

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

Statute of the Tribunal, of compensation for material damage at a sum to be calculated by multiplying the amount of the subsistence allowance by the number of days elapsed since the date of actual entry on duty at Montreal and compensation for damage to career equivalent to three months' net base salary.—Request for symbolic compensation for moral damage.—Substance of the judgement should give the Applicant suitable satisfaction.—Award to the Applicant of \$500 as costs.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Francisco A. Forteza; Mr. Vincent Mutuale; Mr. Francis T. P. Plimpton, Alternate Member;

Whereas, on 19 January 1970, Nicolas Detière, a staff member of the International Civil Aviation Organization, hereinafter called ICAO, filed an application the pleas of which request the Tribunal:

“To order the rescinding of the decisions of 16 October 1968 and 30 September 1969 [transferring the Applicant from the Paris Regional Office to headquarters at Montreal] on the following grounds:

“(1) The contested decisions constitute a violation of the Applicant's contract of employment as Secretary of ECAC [European Civil Aviation Conference];

“(2) On a subsidiary plea, those decisions were made in violation of the regulations and administrative decisions of ICAO concerning transfer;

“(3) On a further subsidiary plea, they constitute a manifest misuse of power, inasmuch as the motives adduced by the Administration to justify the transfer are belied by its own confidential written statements;

“(4) Abuse of right, inasmuch as the decision is both ‘unnecessary’ and ‘excessive’, being, in the final analysis, a purely ‘punitive’ measure against the Applicant.

“Should the Tribunal not order the reinstatement of the Applicant pursuant to the order for rescission prayed for:

“to award him, on the foregoing grounds and because of the serious moral damage and damage to his career caused to him, a sum equivalent to FIVE YEARS' salary.

“To order payment by the Administration of the amount of French francs 7,000 as reimbursement of counsel's costs.”;

Whereas the application contained a request for oral proceedings;

Whereas the Respondent filed his answer on 16 April 1970;

Whereas, on 24 July 1970, the Applicant filed written observations in which he stated that he persisted in his previous pleas and requested the Tribunal

“to award him the sum of \$71,000 in damages, broken down as follows:

“1. *Material damage*

“(a) The material damage resulting from the transfer amounts to approximately \$8,200 (due to the change of post from Paris to Montreal):

“295 days assignment to Montreal—cost \$23 per day,

“miscellaneous travel expenses, including \$338 for the round trip Montreal/Paris,

“monthly loss of earnings of \$108.50 for ten months.

“(b) Counsel’s costs: dollar equivalent of 7,000 *French francs* at the rate of exchange in force on the date when the decision is reached.

“2. *Moral damage*

“ . . .

“For this, the Applicant asks to be awarded the sum of *ONE dollar*.

“3. *Damage to career*

“ . . .

“The logical method is to take the difference, starting in October 1968, between the Applicant’s salary and that of the Director [of the Air Transport Bureau] (who replaces the Secretary of ECAC on an honorary basis in his constitutional role as Secretary General of the plenary sessions).

“This difference amounts to approximately \$320 a month, which must be multiplied by the number of months of service which the Applicant (who has a permanent contract) can expect until the end of his ICAO career.

“This comes to approximately \$62,400:

“\$320 multiplied by 195 months.

“Of this amount, unless he is reinstated in his post in Paris, the Applicant requests that \$12,000 be paid in a lump sum and that the balance be paid to him by ICAO in monthly instalments until the end of his career with the organization, so long as he does not obtain a post as Director in the future. Since the damage to career will cease if he is appointed to such a post, the payments from ICAO would also cease.”;

Whereas the Respondent and the Applicant replied on 15 and 22 September 1970 respectively to questions put by the President of the Tribunal;

Whereas, on 28 September 1970, the Applicant filed two additional documents;

Whereas the Tribunal heard the parties at a public session on 19 October 1970;

Whereas the Applicant filed two additional documents at the public session;

Whereas, on 20 October 1970, the Respondent provided three additional documents at the request of the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the employment of ICAO on 21 January 1957 as a First Officer (P-4) for a two-year appointment. The appointment was explicitly subject to the provisions of the ICAO Service Code and specified that the Applicant’s first assignment would be to the Paris Regional Office of the Air Navigation Bureau. It appears from prior correspondence exchanged by the parties that the appointment was to the post of Secretary of the European Civil Aviation Conference (ECAC)—an organ associated with ICAO and whose secretariat services were provided by ICAO. The Applicant’s appointment was extended for two years on 21 January 1959 and for a further two-year period on 21 January 1961;

on 1 May 1961, with no change in the place of assignment, it was replaced by a permanent contract, also subject to the ICAO Service Code.

