

## Judgement No. 90

*(Original : French)*

Case No. 87 :  
Chiacchia

Against : The Secretary-General  
of the United Nations

*Termination of the employment of a staff member holding a probationary appointment.*

*Request for rescission of a decision to terminate her appointment communicated to the Applicant by the Director of Personnel but arrived at by the Secretary-General before leaving for the Congo where he was to die.—Request for rescission of a decision by the new Secretary-General confirming the first decision.—Held that the contested decisions were taken by the competent authority.*

*The Secretary-General's discretionary powers with regard to the termination of probationary appointments, which must, however, be exercised without improper motive.—Respondent's observance of the procedure laid down in Staff Rule 104.14.—Absence of evidence establishing that the Secretary-General's decision was taken for improper motives.—The findings of the Joint Appeals Board with regard to the conditions prevailing during the probationary period were known to the Secretary-General when he confirmed the decision to terminate the appointment.—Held that there was no misuse of power.*

*Application rejected.*

## THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mme. Paul Bastid, President ; Mr. James W. Barco ; Mr. Louis Ignacio-Pinto ;

Whereas on 11 August 1962 Murielle Chiacchia, former staff member of the United Nations and the Applicant in this case, requested the Tribunal :

- (a) To appoint counsel to assist her in drawing up and filing an application ;
- (b) To extend the time-limit for the filing of an application laid down in article 7, paragraph 4, of the Statute of the Tribunal ;

Whereas on 4 September 1962, under the provisions of staff circular ST/AI/142, the Tribunal appointed as counsel Mr. Felipe Antonio Pradas, a United Nations Staff member ;

Whereas it also extended until 15 November 1962 the time-limit laid down in article 7, paragraph 4, of its Statute ;

Whereas on 5 November 1962 the President, at the request of the Applicant, extended the time-limit until 15 February 1963 ;

Whereas on the latter date the Applicant filed an application to the Tribunal requesting it :

- (a) To declare the application receivable ;
- (b) To rescind the administrative decision to terminate the Applicant's probationary appointment from 20 October 1961, and not to grant her a permanent appointment ;
- (c) To rescind the decision by which the Secretary-General, after consideration of the conclusions and recommendations of the Joint Appeals Board, maintained the aforementioned administrative decision ;

(d) To award the Applicant compensation equivalent to one year's salary for the injury sustained, in the event that the Secretary-General avails himself of the option allowed him under article 9, paragraph 1, of the Statute of the Tribunal and decides, in the interest of the United Nations, that the Applicant is to be compensated without further action being taken in her case ;

Whereas the Respondent submitted his answer on 8 March 1963 ;

Whereas on 5 April 1963 the Applicant filed written observations on the Respondent's answer ;

Whereas the facts in the case are as follows :

The Applicant is a former telephone operator G-2 employed at United Nations Headquarters in New York. She was engaged by the United Nations for the first time on 15 September 1958 under a short-term appointment for the duration of the thirteenth session of the General Assembly. That appointment ended on 15 December 1958. On 13 July 1959 the Applicant was re-engaged under a new short-term appointment, which was changed as from 1 October 1959 to a probationary appointment. On 27 October 1960 she received the first periodic report on her work. That report, covering the period from 13 July 1959 to 1 July 1960, concluded that she was a staff member who maintained a " good standard of efficiency ". On the other hand the second periodic report, covering the period 1 July 1960 to 1 April 1961 stated that she maintained " only a minimum standard ". After receiving a copy of that report, on 2 May 1961, the Applicant submitted a note in rebuttal of the criticisms which it contained. On 31 May 1961 she received the observations of the Office of General Services regarding this note, and was informed that a proposal had been made to the Appointment and Promotion Panel for her termination on the expiration of the probationary period. On 18 July 1961, Working Group No. III of the Panel submitted a report recommending approval of the termination proposal. By letter dated 19 September 1961 the Director of Personnel informed the Applicant that in accordance with the Working Group's recommendations she would not be offered a permanent appointment and that her probationary appointment would be terminated with effect from 20 October 1961. On 25 September 1961 the Applicant notified the Director of Personnel of her intention to appeal against the termination of her appointment, and requested him to inform her of the procedure to be followed in the absence of a Secretary-General. By letter dated 27 September 1961 the Director of Personnel informed her that having reviewed the matter as provided by Staff Rule 111.3 (a), he confirmed the decision which she proposed to contest and that she therefore had two weeks in which to submit an appeal to the Joint Appeals Board. On 9 October 1961 the Applicant submitted an appeal to the Joint Appeals Board, which, after hearing the parties and a number of witnesses, submitted its conclusions and recommendations on 31 May 1962. In this document, the Board first considered the question of the validity of the decision taken regarding the Applicant in the absence of a Secretary-General, during the period from 18 September 1961, the date of the death of Mr. Hammarskjold, to 3 November 1961, the date of the election of U Thant. With regard to the decision communicated to the Applicant by letter from the Director of Personnel of 19 September 1961, the Board noted that before his departure from New York on 12 September 1961, Mr. Hammarskjold had approved in writing the recommendation to terminate the Applicant's appointment. With regard to the confirmation of that decision on 27 September 1961, the Board took cognizance of an opinion of the United

