

Judgement No. 198

*(Original: English)*Case No. 192:
LaneAgainst: The Secretary-General
of the United Nations*Termination of the employment of a staff member holding a probationary appointment.*

Applicant's contention that, as his appointment was not terminated at the end of his extended probationary service, his employment status must be deemed to have been that of a staff member holding a permanent appointment.—Staff Rule 104.12 (a).—Its purpose.—That Rule does not warrant a conclusion that probationary appointments not terminated at the end of the probationary period automatically become permanent appointments.—Applicant's argument based on the conduct of the parties in his case.—The mere fact that the Applicant was transferred to another post at the end of his extended probationary period and was thereafter continued in service for another year and 10 months does not indicate that he acceded to the status of a permanent staff member.—Staff Rule 104.13 (a) (i).—Obligation to fulfil the criteria mentioned in that Rule before being granted a permanent appointment.—Conclusion of the Tribunal that the Applicant did not possess the status of a staff member with a permanent appointment.

Employment status of the Applicant.—Irregular continuation of his probationary appointment through the default of the Administration.—Respondent's argument that the Secretary-General was justified in terminating the services of the Applicant under Staff Regulation 9.1 (c).—Distinction between the termination of a probationary appointment during the probationary period and the termination of such an appointment at the end of such period.—Judgements Nos. 138 and 93.—The Applicant, having completed his probationary period, was entitled to due process for the assessment of his suitability for a permanent appointment.—Consideration of the procedure followed in the Appointment and Promotion Committee.—Conclusion of the Tribunal that the Applicant was deprived of due process since the termination decision was reached without providing the Committee with the most recent information on the Applicant's performance and without affording to the Applicant an opportunity to state his case.—Award to the Applicant of six months' net base salary as compensation for fault of procedure.

Pleas for reinstatement of the Applicant and restitution of his salary and other elements of remuneration.—Pleas rejected, the Applicant not having acceded to the status of a permanent staff member.

Plea that the sums paid to the Applicant in respect of the arrears of annual increments on the recommendation of the Joint Appeals Board should be recalculated in the light of a number of factors.—Plea rejected, the payment of such arrears concluding the Applicant's rights in this behalf.

Plea for compensation for home leave.—Award to the Applicant of such compensation, his anomalous employment situation having deprived him of his rights.

Plea for compensation for removal costs.—Award to the Applicant of such compensation, for the same reason.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Mr. Francis T. P. Plimpton, Vice-President; Mr. Zenon Rossides;

Whereas on 5 July 1974, Martin Lane, a former staff member of the United Nations Conference on Trade and Development, hereinafter called UNCTAD, filed with the Tribunal an application which did not fulfil all the formal requirements of article 7 of the Rules;

Whereas the Applicant, after making the necessary corrections, resubmitted the application on 18 September 1974 and amended it on 24 March 1975;

Whereas the pleas of the application as amended read as follows:

"The Applicant requests the Tribunal to order the following measures:

"1. Rescission of the decision by the Secretary-General of the United Nations to terminate the Applicant's appointment with effect from 18 February 1971, such termination having allegedly been effected in accordance with Staff Regulation 9.1 (c) and related Staff Rules;

"2. Reinstatement of the Applicant in contractual relations with the United Nations in the status of a permanent staff member which he deems he had acceded to *de jure* on the grounds that, after serving the maximum period of probation permitted under the Staff Regulations and Rules, he continued in uninterrupted service with the Organization for a further one year and ten months beyond that period;

"3. Restitution to the Applicant of the salary and related emoluments lost by him between 19 February 1971 and the date of his reinstatement, such restitution (or equivalent compensation in lieu) to be calculated as though the Applicant had been, during that period, on special leave with full pay including entitlement to successive annual increments, as authorized under Staff Rule 105.2, at the rates applicable in the United Nations Office at Geneva, taking into account changes in post-adjustment levels at Geneva and fluctuations in the US dollar/Swiss franc exchange rates occurring during that period, together with payment of moratory interest in respect of all amounts due, at the annual rate of 5 per cent;

