

Judgement No. 318*(Original: English)***Case No. 305:
Flad****Against: The Secretary-General
of the United Nations**

Request by a former staff member of the United Nations for compensation on account of measures taken by the United Nations and by UNDP which had profoundly adverse effects on the Applicant's career, including the withdrawal of an offer of employment and classification as "RP" (rejected permanently for future employment).

Conclusion of the Joint Appeals Board that there was no binding commitment to appoint the Applicant.—Conclusion that the record did not substantiate allegations of prejudice in taking the decision to classify the Applicant's file "RP" but that it was taken without due process.—Recommendation for the rescission or review of this classification and an ex gratia payment of \$US 2,000.—Recommendation accepted.

Applicant's claim that there was a contractual commitment to employ him.—The Tribunal finds that no firm offer of appointment was made.—Applicant's claim that the Respondent's decision not to renew his contract or to offer him a fresh one was motivated by prejudice.—The Tribunal finds that the Applicant was not a victim of prejudice or machination.—Question of the wrong classification as "RP" for nearly five years.—Conclusion of the Tribunal that the Applicant is entitled to compensation for anguish and prejudice to future employment resulting from the "RP" classification.

Considering that the "RP" classification has been deleted, the Tribunal awards compensation for \$US 1,500.—All other pleas rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Endre Ustor, President; Mr. Samar Sen, Vice-President;
Mr. T. Mutuale;

Whereas at the request of Jean L. Flad, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 January 1983 the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 January 1983, the Applicant filed an application the pleas of which read:

"1. Applicant would like by the present application to contest four main sets of decisions taken by the Administration of the United Nations and that of UNDP [United Nations Development Programme] the consequences of which have led to profound adverse effects upon the career and life of the Applicant, namely:

"(a) Breach of a contractual obligation by OPE [Office of Projects Executions], UNDP through the manipulative withdrawal of appointment,

"(b) While not contesting the recommendation of the JAB [Joint Appeals Board] concerning the RP [rejected permanently for future employment] classification and the subsequent decision of the Secretary-General to delete the said classification, Applicant contests the fact that the deletion of the said decision does not delete the effects and consequences which the Applicant has had to endure; Applicant recognizes the fact that the JAB had acknowledged that there was a lack of due process but contests

that the JAB had not fully drawn the consequences of the said lack of due process,

“(c) contests the claim of the Administration that there was no direct cause-effect relationship between the malevolent interference of Mr. Borna and the subsequent withdrawal of appointment (breach of contractual obligation) and the RP classification,

“(d) contests the administrative inaction of UNDP despite repeated requests by Applicant for an open investigation into a number of allegations.

“3. Based upon the foregoing, Applicant submits a claim for damage in order to compensate for the psychological pain and suffering and loss of income, direct and indirect, in total estimated at \$500,000.

“4. Applicant would like to put forward that the main personalities directly involved in the administrative wrongdoings should be made liable along with TARS [Technical Assistance Recruitment Service] and OPE, UNDP for the damaging consequences of the wrongdoings and that the compensation be apportioned $\frac{1}{3}$ to TARS, $\frac{1}{3}$ to OPE/UNDP and $\frac{1}{3}$ to the personalities directly involved in the abuse of administrative authority.”

Whereas the Respondent filed his answer on 21 April 1983;

Whereas the Applicant filed written observations on 30 May 1983;

Whereas the facts in the case are as follows:

After a long period of service, mostly in Africa, with UNOC (United Nations Operation in the Congo), WHO, FAO and UNIDO, the Applicant entered the service of the United Nations on 16 November 1973 as an Administrative Officer under a fixed-term appointment for one year governed by the 200 series of the Staff Rules; he was assigned to a regional technical co-operation project at Ouagadougou, Upper Volta. His appointment was extended from year to year until 15 November 1976. On 1 August 1976 the Applicant was reassigned to N'Djamena, Chad, to perform the administrative tasks of all projects which were being executed in Chad by the Office of Technical Co-operation (OTC) of the United Nations, and his appointment was successively extended to 31 July 1977 and 31 July 1978.

