for the Office of Conference Services informed the Applicant of the recommendation concerning him which had been submitted to the Appointment and Promotion Committee. The Applicant's point of view was set out in the memorandum addressed to the Committee by the Personnel Officer.

The Committee heard the Applicant a few weeks later and he has made no comment on the circumstances in which that interview took place.

That being so, it has not been shown that the Committee's consideration of the unfavourable appraisal of the Applicant took place in circumstances likely to affect the validity of the conclusion reached by the Committee, on which the contested decision was based.

XIV. Consequently, the Tribunal declares that the claim for rescission of the termination decision is ill-founded and rejects the claim for reinstatement of the Applicant in his status as a permanent contract holder.

XV. It is not for the Tribunal to order the Respondent to authorize the Applicant to take a translators' examination.

XVI. It is not for the Tribunal to order oral proceedings concerning the situation of persons who have not submitted an application to it.

XVII. For the foregoing reasons, the application is rejected.

(Signatures)

Suzanne BASTID
Vice-President, presiding

Endre USTOR
Member

Francisco A. FORTEZA
Member

Jean HARDY
Executive Secretary

Geneva, 19 April 1977

Judgement No. 220

(Original: English)

Case No. 204: Hilaire

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

Termination of the employment of a staff member for abandonment of post.

Unauthorized acceptance of alternative employment by the Applicant and his failure adequately to explain his continued absence.—Argument based on the fact that the Medical Director did not formally indicate to the Applicant that further sick leave had been disallowed.—Argument rejected, the Applicant having initiated his own separation from the service.—Argument that disciplinary proceedings should have been instituted.—Argument rejected, because the Respondent had the option of regarding the Applicant's unauthorized absence as abandonment of post or of referring the matter to the Joint Disciplinary Committee.—Requests for a medical review and for the conversion of nine days of annual leave to sick leave.—Requests not receivable.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Mr. Francis T. P. Plimpton, Vice-President; Mr. Endre Ustor; Mr. Francisco A. Forteza, alternate member;

Whereas at the request of Francis A. Hilaire, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended successively to 10 May 1976, 11 June 1976, 18 June 1976 and 28 June 1976 the time-limit for the filing of an application to the Tribunal;

Whereas, on 29 June 1976, the Applicant filed an application the pleas of which read as follows:

"A. Applicant requests the Administrative Tribunal to rescind the administrative decisions of 31 October 1972 and 7 August 1975 to consider his absence from duty as a unilateral separation from the United Nations initiated by him, or as abandonment of post; to order his restoration to full sick leave entitlement in implementation of Staff Rule 106.2; and, if his sick leave is disallowed, to order that proper medical review be instituted as provided under Staff Rule 106.2 *(a)* (viii).

"B. Applicant also requests the Administrative Tribunal to order the correction of his leave record so that the days of his hospitalization, 10–13 and 16–20 August 1971, would be recognized as sick leave and not annual leave."

Whereas the Respondent filed his answer on 13 August 1976;

Whereas, on 27 September 1976, at the request of the Applicant, the Tribunal decided to postpone the consideration of the case to its next session;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 25 February 1958 as a Messenger and received a permanent appointment on 1 February 1960. On 1 March 1961 he became a Security Officer. On 13 May 1969 the Acting Medical Director of the United Nations advised the Chief of the Security and Safety Section that the Applicant should be restricted to working indoors when it was very cold weather. On 10 May 1971, in a memorandum to the Chief of the Security and Safety Section, the Medical Director expressed the hope that temporary arrangements could be made for the next four months so that the Applicant would have a more sedentary job. On 2 August 1971 the Applicant went on authorized annual leave for three weeks. It appears, however, that during that period he was hospitalized for almost two weeks, until 22 August 1971. From 23 August 1971 through 15 November 1971 the Applicant was on certified sick leave. On 13 November 1971 his physician sent to the Medical Director a report stating that during the past few months the Applicant had been plagued with two conditions which had necessitated continued absence from his employment and that it was very difficult to determine when he would be able to return to work and resume normal activities. On 21 December 1971 the Medical Director telephoned the Applicant's physician (because he had been unable to reach the Applicant during the previous weeks), and was told that the physician had not seen the Applicant since mid-November. However, as indicated below, the Applicant's physician, in a letter to the Medical Director dated 9 February 1972, stated that since his report of 13 November 1971 he had seen the Applicant four times in his office in November and December and had spoken to him by telephone several times. The Applicant asserted that he had visited the Medical Director in early November 1971 and again on 22 November 1971 and had requested the Medical Director to communicate with his personal physician; the Medical Director denies this. The Applicant admits that he learned from the Medical Service that further information concerning his state of health in the form of a report from his physician was required before his sick leave might be restored. On 22 December 1971 the Medical Director recorded in a note for the file that he had been

