

graphs there was no prejudice, improper motivation or abuse of power on the part of the Respondent.

XIX. The Tribunal concludes further that, both in reaching the decisions contested and with respect to all other matters to which the application relates, the Respondent acted throughout *bona fide* and within his rights.

XX. The Tribunal accordingly rejects the application and the question of compensation does not therefore arise.

(Signatures)

R. VENKATARAMAN
President

Roger STEVENS
Member

Francisco A. FORTEZA
Member

Jean HARDY
Executive Secretary

Geneva, 17 May 1979

Judgement No. 242

(Original: French)

Case No. 236:
Klee

Against: The Secretary-General
of the United Nations

Non-renewal of a fixed-term appointment.

The Applicant contests the decision taken by the Respondent to grant him an ex gratia payment amounting to three months' net base salary.—The Respondent acknowledges that the Applicant had a legitimate expectancy of extension of his appointment.—Question of the duration of the appointment on which the Applicant could reasonably count.—Consideration of the circumstances in which the Applicant's expectancy originated.—Authorization of removal is linked to the Applicant's prospect of employment.—The Tribunal concludes that the Applicant could count on an appointment for two years.—Question of the injury sustained by the Applicant as a result of the premature termination of the contractual bond.—Formula used by the Respondent to evaluate the injury sustained.—The Tribunal concludes that the way in which the Respondent determined the amount of the ex gratia compensation was not justified.—Previous decisions of the Tribunal regarding the determination of the amount of compensation due for failure to fulfil a legitimate expectancy of extension of contract.—The Applicant is awarded 15 months' salary.—Request for compensation for the Applicant's inability to claim any pension from the Pension Fund.—The principle that damages may not be remote or indirect.—Request rejected.—The Applicant is awarded \$1,000 for costs.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Francisco A. Forteza; Mr. T. Mutuale; Sir Roger Stevens, alternate member;

Whereas, by letters dated 19 and 28 September 1978, Raymond B. Klee, a former staff member of the United Nations Industrial Development Organization, hereinafter called UNIDO, filed an application which did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas after making the necessary corrections, the Applicant again filed his application on 5 March 1979;

Whereas, in the pleas of his application, the Applicant requests the Tribunal to:

- “1. Hear the oral arguments of the Applicant and his Counsel,
- “2. Declare and rule that UNIDO unilaterally and arbitrarily failed to respect the undertaking it had given the Applicant to maintain him in service until 31 March 1977,
- “3. Declare and rule that the failure to respect that undertaking caused serious injury to the Applicant,
- “4. Therefore, to condemn UNIDO to pay the Applicant:
 - “(a) As compensation for the injury sustained as a result of the premature termination of the contract, the equivalent of two years’ net salary plus all the expatriation and other allowances which he received when he was employed by UNIDO;
 - “(b) As compensation for his inability to claim any pension from the United Nations Joint Staff Pension Fund, owing to the fault of the Organization, the equivalent of three years’ net salary plus the aforementioned allowances;
 - “(c) The sum of 3,000 United States dollars as reimbursement of the expenses he has incurred for his defence.”

Whereas the Respondent filed his answer on 9 April 1979;

Whereas the Tribunal heard the parties at a public hearing on 9 May 1979;

Whereas the Applicant submitted an additional document, at the request of the Tribunal, on 10 May 1979, and additional written statements on 10 and 11 May 1979;

Whereas the facts in the case are as follows:

The Applicant, a United States national, entered the service of UNIDO on 7 April 1971 as an Industrial Development Officer in the Industrial Technology Division with a short-term appointment which was extended for short periods until 31 March 1972. On 1 April 1972, he was given a fixed-term two-year appointment which was extended for one year on 1 April 1974. Throughout his period of service the Applicant was rated as “an efficient staff member giving complete satisfaction”. On 7 October 1974, the Applicant requested the UNIDO Personnel Services to confirm that he was entitled to payment of the cost of the removal of his household goods from the United States to Vienna. On 11 October 1974, the Personnel Administration Section replied that since his appointment would expire on 31 March 1975 his request could not be approved at that time owing to the provisions of Staff Rule 107.28 (b). On 16 October 1974, the Director of the Industrial Technology Division addressed to the Chief of the UNIDO Personnel Administration Section a memorandum dealing with the review of the Applicant’s appointment which read as follows:

“ . . .

“You will recall that I had prepared a revised job description for Mr. Klee at

the time when his last contract was extended for a period of one year. This job description reflected substantial requirements of the Industrial Technology Division in dealing with matters coming to the office from the Chiefs of Sections as well as matters going out of the office to the central office and the other Divisions. My idea was to give Mr. Klee a chance to carry out a more complicated job and to show his ability to be a real and effective assistant to the Director.

