

“(b) No provision shall be construed as applying retroactively to participants in the Fund prior to 1 January 1970 unless expressly stated therein or specifically amended to such effect by the General Assembly with due regard to the provisions of article 50”.

The Tribunal observes that there is no question of applying the provisions of the 1970 Regulations retroactively, that is to say, of modifying a legal situation established previously on the basis of the 1967 Regulations. In this instance, it is a question of applying a decision of the General Assembly that takes effect from 1 January 1970 to a legal situation—the legal status of a recipient of a retirement pension—which came into being precisely on 1 January 1970. Since the General Assembly makes no distinction between the methods by which a retirement benefit may be paid, the Respondent’s claim is unfounded.

V. For these reasons, the Tribunal quashes the decision of the United Nations Joint Staff Pension Board, decides that the lump sum representing one-third of the actuarial equivalent of the Applicant’s retirement benefit shall be calculated on the basis of one-fiftieth of his final average remuneration, and orders it to be paid to the Applicant after deduction of the amount already disbursed.

(Signatures)

Suzane BASTID
Vice-President, presiding
Francisco A. FORTEZA
Member

Vincent MUTUALE
Member
Jean HARDY
Executive Secretary

Geneva, 8 April 1971

Judgement No. 142

(Original: English)

Case No. 137:
Bhattacharyya

Against: The Secretary-General
of the United Nations

Non-renewal of the fixed-term appointment of a staff member of the United Nations Children's Fund.

Before the letter of appointment was signed, the Applicant was sent a letter which raised the hope of continued employment with UNICEF dependent upon satisfactory service.—Contention that this letter created a legitimate expectancy of continued employment for the Applicant and that there was a corresponding commitment in this respect by the Respondent.—The Tribunal is competent to consider the contract as a whole in relation to the circumstances in which it was concluded.—Relevance and significance of the above-mentioned letter.—This letter mentioned the opportunities for regular employment dependent upon qualifications and performance only.—The Applicant's high standard of performance was not disputed.—Finding that the circumstances of the Applicant's appointment and his performance of service created a legal expectancy of continued employment.—Corresponding obligation on the part of the Respondent to provide continuing employment to the Applicant within UNICEF.

—Acknowledgement by the Respondent of his duty to justify the non-extension of the Applicant's contract by abolition of post.—Responsibility of the Respondent to take the seniority of the Applicant into consideration and to try to find for him a suitable alternative post.—No proof that the Respondent fulfilled this obligation.—Award to the Applicant of compensation equivalent to seven months' net base salary.

The other pleas of the application are rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; the Lord Crook, Vice-President; Mr. Zenon Rossides; Madame Paul Bastid, Vice-President, alternate member;

Whereas, on 15 September 1970, A. G. Bhattacharyya, a former staff member of the United Nations specifically recruited for the United Nations Children's Fund, hereinafter called UNICEF, filed an application the pleas of which read as follows:

“ . . .

“UNICEF must reinstate me in service with retrospective effect, i.e. from 1 July 1969, and promote me to a suitable higher rank. I am now only 57 years of age and am mentally and physically fit. In the alternative, four years' salary from 1 July 1969 to 30 June 1973 (date of my superannuation) is the least indemnity to be paid to me.

“The terrible financial and mental strain which I have suffered and the humiliation that I have faced before others for the non-renewal of my contract against retention of my juniors and the adverse effect on the education of my only handicapped son are to be taken into account in order to determine higher indemnity.”

Whereas the Respondent filed his answer on 22 December 1970;

Whereas, on 19 February 1971, the Applicant filed written observations requesting that oral proceedings be held in the case and that

“the Tribunal may kindly accept the recommendations of the Rules and Procedures Section of U.N., viz. ‘UNICEF Headquarters be requested to take the action of granting Mr. Bhattacharyya a further extension of his appointment for three months and in the meantime to continue its best efforts to explore the possibilities of finding him an alternative post within the UNICEF establishment in India’ and because I have not yet reached the age of superannuation, kindly reinstate me in a suitable post from 1 July 1969”;

Whereas, on 4 March 1971, the Executive Secretary of the Tribunal informed the parties that the President of the Tribunal had decided not to hold oral proceedings in the case;

Whereas the Applicant submitted an additional document on 18 March 1971;

Whereas the facts in the case are as follows:

The Applicant, who was an official of the Government of Orissa (India), entered the service of UNICEF on 2 June 1963 as Assistant Field Representative under a fixed-term appointment for two years, on secondment from his Government.

