

Representatives are manned by officers at the P-4 level and above does not establish a claim for promotion to P-4 level.

VIII. For the foregoing reasons, the Tribunal reaches the conclusion that the Applicant's claim for a permanent contract and promotion to P-4 level cannot be sustained.

IX. In view of the above decision, the question of fixing compensation in the event of the Secretary-General exercising the option under article 9, paragraph 1 of the Statute of the Tribunal does not arise.

X. The application is therefore rejected.

(Signatures)

R. VENKATARAMAN
President

Francis T. P. PLIMPTON.
Member

Zenon ROSSIDES
Member

Jean HARDY
Executive Secretary

New York, 17 October 1969

STATEMENT BY THE LORD CROOK

I have participated in the consideration of the case and in the drafting of the judgement and I would have signed the judgement with other members had I not been obliged to leave New York earlier.

(Signature)
CROOK

New York, 15 October 1969

Judgement No. 135

(Original: English)

Case No. 134:
Touhami

Against: The Secretary-General
of the United Nations

Non-renewal of a fixed-term appointment.

Principal request for the rescission of the decision not to renew the appointment.—Claim that oral representations had been made to the Applicant that he would eventually be given an indefinite appointment.—Staff Rules 104.1 and 104.12.—Clause in the initial letter of appointment stipulating that the appointment does not carry any expectancy of renewal.—UNDP practice with regard to appointments of field staff.—The Administration was at fault for not covering the appointment by a letter of appointment.—Ex gratia payment to the Applicant in view of that circumstance.

Request for retroactive classification at salary level 5, step VI, and subsidiary request for the production of related documents.—These documents are not necessary, as the initial letter of appointment clearly mentions the salary level.—Failure of the claims made by the Applicant in this regard.—Salary adjustment made by the Respondent on the recommendation of the Joint Appeals Board.—Conclusion that no further adjustment is appropriate.

Claim for payment of overtime.—The claim is not receivable.

Claim for reimbursement for money borrowed from the Applicant.—This claim does not come within the jurisdiction of the Tribunal.

The application is rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Mr. Francis T. P. Plimpton, Mr. Zenon Rossides;

Whereas, on 15 April 1969, Ahmed Touhami, a former local staff member of the Office of the United Nations Development Programme, hereinafter called UNDP, at Rabat, Morocco, filed an application against administrative decisions relating to his separation from service;

Whereas the application did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, under paragraph 10 of that article, the Executive Secretary of the Tribunal returned it to the Applicant and called upon him to make the necessary corrections within eighty days;

Whereas, at the Applicant's request and with the Respondent's agreement, the President extended successively to 30 September, 30 November and 31 December 1969 the time-limit for filing a corrected application;

Whereas the Applicant, after making the necessary corrections, again filed the application on 12 December 1969;

Whereas the pleas of the application requested the Tribunal:

(a) If necessary, to order as a preliminary measure the production of a cable dated 25 or 26 August 1966 from the UNDP Office at Rabat to the Personnel Branch of UNDP in New York, and of the cabled reply dated between 28 and 30 August 1966, concerning the question of fixing the Applicant's salary level at level 5, step VI;

(b) To order the rescinding of the following decisions:

1. The decision not to grant to the Applicant salary level 5, step VI, the "original agreed upon grade";

2. The decision "to dismiss [the Applicant] under a revengeful reason dictated by [his] immediate supervisor";

3. The decision taken by the Secretary-General in the light of the recommendations of the Joint Appeals Board concerning the Applicant's separation from UNDP;

(c) To order the specific performance of the following obligations:

1. The obligation to honour "the conventional oral commitment to grant [the Applicant] an indefinite appointment as from 1 December 1967 as it had originally been agreed upon between [him] and the UNDP Administration . . ., with payment of [his] salary to the date of [his] reinstatement";

2. The restitution "of the 5 steps which had been taken by force from the original agreed upon grade";

3. The cash payment of 97 hours of overtime work done during the weekends in the months of December 1966 and January 1967;

4. The reimbursement of 1,000 dirhams "which had been borrowed by the Deputy Resident Representative from official funds which I had reconciled on his behalf from my own money in the meantime";

5. The imposition of sanctions on UNDP officials in Rabat;

(d) To fix at 30,000 dollars the amount of compensation to be paid to the Applicant should the Secretary-General decide, in the interest of the United Nations, to pay compensation for the injury sustained in accordance with the option given to him under article 9, paragraph 1, of the Statute of the Tribunal.