“I have seen Mr. Klee closely at work and I have found him to be willing and hard-working. Mr. Klee’s efficiency in his work increased significantly and he assisted me in preparing some very important documents. As you know, the pressure of work in the Director’s Office has recently increased tremendously, and I feel that—not due to Mr. Klee’s fault and in spite of all his efforts—it is necessary for me to have a more operationally oriented assistant. At the same time, I have come to the conclusion that Mr. Klee’s background and education as economist and his knowledge in editing could be better used in the Light Industries Section of ITD. The type of work carried out by Mr. Lillie before his transfer to Mr. Afifi’s office is more suitable for Mr. Klee, and his ability and capability may be better used in this Section in the interest of the Division as a whole.

“In accordance with the above, I would like to suggest that

“1. Mr. Klee be transferred to the Light Industries Section and his contract be extended for two years;

“2. The recruitment of a new Assistant to the Director be started as soon as possible.

“I hope that my request will meet with your understanding and I trust that the necessary steps will be taken promptly.”

On 24 October 1974, the Chief of the Personnel Administration Section sent the Applicant the following memorandum:

“I take pleasure in advising you that the Executive Director, in consultation with your Divisional Director and the Chief of Personnel Services, has decided to recommend a two-year extension of your fixed-term appointment which is scheduled to expire on 31 March 1975.

“A presentation in support of the recommendation together with a recent periodic report will be forwarded to the Office of Personnel at United Nations Headquarters for review. In addition, it is sometimes necessary to have the concurrence of the staff member’s Government to a proposal to extend an appointment in the United Nations Secretariat. Should this be necessary in your case, please bear in mind that the Office of Personnel in New York communicates direct with the Permanent Mission of your Government to the United Nations and any other form of official communication on the subject is discouraged.

“Although we will do everything possible to expedite matters, the procedure referred to above often takes a month or more to be completed and, therefore, it may be that you will not hear further from this office for some time. However, please be assured that we will advise you promptly of the final decision when it is received. In the unlikely event that the decision is not forthcoming prior to the expiration of your current appointment appropriate steps will automatically be taken to maintain your present contractual status and to retain you on the Organization’s payroll.

“In the meantime, if there are any particular points which you wish to discuss, I am at your disposal.”

The same day, the UNIDO Personnel Services authorized the Applicant to remove his household goods from the United States to Vienna. On 5 November 1974, the UNIDO Personnel Services recommended to Headquarters that the Applicant's appointment be extended for two years. On 18 January 1975, the Office of Personnel Services at Headquarters informed the UNIDO Personnel Services by telegram that the Assistant Secretary-General for Personnel Services had approved that recommendation. However, on 5 March 1975, the UNIDO Personnel Services addressed the following memorandum to Mr. Abdel-Rahman Khane, Executive Director of UNIDO:

“1. Mr Klee is a staff member (P-3) in the Industrial Technology Division whose appointment expires on 31 March 1975. Mr. Klee's functional title is Industrial Development Officer and as such he serves as a Special Assistant to the Director of the Division. A copy of his job description and his personnel 'fact sheet' are attached for your information and guidance.

“2. In the view of Personnel Services Mr. Klee's contribution to the work of the Organization is marginal, or, in other words, of minimal importance to its substantive programmes. This view is shared by both the Director and Deputy-Director of the Division. When the question of Mr. Klee's extension came to the attention of Mr. Abdel-Rahman last October, it was decided by the Executive Director that on balance the staff member was deserving of a further two-year extension through March 1977. Among the several considerations was the fact that Mr. Klee is 57 years of age and has four children ranging in age from twelve through sixteen. The Executive Director's decision to recommend a two-year extension was conveyed to Mr. Klee on 24 October 1974 and then referred to United Nations Headquarters for approval.

“3. United Nations Headquarters has, in fact, approved the Executive Director's recommendation for a two-year extension. However, Personnel Services has not as yet implemented it because of the serious doubt we have about the wisdom and equity of doing so in light of the present financial situation which calls for greater efficiency and productivity. We believe the implementation of Mr. Klee's two-year extension now would tend to cast doubt about the seriousness of our efforts to improve the professional work capacity of the Organization. The matter becomes particularly important in terms of fairness since we will probably have to separate other staff members whose performance may be somewhat better than Mr. Klee's but still not sufficiently good enough to justify their retention.

