

STATEMENT BY MR. FRANCIS T. P. PLIMPTON

In agreeing with the substance and conclusions of the above judgement, I should record my inability to concur with some of the reasoning or with some of the wording.

(Signature)

Geneva, 19 April 1974

Francis T. P. PLIMPTON

Judgement No. 183

(Original: English)

Case No. 177:
Lindblad

Against: The Secretary-General
of the United Nations

Dismissal for misconduct of a staff member holding a fixed-term appointment.

No dispute between the Applicant and the Respondent as to the circumstances which led to the termination of the Applicant's appointment and those in which the Applicant's fault was discovered.—Request for rescission of the decision terminating the appointment.—Applicant's argument that he was never called upon to answer or offer an explanation for the acts of which he is accused.—Procedure followed by the Respondent.—Consideration of the question whether that procedure complied with the Staff Regulations and Rules.—Conclusion of the Tribunal that the Respondent acted within the terms of the Staff Regulations and Rules, but that wherever he had discretion to opt between two courses of action he selected that which was less favourable to the Applicant.—Consideration of the question whether the Applicant was accorded due process.—Application by the Respondent of Personnel Directive PD/1/69.—No evidence that any written charges were made against the Applicant or that he had any opportunity to reply to such charges in any considered way.—Particular seriousness of this omission in this case.—Conclusion of the Tribunal that the Applicant was not accorded a fair opportunity to give his version of all the relevant facts or to explain his conduct in its entirety.—A staff member against whom disciplinary proceedings are taken should be furnished with a specific charge and should be accorded the right to be heard before a sanction is imposed on him, including the opportunity to participate in the examination of the evidence.—Since Personnel Directive PD/1/69 does not explicitly state such a right, it does not provide adequate protection for staff members away from Headquarters or Geneva and does not establish an equivalent procedure to the Joint Disciplinary Committee procedure as envisaged in Judgement No. 130.—Since the Applicant was not accorded fair procedure, the contested decision is not well founded.—Assimilation of the Applicant's situation to that of a staff member whose contract would have expired on the date of his dismissal.—Award to the Applicant of an indemnity equivalent to 30 working days' pay.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Madame Paul Bastid, Vice-President; Sir Roger Stevens;

Whereas, at the request of Anders Lindblad, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 16 July 1973 and again to 18 October 1973 the time-limit for the filing of an application to the Tribunal;

Whereas, on 18 October 1973, the Applicant filed an application in which he requested the Tribunal:

"1. To declare the decision of the Secretary-General to dismiss me from service with the United Nations for misconduct under Staff Regulation 10.2 and Staff Rule 110.3 (b) invalid, being based on misrepresentation of my conduct and the erroneous assumption that I was responsible for a number of acts (namely, disposing of tax-free liquor on a number of occasions and over a prolonged period, other than on 7 December 1971) for which, contrary to the norms of due process, I was never called to answer or offer an explanation, and in regard to which I hold my behaviour as being never contrary to the staff rules,

"2. To rescind this decision of the Secretary-General as communicated to me by Mr. M. H. Gherab, Assistant-Secretary-General, Director of Personnel, in a letter dated 5 January 1972,

"3. (a) To order my reinstatement as a staff member of the United Nations in the same quality and capacity as that held by me on 5 January 1972 and

"(b) To order that a fair and equitable disciplinary measure be taken under Staff Rule 110.3 (b) or alternatively,

"4. To order the implementation of the recommendation of the Joint Appeals Board that the Secretary-General withdraw his decision of dismissal for misconduct and that a written reprimand be placed in my file and that I be allowed to resign from the date in which I actually left the service of the United Nations (Joint Appeals Board—Report to the Secretary-General, Case no. 224, para. 25) and

"5. To fix, in accordance with article 9 of the Statute of the Administrative Tribunal, the amount of compensation to be paid to me, equivalent to two years' net base salary, should the Secretary-General decide that I be compensated without any further action in my case.";

Whereas the Respondent filed his answer on 28 December 1973;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 20 June 1969 as a Field Service Security Officer under a fixed-term appointment of one year and was assigned to the United Nations Truce Supervision Organization in Palestine (UNTSO). On 20 June 1970 his appointment was extended to 30 June 1971 and on 1 July 1971 it was further renewed for one year. In periodic reports covering his service from June 1969 to June 1971 the Applicant was rated as a staff member who maintains a good standard of efficiency, and his name was included in the promotion list for 1972.

