

Judgement No. 169

(Original: French)

Case No. 164:
Senghor

Against: The Secretary-General
of the United Nations

Termination of the employment of a staff member holding a fixed-term appointment.

Failure to give any precise reason in the notification of termination and in the Secretary-General's reply to the request that the termination decision be reviewed.—Indication of the reason in a subsequent communication.—Recommendation of the Joint Appeals Board that the Applicant should be paid compensation because his termination was not based solely on his unsatisfactory service.—Decision of the Respondent to pay the Applicant compensation in an amount inferior to that recommended by the Joint Appeals Board, solely on the basis of the Board's report.—Since the Respondent does not claim that he is performing an act of grace or making a settlement in equity, his attitude necessarily implies that in substance he accepts the position of the Board.—Question of the amount of compensation to which the Applicant is entitled.—Circumstances in which the Applicant was officially informed that unsatisfactory service was given as the reason for his termination.—The contested decision is improper because the Respondent did not stipulate the ground for termination and did not invite the Applicant to furnish an explanation concerning the complaints which could be made against him.—Impossibility of restoring the parties to the status quo ante.—Compensation in lieu of specific performance considered appropriate.—The Applicant could not expect to remain in his post until the end of his contract.—By paying the Applicant compensation equal to six months' salary and allowances, less the amount of the termination indemnity already paid, the Respondent adequately compensated for the injury sustained.—The request for compensation for moral injury is rejected because the Applicant did not furnish any precise evidence to justify it.—All other requests are rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Francisco A. Forteza; Mr. Mutuale-Tshikantshe;

Whereas on 16 August 1972, Hyacinthe Lat Senghor, a former staff member of the United Nations, filed an application the pleas of which read as follows:

“ . . .

“(b) Contested decisions

“The termination of contract on 21 July 1970 and the decision of the Secretary-General to grant the Applicant compensation equivalent to only six months' salary, less the amount of the termination indemnity already paid to him (one month), despite the recommendation of the Joint Appeals Board . . .

“(c) Should the Secretary-General decide, in the interest of the United Nations, to pay compensation for the damages sustained, the Applicant requests:

“1. Payment in full of his salary and allowances for the period 1 September 1970 to 12 September 1971 as compensation for grave material and professional damages sustained by him;

“2. Payment of the sum of \$10,000 in compensation for moral injury;

“3. He further requests that he be given official notice that he reserves the right to claim compensation in respect of medical conditions contracted in the course of his service.”;

Whereas the Respondent filed his answer on 8 December 1972;

Whereas, on 25 January 1973, the Applicant filed written observations in which he, *inter alia*, requested that witnesses whom the Joint Appeals Board had been unable to hear, be heard;