“4. In light of the above, we feel obliged to recommend for your consideration the separation of Mr. Klee after a short extension of six months through 30 September 1975. This would provide the opportunity for the Division to re-allocate whatever work Mr. Klee is doing and also to provide the staff member sufficient time to seek other employment after the end of the current school year. The Directors of the Division, Messrs. Veliky and Gouri, support this recommendation. Your agreement to the proposal would be appreciated.”

The Executive Director having approved that new recommendation, the latter was transmitted, by telegrams dated 11 and 27 March 1975, to the Office of Personnel Services at Headquarters which, on 31 March 1975, sent a telegram to the UNIDO Personnel

Services stating that the Assistant Secretary-General for Personnel Services had approved it. Consequently, the Applicant was informed on 4 April 1975 that his appointment had been extended until 30 September 1975. On 13 August 1975, the Applicant applied for a post as editor. On 3 September 1975, in a letter addressed to the Executive Director thanking him for the extension of his appointment, the Applicant requested that he be transferred to a post outside the Industrial Technology Division; a handwritten note on that letter shows that that possibility was not excluded. On 1 October 1975, the Applicant's appointment was once again extended for six months, that is, until 31 March 1976. On 12 January 1976, the Applicant was transferred to the Industrial Operations Division. On 29 January 1976, he requested the Executive Director to extend his appointment so that he could attain retirement age and be entitled to a pension. On 30 January 1976, he was informed that UNIDO could not extend his appointment beyond 31 March 1976. On 26 February 1976, the Applicant wrote to the Secretary-General requesting him to rescind that decision. On 22 March 1976, having received no reply, he filed an appeal with the Joint Appeals Board requesting that his case be considered by the Geneva Board. On 3 April 1978, the Geneva Joint Appeals Board submitted its report, in which it made the following recommendation:

“Recommendations of the Board

“92. . . . the Board recommends to the Secretary-General that the Appellant be granted, by way of an adequate and equitable compensation, the amount of one year's salary at the P-3, Step 7, level, including all allowances, except home leave entitlement, which the Appellant would have earned, had he been maintained in UNIDO's service for the period from 1 April 1976 through 31 March 1977.

“93. The Board furthermore recommends to the Secretary-General that UNIDO should pay to the Appellant the travel costs for his round trip from his Austrian residence to Geneva to attend the hearing of the Board.”

On 28 August 1978, the Assistant Secretary-General for Personnel Services notified the Applicant of the Secretary-General's decision in the following terms:

“ . . .

“The Secretary-General, having considered the Report of the Joint Appeals Board in this case, has decided that you be granted an *ex gratia* payment amounting to three months' net base salary at the rate prevailing at the time of your separation from service and that you be reimbursed the amount of travel expenses for your round-trip from your Austrian residence to Geneva to attend the Board's hearings.

“The amount of the above-mentioned *ex gratia* payment was determined according to the formula established by the Administrative Tribunal whereby in cases of legitimate expectancy of extension of fixed-term appointments, the compensation granted is equal to the amount of termination indemnity that would have been payable had the appointment been extended and then terminated forthwith.”

By letters dated 19 and 28 September 1978 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. UNIDO gave the Applicant a formal undertaking that it would maintain him in service for a minimum of two years. It cannot now defend itself by arguing that at the time a mere recommendation was involved. Since the United Nations agreed that the

Applicant's contract should be extended until 31 March 1977, the recommendation became an administrative decision binding on the parties.

2. UNIDO unilaterally went back on its decision, without giving the Applicant any satisfactory explanation, although he had been assured that he would be kept informed of all steps taken involving the central administration.

3. UNIDO was thus at fault on two grounds, first because it failed to inform the Applicant of the real reasons for the decision to reduce the duration of the extension originally envisaged, and secondly because of the unilateral and arbitrary reduction of the duration of the Applicant's contract.

4. The memorandum of 24 October 1974 constitutes a genuine administrative act which is binding on UNIDO. The latter could not go back on that decision without the consent of the Applicant. Moreover, UNIDO cannot argue in good faith that the decision of 24 October 1974 did not constitute a final decision concerning the Applicant, since prior to the Joint Appeals Board proceedings the Applicant did not know that the central Administration had approved the recommendation that his contract be extended for two years. It cannot validly be contested that according to UNIDO practice UNIDO recommendations are always automatically approved by United Nations Headquarters in New York. The Applicant could therefore regard the aforementioned decision as final.

5. The failure to renew his contract, for which no reasons were given, places the Applicant in a disastrous financial situation owing to the fault of UNIDO. The Applicant must repay various loans contracted on the strength of the guarantees of security of employment given by UNIDO. Furthermore, the extension of his contract until 31 March 1977 would have enabled him to claim a retirement pension from the Pension Fund.