Whereas the Respondent filed his answer on 24 February 1970;

Whereas the Applicant filed written observations on 16 March 1970;

Whereas the facts in the case are as follows:

The Applicant, a Moroccan national, entered the service of the UNDP Office at Rabat on 1 September 1966 for a trial period of three months, as a Finance Clerk at level 5, step II of the local salary scale (12,840 dirhams per annum). Just prior to his recruitment by UNDP, he had been employed for five years by the United States Embassy at Rabat. On 23 November 1966 he wrote to the Chief of the Personnel Branch of UNDP, expressing his willingness to continue in service after the expiration of his initial appointment provided his salary was increased to 1,500 dirhams per month. Effective 1 December 1966 the appointment was apparently converted into a fixed-term appointment of one year at the same salary level, although no letter of appointment was issued. On 5 December 1966, the Chief of the Personnel Branch replied to the Applicant that the administration of local staff in the field was in the hands of the Resident Representative, to whom he was therefore transmitting the Applicant's letter. On 17 December 1966, the Resident Representative of UNDP in Rabat addressed to the Chief of the Personnel Branch the following letter:

...

"It now appears that Mr. Touhami will only stay on if given a salary of DH 1,200 per month which, in fact, was the salary he originally requested on joining this office. This would mean putting him at Step 5/VI. He had to be restrained from leaving on 15 December as we pointed out that a month's notice is necessary. However, he will certainly leave if a negative reply is received to his request.

"I should be glad if you would look carefully into this question and let me know as soon as possible if Mr. Touhami's request may be met.

"Incidentally, Mr. Touhami's extension in his present post had already been requested and is enclosed with other Personnel Action Form in a separate letter. It will no doubt need to be amended one way or another.

"Needless to say, this situation faces us with the prospect of losing the sixth accountant in two years. You will admit that the necessity of sending an international accountant is obvious. *It now becomes more urgent than ever to receive candidatures for this post.*"

On 12 January 1967, the Chief of the Bureau of Administrative Management and Budget of UNDP replied as follows:

"I refer to your letter of 17 December about the reclassification of Mr. Touhami to Step VI of Level 5.

"As you know, when Mr. Touhami was recruited in September our salaries on the Rabat local schedule were lagging and they are presently

being revised. If you wish, effective 1 December, you may pay him an *ad hoc* salary of 15,000 dirhams not related to a level or step. When the revision of the schedule is completed we would then advise you as to the correct step of Level 5 into which he should be integrated without a loss in take home pay. At that time it would not necessarily be step VI that would apply.

"Also as we have not received a medical examination from Mr. Touhami he is not eligible for a one year fixed term appointment until medical clearance has been established. He must remain on an extension of his present short term contract, effective 1 December 1966. Before offering him a one year fixed term appointment you may wish to reevaluate your needs for a local finance clerk after the arrival of Mr. Geadeah.

"We would appreciate receiving a medical examination as soon as possible and amended Personnel Actions based on the above if you are in agreement."

A revised salary scale for the local staff of the Rabat Office was issued in January 1967 with retroactive effect from 1 September 1966. For level 5, steps I-VI, the revised scale (in dirhams), as compared with the original scale, was as follows:

	I	II	III	IV	V	VI
Original scale	12,400	12,840	13,280	13,720	14,160	14,600
Revised scale	16,000	16,550	17,100	17,650	18,200	18,750