On 31 October 1977 the Senior Director of the Office of Projects Execution (OPE) of UNDP sent to the Deputy Resident Representative of UNDP in Chad a cable in which he informed him “unofficially” that the Applicant had been appointed Regional Co-ordinator for the “CILLS CHD 401” project. On 1 November 1977 the Director of the Division of Personnel of UNDP advised the Chief of Staff Services of the United Nations that the Applicant had been selected for the post of Regional Co-ordinator in Chad for the Feeder Roads Programme project executed by OPE; as his services were urgently required, the United Nations was requested to agree in principle to his release to UNDP so that UNDP could formulate an offer of appointment. By a memorandum dated 4 November 1977 the Chief of the Central Africa Section of OTC informed the Chief of Staff Services that the Resident Representative of UNDP in Chad had been advised of the Applicant’s “sudden decision to transfer to OPE”, that TARS (Technical Assistance Recruitment Service) had been requested to locate a suitable replacement and that the Applicant’s release to UNDP should be contingent on the availability of such replacement. On 10 November 1977 TARS transmitted a copy of that memorandum to UNDP, adding that they had a candidate to replace the Applicant and that if this candidate proved acceptable to the Government of Chad an agreement could be reached on a date of transfer.

On 21 November 1977 Mr. B. Borna, Resident Representative of UNDP in Senegal, sent a cable to the Director of the United Nations Sahelian Office (UNSO) and to the Senior Director of OPE stating that, while on a stop-over in Chad, he had learned that OPE envisaged a transfer of the Applicant to the road construction project and recommended that the UNDP office in Chad be consulted before a final decision was taken on such a transfer; on the basis of his personal acquaintance with the Applicant at a time both were serving in Cameroon and of information he had gathered during his visit to Chad, he characterized the Applicant as a trouble-maker and advised against his transfer to any UNSO project. On 7 December 1977 the Senior Director of OPE cabled to Mr. W. F. Harper, Resident Representative of UNDP in Chad, that Mr. Borna's cable had been totally unsolicited and that all available official information regarding the Applicant was favourable; stating that the previous Resident Representative in Chad thought well of the Applicant, the cable went on to say that the Senior Director of OPE intended to insist on the Applicant's appointment "except if yourself have serious reservations". It appears that Mr. Harper suggested to the Senior Director of OPE, in a confidential cable, that it would be advisable "to seek a less controversial candidate". On 30 December 1977 the Division of Personnel of UNDP informed the Chief of the Central Africa Section of OTC that UNDP had been forced to make some changes in plans concerning the project and would therefore no longer require the services of the Applicant. On 7 March 1978 the Executive Assistant to the Senior Director of OPE wrote to the Applicant that it had been decided to fill the OPE co-ordinator posts with individuals with extensive experience in co-ordinating project activities between Governments, sub-contractors and OPE rather than with individuals of administrative and financial background. On 29 March 1978, in a letter to the Office of Personnel Services of the United Nations, the Applicant asked to be considered for an administrative post in a peace-keeping operation, adding: "I was to have been nominated co-ordinator of the Sahelian Feeder Road project but this has fallen through . . .". On 12 April 1978 TARS asked Mr. Harper for his "frank and confidential assessment" of the Applicant's performance. In a cable dated 25 April 1978 and a letter dated 27 April 1978, Mr. Harper gave TARS a very negative assessment of the Applicant's performance and recommended that his services should not be retained beyond his current contract. On 8 May 1978 the Deputy Chief of TARS included the following note in the Applicant's file:

"In light of the very negative report dated 27 April 1978 on the above Staff Member and the strong recommendation against any further retention of his services under the programme, I am hereby marking the file 'RP'."
[Rejected permanently]

While exchanging correspondence with OTC on his possible reassignment and on criticism made of his work, on 15 June 1978 the Applicant reiterated his request of 29 March 1978 to the United Nations. On 28 June 1978 Deputy Chief of TARS replied to him that, "due to current circumstances, it is most unlikely that the United Nations may be in a position to avail itself of your services for any alternative assignments". On 5 July 1978, in a cable to the Director of the Division of Personnel of UNDP, the Applicant stated that his separation from the service effective 31 July 1978 had been maliciously initiated by the Resident Representative in Chad; that the Deputy Resident Representative had covered up irregularities found by the Applicant in a school construction project and that the Applicant was being forced to depart because he knew too much; that the Deputy Resident Representative had sought support

from Mr. Borna to damage the Applicant's reputation; and that Mr. Borna's cable of 21 November 1977

(REFERRING TO EVENTS BACK TO 1972 WHICH HAVE NOT INTERRUPTED MY SERVICE WITH UNITED NATIONS) LED TO CANCELLATION BY UNDP/OPE MY APPOINTMENT CO-ORDINATOR ROADS PROJECT CHAD (LEVEL FOUR) PLACING ME LATER IN BIZARRE SITUATION WITH OTC. THEREFORE EYE REQUEST URGENT ON-THE-SPOT IMPARTIAL AND SERIOUS INVESTIGATION BEFORE MY DEPARTURE CHAD. OTHERWISE SHALL USE ALL LEGAL MEANS ESTABLISH TRUTH AND CLAIM JUST COMPENSATION FOR GRAVE PREJUDICE CAREER (WORKING WITH UN SINCE 1961). AM WILLING APPEAR PERSONALLY COMMISSION ENQUIRY HEADQUARTERS WITH DOCUMENTS . . ."