informed on that day by the Security and Safety Section that the Applicant was either working or under a training programme at the Johns-Manville Sales Corporation in New York; upon the Medical Director's instructions the Medical Service had contacted that company and had been told by a secretary that the Applicant was being paid by the company but that additional information could not be released without a written request. On 23 December 1971 the Executive Officer of the Office of General Services wrote to Mr. Muteba, Administrative Officer in the Office of Personnel, that according to information received from the Security and Safety Section the Applicant, while being on certified sick leave, was employed as a sales trainee with the Johns-Manville Sales Corporation and that this was "a classic case where appropriate decisive action needs to be taken to separate a staff member, who under the excuse of being sick remains absent from his duties while at the same time engaging himself in other occupations". On 29 December 1971 Mr. Muteba recorded in a note for the file that on that day he had telephoned the Johns-Manville Sales Corporation and that a Mr. Robert Cheatham of the Personnel Department had disclosed to him that the Applicant "was employed by that company effective 1 December 1971 on a permanent basis and that his annual salary was $15,000". On 3 January 1972 Mr. Muteba wrote to Mr. Cheatham requesting written confirmation of that information. On 4 January 1972 Mr. Muteba cabled the Applicant as follows:

> "You have absented yourself from work without authorization since 16 November 1971 end of your certified sick leave. We are also informed of your employment with Johns-Manville Sales Corporation at 270 Madison Avenue without prior authorization from the Secretary-General and in clear violation of Staff Rules. Before taking any administrative action to separate you from service for abandonment of post you are offered a further opportunity to report to my office —room 2133—immediately but not later than Thursday, 6 January 1972—to explain reasons of absence and answer question of unauthorized outside activity. Should you fail to do so by Thursday, 6 January 1972, I shall proceed with your separation from service with United Nations"

A copy of the cable was sent to the Applicant on the same day by registered letter. On the same day also, according to a note for the file written by Mr. Muteba on 7 January 1972, the Applicant telephoned him about 4 p.m. to explain that a misunderstanding had arisen because his wife was working at the Johns-Manville Sales Corporation, and in the course of the conversation Mr. Muteba read over the telephone the cable which was being sent to the Applicant, who replied that he would try to see Mr. Muteba by 6 January 1972. On 5 January 1972 an Investigator from the Security and Safety Section went to see Mr. Cheatham in his office and obtained from him verbal confirmation of the information conveyed to Mr. Muteba over the telephone on 29 December 1971; having requested that such information be confirmed in writing, the Investigator was advised that before such a letter could be released it would have to be cleared with a company attorney then in the Denver, Colorado office of the Corporation. On 6 January 1972 the Investigator reported his conversation with Mr. Cheatham to Mr. Muteba. Earlier in the day, according to Mr. Muteba's note for the file dated 7 January 1972, the Applicant had called him again on the telephone and had asked to see him by 11 a.m. The Applicant did not show up in Mr. Muteba's office but sent him a letter, dated 6 January [1972] and received on the following day, which read:

> "I was glad I had the opportunity to speak to you on the telephone yesterday when you informed me that I should come to your office. After our conversation I was not feeling well and therefore it was not possible for me to keep the appointment. I very much regret not being able to see you as we had planned.
>
> "In the course of our conversation you mentioned that a cable had been sent to me, but up to the time of writing, I had not received any cable from your office."