By a personnel action form dated 13 and 20 February 1967, the Applicant was reclassified to level 5, step I of the revised scale. On 13 September 1967, the Resident Representative orally informed the Applicant that his appointment would not be renewed upon its expiration on 30 November 1967. In a letter of 18 September 1967 addressed to the Resident Representative, the Applicant discussed the tenure of his appointment and his salary level and claimed *inter alia* that his entry grade had been initially agreed upon at level 5, step VI. On 25 October 1967 the Resident Representative confirmed in writing his decision not to renew the Applicant's appointment; he added that in view of that decision, the question of salary level raised in the Applicant's letter of 18 September 1967 was not pertinent; noting that the Applicant's leave credit would stand at 10½ days on 30 November 1967, the Resident Representative also informed him that his last working day would be 16 November 1967 at 12.30 p.m. On the following day the Resident Representative wrote again to the Applicant, stating that the reason for the decision not to renew his appointment was that his immediate supervisor had not seen fit to recommend its renewal. The Applicant protested against that decision in a letter of 16 November 1967 to the Resident Representative. On 4 December 1967 he presented his case in a letter addressed to the "Executive Chairman" of the Joint Appeals Board. The Acting Director of the Bureau of Administrative Management and Budget of UNDP treated that letter as an initial request for review of an administrative decision under Staff Rule 111.3 (a). In a reply dated 12 March 1968 he informed the Applicant that there were no grounds for reconsidering or rescinding the decision not to renew the Applicant's fixed-term appointment. He added that the Applicant's claim that the Resident Representative had agreed to grant him an indefinite appointment was not substantiated; that the Resident Representative had made no commitment at any time that the Applicant would be granted level 5, step VI on the Rabat local salary scale; and that since the Applicant had taken his annual leave before the expiration of his appointment

he had no leave credit upon separation. By letters dated 18, 19 and 20 March 1968 the Applicant lodged an appeal with the Joint Appeals Board, which submitted its report on 16 January 1969. The concluding section of the report read as follows:

“Conclusions and Recommendations

“29. In dealing with the issues raised in the appeal, the Board had full co-operation of counsel for the two parties. The Board appreciated their combined efforts in aid of its examination of the case not only in the context of the appellant’s terms of appointment, but also in the light of what counsel for the respondent has aptly described as ‘the principles of equity to the staff member and the tenets of sound administrative practice’.

“30. With regard to the principal issue involving the appellant’s contractual status, the Board is of the opinion that the basic fact remains that the appellant was separated from the UNDP Office upon expiration of his fixed-term appointment. Despite the prospect of continued employment implied in that type of appointment as applied to UNDP local staff and the appellant’s expectancy of a long-term appointment apparently induced by the UNDP Office, the appellant has no legally valid claim to an extension of his appointment beyond the date of expiration of his fixed-term appointment. *Accordingly, the Board decides to make no recommendation in support of the appellant’s request that he be reinstated in the UNDP Office with an indefinite appointment.*

“31. As regards the subsidiary issues, the Board is of the view that they involve largely a question of proper application of administrative rules and procedures. The Board’s findings and recommendations in respect of them are as follows:

- “i. On the question of salary level, the Board holds the appellant’s grade at Level 5, Step II, as determined in his Letter of Appointment, to be binding upon the appellant as well as the UNDP Administration. While it dismisses the appellant’s contention regarding a commitment to fix his salary at Level 5, Step VI, the Board fails to see the appropriateness in the action taken by the UNDP Administration to reduce his salary level to Level 5, Step I on the occasion of the revision of the local salary schedule. The Board believes that, as a matter of principle, a general revision of salary scales should not entail any downward adjustment of a staff member’s grade, and considers the action especially unjustifiable in the present case since it was applied to the appellant in a discriminatory manner. *The Board therefore recommends that the appellant’s salary level be restored to Level 5, Step II and that he be paid the differences in salary under the revised scale.*
- “ii. *The Board took note of the declared intention of the UNDP Administration to make good the appellant’s annual salary increment, with the understanding that it will be granted at Level 5, Step III as a corollary of its recommendation regarding his basic salary level.*
- “iii. On the question of accrued annual leave, the Board does not consider it to be consonant with the relevant provisions of the Staff Regulations and Rules for the UNDP Office to put the appel-

lant on compulsory annual leave, thereby depriving him of the cash payment for the accrued annual leave. *The Board therefore recommends that the appellant be paid for the 10½ days of accrued annual leave in accordance with Staff Rule 109.8 (a).*

- “iv. Having taken note of the statement by the UNDP Administration that the appellant has been entered as Associate Participant in the U.N. Joint Staff Pension Fund, the Board regards the issue of his non-participation in the Fund as closed.
- “v. The Board declines to entertain the appellant’s request concerning additional overtime pay on the grounds that, in the absence of such claims duly submitted to the UNDP Office, there has been no administrative decision subject to appeal.

