

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.

Award of compensation in the amount of \$US 1,500.—All other pleas rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Herbert Reis;
Mr. Luis de Posadas Montero;

Whereas, on 3 November 1982, Zuleidu Mamudu Jekhine, a former staff member of the United Nations, filed an application in which he requested the Tribunal:

“1. To *overrule* the decision of the Secretary-General

“(a) not to re-instate the Applicant;

“(b) not to accept the Joint Appeals Board’s recommendation to pay the Applicant compensation equivalent to six months’ net base salary;

“2. To *uphold* the finding of the Joint Appeals Board that the failure by the Respondent to investigate the Applicant’s grievances amounted to an abandonment of the Respondent’s responsibility towards the Applicant;

“3. To *uphold* the conclusion of the Joint Appeals Board that the decision not to refer the Applicant’s case to the appropriate body for consideration for conversion from fixed-term to probationary appointment was taken on the basis of an incomplete presentation of the facts and is therefore invalid;

“4. To *declare and rule* that the decision to separate the Applicant from the service of the United Nations was based on incomplete information, was tainted by prejudice and extraneous considerations and was not taken on the basis of a complete, fair and reasonable procedure;

“5. To *declare and rule* that the failure to follow a proper procedure in these two instances caused serious injury to the Applicant, and to *accept* the Joint Appeals Board’s recommendation to pay the Applicant compensation equivalent to six months’ net base salary;

“6. Therefore, to *order* the Respondent

“(a) to re-instate the Applicant and to consider him for probationary appointment after an additional year of service;

“(b) or, in lieu of specific performance, to pay him two years’ net base salary (with 10% interest per year from September 1980)”;

Whereas the Respondent filed his answer on 17 February 1983;

Whereas, on 29 July 1983, the Applicant filed written observations in which he requested oral proceedings;

Whereas the presiding member ruled on 7 September 1983 that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant, a national of Nigeria, entered the service of the United Nations on 19 September 1972 as a Field Service Security Officer under a fixed-term appointment for one year which was subsequently renewed from time to time, the last time for a period of one year due to expire on 30 September 1978. He was assigned to UNTSO where he served continuously except for a reassignment to UNEF (United Nations Emergency Force) from 1 June 1974 to 31 December 1974. In his first four periodic reports, covering his service from September 1972 to 31 December 1974, the Applicant was rated as a staff member who maintains a good standard of efficiency. In one of those reports—

the third, covering the period from 15 May 1974 to 30 June 1974—it was noted that he tended “to have difficulties in dealing with people”, an appraisal which he contested in a rebuttal dated 26 July 1974 in which he referred to several incidents which he attributed to provocation. In a fifth periodic report, for the period from 5 January 1975 to 31 July 1975, the Applicant was rated as an efficient staff member giving complete satisfaction. In a sixth periodic report, covering his service from 1 September 1975 to 30 June 1976, the Applicant was rated as a staff member who maintains a good standard of efficiency, although the first reporting officer noted that while his duty performance continued to be satisfactory, he tended to have recurring difficulties in his personal relations with other staff. In the last two periodic reports, for the periods 1 July 1976–27 March 1977 and 28 March 1977–September 1977 respectively, the Applicant’s performance was rated as adequate although the first reporting officer again noted, in the first of these reports, that the Applicant’s “recurring relationship difficulties” tended “to detract from his overall performance”.

On 9 July 1976 UNTSO declined to recommend the Applicant for a probationary appointment on the ground that he had had “recurring problems in his relations with other staff and local residents throughout his U.N. service”. On 25 January 1978 the Applicant was involved in two incidents at the main gate of Government House in Jerusalem. On 15 March 1978 UNTSO again declined to recommend him for a probationary appointment on the ground that his “service performance” was not “fully up to standards”.

On 20 March 1978 the Applicant wrote to the Secretary-General complaining of racial discrimination; he apparently received no reply. On 16 June 1978 the Acting Chief Administrative Officer of UNTSO recommended in a letter to the Director of the Field Operations Service at Headquarters that the Applicant’s fixed-term appointment not be renewed because of the numerous incidents in which he had been involved during his service. On 26 June 1978 the Director of the Field Operations Service supported that recommendation in a memorandum to the Office of Personnel Services. On the same day the Applicant wrote to the Personnel Officer of UNTSO asking to be informed of the Administration’s plan with regard to the renewal of his contract. On 29 June 1978 the Personnel Officer sent a memorandum to the Acting Chief Administrative Officer of UNTSO informing him of the Applicant’s inquiry and concluding:

“I believe we should tell him now that we are not recommending renewal of his appointment and should make his plans accordingly.”