"4. Taking into account that annual increments of salary were irregularly withheld from the Applicant between 11 April 1968 and the date of his termination on 18 February 1971, an order that these be restored to him (or equivalent compensation be paid in lieu), the sums due to be calculated in the light of changes in the post-adjustment levels at Geneva between 1968 and 1971 and fluctuations in the US dollar/Swiss franc exchange rates since February 1971; increased contributions to and benefits from the Joint Staff Pension Fund associated with the restored increments; consequentially increased entitlement under the termination indemnity and repatriation grant; consequentially increased compensation for commuted accrued annual leave; and to be accompanied by payment of moratory interest in respect of all withheld amounts at an annual rate of 5 per cent;

"5. In regard to the Applicant's contention that he be paid compensation in respect of two periods of home leave that he lost because of the irregularities accompanying his appointment, an order confirming that the Applicant in 1968 and 1970 did *de facto* acquire entitlement to such home leave under Staff Rule 105.3 and hence to compensation in the amount spent by the Applicant on travel to the home country in those two years;

"6. In regard to the Applicant's contention, which was submitted to the Joint Appeals Board but not considered by that body or by the Secretary-General, that he be paid compensation in respect of his entitlement under Staff Rule 107.27 to remove household goods against reimbursement by the United Nations, because his entitlement to reimbursement had been denied in 1969, an order confirming that the Applicant was entitled to such reimbursement and hence to compensation in the amount spent by the Applicant on removal of his household goods;

"7. In the event that the Tribunal orders reinstatement of the Applicant, on the grounds that his application was well founded, but that the Secretary-General of the United Nations decides to compensate the Applicant in lieu of reinstatement, an order fixing the compensation to be paid at the equivalent of five years' net base salary at the incremental level the Applicant would have reached by the date of the reinstatement order if he had remained in continuous service with the

Organization, plus three months' salary in lieu of notice, less the amount of the termination indemnity already paid to the Applicant;

"7 A. In the event that the Tribunal should find the application under plea 1 to be well founded but that it is not feasible in terms of law to order rescission of the decision to terminate requested thereunder or specific performance of the obligations invoked under pleas 2, 3 and 7, on the grounds that the parties cannot effectively be restored to the *status quo ante*, then that in accordance with established jurisprudence it grant compensation as adequate and proper relief in lieu of the specific performance called for, such compensation to be assessed as equivalent in value to the amount of compensation called for under plea 7 plus the amount the Applicant would have earned between 19 February 1971 and 18 February 1973 had he been on special leave with full pay during that period, such latter amount to be calculated, *mutatis mutandis*, in accordance with the terms and conditions postulated by the Applicant in his plea 3;

"8. In the event that the Applicant and/or his counsel are required to appear at the Tribunal's hearing, an order to reimburse him and/or his counsel, as applicable, for the costs of travel and subsistence associated with such appearance before the Tribunal."

Whereas the Respondent filed his answer on 3 February 1975;

Whereas the Applicant filed written observations on 24 March 1975;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNCTAD on 11 April 1966 as a Conference Affairs Officer under a probationary appointment at level 4, step 3. In a periodic report covering his first year of service, the first reporting officer gave him a top rating on five items ("Professional knowledge and skill", "Power of analysis", "Written expression in working language", "Oral expression in working language", and "Initiative"), an above-average rating on two items ("Judgement" and "Quality of work accomplished"), an average rating on three items ("Skill in producing a solution", "Sense of responsibility", and "Personal relations with others"), a below-average rating on two items ("Industry" and "Quantity of work accomplished") and the lowest rating on one item ("Punctuality"); the second reporting officer rated the Applicant as a staff member who maintains a good standard of efficiency. In a second periodic report, which covered his second year of service, the Applicant received the same ratings except for one item ("Initiative"), where the rating was changed from top to average. In a confidential memorandum dated 11 July 1968, the Chief of the Personnel Section of UNCTAD informed the Office of Personnel of the United Nations that, after a very thorough examination of all the circumstances involved, the Secretary-General of UNCTAD had come to the conclusion that he was unable to recommend the granting of a permanent appointment for the Applicant, although he supported the recommendation of the Applicant's supervisor that a third year of probation be given to the Applicant instead, until April 1969; the Chief of the Personnel Section added that in fact the Applicant was already beginning his third year of probation and had been made fully aware of that recommendation as well as of the circumstances leading to it. The Applicant's third year of service was appraised in a third periodic report which gave him the same ratings as the second report except that he received an average rating on the item "Industry"; the first reporting officer wrote on the report the following comment:

"My evaluation of Mr. Lane's abilities and his weaknesses as a Staff Member remains substantially that given in his last periodic report. During the period under review he has made serious efforts to overcome the weak points indicated in his previous reports, but he has not fully succeeded in achieving a steady regularity in application and punctuality."