On 6 January 1972 also, in a memorandum to the Chief of Staff Services, Mr. Muteba recommended that the Applicant be considered as having abandoned his post as of 16 November 1971 since he had not reported to Mr. Muteba's office on 6 January 1972 as requested. On 7 January 1972 Mr. Muteba appended to the Applicant's letter dated 6 January [1972] a note to the Chief of Staff Services reading:

> "I expected Mr. Francis Hilaire to come and see me by 6 Jan. 1972. As he did not report to my office as agreed on 4 Jan. and 6 Jan. 1972, I therefore assumed that he had abandoned his post. It was on the basis of his failure to comply with our instructions that I recommended, in my memorandum dated 6 Jan. 1972 that he be separated from the service of the United Nations for abandonment of post.
>
> "Consequently I do not believe that his allegations expressed in his letter of 6 Jan 1972 should be taken into account at this stage."

On 10 January 1972 the Chief of Staff Services submitted the following recommendation to the Director of Personnel:

> ". . . Mr. Hilaire has been absent from work since 23 August 1971. The Medical Director certified sick leave for him until 15 November 1971 but since 16 November 1971, Mr. Hilaire's absence has been without plausible excuse and the Medical Director refused to certify this absence as on sick leave. About the end of December 1971 information was received that Hilaire has taken up permanent employment with Johns-Manville Sales Corporation as of 1 December 1971. This was confirmed by Mr. Robert Cheatham of the Personnel Department of the Corporation both by telephone to Mr. Muteba and personally to UN Investigator John Hrusovsky. Mr. Muteba cabled Mr. Hilaire on 3 January 1972 asking for a full explanation and threatening with separation for abandonment of post. Mr. Hilaire has not reported at the office nor did he provide adequate explanation. His conduct would warrant a dismissal but since dismissal is a disciplinary measure and would require referral to the Joint Disciplinary Committee and since the evidence clearly indicates that Mr. Hilaire has in fact abandoned his post from the date of his failure to produce to the Medical Director or to the Administration acceptable proof of illness or of any other plausible excuse, I find that there is a clear case for separation of Mr. Hilaire for abandonment of post with effect from 16 November 1971. *I therefore recommend your approval of the separation initiated by the staff member effective 16 November 1971.*"

On 12 January 1972 the Director of Personnel approved that recommendation and on the following day Mr. Muteba sent the following letter to the Applicant by registered mail:

> "You have absented yourself from duty without prior authorization since 16 November 1971. Several opportunities were given to you to offer a plausible explanation or excuse for your unauthorized absence but you have failed to do so. I have checked with the Office of General Services and with the Medical Director and it has been confirmed to me that you have neither sought nor obtained any authorization for your absence.
>
> "You have been warned both orally and in writing that this absence of yours would be considered as a unilateral separation from the United Nations initiated by you. Since you have had enough time to prove otherwise and to rectify this situation but you have failed to do so, the Director of Personnel has agreed to your separation from service with the United Nations with effect from your absence on 16 November 1971. Please be advised that your separation is being processed accordingly."

Delivery of the letter was refused twice, however, and the letter was returned to sender. That the address to which the letter was sent was the proper address of the Applicant was confirmed by the Applicant by letter dated 12 April 1972. On 3 February 1972 the

Investigator submitted a report from which it appears that on 27 January 1972 he telephoned the Applicant at the Johns-Manville Sales Corporation requesting him to return his United Nations issued security equipment, that the Applicant agreed to telephone him on 31 January 1972 to arrange a date for his visit to the United Nations Headquarters, that the Applicant did not contact the Investigator as promised, that the Investigator again telephoned the Applicant on 2 February 1972, at which point the Applicant stated that no United Nations official had informed him of the termination of his services with the United Nations and promised that he would contact the United Nations Office of Personnel on 3 February 1972 to clarify his status, and that the Applicant did not contact the Office of Personnel as arranged. On 9 February 1972 the Applicant's physician submitted to the Medical Director the following report:

"Since my last letter to you on November 13, 1971, I have seen the above named patient four times in my office in November and December and have spoken to him by telephone several times.