In correspondence prior to the Applicant's appointment, an officer of UNICEF had sent him on 28 June 1962 a vacancy notice as to the post for which he subsequently applied. His application for the post was acknowledged by the Regional Director of UNICEF who, in a letter dated 14 July 1962, stated that he "would like to discuss this question further with my colleagues and also examine the budgetary situation". By a further letter, dated 30 January 1963, the Regional Director informed the Applicant that:

"...after further consultations with our Headquarters, I am now in a position to offer you the post of Assistant Field Representative in our Hyderabad Office. In the following, the terms of your appointment are spelled out."

The letter went on to give details of pay, leave and other terms of appointment and continued:

"I would also like to add that for staff members who join us there will be opportunities after their first fixed term contract for regular employment and for more senior posts in the Organization dependent upon their qualifications and performance.

"Kindly let us know if you will be able to join us so as to enable us to arrange for the necessary formalities e.g. medical check-up etc."

On 1 July 1964, the Applicant's duty station was changed from Hyderabad to New Delhi and he became a Programme Officer, a title which was subsequently changed to Programme and Supply Officer. The Applicant's initial appointment was successively extended to 31 March 1966, 31 March 1967 and 31 March 1969. Having been informed verbally by the Regional Director that his appointment would not be extended beyond 31 March 1969, he made representations to the Executive Director of UNICEF in a letter dated 6 November 1968. On 19 November 1968 the Regional Director confirmed to the Applicant that UNICEF did not plan to extend his contract beyond his present tenure, because his post was being abolished in 1969 as a result of a new organization of the work. On 3 March 1969 the Applicant requested the Secretary-General of the United Nations to review that decision. On the same day the Deputy Executive Director wrote to the Applicant, referring to the fact that the New Delhi office was about to be reorganized. He stated *inter alia*:

"We hope that the reorganization can be effected with due regard to people like yourself who have served the Organization well and loyally for some years. The reorganization plans have not yet been finalized. As you know, one of our Headquarters staff is presently in New Delhi to participate in making the final plans. We would like to have the report of his discussions with [the Regional Director] and the staff concerned before coming to conclusions.

"As I cannot at this time assure you that your contract will be renewed and in your own interests, I would urge you not rely on further employment by UNICEF beyond the expiry date of your present contract.

"On the other hand please be assured that the various representations set forth in your letter will receive our sympathetic consideration and it is our hope that a solution will be reached which will be equitable from your viewpoint as well as satisfactory from the viewpoint of UNICEF's responsibilities in India."

On 21 March 1969 the Applicant sent a reminder to the Secretary-General, asking to be allowed to remain in his post until his appeal was disposed of. On 1 April

1969 the Applicant's appointment was extended for three months. The UNICEF Administration having decided not to extend the Applicant's appointment beyond 30 June 1969 but to offer him payment of one month's salary for each year of service less one with UNICEF, the Applicant protested against the decision in a letter of 28 April 1969 addressed to the Secretary-General. On 9 June 1969 he filed an appeal with the Joint Appeals Board. On 1 July 1969 an officer of the Rules and Procedures Section of the Office of Personnel of the United Nations analysed the Applicant's case in a memorandum addressed to the Chief of that Section. The memorandum read in part as follows:

"4. In Mr. Bhattacharyya's case, the circumstances of his appointment left no doubt that he had joined UNICEF with a reasonable expectancy of stable employment. He was seconded from his governmental service at the behest of UNICEF. No reasonable man would have forsaken his long career with his Government in order to accept a short-term appointment with UNICEF. Throughout his service with UNICEF there was nothing in his record to indicate that the latter was in any way dissatisfied with his performance. His satisfactory service undoubtedly strengthened his expectation that his appointment would continue until he reaches the normal retirement age, which is only four years away.