In April 1969 the Applicant was assigned to the Office of Administration of UNCTAD as assistant to its chief. In a confidential cable dated 5 January 1970, the Chief of the Personnel Section of UNCTAD advised the Office of Personnel of the United Nations that "supervisors would be very reluctant to prepare new periodic report in view no significant change in over-all performance has taken place since July 1969 when most recent periodic report signed by staff member. I have discussed case with supervisor as recently as two weeks ago . . .". In a further confidential cable dated 17 July 1970, the Chief of the Personnel Section stated: "Same applies now. There has been no change by staff member in response to subsequent discussions of his shortcomings". On 18 November 1970 the Director of Personnel informed the Applicant that the Appointment and Promotion Committee, after reviewing his probationary appointment, had made its recommendation through the Appointment and Promotion Board to the Secretary-General and that:

"The Committee, after consideration of the facts of the case, found that you had not fully demonstrated that you met the requirements laid down in Staff Rule 104.13 (a) (i) for the grant of a Permanent Appointment, and accordingly recommended that you should not be offered such an appointment. The Secretary-General, after carefully considering your case in the light of this report and of all the circumstances, has decided to accept the Board's recommendation that you should not be offered such an appointment and that you should be separated from the service under Staff Regulation 9.1 (c) in the interest of the United Nations.

"This letter constitutes formal notice of termination, as required by Staff Rule 109.3 (b), to become effective on 19 November 1970. Your last working day will be 18 February 1971.

"You will also be paid termination indemnity according to Annex III of the Staff Regulations and repatriation grant to which you are entitled under Annex IV, paragraph 1."

On 2 February 1971 the Applicant requested the Secretary-General to review the decision to terminate his probationary appointment. On 23 February 1971 the Director of Personnel informed the Applicant that the Secretary-General saw no reason to change the administrative decision he had taken upon the recommendation of the Appointment and Promotion Committee. On 22 March 1971 the Applicant lodged an appeal with the Joint Appeals Board, which submitted its report on 17 January 1974. The Board's conclusions and recommendations read as follows:

"Conclusions of the Board"

"55. In the light of the above findings the Board concludes:

"1. That the Administration acted without prejudice and objectively in determining that the Appellant did not satisfy the requirements laid down in Staff Rule 104.13 (a) (i) for the grant of a permanent appointment.

"2. That the Secretary-General's decision to separate the Appellant from service under Staff Regulation 9.1 (c) was justified and was not motivated by prejudice or by some other extraneous factor.

"3. That the absence of a final report previous to the termination decision was an administrative error, although it does not appear to have been motivated by prejudice or by some other extraneous factor.

"4. That the Appellant was entitled to annual salary increments as well as to travel and other expenses connected with home leave during his period of probationary service.

“Recommendations

“56. In the light of the above findings and conclusions the Board unanimously recommends:

“1. That a special report covering the Appellant’s unreported period of service be issued and made available to him for his observations thereon and that this information be reconsidered by the appointment and promotion bodies to determine if the Appellant should be granted a permanent or regular appointment.

“2. That pending such re-examination, the administrative decision to terminate the Appellant’s probationary appointment should be maintained.

“3. That the Appellant be duly compensated for the annual salary increments withheld to him as well as for travel and other expenses associated with home leave to which he was entitled during his years of probationary service.”

On 25 March 1974 the Assistant Secretary-General for Personnel Services communicated the decisions of the Secretary-General to the Applicant in the following letter:

“ . . .

