

It is for the Joint Staff Pension Fund and WHO to make within three months the necessary arrangements for the implementation of the decision set forth in paragraph XVII above.

XIX. All other pleas are rejected.

XX. On 12 October 1977, after its Judgement had been drawn up, the Tribunal received from the Respondent the report on the Applicant's exit medical examination. On studying the report, the Tribunal found that under the heading "Conclusion", where the examining physician is invited to "state his conclusions on the physical and mental abilities of the candidate", he had written:

"Defer pending decision of Dr. Dulac, Director, Joint Medical Services, Geneva, Switzerland."

The Tribunal considers that the report on the exit medical examination does not confirm the Respondent's contention that on the date of separation the Applicant was "not in fact incapacitated for further service" within the meaning of article 34 (a) of the Pension Fund Regulations.

The Tribunal therefore considers that the report on the exit medical examination does not affect the conclusions it has reached in this Judgement.

(Signatures)

R. VENKATARAMAN
President

Francisco A. FORTEZA
Member

Suzanne BASTID
Vice-President

Jean HARDY
Executive Secretary

New York, 12 October 1977

STATEMENT BY MR. R. VENKATARAMAN

I have participated in the discussions and read the draft English translation of the Judgement and I concur with the decision.

New York, 12 October 1977

(Signature)
R. VENKATARAMAN

Judgement No. 227

(Original: English)

Case No. 219:
Hill

Against: The Secretary-General
of the United Nations

Non-renewal of a fixed-term appointment.

Acceptance by the Respondent of the finding of the Joint Appeals Board that UNDP broke a promise made to the Applicant when it prematurely decided not to renew his appointment.—Dispute as to the amount of compensation due to the Applicant.—Necessity of determining this amount on the basis of the termination indemnity provisions.—Duration of the appointment which the Applicant would normally have been awarded.—Application of the aforementioned provisions, resulting in the amount already paid

by the Respondent.—Contention of the Applicant that the compensation should take into account the salary increment to which he would have been entitled.—Annex III (c) to the Staff Regulations and Staff Rule 103.8 (c).—Contention rejected.—Conclusion of the Tribunal that the Respondent has correctly calculated the compensation.—Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

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

Whereas, on 14 June 1977, Arthur H. Hill, a former staff member of the United Nations Development Programme, hereinafter called UNDP, filed an application the pleas of which read as follows:

“The United Nations Joint Appeals Board, in its report to the Secretary-General dated 3 December 1976, unanimously recommended ‘. . . that the appellant should be offered an appointment . . .’, but ‘. . . should the UNDP decide not to offer an appointment, justice would be achieved by paying compensation . . .’.

“The Applicant requests the Tribunal to endorse the recommendations of the Appeals Board. He is willing to accept a just compensation in lieu of reinstatement. Under article 7, section 3 (c), the Applicant claims compensation equivalent to two years’ net base salary.”

Whereas the Respondent filed his answer on 29 June 1977;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 23 August 1972 under a fixed-term appointment of two years at the P-5 level as Deputy Regional Representative of UNDP for the Western Pacific Region. On 15 June 1973, during the experimental period which preceded the adoption by UNDP of a new format for reporting on the performance of staff, a performance review report on the Applicant’s service was drawn up. In October-November 1973, in a regular periodic report covering his first year of service, the Applicant was rated average on all specific items except judgement, where he was rated below average, and sense of responsibility, where he was rated above average, and he received the over-all rating of “a staff member who maintains a good standard of efficiency”. On 17 December 1973, in a letter returning the signed report to the Division of Personnel of UNDP, the Applicant wrote that he was “disappointed and surprised by some of the ratings” and looked forward to the opportunity to discuss these during his next visit to Headquarters; he also expressed regret that it did not appear from the report that he had served a full four months as Regional Representative ad interim and that because of duty travel the Regional Representative and himself had actually been together in Apia (Western Samoa), their duty station, for less than five months of the period in question. While the Applicant was on home leave in March 1974, the Government of Western Samoa suspended entry permits for the staff of the Regional Office, which was eventually closed. In March and April 1974 the Applicant visited Headquarters to discuss his future in UNDP. On 25 April 1974 he met with the Deputy Director of the Regional Bureau for Asia and the Far East, who on the same day sent to the Director of the Division of Personnel of UNDP a memorandum reading in part:

“As discussed, I had a meeting today with Mr. Hill in which we discussed his future in UNDP. I informed Mr. Hill that the decision was to assign him as Deputy Resident Representative in Afghanistan for an initial period of one year, and that we will inform the Resident Representative that he should expect Mr.

