Judgement No. 185

(Original: French)

Case No. 184: Lawrence

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

Termination of the employment of a staff member holding a fixed-term appointment.

Request for rescission of the termination decision.—Recommendation of the Joint Appeals Board that that decision should be rescinded because it was improper and that the Applicant should receive his full emoluments up to the date of expiry of his appointment.—Acceptance of that recommendation by the Respondent.—That acceptance constitutes a rescission effected by the competent authority who, having expressed no reservations concerning the reasons given by the Board, must be assumed to have accepted the reasons derived from the irregularity of the decision.—Statement by the Tribunal taking note of that rescission and of the payments effected as a consequence thereof, and noting that on this point the application no longer has any substance.

Request for reinstatement with retroactive effect.—Such reinstatement is impossible, except in the form of payment of emoluments up to the date of expiry of the appointment.—This payment having been made, the Tribunal notes that on this point also the application no longer has any substance.

Request for an education grant.—Staff Rule 103.20 (b).*—Dependence of the grant on the fact that the duty station of the staff member is outside his home country.—Examination of the personnel action forms as regards the Applicant's duty station.—Legal effects of a decision retroactively eliminating New York as the Applicant's duty station.—Conclusion of the Tribunal that the Applicant is entitled to receive the education grant for the period of special leave preceding his termination but not for the period by which that leave was extended in application of the decision taken on the recommendation of the Joint Appeals Board.*

Request for payment of compensation.—Question whether by his decision rescinding the termination decision, the Respondent went as far as was required in restoring the status quo.*—Material injury sustained by the Applicant.—Reasons why he could expect to remain in the service of the United Nations.—Difficulty for the Applicant to find a comparable position.—Moral damage caused to the Applicant by the Respondent's behaviour towards him.—Award to the Applicant of compensation in the amount of $26,000.*

Award to the Applicant of 3,300 French francs for costs.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

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

Whereas, on 13 February 1974, Antoine Lawrence, a former staff member of the United Nations Development Programme, hereinafter referred to as UNDP, filed with the Tribunal an application the pleas of which read:

"The Tribunal is requested

"To rule and judge:

"That the application is receivable and the Tribunal is competent to hear it;

"That the decision of the Secretary-General which took effect on 29 February 1972 must be rescinded;

"That the Applicant must be reinstated as a staff member of the United Nations with retroactive effect to 1 March 1972;

"That the Applicant must be assigned to a post corresponding to his rank and aptitudes;

"That the Applicant must receive full salary up to the date of his new assignment;

"That the Applicant shall receive as damages and *'pretium doloris'* for moral suffering, for the most unjust treatment he has received and for the notoriety of his termination the sum of $20,000.

"Alternatively,

"If the Applicant is not reinstated, that he be paid his full salary up to the expiry of his fixed-term contract concluded on 27 July 1971, including all allowances and emoluments to which he is entitled, including his pension entitlements;

"That this sum should include the education grants for his children up to the date of expiry of the said contract;

"That he be granted as compensation a sum equivalent to four years of his final salary;

"That in any event the Applicant be granted a sum of $1,000 for the expenses he has incurred;

"That the Applicant be allowed the benefit of oral proceedings before the Tribunal";

Whereas the Respondent filed his answer on 18 March 1974;

Whereas, on 20 March 1974, the presiding member decided that there would be no oral proceedings;

Whereas, on 2 April 1974, the Respondent provided additional information at the request of the Tribunal;

Whereas the Applicant submitted written observations on 12 April 1974;

Whereas, on 13 April 1974, the Applicant submitted proof of his expenses at the request of the Tribunal;

Whereas the Applicant provided additional information on 18 April 1974;