"As you know, Mr. Hilaire has varicosities of his left leg and I have advised surgery. While waiting for a hospital bed, he began complaining of shortness of breath, and I delayed any surgical procedure. In discussing this situation with him, I stressed that his present occupation at the United Nations would only aggravate his condition, and I mentioned the possibility of a sedentary occupation.

"Shortly, thereafter, as you are also aware of, he was hospitalized for pulmonary embolism. Since his discharge, he has been constantly on the telephone to me complaining of persistent shortness of breath. Because of this symptom, a scintiphoto of the lungs using 131 Iodine macroaggregated albumin was performed on January 6, 1972. The left lung field had normal perfusion, but the findings on the right were consistent with pulmonary embolus.

"His shortness of breath persists, and at the present time, I do not know how well he would tolerate any employment.

"In view of his clinical findings, I have, therefore, recommended to him that he should remain at home under medical supervision for an indefinite period of time."

On 15 February 1972 Miss Chell, Administrative Officer in the Office of Personnel, informed the Applicant that the Office of General Services was unable to initiate his final clearance papers to pay him the monies still due to him for salary and accrued annual leave because he had not yet returned the United Nations property in his possession; she attached to her letter a copy of the letter of 13 January 1972. On 8 March 1972 Miss Chell recorded in a note for the file that the Applicant had telephoned and asked about sending him the money still owing to him as salary and about his income tax return, that she had explained that the Security and Safety Section was still waiting for him to return the items he still had which belonged to the United Nations and that the Applicant had said that he was not feeling well at that time and would do it as soon as he could. In a further note for the file, Miss Chell recorded on 24 March 1972 that the Applicant had telephoned again to say that he had still not received his statement of earnings for the Internal Revenue Service and to inform her that he had turned in all outstanding property of the United Nations. On 12 April 1972 the Applicant wrote to Mr. Walewski, Administrative Officer in the Office of Personnel, requesting that, in keeping with his physician's report of 9 February 1972, he be restored to full sick leave status as of 16 November 1971 under the terms of Staff Rule 106.2. Mr. Walewski referred the Applicant's letter to the Medical Director, who on 5 May 1972 commented as follows:

"As I understand that Mr. Hilaire began another job, outside the UN, on 1 December 1971, and as I had certified his sick leave up to 15 November 1971, I

believe that he wishes to be granted sick leave for the period 16 November to 30 November 1971.

"When I telephoned Mr. Hilaire's physician on 21 December 1971 (because I had been unable to reach Mr. Hilaire on the telephone on several occasions during the previous weeks), he told me that he had not seen Mr. Hilaire since mid-November.

"As Mr. Hilaire was able to work on 1 December 1971, he obviously was not fully disabled right up to 30 November and he would presumably have been fit to work at the UN on light duty for at least a week or so before that date as he had been on full sick leave since 23 August 1971.

"I have insufficient evidence that Mr. Hilaire was so disabled between 16 November and 30 November 1971 to justify the certification of sick leave for this period."

On 10 May 1972 the Personnel Officer of General Services informed the Applicant that the Medical Director had found insufficient evidence to justify the certification of sick leave for the period from 16 to 30 November 1971. On 6 June 1972 the Applicant submitted to the Director of Personnel a request that, if the certifications of sick leave that he had provided remained unacceptable, the provisions of Staff Rule 106.2 *(a)* (viii) be applied and medical review be instituted. On 19 July 1972 the Office of Personnel confirmed the ruling conveyed to the Applicant on 10 May 1972. On 20 August 1972, in a further letter to the Director of Personnel, the Applicant requested clarification of his status. On 18 September 1972 the Office of Personnel replied that the Applicant had unilaterally initiated his separation from the service of the Organization effective 16 November 1971 and that consequently the question of restoration to sick leave status did not arise. On 14 October 1972 the Applicant asked the Secretary-General to review the decision communicated to him on 18 September 1972. On 31 October 1972 the Applicant's request was denied and, on 15 January 1973, he lodged an appeal with the Joint Appeals Board. The Board submitted its report on 26 June 1975. The final section of the report read as follows:

"Conclusions and recommendations

"44. The Board finds that the appellant abandoned his post when he failed to return to duty or to offer any explanation of his continued absence, that it was not obligatory for the respondent to institute disciplinary proceedings against the appellant for having engaged in unauthorized outside employment, and that the applicant's separation from the service is therefore well founded.

