

terms of the Rule. In addition to the express reference in Rule 103.11 (b) to "exceptional cases", the Rule speaks of a staff member "who is called upon to assume the full duties and responsibilities of a post at a clearly recognizable level higher than his or her own". As the Applicant herself complained to the Director of the Library in a memorandum of 27 September 1977, the duties which she was given in her first eight months in the Catalogue Section, as a Library trainee, comprised "mainly clerical assignment".

IX. The final plea put forward by the Applicant is for three months' salary for professional and moral injury suffered by reason of her mistreatment. The Tribunal accepts the Applicant's contention that she was motivated to move to the Library by the hope of receiving a promotion and that she might otherwise have remained in the Reproduction Section of the Conference Services Department with the possibility, in due course, of achieving the G-5 level there. Similarly, it recognizes that the training she received on moving to the Library did not fulfil either her hopes or those of the Library, and that the evaluation of her performance was, for a time, not positive at least in part because of inadequate training. The Joint Appeals Board cited these factors in recommending an award of three months' net base salary "for the anxiety that the situation had caused her". This recommendation was not accepted by the Administration, citing the Board's conclusion that no entitlement to promotion had been established and basing its refusal "as a matter of principle and precedent". Without seeking to justify this refusal, the Tribunal has no legal basis for obliging the Secretary-General to make the award recommended to him.

X. For the foregoing reasons the claims of the Applicant must be rejected.

(Signatures)

Arnold KEAN
Vice-President, presiding

Endre USTOR
Member

Geneva, 3 June 1985

Herbert REIS
Member

R. Maria VICIEN-MILBURN
Executive Secretary

Judgement No. 343

(Original: English)

Case No. 340:
Talwar

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

Request by a former staff member of UNICEF to find biased and discriminatory treatment and misuse of discretionary powers on account of the decision rejecting the Applicant's request for an extension of his appointment beyond retirement age; request for compensation for injuries sustained.

Conclusion of the Joint Appeals Board that the decision not to extend the Applicant's appointment beyond mandatory retirement age was taken properly within the discretionary authority of the Secretary-General and that the Applicant did not substantiate allegations of discriminatory treatment and misuse of discretionary powers.—Recommendation to reject the application.

Question of the Applicant's right to be granted an extension beyond the mandatory retirement age.—Staff regulation 9.5.—Policy defined by General Assembly resolution 33/143.—Applicant's contention that the granting of extensions to several staff members in the service in which he was employed created an expectancy for him and that the refusal of extension in his case was discriminatory.—Tribunal's conclusion that extensions are subject to decisions of an exceptional nature at the discretion of the Secretary-General.—Exceptional and discretionary decisions cannot create an expectancy.—Finding that the Applicant provided no proof of discriminatory treatment.—The Tribunal holds that, under staff regulation 9.5, extensions are only granted exceptionally at the discretion of the Secretary-General and within the limits of General Assembly resolution 33/143 which lays down the policy that extensions can only be allowed in case of unavailability of a suitable replacement.—The Tribunal holds that the cases referred to by the Applicant constitute an erroneous practice which cannot establish a precedent.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. T. Mutuale, President; Mr. Herbert Reis; Mr. Luis M. de Posadas Montero;

Whereas on 11 July 1984, Mr. Om Parkash Talwar, a former staff member of the United Nations, specifically recruited for the United Nations Children's Fund, hereinafter referred to as UNICEF, filed an application that did not fulfil some of the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the President of the Tribunal, with the agreement of the Respondent, extended the time-limit to file a corrected application until 22 November 1984;

Whereas the Applicant, after making the necessary corrections, again filed the application on 4 October 1984;

Whereas the pleas of the application read as follows:

“(a) Biased and discriminatory treatment;

“(b) Misuse of discretionary powers; flouting the guidelines of U.N. Administrative Instructions.”;

Whereas, in his application, the Applicant also requested the Tribunal to order

“that 18 months pay be granted to me as compensation for the injury sustained and an additional amount of actual expenses incurred by me on this case (which now total more than Dollars 500/—) be paid.”;

Whereas the Respondent filed his answer on 9 November 1984;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 15 October 1951 as a secretary/stenographer at the ND-4 level in the New Delhi office. He continued to be employed by UNICEF until 30 June 1982, date on which he separated from the service of that Organization at the ND-7 level, having reached age sixty, the mandatory retirement age under Staff Regulation 9.5.