“32. Finally, viewing the case as a whole, the Board notes with concern that sound administrative practice did not appear to have been followed in regard to the appellant during his employment with the UNDP Office. In its eagerness to recruit the appellant, the UNDP Office led him to forsake his indefinite appointment with his former employer by inducing and encouraging him in the belief that his appointment would be a continuing and long-term proposition. The lack of a formal Letter of Appointment for the fixed-term contract further left the tenure of his appointment uncertain. Through other administrative actions or inactions, the UNDP Office prejudiced the rights and interests of the appellant in the matters of his salary level, salary increment, Pension Fund status and accrued annual leave. As a result, the appellant was compelled to expend a large amount of time and efforts in seeking vindication of his legitimate claims through the arduous and prolonged appeal proceedings. Inasmuch as the appellant has suffered substantial hardship because of the administrative negligence, *the Board deems it equitable to recommend that the appellant be compensated by an ex gratia payment of an amount equivalent to his last month’s salary.*”

On 18 February 1969, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had reached the following decisions concerning the appeal:

“... .

“The Secretary-General has carefully re-examined your complaints in the light of the report of the Joint Appeals Board and has taken the following decisions:

“(1) To maintain the decision of your separation on the expiration of your appointment on 30 November 1967.

“(2) To order a restoration of your salary level to Level 5, Step II, and to authorize payment to you of the differences in salary under the revised scale.

“(3) To order the payment to you of full salary and allowances, if any, for the 10½ days of accrued annual leave in accordance with Staff Rule 109.8(a) until 30 November 1967.

“(4) To authorize on the basis of equity an *ex gratia* payment to you of an amount equivalent to your last month’s salary with UNDP.

“The Secretary-General has taken note of the following:

“(1) An expression of intent by UNDP to reinstate your annual salary increment as of the date it was withheld.

"(2) That for the period of your service the UNDP has included you as an Associate Participant in the United Nations Joint Staff Pension Fund. This does not involve the payment of any funds to you but it provides you with protection under the Fund for the period of your service.

"(3) The Joint Appeals Board's decision not to entertain your request concerning additional overtime pay on the ground that there has been no administrative decision subject to appeal.

"A copy of the report of the Joint Appeals Board, together with a copy of this letter to you, is being forwarded to the UNDP administration for implementation of those decisions which involve further action in the matter."

On 15 April 1969, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. In the course of the discussion which led to the Applicant's recruitment from the United States Embassy at Rabat, it was orally, but formally, agreed that he was recruited for continuing service and that he would receive an indefinite appointment after fifteen months. This commitment on the part of the Administration appears clearly from the facts surrounding the case and was recognized directly by the Joint Appeals Board and indirectly by the Administration itself in correspondence exchanged between its officials. Such a commitment is also implied in the personnel action form dated 13 and 20 February 1967 and in the provisions of the UNDP Field Manual relating to appointments.

2. Staff Rule 104.12 (b) cannot be applicable since no letter of appointment was issued when the initial contract of three months was extended for one year. Besides, Staff Rule 104.12 (b) comes under the heading "temporary appointments", a category of appointments excluded by the words "as distinct from recruitment specifically for temporary or short term duties" in the Field Manual provisions governing initial fixed-term appointments. In fact, while the appointment of international staff is governed by Staff Rules 101.1 to 112.8, the appointment of local staff is governed by Field Manual Section IV-C only, except where the Field Manual refers explicitly to Staff Rules 101.1 to 112.8. In the case of the Applicant, applying those Staff Rules is even less justifiable since he did not receive a copy of the Staff Regulations and Rules at the time of his appointment.