"45. The Board finds further that the appellant was notified on 4 January 1972 that further sick leave after 15 November 1971 was refused, and that he could have requested a medical review of that decision at that time.

"46. The majority of the Board holds that the effective date of the appellant's separation from service for abandonment of post should have been 26 November 1971, the end of the fourth working day following the day on which he was requested by the Medical Director to produce a further medical report, and that he is therefore entitled to payment for nine working days of sick leave from 16 November 1971 through 26 November 1971.

"47. The majority of the Board finds, lastly, that the appellant is not entitled to convert nine days of annual leave in August 1971 to sick leave, since he did not submit the relevant request for sick leave promptly, as required in Staff Rule 106.2 *(b)*.

"48. In view of the foregoing, the Board recommends that the appellant's pleas should be denied. The majority of the Board recommends further that the effective date of the appellant's separation from service should be changed from

15 November 1971 to 26 November 1971 and that he should therefore be paid for nine working days of sick leave."

The Alternate Member elected by the Staff appended to the Board's report the following dissenting opinion:

"1. I concur completely with the conclusions set out in paragraphs 44 and 45.

"2. I am, however, unable to support the conclusion of the majority of the Board in paragraph 46. In my view, the period from 16 November 1971 through 11 December 1971, when the Medical Service, having before it a medical report indicating that the appellant was not fit to return to duty, did not notify the appellant formally that sick leave was disallowed and the Administration did not request the appellant to return to work, may not be considered as unauthorized absence, and the effective date of the appellant's separation from service for abandonment of post should therefore be 11 December 1971, the day before the appellant, according to the latest information provided by the Johns-Manville Sales Corporation, began his employment with the Corporation.

"3. I am also unable to agree with the conclusion reached by the majority of the Board in paragraph 47. I consider that, if the appellant is able to establish that he was hospitalized during the three week period in August 1971 when he was on authorized annual leave, the Organization is under a moral obligation to recognize those days as sick leave and should grant the appellant an *ex-gratia* payment for the sick leave in question."

On 7 August 1975 the Officer-in-Charge of Personnel Services communicated the decisions of the Secretary-General to the Applicant in the following letter:

". . .

"The Secretary-General has re-examined your claim in the light of the Board's Report, including the dissenting opinion, and has taken note of the Board's conclusion that it makes no recommendation in support of your appeal.

"Accordingly, the Secretary-General has decided to maintain the decision of your separation from service for abandonment of post. He has also decided to accept the recommendation of the Board's majority that the effective date of your separation from service should be changed from 15 November 1971 to 26 November 1971 and that you should accordingly be paid for nine working days of sick leave covering that period."

On 29 June 1976 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The issue in the case is the Applicant's restoration to full status as a staff member on permanent appointment, as of 16 November 1971, and his restoration to full sick leave status in implementation of Staff Rule 106.2.

2. The charge of unauthorized absence from duty was unfairly and unlawfully contrived to justify retrospectively the circumvention of the medical issue that was evident in November 1971 as the very core of the problem, and the circumvention of the proper procedures that are applicable under Staff Rule 106.2.

3. In November 1971 the Applicant's sick leave and annual leave entitlements were not exhausted and, in spite of medical certification dated 13 November 1971 from his physician, his sick leave was disallowed as of 16 November 1971 without stated medical reason. Furthermore, the procedure under Staff Rule 106.2 *(a)* (vii) was ignored. The Applicant was given to understand that further medical certification was necessary. He was thus led to believe that he could obtain approval of certified sick leave retrospectively, and was thus prevented from requesting the institution of the medical procedure

provided under Staff Rule 106.2 *(a)* (viii). In fact, the Applicant's physician was not informed either of the fact, or of the nature, of the Medical Director's disagreement with the report of 13 November 1971.