Hill's arrival in early June. The exact date of arrival will be cabled by Mr. Hill directly.

“ . . .

“I also told Mr. Hill that the reports that we have on his performance in Western Samoa were not promising, and that it was in his own interest and our interest to clear these ambiguous records. For this reason we are going to ask Mr. Borthwick, the Resident Representative in Afghanistan, to supervise him closely and to report to us on his progress in the first six months after his arrival in Kabul, and for a second and final report during this checking period after one year.

“I have handed a copy of this memorandum to Mr. Hill, who has acknowledged receipt of the copy.”

On 6 May 1974 the Regional Representative of UNDP in Western Samoa, who had been asked on the occasion of his separation from service to provide an evaluation of the Applicant's performance for the period from August 1973 to April 1974, stated that there were no changes to be made in the previous report. On 7 June 1974 the Deputy Director of the Regional Bureau for Asia and the Far East sent to the Resident Representative of UNDP in Afghanistan the following letter:

“I am writing in connexion with the Deputy Resident Representative-Designate to your office, Mr. Arthur Hill, who is expected to report to Kabul this week. As you may have surmised, for reasons outside our control, including the decision by the Government of Samoa to suspend entry permits for all UN Staff catching Mr. Hill out of the country on Home Leave, as well as since we were anxious to alleviate the difficult staffing situation in your office, we were obliged to accelerate arrangements for Mr. Hill's assignment to Kabul.

“However, as you have accepted Mr. Hill, 'sight unseen', to be perfectly fair I should mention that Mr. Hussey [the Regional Representative of UNDP in Western Samoa]'s reports on his performance in Apia are not the best, which given the awkward personal relationship between the two, we are prepared to discount to a certain degree. At the same time, Mr. Hill was interviewed by senior members of my Staff in the Bureau while in New York some weeks back and we are reasonably certain that with your assistance and guidance he will be able to make a worthwhile contribution to the work of the Kabul office. . . . I am attaching a copy of [the memorandum of 25 April 1974 mentioned above] which clearly sets out the Bureau's position on his assignment. Mr. Hill's contract has been extended into 1975 and we regard his first six months in Kabul as a sort of 'probationary period' and would look forward to receiving your interim reports on his development.”

The Applicant took up his duties at Kabul on 8 June 1974. On 24 June 1974 the new procedures for reporting on the performance of UNDP staff members were announced in a circular (UNDP/ADM/PER/56) which provided *inter alia* that the performance review reports issued earlier would be placed in the official personnel files unless the staff member concerned objected to that procedure before 1 September 1974 by writing to the Director of the Division of Personnel. On 13 August 1974 the Applicant accordingly sent a letter to the Director of the Division of Personnel, agreeing to the performance review report being included in his official personnel file but asking that his comments (attached as annexes to his letter) on both the performance review report and the regular periodic report be also placed on file, together with his letter. On 10 September 1974 the Director of the Division of Personnel replied:

“That headquarters has some doubt concerning the validity of the performance assessments made on you thus far should be clear from the memorandum from Mr. Vegega [Deputy Director of the Regional Bureau for Asia and the Far

East] to me dated 25 April 1974, of which you have a copy. (I am enclosing an additional copy for your convenience.) That memorandum reflects a decision process that makes every attempt to be absolutely fair to all concerned.

“. . . Annexes I and II to your letter can be construed as rebutting the Performance Review Report and Periodic Report referred to in your letter.

“Since Annex II is the easier to deal with, I will address that first. It is submitted close on one year after the fact and deals with matters that appear to be judgemental and, in any case, are rated as ‘average’. With the foregoing in mind, I do not see what is being rebutted, as opposed to questioned as judgement.

“The rebuttal to the Performance Review Report is a somewhat more complex matter. If the report is placed on the file, you obviously have a right to rebut it. However, in that you dispute its contents, you have a much more direct form of rebutting it: preventing its placement on the official file. It would appear to me that it would be far more logical to direct that the report not be placed on file than to direct (albeit passively) that it be placed on file and then to rebut its contents. Further, I would remind you that the Regional Bureau has, by implication, accepted that there were problems attendant to your service in Western Samoa and have chosen to assign you to another office where similar problems presumably do not exist and to assess your performance there.