“Having re-examined this case in the light of the Board’s report, the Secretary-General has decided to take note of the Board’s finding that the question of your termination was correctly dealt with under Staff Regulation 9.1 (c) (and not 9.1 (a)) since you had never received a permanent appointment and could therefore only be considered as on extended probationary appointment beyond the period stipulated in the Staff Rules. The Secretary-General has taken further note of the Board’s finding that the decision to separate you from service was justified on the basis of the recorded indications over the period of employment (four years and ten months) of less than satisfactory performance. Consequently, the Secretary-General has decided to maintain his previous decision to terminate your appointment under Staff Regulation 9.1 (c).

“The Secretary-General has accepted the first part of recommendation 1 by the Board that a special report covering your unreported period of service be issued and made available to you for your observations thereon. However, the Secretary-General has decided to reject the second part of that same recommendation, namely, that this information be considered by the Appointment and Promotion bodies to determine if you should be granted a permanent or regular appointment.

“With regard to recommendation 3 of the Board, the Secretary-General agrees that compensation be paid to you in the amount of the annual salary increments which were not granted to you during your years of probationary service but which should have been paid under Staff Rule 103.8 which states that ‘in the absence of exceptional circumstances, staff members holding probationary appointments shall become eligible for a second salary increment only after they have been granted permanent or regular appointments or if their probationary periods have been extended.’ The Secretary-General holds that this Rule meant that only a second salary increment should be paid (since Rule 104.12 contemplates extension for not more than one additional year). However, since the probationary period in this instance was extended irregularly into a fourth and the larger part of a fifth year, justice required that additional salary increments be paid for these years as well.

“With regard to that part of recommendation 3 of the Board which recommends that travel and other expenses associated with two periods of home leave claimed by you be paid, the Secretary-General did not concur. You would admittedly have been entitled to claim home leave in the third (extended) year of your probationary service (April 1966 to 1969) under Staff Rule 105.3 (e). However, there was no evidence that you ever applied for such leave or that you asked for

a delayed entitlement at the time and there was equally no evidence that you were denied the right to take home leave at the time had you desired to do so. Staff members cannot be compensated for home leave to which they may be entitled but which they did not in fact choose to take at the time. The same reasoning applies to the question of an alleged second period of home leave entitlement which you never requested and for which you never requested a delayed entitlement and which was never refused to you during your period of service with UNCTAD.” On 5 July 1974 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. With regard to the plea for rescission of the decision to terminate:

(a) The Applicant was irregularly terminated under Staff Regulation 9.1 (c), since at the time the decision was taken he was not the holder of a probationary appointment;

(b) At no time during the review of his service, either before or after his termination, was due process followed by the Respondent, so that the Applicant was throughout denied the protection he was entitled to, in law and equity, under the letter and spirit of the Staff Regulations and Rules;

(c) Given that significant factors of an extraneous nature vitiated the proper evaluation of his status and services, the decision by the Respondent to terminate him on the grounds alleged:

(i) was not well founded;

(ii) created a situation gravely prejudicial to the Applicant's rights and interests under the Charter and the Staff Regulations and Rules; and

(iii) can be rectified only through rescinding of the Respondent's decision of 18 November 1970 to terminate the Applicant's services.

2. With regard to the plea for compensation for denied entitlement to reimbursement for home leave travel: The Applicant was entitled to home leave; he made oral inquiries as to his entitlement which were answered negatively because of the absence from his file of any "personnel action" form to establish his contractual status; as he took home leave at his own expense in 1968 and 1970, his claim for compensation within the amount authorized under the Staff Rules is reasonable and equitable.

3. With regard to the plea for compensation for denied entitlement to reimbursement for removal costs: The Applicant's oral inquiries concerning his entitlement were answered negatively because of the absence from his file of any "personnel action" form establishing his contractual status; as he subsequently removed his household goods at his own expense, his claim for compensation within the amount authorized under the Staff Rules is reasonable and equitable.

4. With regard to the plea for compensation in lieu of reinstatement and to the plea for compensation in lieu of specific performance if restoration of *status quo ante* be found not possible: The irregular termination of the Applicant's appointment and its consequences caused exceptional prejudice to his professional career and reputation and to the prospects for his further employment; the hearing and evaluation of his appeal, in particular, were subjected to abnormal delays which had the effect of prejudicing the resumption of his career in an international organization outside the United Nations, as well as his chances to be re-employed within the United Nations system, and which must indeed be held to constitute yet a further element in the denial of due process he has suffered in connexion with his termination and its consequences; failing reinstatement, payment of compensation equivalent to five years' net base salary would represent a proper and equitable settlement in redress of the moral and material injuries sustained by him.