Whereas, on 12 March 1973, the statement of Mr. Ibrahima Sow, Principal Civil Administrator, technical adviser in the office of the President of the Republic of Senegal, was taken at Dakar by a staff member of the United Nations designated for that purpose by the President of the Tribunal in accordance with article 10, paragraph 3, of the Rules;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 13 September 1967 on a fixed-term appointment for four years, at the P-5 level, as Secretary of the Economic Commission for Africa (ECA). On 28 January 1969, the Applicant wrote a memorandum to the Executive Secretary of ECA in which he put forward proposals concerning the recruitment policy to be followed in order to reduce the linguistic imbalance between English-speaking and French-speaking members of the Commission's staff; he stated that if his proposals were rejected he would regretfully have to draw the conclusion that "our ideas about the future of ECA do not coincide", and he attached to the memorandum a report, prepared by him, which "might be transmitted to certain friends in French-speaking embassies whose countries are represented on the Recruitment Committee and who share my conviction that ECA would gain in all respects by being a bilingual African organization". On 28 February 1969, the Applicant transmitted to the Executive Secretary a copy of a letter he had sent to his uncle, the President of Senegal, asking the latter to appoint him Ambassador of Senegal in Ethiopia; in that letter he explained that, if he was assured of being appointed to that post, he could "devote himself fully and fearlessly to an intelligent campaign which would open wide the doors of ECA to '*francophonie*'", and he described how he was trying "skilfully to overcome obstacles and in spite of [the Executive Secretary] to bring about the basic changes which are needed". On the same day, the Executive Secretary sent the Applicant a confidential memorandum in which he said that, having had an opportunity to observe his work during his 17 months' service with ECA, he was obliged to place on record the fact that the Applicant was unsuited by training, experience, temperament and aptitude to fulfil the duties of an international civil servant. On 2 April 1969, the Applicant wrote to the Executive Secretary protesting the fact that the latter was entrusting tasks directly to one of the Applicant's subordinates. On the same day, the Executive Secretary informed the Applicant in reply that he would call on him when he considered his services adequate but that the Applicant should expect that in future a large part of the work of the Secretary of the Commission would be entrusted to his assistant. On 4 July 1969, in a confidential memorandum addressed to the Director of Personnel, the Executive Secretary recommended termination of the Applicant's appointment, stating that experience had shown the Applicant to be a scatterbrain, that he had proved himself totally incapable of performing his duties and that the greater part of his work had had to be entrusted to other staff members. On 1 September 1969, the Applicant's within-grade salary increase was withheld on the instructions of the Executive Secretary. On 2 October 1969, the Executive Secretary, acting as both first and second reporting officer, prepared a periodic report covering the first two years of the Applicant's service, in which he rated him as "on the whole, an unsatisfactory staff member". On 15 October 1969, the Applicant submitted a statement of rebuttal to his periodic report and, on 3 February 1970, the Executive Secretary recorded his comments on that statement. On 21 January 1970, the Applicant requested a transfer from ECA to Headquarters, New York, preferably to the Office of Legal Affairs. On 18 February 1970, ECA informed Head-

quarters by cable that it had no objection to the Applicant taking up his duties with the Office of Legal Affairs on 1 March 1970; it was ECA's understanding, the cable stated, that the Applicant's posting to Headquarters had been cleared in January with the Legal Counsel, the Under-Secretary-General for Economic and Social Affairs and the Executive Secretary of ECA. It is clear from an internal memorandum of the Office of Personnel dated 20 March 1970 and a memorandum dated 23 April 1970 from the Office of Legal Affairs to the Office of Personnel that the Legal Counsel did not want the Applicant transferred to his Office and that, in the opinion of the Director of Personnel, an effort must be made to place the Applicant either in Geneva or in Vienna. On 30 April 1970, the Office of Personnel informed the Applicant, who had been evacuated to his home country for reasons of health, that the prospects of finding a suitable place for him were bad and suggested that he should resign or agree to the termination of his appointment with full indemnity. The Applicant rejected those proposals on 4 May 1970 and, on 8 July 1970, the Office of Personnel cabled him that since efforts to place him in another post had failed it was recommending that the Secretary-General terminate his appointment on grounds of unsatisfactory services. On 21 July 1970, the Director of Co-ordination, Office of Personnel, informed the Applicant that the Secretary-General had decided to terminate his appointment in conformity with Staff Regulation 9.1 (b) and to pay him a termination indemnity in accordance with Annex III (b) of the Regulations. On 14 August 1970, the Applicant requested the Secretary-General to review his decision to terminate his appointment. On 25 August 1970, he was informed that the Secretary-General saw no reason to modify that decision. On 1 September 1970, the Director of Co-ordination informed the Applicant in a letter that the reason for the termination of his appointment was that indicated by the Office of Personnel in its cable of 8 July 1970. On 23 October 1970, the Applicant lodged an appeal with the Joint Appeals Board, which submitted its report on 20 March 1972. The Board's conclusions and recommendations read as follows:

"Conclusions and recommendations

"52. The Board finds that the termination of the appellant's fixed-term appointment prior to its expiration date was not based solely on his unsatisfactory service, and that certain factors unrelated to the appellant's performance have contributed to the decision of termination. The Board further finds that the decision appealed against has resulted in certain material and moral injury to the appellant.