Whereas the Respondent's principal contentions are:

1. Whatever legally significant expectancy of employment with UNIDO the Applicant may have had after the expiration of his contract on 31 March 1975 was realized when UNIDO granted him a six-month extension. The Respondent does not dispute in the circumstances of this case that the authorization to remove the Applicant's household goods created an expectancy that his contract would be extended, as indeed it was. But the memorandum of 24 October 1974 was not a formal undertaking by UNIDO to maintain him in service for a minimum of two years. It merely informed the Applicant that UNIDO had recommended a two-year extension of his contract. Such a recommendation, regardless of whatever subjective hopes it might have raised, was not a formal and binding administrative decision or administrative act. It merely formed part of the internal consultative procedure between UNIDO and Headquarters. No legal expectation deriving from the recommendation referred to in the memorandum of 24 October 1974 could have survived the decision communicated to the Applicant on 4 April 1975.

2. Even if, as the Respondent emphatically denies, the Applicant had had a right to a two-year appointment until 31 March 1977, he would not be entitled to the additional compensation he claims.

3. The Respondent cannot be held responsible for debts contracted by the Applicant in the subjective hope of continued employment, particularly in view of the fact that the Applicant was under notice that UNIDO did not intend to grant him an appointment for a full two years more.

4. The Respondent denies any obligation arising from the fact that a prolongation

of the Applicant's contract would have permitted him to invoke his rights to a pension in the Pension Fund.

The Tribunal, having deliberated from 9 to 22 May 1979, now pronounces the following judgement:

I. The Applicant contests the decision, taken by the Respondent following the recommendation of the Joint Appeals Board, to grant him an *ex gratia* payment amounting to three months' net base salary at the rate prevailing at the time of his separation from service. That decision refers to the "formula established by the Administrative Tribunal . . . in cases of legitimate expectancy of extension of fixed-term appointments."

II. By this reference, the Respondent acknowledged that the Applicant had a legitimate expectancy of extension of his appointment. However, since the Respondent claims to have realized that expectancy by successive extensions of the Applicant's appointment, the Tribunal must determine the duration of the appointment on which the Applicant could reasonably count and whether that expectancy was realized.

III. The Tribunal acknowledges that the memorandum of 24 October 1974 does not have the character of an administrative decision obliging the Respondent to maintain the Applicant in service until 31 March 1977. On the other hand, the Tribunal considers that by that memorandum the Respondent undertook to recommend to Headquarters that the Applicant's appointment be extended for a period of two years and to take steps to maintain his contractual status and retain him on the Organization's payroll until a final decision was taken.

This undertaking by the Respondent can only mean that he was convinced that the agreement of Headquarters would be obtained. It was that conviction on the part of the Respondent and the fact that he informed the Applicant of it that gave the latter grounds for his expectancy that he would be maintained in service for a certain period. The same conviction led the Respondent to authorize the removal of household goods and to defray the expenses incurred for that purpose. The Respondent has maintained that the authorization of the removal was the only administrative decision from which the Applicant's expectation flowed. The Tribunal does not accept that argument. The authorization had been refused on 11 October 1974 on the ground that the Applicant's contract expired on 31 March 1975 and that his contractual status must first be reviewed by the Executive Director. Thus, as far as the Administration was concerned, the authorization of the removal was linked to the Applicant's prospect of employment. And it was precisely on 24 October 1974, when the Applicant was informed of the Executive Director's decision to recommend to Headquarters that his appointment be extended for a period of two years, that the authorization for the removal was granted. The Applicant's expectancy therefore resulted from the conjunction of these two steps by the Administration.

IV. Since the Applicant's expectancy originated in the steps taken by the Respondent on 24 October 1974, it follows that the duration of the appointment on which the Applicant could count was that specified by the Respondent in the memorandum of that date, namely two years.

As to the appointments granted to the Applicant after 31 March 1975, which represented a total of one year of service, they cannot be taken into account to cover 50 per cent of the duration of the expected appointment. For they were granted in the short term and in circumstances quite different from those envisaged in the memorandum of 24 October 1974, whereas the prospect revealed by the Respondent in that memorandum, consolidated by an authorization for the removal of household goods which entailed

expenditures to be defrayed by the Respondent, was that of stable employment for a period sufficiently long to justify the removal.

V. The Tribunal notes that Headquarters agreed to the proposals contained in the memorandum of 24 October 1974 and that, contrary to the undertakings given, the Applicant was not so advised. The reasons given by the Respondent to justify his change of position were carefully examined by the Joint Appeals Board, which did not consider that they justified disregarding the expectancy created to the benefit of the Applicant.