On 9 July 1981, approximately one year before the Applicant would reach age sixty, he requested the Officer-in-charge of the New Delhi office to grant him an interview in order to discuss:

“(a) possibility of extension of service beyond retirement age.

“(b) possibility of part-time employment after retirement age.

“(c) possibility of *ex gratia* payment at the time of retirement.”

On 12 February 1982 the Applicant addressed a memorandum to his supervisor, the Programme Officer (WESS) [Water and Environmental Sanitation Section], in which he requested an extension of his appointment beyond retirement age. The memorandum read in part as follows:

“1. As you already know, I am due for retirement in June 1982, but am interested in the continuation of service, should the office need my services beyond that date. I am interested in a one-year’s extension and I am listing below my suggestions for your consideration.

“2. I have discussed this matter of ‘extensions’ with Ms Jane Campbell [Chief Recruitment and Placement Service] of NYHQ [New York Headquarters], who has informed me that HQs is flexible in this regard and the Regional Director can recommend such extensions—which are usually agreed to, especially at this stage, when there is a budgetary cut and ban on recruitment . . .”.

In a memorandum dated 18 March 1982 addressed to the Officer-in-charge of the New Delhi office, the Programme Officer at WESS “strongly” recommended that the Applicant’s appointment be extended for one year after the Applicant’s sixtieth birthday, because of the Applicant’s “high dedication to his duty” and “his competence in accomplishing the tasks that have been assigned to him”. In addition, the Programme Officer stated:

“I do not hesitate to affirm that Mr. Talwar is one of the most valuable staff members in my section. I would be grateful if you will support my recommendation, which is not only on the basis of humanitarian reasons but, much more, on the basis of the benefits to be derived from the staff member’s contribution to the water programme.”

On 24 March 1982 the Regional Director recorded in a note for the file the substance of a discussion held with the Applicant concerning the Applicant’s request for an extension of his appointment beyond retirement age. The note read in part as follows:

“I met with him on 24 March and told him that I believed that he had earned his right to rest and that within the generally accepted guidelines for such extensions, I could not recommend his extension. I encouraged him to begin as soon as possible the process of retirement from the Pension Fund leading to separation upon retirement from UNICEF at the end of June 1982 . . .”.

On 29 March 1982 the Applicant initiated administrative procedures related to his forthcoming retirement from UNICEF and for this purpose completed and submitted to the Secretary of the United Nations Joint Staff Pension Fund certain administrative forms.

On 18 June 1982 the Regional Personnel Officer issued a Personnel Action Form concerning the Applicant’s “separation upon reaching the age of retirement”. On the same date he prepared the forms PF [Pension Fund]/4-Rev. 1—“Separation Notification”—and PENS. [Pension] E/7—“Instructions for Payment of Benefits”—for transmission to the Secretary of the United Nations Joint Staff Pension Fund at Headquarters. The form PENS. E/7 was signed by the Applicant, and contained instructions for payment of his pension.

In a cable dated 22 June 1982 addressed to the Director, Division of Personnel, and to the Chief, Personnel Services Section at Headquarters, the Applicant asserted that the decision by the Regional Director not to grant him an extension of his appointment beyond age sixty, as opposed to the decision to grant extensions beyond age sixty to three other UNICEF staff members at New

Delhi raised "fundamental issues of discriminatory treatment between Professional versus General Service, between project versus core staff". He therefore sought "redress of [his] grievance from inhouse channels" before approaching the United Nations Panel on Discrimination. He also requested that his separation action which had been sent to New York, be withheld pending the outcome of the grievance procedures.