In a letter of 16 October 1968, the Secretary General of ICAO informed the Applicant that, in resolution 23/1 adopted at its sixteenth session, the Assembly had requested the Council to arrange for certain statistical work to be done on the subject of non-scheduled commercial air transport; that, in view of the urgency and complexity of the work involved, the Air Transport Bureau required at headquarters an experienced officer who would also be able to help train air transport officers; and that he had therefore decided, taking into account also the fact that the Applicant had served in Paris for nearly twelve years and that a certain amount of rotation of staff between headquarters and regional offices was desirable, to transfer the Applicant from the Paris Regional Office to the Air Transport Bureau at Montreal some time between 1 January and 1 March 1969; the Secretary General added that he was taking the necessary measures to appoint the Applicant's successor in Paris. On the same day, the Director of the Air Transport Bureau had addressed to the Secretary General, in connexion with the letter to be sent to the Applicant announcing the decision to transfer him, a memorandum in which he stated *inter alia* that it was unfortunate that his predecessors had not written any adverse reports on the Applicant—reports which he himself would certainly have to write in the near future if the Applicant was not transferred—and that advantage should be taken of the Assembly resolution because it provided a good opportunity to take a measure that was not too punitive. In a cable of 21 October 1968, the Applicant requested the Secretary General to postpone the transfer. On 22 October 1968, the President of ECAC sent the President of the Council of ICAO a Telex in which he said that he was surprised to learn of the Secretary General's intention to replace the Applicant in the Paris post; he considered that, in view of the relationship between ICAO and ECAC, the replacement should be made with the agreement of ECAC. In a letter of 24 October 1968, the President of the Council of ICAO replied in substance that the Secretary General's decision to transfer the Applicant to Montreal was not subject to the agreement of ECAC, that ICAO had undertaken to provide ECAC with a well-qualified member of the Paris Regional Office but not to keep a particular individual indefinitely in that post and that the Applicant, who was a member of the staff of ICAO, was subject to the same obligations as other staff members; the President of the Council then explained the reasons for the Secretary General's decision, which were similar to those given by the Secretary General in his above-mentioned letter of 16 October 1968. On 26 October 1968, in a letter addressed to the Secretary General in reply to the one sent to him by the Secretary General on 16 October 1968, the Applicant pointed out that the work to be assigned to him could be done better in Paris, that he had been recruited primarily to assist ECAC, that ICAO had actually given him the title of Secretary of ECAC and that he would not have left his post as assistant to the President-Director General of SABENA to become an air transport officer at Montreal. On 12 December 1968, the President of the Council of ICAO sent the President of ECAC another letter from which it appeared that the Secretary General would agree to postpone the transfer of the Applicant in order to accommodate ECAC. On 26 February 1969, the Secretary General informed the Applicant that his transfer was postponed; on 22 April 1969, he advised him that the transfer would take place not later than 1 December 1969. The Applicant requested him on 23 May 1969 to review his decision but the Secretary General replied by letter of 13 June 1969 that the decision was definitive; in his letter, the Secretary General specified that the

Applicant's post would be that of assistant to the Director of the Air Transport Bureau—a P-4 post, whose duties he enumerated. On 27 June 1969, the Applicant submitted an appeal to the ICAO Advisory Joint Appeals Board, which gave its opinion (opinion No. 34) on 27 August 1969. The conclusions and recommendations of this opinion are as follows:

"Conclusions and findings

"50. The Board considered as a preliminary issue the allegation that the post held by the Appellant was of such a particular nature that it was not subject to the ICAO Service Code and, therefore, that the Appellant could not be transferred because the Rules of the ICAO Service Code were not applicable.