VI. The Applicant requests the Tribunal to compensate for the injury resulting from the fact that the Respondent did not respect his undertaking to maintain the Applicant in service until 31 March 1977. The application refers first to the injury sustained as a result of the premature termination of the contractual bond.

VII. In the decision which he took following the recommendation of the Joint Appeals Board, the Respondent acknowledged, as stated above, that the Applicant had a legitimate expectancy that his appointment would be extended. But he deduced from this that the Applicant was in the position of a staff member who, according to the jurisprudence of the Tribunal, could "anticipate" the granting of a contract according to "normal practice" (Judgements Nos. 132, *Dale*, para. XIII, and 227, *Hill*, para. IV). But that was not the Applicant's position. The competent authority had informed him of UNIDO's proposal that he be granted a two-year contract more than five months before his current contract expired and all necessary arrangements had been made to ensure that there was no interruption in his service. Thus, from the outset, the expectancy of extension had been defined clearly. The situation in this case therefore differs from those in which the Tribunal evaluated the compensation according to the "formula" to which the Respondent refers. The Tribunal concludes that the way in which the Respondent determined the amount of the *ex gratia* compensation was not justified.

VIII. The Tribunal has acknowledged in several cases that, in determining the amount of compensation due for failure to fulfil a legitimate expectancy of extension of contract, it is necessary to take into consideration the circumstances in which that failure occurred. In Judgement No. 199 (*Fracyon*), the Tribunal, having noted that the Applicant's case had not been given fair consideration and that the principle of good faith had been disregarded, awarded six months' salary. It adopted the same solution in a case where there had been a lack of objectivity on the part of the Respondent in dealing with the Applicant's rebuttal of his periodic report (Judgement No. 203, *Sehgal*). In Judgement No. 192 (*Levcik*), the Tribunal found that the decision not to extend the appointment had been based on an error of law and fixed the compensation at one year's salary, taking into account that the Applicant had been without any post for 10 months and had then obtained a post carrying emoluments lower than those of his United Nations post.

IX. In the present case, the Joint Appeals Board, as noted above, found that the reasons invoked by the Respondent for not realizing the expectancy created by him were not justified. The Tribunal notes, moreover, that contrary to what happened in other cases the change of position on the Respondent's part was not due to an external intervention (see Judgements Nos. 132, *Dale*, 178, *Surina*, and 192, *Levcik*) but to the very authorities which had taken the steps that had created the Applicant's expectancy.

X. The Respondent has not denied that his conduct has caused exceptional material difficulties for the Applicant. The Tribunal notes, however, that the Applicant was remunerated from 1 April 1975 to 31 March 1976 under short-term appointments.

XI. In the light of what has been said above concerning the circumstances in which

those appointments were granted, the Tribunal considers that in addition to the compensation equivalent to one year's salary, calculated as stated in the recommendation of the Joint Appeals Board, the Applicant should be granted the equivalent of three months' salary.

XII. Consequently, having also been informed that the Applicant has rejected the *ex gratia* compensation granted by the Respondent, the Tribunal decides that the Respondent shall pay the Applicant the amount of 15 months' salary at the P-3, step VII level, including all allowances, except home leave entitlement, which the Applicant would have earned had he been maintained in UNIDO's service for 15 months from 1 April 1976.

XIII. With regard to the request for compensation for the Applicant's inability to claim any pension from the Joint Staff Pension Fund, the Tribunal considers that the fact that the Applicant could have validated his earlier period of service does not affect the fact that, if his legitimate expectancy of a two-year appointment had been realized, he would normally have been entitled to a pension. The Tribunal notes that the Applicant obtained repayment of his own contributions in accordance with article 32 of the Regulations of the Pension Fund. The Tribunal notes, however, that the Applicant's right to a retirement pension could have been affected by a change in personal circumstances and, on the basis of the principle that damages should not be remote or indirect, it rejects the request.

XIV. The Applicant requests \$3,000 as reimbursement of his legal expenses.

The Tribunal notes that the Applicant could have had recourse to the services of a member of the panel of counsel. In view of its resolution of 14 December 1950 and considering the circumstances of the case, the Tribunal orders the Respondent to pay the Applicant the sum of one thousand dollars as costs.

(Signatures)

Suzanne BASTID
Vice-President, presiding

Francisco A. FORTEZA
Member

T. MUTUALE
Member

Geneva, 22 May 1979

Roger STEVENS
Alternate member

Jean HARDY
Executive Secretary