

8 February 1973 from the Chief of the Personnel and Administrative Services Department of ILO, produced by the Respondent, while admitting that the Applicant's suitability for employment was examined by ILO, states that the Applicant was not accepted as he did not possess the requisite qualifications and that no adverse report on the Applicant was "received at the ILO".

XI. The Tribunal is unable to hold on the evidence that the rejection of the Applicant's candidacy by ILO was directly due to the adverse periodic report. But it is clear from letters produced by the Applicant that the existence of an unfavourable report on his performance was generally known. It also appears from the file that at least one eminent person felt that his supporting action on behalf of the Applicant would have been useless in view of the existence of the unfavourable periodic report. The Tribunal therefore reaches the conclusion that the Applicant's employment prospects were affected to some extent by the invalid periodic report of June 1969.

XII. It is not easy to assess in financial terms the extent of the loss suffered by the Applicant on account of the invalid periodic report. The Tribunal has to fix a fair and reasonable compensation for the injury sustained.

XIII. The Tribunal accordingly awards the Applicant a sum of \$1,000 as compensation for the prejudice caused to his prospects of employment by the invalid periodic report of June 1969.

(Signatures):

R. VENKATARAMAN
President

Suzanne BASTID
Vice-President

Geneva, 23 March 1973

F. A. FORTEZA
Member

Jean HARDY
Executive Secretary

Judgement No. 168

(Original: French)

Case No. 160:
Mariaffy

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

Termination of the employment of a staff member holding a probationary appointment.

Decision of the Secretary-General to terminate the Applicant's appointment on the recommendation of the Appointment and Promotion Board, itself adopted on the recommendation of the Office of Personnel in New York, whereas the competent authorities of the United Nations Office in Geneva had recommended extension of the probationary period for one year.—Request of the Applicant for rescission of this decision on the ground that he had reason to count on a one-year extension of his probationary service.

The two periodic reports submitted to the Appointment and Promotion Committee covered approximately 21 months during which, because of a car accident, the Applicant had effectively worked only approximately 16 months.—The Applicant refrained from drawing attention to the fact that, for reasons beyond his control, he had not in fact had the opportunity to serve a normal probationary period.—Lack of any strict rule relating to the length of service which must be taken into account.—The Respondent

has a wide margin of discretion in determining the moment at which a decision is taken on the future of the holder of a probationary contract.—The Tribunal concludes that the Respondent had a right to make a final decision on the future of the Applicant, on the basis of the information at his disposal and at a date consonant with normal administrative practice.—The Respondent also took medical factors into consideration.—Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Francisco A. Forteza; Mr. Mutuale-Tshikantshe;

Whereas, on 18 May 1972, David Mariaffy, a former staff member of the United Nations, filed an application requesting the Tribunal:

“(a) to rescind the decision by the Secretary-General to terminate the Applicant’s appointment on 28 [26?] February 1971;

“(b) to fix at the equivalent of one year’s salary the compensation to be paid to the Applicant should the Secretary-General, within 30 days of notification of the judgement, decide, under the option given to him in article 9, paragraph 1, of the Statute of the Administrative Tribunal, that the Applicant shall be compensated for the injury sustained.”;

Whereas the Respondent filed his answer on 4 August 1972;

Whereas, on 16 October 1972, the Applicant filed written observations, in which he made a request for oral proceedings;

Whereas, on 2 February 1973, the Executive Secretary of the Tribunal informed the parties that the President had decided that the circumstances of the case did not justify such proceedings;

Whereas the facts in the case are as follows:

The Applicant was given a probationary appointment by the Organization on 3 November 1968 as a Sales Promotion Officer in the Documents Division of the United Nations Office at Geneva. In the periodic report covering his first year of service, his superiors described him as “a staff member who maintains a good standard of efficiency” while expressing regret at the considerable amount of sick leave which he had been obliged to take as a result of a car accident. In a second report, covering the period from 3 November 1969 to 31 July 1970, during which the Applicant took only three days sick leave, the Second Reporting Officer considered that the Applicant “could be a staff member who maintains a good standard of efficiency”, and the First Reporting Officer made the following comments:

“As a result of Mr. Mariaffy’s successive accidents at the beginning of his probationary period, I am hardly in a position to give as favourable an evaluation of him as I would wish. It is regrettable that, during the period under review, Mr. Mariaffy has not been able to contribute as fully as I had hoped to the work of the Section and that he has not been able to provide all the expertise and new knowledge that could legitimately be expected of a promoter of publication sales recruited specifically for his specialized knowledge.”