"5. Given this reasonable expectancy of continued employment, the question is whether the decision not to renew the appointment can stand up on the professed ground of abolition of post. If such were indeed the case, whatever expectancy that Mr. Bhattacharyya might have would have lapsed. The file contains little information that can be relied upon to substantiate the argument that the decision was based on a genuine consideration of reduction of forces in the New Delhi Office. In the absence of any contradiction, credence would have to be given to Mr. Bhattacharyya's contention that the UNICEF project of applied nutrition was expanding, that he was merely replaced by the appointment of an internationally-recruited junior professional and that, in any event, vacancies for national professionals existed in UNICEF offices in India for which he would be both suitable and qualified. It is also pertinent to note that even UNICEF headquarters was not fully aware as to how the reorganization of the New Delhi Office would have made Mr. Bhattacharyya's services redundant. It had requested the Regional Director to provide a rational scheme of reorganization, but this request has not been complied with.

"6. . . . Since he was one of the most senior members among the national professionals and in view of his consistent record of satisfactory service and extensive experience in UNICEF work in India, the abolition of post would have to be followed by a search for an alternative post within the UNICEF establishment in India. It does not appear from the file that such efforts have been undertaken. . . .

" . . .

"8. In the interest of both justice and good administration, I believe that UNICEF headquarters should take a definite stand in determining whether the separation of Mr. Bhattacharyya's services was indeed warranted by abolition of post and, if so, whether in view of his long service and satisfactory performance, he should not be transferred to another post where he would be able to continue his contribution to the work of UNICEF

in India. . . . I would therefore recommend that the UNICEF headquarters be requested to take the immediate action of granting Mr. Bhattacharyya a further extension of his appointment for three months and in the meantime to continue its best efforts to explore the possibilities of finding him an alternative post within the UNICEF establishment in India."

On the same day the Chief of the Section expressed his agreement with that recommendation in a note appended to the memorandum, adding:

"Since we are responsible for the final disposition of the case following appeal we are equally responsible for a review of the contested administrative decision before the appeal is filed and heard. We should endeavour to avoid unnecessary or indefensible appeals."

The Joint Appeals Board submitted its report on 16 June 1970. The concluding sections of the report read as follows:

"Considerations and conclusions

"26. In reviewing all aspects of this case the Board particularly considered two basic points: whether there was a violation of Staff Regulations and Staff Rules or non-observance of the terms of appointment of the appellant, and, secondly, if there was a reasonable expectation on the part of the appellant of the continuation of his appointment.

"27. The Board is satisfied that in not renewing the appellant's fixed-term appointment after 30 June 1969, UNICEF did not violate any Staff Regulations and Staff Rules nor the terms and conditions of the appellant's appointment.

"28. The Board also recognizes that normally a fixed-term appointment does not carry an expectation of renewal but under certain circumstances an expectation may have been created such as in this case when the Regional Director wrote to the appellant on 30 January 1963 at the time of offering him the appointment with UNICEF and his letter contained the following stipulations:

'I would also like to add that for staff members who join us there will be opportunities after their first fixed-term contract for regular employment and for more senior posts dependent upon their qualifications and performance.'

"Moreover, it was not unreasonable for the appellant to expect continuation of appointment under fixed-term contracts considering that he could not have been given a permanent appointment by UNICEF in view of his age.

"29. Without prejudice to local conditions and requirements of the Office, the Board feels that once a decision was taken to abolish a Programme Officer's post, probably a more careful review could have been undertaken to decide on the person to be retrenched, taking into account the important question of seniority among other considerations. The Board understands that the appellant was senior to some other Programme Officers and also that no attempt was made to assign the appellant elsewhere.

