

Judgement No. 55

Case No. 59 :
Russell-Cobb

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

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President ; Mr. Sture Petré, Vice-President ; Mr. Djalal Abdoh ; Mr. Omar Loufi, alternate member ;

Whereas Trevor Russell-Cobb, a former official of the United Nations Technical Assistance Administration at Geneva, filed an application to the Tribunal on 15 October 1954 requesting :

(a) that the Tribunal should declare that the decision taken on 19 May 1954 to terminate his appointment was taken in breach of the Staff Regulations and Staff Rules ;

(b) that there should be paid to him the sum of \$17,000 as damages ;

(c) that there should be paid to him the sum of \$10,000 as additional damages for special injury sustained ;

Whereas the Respondent filed his answer to the application on 1 November 1954 ;

Whereas the Applicant submitted a further statement in writing on 23 November 1954 ;

Whereas the Respondent produced on 30 November 1954, in conformity with article 9 of the Rules, an additional document consisting of a statement by the Director of the Technical Assistance Administration ;

Whereas the facts as to the Applicant are as follows :

The Applicant entered the service of the British Council in 1946, after being demobilized. He was specifically responsible for matters connected with fellowship-holders, and was assistant director of this service. The Technical Assistance Administration at Geneva, with which he had been in contact, requested the British Council to place him at its disposal for a period of six weeks from 25 October 1951. On 13 November 1951 the principal representative of the Technical Assistance Administration at Geneva asked the British Council to release the Applicant so that he could take up a post in the United Nations. The Applicant took up his duties on 2 January 1952, under a one-year contract, as Technical Assistance Officer at Geneva. He was given a further one-year contract on 1 January 1953, and on 17 December 1953 he received a temporary indefinite appointment. On 19 May 1954 the Chief of the Personnel Division at Geneva

informed him that it had been decided to terminate his appointment with effect from 30 June 1954 under regulation 9.1 (c) of the Staff Regulations. In reply to an oral inquiry by the Applicant, the Chief of the Personnel Division informed him in a letter dated 25 May 1954 that the decision to terminate his employment had been made necessary by a "reduction in strength as the result of budgetary limitations". On 1 June 1954 the Applicant asked the Director of the European Office of the United Nations to reconsider the decision to terminate his appointment. On 16 June, having received no reply, he submitted the matter to the Appeals Board. In a report dated 30 June 1954, the Board recommended that:

- "1. The decision to terminate Mr. Russell-Cobb's appointment on 30 June 1954 be reconsidered.
- "2. His case be reviewed at the forthcoming session of the Review Board in Geneva.
- "3. Further thorough search for alternative employment be undertaken."

On 14 July 1954 the Secretary-General wrote to the Applicant confirming the decision to terminate his employment. The Applicant sent a summary of his application to the Tribunal by telegram on 10 October 1954 and filed his application *in extenso* on 15 October.

Whereas the Applicant's principal contentions are:

1. That there was a breach of the terms of Bulletin ST/SGB/94/Amend.1 of 8 March 1954 when he was not retained in his appointment until his position had been examined by the Review Board, which is required to review the status of all staff members when they have completed their two-year probationary periods.

2. That there was a breach of the terms of the aforesaid Bulletin through the fact that he was not called upon to appear before the said Board. The appearance before the Review Board of a staff member who has completed a probationary period of two years is a right that the Administration cannot deny, having regard to the fact that the Applicant was not conditionally, but compulsorily, a candidate for a permanent contract. The Administration has failed to fulfil the fundamental obligations arising from the provisions applicable to the Applicant, and that behaviour had an undeniable influence on the decision to terminate his employment.

3. A staff member on probation cannot be terminated because of budgetary reductions unless his qualifications are first fairly and exhaustively examined. Although Rule 109.1 of the Staff Rules, which is relevant to the case, states that staff members with permanent appointments shall as a general rule be retained in preference to those holding other appointments, it also provides that the Administration shall give due regard to the competence of the persons concerned and to their nationality from the point of view of geographical distribution.

The Administration ignored the principle that a staff member may be terminated for budgetary reasons only after it has made genuine efforts to find him another post in the Organization.

4. The administrative action that culminated in the abolition of the Applicant's post was decided upon without his immediate supervisors being consulted, and the steps taken by the Administration to find employment for him seem to have been undertaken as empty administrative formalities with no sincere desire that they should be successful.

5. These violations are all the more serious because the status of an international civil servant is not only governed by regulations, but also has a contractual aspect. The present case provides a particularly striking example of assurances for the future given to the applicant as an inducement to contract. By terminating his appointment, the Administration has caused him a serious injury for which it owes him compensation.

6. Considerations other than the budgetary reasons mentioned worked to the detriment of the Applicant when the staff member who replaced him at Geneva was transferred. That transfer occurred before the decision to terminate the Applicant's employment had been taken and, moreover, the Director of the European Technical Assistance Office has acknowledged that he was not consulted on that action.

7. The Applicant has expressed the hope that the Tribunal will, if it sees fit not to accept the preceding arguments, institute an inquiry into the manoeuvres which, he stated, worked against him, and he has declared that he is prepared to produce certain documents and evidence to the Tribunal.

Whereas the Respondent's answer is :

1. The decision to terminate the Applicant's appointment under Staff Regulation 9.1 (c) is entirely proper.

2. The Secretary-General's Bulletin ST/SGB/Amend.1 does not affect the Secretary-General's authority to terminate temporary appointments. The transitional measure provided for in that Bulletin must be construed in the context of the Bulletin. To accept the Applicant's contention that the transitional measure makes his appointment immune from termination would be tantamount to suspending the application of the Staff Regulations relating to termination.