4. There has been no explanation of the fact that, in the circumstances that were designed in November 1971, the Applicant was not ordered to report for duty on 16 November 1971, but on 10 January 1972, on the same day that he was to appear at a hospital.

5. By 16 November 1971, the medical review that was indicated concerned not only the question of authorization of certified sick leave, but also the question of a *medical* determination of the Applicant's ability to work. The decline in the Applicant's health had originated in a service-incurred illness. A proper review under the medical procedure provided in the Staff Rules would have taken into account the medical facts prior to 16 November 1971.

6. Under the Staff Rules there is no definition of, or justification for, the sort of status that was devised for the Applicant as of 16 November 1971. In November 1971 the Administration sought to place the Applicant in an anomalous position, in disregard of the proper corrective procedures under Staff Rule 106.2.

Whereas the Respondent's principal contentions are:

1. The Respondent's decision to consider the Applicant's unauthorized absence a self-initiated separation constituting an abandonment of post was not only a correct, fair and lawful decision, and in full conformity with the terms of the Applicant's appointment, but represented, in the circumstances, a relatively lenient course of action on the part of the Respondent.

2. The Applicant's furtive and unilateral acceptance of outside employment, which was in clear violation of Staff Regulations 1.2, 1.4 and 1.6, as well as of the specific requirements of Staff Rule 101.6 *(a),* excluded any possibility of the Applicant's continued and simultaneous employment by the United Nations, even in the event that his unauthorized absence could have been adequately accounted for (which the Respondent denies), and also excluded the continuance of any rights which he might otherwise have claimed under the terms of a United Nations appointment. Such acceptance was also tantamount to defrauding the United Nations. In a circumstance of such seriousness, the Respondent would have been fully justified in resorting to disciplinary measures.

3. All of the rights which the Applicant is entitled to claim under the terms of his appointment up to the date of his separation have been granted by the Respondent, and no question arises or can arise of any further entitlement to sick leave (not already granted) or of any refusal of sick leave in respect of which a review can lawfully be claimed under Staff Rule 106.2 *(a)* (viii).

4. If it was ever the case that the Applicant could lawfully have claimed sick leave during part of the period of his authorized annual leave in August 1971, any such entitlement was governed by the terms of Staff Rule 106.2 and in particular paragraph *(b)* thereof. In any event, by not reporting his alleged sickness or hospitalization, or claiming sick leave in respect of this period until more than one and a half years later, and by not providing the necessary certifications, the Applicant failed to comply with the essential requirements of Staff Rule 106.2.

The Tribunal, having deliberated from 13 to 20 April 1977, now pronounces the following judgement:

I. In its report the Joint Appeals Board noted:

> ". . . while there was some question as to whether the appellant's employment with the Corporation had begun on 1 December 1971 or on 12 December 1971, the fact of his employment, beginning at some time in the first half of December 1971, was admitted."

Not only does such conduct violate the specific requirements of Staff Rules 101.6 *(a)* and 106.2 *(a)*, it clearly rebuts the Applicant's contention that he was still an employee of the Organization at any time after 12 December 1971. The unauthorized acceptance of alternative employment by the Applicant is inconsistent with an intention to continue employment at the United Nations and constitutes abandonment of his post.

The intention to abandon employment at the United Nations is further demonstrated by the Applicant's failure adequately to explain his continued absence. As the Respondent notes, there is no requirement on the part of the Organization to order an absent employee back to work. On the contrary, under Staff Rule 106.2 a staff member is obligated to attend to his duties and to explain any uncertified absence.

II. While the dissenting Board member is correct in observing that from 16 November 1971 through 11 December 1971 (the day before the Applicant became an employee of Johns-Manville Sales Corporation), the Medical Director had in his possession a letter from the Applicant's physician dated 13 November 1971 stating that it was "very difficult to determine when he will be able to return to work and resume normal activities", and while the Medical Director did not formally indicate to the Applicant that further sick leave had been disallowed, it is clear that the Applicant was aware that a further report from his physician was required before any further sick leave could be granted. By the time any review of his medical status could have been instituted, the Applicant had initiated his own separation from the service and ceased to be a staff member of the United Nations.