Whereas, on 20 and 24 April 1974, the Respondent provided additional information at the request of the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Operation in the Congo (ONUC) on 11 May 1961 as Counsellor to the Minister of Planning and Co-ordination under a one-year appointment which was subsequently extended several times. On 1 May 1965 he was appointed Resident Representative of the United Nations Technical Assistance Board and Director of Special Fund Programmes in Togo and his appointment was converted into a two-year fixed-term appointment, which was extended for a further two years on 1 May 1967. On 1 March 1969, the Applicant was reassigned to the post of UNDP Resident Representative in the Central African Republic and on 1 May 1969 his appointment was extended for two years. On 28 October 1970 the Director of the Bureau of Administrative Management and Budget, UNDP, wrote to the Applicant offering him an extension of his contract for a further two years, adding: "I take this opportunity to express the Administrator's and my appreciation of your excellent contribution to the Programme". By a cable of 27 November 1970 the Applicant accepted the extension. On 27 January 1971 the Director of the Bureau of Administrative Management and Budget informed the Applicant that UNDP intended to reassign him about the third week of March and that Mr. Balima would assume the post of Resident Representative in the Central African Republic. On 29 January 1971 the Applicant replied that although two of his sons could not complete their studies

in the Central African Republic until June he would nevertheless comply with the instructions received. In February 1971 a global meeting of Resident Representatives was held at New Delhi, at which, according to the Applicant, the Deputy Administrator of UNDP told him that the President of the Central African Republic had requested his removal because of his French nationality. On 27 March 1971 the Applicant wrote to the Deputy Administrator that on returning to the Central African Republic he had had several interviews with the President of the Republic, who had stated that he had not requested his removal or objected to his French nationality. In reply, the Deputy Administrator sent the Applicant, on 5 April 1971, a copy of a letter dated 22 October 1970 in which the President of the Republic confirmed his agreement with the Secretary-General concerning the "assignment of Mr. Albert Balima to the Central African Republic as UNDP Representative after the departure of Mr. Antoine Lawrence", and asked the Applicant to treat the matter as closed. Meanwhile, on 10 March 1971, the Assistant Administrator and Director of the Bureau of Operations and Programming, UNDP, had advised the Director of the Bureau of Administrative Management and Budget that the Applicant had been appointed UNDP consultant for the regional project (REG-43) on pre-investment assistance to the African Development Bank in Abidjan (Ivory Coast) and that he would initiate his new assignment as soon as he could leave his post in the Central African Republic. On 25 March 1971 the Director of the Bureau of Administrative Management and Budget cabled the Applicant, who on 6 and 23 March 1971 had requested instructions concerning his transfer to Abidjan, that the Resident Representative in the Ivory Coast had been requested to inform the Government of the Applicant's appointment as special UNDP consultant to the African Development Bank, that the transfer would be effective on 1 April 1971 and that the Applicant should therefore proceed to Abidjan without delay. The Applicant arrived in Abidjan on 2 April 1971. A cable sent by the Applicant on 7 April 1971 to the Director of the Bureau of Operations and Programming shows that the President of the African Development Bank had not requested the services of any UNDP consultant or economic adviser during the current phase of project REG-43 and that he had not been informed of the Applicant's arrival; the latter therefore requested authorization to travel to New York. On the same day the Director of the Bureau of Administrative Management and Budget replied that the position would be clarified after consultation with the Associate Director of the Bureau of Operations and Programming as soon as the latter returned to New York, and suggested that the Applicant should stay at Abidjan until then. On 21 April 1971 the Associate Director of the Bureau of Operations and Programming cabled the Applicant that definitive decisions would be taken on the basis of the report to be made by a financial adviser to the Administrator of UNDP who was to arrive in Abidjan on 25 April 1971; the Applicant was asked not to take any action or make any representations in the meantime. On 27 May 1971 the Applicant was asked to come to New York to discuss his position. As of 6 June 1971 he was temporarily reassigned to Headquarters awaiting field reassignment. It appears that his appointment to the post of Resident Representative in Dahomey was envisaged, the President of that country having requested his appointment in a letter to the Secretary-General dated 21 April 1971; it appears, however, that another candidate was subsequently accepted under pressure from UNDP. On 30 June 1971 the Director of the Bureau of Administrative Management and Budget had a discussion with the Applicant which he summarized in a note for the file; according to that note, he advised the Applicant that UNDP, having drawn a blank with the African Development Bank and the possible assignment to Dahomey, was exploring the possibility of sending him to Haiti as an economic adviser, but that if that prospect fell through UNDP would have to discuss with the Applicant the question of his contractual status. In a memorandum dated 1 July 1971 the Applicant reminded the Director of the Bureau of Administrative Management and Budget that the latter had stated in the course of their

discussion that, if the Haitian assignment did not work out, the Administrator of UNDP would like to know whether the Applicant would accept an eventual "special separation" and gave the following reply:

> "*(a)* I would not have any fundamental objections substantively, since the Administrator is the only person to decide in this domain; however, I would hope that he would not make such a decision;
>
> "*(b)* As for the form, if such a decision is reached by the Administrator, I would request that a Board of Honour be selected, so that I would be able to clarify certain points before my 'special separation' ".