3. The Applicant resigned his post in the United States Embassy at Rabat on the clear understanding that his salary level would be fixed at level 5, step VI, of the existing salary scale and that salaries would soon be increased by about 30 per cent. In December 1966 the Resident Representative again agreed to that salary level, and promised that the Applicant would be recommended for an international post within six months or one year.

4. Although the Applicant was orally requested to work overtime in December 1966 and January 1967 and presented his claims to his supervisor, he was denied payment of ninety-seven hours on the pretext that salaries had been increased and that he would be recommended for an international post.

5. The Administration must reimburse the money borrowed from official funds by the Deputy Resident Representative since it is fully responsible for his signature.

Whereas the Respondent's principal contentions are:

1. The decision for the Applicant's separation from service was valid whether viewed as non-renewal of an expired fixed-term appointment or as termination of an indefinite appointment:

(a) As a fixed-term appointee, the Applicant had no rights relating to service after 30 November 1967: the oral statements allegedly made by the Resident Representative before the Applicant's initial appointment have not been established and, in any event, oral discussions preceding the initial appointment could not be the basis of a right to receive further appointment fifteen months later; the UNDP Field Manual gives no support to the Applicant's claim as of right to an indefinite appointment;

(b) Even if the Applicant had acquired, contrary to the evidence in the case, some or all of the rights of an indefinite appointee, the decision to discontinue his services would have been justifiable as a valid exercise of discretion under Staff Regulation 9.1 (c); the Applicant has not established, or even offered any evidence of, personal prejudice on the part of his supervisors, nor has he suggested what improper motive he considers to be the real reason for the contested decision; the reasons for the decision have not been withheld by UNDP and are directly related to the requirements of the Rabat Office.

2. The Applicant has no entitlement to salary step above that specified in his appointment.

3. The Applicant's request for ninety-seven hours overtime is wholly unsubstantiated.

4. The Applicant's requests for reimbursement of money allegedly borrowed by the Deputy Resident Representative and for sanctions against UNDP officials in Rabat are not matters for the Tribunal's determination.

The Tribunal, having deliberated from 13 to 26 October 1970, now pronounces the following judgement:

I. The Applicant's first claim is that he was wrongfully separated from UNDP on 30 November 1967, and that he should be reinstated as from that date.

The Applicant bases this claim on oral representations alleged to have been made to him, prior to or at the time of his first appointment to UNDP on 1 September 1966 for a trial period of three months, that he would eventually receive an indefinite appointment. Since, under Staff Rule 104.1,

"All contractual entitlements of staff members are strictly limited to those contained expressly or by reference in their letters of appointment.", his three-month appointment and his one-year appointment from 1 December 1966 to 30 November 1967 should be regarded as fixed-term appointments coming under Rule 104.12 (b), which reads in part:

"The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment."

The Applicant's letter of appointment dated 1 September 1966 for the three-month trial period, signed by him, specifically refers to the Staff Regulations and Rules, and he is of course bound by them. Also, below his signature appears the following:

"This fixed-term appointment does not carry any expectancy of renewal . . .".

The Applicant's assertions that he did not read what he signed and that he did not receive a copy of the Staff Regulations and Rules at the time of his appointment are immaterial.

Furthermore, the Applicant's initial fixed-term appointment for the trial period of three months, followed by the fixed-term appointment of one year, conformed to the usual UNDP practice, as evidenced by the UNDP Field Manual provisions reading in part as follows:

"Initial fixed-term appointment. If a staff member is recruited with an expectation of continuing service (as distinct from recruitment specifically for temporary or short term duties) he normally is given initially a fixed-term appointment for a trial period of three months duration.

"Fixed term appointment. If the staff member's services have proved satisfactory during the trial period he normally receives on completion of that period an appointment for a fixed-term of one year.

"Indefinite appointment. If the staff member's services are to continue after completion of the first year's fixed-term appointment, he receives either a further fixed-term appointment or, alternatively, an indefinite appointment."

In this case, after completion of the first year's fixed-term appointment, the Applicant's services were, by a decision of the Administration, *not* to continue, and he therefore was *not* entitled to receive either a further fixed-term appointment or an indefinite appointment.