Having been advised by UNDP to refer the matter to OTC, the Applicant wrote on 18 October 1978 to the Director of the Division of Personnel of UNDP stating that his complaints did not involve OTC but various UNDP staff members and reiterating his wish to appear before a board of inquiry; he requested to know what action the Director could take "to end Mr. Borna's vendetta" against the Applicant and what compensation could be offered to him for the moral and financial prejudice he had suffered. On 30 October 1978 the Director of the Division of Personnel of UNDP replied that UNDP would be looking into the various allegations made by the Applicant and would revert to the matter in due course. Having written again to the Director of the Division of Personnel of UNDP on 21 and 22 March 1979, the Applicant was informed on 11 April 1979 that UNDP had not yet completed its review of the matter but that it would communicate with him in due course. On 7 June 1979 the Applicant wrote once more to the Director of the Division of Personnel of UNDP and on 18 June 1979 he received again the assurance that UNDP would "most certainly revert to you as soon as the relevant examination has been completed". A further letter of the Applicant, dated 30 July 1979 and addressed this time to the Assistant Administrator, Bureau for Administration of UNDP, was again answered with the assurance that UNDP's investigations were continuing and that UNDP would communicate with the Applicant when its study of the matter had been completed. On 10 July 1980 the Applicant requested in a letter to the Secretary-General that a full investigation be carried out and on 20 October 1980, having received no reply, he lodged an appeal with the Joint Appeals Board. The Board submitted its report on 20 April 1982. The Board's conclusions and recommendations read as follows:

"Conclusions and recommendations

"88. The Board concluded that the dealings between OPE and the appellant relating to the appellant's candidature for the position of Co-ordinator for the road construction project in Chad did not result in a commitment for UNDP to appoint the appellant to that position.

"89. The Board concluded that the record did not substantiate the appellant's contentions (a) that there had been deliberate malevolent representation by Mr. Borna, then by Mr. Harper as a result of which a personal vendetta ('vengeance') was pursued leading to the 'RP' of the appellant and (b) that Mr. Borna's cable had resulted in the withdrawal of the offer of appointment to the Co-ordinator post. The Board concluded that the decision to classify the appellant's file 'RP' had been taken without due process. The Board therefore recommends that either this decision be rescinded to the extent that it amounts to permanent rejection of the appellant for future employment with the United Nations or that the

evidence on which the contested decision was based be reviewed, with the appellant being duly heard in the process, in order to determine whether this evidence justified a permanent rejection of the appellant for future employment with the United Nations. The Board further recommends that in deciding on this issue, the appellant's earlier record of performance be given due weight.

"90. The Board concluded that it would be appropriate for the Organization to provide financial relief to the appellant for the uncertainties to which he had been subjected and the false hopes he had been caused to entertain as the result of conduct which failed to measure up to the fair standards which the Organization should have maintained in its dealings with the appellant. The Board therefore recommends that the Organization pay the appellant the sum of \$2,000 on an *ex gratia* basis."

On 6 August 1982 the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General, having re-examined his case in the light of the Board's report, had decided:

"(a) In so far as the decision to reject you permanently for consideration for future employment is concerned, to remand the case for correction of procedure and review of this decision;

"(b) To grant you an *ex gratia* payment in the amount of \$2,000, and

"(c) To take no further action in this case."

On 1 November 1982 the Assistant Secretary-General for Personnel Services also informed the Applicant that the decision to reject him permanently for consideration for future employment had been reviewed and that the "RP" notation on his file had been deleted. On 31 January 1983 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The offer of appointment by OPE was a valid one—made and accepted—and therefore creates contractual obligations.

2. The interference of Mr. Borna was manipulative and malevolent in intention and objective and has led as intended to the withdrawal of appointment and the "RP" classification.

3. The aforementioned administrative wrongdoings have caused the Applicant a lot of suffering and loss of income.

4. There was no justification for UNDP continued silence on the matter thereby tacitly endorsing the wrongful administrative action of TARS.