In August 1971 the Applicant, whose appointment had been extended for two years as from 1 May 1971, was sent to Haiti for discussions with the representatives of the Haitian Government. Those discussions revealed that the Government required an expert econometrician rather than an expert in planning such as the Applicant. For the purpose of the Applicant's visit the Government representatives had received from UNDP an out-of-date curriculum vitae, although early in July 1971 the Applicant had supplied UNDP with an up-to-date curriculum vitae mentioning a doctorate in economic sciences he had obtained in 1970. According to a note placed in the file by the Director of the Bureau of Administrative Management and Budget, the latter told the Applicant, at a meeting on 3 September 1971, that further exploration would be undertaken within UNDP and with the United Nations, particularly the Office of Technical Co-operation, with a view to finding him another assignment, but that if those efforts were unsuccessful the possibility of his separation from the service would have to be envisaged. On 28 September 1971 the Applicant returned to his own country on leave. On 26 November 1971 he wrote to the Director of the Bureau of Administrative Management and Budget asking for information about his future assignment; no reply to this letter is contained in the file. On 30 November 1971 the Director of the Office of Technical Co-operation informed the Director of the Bureau of Administrative Management and Budget with regret that "our intensive efforts and discussions with respect to a future assignment for Mr. Lawrence have not developed any possibilities for utilizing his services either at the present time or in the foreseeable future". On 5 January 1972 the Applicant sent a cable to the Administrator of UNDP stating that he had received no answer from the latter's aides and would be grateful if the Administrator could give his personal attention to the Applicant's case. On 6 January 1972 the Director of the Bureau of Administrative Management and Budget replied, informing the Applicant that no assignment had materialized and that he would therefore be placed on special leave with pay until the end of February 1972. On 24 January 1972 the Director of the Bureau of Administrative Management and Budget wrote to the Applicant as follows:

> "The Administrator has now come to the conclusion, regrettably, that we have exhausted all possibilities of finding an alternative assignment for you. As evidence of our serious interest in exploring such possibilities we had agreed that following your annual leave, we would place you on Special Leave with Full Pay during the period of our efforts. Most recently I have informed you of the extension of your Leave with Full Pay until the end of February 1972. Your present Fixed-Term contract which, as you know, does not automatically carry any expectation of renewal, is due to expire on 30 April 1973.
>
> "In the circumstances which I have outlined above, the Administrator has regrettably come to the further conclusion that the only course of action open to him now is to terminate your Fixed-Term appointment with the United Nations Development Programme under the provisions of Staff Regulation 9.1 *(b)*, in view of the fact that we are unable to utilize your services for lack of a suitable post. Therefore, this letter constitutes formal notice of termination in accordance with

Staff Rule 109.3 *(b)*, such notice to be effective 29 February 1972 COB. In view of the fact that your services will not be required during the notice period, you will be paid compensation in lieu of thirty days' notice in accordance with Staff Rule 109.3 *(c)*.

" . . . "

On 4 February 1972 the Applicant requested the Secretary-General to review the decision to terminate his appointment. Having received no reply within the statutory time limit, the Applicant submitted an appeal to the Joint Appeals Board, which submitted its report on 10 July 1973. The conclusions and recommendations of the Board read as follows:

"Conclusions and recommendations

"36. The Board finds that the termination of the appellant's fixed-term appointment prior to the expiration date was not authorized under Staff Regulation 9.1 *(b)* and was therefore improper and should be rescinded.

"37. Accordingly, the Board recommends to the Secretary-General that the decision of termination be cancelled to allow the appellant's fixed-term appointment to run its course and that consequently the appellant receive his full salary and emoluments (including pension entitlements) up to the date of expiration of his fixed-term appointment, less the amounts of termination indemnity and compensation in lieu of notice already paid him.