"51. By the contracts signed by the Appellant, he was assigned to the Air Navigation Bureau, European Office, as a member of the ICAO staff and subject to the terms of the contracts which provided, by reference to the Service Code, the application of its rules. These rules provide *inter alia* that a staff member of the Organization can be transferred from one post to another, provided certain principles, established in the Service Code itself and the regulations giving effect to it, are complied with. The fact that the Appellant was assigned to a post that gave him a certain freedom from supervision by ICAO does not alter the fact that he is under a contract with ICAO and that, though much of the work performed by him was for ECAC, this was done in accordance with an agreement between ECAC and ICAO in accordance with which the latter would provide secretariat services for ECAC.

"52. It is therefore submitted that the Appellant cannot claim the non-applicability of the Service Code or that the transfer to another post is ruled out by the terms of his contract.

"53. This leads to consideration of the terms and conditions established by the Service Code and the GSI [General Secretariat Instructions] for the transfer of a staff member from one position to another in any of the offices of the Organization. The relevant provisions in this matter are:

(a) Paragraph 7 of Article IV, Part III of the ICAO Service Code:

'7. The Secretary-General may transfer a staff member of the Director and Principal Officer category and Professional category to any comparable position in any of the offices of the organization, having due regard to the personal interest of the staff member concerned. Any transfer of a staff member within the same level shall not necessitate a new contract'

"and (b) GSI 1.7.3, paragraphs 3 (b) and 8 (b):

'3. . . . Notification of vacancies to the staff may also be dispensed with if the vacancy is to be offered to:

"(a) . . .

"(b) a staff member of the same level whose transfer to the vacancy is considered to be in the interest of the Organization, provided that the vacancy is of the same character and in the same duty station as the post held by the transferee.'

'8. The Appointment and Promotion Board procedure may be dispensed with if the vacancy is to be offered to:

"(a) . . .

“(b) a staff member of the same level whose transfer to the vacancy is considered to be in the interest of the Organization, provided that the vacancy is of the same character and in the same duty station as the post held by the transferee.’

“54. The question of deciding, in the first place, whether the two posts are comparable is a delicate one in which many considerations, such as the ‘status’, type of work performed and others which should be taken into account, cannot always be easily balanced.

“55. The Board has noted that the P-4 post to which Mr. Detière is proposed to be transferred by the Organization does not appear in the establishment. The draft post description provided by the Air Transport Bureau at the request of the Board is couched in such general terms that it is difficult to ascertain exactly what the duties and responsibilities of the incumbent under the direct supervision of the Director of the Air Transport Bureau are going to be. It seems, however, that these duties and responsibilities can scarcely compare with the post of Secretary to ECAC, as they appear in Vacancy Notice PC 15/56 of 16 August 1956 and the post description of 24 October 1968.

“56. If one takes into account all the above as well as the evidence in the Memorandum, dated 16 October 1968, from [the Director of the Air Transport Bureau] to the Secretary General, . . . it is difficult to escape the conclusion that this post has been created to provide the instrument for a transfer as a disciplinary action and in a desire to have tighter control over the work done by the Appellant.

“57. The Board has noted in this respect that the Appellant has not been subject to any adverse report from his superiors at any time; on the contrary, he has been praised by ECAC.

“58. The Service Code provides also that a transfer should be made ‘having due regard to the personal interest of the staff member concerned’ (para. 7, Art. IV, Part III). The Board cannot accept the argument of the Appellant to the effect that the interpretation of this proviso is that no transfer can be effected without the consent of the staff member concerned, who is to decide ultimately on what his interests are. The Board’s view is that such an interpretation would provide the Appellant with a veto power on matters of transfer, an intention that is difficult to ascribe to those who drafted the rules.

“59. Nor is it in agreement with the view advanced by the Representative of the Secretary General that the interests of the staff member are well served if the material arrangements are taken into account and that, in the present case, the delay accorded to the Appellant in order to move to Montreal takes care of such a condition.