Nations Legal Counsel to the effect that the Director of Personnel was entitled to exercise the functions of the Secretary-General under the Staff Regulations and Rules during the interim between Mr. Hammarskjöld's death and the election of his successor. Without expressing any views on this opinion, the Board examined the case on its merits. It noted first "that the stated grounds for the Appellant's termination, despite the fact that her work as such [had] been recognized to be highly satisfactory, were twofold: (a) failure 'to subordinate her own personal and private feelings to the discipline of a unit' and (b) lack of punctuality". The Board then analysed the situation prevailing at the time in the unit in which the Applicant had been employed, and noted certain features in the behaviour of her supervisors. In particular, it found "indications pointing to the possible presence of an element of *a priori* unfavourable attitudes towards the Appellant on the part of her supervisors, before the second year of her probation had begun". Lastly, the Board unanimously submitted the following recommendations:

"While noting that the above might have created an unfavourable situation for the Appellant during her second, the most important, year of probation the Joint Appeals Board did not, however, feel that this could be considered conclusive evidence of prejudice or lack of due process to an extent sufficient for rescinding a decision to terminate a probationary appointment. Since the Board was also extremely conscious of the discretionary powers of the Secretary-General in prescribing which staff members are eligible for permanent appointment, the Board was not in a position to recommend reinstatement. However, the Board draws attention to administrative factors brought out above and hopes that the Secretary-General, having received the report of the Joint Appeals Board, will wish to take cognizance of these factors in his final decision on the particular case of the Appellant, not excluding the possibility of giving her another chance within the framework of the Organization."

By a letter dated 16 July 1962, the Director of Personnel informed the Applicant that after considering the conclusions and recommendations of the Joint Appeals Board, the Secretary-General had decided to maintain the contested decision. On 15 February 1963, the Applicant filed the above-mentioned application.

Whereas the Applicant's principal contentions are as follows:

1. The Joint Appeals Board expressed the hope that the Secretary-General would not exclude the possibility of giving the Applicant another chance within the framework of the Organization. The Board could not have expressed such a hope if its examination of the case had not convinced it that the Applicant possessed the qualities required of United Nations staff members.

2. The Joint Appeals Board noted that the quality of the Applicant's work had not been denied by the Administration, and that the sole grounds for her termination had to do with her punctuality and her alleged inability to subordinate her personal feelings to the discipline of a unit. The Board also noted that there were certain undercurrents of animosity towards recently recruited staff members in the Telephone Unit, that somewhat paternalistic patterns prevailed there and that tardiness in the Unit was handled with a degree of elasticity bordering on the arbitrary. In addition, the Board found indications of *a priori* unfavourable attitudes towards the Applicant.

3. During the twenty-nine months of the Applicant's service in the Secretariat, her work was rated unfavourably only during the nine-month period covered by the second periodic report. Evaluations made in the circumstances noted by the Joint Appeals Board cannot provide an objective basis for an unfavourable conclusion regarding the Applicant's qualifications for a permanent appointment.

4. Every contract creates obligations and rights for both parties. While the Applicant's probationary appointment entailed for her the obligation to perform certain work, it also gave her the right to perform that work in conditions less unfavourable than those noted by the Joint Appeals Board.

5. The history of Staff Regulation 9.1 (c) shows that the broad powers vested in the Secretary-General by that Regulation were granted to him solely to enable him better to protect the interests of the United Nations. Their exercise is therefore subject to judicial review for misuse of power.

Whereas the Respondent's principal contentions are as follows :

1. The purpose of a probationary appointment is to provide the Secretary-General with a basis for determining suitability for permanent appointment. The Secretary-General's discretion with respect to the termination of such appointments is therefore the same as that with respect to the grant of permanent appointments.

2. To rebut any general allegation of improper motive or lack of due process, it suffices to note that the procedure provided for in Staff Rule 104.13 was observed in full although the Secretary-General had discretion under Staff Regulation 9.1 (c) to terminate the Applicant's appointment. Thus, the Applicant's case was considered by a Working Group of the Appointment and Promotion Panel, which, after a thorough review of the case and after considering the Applicant's contentions, unanimously recommended the termination of her services.

3. The issue of alleged animosity against the Applicant on the part of her supervisors was reviewed four times : initially after receipt of the Applicant's note rebutting the criticism contained in the second periodic report, a second time in Working Group III of the Appointment and Promotion Panel, a third time before the Joint Appeals Board, and a fourth time after the Joint Appeals Board had submitted its conclusions and recommendations. None of those reviews disclosed any evidence that the contested decision was improperly motivated and as such invalid.

4. The Joint Appeals Board expressed no opinion warranting the conclusion that there were vitiating motives in the contested decision. The Board did not find that the decision involved non-observance of the Staff Regulations or Rules, or prejudice or denial of due process. Moreover, it took pains to make it clear that the hope conveyed to the Secretary-General was in no way intended as a finding with respect to the validity of the contested decision.

