

to the date of the end of her contract on 31 May 1962, less the sums already paid to her up to and at the time of her termination, less also the amount paid to her in accordance with the letter of 2 June 1965, referred to in paragraph III above, the amount payable being increased proportionately in respect of any salary increases affecting the staff of the Regional Office at Phnom Penh during the period of her contract ; such amount to be paid in French francs at the rate of exchange in effect in August 1961.

X. The Tribunal rejects all other claims.

(Signatures)

CROOK

Vice-President, presiding

Suzanne BASTID

President of the Tribunal

Geneva, 16 March 1966.

Sture PETRÉN

Member

N. TESLENKO

Executive Secretary

Judgement No. 101

(Original : English)

Case No. 103 :
Rau

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

Grant to a staff member of the United Nations Children's Fund of a probationary appointment and later a fixed-term appointment.—Non-renewal of the fixed-term appointment.

Principal request for rescission of the decision by which a probationary appointment was converted into a fixed-term appointment.—The Applicant accepted the fixed-term appointment offered her and her request is directed against a decision which was not contested by her at that time under the applicable appeals procedure.—Request not receivable.

Subsidiary request for rescission of the decision refusing a renewal of the fixed-term appointment.—Secretary-General's discretionary power as to the decision to be taken at the expiry of this type of appointment.—Grounds relating to the Applicant's conduct and work given to support the decision not to renew the appointment.—Discrepancies between the written evaluation in the periodic reports of the Applicant's performance and the oral testimonies.—The Respondent having had at his disposal in the Joint Appeals Board's report all the facts relating to the manner in which the Applicant's service had been evaluated, the conclusion finally reached by him was a matter within his discretion.—Request rejected as ill-founded.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President ; the Lord Crook, Vice-President ; Mr. Louis Ignacio-Pinto ;

Whereas, on 20 October 1965, Mrs. Lorraine Rau, née Davila, a former staff member of the United Nations, specifically recruited for the United Nations Children's Fund, hereinafter called UNICEF, requested the President of the Tribunal to grant an extension of the time-limit for the filing of an application to the Tribunal ;

Whereas, on 8 November 1965, the President, with the agreement of the Respondent, extended to 10 March 1966 the time-limit for the filing of the application ;

Whereas, on 8 March 1966, the Applicant filed an application the pleas of which she amended on 1 and 25 July 1966, and 14 September 1966 ;

Whereas the pleas, as amended, request the Tribunal :

A. *As to procedure :*

1. To hold oral proceedings ;
2. To hear as witnesses four officials who had supervised the Applicant's work ;
3. To order the production by the Respondent of an opinion prepared by the Office of Legal Affairs which he quoted during the proceedings before the Joint Appeals Board ;

B. *As to substance :*

1. *Either* (a) To rescind the decision by which the Applicant's probationary appointment was converted in May 1963 into a fixed-term appointment ;
 - (b) To rule that the Applicant was entitled to receive in May 1963 a permanent or regular appointment ;
 - (c) To order the payment of full salary and allowances from May 1965 to the date of the judgement ;
- Or* (a) To rescind the decision by which the Applicant was refused a renewal of her fixed-term appointment in May 1965 ;
 - (b) To order the payment of full salary and allowances from May 1965 to the date of the judgement ;
2. To fix at the equivalent of two years' net base salary the amount of compensation to be paid to the Applicant if the Secretary-General decides, under the option given to him in article 9, paragraph 1, of the Statute of the Tribunal, not to reinstate her ; this amount being in addition to the full salary and allowances to be paid to the date of the judgement ;

Whereas the Respondent filed his answer on 16 May 1966 ;

Whereas the answer requests the Tribunal, if it decides to receive oral testimony, to hear the supervisor of the UNICEF Typing Pool in addition to the witnesses designated in the application ;

Whereas, in the course of oral proceedings held on 22 September 1966, the Tribunal heard counsel for the parties, the four witnesses suggested by the Applicant and the witness suggested by the Respondent ;

Whereas, at the Tribunal's request, the Respondent filed two additional documents on 23 September 1966 ;

Whereas, on 27 September 1966, the Applicant filed a supplementary statement submitted in writing by one of the witnesses heard on 22 September 1966 ;

Whereas the facts in the case are as follows :

The Applicant entered the service of the United Nations on 1 May 1961 under a short-term appointment for three months with UNICEF as an IBM Key punch Operator. On 31 July 1961 her appointment was extended to 31 October 1961. On 16 August 1961 she received a probationary appointment at the G-3 level with the same functional title and assignment. Her letter of appointment specified that the "probationary period [will be] reduced because of previous service and [the appointment] will be reviewed as of 30 April 1963". On 17 July 1962 the Applicant was shown and signed a periodic report on her work from 1 May 1961 to 29 June 1962. The report rated her as "a staff member who maintains a good standard of efficiency". On 9 January 1963 the Assistant Comptroller addressed to the Comptroller of UNICEF a memorandum relating to the probationary appointments of the Applicant and of another IBM keypunch operator. The memorandum read :

"The two-year probationary contracts of both [staff members] expire on 28 February and 30 April respectively.