Whereas the Respondent's principal contentions are:

1. In determining that the Applicant had not fully demonstrated his suitability for a permanent appointment, the Secretary-General acted without prejudice and on the basis of objective findings, and the contested decision was within his competence and fully justified under Staff Regulation 9.1 (c):

(a) At the time of the Applicant's termination the only contract existing between him and the United Nations was a probationary one. An automatic conversion of a probationary contract into a permanent appointment cannot be presumed;

(b) The responsibility to uphold the highest standards of competence and efficiency in the Secretariat is placed with the Secretary-General although he will, in making his determination as to a staff member's competence, rely on evaluations of that staff member's work made by his supervisors;

(c) The lack of a periodic report for the last one year and ten months of the Applicant's service and the alleged absence of an accurate job description did not prevent the Office of Personnel or the appointment and promotion bodies from determining whether the Applicant had attained the requirements for a permanent contract. The failure to observe the required forms with regard to periodic reports is explained, if not excused, by the fact that the Applicant's extended probationary period did not fall within the three-year limit envisaged by the Staff Regulations and Rules, which constituted an anomaly of form. The Applicant was kept fully aware throughout of the negative evaluation being made of his work by his supervisors, and at no time did he rebut that negative evaluation.

2. Since, for the regular probation period of at the most three years, the appointment and promotion bodies based their assessment of the Applicant's competence on three periodic reports covering three years of probationary service, the Applicant was afforded the full protection of the process to which he was entitled. As those bodies were also aware that the Applicant's rating had not improved during his final one year and ten months of service, it would have been useless to resubmit the matter to them.

3. The Applicant's plea for reinstatement has no basis. Even if there was an administrative error in keeping him after his three years of probationary service had expired, that error constitutes no basis whereby the Secretary-General may be forced to give, contrary to a requirement of the Charter, a permanent appointment to a staff member found to be incompetent. Nor has the Applicant any basis for claiming damages since, far from subjecting him to any hardships, his continuation in service conferred benefits on him.

4. The Applicant's claim for compensation in respect of home leave should be denied as staff members cannot be and are not compensated for home leave which they did not in fact take at the time. His request for removal costs should be denied for the same reason.

5. The Applicant's plea for five years' salary in lieu of reinstatement should be denied since neither wrongful termination nor any ensuing right to reinstatement has been established.

The Tribunal, having deliberated from 31 March 1975 to 23 April 1975, now pronounces the following judgement:

I. The Applicant seeks rescission of the decision terminating his appointment effective 18 February 1971, reinstatement and other reliefs. He contends that as his appointment was not terminated at the end of his extended probationary service in April 1969 in accordance with Staff Rule 104.12 his employment status must be deemed to have been that of a staff member holding a permanent appointment and that the termination of his appointment in the exercise of the discretionary powers of the Secretary-General under Staff Regulation 9.1 (c) is unsustainable.

II. Staff Rule 104.12 (a) reads as follows:

"The probationary appointment may be granted to persons under the age of 50 years who are recruited for career service. The period of probationary service under such an appointment shall normally be two years. In exceptional circumstances, it may be reduced or extended for not more than one additional year.

"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.

"The probationary appointment shall have no specific expiration date and shall be governed by the Staff Regulations and Staff Rules applicable to temporary appointments which are not for a fixed term."

The Applicant contends that according to that staff rule and the terms of his appointment, "unless separated from the service of the Organization at the end of his probationary appointment, the Applicant must be granted a permanent appointment".

The Tribunal considers that the text quoted above does not warrant a conclusion that probationary appointments not terminated at the end of the probationary period automatically become permanent appointments. If the Applicant's interpretation were correct, it could also be argued conversely that all probationary appointments not converted into permanent appointments stand automatically terminated and that the Applicant had no contractual status with the United Nations after the expiry of the probationary period. The clear intention of the rule is that, in the interest of both the staff member himself and the Organization, there should be no prolongation of uncertainty in the case of a probationary staff member after the expiry of the probationary period.