"Recommendations

"30. In view of the exceptional circumstances prevailing in this case, the Board would have recommended the payment of an indemnity to the appellant. However, UNICEF has paid the appellant Rs. 14541.65, which is equivalent to five months' emoluments. If this payment is an indemnity

and if after a review the Secretary-General finds this indemnity adequate, the Board recommends no further action in this case.”

By a letter dated 14 July 1970, the Applicant was informed that, since the Secretary-General had considered that the separation benefit paid by UNICEF represented an adequate compensatory payment, he had decided that no further action be taken in the case. On 15 September 1970, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. During the Applicant's recruitment UNICEF had given him a definite written commitment on 30 January 1963 to retain him as a regular staff member in more senior posts until the date of his retirement; this amounted to a condition of the Applicant's appointment and his expectation for continuity was based on that commitment and service condition.

2. While selecting the Applicant for separation from UNICEF no regard was paid to the above-mentioned service conditions nor to seniority and other considerations; this was a clear violation of Staff Rule 109.1 (c) (ii).

3. These other considerations included the Applicant's efficient performance in UNICEF, his integrity and also the Regional Director's intention to retain another person in the vacancy created by the Applicant's separation from service.

4. No attempt was made by UNICEF to assign the Applicant elsewhere.

5. Since indemnity is payable only to permanent staff members under Staff Rule 109.3 (Annex III), the Joint Appeals Board treated the Applicant as a permanent staff member; according to Staff Regulation 9.1 (a), the services of a permanent staff member can be terminated by the Secretary-General only in the interest of good administration of the Organization, and provided that the action is not contested by the staff member concerned.

6. The amount paid to the Applicant, if at all an indemnity, is not an adequate compensation.

7. The terms of the Applicant's appointment were deliberately violated because of the Regional Director's prejudice against the Applicant.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right or legal expectancy of reappointment after the expiry of his fixed-term appointment. In particular, the statement in the letter of 30 January 1963 relied on by the Applicant may not reasonably be interpreted to create any obligations on UNICEF's part beyond the explicit terms detailed in the earlier part of the letter. Moreover, whatever the import of that letter at that time, it cannot prevail over the express terms of appointment which were subsequently accepted.

2. The Applicant's separation from service resulted from the expiry of his fixed-term appointment, not from a termination under Staff Regulation 9.1. Accordingly, Staff Rule 109.1 (c) has no application to his case. UNICEF was, therefore, under no legal obligation to consider the Applicant either for any vacancy or for posts already held by staff members with fewer years of fixed-term service. The efforts to place the Applicant elsewhere were not made pursuant to any procedural right.

3. The case does not involve issues of prejudice or improper motive. No commitment or legal expectancy for the Applicant's further service having been

established, the Tribunal is not concerned either with the reasons for the contested decision or with the procedures preceding the Applicant's separation from service. Besides, far from being victimized as a result of personal prejudice, the Applicant was accorded generous and fair treatment to the greatest extent consistent with UNICEF's responsibility for the administration of the Regional Office in India.

The Tribunal, having deliberated from 29 March to 14 April 1971, now pronounces the following judgement:

I. The Applicant, who was an official of the Government of Orissa (India), entered the service of UNICEF on 2 June 1963 as Assistant Field Representative under a fixed-term appointment for two years, on secondment from his Government. His appointment was recorded in a "letter of appointment" signed by him on 8 July 1963. This letter, which was in a standard printed form, provided *inter alia* that "the Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations".

II. Prior to the issue of the above letter, however, the Applicant had discussions and correspondence relevant to his appointment with the Regional Director of UNICEF. In a letter to the Applicant dated 14 July 1962, the Regional Director wrote:

"I appreciate the confidence that you have in our Organization which is evinced by your application but would like to discuss this question further with my colleagues . . .".

Subsequently, in a letter dated 30 January 1963, the Regional Director wrote to the Applicant that

". . . after further consultations with our Headquarters, I am now in a position to offer you the post of Assistant Field Representative in our Hyderabad Office. In the following, the terms of your appointment are spelled out".