“All things considered, would it not be preferable to treat the occurrences in Western Samoa as a closed book and to approach your Kabul assignment with all vigour? That obviously would include not placing the Performance Review Report, (and, for that matter, your 13 August letter) on file. If, however, you wish to have the form placed on the file and to have your letter serve as a rebuttal to it, we will conform to your wishes, even though I fail to see the logic of such a move. Therefore, I await your reply.”

On 21 September 1974 the Applicant informed the Director of the Division of Personnel that he wished to treat the occurrences in Western Samoa as ‘a closed book’ and to have his performance review report and his earlier letter removed from his official file. In the meantime, the Applicant’s appointment had been extended for one year as of 23 August 1974. The first six months of the Applicant’s service in Afghanistan were evaluated in a performance review report in which the Resident Representative of UNDP criticized some aspects of the Applicant’s work; a section of the report dated 10 December 1974 and containing additional comments made by the Resident Representative and by the Applicant following a discussion of the preceding sections of the report read:

“Mr. Borthwick stressed that his evaluation is not intended to be his final evaluation. Mr. Borthwick recognizes that Mr. Hill’s assignment to Kabul after a clearly unhappy experience in Apia and at a time when this office was still facing staff shortages, in the face of a heavy programming load, did not make Mr. Hill’s first three months easy ones. The more recent reorganization period is a further complicating factor in this evaluation. Mr. Borthwick felt that the present report must be regarded only as an interim one and would not be used for any decisions in the near future on Mr. Hill’s future in UNDP.

“Mr. Borthwick and Mr. Hill agreed that more frequent frank exchanges should be held in the next period. Mr. Borthwick hopes that he will have more time to assist Mr. Hill to develop his skills in programme work. Mr. Hill believes that he is becoming less influenced by his Apia experience and is now more settled (his personal effects have just arrived).”

On 14 March 1975 the Director of the Division of Personnel wrote to the Applicant the following letter:

"As you know, the extension of your fixed-term contract with UNDP expires on 22 August 1975 and I thought that I should write to you at this stage to inform you that we are not in a position to offer you a further extension.

"You will recall that, when your reassignment to Kabul was arranged following the somewhat unusual circumstances which led to the need to move you from Apia, it was made clear to you that this second chance would be on rather a trial basis; your contract was accordingly renewed for one year rather than the usual term of two years.

"We appreciate that as far as Mr. Borthwick is concerned, his first assessment in your performance review report was not intended to be final. I very much regret to inform you that the decision to allow your contract to lapse and not extend it has been made as a result of subsequent consultations between the Regional Bureau for Asia and the Pacific and the Division of Personnel. . . ."

On 15 March 1975 the Resident Representative advised the Director of the Regional Bureau for Asia and the Pacific that:

"More than three months have passed since my evaluation of his first six months. In this time, Mr. Hill has shown no improvement in his work with the Programme Officers. However, his work in general administration is satisfactory. I am now convinced he is not the DRR we need in Kabul."

The letter of 14 March 1975 was transmitted to the Applicant under cover of a letter dated 18 March 1975 from the Chief of the Recruitment and Development Branch of the Division of Personnel to the Resident Representative which read:

"I am sending you this copy of a letter to Mr. Hill together with the original addressed to him in which we inform him that his contract will be allowed to lapse in August 1975 and not be extended.

"This will no doubt be a disappointment to him. While we recognize that your assessment of his work in his Performance Review Report was not intended to be final as far as you were concerned, we reviewed the position here at Headquarters and the decision not to extend him was based on his performance in Western Samoa as well as Afghanistan. As you know, he was basically given a second chance and had a chance of really proving himself under a second Resident Representative and of neutralizing the previous adverse reports on him; this he was unable to do and we regret that such action is necessary in the interest of the Organization to recruit and retain the best available staff, and the competition for posts with UNDP increases steadily.

"We will be forwarding to you under separate cover the candidature for Deputy Resident Representative to replace Mr. Hill which has now been endorsed by the Administrator's Quarterly Meeting on Resident Representatives and Deputy Resident Representative assignments."