“60. In the opinion of the Board, the personal interest of the staff member has to be taken into account by approaching him and trying to ascertain to what extent the personal interest of the staff member can be reconciled with the interest of the Organization, so that no injustice or hardship may result from a unilateral action by the Administration. The Board notes that such a consultation did not take place prior to the decision to transfer the Appellant to another post.

“61. The interest of the staff member is particularly safeguarded in the case of a transfer to another duty station. This is covered by the above-

mentioned G.S.I. 1.7.3, paras. 3 (b) and 8 (b), where it is stated that a staff member cannot be transferred from one duty station to another without having the vacant post advertised and that the intervention of the Appointment and Promotion Board cannot be dispensed with in such a case.

"62. For all the above, the Board is of the opinion that the procedure regarding transfers has not been followed in the present case and that the action taken by the Administration is therefore invalid.

Recommendation

"63. The Board recommends to the Secretary General that the decision to transfer Mr. Detière to Headquarters as an Assistant to the Director of the Air Transport Bureau be rescinded.

"64. The Board is aware of the situation that exists at present, i.e. that another person has been designated to replace Mr. Detière and has been working in the European Office for some time. This might place the Administration in an awkward position and the Board would suggest that if it is considered imperative, in the interests of the Organization, to transfer Mr. Detière, the proper motives should be taken into account, a comparable post be offered and the procedure prescribed by the Service Code and the G.S.I. be duly followed.

"65. In case the Secretary General does not accept the Recommendation of the Board, he may wish to examine the implications of an appeal to the United Nations Administrative Tribunal, . . . and consider suspension of his decision to make a transfer, pending the results of such an appeal."

The Secretary General rejected the recommendation of the Board on 30 September 1969 and the Applicant filed the above-mentioned application on 19 January 1970.

Whereas the Applicant's principal contentions are:

1. The cause and object of the initial contract were, for both parties, a very specific post, that of Secretary of ECAC; the fact that the Applicant held that position was repeatedly confirmed over the years and eventually recognized in the Constitution of ECAC; the statutory provisions must be interpreted in the light of the contractual conditions which induced the parties to enter into the contract. Accordingly, the Secretary General could not decide unilaterally to transfer the Applicant.

2. The Secretary General observed none of the rules of the Service Code and the GSI concerning the transfer of staff members. In particular, the transfer was not to a comparable position, due regard was not paid to the interest of the staff member and the procedure prescribed for the filling of vacancies was not followed. Yet those were substantive rules designed to protect staff members against arbitrary action by the Administration.

3. The contested decision constitutes a misuse of power. The Administration used its power to transfer staff members for a purpose not provided for in the rules and differing from the motives cited.

4. In addition, the contested decision constitutes an abuse of right because, as well as being unjust, it was punitive and unnecessary.

Whereas the Respondent's principal contentions are:

1. The status of the Applicant was essentially that of an ICAO employee, assigned as such to perform duties for ECAC; it appears from the texts governing

the relationship between ICAO and ECAC that the Applicant was not a member of a separate ECAC secretariat; under his successive contracts, the Applicant was always subject to the provisions of the Service Code concerning the transfer of staff members.

2. Since it was of the same grade and involved functions requiring economic expertise, the position to which the Applicant was transferred is comparable to the position which he occupied in Paris and the Applicant's transfer was postponed partly out of regard for his interest. The rules concerning vacancies cannot be cited by the Applicant, since he was in fact appointed to the post in question.

3. The allegation that the contested decision constitutes a misuse of power is not borne out by the documents cited by the Applicant.

4. The contested decision is not an abuse of right. The act of transferring the Applicant was neither an unnecessary nor an excessive measure and the fact that the transfer was to ICAO headquarters cannot be regarded as a punishment.

The Tribunal, having deliberated until 29 October 1970, now pronounces the following judgement:

I. The Applicant requests the rescinding of the decision transferring him from the post of Secretary of ECAC in Paris to that of assistant to the Director of the Air Transport Bureau at Montreal, maintaining in the first place that his contract of employment had as its object and cause a specific post and that, in those circumstances, the Secretary General of ICAO could not unilaterally decide the transfer.