On 23 June 1982 the Applicant filed a complaint with the UNICEF New Delhi Grievance Committee against the decision of the UNICEF Regional Director not to recommend to the appropriate authorities at Headquarters the extension of his appointment beyond retirement age. The complaint read in part as follows:

"Over the last six months I have tried for an extension of service for at least one year but have been informed by the Administration that the rules do not permit. My supervisor also recommended my extension for a year because of the official need in the section"

"Over the last one year, Administration at New Delhi has recommended several extensions beyond the retirement age and even one extension has been recommended last month. Denial of a similar extension to the undersigned raises the doubt of 'discrimination' and before I take up this matter with the U.N. Discriminatory Panel, I wish to explore the inhouse sources of UNICEF, where I have spent 31 years of my life."

On 28 June 1982 the Director, Division of Personnel instructed the Chief, Personnel Services Section at Headquarters to proceed with the Applicant's separation from service on reaching retirement age and stated in addition: "We must do nothing that might appear to concede that extension beyond retirement is a staff member's right." On 30 June 1982 the Applicant was in fact separated from the service of UNICEF, having reached age sixty on 22 June 1982.

On 30 June 1982 the Chief, Personnel Services Section at Headquarters informed the Applicant that

"EXTENSION BEYOND RETIREMENT AGE IS DISCRETIONARY AND DEPENDS ON NEED OF ORGANIZATION SPECIFICALLY FOR YOUR SERVICES BEYOND RETIREMENT STOP IN YOUR CASE DECISION WHETHER TO RECOMMEND EXTENSION OR NOT IS STRICTLY MATTER FOR LOCAL DECISION"

On 14 July 1982 the Applicant requested the Chief, Personnel Services Section at Headquarters to be "treated on leave under spirit of Staff Rule 110.4 pending investigation" and to "authorise Delhi office to accept Pension Fund and Group Life Insurance dues for July and succeeding months until finalization of case". In a cable dated 19 July 1982 the Chief, Personnel Services Section informed the Applicant that his appeal could have no effect on the administrative decision not to extend his appointment beyond retirement age.

At a meeting held on 29 July 1982, the New Delhi Grievance Committee discussed the complaint filed by the Applicant on 23 June 1982 and rejected it. The minutes of the meeting read in part as follows:

"The Committee noted that the grant of extension of appointment beyond retirement age is 'discretionary' and depended on the need of the organization specifically for the service of a staff member beyond his retirement date.

"As regards the allegation of Mr. Talwar on his doubt of 'discrimination', the Committee did not have evidence of this, nor did Mr. Talwar establish grounds for his doubt.

“In a broader context of extension of appointment beyond retirement age, the Committee noted the global staff concern at the revolving door entry of retirees, which is seen as coming in the way of career opportunities for younger staff. In this connection, extension of appointment of Mr. Talwar, who is occupying a core post, might be resented to by other staff at lower levels of GS [General Service] category as denial of their promotion opportunities especially in the present context of zero-growth budgeting.”

On 24 August 1982 the Applicant lodged a complaint with the Internal Review Committee [*sic*] at UNICEF Headquarters and asked it

“to quash the Administrative action of the Regional Director on the grounds of misuse of his authority, and reinstate me in my original position or in default pay 18 months salary and allowances as a compensation plus the expenditure incurred by me in sending cables, letters etc. through commercial channels—amounting to \$300.00.”

In a letter dated 24 September 1982 the Chief, Personnel Services Section informed the Applicant that there was no basis for acceding to his claim for reinstatement or eighteen months compensation plus expenses on the following grounds:

“Under staff regulation 9.5 staff are automatically separated at the end of the month in which the 60th birthday occurs.

