

of the Statute of the Tribunal, at a sum equal to the net amount of the additional financial advantage which the Applicant would have derived, or would derive, if the date of her next salary increment had not been changed from September 1966 to June 1967.

(Signatures)

Suzanne BASTID
President

H. GROS ESPIELL
Member

Francis T. P. PLIMPTON
Member

Jean HARDY
Executive Secretary

Geneva, 24 April 1968.

Judgement No. 117

(Original: English)

Case No. 118:
van der Valk

**Against: The United Nations Relief
and Works Agency for
Palestine Refugees in
the Near East**

Termination on the ground of abolition of post of the temporary indefinite contract held by a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East.

Contention that the abolition of the Applicant's post was unwarranted.—Regulation 9.1 of the International Staff Regulations of UNRWA.—Limits of the discretionary powers of the Administration.—Nature of the Agency.—Refusal of the Tribunal to substitute its judgement for that of the Administration in respect of reorganization of posts.

Argument that, in the case of abolition of post, the more senior staff should be preferred to others.—There is no such obligation in the absence of specific provisions to that effect.—Obligation of the Agency to try to find alternative employment for the Applicant.—The Agency complied with this obligation.

Argument relying on improper motivation and prejudice.—The Tribunal is unable, having regard to the circumstances of the case, to find that the termination of the services of the Applicant was actuated by such motives.

The application is rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of the Lord Crook, Vice-President, presiding; Mr. R. Venkataraman, Vice-President; Mr. Francis T. P. Plimpton;

Whereas, on 31 January 1967, Pieter C. van der Valk, the Applicant in the present case and, at the time, a staff member of the United Nations Relief and

Works Agency for Palestine Refugees in the Near East, hereinafter called UNRWA, requested the President of the Tribunal to designate a counsel to assist him in drawing up and submitting an application to the Tribunal;

Whereas, on 6 February 1967, the President, in pursuance of Administrative Instruction ST/AI/163, designated as counsel Miss Lila Fenwick, a staff member of the United Nations;

Whereas, at the Applicant's request and with the Respondent's agreement, the President extended to 21 June 1967 the time-limit for the filing of the application;

Whereas, on 18 May 1967, Mr. Nandasiri Jasentuliyana, a staff member of the United Nations, replaced Miss Fenwick as counsel for the Applicant, Miss Fenwick having been relieved of her duties by the President at her own request;

Whereas, at the Applicant's request and with the Respondent's agreement, the President extended to 6 October 1967 the time-limit for the filing of the application;

Whereas, on 5 October 1967, the Applicant filed an application requesting the Tribunal:

“(a) To declare the application receivable;

“(b) To rescind the administrative decision of 18 November 1965 by which the Respondent terminated the services of the Applicant under the terms of Staff Regulation 9.1;

“(c) To rescind the decision of 15 December 1966 by which the Respondent, after consideration of the conclusions and recommendations of the Joint Appeals Board, maintained the aforementioned administrative decision;

“(d) To order the Respondent to reinstate the Applicant in the services of UNRWA; and

“(e) To order payment to the Applicant of his salary from 15 February 1967, until the date of his effective reincorporation to UNRWA;

“(f) Should the Respondent, by virtue of the authority vested in him in article 9.1 of the Statute, decide to pay compensation for the prejudice suffered, to order the payment to the Applicant of a sum equivalent to three years' net base salary, being the amount the Applicant was deprived of by the decision of the Respondent to terminate the services of the Applicant prior to the due date of his retirement.”;

Whereas the Respondent filed his answer on 28 November 1967;

Whereas the Applicant filed written observations on 10 January 1968;

Whereas, on 5 February 1968, the Respondent filed a reply to the Applicant's written observations;

Whereas, on 18 March 1968, the President requested the Respondent to produce the Applicant's confidential file;

Whereas the Respondent produced the file on 27 March 1968;

Whereas the Applicant submitted observations on the file on 4 April 1968;