Whereas the Respondent's principal contentions are:

1. No offer of further appointment was made to the Applicant and as the Applicant had no legal expectancy of any further employment with the United Nations it follows that the Applicant's separation at the expiration of his fixed-term appointment did not violate his rights.

2. The Applicant does not substantiate in what manner the temporary and confidential "RP" classification on a United Nations file could have caused him prejudice since the fact that he was not employed by the United Nations after his separation did not violate any of his rights.

The Tribunal, having deliberated from 10 to 24 October 1983, now pronounces the following judgement:

I. The pleas advanced by the Applicant can be broken down into three major considerations: it is alleged, first, that a contractual obligation existed

between the Applicant and the Respondent for his employment by UNDP as a road construction project Co-ordinator in Chad; secondly, that the Respondent's decision for not renewing his existing contract and for not offering him a fresh one was motivated by prejudice; and thirdly, that the Joint Appeals Board had not "fully drawn the consequences" of its finding that the Respondent's decision to classify the Applicant as "RP" (rejected permanently) was not based on due process.

II. The Tribunal finds that the voluminous record of this case, meticulously and diligently examined by the Joint Appeals Board, establishes that the Applicant had no firm offer of (and therefore could not accept) an appointment by UNDP as a road construction project Co-ordinator in Chad. All the circumstantial and incidental evidence adduced in this respect can at the most raise the presumption that the Respondent seriously contemplated and even allowed the Applicant to expect such an appointment, but in practice this expectation was not confirmed and the contemplated appointment could not be made effective as the Respondent changed his mind about the Applicant's suitability for the job.

III. The Tribunal considers it more than likely that in coming to this decision, the Respondent was influenced by the reports received about the Applicant's performance and conduct from Mr. W. F. Harper, the Resident Representative of UNDP in Chad. However, in the absence of any reliable evidence of prejudice on the part of Mr. Harper for rendering an unfavourable assessment of the Applicant's work and general behaviour, the Tribunal is not prepared to conclude that Mr. Harper was influenced either by his colleague and friend in Senegal, Mr. B. Borna, or by the Deputy Resident Representative or the Project Manager in Chad and led to suggest that the Applicant should be separated because he knew too much of serious financial irregularities in the operation of several projects in Chad. The Tribunal is also unable to accept the allegation that Mr. Harper was anxious to "cover up" these misdeeds in collusion not only with officials in Chad and other places but also as a part of a high-level conspiracy of silence to protect the wrong-doers. The Tribunal's view is based first and foremost on lack of any motive on the part of Mr. Harper and the senior officials in New York for such an elaborate manipulation—the widespread financial irregularities could hardly be concealed by separating the Applicant. Indeed, auditors were sent to Chad for a proper scrutiny of the accounts, but could not make much headway partly because the accounts—for which the Applicant was to some extent responsible—were in a most confused state, and partly because the Applicant did not produce papers which he claims to have had in his possession and which might have supported his allegation of wrong-doing.

IV. The Applicant's candidacy for appointment as a road construction project Co-ordinator in Chad was finally rejected in December 1977 and the letters he wrote on 29 March and 15 June 1978 show that he was not insisting on being given this job—a post which he later claimed to have been offered to him and accepted by him; nor did he at that stage accuse anyone of malice, prejudice, unworthy motives and vendetta. These accusations became more frequent and increasingly strident from July 1978 onwards, when he obtained copies of confidential reports and documents. On the other hand, the letter dated 28 June 1978 from the Deputy Chief of TARS to the Applicant conveys a misleading impression; the letter says in part:

"As you may be aware, the very nature of the programme determines that service in our technical cooperation projects cannot, in any way, be

considered as a career. The CDPS [Career Development and Placement Section] is involved only in the career development of permanent staff and therefore cannot handle any requests such as yours.”

and concludes:

“I do wish I could be more encouraging, but I see no point in deluding you with vague promises that could not possibly be fulfilled. Elementary reasons of consideration toward you move me, therefore, to be straightforward and suggest that, rather than subjecting yourself to possible frustration, you might wish to direct your interest to more promising fields of enterprise.”

Since on 8 May 1978 the Applicant had been classified as “RP”, the text quoted above appears more to be an attempt to be polite than convey the bitter truth that the Applicant was not to be considered for any type of work in the United Nations system.