“UNICEF policy on retirement was outlined in General Administrative Memo 79/2 of 5 February 1979:

“We would like to remind field offices that the retirement age of 60 should be closely followed. Recent actions taken by the General Assembly have emphasized that extensions beyond 60 are to occur very exceptionally. Exceptions are to be made only when the staff member performs duties absolutely essential to the functioning of the office and efforts at finding a replacement for the staff member have not yet been successful.”

“. . . Given the circumstances of the New Delhi job market, we cannot see why a replacement for you could not be found more or less immediately. . . .

“The possibility of prejudice, improper motive, or contravening the stated procedures of UNICEF should now be considered. . . . As I am sure you appreciate, the decision to make an exception based on specific conditions in one case does not set a precedence for that exceptional decision to be taken in other cases where those same conditions do not exist. In each of the cases you cite . . . the nature of the skills and particularly the type of appointment of these staff were fundamentally different from your own. It is not a matter of professional staff being favored over General Service staff, but rather a difference between the temporary delivery of services that is the very basis of the Project Personnel category and the ongoing nature of most core posts, including your own. . . .

“ . . .

“Staff regulation 9.5, which provides for retirement at age 60, allows for exceptions to be made: ‘The Secretary-General may, in the interest of the Organization, extend this age limit in exceptional cases.’ However, the condition of rule 112.2 (b) that it not be prejudicial to the interests of other staff does have a bearing in your case. If a case were to be made that your

appointment should be extended for personal reasons, then the interests of other staff would in fact be prejudiced. Your post would not be available for other staff to apply for. If a decision were made to fill the post internally (there of course is no requirement that it be filled in this way), then another post would be freed for application, creating a string of possible promotions through several grade levels. Extending your appointment would inhibit this process, and is therefore prejudicial to the staff involved. . . .

“Having established that there unfortunately is no basis for continuing your appointment, it is only left to point out that there is no evidence that the local Grievance Committee, in not arriving at a recommendation satisfactory to you, acted improperly, and there is certainly no evidence that the Regional Director has misused his discretionary powers, as you suggest. Regardless of the contents of Mr. Bevaqua’s [Programme Officer, WESS] recommendation which you wish to see, it remains just that, a recommendation which does not in itself create any obligation on the part of the organization.”

On 20 October 1982 the Applicant requested the Secretary-General to review the administrative decision taken by UNICEF not to extend his appointment beyond retirement age. In a reply dated 29 November 1982, the Director, Division of Personnel Administration at United Nations Headquarters stated *inter alia*:

“As you well know under staff regulation 9.5 ‘Staff members shall not be retained in active service beyond the age of 60 years. The Secretary-General may, in the interest of the Organization, extend this age limit in exceptional cases’. A strict application of this provision has been emphasized in recent years by the General Assembly of the United Nations.

“In his letter dated 22 September 1982, the Chief, Personnel Services Section, UNICEF, has thoroughly detailed the reasons why, unfortunately in your case, there were no grounds for an exceptional consideration of your case. No other reasons could be adduced which would justify an acceptance of your request.

“The Secretary-General, therefore, finds no grounds to rescind the decision you challenge.”

On 22 December 1982 the Applicant lodged an appeal with the Joint Appeals Board. The Joint Appeals Board adopted its report on 8 May 1984. Its conclusions and recommendation read as follows:

“Conclusions and Recommendation

“30. The Panel *finds* first that the administrative decision of the Regional Director, UNICEF, New Delhi, India, not to exceptionally grant the appellant an extension of appointment beyond the mandatory retirement age was taken properly within the delegated discretionary authority of the Secretary-General under Staff Regulation 9.5, in respect of the appellant’s implied contractual right to a fair and equitable treatment and with due regard to the principle of good faith in the relations between the staff and the Organization.