"38. The Board recommends further to the Secretary-General that, in view of the policy adopted by him in a recent test case, he grant to the appellant, upon separation from the service at the expiration of his fixed-term appointment of 30 April 1973, an *ex-gratia* payment of 9 months of base salary, which represents the amount of termination indemnity that the appellant would have received under annex III to the Staff Regulations had he held a permanent appointment for 12 years.

"39. The Board makes no recommendation in support of the appellant's other claims."

On 18 October 1973 the definitive decisions of the Secretary-General were communicated to the Applicant in the following terms:

"The Secretary-General, after considering your case, has decided to accept the recommendation in paragraph 37 of the Report of the Board and consequently to pay you your full salary and emoluments up to 30 April 1973, less the amounts of termination indemnity and compensation in lieu of notice already paid to you.

"The Secretary-General has, in addition, decided to reject the recommendation in paragraph 38 of the Report of the Board concerning an *ex gratia* payment of nine months of base salary, because he sees no valid justification that would enable him to authorize such a payment."

On 13 February 1974 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. None of the reasons for termination mentioned in the Staff Regulations were relevant to the Applicant's case. The reason given for the contested decision was not one of those which permit the Secretary-General to terminate an appointment. The Administrator of UNDP could not add additional reasons for termination to those given in the exhaustive list in the Staff Regulations.

2. Contrary to the Respondent's contentions, UNDP made no serious effort to offer the Applicant a new assignment after he had been recalled—without a valid reason —from the post he occupied. It was therefore untrue to state that all efforts to find

another assignment for the Applicant had been fruitless, leaving UNDP no alternative but to terminate his appointment.

3. There was thus a deliberate decision by UNDP to separate the Applicant from service, an arbitrary and unjust decision which cannot be related to the application of any provision of the Staff Regulations or Rules. By thus terminating the Applicant's career without a valid reason after 11 years of good and loyal service, the Secretary-General committed an abuse of power. Moreover, by maintaining uncertainty about the reasons for the termination of the Applicant's appointment, the Respondent—who had never criticized the Applicant for any failure to perform his duties or any attitude incompatible with those duties—caused the Applicant undoubted injury.

4. The simple payment to the Applicant of his salary up to the date of expiry of his appointment does not suffice to restore the Applicant's rights or compensate for the injury he has sustained.

Whereas the Respondent's principal contentions are:

1. The application, in so far as it is directed against the Respondent's decision to terminate the Applicant's appointment on 29 February 1972, is not receivable. The issue has already been the subject of a favourable recommendation by the Joint Appeals Board, which the Secretary-General accepted completely.

2. The termination of the Applicant's contract is no longer a matter of controversy. Even if the Tribunal should consider the application receivable *in toto*, it would be futile to reopen the dispute concerning the Applicant's allegations concerning the irregularity of the process that led to the contested decision.

3. The Applicant's rights to compensation are limited to his salary and allowances until the date of expiry of his contract (30 April 1973):

(a) The Applicant's right to receive, in addition to salary and allowances, an education grant for his children does not derive automatically from the validity of his contract until 30 April 1973;

(b) The Respondent had no obligations with respect to the Applicant's employment after 30 April 1973. The Respondent did not create in the Applicant any expectancy of renewal of his contract, quite the contrary, since he sought to terminate the contract 14 months before its natural expiration;

(c) The claims for damage submitted by the Applicant are unfounded: the application does not establish the existence of any liability beyond compensation under the contract, and by definition an *ex gratia* payment applied in one case does not create a precedent for other cases; moreover, the calculation of the sums claimed by the Applicant does not follow any reasonable criterion.

The Tribunal, having deliberated from 16 to 25 April 1974, now pronounces the following judgement:

I. The Applicant requests rescission of the decision by the Respondent terminating as of 29 February 1972 the Applicant's fixed-term appointment which was due to expire on 30 April 1973.

In paragraph 36 of its report of 10 July 1973, the Joint Appeals Board found that the decision to terminate the appointment was improper and should be rescinded. It recommended to the Secretary-General that the decision be cancelled to allow the Applicant's fixed-term appointment to run its course, and that the Applicant receive his full salary and emoluments (including pension entitlements) up to the date of expiry of his fixed-term appointment, less the amounts of indemnity and compensation already paid him.