On 17 August 1970, the Chief of the Personnel Administration Section informed the Applicant that the Appointment and Promotion Board in New York would shortly be reviewing his appointment; that his superiors did not feel that they were in a position at present to recommend him for a permanent appointment, and had thus recommended a one-year extension of his probationary appointment; that the Director of the Medical Service (in Geneva) considered it advisable from the medical point of view that his probationary period should be extended; and that the Personnel Administration

would accept the opinion of the Chief of the Documents Division and the Director of the Medical Service (in Geneva) and recommend to the Appointment and Promotion Board in New York that his probationary period should be extended by one year. On 13 January 1971, the Director of Personnel wrote to the Applicant as follows:

“The Appointment and Promotion Committee has recently reviewed the probationary appointment which you hold and has made a recommendation to the Secretary-General through the Appointment and Promotion Board. Extracts from the Committee’s report will be sent to you on request.

“After careful study of your case, and in the light of the above report and all the relevant circumstances, the Secretary-General has decided to accept the Board’s recommendation and to terminate your probationary appointment on the grounds that you have not demonstrated your suitability as an international civil servant as required by Staff Rule 104.13 (a) (i). This decision has been taken in the interest of the Organization, pursuant to Staff Regulation 9.1 (c).

“This letter constitutes official notice of termination under Staff Rule 109.3 (b). This notice shall take effect on 26 January 1971.

“Since 30 days’ notice is required for staff members whose probationary appointment is to be terminated, the date of your separation from service will be 26 February 1971.

“ . . . ”

Since the Applicant asked to receive extracts from the Committee’s report, the Director of Personnel sent them to him on 26 February 1971 in a letter stating the following:

“I wish to inform you that the Appointment and Promotion Committee considered your case at its 1236th meeting in the light, *inter alia*, of the two periodic reports in your file and the statements made by the Medical Director of the United Nations. The Committee’s report reads as follows:

“[It was reported to the Committee] ‘that the United Nations Office at Geneva had recommended a one-year extension of Mr. Mariaffy’s probationary appointment but that the Office of Personnel, upon review of the medical report on Mr. Mariaffy’s state of health, had decided to recommend that his services be terminated.

“ ‘The Committee, in the light of the information before it, *decided to agree with the intention of the Office of Personnel to recommend that Mr. Mariaffy be separated from the service of the Organization.*’ ”

On 3 March 1971, the Applicant wrote to the Secretary-General requesting reconsideration of the decision to terminate his appointment. He drew particular attention to a new medical examination, which had been favourable, and to a third periodic report, covering his last seven months in his post, in which he was described as “a staff member who maintains a good standard of efficiency” and in which it was stated that he had “regained his equilibrium, his drive, and his dynamism” and that, since October 1970, he had “given full satisfaction”. Since the decision was confirmed on 23 March 1971, the Applicant, on 16 April 1971, appealed to the Joint Appeals Board, which made its report on 16 November 1971. The last two sections of that report read as follows:

“VIII. *Conclusions*

“56. In view of the above considerations, the Board unanimously reached the following conclusions:

“57. The Applicant has not demonstrated his suitability as an international civil servant, as required by Staff Rule 104.13 (a) for the granting of a permanent appointment.

“58. The Secretary-General’s decision to terminate the Applicant’s appoint-

ment under Staff Regulation 9.1 (c) is legally valid and was taken in the interest of the United Nations.