On 7 December 1971, the Supervisor of the UNTSO Service Institute of Jerusalem reported to the Deputy Chief Administrative Officer of UNTSO that for some time the Applicant had been observed purchasing cigarettes and liquor in quantities which seemed to be in excess of his personal requirements; on that day in particular, the Applicant had made an unusually large purchase and the fact had been reported to the Chief of the Survey and Investigation Unit of UNTSO. On the same day the Tiberias Control Centre, which had been instructed to stop the Applicant on his way back to Damascus, his duty station, and to ascertain the amount of Service Institute items carried by him searched his vehicle and found that most of the items purchased by him were missing. The Applicant was asked to explain in writing the discrepancies between the quantity purchased and the quantity carried and, after making his statement, he was allowed to proceed to Damascus. In his statement, the Applicant acknowledged that he had disposed of the remainder to a friend in Jerusalem, that he had not been compensated for these items, but that he expected to receive payment later. Upon his arrival at Damascus, the Applicant wrote a second statement in which he identified the friend to whom he had disposed of the bulk of his purchase and in which he volunteered

information concerning previous purchases he had made at the Service Institute; in conclusion the Applicant stated that he now fully realized the stupidity of his actions and that he was prepared to assist the United Nations authorities in an investigation of the incident, and he asked that in view of his previous unblemished record and of the circumstances of the incident judgement of his actions should not be too harsh. The Applicant's statements were transmitted by the Chief Administrative Officer of UNTSO to the Chief of the Field Operations Service at Headquarters on 11 December 1971, together with other documents related to the case. On 15 December 1971 the Chief of the Field Operations Service recommended the Applicant's immediate termination to the Office of Personnel. On 22 December 1971 the Director of Personnel recommended to the Secretary-General that the Applicant be dismissed for misconduct and that no termination indemnities be paid to him. On 5 January 1972 the Director of Personnel sent the following letter of dismissal to the Applicant:

"This is to inform you that the Secretary-General has decided to dismiss you from service with the United Nations for misconduct under Staff Regulation 10.2 and Staff Rule 110.3 (b).

"This letter constitutes formal notice of dismissal under Staff Rule 109.3 (b). The Secretary-General has decided not to grant you any termination indemnity under Annex III (d) of the Staff Regulations. Your dismissal date will be the date of receipt of this letter.

"In cases of staff members holding fixed-term appointments, the required period of notice is thirty days. The Secretary-General, however, has decided to grant you compensation in lieu of notice under Staff Rule 109.3 (c). Your last working day will, therefore, be the same as the date of dismissal. You will also receive payment for accrued annual leave within the limits of the Staff Rules."

On 17 January 1972 the Applicant requested the Secretary-General to reconsider his decision "in the light of the following:

"(a) The offense followed two and a half years of exemplary service to the Organization which included a total of one year's service at the Suez Canal during periods of intense military activities. I feel that the fact of placing my life in considerable danger for an extended period in the interests of the Organization should be taken into account when passing judgement.

"(b) The amount of goods involved was minimal and in fact no payment was ever received in return.

"(c) The goods were reluctantly handed over after considerable persuasion had been brought to bear on me.

"(d) No attempt was made to cause confusion by lying after having been caught when this could quite easily have resulted in UN action not being taken.

" . . . "

On 15 February 1972 the Director of Personnel informed the Applicant that, having re-examined his case in the light of the various points raised by him, the Secretary-General had concluded that there were no valid grounds for changing his decision. On 22 February 1972 the Applicant lodged an appeal with the Joint Appeals Board, which submitted its report on 18 December 1972. The considerations, conclusion and recommendation of the Board read as follows:

"Considerations

"18. The Board was concerned to find that in spite of the decision of the United Nations Administrative Tribunal in the Zang-Atangana case no procedure equivalent to referral to the Joint Disciplinary Committee had been established for staff members serving at duty stations other than Headquarters or Geneva. This was all the more surprising in locations where the number of

staff members stationed in the area would make it easy to set up the proper machinery.

"19. The Board considered that the present appeal provided an additional example of the lack of equal protection for staff members serving in the field resulting from the absence of such a procedure, which could have been easily remedied by taking the proper initiative.

"20. The Board noted further that in Personnel Directive PD/1/69 of 28 January 1969 a procedure had been established to 'enable the Secretary-General to examine effectively and without delay cases involving misconduct by staff members serving away from Headquarters or Geneva'. The Board considered that while in the present case there had been substantial compliance with the procedure laid down in that Directive, that procedure in itself could not be deemed to provide the safeguards inherent in the Joint Disciplinary Committee procedure. Consequently, in view of the absence of an examination of the case by a body such as the Joint Disciplinary Committee, the Board felt obliged to look itself into the substance of the case.