Whereas the Respondent submitted comments on those observations on 18 April 1968;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 12 November 1951 as assistant officer under a temporary indefinite contract. His letter of appointment

specified that conditions of employment were in accordance with the Agency's Personnel Regulations as published and that the appointment might be terminated at one month's written notice by either party. The Applicant served as Welfare Officer at the Beirut Headquarters and in Jordan until July 1952, when he was assigned to Gaza as Camp Distribution and Registration Officer. In December 1954, he was reassigned as Field Registration and Distribution Officer in Lebanon and, in January 1960, his post was retitled "Field Eligibility, Registration and Distribution Officer". In September 1961 the Applicant was reassigned as Field Distribution Officer in Jordan. On 18 November 1965, the following letter was addressed to him by the Chief of the Personnel Division:

"I am writing to confirm your recent conversation with the Director of UNRWA Affairs, Jordan, who advised you on behalf of the Acting Commissioner-General that the necessity to make further staff economies this year has resulted in a decision to eliminate your post on 31 July 1966. I am accordingly taking this opportunity of giving you formal notice of the Agency's intention to terminate your appointment under the provisions of Staff Regulation 9.1 on the close of business 31 July 1966.

"The Acting Commissioner-General has asked me to say how sorry he is that your separation is necessary, entailing as it does the release of an officer who has served the Agency for so long as yourself. We hope that this advanced notice will give you adequate opportunity of making other arrangements for your future. As you know we will be glad to assist you in any way that is possible.

"We shall be writing to you later regarding your entitlements on separation."

On 8 March 1966, the Applicant addressed to the Commissioner-General of UNRWA, with whom he had discussed the matter in January, a letter requesting him *inter alia* to cancel the letter of 18 November 1965 reproduced above and to decide as a matter of principle that in cases of abolition of posts the staff members with less seniority should be discharged first. In his reply, dated 26 May 1966, the Commissioner-General informed the Applicant that the date formerly envisaged for the termination of his services was postponed until 31 August 1966; on the question of principle raised by the Applicant, the Commissioner-General stated:

"The other matter which you raised is that of relative seniority in UNRWA service and employability in other United Nations organizations. While every possible consideration is given to these factors in selecting staff for retention or otherwise in the Agency's service at the present time, it is sometimes essential for the Agency to give priority to other considerations, such as the various needs of programs and services as a whole, and the manner in which those needs can best be fulfilled, now and in the longer term, in the interests of the organization and the refugees. I feel sure you will understand that the Agency could not conscientiously allow its staff pattern to be influenced by one factor alone, and that indeed many factors must be taken into account when a staff body has to be reduced.

"You may nevertheless rest assured that, although I cannot at present foresee any possibility of retaining your services beyond 31 August this year, every consideration will be given to reviewing this decision in the light of any opportunities which might arise between now and that date, and that I shall continue to give my support to the efforts which have already been

made to secure any other international employment for which you may be qualified. In view of the circumstances as I see them, I feel that you should keep in close touch with Chief Personnel Division regarding the applications which you have already submitted and regarding any further support which it might be possible to give to them from Headquarters."

On 8 June 1966 the Applicant filed an appeal with the Joint Appeals Board of UNRWA which submitted its conclusions and recommendations to the Commissioner-General on 11 October 1966. These conclusions and recommendations were contained in the Minutes of the 4th meeting of the Board, the relevant sections of which read as follows:

"POINT I

"The terms of the letter of separation stated that the post occupied by the appellant (Field Distribution Officer) has been changed from one of an international held post to an area held post in order to effect economies. The appellant insisted that the elimination of the post for reason of staff economies could not automatically justify his separation when his seniority was definitely greater than other international staff members of equal qualifications whose services were retained unless there were other reasons. He had not been informed of these reasons and, if this was the case, the effective basis or criteria that led to the decision of terminating his services were not communicated to him in the letter of separation and should have been.

"The Board decided that the elimination of the post occupied by the appellant did represent financial savings to the Agency and this must be accepted as the overriding reason for separation of the appellant. The Board then examined the claim of the appellant that consideration of his length of service and qualifications should have resulted in the retention of his services in preference to other staff members.