5. It is not incumbent on the Respondent, in order to justify the decision to terminate the Applicant's appointment, affirmatively to establish her unsuitability for permanent appointment.

The Tribunal, having deliberated from 17 September to 9 October 1963, now pronounces the following judgement :

I. The Applicant requests, first, the rescission of a decision to terminate her appointment, communicated to her on 19 September 1961 by a letter signed by the Director of Personnel. On that date the Secretary-General was no longer alive. However, the report of the Joint Appeals Board shows that before leaving New

York for the Congo the Secretary-General had approved in writing a recommendation for termination of the Applicant's appointment which had been submitted to him by the Chairman of the Appointment and Promotion Board. That being the case, the question of the competence of the Director of Personnel to perform a function vested in the Secretary-General does not arise, since the Director of Personnel merely notified the person concerned of the decision arrived at.

The other decision whose rescission the Applicant requests confirms the first. It was communicated on 16 July 1962 by the Director of Personnel and was taken by the present Secretary-General after a review of the Joint Appeals Board's conclusions and recommendations on the case.

Consequently, the Tribunal concludes that the contested administrative decisions were taken by the competent authority.

II. The Applicant was notified of the termination of her appointment on 19 September 1961. She was informed that her last working day would be 20 September, and that she would receive one month's pay in lieu of notice. She had been employed under a probationary appointment effective from 1 October 1959. The letter of appointment provided that at the end of the probationary service the Applicant would be granted a permanent appointment or would be terminated. It further specified that the appointment could be terminated by the Secretary-General on thirty days' notice in writing, in accordance with the relevant provisions of the Staff Regulations and Rules. Under Staff Rule 104.14 the Appointment and Promotion Board is required to review the suitability for permanent appointment of staff members serving on probationary appointments and to make recommendations to the Secretary-General.

The Secretary-General's powers with regard to the termination of probationary appointments are determined by Staff Regulation 9.1 (c), which provides that :

" 1. In the case of all other staff members, including staff members serving a probationary period for a permanent appointment, the Secretary-General may at any time terminate the appointment, if, in his opinion, such action would be in the interest of the United Nations. "

As it has consistently ruled, the Tribunal considers that this provision grants the Secretary-General discretionary powers. Such discretionary powers must, however, be exercised without improper motive which, if found, would constitute a misuse of power calling for the rescinding of the decision (Judgements Nos. 18, 27, 43, 44, 45, 48, 49, 50, 54, etc.).

III. The Applicant contests the decision to terminate her appointment on the ground of the unanimous findings of the Joint Appeals Board with regard to the conditions prevailing during her probationary service and to the attitude towards her of her supervisors. She emphasizes that her work was regarded as satisfactory during the greater part of the probationary period, and that no objective conclusions can be drawn from her last periodic report.

IV. The Tribunal notes that in determining what action to take in respect of the Applicant on the expiration of the probationary period, the Respondent followed the procedure laid down in Staff Rule 104.14, and expressly based the decision to terminate her appointment on the report unanimously adopted, after hearing the Applicant, by Working Group No. III of the Appointment and Promotion Board.

Moreover, the Applicant has not established that the Secretary-General's decision was taken for improper motives. The Applicant's complaints regarding

the conditions prevailing during her probationary period and the conduct of her supervisors were considered with the greatest care by the Joint Appeals Board. The Board's report contains detailed and unanimous findings which, while not excluding the possibility of giving the Applicant another chance within the framework of the Organization, nevertheless did not recommend her reinstatement. The Tribunal notes that the Board's findings with regard to the conditions prevailing during the Applicant's probationary service were known to the Secretary-General when he decided to maintain the disputed decision.

Accordingly, the Tribunal considers that the termination of the Applicant's appointment does not exceed the Secretary-General's powers under Staff Regulation 9.1 (c).

V. Consequently, the application is rejected.

*(Signatures)*

Suzanne BASTID  
*President*

James W. BARCO  
*Member*

*New York, 9 October 1963.*

LOUIS IGNACIO-PINTO  
*Member*

N. TESLENKO  
*Secretary*

## Judgement No. 91

*(Original : English)*

**Case No. 82 :**  
**Miss Y**

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

*Termination of the permanent appointment of a staff member for health reasons.*

*Panel of doctors formed to implement Judgement No. 83 ordering the remand of the case for correction of procedure.—Classification of the answers of the doctors to the questions put by the Medical Director and by counsel for the Applicant.*

*Consideration of whether the Respondent could have terminated legally the appointment of the Applicant for reasons of health, had the Respondent possessed the medical reports on the date of the issue of the notice of termination.—Staff Regulation 9.1. (a).—The view of the third doctor that the Applicant was not incapacitated for further service has to be read with the answers of all the doctors to all the questions.—Held that the Respondent's decision, on a review of the medical opinions, to maintain the termination was a matter for his judgement and was not without any basis.—No prejudice or improper motivation.—Request for rescission of the contested decision rejected.*

*The question of the other ground for the termination invoked by the Respondent, namely, unsatisfactory services, does not arise for determination by the Tribunal.*

*Application rejected.*