"21. The Board noted the clear statement in the Field Administration Handbook, page A-23 of January 1960, that whenever staff assigned to field offices enjoyed privileges and immunities under the Convention on the Privileges and Immunities of the United Nations, except as allowable under laws of the State in which articles had been imported, recipients should 'under no circumstances sell, barter, exchange or give away articles received under exemption from customs duties'. According to that directive, in cases of doubt a reference must be made to the Field Operations Service for advice. Provision was made, by way of exception and with the approval of the Head of the Office, for a recipient to make an outright gift of a limited quantity of articles received free from customs duties 'in case such gift is used in reciprocation of social obligations incurred, which cannot be reciprocated properly otherwise'. The Board observed that the appellant's action was a violation of that directive and an abuse of the privileges and immunities accorded to the United Nations.

"22. The Board emphasized the importance for all staff members to maintain high moral standards and at all times conduct themselves in a manner befitting their status as international civil servants and considered that the appellant's behavior justified his leaving the service of the United Nations.

"23. The Board noted, however, that: (a) the appellant had not been given a warning concerning his conduct and the suspicions it had aroused; (b) the offence of sale of the goods he had purchased had not been actually carried out and as far as the Board could ascertain he had not gained any profit; (c) the appellant fully co-operated with the authorities, readily admitted his fault and did not behave in any way as a person used to improper commercial transactions; (d) the supervisors of the appellant who were most familiar with the circumstances of the case as well as with his character did not feel that he deserved such a severe punishment as dismissal for misconduct.

"24. The Board felt that in the light of all these considerations a less severe disciplinary measure might have been more appropriate.

"Conclusion and recommendation"

"25. The Board recommends that the Secretary-General withdraw his decision of dismissal for misconduct and that a written reprimand be placed in the appellant's file and that he be allowed to resign from the date on which he actually left the service of the United Nations."

On 2 February 1973 the Assistant Secretary-General for Personnel Services informed

the Applicant that, in view of the serious nature of his misconduct and in the absence of any substantial grounds that would warrant reconsideration of the decision of dismissal, the Secretary-General had decided to maintain his decision. On 18 October 1973 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The factual information on which the Secretary-General based his decision was incomplete, incorrect and misleading. It implied in particular that the Applicant was responsible—and had acknowledged responsibility—for a number of acts of unlawful disposal of duty-free goods prior to 7 December 1971 which the Applicant had never committed and which were never the subject of the procedures required under paragraph 2 of Personnel Directive PD/1/69 of 28 January 1969. One mistake made by the Applicant and immediately admitted by him was used as a final and definitive proof of a whole line of conduct attributed to him which was never so much as tested, let alone proven.

2. The procedures outlined in the above-mentioned Personnel Directive were not properly followed.

Whereas the Respondent's principal contentions are:

1. The Applicant was accorded a fair opportunity to give his version of the facts as well as to give his explanation of his conduct, including extenuating circumstances, all of which were taken into account in reaching the decision. The applicable personnel directive and the Staff Rules and Regulations were complied with; and by virtue of such compliance, the Applicant's procedural rights were observed.

2. The contested decision was not based on incorrect facts.

3. The dismissal was not arbitrary.

The Tribunal, having deliberated from 8 to 23 April 1974, now pronounces the following judgement:

- I. The Tribunal notes that there is no dispute between the Applicant and the Respondent as to the circumstances which led to the termination of the Applicant on 5 January 1972. The Applicant admits to having purchased on 7 December 1971 tax-free goods at the Service Institute in Jerusalem in excess of his personal requirements in contravention of the directives regarding privileges and immunities given in the Field Administration Handbook. He also acknowledges that on earlier occasions he had made purchases of similar items which he had given away as gifts in return for hospitality. While he does not admit that in so doing he was at fault, the Tribunal notes that, under the directives referred to, gifts are permitted only by way of exception and with the approval of the Head of the Office, which was not obtained in this case. Further there is no dispute as to the circumstances in which the Applicant's fault was detected. On arriving at the Tiberias Control Centre on 7 December 1971 on his way back to Damascus, he was questioned regarding the purchases he had made, and admitted in a written statement that he had disposed of most of the articles to a friend in Jerusalem. Having been advised to report the matter to his superior officer on arrival in Damascus, he prepared a further statement in which he referred to earlier purchases. He fully acknowledged his fault with regard to his purchases of 7 December 1971, offered to assist in any necessary investigations and asked that he should not be judged too harshly.