"The Board, after some discussion, agreed that the administration had the responsibility of selecting the staff best suited for the Agency's present and future needs. This evaluation would most certainly be made by comparing the substantive efficiency of the appellant with that of other staff members of comparable qualifications.

"The Board noted that review of the evaluation of performance, suitability for future programs and all other factors relating to the substantive question of efficiency was excluded by Rule 1.111.1 from the scope of its authority unless evidence showed that prejudice or other extraneous circumstances had influenced the decision of the Administration.

"The Board after a careful study of all the documents submitted and the declarations made to the Board by the appellant could find no evidence that either prejudice or any extraneous circumstances had prevailed which could be said to have affected the decisions of the Administration.

"The Board unanimously agreed that it had no alternative but to reject this point of the appeal.

"POINT II

"The extension of his date of separation to the end of August 1966 was inadequate and that the Agency was morally obligated to suspend all separations of this nature until it had reached a decision concerning the integration of UNRWA international staff members into the UN Pension

Fund as members with long service might be unjustly penalized by losing a benefit to which their length of service would give them entitlement and as such an integration might also create some suitable vacancies for staff under notice of separation.

“The Chairman informed the Board that the Administration had advised him that notices of separation for Mr. van der Valk and some other staff members would be extended till the end of December and that the Administration was still reviewing feasibility of integrating the staff into the UN Pension Fund. The Administration expected to reach a final decision before expiration of the separation notice recently extended thus giving the appellant an opportunity of participating.

“The Board noted that the Agency thereby had recognized the substance of the point presented by the appellant. The Board agreed that this point of the appeal had now been invalidated by the recent extension of the separation notice by the Administration and could only be reconsidered if decision was not reached before the expiration of the separation notice.

“POINT III

“The appellant listed a number of compassionate reasons which he feels should be considered in favour of his retention.

“The Board noted that the appellant:

- (i) Had joined the Agency on 12th November 1951 and will have served almost 15 years;
- (ii) Was 56 years old and would be eligible for retirement in 1970;
- (iii) Except for minor period of 4 months in Jordan Field Office, had received satisfactory performance ratings from all his other supervisors during over 14 years of service;
- (iv) Was transferred to Jordan Field Office in 1961 to enable a transfer to Lebanon of another staff member for compassionate reasons;
- (v) Had suffered a serious accident during his period of employment in Jordan which had left him a cripple and that this may handicap him for consideration by a future employment.

“The Board examined these reasons and agreed that they should normally be worthy of consideration in any organization. The Board unanimously suggests that the Administration should give the appellant any opportunity that might arise before his final separation to fill any post of equivalent grade and requiring similar qualifications to those of the appellant that may become vacant on a trial basis before resorting to external recruitment or transfers from other UN sources.”

UNRWA's position with regard to the Board's recommendations on Points I and III of the appeal was stated as follows in a letter of 15 December 1966 addressed to the Applicant by the Acting Commissioner-General:

“ . . .

“3. You will note that the Board has recommended that the principal point of your appeal (viz. that the termination of your service was not justified, particularly in view of your seniority, and that adequate reasons for the Agency's decision had not been communicated to you) be rejected.

“ . . .

"6. As to the third point of your appeal, you may rest assured that the Agency had taken into consideration all the compassionate circumstances which you have listed in favour of your retention. They remain present in the mind of the Commissioner-General and in that of the members of his staff who have dealt with your case. The Board has recommended that every effort be made to absorb you before your final separation and before resorting to external recruitment. You may be assured that, although no external recruitment of generalists is at present envisaged, your name will be considered, as well as those of other staff due for separation early next year, in connection with any vacancies which may occur amongst international posts of the Agency and for which your experience and qualifications would fit you. I am bound to say, however, that, at the present time, we see very little likelihood of such vacancies occurring.