"53. The Board therefore recommends the payment to the appellant of compensation equal to the total of his salary and allowances for the period 1 September 1970, the day following the month of notice, to 12 September 1971, the date on which his appointment was due to expire, minus the amount of the termination indemnity."

On 9 June 1972, the Director of Personnel informed the Applicant that, having reviewed his case in the light of the Board's report, the Secretary-General had decided to grant him compensation amounting to six months of his salary and allowances, less the amount of the termination indemnity which had been paid to him. On 16 August 1972, the Applicant filed the aforementioned application.

Whereas the Applicant's principal contentions are:

1. The contested decision was in fact based on reasons—for example, the dispatch of a letter to the President of Senegal—totally unrelated to the quality of the Applicant's services and Staff Regulation 9.1 (b) was invoked retroactively.
2. The Executive Secretary of ECA discriminated against French-speaking Africans, particularly in the matter of appointments.

3. The Respondent has not proved that he made serious and persistent attempts to find another post for the Applicant as he had undertaken to do.

4. The exaggerated nature of the Executive Secretary's comments on the Applicant's statement of rebuttal to his periodic report provides proof of the Executive Secretary's bias and of his hostility towards the Applicant. Furthermore, in flagrant violation of paragraph 5 of Administrative Instruction ST/AI/115, the Executive Secretary was the first and only supervisor to prepare the periodic report and reply to the Applicant's arguments. Furthermore, in violation of the provisions of the same administrative instruction, the Applicant was not afforded an opportunity to rebut the allegations made and the excuses given by the Executive Secretary in his confidential memorandum of 4 July 1969 addressed to the Director of Personnel, which was not communicated to the Applicant.

5. Since responsibility for the termination of the Applicant's contract lies entirely with the United Nations Administration, the Applicant is entitled to request the Tribunal for full compensation for the material, professional and moral injury sustained by him.

Whereas the Respondent's principal contentions are:

1. The Applicant's appointment was lawfully terminated by reason of his unsatisfactory service. The judgements in the periodic report are based on direct observation of the Applicant's work and it is not up to the Tribunal to substitute its own. As Secretary of the Commission, the Applicant was responsible to the Executive Secretary—acting on behalf of the Secretary-General—and under his authority in the performance of his functions; he was not directly responsible to the Commission or its component organs. Yet, it is clear both from his conduct and from his own admissions that, in defiance of the Secretary-General's delegated authority and in violation of the Staff Regulations, he substituted his own judgement for that of the Executive Secretary as to the organization of the secretariat of ECA and was seeking the collaboration of authorities external to the United Nations Secretariat with a view to bringing about the changes which he advocated.

2. The decision to terminate his appointment was not motivated by prejudice or hostility or other improper motive. It was the independent and considered judgement of the Executive Secretary, and of the Respondent, that the work of the Applicant had in fact proved unsatisfactory.

The Tribunal, having deliberated from 22 to 26 March 1973, now pronounces the following judgement:

I. In the pleas in his application, the Applicant states that he contests two decisions: "the termination of contract on 21 July 1970" and the Respondent's decision to grant him "compensation equivalent to only six months' salary . . . despite the recommendation of the Joint Appeals Board". In his written observations, he requests the Tribunal to declare that the termination of his contract was improper and to grant him the full benefit of his pleas before the Joint Appeals Board, namely, payment of the salary and allowances he would have received up to the expiry of his fixed-term appointment and the sum of \$10,000 in respect of the moral injury sustained.

In the application itself, the claims concerning payment of salary and allowances up to the expiry of the contract and the compensation of \$10,000 are made in the event that the Secretary-General should avail himself of the option to compensate the Applicant on the conditions stipulated in article 9.1 of the Statute of the Tribunal.

II. The Tribunal is required primarily to consider whether the decisions taken with respect to the Applicant disregard his rights under his contract and under the provisions of the Staff Regulations and Rules.