"59. Independently of these unanimous conclusions, the Chairman expressed the view, which was not shared by the other members of the Board, that, while the Applicant had no legal right to an extension of his probationary appointment, the fact that Personnel Services in Geneva and the unit concerned had both recommended that the probationary period be extended for one year constituted an important element which should not be overlooked. If the interests of the Administration justified the Secretary-General's decision to dispense with the Applicant's services, justice, which had always governed the decisions of the Secretary-General, required that all factors should be taken into account either in determining suitability as an international civil servant, or in considering the possibility of an extension, or, again, in establishing the amount of any termination indemnity. The indemnity provided for in Annex III to the Staff Regulations, which might be just in the case of a termination based on a unanimous opinion, might be inadequate in the case of a decision based on a divided opinion, especially since, in this case, the Geneva recommendation caused the Applicant to count on an extension of the probationary period and since the health reasons which, in short, had motivated the decision were not such as to establish entitlement to a disability pension or other benefit.

"IX. Recommendations

"60. In view of the above considerations and conclusions, the Board unanimously recommends that the Secretary-General should maintain his decision to terminate the Applicant's appointment.

"61. The Chairman, whose view is not shared by the other members of the Board, recommends that the Secretary-General, for the reasons set out above, consider the possibility of granting the Applicant an indemnity larger than that provided for in Annex III to the Staff Regulations. This indemnity could, in his view, amount to the equivalent of four months' salary."

On 15 February 1972, the Director of Personnel informed the Applicant that the Secretary-General had decided to accept the recommendation of the Joint Appeals Board that the decision to terminate his appointment should be maintained and that the standard indemnity should be paid. On 18 May 1972, the Applicant filed the above-mentioned application.

Whereas the Applicant's principal contentions are:

1. Judgement No. 107, referred to by the Joint Appeals Board, has no relevance to this case. In the case of Judgement No. 107, express medical reservations had been made at the time of appointment, and a fixed-term appointment was involved.

2. The termination deprived the Applicant of a legitimate expectation that he would be able to continue his career, an expectation encouraged by the recommendation of his superiors, the Geneva Personnel Administration and the Geneva Medical Service.

3. In so far as it is based on the views of the Director of the Medical Service in New York, the termination deprives the Applicant—for medical reasons resulting from events subsequent to his appointment—of any future benefits under the Pension Fund and medical insurance schemes in which he had become a participant on his appointment.

4. In so far as, belatedly and before the Joint Appeals Board, it was alleged that the Applicant had not "demonstrated his suitability as an international civil servant", the termination was unjust and ill-timed since, on the one hand, it is not true to say that the Applicant had not demonstrated his suitability as an international civil servant

and, on the other, the Appointment and Promotion Board did not have before it evaluation material covering a normal two-year probationary period.

5. Staff Regulation 9.1 (c), on which the Respondent's case essentially rests, is not relevant to the present case.

6. The Secretary-General's decision not to extend the Applicant's probationary appointment was not consistent with Staff Regulation 4.5 (b); the Applicant had reason to expect an extension of his probationary period.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's decision not to extend the Applicant's probationary appointment for a third year was consistent with Staff Regulation 4.5 (b) and the Applicant had no right to expect an exceptional extension of probationary service beyond the normal two-year period prescribed in Staff Regulation 4.5 (b). Since he had been employed for the normal probationary period, and since his case had been reviewed under the standard procedure, the Applicant had no legal right to remain in the service of the Organization. The recommendation by the Geneva Personnel Administration, whether kept confidential or notified to the staff member, was made at an intermediate level in the course of the decision-making procedure. Medical factors played an important role in the Applicant's case, but it was not the task of the Tribunal to determine whether the Applicant's failure to demonstrate his suitability was entirely, or primarily, or only partly, attributable to medical reasons.

2. The contested decision was taken by the Secretary-General in the proper exercise of his authority under Staff Regulation 9.1 (c) and after proper procedures.

The Tribunal, having deliberated from 22 to 26 March 1973, now pronounces the following judgement:

I. The Applicant held a probationary appointment. According to paragraph 3 of his letter of appointment and Staff Rule 104.12 (a), the period of probationary service is normally two years, although it can in exceptional cases be reduced or extended for not more than one year.