"In view of the anticipated changes in the organizational structure of the machine operation because of the UNICEF participation in the Electronic Data Processing operation of the United Nations, it is recommended that both staff members be awarded a fixed-term contract."

That recommendation was endorsed by the Comptroller and approved by the UNICEF Personnel Committee at a meeting held on 25 January 1963. The Committee noted that the Applicant's services had been satisfactory. On 14 February 1963 the Chief of the Administrative Division of UNICEF issued a Personnel Action form concerning the Applicant which contained the following indications :

"Action :

- "1. Termination of probationary appointment ;
- "2. Fixed-term appointment for one year.

"Effective Date :

- "1. cob [close of business] 30 April 1963 ;
- "2. 1 May 1963 - cob 30 April 1964.

"Remarks of Office of Personnel :

- "Termination indemnity to be held in escrow.
- "Accrued annual leave to be carried over to new appointment.
- "Entitled to Service Benefit from 1 May 1963."

On 15 February 1963 the Applicant signed a letter of appointment as an IBM Key punch Operator with UNICEF at the G-3 level for a fixed term of one year from 1 May 1963 to 30 April 1964. On 25 April 1963 she was shown and signed a periodic report on her work from 30 June 1962 to 22 April 1963. The report rated her as "a staff member who maintains a good standard of efficiency". On 27 January 1964 the Deputy Comptroller addressed to the Comptroller a memorandum relating to the contractual status of the Applicant and of the other IBM Key punch Operator concerned. The memorandum stated :

"In both cases it is recommended that the fixed-term appointments are extended for one year. In view of the fluid situation caused by the

forthcoming merger of the Data Processing Unit with the EPD [Electronic Data Processing] of the United Nations it is impossible to offer a different contract to the two staff members.

“ Mr. Moran, their immediate supervisor, and Mr. Hogg [Deputy Chief, Accounts Section] support the recommendation for an extension of these fixed-term contracts ”.

On 25 February 1964 the Applicant's fixed-term appointment was extended for one year. On 30 April 1964 the Deputy Comptroller addressed the following memorandum to the Comptroller of UNICEF :

“ I wish to report on the conversation with Mrs. Rau which took place in my office yesterday in the presence of Messrs. Hogg [Deputy Chief, Accounts Section] and Moran [IBM Supervisor].

“ Mrs. Rau's attention was drawn to previous conversations in regard to her attendance and performance to which reference was also made in periodic reports. As to the present she was informed that reports of her supervisors indicate lately a lack of co-operation and a decline in the standard of her work, particularly in regard to accuracy, and it was pointed out that these latest developments coincide with the signing of the contract, extending her appointment for a further year, which does not shed a favourable light on her.

“ Mrs. Rau denied vigorously that the above was the case and expressed the wish that under the circumstances she should be transferred from the Comptroller's Office.

“ She was informed that this request would be referred to the Personnel Officer, but that co-operation and a high standard of performance are, under all circumstances, a prerequisite for any further employment in the organization.

“ She was also informed that the contents of the conversation would be summarized in writing so as to give her an opportunity to put her side of the story on paper. “

The memorandum of the Deputy Comptroller was shown to the Applicant who submitted a written rebuttal and reiterated her “ request for a transfer from the Comptroller's Office ”. On 18 May 1964 the Applicant was transferred to the Administrative Division of UNICEF as a typist in the Stenographic Pool. On 1 September 1964 she was assigned to the Shipping Section as a clerk/typist. On 6 November 1964 the Chief of the Shipping Section informed the Personnel Officer that he believed that the Applicant was “ not suited for this work “ and recommended “ that replacement be made as soon as feasible ”. On 9 November 1964 the Personnel Officer informed the Applicant that she would be transferred to the Stenographic Pool and that it was doubtful whether her appointment could be extended beyond its expiration date. On 8 March 1965 the Chief of the Administrative Division wrote to the Applicant as follows :

“ I am writing to you to confirm our decision not to renew your Fixed-Term Appointment when it expires on 30 April 1965. This information was given to you verbally by Miss Taylor [Personnel Officer] last November and again today.