III. The Applicant argues that the Tribunal has held in its jurisprudence that the terms and conditions of employment of a staff member may be express or implied, that they may be gathered from correspondence and surrounding circumstances and that, from the conduct of the parties in his case, he should be deemed to have acceded to the status of a staff member holding a permanent appointment.

The Tribunal notes that the mere fact that the Applicant was transferred to another post at the end of his extended probationary period and was thereafter continued in service for another one year and ten months does not indicate that he acceded to the status of a permanent staff member or was treated as such. Staff Rule 104.13 (a) (i) provides as follows:

"The permanent appointment may be granted to staff members who are holders of a probationary appointment and who, by their qualifications, performance and conduct, have fully demonstrated their suitability as international civil servants and have shown that they meet the high standards of efficiency, competence and integrity established in the Charter."

It follows that a staff member on probationary appointment must fulfil the criteria mentioned in that Staff Rule before he can be granted a permanent appointment and that there could be no automatic conversion of a probationary appointment into a permanent appointment either by efflux of time or by an omission on the part of the Administration.

IV. On the interpretation of Staff Rule 104.12 and on a consideration of the facts and circumstances of the case, the Tribunal reaches the conclusion that the Applicant did not possess the status of a staff member with a permanent appointment. Consequently Staff Regulation 9.1 (a) applicable to termination of service of a staff member with a permanent appointment does not govern the Applicant's case.

V. The Tribunal notes that as conceded by the Respondent the employment status of the Applicant from 11 April 1969 to 18 February 1971 was anomalous. As the probationary appointment granted to the Applicant was not terminated at the end of

his extended period of probation in accordance with Staff Rule 104.12 (a), the Tribunal considers that the Applicant's employment status from 11 April 1969 to 18 February 1971 was in effect a continuation, although irregular, of his probationary appointment through the default of the Administration.

VI. The Respondent argues that as the termination in this case was neither of a permanent appointment nor of a fixed-term appointment before the expiration date, the Secretary-General was justified in terminating the services of the Applicant under Staff Regulation 9.1 (c) in the interest of the United Nations of which he is the sole judge.

While recognizing the right of the Secretary-General to terminate probationary appointments under Staff Regulation 9.1 (c), the Tribunal has drawn a distinction between the termination of a probationary appointment during the period of probation and the termination of such an appointment at the end of such period. Thus in its Judgement No. 138 (*Peynado*) the Tribunal stated:

"In Judgement No. 93 (*Cooperman*) the Tribunal, while recognizing the right of the Secretary-General to terminate a probationary appointment under Staff Regulation 9.1 (c) at his discretion, drew a distinction between termination arising at the end of the probationary service and the one arising during the period of probation. The Tribunal stated:

"Looking at the tenor of Staff Rules 104.12 and 104.13, it appears that they deal with a situation arising at the end of the period of probation when a decision about the grant of a permanent or regular appointment has to be taken."

"The purpose of probationary appointments is to grant career service on satisfactory performance and procedures are prescribed for a proper assessment of the suitability of staff members on probation for the grant of permanent or regular appointments. Under Staff Rule 104.13 (c) (iii), it is mandatory, in the absence of a favourable recommendation agreed between the Office of Personnel and the Department concerned, to refer the case to the Appointment and Promotion Board at the end of the period of probation. According to Staff Rule 104.14 (f), the Appointment and Promotion Board shall make recommendations to the Secretary-General in respect of the suitability for permanent or regular appointment of staff members serving on probationary appointments. Thus certain safeguards for a fair review of the suitability for the grant of permanent appointments have been provided under the Staff Rules and the observance of these provisions constitutes due process for the assessment of such suitability."

In the present case the Applicant's probationary appointment was not terminated during the period of probation but long after the expiry of such period. The Tribunal holds therefore that the Applicant, having completed his probationary period, was entitled to due process for the assessment of his suitability for a permanent appointment.