- II. The Applicant seeks rescission of the administrative decision of dismissal on the grounds that the decision was based on an erroneous assumption that he was guilty of disposing of tax-free goods on a number of occasions over a prolonged period for which, contrary to the norms of due process, he was never called upon to answer or offer an explanation.

The Respondent, however, claims that the Applicant "was accorded a fair oppor-

tunity to give his version of the facts as well as to give his explanation of his conduct, including extenuating circumstances, all of which were taken into account in reaching the decision” and that “the applicable personnel directive and the Staff Rules and Regulations were complied with; and by virtue of such compliance, the Applicant’s procedural rights were observed”.

III. The Respondent’s action was as follows: All the various documents in the case, comprising the Applicant’s two statements of 7 December 1971, confidential reports by the Service Institute Supervisor to the Deputy Chief Administrative Officer and by the Deputy Chief Administrative Officer to the Chief Administrative Officer, a report from the Field Service Assistant at Tiberias and a letter from the Applicant’s superior officer at Damascus, were sent by the Chief Administrative Officer to the Chief of the Field Operations Service on 11 December 1971 under cover of a letter which stated *inter alia*: “These documents are self-explanatory and constitute as a whole the report on the case. I assume that nothing further will be needed”. The Chief of the Field Operations Service sent the same documents on 15 December 1971 to the Office of Personnel, observing that in his opinion they constituted incontrovertible evidence of the Applicant’s “blatant act of wrong-doing”, and in view of the seriousness of the matter recommending his immediate termination. The Director of Personnel recommended to the Secretary-General that the Applicant be dismissed for misconduct under Staff Regulation 10.2 and Staff Rule 110.3 (b), that “considering the gravity of the offense to the interests of the Organization . . . no indemnities be paid”, and that compensation be paid in lieu of one month’s notice. These recommendations were agreed to by the Secretary-General on 29 December 1971 and the Applicant was informed of this decision in a letter from the Director of Personnel dated 5 January 1972.

IV. The Tribunal has therefore to consider whether, under the procedures followed, (a) the Staff Regulations and Rules were complied with and (b) the Applicant was accorded due process and a fair opportunity to give his version of the facts and his explanation of his conduct, including extenuating circumstances.

V. As to (a), the Respondent acted under the first paragraph of Staff Regulation 10.2 and under Staff Rule 110.3 (b). Such action was clearly within his rights, though it may be observed that Staff Rule 110.4 provides for an alternative course of action, namely, suspension pending investigation, and that this was not followed, presumably as a result of the recommendation of the Field Operations Service dated 15 December 1971. The decision to give one month’s compensation in lieu of notice was taken in accordance with Staff Rule 109.3 (b) and (c), and the decision not to make an indemnity payment corresponded to provision (d) of Annex II to the Staff Regulations though here again it may be observed that under this provision it was open to the Secretary-General at his discretion to grant an indemnity and that he did not choose to exercise his discretion in this sense. The Tribunal concludes from the foregoing that the Respondent acted within the terms of the Staff Regulations and Rules, but that wherever he had discretion to opt between two courses of action he selected that which was less favourable to the Applicant, who accordingly received the least favourable treatment short of summary dismissal which could be meted out to him within the Staff Regulations and Rules.

VI. As regards (b), the Respondent contends that proper procedures in accordance with Personnel Directive PD/1/69 and Staff Regulation 11.1 were followed in the case of the Applicant, who was serving away from Headquarters and Geneva, and that the Applicant’s procedural rights were thus fully observed. Personnel Directive PD/1/69 requires all relevant documentation to be placed before the Secretary-General as speedily as possible. The documentation called for includes a report of the misconduct, a description of the circumstances, comments by the Chief of Administration regarding

his conduct of the case and evaluation of the facts, a written statement by the staff member giving his side of the story and commenting on the charges made against him, and a recommendation of the disciplinary action which should be taken. The Tribunal observes that the opportunity given to the Applicant to give his version of the facts and to explain his conduct in pursuance of the above procedure was confined to a statement taken from him at the time that he was apprehended and a further statement made later on the same day. There is no evidence that any written charges were made against him or that he had any opportunity to reply in any considered way to such charges. In the Tribunal's view, this would have been a serious omission even if the charge against him had been the simple and straightforward one of a single offence committed on 7 December 1971; there is, however, some evidence that it was not, and that account was taken, both in apprehending him and in recommending his dismissal, of his earlier action in making purchases at the Service Institute in excess of his personal requirements. It would appear from the Applicant's somewhat confused reference to this matter in his second statement of 7 December 1971 that these earlier purchases had been the subject of oral representations of some kind to him either at Tiberias or on his arrival at Damascus, though there was no formal charge. Nevertheless, in the letter from the Director of Personnel dated 22 December 1971 recommending the Applicant's dismissal, these earlier purchases are referred to in a way which suggests that they played a significant part in influencing the decision. Thus the letter states *inter alia*:

"In October-November 1971, Mr. Lindblad was put under surveillance by the Survey and Investigation Unit of UNTSO because of his recurrent purchases of excessive amounts of duty-free goods in the Service Institute and the suspicion that he might be disposing of them to unauthorized third parties for profit . . . [By his action of 7 December 1971] he thus confirmed the existing suspicions and gave incontrovertible evidence of his violation of the regulation . . .".

