognizes that it is not impossible that, if the incident of 14 July 1962 which was to lead to the Applicant's summary dismissal had not occurred, a new contract might have been offered to him, but nothing in the file enables it to determine with certainty what would have been the Respondent's decision on this point. That being so, the Tribunal cannot find that the Applicant has rights arising out of a contract that was never made.

III. The Applicant's other requests relate to the decision taken by the Respondent on 20 October 1964. On that date, the Acting Director of Personnel informed the Applicant that " After examining the report [of the Joint Appeals Board], the Secretary-General decided to rescind your summary dismissal... ".

The Tribunal notes that the decision in question uses—to describe the action taken by the Secretary-General—the same terminology as is employed in its own Statute to define the legal effects of a judgement finding that an application alleging non-observance of an contract of employment or of the terms of appointment is well founded.

The use of the term " rescind " with reference to an administrative decision indicates an intention to restore the situation that would have existed if the decision in question had never been made.

This appears, moreover, to have been the Respondent's opinion since he arranged for the payment of the Applicant's salary until the expiration of the fixed-term contract. But the question then is whether, by so doing, he made the *restitutio in integrum* necessitated by the rescission of the disciplinary action.

IV. The Tribunal notes that the decision of rescission was not taken until 20 October 1964, or more than two years after the summary dismissal. Thus, during this protracted period, the length of which was due to the delay in the proceedings before the Joint Appeals Board, the Applicant was in the position of a person who had sustained the most severe disciplinary penalty—a penalty which, in the words of Judgement No. 30, paragraph 8, implied that the misconduct was " patent " and that the interest of the service required " immediate and final dismissal ".

The Applicant contends that there was a gross abuse of disciplinary power, gross negligence in the performance of the obligations arising out of the contract of employment, which would involve the responsibility of the Respondent.

The Respondent considers, on the other hand, that the problem of responsibility for the injury resulting from the disciplinary action, which was subsequently rescinded, is not within the Tribunal's competence. He argues that the disciplinary action was taken in accordance with the regular procedure, and that the authority possessing the disciplinary power may reconsider a decision, especially when it

believes that revocation of the penalty is no longer likely to affect the interests of the Organization.

V. The Tribunal considers that these arguments raise problems which it does not have to decide in the present case. As the Respondent stated explicitly in his letter dated 20 October 1964 that he had decided " to rescind " the summary dismissal, the only question is whether the decision notified to the Applicant on that date drew all the necessary legal inferences from the rescission and went as far as was required in restoring the *status quo*. This question is incontestably within the Tribunal's competence, for the decisions taken by the Secretary-General in respect of a staff member and the obligations arising therefrom fall within the terms of appointment (*conditions d'emploi*) upon which the Tribunal is competent to pass judgement pursuant to article 2, paragraph 1, of its Statute.

VI. The Tribunal recognizes that *restitutio in integrum* is required only to the extent that the injurious consequences of the act later rescinded appear to follow directly from that act. Within these limits, the essential fact is obviously the difficulty which the Aplicant, under the stigma of a very severe disciplinary penalty, encountered in finding employment corresponding to his abilities.

The file shows that a request for information, together with a questionnaire, sent as early as 31 October 1962 to the United Nations by the United Kingdom Prison Commission which had recruited the Applicant on a temporary basis, remained unanswered. Another request which stressed the urgent need for this information, together with another copy of the questionnaire, was sent from London on 17 January 1963. A reply was sent on 21 January 1963. The Respondent used for his reply a form which made it clear that the Applicant had not been retained in his employment with the United Nations until the expiration of his one-year contract. Although the information furnished by the Applicant during the oral proceedings shows that the request sent on 31 October 1962 unquestionably reached the United Nations Secretariat, the Tribunal was unable to obtain information concerning the grounds for the silence which was maintained for almost three months or to secure access to the questionnaire twice sent by the United Kingdom Prison Commission and not used by the Respondent in his reply.

The Tribunal notes that on 20 August 1962, immediately after his dismissal, the Applicant applied for a post with the United Kingdom Prison Commission, and that he was recruited by letter of 8 October 1962 for a training period beginning on 12 November 1962. It was indicated that this appointment was " subject to satisfactory references and satisfactory replies to such other inquiries as the Commissioners may decide to make ". Then, in early February 1963 the Applicant was dismissed. It is the Tribunal's conviction that, as the post was that of a police and security officer, the information sent under the circumstances described above had a decisive influence on the action taken with regard to the Applicant.

VII. When the disciplinary action was rescinded, the Respondent took no steps to restore the *status quo* in respect of the Applicant's possibilities of finding other employment. By failing to do so, the Respondent did not draw—as he was under a duty to do—all the necessary legal inferences from the rescission occurring more than two years after the contested decision. The Tribunal must order the Respondent to perform that duty.

VIII. The Tribunal must note, however, that it is probably no longer possible at the present time for the Respondent to restore the situation—in respect of the

re-employment of the Applicant—that would have existed if the summary dismissal had never taken place.

That being so, an award of compensation is the only means of drawing, in this respect, the legal inferences from the obligations resulting from the rescission.

In fixing this compensation, the following considerations must be taken into account : at the time of the rescission of the decision of dismissal, the Applicant was forty-one years of age ; he had been for more than two years under the stigma of very severe disciplinary action preventing his normal re-employment ; in the years that preceded his entry into United Nations service, he earned approximately $3,000 per year ; his base salary at the United Nations was $3,240. To provide for the *restitutio in integrum* which is the legal consequence of the rescission of the decision of summary dismissal, the Tribunal awards to the Applicant compensation of $5,000 (five thousand dollars).

IX. Concerning the request for the issue to the Applicant of a certification of service, the Tribunal finds that Staff Rule 109.11 is applicable to the Applicant and that no mention of the rescinded decision may be made, in any form whatsoever, in that certification.

X. The other requests for relief are rejected.

(Signatures)

Suzanne BASTID
President

Louis IGNACIO-PINTO
Member

H. GROS ESPIELL
Member

N. TESLENKO
Executive Secretary

New York, 4 October 1965.

Judgement No. 98

(Original : English)

Case No. 97 : Gillman

Against : **The Secretary-General of the United Nations**

Termination of the employment of a staff member holding a permanent appointment, on the ground of unsatisfactory service.

Determination of the decision whose validity the Tribunal has to examine.—Obligation of the Respondent, when he terminates a permanent appointment, to comply with the Staff Regulations and to carry out prior thereto a complete, fair and reasonable procedure.—Review by the Working Group of the Appointment and Promotion Board of the services of the staff member concerned represents, in principle, such a procedure. —The Working Group did not give an accurate account of the situation revealed by the reports on the Applicant.—The Working Group, when it drew up the Applicant's sick-leave record, added annual leave to sick leave and paid no regard to the circumstances of the accident which occurred while she was carrying out her supervisor's instructions.—Connexion between the Working Group's report and the contested decision.