VII. The Respondent contends that such an assessment was made by the Appointment and Promotion Committee in 1970 and that the periodic reports covering the first three years of service of the Applicant were fully considered by the Committee. The Respondent points out that in the first periodic report it was indicated that the Applicant tended to fall behind the work and was insufficiently punctual; that in the second periodic report it was stated that the Applicant's "overall performance has been too often affected by the fact that he finds it difficult to adapt himself to the exigencies of an office routine which, by necessity, calls for a measure of punctuality and regularity in application"; and that in the third periodic report it was stated that the Applicant had not "fully succeeded in achieving a steady regularity in application and punctuality". The Respondent stresses that, although no periodic report was prepared for the subsequent period, the Chief of the Personnel Section of UNCTAD sent to the Office

of Personnel of the United Nations confidential cables dated 5 January 1970 and 17 July 1970 in which he reported no improvement in the Applicant's shortcomings. The Respondent argues that, as the Appointment and Promotion Committee made a negative recommendation concerning the grant of a permanent appointment to the Applicant after reviewing his first three years of service on the basis of objective standards, the requirements of due process were fully met.

The Tribunal observes that no periodic report was prepared for the period covering one year and ten months after the expiry of the extended probationary period and that the Applicant had no opportunity to offer his comments for that period. Even assuming that the confidential cables dated 5 January 1970 and 17 July 1970 from the Chief of the Personnel Section of UNCTAD to the Office of Personnel of the United Nations were a substitute for a periodic report, there is nothing to show that those cables were brought to the attention of the Applicant for his comments.

The Tribunal reaches the conclusion that the Applicant was deprived of due process since the termination decision was reached without providing the Appointment and Promotion Committee with the most recent information on the Applicant's performance and without affording to the Applicant an opportunity to state his case.

VIII. On the basis of the above finding, the Tribunal considered whether the injury suffered by the Applicant should be redressed by a remand for correction of procedure through reconsideration of the Applicant's eligibility for permanent appointment by the Appointment and Promotion Committee, or by payment of compensation.

Considering that on examination of the Applicant's record relating to his first three years of service the Appointment and Promotion Committee reached the conclusion that he did not qualify for a permanent appointment and considering that the non-examination of the Applicant's entire service record was a fault of procedure which even if corrected would not have the effect of effacing the earlier ratings, the Tribunal concludes that the award of compensation for fault of procedure is more appropriate in this case and orders payment of six months' net base salary as compensation to the Applicant.

IX. The Applicant seeks reinstatement under plea No. 2 and restitution of emoluments from 19 February 1971 together with successive annual increments and post adjustment applicable to Geneva with interest at 5 per cent per annum under plea No. 3. As the Tribunal has rejected the Applicant's plea that he had acceded to the status of a permanent staff member, his claims under pleas Nos. 2 and 3 fail.

X. In respect of the arrears of annual increments from 11 April 1968 to 18 February 1971 paid to him on the recommendation of the Joint Appeals Board, the Applicant claims under plea No. 4 that the sums due should be recalculated in the light of a number of factors such as changes in post adjustment in Geneva, fluctuations in the United States dollar/Swiss franc exchange rates, increased contributions to and benefits from the Staff Pension Fund, etc.

The Tribunal observes that the Joint Appeals Board did not recommend that the Applicant be reinstated or restored to the *status quo ante* which might have enabled him to claim restoration of allied entitlements. The Joint Appeals Board found, and the Secretary-General accepted, that the Applicant was entitled "to successive salary increments after his second, third and fourth years of service". The Tribunal finds that the payment of arrears of increments for the period during which such increments were withheld concludes the Applicant's rights in this behalf.

XI. As regards plea No. 5 for compensation for home leave, the Respondent states that "the Applicant has supplied no evidence that he ever applied for such leave or that having asked for a delayed entitlement to home leave it was denied him". The Applicant points out that because of the absence from the files of any "Personnel Action" form

“to establish his status as a staff member on an extended probationary appointment”, his oral inquiries as to his entitlement met with a negative reply from the Administration.

In the view of the Tribunal, it follows from the absence of a “Personnel Action” form that even if the Applicant had made a formal request for home leave the response would not have been different. The Tribunal holds that the anomalous employment situation deprived the Applicant of his rights and that the Applicant is therefore entitled to reimbursement within the amount authorized by the Staff Rules, subject to proof that such expenses were incurred by the Applicant.