The Applicant does not appear to have been given any adequate opportunity to explain these earlier purchases which in his application he maintains were not "excessive". The Tribunal concludes that, having regard to the summary manner in which the Applicant's statements were taken and the absence of any provision for the rebuttal by him of any specific formal charges, the Applicant was not accorded a fair opportunity to give his version of all the relevant facts or to explain his conduct in its entirety.

VII. In the Tribunal's view, a staff member against whom disciplinary proceedings are taken under Staff Rule 110.3 should be furnished with a specific charge and should be accorded the right to be heard before a sanction is imposed on him. This right includes *inter alia* the opportunity to participate in the examination of the evidence.

The Tribunal observes that such a right is not explicitly stated in Personnel Directive PD/1/69 and therefore holds that the Personnel Directive does not as at present drafted provide adequate protection for staff members away from Headquarters or Geneva involved in disciplinary proceedings and does not establish an "equivalent procedure" to the Joint Disciplinary Committee procedure as envisaged in Judgement No. 130 (*Zang-Atangana*).

VIII. As the Tribunal finds that the Applicant was not accorded fair procedure for rebuttal of all the charges on which the contested decision is based, that decision is not well founded. In view of the fact that the Applicant was on a fixed term contract which expired on 30 June 1972 and since neither remand of the case for correction of procedure nor reinstatement is possible as of the date of the present Judgement, the Tribunal, taking into consideration all the circumstances of the case, decides to assimilate the situation to one of termination of the Applicant's contract on 5 January 1972, the date of his dismissal.

IX. The Tribunal accordingly rules that the Applicant should be granted an indemnity as prescribed in Annex III (b) to the Staff Regulations, that is to say thirty working days' indemnity pay, and so orders.

(Signatures):

R. VENKATARAMAN

President

Suzanne BASTID

Vice President

Geneva, 23 April 1974

Roger STEVENS

Member

Jean HARDY

Executive Secretary

Judgement No. 184

(Original: French)

Case No. 180:
Mila

Against: The Secretary-General
of the United Nations

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

Witnesses heard by the Tribunal.

Issues on which the Applicant and the Respondent are in fundamental disagreement.

Previous judgements of the Tribunal relating to the termination of a permanent appointment on the occasion of the five-year review.

Consideration of the Applicant's performance of his duties and of the relations of the group of cleaners-movers with their supervisors.

Scrutinization of the procedures followed in connexion with the termination of the Applicant's appointment.—Rejection of certain allegations by the Applicant concerning procedural irregularities.—Finding by the Tribunal that there were three serious irregularities in the procedures followed in connexion with the termination of the Applicant's appointment.—Irregularity relating to the nature of the warnings given to the Applicant as to his performance and conduct.—Respondent's failure to give the Applicant written warning of the possible consequences of his behaviour or to record in his file the oral warnings he claims to have given him.—Irregularity relating to the Respondent's failure to observe the terms of circular ST/AI/115.—The Head of the Department did not make an investigation following the Applicant's rebuttal of his periodic report.—A belated "note for file" is insufficient to repair this deficiency.—Irregularity relating to the failure of the Appointment and Promotion Panel to hear a more representative body of witnesses and to probe in greater depth the deterioration in the relations between the team of cleaners and their supervisors.—Failure of the Panel to make a sufficiently thorough review of the Applicant's standards of efficiency, competence and integrity.—Conclusion of the Tribunal that the procedure followed prior to the decision to terminate the Applicant's appointment was improper.—Case remanded for correction of the procedure.—Award to the Applicant of compensation equivalent to three months' net base salary for the loss caused by the procedural delay.

Award to the Applicant of \$800 as costs.

Applicant's subsidiary application in respect of the permanent partial disability he claims to have suffered as a result of a service-incurred accident.—Application not receivable.

Applicant's incidental pleas requesting the Tribunal to set aside the documents submitted by the Respondent following the oral proceedings.—Pleas rejected.