After setting out the terms relating to level, children's allowance, leave, etc., the letter stated:

"I would also like to add that for staff members who join us there will be opportunities after their first fixed term contract for regular employment and for more senior posts in the Organization dependent upon their qualifications and performance".

III. The Tribunal notes that in the above letter of 30 January 1963 in which the terms of the Applicant's appointment are "spelled out", no mention is made of the important provision which subsequently appeared in the letter of appointment, namely, that the fixed-term appointment did not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations. Not only was the Applicant's attention not drawn to that provision, but the letter dated 30 January 1963 raised the hope of continued employment with UNICEF dependent upon satisfactory service.

The Tribunal also observes that the closing paragraph in that letter, which read:

"Kindly let us know if you will be able to join us so as to enable us to arrange for the necessary formalities e.g. medical check-up etc.",

indicates that the Applicant was expected to make his decision as to joining the Organization on the basis of the contents of the letter.

IV. The Applicant claims a right to renewal of his contract and to continuance in a post with UNICEF until he reaches the age of superannuation. His main ground for such claim is that in accepting the offer of a fixed-term appointment, he relied on the statement in the letter dated 30 January 1963 to the effect that, depending upon his qualifications and performance, he would have an opportunity "for regular employment and for more senior posts" in the Organization. This, the Applicant alleges, created a legitimate expectancy of continued employment with UNICEF. He also claims a corresponding commitment in this respect by the Respondent.

V. As a general rule fixed-term appointments do not carry a right of renewal. This is explicit in Staff Rule 104.12 (b), the wording of which has been incorporated in the standard letter of appointment. Nevertheless, the Tribunal is competent to examine the surrounding facts in which the letter of appointment was signed. The Tribunal has to consider the contract as a whole, not only by reference to the letter of appointment but also in relation to the circumstances in which the contract was concluded.

In Judgement No. 95 (*Sikand*) the Tribunal stated:

"The Tribunal in its jurisprudence has established that the terms and conditions of employment of a staff member with the United Nations may be expressed or implied and may be gathered from correspondence and surrounding facts and circumstances".

VI. The Tribunal observes that the contract of employment in this case presents special features. The antecedents to the letter of appointment and particularly the official offer of the appointment and its terms contained in the letter of the Regional Director dated 30 January 1963 are of significant relevance.

The Tribunal further notes that the Regional Director wrote that letter following upon relevant conversations and correspondence with the Applicant and "after . . . consultations with our Headquarters". The letter was, therefore, a studied and fully considered document.

VII. The Tribunal takes note of the facts stated in the memorandum of 1 July 1969 relating to the Applicant's case, addressed by an officer of the Rules and Procedures Section to the Chief of that Section, that the Applicant "was seconded from his governmental service at the behest of UNICEF" and that "throughout his service with UNICEF there was nothing in his record to indicate that the latter was in any way dissatisfied with his performance".

VIII. The Tribunal further notes the difference in the language used while offering employment. In the case of *Rajappan* (Judgement No. 139), another employee of UNICEF, the letter offering employment stated:

"At the end of that period, subject to satisfactory service and mutual agreement, the probationary contract would be converted into a regular contract with the United Nations".

In the case of *Dale* (Judgement No. 132), an employee of ICAO, the letter setting forth the conditions of service stated:

"Your initial contract will be for a period of one year, renewable subject to satisfactory service and by mutual consent."

The Tribunal has ruled in the past that where a contract was renewable subject to satisfactory service and mutual consent, the Administration had the right to withhold its consent even though the Applicant's service was satisfactory. But in the present case the letter dated 30 January 1963 mentioned the opportunities for regular employment and for more senior posts dependent upon qualifications and performance only and made no reference to any other condition. Taking all circumstances into account, it is clear that a reasonable expectancy of continued employment with UNICEF was created in the Applicant's mind.