" . . . "

On 5 October 1967 the Applicant, whose separation from service had been further postponed to 31 December 1966, 31 January 1967 and 15 February 1967 successively, filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The functions that were carried out by the applicant were not abolished when the post he was occupying was abolished by the contested decision. Therefore, the abolition of his post was not warranted in the interest of good administration and was not in the interest of UNRWA, but only a fictitious substitution of one class of post for another with the sole object of affecting the position of the Applicant.

2. The Administration failed to observe a principle of administrative law when it terminated the services of the Applicant while maintaining the services of more junior staff officers.

3. The fact that junior officers were retained while the services of the Applicant were terminated and that the Respondent meted out differential treatment to different staff members and in spite of repeated requests did not make available to the Joint Appeals Board the confidential files relating to the Applicant clearly indicates that extraneous and prejudicial circumstances have influenced the contested decision of the Respondent.

4. The Respondent did not make any attempts at finding alternative employment for the Applicant. The obligation on the part of the Respondent to find alternative employment to a staff member whose post is abolished is not a general one but a legal obligation based on principles of administrative law recognized by every conceivable legal system. Therefore, the Respondent's assurances of a general nature that the Applicant will be helped in finding alternative employment are clearly insufficient to discharge his legal obligation. In fact, even if the Respondent made inquiries (which were not done) this would not absolve him from his legal obligation. The criterion is whether the Respondent was able to find alternative employment. In any case, the duty to find alternative employment arose before terminating the Applicant's services, and no attempt was made by the Respondent to find such alternative employment for the Applicant at any time before he was given notice of termination. Therefore, even if any inquiries were made, they were belated. Furthermore, in the absence of an available post, the duty of the Respondent towards a senior staff member with a sound service record should have caused him to refrain from, or at least delay, abolishing the Applicant's post.

5. In arriving at his contested decision, the Respondent disregarded the rights of the Applicant and, in particular, his acquired right to expect, after serving UNRWA for fifteen years, a continuation of his services for the three years left prior to his due date of retirement.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant was the result of a decision to make his international post redundant and to replace it by an area staff post as part of a general policy aimed at achieving economies and preserving UNRWA's maximum capacity to carry out its services to the refugees under its mandate. It was taken under Regulation 9.1 of the International Staff Regulations which provides the statutory basis upon which the Commissioner-General has the right to terminate the appointment of international staff at any time if he considers that such action is in the interest of UNRWA. Whether by reason of a possible decision of the General Assembly to terminate UNRWA's mandate or of a lack of sufficient voluntary contributions, such staff always face possible redundancy.

2. Under the criteria applied by UNRWA in selecting staff for retention when posts are abolished (namely, in descending order of priority, the relative importance of the post; the possibilities of absorption of the duties of the post by other staff; as between comparable posts, the relative efficiency of the staff members involved; and, as between staff members of comparable efficiency, various compassionate factors, including length of service), the Applicant's post and his services were considered to be less essential to UNRWA than those of other staff members. As to seniority, it is only relevant as one among several compassionate factors to be taken into account as between officers of equal efficiency in similar posts.

3. The Administration is not under an obligation to *find* alternative employment for redundant staff members. Moreover, it is doubtful whether there is any general principle of law, in the absence of statutory provisions, that the Administration is even under an obligation to *seek* alternative employment. Nevertheless, UNRWA did, in fact, consider the Applicant for all the vacancies which arose between the time when the decision was taken to abolish his post and the date of his separation, but it was forced to the conclusion that he was not suitable for any of these vacancies. UNRWA went further and supported the Applicant's application for posts in another organization.

4. The Applicant's allegations of improper motives are extremely vague and are based upon misunderstandings and strained conjectures. Far from being activated by improper motives or prejudice, UNRWA went far beyond its legal obligations in an effort to minimize the hardship caused by the Applicant's termination.

5. UNRWA had legitimate reasons of principle for not disclosing the Applicant's confidential file to the Joint Appeals Board. Moreover, that file was not relevant to the proceedings before the Board, and the Commissioner-General had had his attention drawn to the controversy about the file.