II. The Tribunal notes that, when ECAC was established, the States which constituted the Conference requested ICAO to provide it with the necessary secretariat staff. At its tenth session, the ICAO Assembly acceded to that request.

III. The recruitment of the Applicant as Secretary of ECAC was effected by ICAO, which naturally made sure that he possessed the necessary qualifications for that post. The initial and subsequent letters of appointment, including the letter of appointment to permanent employment, expressly state that the appointment is to the staff of ICAO, that the first assignment is to the Paris Regional Office of the Air Navigation Bureau and that the appointment is subject to the provisions of the ICAO Service Code and subsequent amendment. No specific clause implies that any provision of the Service Code—for instance part III, article IV.7, concerning transfers—would not be applicable to the Applicant. The fact that, at the time of recruitment, the Applicant's qualifications to perform the duties of Secretary of ECAC were taken into consideration cannot have such an implication. In addition, the Applicant has admitted that in the performance of his duties he worked immediately under the Director of the Paris Regional Office. He did, it is true, point out that this situation changed in 1961: the establishment within ECAC of a bureau composed of five and then seven directors-general of civil aviation meeting several times a year increased his powers and responsibilities. His independence vis-à-vis the Director of the Paris Regional Office became a fact. It is observed that, when he drew up the periodic reports on the Applicant for 1967 and 1968, the Director of the Paris Office, in agreement with the Director of the Air Transport Bureau, did not mark the sections headed "capacity" and "performance of duties". It was, however, the Director of the ICAO Air Transport Bureau who made these evaluations himself.

IV. It is true that, by agreeing in its resolution A 10-5 that staff members of the Organization should provide secretariat services for ECAC, the ICAO

Assembly allowed such staff to be made available to organs established by the States members of ICAO participating in ECAC, while ECAC made do with staff under the administrative jurisdiction of ICAO. This situation may have created certain practical difficulties. The Tribunal notes, however, that it was not considered necessary to modify the principle involved when the agreement between ICAO and ECAC regarding ECAC secretariat services was concluded—an agreement which came into force on 12 July 1969 and therefore does not apply to the case.

The Tribunal concludes that the Applicant cannot cite any special commitment by ICAO subordinating the Secretary General's right to transfer an ICAO staff member to special requirements. No specific obligation on this score rests with the Respondent.

V. The Respondent has emphasized on numerous occasions in this case the importance for the proper functioning of the Organization of the right to transfer staff. The Tribunal shares this view. It considers, however, that in exercising this prerogative the Respondent should observe the rules laid down in the Service Code.

Part III, article IV.7, of the Service Code states that "The Secretary General may transfer a staff member of the Director and Principal Officer category and Professional category to any comparable position in any of the offices of the Organization, having due regard to the personal interest of the staff member concerned".

In order to transfer a staff member, the Respondent must therefore ascertain that the positions are comparable and pay due regard to the personal interest of the staff member concerned. The Tribunal observes that the Service Code does not state that the Secretary General has discretionary power to evaluate these two requirements. Furthermore, since these requirements must be met in order for the Secretary General to take his decision, it is clear that the regularity of the decision cannot be justified simply by citing any action which was subsequent to the decision and which the Respondent considers sufficient to meet these requirements. Accordingly, the Tribunal considers that the terms of part III, article IV.7, of the Service Code imply that, before deciding a transfer, the Secretary General has notified his intention to the staff member concerned, informed him of the position to which he is to be assigned, so that the "comparability" can be assessed, and told him how he intends to pay regard to his interests. It is of course the responsibility of the Secretary General to take the decision, but the staff member is entitled to be informed specifically of the nature of the position to which he is to be assigned and, above all, to make known his views on the subject and also to state what he himself considers to be his own interests, which should be considered.