On 29 March 1975 the Resident Representative wrote to the Chief of the Recruitment and Development Branch that he was disturbed at the thought that he had played a part in the Applicant's separation from UNDP, adding:

"UNDP has taken the decision before the further evaluation from me and I am wondering what other factors have entered into the case. Am I still required to write a final evaluation before he leaves?"

On the same day the Applicant complained to the Director of the Division of Personnel that the second chance which had been offered had not in fact been given since a decision had been made without even seeking the final judgement and recommendation of the Resident Representative. On 10 April 1975, in a reply to the Resident Representative's letter of 29 March 1975, the Chief of the Recruitment and Development Branch assured him that he should not feel personally responsible for the decision,

which had been taken after very careful deliberation and consultations with the Regional Bureau, that Headquarters already had a number of communications from him on the Applicant and that he would be advised if a further evaluation at the end of the Applicant's service was required. On 21 April 1975 the Applicant requested the Secretary-General to review the administrative decision conveyed to him in the letter dated 14 March 1975 from the Director of the Division of Personnel. On 20 May 1975 the Assistant Secretary-General for Personnel Services of the United Nations informed the Applicant that the Secretary-General had decided to maintain the contested decision. On 30 June 1975 the Applicant received a copy of the performance review report covering his first six months of service in Afghanistan, completed with comments in which the second and third reporting officers agreed with the Resident Representative's evaluation. On the same day he lodged with the Joint Appeals Board an appeal supplemented with a rebuttal to the performance review report. While the Applicant's appeal was pending, the latter part of his service up to 1 July 1975 was the subject of a second performance review report which he rebutted in a further supplement to his appeal. The Joint Appeals Board submitted its report on 3 December 1976. The Board's conclusions and recommendations read as follows:

"Conclusions and recommendations

"41. The Board finds that the UNDP, when offering the appellant an extension of his employment for a period of one year beginning 23 August 1974, undertook to obtain from the Resident Representative in Afghanistan a final report on the appellant's performance during that year before reaching a decision on the appellant's future with the UNDP.

"42. The Board concludes that the UNDP did not carry out this commitment but rather decided prematurely, without observing the condition it had established, not to renew the appellant's appointment.

"43. The Board recommends that the appellant should be offered an appointment for a fixed term of one year in an appropriate post so that he may have the opportunity, denied to him by the contested decision, to demonstrate his suitability for career service with the UNDP.

"44. The Board urges that should such an appointment present practical difficulties and should the UNDP decide not to offer an appointment, justice would be achieved by paying compensation of an amount of \$10,000 for the injury suffered by the appellant as a consequence of the decision taken."

On 27 April 1977 the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had taken note of the Board's conclusions and recommendations and had decided to grant him an amount of compensation equivalent to the termination indemnity to which he would have been entitled under the Staff Regulations and Rules had his fixed-term appointment been extended for one year and immediately terminated upon extension. On 2 May 1977 the Applicant advised the Assistant Secretary-General for Personnel Services that he found that amount of compensation unacceptable and on 14 June 1977 he filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was denied due process through the non-observance of his terms of appointment and is asking for a more realistic level of compensation for the injury received.
2. The Applicant returned to the United States at a time of severe economic recession and despite diligent effort was unable to obtain another position of any kind until 1 December 1975. During that time he was not eligible for any form of unemployment insurance, and had no source of income.

3. Had the Applicant's contract with UNDP been renewed he would have received a further salary increment beginning on 23 August 1975. Instead, on 1 December 1975 he accepted a salary below his level at the time of his separation from UNDP.

4. As a consequence of the UNDP's action in not observing the terms and conditions of his contract the Applicant suffered significant psychological injury.

Whereas the Respondent's principal contentions are:

1. The only issue in dispute is the amount of money that the Applicant should have been paid in respect of the failure to extend his appointment with UNDP for a year.

2. In lieu of renewing the Applicant's contract for one year, the Respondent was justified in following the same course of action as that taken by the Tribunal in Judgement No. 132, paragraph XIII.

3. In calculating a termination indemnity as though there had been a contract renewal which commenced and terminated in August 1975, the Respondent rightly did not take into account a salary increment that might otherwise have commenced to be payable that month.

4. The Applicant has therefore been both legally and reasonably compensated and his plea for further compensation should be rejected.