“ Since it is my understanding that you wish to dispute this decision, I think it is appropriate to place on record here our reasons for taking it. On 30 April 1964 Mr. Kraus, then Assistant Comptroller, reported that you had

been told that you were lacking in co-operation and that the standard of your work had deteriorated, especially since the extension of your Fixed-Term Appointment for a further year had been signed in February 1964. This memorandum was shown to you by Miss Taylor and you made a written reply in which you requested a transfer from the Comptroller's Division. On 18 May 1964 you were transferred to the Administrative Division as a typist in the Stenographic Pool. On 1 September 1964 you were assigned to the Shipping Section as Clerk/Typist to fill a vacant post in that Section. In November 1964 Mr. Adamowski, the Chief of the Section, requested that you be transferred from his Section because you were not suited for the work there, and you were reassigned to the Stenographic Pool in December 1964. Miss Taylor told you then that since two Divisions of UNICEF had requested your transfer elsewhere your contract would be permitted to expire without renewal on 30 April 1965. On more recent consideration it has been decided to maintain this position."

On 8 April 1965 the Applicant requested the Secretary-General to review the decision not to renew her fixed-term appointment. On 15 April 1965 the Director of Personnel informed the Applicant on behalf of the Secretary-General that "having reviewed the decision of UNICEF to permit your fixed-term appointment to expire on 30 April 1965, I [the Director of Personnel] am satisfied that there is no valid ground for changing that decision". On 26 April 1965, a periodic report was issued on the Applicant's work from 1 May 1964 to 30 April 1965. The report rated her as "a staff member who maintains a good standard of efficiency". It noted however that :

"During part of the period covered by this report, Mrs. Rau was assigned to the Shipping Section of the Supply Division. Since her return to the Pool, Mrs. Rau has allowed her discontent to upset other staff members working in the area of the Typing Pool."

On 29 April 1965 the Applicant instituted proceedings before the Joint Appeals Board. On 16 September 1965 the Board adopted a report concluding that it had "unanimously decided to make no recommendation in support of the appeal". On 12 October 1965 the Director of Personnel informed the Applicant that the Secretary-General had decided "to accept the decision of the Joint Appeals Board to make no recommendation in support of your appeal". On 8 March 1966 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are :

1. Staff Rule 104.12 provides that at the end of the probationary service the holder of a probationary appointment shall be granted either a permanent or a regular appointment or be separated from the service of the United Nations. Instead of choosing one of the alternatives laid down in that provision, the Respondent granted the Applicant a one-year fixed-term appointment at the end of her probationary service in 1963. Furthermore, in contravention of Staff Rule 104.13 (c) (iii) he failed to refer to the UNICEF Personnel Committee, which fulfils the role of the Appointment and Promotion Board, the question of granting to the Applicant a permanent or regular appointment.

2. The decision to grant the Applicant a one-year fixed-term appointment was taken on the grounds that it was anticipated that her post—i.e., IBM Key punch Operator—would be abolished in the near future. These grounds would have

justified the extension for one year of the Applicant's probationary appointment, as expressly authorized in Staff Rule 104.12. They did not justify a violation of that provision.

3. The granting to the Applicant of a fixed-term appointment at the end of her probationary service cannot be construed as a termination followed by re-employment in the meaning of Staff Rule 104.3. Indeed :

(a) Staff Rule 109.3 was not complied with, since the Applicant received no notice of termination of her probationary appointment.

(b) The fixed-term appointment granted to the Applicant was not a reinstatement since the letter of appointment contained no provision to that effect, as required in Staff Rule 104.3 (a). Moreover, the termination indemnity to which the Applicant was entitled at the end of her probationary service was held in escrow by the Respondent and was paid to her only in 1965, when she was separated from the service of the United Nations. Since Staff Rule 104.3 (b) provides that on reinstatement a staff member must return to the organization the termination indemnity, the fact that the Respondent held the indemnity in escrow indicates that he did not construe the fixed-term appointment as a reinstatement.

(c) Staff Rule 104.3 (a) provides that, in the event of a staff member being given a new appointment, its terms shall be fully applicable without regard to any former period of service. The fixed-term appointment granted to the Applicant at the expiration of her probationary service was not a new appointment since, far from disregarding the Applicant's former period of service, it provided that her accrued leave would be carried over and that she would continue to be a full participant in the Pension Fund.