VI. The Respondent maintained that comparability of positions was assured if the staff member was transferred to a position of the same grade. This is undoubtedly one requirement but the concept of "comparability" of positions ("poste équivalent" in the French text of the Service Code) is, in the opinion of the Tribunal, more complex. It will be seen that GSI 1.7.3, paragraphs 3 (b) and 8 (b), which the Advisory Joint Appeals Board considered, concerns transfers to a vacancy "of the same character". In the case of such transfers, the instruction states that notification of the vacancy may be dispensed with and provides for the possibility of dispensing with the Appointment and Promotion Board procedure.

This text clearly shows that the statutory texts introduce considerations other than grade into the concept of comparability of positions.

The lack of complete advance information about the position, and particularly the lack of a post description, prevents the staff member in question from stating his views on the comparability of the positions and, in the view of the Tribunal, does not permit the proper application of part III, article IV.7, of the Service Code.

In his letter of 16 October 1968, the Respondent informed the Applicant of his decision to transfer him to the Air Transport Bureau at Montreal. With regard to the duties to be assigned to him, reference was made, firstly, to certain statistical work concerning non-scheduled air transport requested by a resolution of the Assembly and, secondly, to assisting the Bureau in the training of air transport officers assigned to the regional offices. It was only at the request of the Advisory Joint Appeals Board that a draft description of the post to which the Applicant was transferred was prepared and it was only after the recommendations had been made by the Board and rejected by the Respondent that a final post description was prepared and a true assessment could be made of the comparability of the positions. By that time, however, the decision to transfer the Applicant was already an established fact and it had been taken and confirmed without a reasonable procedure whereby the requirement of comparability of positions laid down in part III, article IV.7, of the Service Code could be met.

VII. According to the decision notified on 16 October 1968, a period of two and a half to four and a half months was to elapse before the arrival of the Applicant at Montreal. The only concern expressed was a desire to ensure the continuity of the servicing of ICAO and ECAC by appointing a successor forthwith. Nothing in this document reveals an effort to pay "due regard to the personal interest of the staff member concerned" and the Applicant is given no means of apprising the Secretary General, before the transfer, of what he considers to be his personal interest.

In these circumstances, assuming that the Respondent took into account the professional interest of the Applicant before taking the decision to transfer him, the Applicant was totally ignorant of the issues involved and had not been enabled to present his own viewpoint.

The Tribunal notes, in addition, that part III, article IV.7, of the Service Code does not specify that it is the "professional" interest of the staff member which is concerned. Consequently, there should be nothing to prevent the staff member from submitting for the consideration of the Secretary General other interests which might be affected by the transfer action.

VIII. In any case, in view of the procedure followed, the transfer decision was taken without the requirements of part III, article IV.7, of the Service Code having been fulfilled.

Accordingly, the Tribunal decides that the contested decision is irregular.

IX. The Applicant maintained that the transfer decision constituted a misuse of power, on the ground that its real purpose was the exercise of disciplinary power against him. He based his argument on the memorandum which the Director of the Air Transport Bureau sent to the Secretary General on 16 October 1968 on the subject of the transfer decision to be notified to the Applicant. This document and the annotations of the Applicant's superior dated 2 May 1968 on the periodic report for 1967 reflect attitudes which, in the view of the Tribunal,

are contrary to sound administrative practice. In particular, the Tribunal notes that, in making his evaluations, the superior refers to a relationship which he had with the Applicant before the latter's entry on duty. In the above-mentioned memorandum, he indicates that, if the transfer does not take place, he intends in the future to make unfavourable evaluations in the Applicant's periodic reports.

It appears from this memorandum that the Applicant's superior had an unfavourable opinion of his services. He actually says that the work requested by the Assembly provides an "opportunity" to transfer the Applicant and that a measure adopted later might be more "punitive"

The Tribunal observes that the Applicant solemnly declared during the oral proceedings that he had not been informed of the criticisms made of his services. The Respondent did not contest this point. He indicated that, according to the rules in force in ICAO, it was in order for the periodic report for 1967 and the one for 1968, which was drawn up after the contested decision, not to be transmitted to the Applicant. It was thus not until the proceedings before the Advisory Joint Appeals Board that the Applicant was informed of the complaints made about his services.