Shortly before the end of this normal two-year period, the competent authorities in Geneva did not recommend that the Applicant should be given a permanent appointment, or that his appointment should be terminated, but recommended that his probationary appointment should be extended for an additional year. The Office of Personnel in New York did not accept that view, but recommended that the Applicant's services should be terminated. The Appointment and Promotion Committee, and subsequently the Appointment and Promotion Board, accepted that recommendation; in accordance with it, and pursuant to Staff Regulation 4.5 (b), the Secretary-General decided to terminate the Applicant's appointment. According to the letter from the Director of Personnel dated 13 January 1971, which constituted official notice of termination and which was confirmed by his letter of 23 March 1971, the decision was based on the Applicant's failure to demonstrate his suitability as an international civil servant as required by Staff Rule 104.13 (a) (i); in his first letter, the Director of Personnel added: "This decision has been taken in the interest of the Organization, pursuant to Staff Regulation 9.1 (c)"; in his second letter, he referred to "serious reservations expressed by the Director of the Medical Service".

II. The Applicant contests that decision and seeks its rescission. He considers that he had reason to count on a one-year extension of his probationary appointment, as had been recommended by the Geneva Office, in order that a decision regarding the granting of a permanent appointment should be taken in full awareness of his abilities.

III. The Tribunal notes that the two periodic reports submitted to the Appointment and Promotion Committee covered approximately 21 months during which, because of his car accident, the Applicant had effectively worked only approximately

16 months. The Applicant was aware of those reports and he had been informed, on 17 August 1970, of the forthcoming review of his probationary appointment. He had also been informed that he had the option of submitting a written statement to the Board, but he refrained from doing so. He thus did not deem it necessary at that time to draw attention to the fact that, for reasons beyond his control, he had not in fact had the opportunity to serve a normal probationary period, and that he considered that he had the right to an extension.

IV. Neither the Committee, nor the Board, nor the Respondent considered that the effective length of the Applicant's service could prevent the taking of a decision to terminate his appointment. The Tribunal observes that the probationary contract and the provisions of the Staff Rules and Staff Regulations applicable to it contain no strict rules relating to the length of service which must be taken into account. It is stated that "The period of probationary service under such an appointment shall normally be two years" (Staff Rule 104.12 (a)). It is also indicated that "The probationary appointment shall have no specific expiration date" (*ibid.*). The provision relating to the future of holders of probationary appointments reads: "At the end of the probationary service the holder of a probationary appointment shall be granted either a permanent or a regular appointment or be separated from the service" (*ibid.*). Only the possibility of extending the probationary period "in exceptional circumstances" is limited to one year at the most (*ibid.*).

V. It follows from this set of provisions that the Respondent has a wide margin of discretion in determining the moment at which a decision is taken on the future of the holder of a probationary contract. In addition, the Applicant did not choose to avail himself of the option open to him to draw attention to the specific factors in his own situation following his car accident. Finally, it should be noted that, at the moment when the final decision was taken, a further period of seven months was covered by a third periodic report, the findings of which were considered by the Respondent, although the Respondent did not consider it necessary to change his view.

Thus there are no grounds for asserting that the Respondent was legally obliged to extend the probationary period in order to compensate for the Applicant's absences resulting from his accident. The Tribunal thus concludes that the Respondent had a right to make a final decision on the future of the Applicant on the basis of the information at his disposal and at a date consonant with normal administrative practice.

VI. The Tribunal further notes that, independently of Staff Regulation 9.1 (c) which he invoked, the Respondent gave the reasons for the termination decision by referring not only to the provisions of Staff Rule 104.13 (a), but also to the opinion of the Director of the United Nations Medical Service. The assessment of the Applicant's abilities is a matter within the competence of the Respondent. The Respondent must also take into consideration, on the recommendation of his appropriate advisers, medical factors as they exist at the time when the question of the granting of a permanent contract arises.

VII. For the above reasons, the application is rejected.

(Signatures):

Suzanne BASTID
Vice-President, *presiding*

F. A. FORTEZA
Member

Geneva, 26 March 1973

MUTUALE-TSHIKANTSHE
Member

Jean HARDY
Executive Secretary