The Tribunal, having deliberated from 28 September to 12 October 1977, now pronounces the following judgement:

I. The Respondent does not challenge the finding of the Joint Appeals Board that UNDP undertook to give the Applicant a full year in which to prove himself worthy of further employment, nor does the Respondent dispute that this promise was broken when UNDP prematurely made the decision not to renew the Applicant's appointment. Where an application is well founded the Tribunal is directed by article 9, paragraph 1, of its Statute to order the rescinding of the decision contested or the specific performance of the obligation invoked. The Tribunal is also directed to fix the amount of compensation to be paid to the Applicant should the Secretary-General decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in his case. Here the Secretary-General has so decided and the Applicant has raised no objection.

II. The Joint Appeals Board recommended the payment of \$10,000 as just compensation. The Respondent decided instead to pay the Applicant \$5,469, basing that decision on Judgement No. 132 (*Dale*) where in a somewhat similar factual situation the amount of compensation was determined by reference to the Staff Regulations and Rules dealing with termination indemnities. The Applicant requests a sum equivalent to two years' net base salary which under article 9 of the Statute is the maximum amount that the Tribunal is authorized to fix save in exceptional circumstances.

III. The termination indemnity provisions of the Staff Regulations and Rules are intended to deal with the case of an employee who has been "terminated" as that term is defined in Rule 109.1 (*b*). They are not intended to deal with the case of an employee who has only been deprived of the *chance* to prove himself worthy of further employment. Where an employee has been deprived of the *chance* to prove himself worthy of further employment, the magnitude of the injury is uncertain, because the value of the chance is uncertain. However, the Tribunal is of the view that such an employee should be given the benefit of the doubt, as the uncertainty is not of his making, and that compensation should be awarded on the same basis as it would have been awarded had the employee succeeded in gaining the appointment he sought. In other words, such an employee should be treated as if he had received the appointment he sought and had then been "terminated". Thus the termination indemnity provisions provide the measure of appropriate compensation in this case.

IV. The first step in applying the termination indemnity provisions to the Applicant is to determine what would have been the duration of the appointment that the Applicant would have been awarded had his services proved satisfactory during his trial year in Afghanistan. The Tribunal indicated in its Judgement No. 132 (*Dale*) that it is a factual question to be determined according to "normal practice" in the programme in which the Applicant was employed. The Applicant's last appointment was for one year, and the Tribunal decides that, under the circumstances, a one-year appointment should be the measure.

V. That being so, paragraph (*b*) of Annex III to the Staff Regulations provides that staff members having temporary appointments for a fixed term of over six months which are terminated prior to the expiration date shall be paid five days' indemnity pay for each month of uncompleted service; paragraph (*c*) provides that indemnity pay shall be calculated on the basis of the base salary at the time of termination; and Staff Rule 109.4 (*a*) provides that base salary shall be subject to staff assessment. The application of this formula to the Applicant results in the \$5,469 already paid by the Respondent to the Applicant.

VI. If the Applicant had received a one-year appointment for the year beginning 23 August 1975, he would have completed on that date three years of service and would have been entitled to the salary increment then accruing, and during the ensuing twelve months of the appointment would have been entitled to the increased salary. He accordingly maintains that his compensation in respect of the twelve months of uncompleted service under the hypothetical one-year appointment should take into account such salary increment. However, the indemnity payment in respect of the twelve months of uncompleted service on the hypothetical one-year appointment is to be calculated, under paragraph (*c*) of Annex III to the Staff Regulations, on the basis of the staff member's base salary *at the time of termination*. The time of supposed termination was 23 August 1975, and on that date the salary increment had not accrued.

VII. Staff Rule 103.8 (*c*) reads in part "*(c)* Salary and wage increments shall be effective on the first day of the pay period in which the service requirements are completed", which would mean that the Applicant's salary increment accruing 23 August 1975 would take effect as of 1 August 1975; however, the Rule goes on to provide: "No increment shall be paid in the case of staff members whose services will cease during the month in which the increment would otherwise have been due." Having regard to this Rule, the Tribunal considers that the Respondent was correct in not taking into account a salary increment which might have taken effect in August 1975 if the Applicant's appointment had been renewed.

VIII. The Tribunal therefore rules that the Respondent has correctly calculated the compensation due to the Applicant, and the application is accordingly rejected.

(Signatures)

R. VENKATARAMAN
President

Francis T. P. PLIMPTON
Vice-President

New York, 12 October 1977

Roger STEVENS
Member

Jean HARDY
Executive Secretary