Were this a disciplinary proceeding, initiated because of the Applicant's failure to conform to the Staff Rule regarding the submission of sufficient evidence of illness, the dissenting Board member's objection that the Medical Service did not formally notify the Applicant that his sick leave had been disallowed might have merit. But the Applicant is not being disciplined for a violation of staff rules, he is being separated from the service because of his own abandonment.

III. The Applicant's second contention, that disciplinary proceedings should have been instituted, is also in error. As the Board properly recognized, the Respondent had the option of regarding the Applicant's unauthorized absence as abandonment of post and, therefore, cause for separation, or of referring the matter to the Joint Disciplinary Committee.

IV. Little needs to be said concerning the Applicant's belated request for a medical review pursuant to Staff Rule 106.2 *(a)* (viii). Even if the contention that the Medical Director's conduct during November and December of 1971 was ambiguous were accepted, it is clear that at least as early as 4 January 1972 the Applicant was aware that his explanation for absence was considered inadequate by the Respondent. On that date, the Administrative Officer cabled the Applicant:

> "You have absented yourself from work without authorization since 16 November 1971 . . ."

Clearly, the Applicant was aware that his sick leave claim had been rejected. The failure of the Applicant promptly to request a medical review once the Respondent's position had become clear forecloses his attempts belatedly to raise the issue.

V. It is the same lack of timeliness that condemns the Applicant's request to convert nine days of annual leave in August 1971 to sick leave under Staff Rule 106.2 *(b)*. Not until 21 May 1973, when the case had already reached the Joint Appeals Board stage, was this issue first raised. The Tribunal holds therefore that the Applicant's request was belated and that his claim consequently fails.

VI. For the foregoing reasons the application is rejected.

(Signatures)

R. VENKATARAMAN
President

Francis T. P. PLIMPTON
Vice-President

Endre USTOR
Member

Francisco A. FORTEZA
Alternate member

Jean HARDY
Executive Secretary

Geneva, 20 April 1977

Judgement No. 221

(Original: English)

Case No. 209: Bérubé

Against: **The Secretary-General of the International Civil Aviation Organization**

Grant of a permanent appointment at the G-5 level cancelling and superseding a permanent appointment at the G-7 level.

Request for rescission of the Secretary-General's decision accepting the opinion of the Advisory Joint Appeals Board declaring the appeal not receivable.

Request for oral proceedings.—Request rejected, as all material facts are on record.—Request that the Tribunal declare its competence in the case.—The Tribunal holds that it is competent, since the Applicant is a staff member of a specialized agency which has acceded to the jurisdiction of the Tribunal and questions relating to non-observance of pertinent staff regulations and rules arise for consideration in the case.—Request that the Tribunal declare the application receivable.—Observation by the Tribunal that the receivability of the application is not contested.

Principal request.—Contention of the Respondent that no administrative decision was taken in the case.—Contention rejected, because the very offer of a new appointment contained an administrative decision, namely to cancel and supersede the Applicant's earlier letter of appointment.—The relevant staff regulations and rules were not fully discussed with the Applicant before her acceptance of an appointment at a lower level.—Conclusion of the Advisory Joint Appeals Board that since duress had not been established the appeal was not receivable.—Reasons other than duress rendering a contract voidable.—Obligation, before any change in a staff member's conditions of service is made to his prejudice, to explain to the staff member all implications of the change.—Fact that the Board pronounced on the validity of the new contract.—Conclusions of the Tribunal that in this case the Respondent took an administrative decision which is appealable, that the Applicant cannot be barred from agitating her case on merits, that the question relating to the adverse consequences of the new contract on pension benefits accruing to the Applicant calls for a decision on merits, and that the Board was in error when it decided that the appeal was not properly receivable.

Rescission of the Secretary-General's decision accepting the opinion of the Advisory Joint Appeals Board.—Case remanded for a decision on merits.