XII. As regards plea No. 6 for compensation for removal costs, the Respondent argues that “there is no evidence that [the Applicant] made any application with respect to removal costs”. On the analogy of the foregoing reasoning relating to home leave, the Tribunal awards reimbursement of the removal costs within the amount authorized by the Staff Rules, subject to proof that such expenses were incurred by the Applicant.

XIII. Plea No. 7 does not arise for consideration as the Tribunal has not ordered reinstatement of the Applicant and plea No. 7 A is covered by the decision in paragraph VIII above.

XIV. For the foregoing reasons, the Tribunal:

- (1) Orders the Respondent to pay to the Applicant compensation in the amount of six months’ net base salary;
- (2) Orders the Respondent to pay to the Applicant compensation for home leave as specified in paragraph XI above;
- (3) Orders the Respondent to pay to the Applicant compensation for removal costs as specified in paragraph XII above;
- (4) Rejects the Applicant’s other pleas.

(Signatures)

R. VENKATARAMAN
President

Francis T. P. PLIMPTON
Vice President
New York, 23 April 1975

Zenon ROSSIDES
Member

Jean HARDY
Executive Secretary

Judgement No. 199

(Original: English)

Case No. 190:
Fracyon

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

Non-renewal of fixed-term appointment.

*Staff Rule 104.12 (b) and corresponding clause in the letters of appointment of the Applicant.—
Review of the particular circumstances of the case.—The decision not to renew the Applicant’s appoint-*

ment was reached on the basis of confidential letters not disclosed to the Applicant and prior to the preparation of the last periodic report.—Right of the Applicant, by virtue of circular ER/12, to have his case given fair consideration with a view to a regular appointment.—Conclusion of the Tribunal that the Applicant was not given the fair consideration implied in circular ER/12 and that the Respondent disregarded the principle of good faith in relations between the parties.

Applicant's argument that the non-renewal of his appointment was the result of prejudice against him.—Conflicting evidence on this point.—Argument rejected.

Conclusion of the Tribunal that the application is well founded.—Difficulty of remanding the case and restoring the parties to the status quo ante.—Award to the Applicant of compensation equivalent to six months' net base salary.

Order that the last periodic report and certain confidential letters be excluded from the Applicant's Official Status file.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Mr. Francis T. P. Plimpton, Vice-President; Sir Roger Stevens;

Whereas at the request of Mansour Fracyon, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended successively to 10 August 1973, 30 November 1973, 1 January 1974, 31 March 1974, 6 May 1974, 31 May 1974, 15 June 1974, 27 June 1974 and 26 July 1974 the time-limit for the filing of an application to the Tribunal;

Whereas, on 24 July 1974, the Applicant filed an application in which he requested the Tribunal to order:

"1. Rescission of the decision, notified by Headquarters to the Director of the Teheran Information Centre in Administrative Report IC/71/1 of 8 January 1971 and reaffirmed in letter dated 2 February 1971 from Assistant Secretary-General, Director of Personnel, to applicant, not to continue applicant's employment: which decision, he submits (a) was adopted in disregard of certain required procedures as indicated in Parts III A and B, below, and (b) was the result of prejudice against him on the part of his direct supervisor;

"2. Institution of a fair and orderly review of the applicant's record of service and his suitability for employment as an information assistant in the sense of paragraph 9, third sentence, of circular ER/12 of 4 November 1970 of the Office of Public Information. The steps recommended by the Joint Appeals Board in its report on case No. 215, para. 55 (see annex 2), would be one way of carrying out such a review, acceptable to the applicant;

"3. The voiding and destruction of the applicant's periodic report for the period 1 March 1970–28 February 1971 (see annex 37 b);

"4. Insertion in the applicant's files of a statement to the effect that there is no obstacle to the applicant's employment by the United Nations, as indicated in para. 197, below;

"5. Payment of appropriate compensation to the applicant in case the Secretary-General decides, under article 9, para. 1, of the Tribunal's Statute not to take further action on a finding by the Tribunal that the present application is well founded (see Part III.C, below, paras. 199 to 200);

"6. Insertion of the 'Considerations' and 'Conclusions and Recommendations' contained in paragraphs 46 to 56 of the Joint Appeals Board's report on case No. 215, together with the dissenting opinion on the conclusions, in the files which