The Respondent informed the Applicant on 18 October 1973 that he accepted "the

recommendation in paragraph 37 of the Report of the Board". He therefore decided to pay him his full emoluments up to 30 April 1973 less indemnities already paid.

II. The Applicant interprets this decision as bringing the date of termination of the contract forward to 30 April 1973. He considers that this decision did not fulfil his requests, whose basic aim was his reinstatement. Consequently, he maintains that the Respondent's decision of 29 February 1972 must be rescinded and he must be reinstated as a staff member of the United Nations with retroactive effect to 1 March 1972.

III. The Tribunal notes that in accepting the recommendation of the Joint Appeals Board on 18 October 1973 the Respondent decided to rescind the legal effect of the act by which he had terminated the contract. This is thus a rescission effected by the competent authority who, having expressed no reservations concerning the reasons given by the Joint Appeals Board, must be assumed to have accepted the reasons derived from the irregularity of the decision of 29 February 1972.

That being so, the Tribunal takes note of that rescission, and of the payments effected as a consequence thereof, and notes that on this point the application no longer has any substance.

IV. The Applicant requests that he be reinstated with retroactive effect to 1 March 1972 in a post corresponding to his rank and aptitudes. The Tribunal notes that the Applicant's contract expired on 30 April 1973 and that retroactive reinstatement is impossible except in the form of payment of emoluments up to the date of expiry of the contract. This payment having been made, as stated in paragraph III above, the Tribunal notes that on this point also the application no longer has any substance.

V. The Applicant also requests an education grant for his children up to 1 May 1973.

According to Staff Rule 103.20 *(b)*

> "A staff member, who is regarded as an international recruit under Rule 104.7, and whose duty station is outside his home country, shall be entitled to an education grant in respect of each dependent child in full-time attendance at a school, university or similar educational institution."

The Respondent has decided that the Applicant ceased to be entitled to the education grant for his children as from 26 January 1972, the date on which he was placed on special leave in his country of origin.

VI. The Tribunal notes that according to the rule quoted above, the education grant depends on the fact that the "duty station" of the staff member is "outside his home country".

The personnel action form dated 25 February 1972 concerning the granting of special leave with pay from 26 January 1972 to 29 February 1972 contains under the heading "Official duty station" the words "New York—Awaiting reassignment".

This document implies that the condition laid down in Rule 103.20 *(b)* regarding duty station was fulfilled until 29 February 1972. However, on 3 August 1972 a new document was prepared whose purpose was to amend the preceding document retroactively and to delete the reference to New York as official duty station since 28 September 1971. The new document states "Staff member is in his home country, Paris, France, awaiting reassignment".

After the Secretary-General's decision accepting the recommendation of the Joint Appeals Board, the document prepared on 28 February 1974 for the purpose of retroactively extending the special leave until 30 April 1973 contains under the heading "Official duty station" the words "Awaiting reassignment".

VII. The Tribunal notes:

(1) That after having indicated New York as "Official duty station", the Respondent retroactively eliminated that reference and stated that the Applicant was in fact in Paris; and

(2) That the Respondent has acknowledged that the education grant was due until 26 January 1972, that is, until the end of the Applicant's ordinary leave, but that he refuses it for the special leave (26 January–29 February 1972).

Thus, during the special leave, the Applicant did not have a "duty station", that is, a country where he was "serving". Consequently, Staff Rule 103.20 *(b)*, which concerns "serving" staff members, would not cover the situation of the Applicant, namely a situation in which a staff member who is not "serving" in fact is residing in his country of origin. The Applicant could therefore not rely on that text to claim the education grant.

This supposes that the Respondent, in determining the duty station of the Applicant, had adopted a position which was legally well-founded.

VIII. However, it cannot be contested that New York officially remained the Applicant's duty station until the decision of 3 August 1972. Moreover, the education grant was accorded until the beginning of the special leave. The Respondent should therefore logically have accorded the education grant throughout the special leave, that is, until 29 February 1972.