The Tribunal, having deliberated from 15 to 26 April 1968, now pronounces the following judgement:

I. The Applicant requests the rescinding of the administrative decision terminating his services with UNRWA on the grounds that the abolition of his post and conversion thereof into an area staff post was unwarranted; that even if the post was abolished the Applicant should have been retained in preference

to staff members more junior to him in service; and that the contested decision was motivated by prejudice.

II. Regulation 9.1 of the International Staff Regulations of UNRWA reads as follows:

“The Commissioner-General may at any time terminate the appointment of a staff member if, in his opinion, such action would be in the interest of the Agency.”

The Tribunal, while examining similar provisions in the Staff Regulations of the United Nations, has held that though the Staff Regulations and Rules vest a wide discretion with the Administration, yet such powers must be exercised without improper motivation or misuse of power.

III. An examination of the nature of the Respondent Agency is relevant to the consideration of the case. In its Judgement No. 63, the Tribunal stated as follows:

“The Tribunal recognizes that UNRWA is of a temporary nature, depending on voluntary contributions intended for the benefit of Palestine Refugees, and with complete autonomy over its budgetary and financial organization. In considering the claim of the Applicant due regard has therefore to be paid to the nature of the Agency, its organization and functions.”

Since this judgement was rendered in 1956, the Agency has been renewed by the General Assembly from time to time and has had to face increasing budgetary deficits. It is also relevant to note that UNRWA never uses permanent contracts but only temporary indefinite contracts for its staff members.

IV. The Applicant contends that there was no real abolition of the post of Field Distribution Officer in Jordan but only substitution of an area staff officer for an international staff officer; that the financial savings on that account were marginal; and that such action was not warranted in the interests of good administration.

The Respondent, however, contends that the savings arising from the conversion of the international post to an area post were substantial and that such substitution would provide opportunity for employment to a local person, which would further the interests of the area and of the Administration.

In view of the well-established jurisprudence of the Tribunal that the Tribunal cannot substitute its judgement for that of the Administration in respect of reorganization of posts or staff in the interest of economy and efficiency, the Tribunal does not enter into the merits of either the abolition of the post of Field Distribution Officer or the substitution of an area staff officer for the international staff officer.

V. The Applicant argues that even if a post is abolished, junior staff members should be terminated in preference to senior members, according to an “established principle of administrative law . . . constantly upheld in the United Nations system and the Administrative Tribunal”. Reliance is placed on the observations of the Tribunal in the *Aubert* case (Judgement No. 2) that the more senior staff and those holding permanent contracts should be preferred to others in the case of abolition of post. But the Respondent points out that the necessity to take seniority into account was laid down by a specific provision in the Staff Rules of the United Nations in the *Aubert* case and that the principle does not apply in the absence of similar provisions in the Staff Rules of UNRWA. An

examination of the judgement in the *Aubert* case discloses that the decision was based on the non-observance of Staff Rule 104 and the "Interpretation and Conditions" of the Administrative Manual of the United Nations which set out clearly the procedure to be followed in the case of termination of appointments due to reduction in force or abolition of posts. The absence of similar provisions distinguishes the present case from the judgement in the *Aubert* case.

The Applicant urges that the Personnel Directive No. A/9 in force during the relevant period (26 July 1966 to 1 March 1967), though addressed to the area staff, applied to both categories of staff as admitted by the Respondent and that, according to the said Personnel Directive, efficiency and seniority were of equal importance in the consideration of staff members affected by abolition of posts.

The Tribunal observes that there is marked difference in the language and intent of Staff Rule 104 and the "Interpretation and Conditions" on the one hand and the Personnel Directive No. A/9 on the other, and concludes that neither the judgement in the *Aubert* case nor the Personnel Directive No. A/9 sustains the Applicant's plea that in the case of abolition of posts, senior staff members should be retained in preference to juniors in service.