Two handwritten notes initialed by the Personnel Officer appear on that memorandum. One, dated 3 July 1978, reads: “A/CAO advises Mr. Jekhine to be advised his case is under consideration” and the other “S/M(staff member) informed”. On 30 June 1978, in a letter to the Director of the Field Operations Service at Headquarters, the Applicant stated that he had learned that his contract would not be renewed and, after giving an account of some incidents in which he had been involved, he requested reconsideration of the matter. On 5 July 1978 the Acting Chief Administrative Officer of UNTSO cabled Headquarters, referring to his letter dated 16 June 1978 and to the Applicant’s inquiry of 26 June 1978 and asking to be advised of their decision. On the following day Headquarters replied that the Applicant’s case was being considered by the Office of Personnel Services. On 12 July 1978 the Director of the Field Operations Service informed the Applicant, in reply to his letter of 30 June 1978, that the renewal or non-renewal of his fixed-term appointment and the incidents to which he had referred were under consideration by the offices

concerned at Headquarters and that he would be advised of the outcome; copies of that reply and of the Applicant's letter were sent on the same day to the Acting Chief Administrative Officer of UNTSO. On 1 August 1978 the Director of the Field Operations Service advised UNTSO that, following the agreement of the Office of Personnel Services, the Applicant's fixed-term appointment would not be renewed upon its expiry on 30 September 1978; he asked that the Applicant be informed accordingly. By a cable of 16 August 1978 from Headquarters, the Applicant was advised that his fixed-term appointment would not be renewed. On 21 August 1978 the Applicant wrote a letter to the Secretary-General requesting a review of the decision not to renew his appointment and on 28 September 1978, having received no reply, he lodged an appeal with the Joint Appeals Board. The Board submitted its report on 10 May 1982. The Board's conclusions and recommendation read as follows:

"Conclusions and recommendation

"32. The Board finds that the failure by the respondent to investigate the appellant's grievances amounted to an abandonment of the respondent's responsibility towards the appellant.

"33. The Board concludes that the decision not to refer the appellant's case to the appropriate body for consideration for conversion from fixed-term to probationary appointment was taken on the basis of an incomplete presentation of the facts and is therefore invalid.

"34. Accordingly, the Board recommends to the Secretary-General to pay to the appellant compensation equivalent to six months' net base salary."

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 to maintain the contested decision and not to accept the Board's recommendation, on the grounds:

"(a) that, in accordance with the terms of your letter of appointment and with Staff Rule 104.12 (b), you had no legal expectancy of renewal or conversion of your appointment to any other type of appointment.

"(b) that you have not met the burden of proving that the contested decision was motivated by prejudice or other extraneous considerations, and

"(c) that neither can the contested decision be considered to have been vitiated by procedural irregularities."

On 3 November 1982 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's allegations of racial discrimination were never properly investigated. The Respondent's failure to investigate the Applicant's grievances is to be construed as constituting discrimination against the Applicant.

2. The Applicant's repeated requests for a transfer were never treated in more than a routine fashion. This makes the Administration partially responsible for the problems he was having in his "work relationships"—the reason given by the Administration for the non-renewal of his contract.

3. The decision to terminate the Applicant was not based on an over-all review of his record but on various incidents which were never investigated impartially. Over a five-year period, the Applicant's services were consistently rated as at least satisfactory. No performance evaluation report exists for the

last period of service and the Applicant therefore had no opportunity to comment on or rebut such a report. Moreover, a review of his eligibility for a career appointment was never considered by a joint body.

4. The Applicant had every reason to expect continued employment with the United Nations.

5. The Respondent must be held liable for the damage done to the Applicant's life and career through the actions of staff members with supervisory functions. Since prejudice, improper motivation and irregular procedures have been found by the Joint Appeals Board, the Respondent cannot raise the defense of discretionary authority.

Whereas the Respondent's principal contentions are:

1. The Applicant was properly separated from service as a result of the expiry of his fixed-term appointment since he had no expectancy of renewal of his appointment.

2. The Applicant was properly considered for a probationary appointment during his service and the decision not to recommend him for such an appointment did not violate any of his rights.

3. The decisions to allow the Applicant's fixed-term contract to expire and not to grant the Applicant a probationary appointment were properly motivated and the Applicant does not establish improper motive by reference to the Respondent's failure to institute a special investigation into his unsubstantiated charges of racial prejudice on the part of his supervisors or by the failure of the Administration to assign him other employment.

The Tribunal, having deliberated from 4 to 28 October 1983, now pronounces the following judgement:

I. The Tribunal does not question the right of the Respondent not to renew a fixed-term contract but would stress, as stated in numerous cases before it, that the discretionary power of the Respondent in this field should be free of any improper motive or prejudice. The Tribunal has also held that while a fixed-term contract cannot create any legal expectancy for its continuance or renewal, reasonable expectation for extension can often arise from the totality of circumstances surrounding a staff member's separation from service, and that such expectation should be taken into account.