4. In 1964, the Applicant's fixed-term appointment was extended for one year. In 1965 no further renewal or extension was granted and the Applicant was separated from the service of the United Nations. In the meantime, she had been transferred to an established post in the Stenographic Pool. In view of the specific grounds given for the failure to grant her a permanent appointment in 1963 and in the light of her record of service, the Applicant had acquired a right to expect that she would continue to be employed as a typist in the Pool or in some other capacity.

5. The decision not to renew her fixed-term appointment in 1965 was based on charges made against the Applicant by some of her supervisors. The periodic reports on the Applicant's performance clearly show that these charges were without foundation. In some instances, moreover, they appear to have been motivated by favouritism toward a co-worker.

6. Since the Respondent indicated to the Applicant the grounds for his decision not to renew her fixed-term appointment, he is obliged to justify these grounds and the Tribunal can examine the facts on which they are based.

Whereas the Respondent's principal contentions are :

1. The Applicant's probationary appointment was properly terminated under Staff Regulation 9.1 (c) which grants the Secretary-General discretionary power to terminate such appointments at any time if in his opinion that is in the interest of the United Nations. The Applicant did not contest the termination of her probationary appointment within the time-limit laid down in Staff Rule 111.3 and has neither alleged, nor adduced any evidence of improper motive, prejudice or bad faith.

2. The decision to terminate the Applicant's probationary appointment was made before the completion of the probationary period indicated in her letter of appointment. Staff Rules 104.12 and 104.13 (c) were therefore not applicable in the present case.

3. In terminating the Applicant's probationary appointment the Respondent fully complied with Staff Rule 109.3. The Applicant was given a written offer of a fixed-term appointment and a Personnel Action form. This form clearly indicated that the arrangement consisted of two operations: (i) termination and (ii) re-employment on a fixed-term appointment immediately following the effective date of the termination. These documentary materials constituted written notice within the meaning of Staff Rule 109.3.

4. The question whether certain alternatives other than the one actually taken were open to the Respondent is irrelevant. Indeed, the Tribunal cannot review the choice made by the Respondent as among the alternatives unless there is evidence to show that he was influenced by improper motives, prejudice or bad faith. No such evidence has been adduced by the Applicant.

5. The fixed-term appointment granted to and accepted by the Applicant was a new appointment and constituted re-employment within the meaning of Staff Rule 104.3. While indicating that the new appointment as agreed upon by the parties cannot be modified with reference to the staff member's previous service, Staff Rule 104.3 (a) does not preclude the parties from taking into consideration, in arriving at the new contractual terms, such matters as professional experience gained during previous service and accrued leave or sums owed to the staff member.

6. Staff Rule 104.12 (b) specifies that a fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment. This provision was repeated in clause 3 of the Applicant's letter of appointment. Furthermore, the Applicant adduces no evidence to show that any representation was ever made to her by authorized officers in circumstances which would have created any expectancy of further employment with the organization.

7. Even if it were assumed that legal expectancy of further employment had existed, the decision not to extend the Applicant's fixed-term appointment for a second time would still be valid since it was based on adequate grounds relating to the quality of Applicant's service.

The Tribunal, having deliberated until 5 October 1966, now pronounces the following judgement :

I. In her final submission as to substance, the Applicant presented two sets of pleas to the Tribunal corresponding to different legal positions. The Applicant specified that the second set of pleas had a subsidiary character.

II. The Applicant's first set of pleas requested the Tribunal :

“(a) To rescind the decision by which the Applicant's probationary appointment was converted in May 1963 into a fixed-term appointment ;

“(b) To rule that the Applicant was entitled to receive in May 1963 a permanent or regular appointment ;

“(c) To order the payment of full salary and allowances from May 1965 to the date of the judgement ;”

The Tribunal observes that by those pleas the Applicant challenges the validity of a decision taken on 14 February 1963 the scope of which is defined in a “Personnel Action ” form of that date. That document, issued two and a half

months before the expiry of the probationary appointment, indicated clearly that its purpose was to terminate that appointment on the date of expiry of the probationary period specified in the letter of appointment and to grant the Applicant, thereafter, a one-year fixed-term appointment. The Tribunal observes that the Applicant accepted the one-year appointment offered her and that, subsequently, she accepted a further one-year appointment, which expired on 30 April 1965. In her application she argued that the grant of a fixed-term appointment following a probationary appointment was contrary to the Staff Regulations and Rules applicable to UNICEF. The Tribunal notes that the Applicant's pleas are directed against a decision taken on 14 February 1963, which was not contested by her at that time under the applicable appeals procedure. Consequently, the Tribunal rules that the pleas challenging the validity of that decision were not receivable, under article 7 of its Statute, at the date of submission. Accordingly, the request for the production of a legal opinion relating to questions raised by those pleas is also not receivable.