“31. The Panel *finds* next that the appellant did not meet the two requirements, established by UNICEF, to exceptionally grant him an extension beyond retirement age—the performance of the assigned duties must be absolutely essential to the functioning of the office and a replacement of the staff member has not yet been found—according to UNICEF General Administrative Memorandum No. 79/02 of 5 February

1979 and that the contested decision was therefore taken in compliance with the UNICEF personnel policy and practice on the basis of General Assembly resolutions 33/143 and 35/210. The Panel *finds*, moreover, that the decision of the Regional Director, UNICEF, New Delhi, not to exceptionally grant the appellant an extension of appointment beyond retirement age under Staff Regulation 9.5 was made in the interest of the Organization to make an established G-7 post available and to enhance career development at UNICEF, New Delhi, through a string of possible promotions, without prejudicing the interests of any other staff member in accordance with Staff Rule 112.2 (b).

“32. The Panel *finds* also that the appellant had no expectancy of extension of appointment beyond retirement age with due regard to the discretionary authority of the Secretary-General under Staff Regulation 9.5 and that, furthermore, the exceptionally granted extensions beyond retirement age of three International/National Project Personnel Officers, temporarily assigned to specific UNICEF projects, for technical and financial reasons without blocking an established core post, were fundamentally different cases. The Panel therefore rejects the appellant’s contention of ‘inequity treatment’ as unfounded and not valid.

“33. The Panel *finds* that the appellant has not met the *burden of proof* to substantiate conclusively his allegation of ‘discriminatory treatment’, ‘prejudice’ and ‘misuse of discretionary powers’ on the part of UNICEF, New Delhi, endorsing the findings of the local Grievance Committee, UNICEF, New Delhi, of 29 July 1982, and therefore rejects the appellant’s contention as unfounded and not valid.

“34. The Panel *finds* finally that the appellant has not suffered financial damages and therefore rejects the appellant’s claim for compensation as unfounded and not valid.

“35. Accordingly, the Panel makes no recommendation in support of the appeal and rejects the appellant’s claims in all respects.”

On 8 June 1984 the Assistant Secretary-General for Personnel Services informed the Applicant that

“The Secretary-General has taken note of the Board’s report and in the light of the Board’s report, has decided to maintain the contested decision and to take no further action on the matter.”

On 4 October 1984 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The Applicant, a staff member in the General Service category, was discriminated against by the UNICEF authorities, because they granted extensions of appointments beyond retirement age to three staff members in the Professional category employed in the New Delhi office and not to him.

2. The Applicant’s right to an investigation of discriminatory treatment was denied at the Local Grievance Committee level and at the Joint Appeals Board level when the Applicant’s plea for additional information related to the extensions of the appointments of three staff members in the Professional category beyond retirement age was rejected.

3. The Regional Director of UNICEF misused his discretionary authority when he granted extensions for one or two years to Professional staff members

because information circular ST/IC/81/1 of February 1981 prohibits extensions of appointments beyond retirement age for more than six months.

Whereas the Respondent's principal contentions are:

1. Staff Regulation 9.5, reinforced by General Assembly Resolution 33/143 II and UNICEF General Administrative Memorandum No. 79/02, Part VI, establishes a retirement age of sixty years which may be waived only in exceptional circumstances in the interest of the Organization. The Applicant's separation at age sixty did not violate his rights as it was properly concluded that an extension of service would not be in the interest of the Organization.

2. General Assembly Resolution 35/210 VI, which liberalizes retirement policy for certain categories of General Service staff, does not apply to the Applicant.

3. The refusal to extend the Applicant's appointment beyond the established retirement age did not result in discrimination against him.

The Tribunal, having deliberated from 21 May to 3 June 1985, now pronounces the following judgement:

I. The Applicant submits that he should have been retained as a staff member after the age limit of 60. In order to support his request for an extension beyond the mandatory retirement age, the Applicant relies on a memorandum dated 18 March 1982 in which his supervisor strongly recommended an extension beyond the above-mentioned age limit. The Applicant also asserted, on 23 June 1982, that he needed the extension in order to "help [his] children in settlement in life" and that "over the last one year" the UNICEF Administration at New Delhi had "recommended several extensions beyond the retirement age" for other UNICEF staff members.