IX. The Tribunal observes that the Applicant's record of performance was of a high standard and this has not been disputed by the Respondent. In a letter dated 23 January 1967, the Deputy Regional Director wrote to the Government of Orissa that "Mr. Bhattacharyya's service with us during the last 3½ years has been very useful to UNICEF especially in the Applied Nutrition field". In the periodic report dated 5 June 1968, the Applicant was rated by the Regional Director as "a staff member who maintains a good standard of efficiency". The Tribunal, therefore, finds that the circumstances of the Applicant's fixed-term appointment and his performance of service created a legal expectancy of continued employment with UNICEF.

X. The Tribunal further decides that such legal expectancy created a corresponding obligation on the part of the Respondent to provide continuing employment to the Applicant within UNICEF.

XI. The Tribunal notes that the Regional Director, in his letter to the Applicant dated 19 November 1968, found it necessary to base the decision not to renew the Applicant's contract on a ground other than the expiration of his fixed-term contract, namely:

"because the post which you hold is being abolished in 1969 as a result of a new organization of the work."

XII. The Tribunal finds that the Respondent thereby acknowledged his duty to justify the non-extension of Applicant's contract by abolition of post.

The Tribunal further finds that the Respondent had to take into consideration the seniority of the Applicant in respect of posts held by staff members with fewer years of fixed-term service and also to make a *bona fide* search for an alternative post within UNICEF in accordance with the procedure prescribed in Staff Rule 109.1 (c).

XIII. The Tribunal observes that the responsibility of the Respondent to find a suitable alternative post for the Applicant was discussed in the memorandum of 1 July 1969 from an officer of the Rules and Procedures Section, where it was stated:

". . . The file contains little information that can be relied upon to substantiate the argument that the decision was based on a genuine consideration of reduction of forces in the New Delhi Office. In the absence of any contra-indication, credence would have to be given to Mr. Bhattacharyya's contention that the UNICEF project of applied nutrition was expanding, that he was merely replaced by the appointment of an internationally-recruited junior professional and that, in any event, vacancies for national professionals existed in UNICEF offices in India for which he would be both suitable and qualified. . . . Since he was one of the most senior members

among the national professionals and in view of his consistent record of satisfactory service and extensive experience in UNICEF work in India, the abolition of post would have to be followed by a search for an alternative post within the UNICEF establishment in India."

This memorandum was approved by the Chief of the Rules and Procedures Section in the following terms:

"This is a very thorough but fair analysis of the case and I entirely agree with [the officer's] recommendation. Since we are responsible for the final disposition of the case following appeal we are equally responsible for a review of the contested administrative decision before the appeal is filed and heard. We should endeavour to avoid unnecessary or indefensible appeals."

The Joint Appeals Board was also of the view that "probably a more careful review could have been undertaken to decide on the person to be retrenched, taking into account the important question of seniority among other considerations".

Accordingly, the Tribunal finds no satisfactory proof that either the seniority of the Applicant was taken into consideration or a search for a suitable alternative post was made by the Respondent.

XIV. The Applicant claims reinstatement in the service of UNICEF and continued employment until 30 June 1973, when he expected to be superannuated. Specific performance of an obligation undertaken is difficult in case of non-renewal of fixed-term contracts. Where specific performance is impossible, the Tribunal has held that compensation in lieu thereof may prove to be adequate and proper relief (Judgements Nos. 68 and 92). In this case, the Applicant could have anticipated continuation in service until superannuation, i.e. for a period of four years from the date of his separation from service. In Judgement No. 132 (*Dale*) the Tribunal has held that in the absence of effective performance of duties the situation may be assimilated in a case where services were terminated immediately after renewal of the contract. In such a situation, a staff member would be entitled to a termination indemnity of one week's salary for each month of uncompleted service. Accordingly, the Applicant could expect to receive an amount approximately equivalent to one year's salary. Taking into account that five months' salary have been paid already to the Applicant as indemnity, the Tribunal fixes as compensation an amount of seven months' net base salary, and awards accordingly.

XV. The other pleas of the application are rejected.

(Signatures)

R. VENKATARAMAN
President

CROOK
Vice-President

Zenon ROSSIDES
Member

Suzanne BASTID
Vice-President, alternate member

Jean HARDY
Executive Secretary

Geneva, 14 April 1971