III. The Applicant's subsidiary pleas request the Tribunal :

“(a) To rescind the decision by which the Applicant was refused a renewal of her fixed-term appointment in May 1965 ;

“(b) To order the payment of full salary and allowances from May 1965 to the date of the judgement ;”

The Tribunal notes that Staff Rule 104.12 (b) concerning fixed-term appointments reads as follows :

“(b) *The Fixed-Term Appointment*

“The Fixed-Term Appointment, having an expiration date specified in the letter of appointment, may be granted for a period not exceeding five years to persons recruited for service of prescribed duration, including persons temporarily seconded by national governments or institutions for service with United Nations. The Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment.”

The final sentence of that rule is reproduced verbatim in the letter of appointment signed by the Applicant. It shows the intention to leave to the Secretary-General discretion to decide whether the staff member concerned should be retained in the service of the Organization at the expiry of the fixed-term appointment. The Tribunal notes furthermore that the Applicant has not established that the discretionary power of the Secretary-General in the present case had been limited by any commitment to retain her in the service of the Organization.

IV. The Tribunal observes that grounds for the decision not to renew the Applicant's fixed-term appointment were communicated to her by the Chief of the Administrative Division of UNICEF in a letter dated 8 March 1965. These grounds relate to the Applicant's conduct and work. The Applicant's file also contains a communication from the Acting Executive Director of UNICEF, addressed to the Director of Personnel, dated 14 April 1965, stating the reasons for which, in his view, the contested decision should be upheld. Those reasons also relate to the quality of the Applicant's service.

The Tribunal notes, however, that in 1963 the only reason given for the grant of a fixed-term appointment at the end of the probationary period was the uncertainty concerning the future of the unit in which the Applicant was working. Her departmental Chief recognized at the time, in making his recommendation, that her services were satisfactory. When the decision was taken not to renew the

appointment in 1965, the considerations were different since the Applicant had been transferred to another unit and only the quality of her services was brought into question.

At the Applicant's request, the Tribunal heard the testimony of four witnesses who had supervised her work. Another witness who had supervised her work was heard at the request of the Respondent. Two of these five witnesses gave favourable evidence as to the Applicant's performance.

The Tribunal was unable to find in the Applicant's file any periodic report on her work from 23 April 1963 to 30 April 1964. The periodic report for the period 1 May 1964 to 30 April 1965 was issued only after the Applicant had been informed in writing that her fixed-term appointment would not be renewed.

In this connexion the Tribunal notes that the Joint Appeals Board stated in its report to the Secretary-General :

" 27. The Board noted that in the two periodic reports covering the probationary period, the Appellant was rated as a staff member who maintains a good standard of efficiency and that, contrary to the Administrative Instruction No. 511 of 11 April 1956, no periodic reports seem to have been prepared for the period covering either of the fixed-term contracts. During the hearings, however, four out of five witnesses testified that in fact the Appellant's performance was less than satisfactory, that she was erratic and unreliable in her work and that her attitude was careless. Testimony by her superiors and the record indicate that her shortcomings were brought to the Appellant's attention orally and in writing.

" 28. In its review of the case the Board noted with concern the manner in which the UNICEF Administration appears to have disregarded the Regulations and Rules applicable to the case at hand and felt it necessary to emphasize the need for consistent adherence to the Staff Rules. The Board also took a serious view of the discrepancies between the written evaluation in the periodic reports of the Appellant's performance and the oral testimonies. The Board wishes to stress the necessity for consistent and clear reporting, particularly in cases where a staff member's future is at stake. "

V. The Joint Appeals Board's report, therefore, duly brought to the Respondent's attention the problems raised by the manner in which the Applicant's service had been evaluated.

Thus, before confirming the decision not to renew the Applicant's appointment, the Respondent had at his disposal all the facts relating to the manner in which the Applicant's service had been evaluated. The conclusion finally reached by the Respondent under these circumstances was a matter within his discretion.

VI. Accordingly, the Tribunal finds the subsidiary pleas of the Applicant ill-founded.

VII. For the foregoing reasons, the Tribunal rejects the application.

(Signatures)

Suzanne BASTID

President

CROOK

Vice-President

New York, 5 October 1966.

L. IGNACIO-PINTO

Member

N. TESLENKO

Executive Secretary