V. The Tribunal notes that once the Applicant considered that he had been the victim of malice and manipulation of Mr. Borna, Mr. Harper and others, he wrote several letters to UNDP headquarters alleging all manner of evil deeds perpetrated in the UNDP Office in Chad and asking for a local investigation. The replies to all these letters kept on suggesting that the subject was being looked into and that the results would be communicated to the Applicant in due course. In practice, nothing was conveyed to him, even though some departmental (and apparently confidential) enquiry was held.

VI. Mr. Borna was Resident Representative of UNDP in Cameroon in 1971-72 when the Applicant was also there as UNIDO Administrative Officer for field project and Assistant to an industrial development project. Late in 1977 he visited N'Djamena and, on coming to know that the Applicant was being considered as road construction project Co-ordinator, he cabled Headquarters that the Applicant was unsuitable for the job; at the same time he wrote to Mr. Harper about some problems he had had with the Applicant's habit of by-passing the official channel of communication and making difficulties among project managers, contractors and others. The Applicant does not deny that he followed unorthodox methods of correspondence but asserts that in 1971, he was specifically asked by UNIDO to report directly all that he found wrong in the execution of various works and projects in Cameroon. The Applicant implies that Mr. Borna's attitude was determined by his chagrin that the Applicant was responsible for drawing the attention of UNIDO and others to all the wrongs that were taking place in Cameroon while Mr. Borna was Resident Representative in that country.

VII. The Tribunal finds no reason to disagree with the conclusion arrived at by the Joint Appeals Board that, in drawing the attention of UNDP to the unsuitability of the Applicant for the proposed post, Mr. Borna was motivated neither by malice nor by prejudice. The Tribunal considers that the course of events was such that the Applicant cannot be said to have been a victim of prejudice or machination, but that because of lack of due process in classifying him in the “RP” category and the consequences following therefrom, the Applicant's plea for relief needs close examination.

VIII. In recommending to the Secretary-General that the Applicant be paid \$2,000 *ex gratia*, the Joint Appeals Board based itself on the uncertainties to which the Applicant had been subjected and the false hopes he had been caused to entertain, but did not consider whether the wrong classification did in fact injure the prospects of the Applicant's future employment apart from such

mental anguish as he might have suffered. Such a classification prevents the Applicant from proving that he did in fact suffer damage: any consultation that might take place between a prospective employer and his past employer, the United Nations, could only be treated as confidential and thus could not be within the Applicant's knowledge. He claims that for several years he remained without a job and suggests that this was due to his classification as "RP". The Tribunal considers that the Applicant is entitled to some compensation for the anguish he underwent and for the prejudice to future employment he may have suffered as a result of having been classified as "RP" for nearly 5 years.

IX. Bearing in mind that this classification has now been deleted on the recommendation of the Joint Appeals Board, the Tribunal orders the Respondent to pay \$1,500 to the Applicant and rejects all other pleas.

(Signatures)

Endre USTOR
President

Samar SEN
Vice-President

New York, 24 October 1983

T. MUTUALE
Member

Jean HARDY
Executive Secretary

Judgement No. 319

(Original: English)

Case No. 300:
Jekhine

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

Request by a former staff member of the United Nations for reinstatement and consideration for a probationary appointment or, alternately, for compensation, and for confirmation of the conclusions of the Joint Appeals Board.

Conclusion of the Joint Appeals Board that the failure of the Respondent to refer the Applicant's case for consideration for a probationary appointment was based on an incomplete presentation of facts and therefore invalid.—Recommendation to pay the Applicant compensation equivalent of six months' net base salary.—Recommendation rejected.

Principles applicable to renewal of fixed-term contracts.—Discretionary power of the Respondent whose decision should nevertheless be free of any improper motive or prejudice and take into account any reasonable expectation.—Question whether the Respondent examined all the relevant developments before deciding not to offer the Applicant a probationary appointment and not to renew his fixed-term contract.—Question of the role of a joint staff/Administration body under staff rule 104.14.—Finding of the Tribunal that, while the Respondent made a legitimate use of the Applicant's record, he did not take sufficiently into account the working conditions in which the Applicant was working.—Finding of the Tribunal that the Applicant behaved in ways inconsistent with best rules of conduct.—Applicant's contention that the decision was based on racial discrimination.—Question of the legal aspects of such an allegation and the burden of proof.—Opinion of the Tribunal that if such allegation is made some investigation is called for.—The Tribunal finds that no enquiries were made.—Conclusion of the Tribunal that, while the Respondent used his discretionary power without improper motive or prejudice, he was amiss in not considering the Applicant's complaints, though these omissions did not cause substantial injury to the Applicant.