II. In the light of these criteria, the Tribunal finds that while the conclusion of the Joint Appeals Board that "the failure by the respondent to investigate the appellant's grievances amounted to an abandonment of the Respondent's responsibility towards the appellant" may appear to be unusually terse, the fact that the letter of 20 March 1978 from the Applicant to the Secretary-General remained unattended to cannot be ignored. The Respondent states that he cannot trace this letter or any reply to it in the files. He contends that the Applicant did not refer to his letter of 20 March 1978, which gave a comprehensive and detailed account of the case as seen by the Applicant, and that it was not "adverted to in the Applicant's other communications submitted to the Administration around that time (see Annexes 11, 15 and 18)." The Tribunal has examined these three annexes and finds that in Annex 18, which is a letter dated 21 August 1978 from the Applicant to the Secretary-General, the concluding paragraph refers to "my letter of 20th March 1978 which was addressed personally to you". In any event, this letter was admittedly available to the Respondent during the deliberations of the Joint Appeals Board. There is also no record to indicate what action, if any, was taken on the Applicant's letter of 29 April 1978 which he wrote to the Assistant Secretary-General for

Personnel Services after his visit to Jerusalem; in this letter the Applicant mentions that "psychological war on my personality became intensified" and relates this to his belief that "a word must have reached here (Jerusalem) from New York about my petition". Nor do the files show that any reply was ever sent to the Applicant in response to his letter of 21 August 1978 addressed to the Secretary-General. In these circumstances, the Respondent's insistence on his legal rights and discretionary power not to renew the Applicant's fixed-term contract or to offer him a probationary appointment can legitimately raise the question whether he examined all the developments before deciding not to offer the Applicant a probationary appointment and not to renew his fixed-term contract.

III. In connexion with the question of a probationary appointment, the Tribunal examined the role of a joint body of staff and Administration. While Staff Rule 104.14 is far from clear in this respect, obviously the Respondent would be expected, if only for the sake of fairness, to use the existing machinery.

IV. The Applicant objects to the use of an undated and unsigned note submitted by the Respondent on 17 February 1983 containing a resumé of events involving the Applicant from 19 September 1972 to 2 October 1978. The Tribunal considers it entirely in order for the Respondent to have such a resumé prepared especially as he has maintained that his decision to separate the Applicant from the service of the United Nations was taken after a careful review of the entire record. It would have been more desirable if the resumé were signed and dated, and the occasion for preparing it clearly stated, but the lack of information on these points does not detract from the considerations the Respondent might have in mind in deciding not to renew the Applicant's fixed-term contract. In reality many of the events mentioned in the resumé have been subject matters of previous investigation and correspondence. The Tribunal considers that the Respondent made a legitimate use of the record of the Applicant's work and conduct, but did not take sufficiently into account the atmosphere prevailing in UNTSO (and also in UNEF, where the Applicant was assigned from 1 June 1974 to 31 December 1974) during the whole of the Applicant's tenure there—an atmosphere to which he drew repeated attention. The Applicant's contention that he could not, however, always bring to the notice of higher authorities all that was happening for fear of reprisal cannot be sustained; first, in many instances he did complain, and in some others he showed a forgiving mood and in one case at least he offered apologies of sort for his behaviour. The records are replete with several incidents in which coarse language, rude manners and occasional violence were used. The Applicant attempts to defend himself by implying zeal in serving the highest interests of the United Nations, whereas in practice his colleagues, seniors and several others found him obstreperous, difficult and at times obstructive and even undisciplined. The Respondent had undoubted discretion to decide if the Applicant's work and conduct justified further extension of his service, but the Tribunal considers that had the Respondent simultaneously enquired into the conditions in which the Applicant was working, the exercise of his discretion would have been more accurately based on facts.

V. The Applicant does not contend that the non-renewal of his contract or the failure to grant him a probationary appointment was based on racial discrimination, and the Tribunal notes that in the earlier years (1972-73), except on one occasion when prompt action was taken, the periodic reports on the Applicant's work show that there was no element of vendetta or malice against him because of his ethnic origin or for any other reason. Indeed, even Mr. Connolly, who was the Applicant's supervisor for much of the time, defended him at least on one occasion, although the Applicant repeatedly contends that

Mr. Connolly generally sided with some elements hostile to the Applicant. The fact clearly emerges that the Applicant did on numerous occasions behave in a way inconsistent with the best conduct rules of his employment, but the Tribunal cannot pronounce whether, and if so to what extent, his behaviour was influenced by what he considered, rightly or wrongly, to be provocative and unfair attitudes on the part of people he was working with.

VI. The Tribunal has found no substantial evidence to justify the Applicant's complaint that he was not considered, except routinely, for other jobs for which he thought himself qualified or that he was not transferred where possibilities of such transfers clearly existed. In fact he worked in four different places (Jerusalem, Ismailia, Damascus and Cairo) in six years and was given opportunity to work in the UNTSO Registry and in UNEF. Furthermore, whenever his requests for some other work or post were refused, there was some examination and explanation, and the Applicant did not press his requests.