II. The Tribunal does not contest the merits shown in the Applicant's record nor the humanitarian factors that might exist in his case, but is bound to point out that these reasons are irrelevant as far as extensions beyond the 60-year age limit are concerned. Extensions beyond the age of 60 are governed by Staff Regulation 9.5 which provides that:

"Staff members shall not be retained in active service beyond the age of sixty years. The Secretary-General may, in the interest of the Organization, extend this age limit in exceptional cases."

In the opinion of the Tribunal, such "exceptional cases" have been defined by the General Assembly in Part II, para. 3, of its Resolution 33/143 of 20 December 1978, as those in which a suitable replacement for the retiring staff member has not been found, a process which should not normally go beyond six months.

III. In the Applicant's case, suitable replacements were easily available and, as a consequence, no need for an extension appeared, in spite of the Applicant's excellent record and of the humanitarian reasons that might have been argued in his favour.

IV. In support of his case, the Applicant mentions the fact that, in the service in which he was employed, some other staff members were retained beyond the 60-year age limit. In the Applicant's view, the granting of these extensions created an expectancy in connection with his own situation, so that any decision in his respect that would differ from those taken in the cases in which extensions were granted, would imply discriminatory treatment against him. The Tribunal cannot concur with this view. Extensions beyond retirement age are subject to decisions of an exceptional nature to be taken by the Secretary-General or his representatives, according to their discretion, and, as a

general rule, no exceptional and discretionary decision can create an expectancy.

V. Furthermore, no proof has been provided by the Applicant to substantiate his claim that the decision to put an end to his services at the regular age of 60 was due to discriminatory reasons.

VI. Nevertheless, the Tribunal notes that the Applicant's impression that extensions should be granted when satisfactory services were involved was created by the criteria used by the Administration in some cases when dealing with these matters. For instance, on 30 June 1982, the Chief, Personnel Services Section of UNICEF, informed the Applicant that extensions beyond retirement age "depend on need of organization specifically for your services beyond retirement". Again, on 23 February 1984, in a memorandum addressed to the Alternate Secretary of the Joint Appeals Board in New York, the Officer-in-charge, Division of Personnel, UNICEF, says that "Each case for extension is judged on its individual merits", thus implying that highly rated staff members would normally be eligible for an extension.

VII. The Tribunal points out that this is not the spirit of the current regulations, chiefly of the decision of the General Assembly in 1978 which clearly states that there is only one reason for the exercise of discretion to grant extensions, and that is not satisfactory service or any other reason but unavailability of a suitable replacement for the retiring staff member. In a number of cases, there has not been a clear notion as to when an extension was possible under the 1978 decision of the General Assembly and thus extensions have been granted on grounds other than those contemplated by it. This might have induced the Applicant to believe that his excellent record could entitle him to an extension and also to believe that the previous extensions granted to other staff members in his same service could serve as a precedent in his favour.

VIII. The Tribunal holds that, under Staff Regulation 9.5, extensions are only to be granted exceptionally according to the Secretary-General's discretion and within the limits of the decision of the General Assembly. Thus, no staff member can normally claim the existence of precedents that could create an expectancy as to his or her continuation in service beyond the normal age limit, as clearly stated by the Joint Appeals Board in its report.

IX. Furthermore, in this case, the extensions on which the Applicant relies in order to claim the existence of precedents refer to decisions taken without duly complying with the current regulations, since, apparently, in granting such extensions, considerations apart from those connected with the availability of a suitable replacement for the retiring staff member were prevalent, namely, "the nature of the skills and particularly the type of appointment" of those staff.

X. The Tribunal holds that if precedents cannot normally be established through the exercise of discretionary and exceptional powers, it is wholly impossible for a precedent to be created as a consequence of an erroneous practice that should be discontinued.

XI. For the above reasons, all pleas are rejected.

(Signatures)

T. MUTUALE
President

Herbert REIS
Member

Geneva, 3 June 1985

Luis M. de POSADAS MONTERO
Member

R. Maria VICIEN-MILBURN
Executive Secretary