The Tribunal considers that the document of 3 August 1972 eliminating New York as duty station did not affect the Applicant's acquired rights. The withdrawal of the previous decision concerning the duty station would have been legally well-founded only if that decision was illegal, which was neither established nor even claimed by the Respondent.

The fact that New York was the provisional duty station should have entitled the Applicant to the education grant during his special leave.

IX. The Tribunal concludes that the decision eliminating New York as the provisional duty station could not have legal effect for the period of the special leave (26 January–29 February 1972). The Applicant is thus entitled to receive for that period the education grant provided for in the Staff Rules.

X. On the other hand, when the special leave was extended from 29 February 1972 to 30 April 1973 pursuant to the decision of 18 October 1973, the decision of 3 August 1972 could have effect, so that the Applicant, residing in his country of origin, had no duty station. Consequently, since his situation no longer fulfilled the conditions set in the aforementioned Staff Rule, he was not entitled to receive the education grant for the period 29 February 1972–30 April 1973.

XI. Having acknowledged that reinstatement was not possible, the Tribunal proceeded to examine the request for the payment of compensation in an amount equivalent to four years of the Applicant's final salary.

The Tribunal noted that by his decision of 18 October 1973 the Respondent, accepting the recommendation of the Joint Appeals Board, rescinded the decision terminating the Applicant's fixed-term contract. It is for the Tribunal to determine whether, by that decision, the Respondent drew all the necessary legal inferences from the rescission and went as far as was required in restoring the *status quo*. The Tribunal recognizes that *restitutio in integrum* is required only to the extent that the injurious consequences of the act later rescinded appear "to follow directly from that act" (Judgement No. 97, *Leak*, paragraph VI).

The Tribunal observes that, in the present case, although the Applicant held a fixed-term contract, he could reasonably expect to remain in the service of the United

Nations in view of his lengthy service with the Organization at the D-1 level, the acknowledged quality of his services—which was attested to in a memorandum dated 17 January 1972 from the Director of Personnel to the Director of the Division of Recruitment—and the number of posts corresponding to his aptitudes. Moreover, his age and the orientation of his career undoubtedly made it difficult for him to find a comparable position. Consequently, the Tribunal recognizes that the Applicant has sustained material injury. Moreover, the Respondent's behaviour towards him in the months preceding his separation from service, the conditions in which his assignment in Bangui was terminated and in which he was sent to Abidjan and then to Port-au-Prince caused him moral damage.

For these reasons, the Tribunal decides to grant the Applicant compensation in the amount of $26,000.

XII. On the basis of the statements of expenses submitted by the Applicant, the Tribunal decides to grant him 3,300 French francs for costs.

(Signatures)

Suzanne BASTID
Vice-President, presiding

MUTUALE TSHIKANKIE
Member

F. A. FORTEZA
Member

Jean HARDY
Executive Secretary

Geneva, 25 April 1974

Judgement No. 186

(Original: English)

Case No. 183: Smith

Against: **The United Nations Joint Staff Pension Board**

Request by a former staff member of WHO that a child's benefit payable to his daughter be paid not to her but to him.

Request for production of a full report of the proceedings of the Standing Committee of the Joint Staff Pension Board and all communications of the latter with third parties.—Principle, accepted by the Tribunal, of the confidentiality of such documents.—Request rejected, since no case has been made out by the Applicant to depart from that principle.

Principal request.—Article 37 (a) *of the Pension Fund Regulations and Administrative Rule J.2* (e).*—Applicant's argument that the Pension Board has not proved the existence of exceptional circumstances in the sense of Administrative Rule J.2* (e).*—Applicant's argument based on a strict reading of article 37* (a).*—Absurdity and contradiction to which this reading would lead.—Interpretation of the two applicable texts by the Tribunal.—Criticism by the Tribunal of the fact that the Standing Committee did not give any reasons for its decision and merely referred to the relevant provisions of the Regulations and Administrative Rules of the Pension Fund.—Respondent's argument based on the fact that at the time when payment of the benefit was claimed the child had attained majority and the competence to give a valid receipt.—Need to determine not whether the child had attained the age of 21 and was competent to give a valid receipt but whether the circumstances were normal or exceptional.—Possibility envisaged by the Tribunal of remanding the case to the Pension Board for a statement of reasons in*