VII. There is some controversy between the Applicant and the Respondent about the legal aspects of allegations of racial prejudice in administrative matters—especially on the question where the burden of proof should lie in respect of such allegations. The Tribunal would not wish to pronounce on a general question of this nature but would state that once some complaints have been made some preliminary investigation is called for to determine if such complaints are baseless and malicious or are founded on some facts. In this instance, several allegations were made of *prima facie* prejudice or at least of group hostility against the Applicant and no enquiries were made except when it was discovered that some scurrilous invectives had been painted near the entrance to UNTSO buildings and a general exhortation for vigilance against miscreants was prescribed.

VIII. The Tribunal has received the impression that while at Headquarters there was a degree of objectivity about the Applicant's claims and performance, the local officials were anxious—particularly after the incidents on 25 January and 21 April 1978—that the Applicant should not be allowed to work in the United Nations system any longer. Between June and September 1978 some very speedy exchange of messages and letters took place between UNTSO at Jerusalem and Headquarters; nonetheless, no specific reply was sent to the Applicant as a result of the incidents in January and April 1978, although this was promised in a letter of 12 July 1978 from the Director of the Field Operations Service. Matters came to a head in 1978 and since the Applicant's contract was due for renewal in September of that year, the influence of these latest incidents on the decision to separate him finally must have been considerable. The Tribunal notes that similar incidents had taken place in the past but were smoothed over.

IX. In the light of these considerations, the Tribunal finds that the Joint Appeals Board's conclusions and recommendation cannot be fully supported. The Tribunal concludes, however, that while the Respondent used his discretionary power without any improper motive or prejudice, he was nonetheless remiss in not considering the Applicant's complaints and all the circumstances prevailing at the time as indicated in his letters of 20 March 1978 and 21 August 1978 to the Secretary-General and in his letter of 29 April 1978 to the Assistant Secretary-General for Personnel Services. The Tribunal does not, however, regard these omissions as causing substantial injury to the Applicant's interests.

X. For the foregoing reasons the Tribunal

(1) orders the Respondent to pay compensation to the Applicant in the amount of \$US 1,500;

(2) rejects all other pleas.

(Signatures)

Samar SEN

Vice-President, presiding

Herbert REIS

Member

New York, 28 October 1983

L. de POSADAS MONTERO
Member

Jean HARDY
Executive Secretary

Judgement No. 320

(Original: English)

Case No. 308:
Mills

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

Request by a former staff member of the United Nations to rescind the decision rejecting the Applicant's request for reimbursement of the United States income tax on a partial lump-sum withdrawal benefit from the Staff Pension Fund.

Direct submission of the application to the Tribunal under article 7.1 of its statute.

Consideration of the entitlement to reimbursement of income tax levied by the United States on a lump-sum payment from the Staff Pension Fund.—Applicant's legitimate expectation to receive such reimbursement in accordance with staff regulation 3.3 (f), information circular ST/ADM/SER.A/1828, Judgement No. 237 (Powell) and information circular ST/IC/77/90.—Question whether by transferring to FAO shortly before reaching the mandatory retirement age in the United Nations the applicant lost the entitlement to tax reimbursement by the United Nations.—Respondent's contention that a staff member's terminal and pension entitlements are established under the rules of the organization from which he retires.—Applicant's contention that the application of this principle would lead to serious anomalies in that a staff member transferring from the United Nations to another organization would lose an important entitlement while in the reverse situation the staff member would benefit from a windfall.—The Tribunal reiterates its finding in Judgement No. 237 that the tax reimbursement on the lump-sum commutation is a terminal benefit, though it may not be payable at the time of separation.—Interpretation of the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff.—The view of the Tribunal that the organizations would not normally affect adversely legitimate expectations of staff members, seek to avoid inequities and not act in a way to prejudice certain categories of staff.—Finding of the Tribunal that the Guide to National Taxation of UNJSPB Benefits with Special Reference to United States Taxes cannot serve as vehicle for promulgating official United Nations policy.—Finding of the Tribunal that refusing to reimburse the tax paid by the Applicant would be inequitable and contrary to the principle of equality of treatment.

Rescission of the decision rejecting the Applicant's request for tax reimbursement.—Order to the Secretary-General to reimburse the tax the Applicant would have paid if he had retired on the day of his transfer to FAO, with interest.—In case of disagreement on the actual amount, the parties may turn directly to the Tribunal for settlement.

Dissenting opinion of Mr. Luis de Posadas Montero.—Having retired as a staff member of FAO, the Applicant is only entitled to rights and benefits due at the time of retirement to staff members of that Organization and not to entitlements due only to those who retire as staff members of the United Nations.