The Tribunal observes, however, that the Applicant's fixed-term appointment from 1 December 1966 to 30 November 1967, though evidenced by a personnel action form, was not followed by a written letter of appointment, and that the Administration was at fault for not furnishing to the Applicant a written letter of appointment. This may have created an impression in the mind of the Applicant that he was accorded an indefinite contract. The Tribunal notes that taking that circumstance into account, the Joint Appeals Board recommended, and the Administration made, an *ex gratia* payment of one month's salary.

II. The Applicant's claim for grant of salary level 5, step VI, is based on alleged oral promises made to him at the time of his entering the service. The Applicant has also called for production of inter-office correspondence, more particularly of cables exchanged between Rabat and New York between 25 and 30 August 1966. The Respondent has pleaded inability to locate any such cables. The Tribunal has not found it necessary to order the production of either these or any other correspondence offered to be produced by the Respondent as the letter of appointment dated 1 September 1966 and duly signed by the Applicant clearly mentions the level as 5, step II. Besides, the letter dated 17 December 1966 from the Resident Representative of UNDP in Rabat to the Chief of the Personnel Branch of UNDP, which states that "Mr. Touhami will only stay on if given a salary of Dh 1,200 per month which, in fact, was the salary he originally requested on joining this office", shows that there was a strong request or claim but no acceptance as contended by the Applicant.

III. The reclassification of the Applicant in February 1967 to level 5, step I of the revised scale at a salary of 16,000 dirhams, when he had been appointed level 5, step II entitled under the revised scale to 16,550 dirhams, was incorrect. This was recognized in the report of the Joint Appeals Board and the Secretary-General has taken corrective action. No further adjustment is appropriate.

IV. The Applicant's claim for ninety-seven hours overtime does not appear to have been submitted to the UNDP Office or substantiated, and is not receivable.

V. As the claim fails, the question of fixing compensation does not arise.

VI. The Tribunal cannot go into the merits of the claim for reimbursement for money borrowed by the Deputy Resident Representative, as the claim does not come within the jurisdiction of the Tribunal.

VII. The application is rejected.

(Signatures)

R. VENKATARAMAN

President

Francis T. P. PLIMPTON

Member

Zenon ROSSIDES

Member

Jean HARDY

Executive Secretary

New York, 26 October 1970

Judgement No. 136

(Original: French)

Case No. 135:
Detière

Against: The Secretary General of the
International Civil Aviation
Organization

Request for the rescission of a decision transferring an ICAO staff member from the Paris Regional Office to Headquarters at Montreal.

Principal request.—Argument based on a specific post being the object and cause of the contract of employment.—Measures taken for ICAO to provide the European Civil Aviation Conference (ECAC) with the necessary secretariat staff.—Recruitment of the Applicant by ICAO as Secretary of ECAC.—Applicability of the ICAO Service Code to the Applicant.—Position of the Applicant vis-à-vis the Director of the Paris Regional Office.—Resolution A 10-5 of the ICAO Assembly.—Agreement between ICAO and ECAC regarding the provision of secretariat services.—Conclusion of the Tribunal that the Applicant cannot cite any special commitment by ICAO subordinating the Secretary General's right to transfer a staff member to special requirements.—Argument based on the obligation of the Secretary General to observe the rules laid down in the Service Code relating to staff transfers.—Part III, article IV.7, of the Service Code.—Conditions relating to the comparability of positions and the need to pay due regard to the interests of the staff member.—Implicit obligation of the Secretary General, before deciding a transfer, to inform the staff member of the position to which he is to be assigned and to tell him how he intends to pay regard to his interests.—The concept of comparability of positions includes considerations other than grade.—The contested decision was taken without a reasonable procedure whereby the requirement of comparability of positions could be met.—The Applicant was not enabled to present his own viewpoint regarding his interests.—Non-compliance with the requirements of Part III, article IV.7, of the Service Code.—Irregularity of the contested decision.—Complaints of misuse of power and abuse of right.—No ruling required on these complaints.

Rescission of the contested decision.—Award to the Applicant, should the Secretary General decide to exercise the option provided for in article 9, paragraph 1, of the