VI. The Applicant pleads that the obligation on the part of the Respondent to find alternative employment for a staff member whose post is abolished is not a general one but a legal obligation based on principles of administrative law and that the Respondent did not make any attempts at finding alternative employment for the Applicant. The Respondent contends that the prior decisions of the Tribunal imposing an obligation on the part of the Administration to seek alternative employment for a staff terminated for redundancy were based on statutory provisions, and that similar provisions had not been made in the Staff Rules of UNRWA mainly because of the nature of its organization. The Tribunal notes that the decisions of the Tribunal in the *Aubert* case and the *Morrow* case (Judgement No. 16) were based on the non-observance of the specific Staff Rule 104 and the "Interpretation and Conditions" of the Administrative Manual of the United Nations. But the Tribunal in the cases of *Howrani and four others* (Judgement No. 4) held:

"That in the case of termination of employees with service ratings of 'satisfactory' or better, there is a presumptive right to consideration for posts elsewhere in the Secretariat for which their qualifications are appropriate, and that an essential of due process is either an affirmative showing that reasonable efforts were made to place such employees in other posts, or a statement of reason why this was not done."

The Tribunal considers that the principle cited above is valid in the case of abolition of post now under consideration, and therefore proceeds to examine whether the Applicant was in fact considered for alternative employment.

VII. The Respondent has given a list of the twenty-one vacancies which arose during the period, into which the Applicant could not be fitted. He has also filed an affidavit from the Chairman of the International Staff Management certifying that the Applicant "was considered for all of the post vacancies occurring at that time and for which his qualifications made him a possible appointee. Preference was given to other internal candidates, already in the Agency's service, because they were in the judgement of the Committee materially better qualified than Mr. van der Valk". The Applicant's contention that the Respondent erred in not examining the possibility of finding alternative employment *before* the letter of termination was issued

is unsustainable as there was no such statutory obligation in his case as there was in previous cases under Staff Rule 104 of the United Nations. The Applicant's further contention that the Respondent failed to consider him for alternative employment between the date of notice and actual termination is denied by the affidavit of the Chairman of the International Staff Management Committee. Whether the Applicant could have been preferred on merits to others in the Agency for retention in service is a matter of administrative judgement and the Tribunal does not enter into the relative merits of the candidates.

VIII. The Applicant strongly relies on improper motivation and prejudice as the main cause of termination. He has supported the charge with reference to the confidential documents disclosed to him by order of the Tribunal under article 10 of its Rules. The Applicant contends that his rating was good from 1951 to 1961 but that in 1962 the Officer whom the Applicant replaced in Jordan was prejudiced against him as a result of which some critical reports were made against him; that there was an attempt to get rid of him in 1962 which failed to materialize; and that this prejudice continued till 1965 when the abolition of post was seized upon to effect his termination. The Respondent argues that the rating of the Applicant was at all material times never more than moderate, that even though the Applicant was considered for termination of service at the end of 1962 the termination was not effected, and that the decision to abolish the post and terminate the Applicant was one of a series of measures taken between 1963 and 1967 resulting in the redundancy of seventy-four staff members.

The Tribunal has examined the ratings of the Applicant and finds that the assessment is mixed. The Tribunal notes that this post was not singled out for abolition but was one of a number declared redundant owing to budgetary necessities. There is nothing on record to show that the abolition of the post and notice of termination of the Applicant in 1965 was influenced by prejudice or extraneous circumstances. In fact, the termination which should have become effective on 31 July 1966 was postponed till 15 February 1967 in order to enable the Applicant to qualify for pension benefits.

Taking into account the character of the Agency, its budgetary difficulties, the genuine programme of reduction of international staff and progressive replacement of those by area staff, and the conflicting ratings of efficiency of the Applicant, the Tribunal is unable to find that the termination of the services of the Applicant was actuated by improper motivation or prejudice.

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

(Signatures)

CROOK
Vice-President, presiding

R. VENKATARAMAN
Vice-President

Francis T. P. PLIMPTON
Member

Jean HARDY
Executive Secretary

Geneva, 26 April 1968.