III. The Tribunal notes that the Applicant was informed that his appointment had

been terminated by a letter of 21 July 1970 from the Director of Co-ordination, Office of Personnel. Reference was made in that letter to Staff Regulation 9.1 (b) which authorizes the Secretary-General to terminate the appointment of a staff member with a fixed-term appointment prior to the expiration date for any of the reasons specified in Staff Regulation 9.1 (a) (unsatisfactory service, abolition of post or reasons of health). No precise reason for termination of the appointment was given in the letter. Nor was the reason for the termination mentioned in the letter of 25 August 1970 replying, on behalf of the Secretary-General, to the request that the decision to terminate the appointment be reviewed in accordance with Staff Rule 111.3 (a). It was only in a letter dated 1 September 1970 that the Director of Co-ordination, Office of Personnel, expressed his regrets to the Applicant that the reason for the termination had not been conveyed to him before; he said:

“Since [the Office of Personnel] had cabled you on 8 July informing you of the decision to recommend that the Secretary-General terminate your appointment for unsatisfactory services, I inadvertently omitted to repeat the reason in my letter of 21 July.”

There followed some remarks relating to the periodic report covering the period 13 September 1967 to 12 September 1969.

IV. The Joint Appeals Board found that “the termination of the appellant’s fixed-term appointment . . . was not based solely on his unsatisfactory service, and that certain factors unrelated to the appellant’s performance have contributed to the decision of termination”. It found that the “decision appealed against has resulted in certain material and moral injury to the appellant” and recommended that he be paid the total of the salary and allowances he would have received until the day when his appointment was due to expire, minus the termination indemnity.

On 9 June 1972, following those recommendations, the Secretary-General’s decision was communicated to the Applicant in the following terms:

“Having reviewed the case in the light of the Board’s report and having studied its recommendations, the Secretary-General has decided to grant you compensation amounting to six months’ salary and allowances, less the amount of the termination indemnity you have received”.

V. The Tribunal notes that the decision in question was directly linked to the contents of the report of the Joint Appeals Board: it was “in the light” of that report that the case was reviewed. Now that review led the Secretary-General, on 9 June 1972, to modify the termination decision of 21 July 1970 in which he had granted the termination indemnity provided for in subparagraph (b) of annex III of the Staff Regulations, that is to say, five days’ salary for each month of uncompleted service, or a little over two months’ salary. As a result of the final decision of 9 June 1972, the Applicant was given nearly four months’ additional compensation.

The Tribunal notes that the only basis given for the final decision is the report of the Joint Appeals Board. The Respondent does not claim that he is performing an act of grace or making a settlement in equity. Thus, his attitude necessarily implies that in substance he accepts the position of the Joint Appeals Board: he admits that the termination of the appointment was improper, but his assessment of the injury sustained by the Applicant as a result of the termination decision is different from, and less favourable than, that of the Board.

In the circumstances, the Tribunal considers that the question still at issue is essentially that of the amount of compensation to which the Applicant is entitled.

VI. While there is no need to review the considerations which led the Joint Appeals Board to its recommendations, the Tribunal must emphasize, as it stated above, that the termination decision does not specify the precise reason for the termination,

whereas Staff Regulation 9.1 (b) determines by reference the cases in which the appointment of a staff member with a fixed-term appointment may be terminated. When on 1 September 1970, subsequent to the termination decision, the Applicant was officially informed that his unsatisfactory services were given as the reason, reference was made only to the periodic report on him, a report prepared almost a year previously. It must be noted that the Executive Secretary of ECA, who prepared the report, had also signed it as second reporting officer and as chief of section and that he had also prepared, on 3 February 1970, the reply to the Applicant's comments.

Thus, at the time the termination decision was taken, the Applicant had not been officially informed of the reason for the termination and had not been requested to give an explanation. Reference is, of course, made in the letter of 1 September 1970 to a cable sent to the Applicant by the Office of Personnel on 8 July 1970. The cable reads as follows:

" . . . Regret inform you efforts to find you post elsewhere ECA unsuccessful. No question your file indicates unsatisfactory services but in view of interruption due health conditions termination delayed in hope of finding you post elsewhere ECA. Efforts having failed we are recommending SecGen [Secretary-General] terminate appointment for unsatisfactory services which will entitle you to full termination indemnity."