In view of the special nature of the Applicant's duties in ECAC, this was particularly unfortunate and could only place the person concerned in an irregular situation, when the persons under whose immediate authority he performed his duties were satisfied with his services.

Because the Applicant had not been informed of the opinion about him held by his superior at Montreal, it was even more necessary, at the time of the transfer decision to be taken by the Secretary General, to follow a procedure enabling the Secretary General to observe the requirements laid down in the Service Code.

Having reached the conclusion stated in paragraph VIII above, the Tribunal considers that no ruling is required on the complaint of misuse of power affecting the legality of the contested decision or on the complaint of abuse of right.

X. In conclusion, the Tribunal decides that:

(1) The contested decision is rescinded. Accordingly, the Applicant is entitled to be reinstated in the position which he occupied on 16 October 1968.

In addition, the Respondent shall pay the Applicant the difference between the salaries and allowances to which he was entitled and those which he has actually received since that date.

(2) Should the Respondent decide, within thirty days of the notification of the judgement, not to reinstate the Applicant in his post in Paris but to exercise the option provided in article 9, paragraph 1, of the Statute of the Tribunal and to compensate the Applicant, the amount of compensation shall be fixed by the Tribunal.

XI. The Tribunal notes that this compensation is to be paid for the injury sustained by the Applicant as a result of non-reinstatement in his Paris post. The Tribunal observes that, in his present post at Montreal, the Applicant retains his permanent contract with the salary and allowances attaching thereto.

The Applicant claimed that he had suffered material damage, moral damage and damage to career.

The Tribunal realizes that, from the date of his arrival at Montreal until the date on which the Respondent exercises the option provided by article 9, paragraph 1, of the Statute of the Tribunal, the Applicant may, in the conviction

that his case was well-founded, legitimately have kept his establishment in Paris and lived at Montreal as though he was on a temporary mission. The injury suffered on this ground may be assessed on the basis of the number of days elapsing between these two dates and of the amount of the normal subsistence allowance.

The Tribunal orders the Respondent to pay damages for this injury and fixes the compensation thus awarded at a sum to be calculated by the Respondent by multiplying the amount of the subsistence allowance paid at Montreal on the date of the judgement to staff members of the Applicant's grade by the number of days which have elapsed between the date of actual entry on duty at Montreal and the date on which the Respondent opts for the payment of compensation.

The Applicant did not justify the travel expenses (including \$338 for a round trip Montreal/Paris) for which he requests reimbursement. In addition, the request for reimbursement of the difference in post adjustment between Paris and Montreal is unfounded, in view of the purpose of this special allowance and the Tribunal's decision to award the subsistence allowance. Accordingly, these two requests are rejected.

XII. The Tribunal realizes that the Applicant's career undergoes a considerable change as a result of his maintenance in his present post in the circumstances in which he was assigned thereto. The Applicant requests the Tribunal to award damages for this injury in the form of compensation corresponding to the difference between his present salary and a Director's salary, until the end of his career with the Organization. The Tribunal sees no justification for this claim.

The Tribunal finds, however, that due process was not observed in the adoption of the contested decision. The Tribunal decides that, while the material damage will be redressed in the manner provided in paragraph XI above, the Applicant is entitled to receive, in addition to the compensation thus awarded, compensation equivalent to three months' net base salary.

XIII. With regard to the moral damage for which the Applicant requests symbolic damages, the Tribunal considers that the substance of this judgement should give him suitable satisfaction.

XIV. The Applicant asked to be awarded the dollar equivalent of 7,000 French francs for counsel's costs.

The Tribunal notes that the Applicant could have had his case presented by a staff member acting as counsel.

The Tribunal, having regard to its resolution of 14 December 1950, and considering the nature and circumstances of the case, orders the Respondent to pay the Applicant the sum of 500 Canadian dollars as costs.

(Signatures)

Suzanne BASTID
Vice-President, presiding

F. A. FORTEZA
Member

V. MUTALE
Member

Francis T. P. PLIMPTON
Alternate Member

Jean HARDY
Executive Secretary

New York, 29 October 1970