Although the cable mentions unsatisfactory services, no specific grounds for complaint are mentioned and the Applicant is not requested to furnish an explanation. In any case, unsatisfactory services were not mentioned at all as the grounds for termination at the time of the final decision.

The Tribunal does not have to seek the reasons for the abnormal conduct of the Respondent in this case. It notes merely that, as the Respondent did not stipulate the grounds for termination and did not invite the Applicant to furnish an explanation concerning the complaints which could be made against him with a view to terminating his appointment, the contested decision must be regarded as improper.

VII. The Applicant has not requested reinstatement. It is clear from the file and, in particular, from a communication from the Applicant that, owing to his state of health, he could not return to his duty station. Moreover, his contract expired on 12 September 1971. Thus, the rescission of the contested decision could not have the effect of restoring the parties to the *status quo ante*.

The Tribunal has previously held (Judgements No. 68, Bulsara, No. 92, Higgins, and No. 113, Coll) that where the parties cannot be restored to the *status quo ante*, compensation in lieu of specific performance may prove to be adequate and proper relief.

Where the Applicant could normally expect to remain in the service of the Organization until the expiration of his contract, the Tribunal held (Judgement No. 113, Coll) that, bearing in mind all the circumstances of the case, the monetary compensation to which the Applicant is entitled would be fairly appraised if the person concerned was awarded as indemnity the equivalent of his base salary for the period of the contract remaining as from the date of termination, less the sums already paid following the termination.

In the present case, the Tribunal finds, on the basis of all the evidence in the file, that the Applicant could not expect to remain in his post until the end of his contract. It considers that in assessing, in his decision of 9 June 1972, the injury sustained by the Applicant at an amount equal to six months' salary and allowances, less the amount of the termination indemnity already paid, the Respondent has assessed the injury sustained equitably and reasonably. As to the request for compensation for moral injury, the Applicant has not furnished any precise evidence to justify it. This request must therefore be rejected.

VIII. For these reasons, the Tribunal decides that the contested decision was improper but that the compensation paid by the Respondent constituted adequate compensation for the injury sustained by the Applicant.

IX. All other requests are rejected.

(Signatures):

Suzanne BASTID
Vice-President, presiding
F. A. FORTEZA
Member
Geneva, 26 March 1973

MUTUALE-TSHIKANTSHE
Member
Jean HARDY
Executive Secretary

Judgement No. 170

(Original: English)

Case No. 163:
Sule

Against: The Secretary-General
of the United Nations

Non-renewal of a fixed-term appointment.—Non-conversion of that appointment to an indefinite appointment.

Request for the rescission of the decision not to renew the appointment or to convert it to an indefinite appointment and for payment of compensation for the injury sustained.—Provision in the letter of appointment stating that the appointment does not carry any expectancy of renewal or of conversion to any other type of appointment.—Staff Rule 104.12 (b).—Paragraph 3 (a) of the Conditions of Service for Locally Recruited Staff Members of the UNDP Office in Nigeria.—Interpretation of the Applicant, who argues that by virtue of the clause of that paragraph relating to indefinite appointments he was entitled to receive either another fixed-term appointment or an indefinite appointment.—This clause is applicable only if the staff member's services are to continue.—It is not applicable to the Applicant, because the decision regarding his latest fixed-term appointment was that his services were not to continue.—Acceptance of the Applicant's interpretation would be inconsistent with the terms of his letter of appointment and of the Staff Rules and would negate the very concept of a fixed-term appointment.—Request rejected.—Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Mr. Francis T. P. Plimpton, Vice-President; Sir Roger Stevens;

Whereas on 27 April 1972, at the request of Samuel B. Sule, a former local staff member of the Office of the United Nations Development Programme, hereinafter called UNDP, at Lagos, Nigeria, the Tribunal decided, under article 7, paragraph 5 of its Statute, to fix at 1 July 1972 the time-limit for the filing of an application to the Tribunal;

Whereas, on 16 May 1972, the Applicant filed an application which did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;