3. The needs of the service required the termination of the Applicant's temporary appointment. The decision to abolish the post occupied by him was the subject of discussions between the services of the Technical Assistance Administration at Headquarters and the Director of the Office at Geneva.

4. The Administration explored every possible avenue to find other employment for the Applicant in the Secretariat or in another inter-

national organization, and he was advised of two possible appointments ; an appointment as Administrative Officer in the Office of the Resident Representative of the Technical Assistance Board in Afghanistan and an appointment as United Nations Children's Fund Representative at Brazzaville. In both cases, the Applicant was not interested.

5. The Applicant ought to have realized that a temporary appointment with the Technical Assistance Administration could not, in view of the financial basis of that Administration, guarantee a permanent career with the United Nations.

The Tribunal having deliberated from 26 November to 14 December 1954, now pronounces the following judgement :

1. The principal object of the application is to secure a judgement by the Tribunal that the decision to terminate the Applicant's appointment, taken on 19 May 1954, was taken in breach of the Staff Rules and Regulations.

The Tribunal notes that in terminating the employment of the Applicant, who held a temporary-indefinite appointment, the Respondent relied on regulation 9.1(c) of the Staff Regulation, under which the Secretary-General may at any time terminate the appointment of a staff member having neither a permanent appointment nor a fixed-term appointment if, in his opinion, such action would be in the interest of the United Nations.

In response to the Applicant's request for a statement of the reasons for which his appointment had been terminated, the Respondent stated that the termination had been made necessary by a "reduction in strength as the result of budgetary limitations".

2. In challenging that decision, the Applicant advanced first of all various arguments derived from Bulletin ST/SGB/94/Amend.1 of 8 March 1954, which prescribes that staff members holding temporary-indefinite appointments shall, after they have completed two years of service, be considered for permanent or regular appointment or with a view to their separation from the service or to the extension of their period of probationary service. According to the Applicant the provisions of this Bulletin, having become an integral part of the Staff Rules, regularized the status of a staff member holding a probationary appointment by affording him a double guarantee :

(1) Continuance in his post until his status has been reviewed by the Review Board, and

(2) A review of his status, after a period of two years, with a view to its regularization.

Being automatically a candidate for a permanent appointment, a staff member who has completed his probationary service satisfactorily would thus have a special status. The Administration would retain the

ability to limit its duration by undertaking the review prescribed in the Bulletin, but the Bulletin would guarantee that the staff member would be retained in his post until the Review Board met. The Applicant argues that only the prior review of his status by the Review Board would have made it possible for Rule 109.1 of the Staff Rules, relating to the selection of staff members for retention in the event of a reduction of staff, to be applied to him fairly. Both the Applicant's periodic reports and the opinion of his superiors excluded any doubt that he would have been granted a permanent appointment which would have given him the same appointment status as the staff member who was given the preference over him. The Applicant further argues that the Administration, by delaying the appearance of a staff member before the Review Board, prolongs the probationary period in violation of the Staff Regulations.

3. The Respondent replies that the transitional measures contained in the aforementioned Bulletin did not affect the authority of the Secretary-General to terminate the Applicant's appointment in accordance with the Staff Regulations and Rules. Any other interpretation would expand the scope of the transitional measure, which was intended to meet a particular situation, to an unrelated area. Furthermore, the Secretary-General had no authority to alter the application of the Staff Regulations and Rules applicable to the termination of temporary-indefinite appointments, which were adopted by the General Assembly.

Consideration of the Applicant's case by the Review Board would have been undefensible administrative action, since the decision to abolish the Applicant's post had been taken at the end of November 1953 and there was no position for him in the Organization.

4. The Tribunal notes that it is clear from the Secretary-General's Bulletin of 8 March 1954 that the rule relating to staff members holding temporary-indefinite appointments, while of a temporary nature, has the legal force of a provision of the Staff Rules and Regulations, non-observance of which can be pleaded before the Tribunal under article 2 of its statute.

By stipulating that staff members who on 15 March 1954 are holders of temporary-indefinite appointments "shall be retained in their present appointment status", the text precludes the immediate application to such staff members of the Staff Rules revised in consequence of amendments made to the Staff Regulations by the General Assembly at its eighth session.

Whereas in future, temporary-indefinite appointments will be strictly reserved for restricted categories of staff members, present holders of this type of appointment are subject to no immediate change in the nature of their appointments. However, in accordance with the desire expressed by the General Assembly that this type of appointment

should be abolished in principle, the transitional measure prescribes that after two years of service the status of staff members holding such appointments shall be reviewed, with a view to determining their future, in accordance with the general system provided for in the new Staff Rules: either a permanent or regular appointment, or separation from the service, or if necessary an extension of the period of probationary service for not more than one additional year.

In making these stipulations, the Staff Rules do not merely offer the Administration the opportunity of undertaking such a review; they do not create a favour that the Administration may grant as it deems fit. They prescribe a procedure of review the application of which those concerned are entitled to demand.

While the date on which the said procedure is to be instituted is not fixed by regulation, it is clear that the text does not confine itself to fixing the date of commencement of the period during which the review must be undertaken: the review must in fact be undertaken "after the completion of the period", and the period of probation may be extended by administrative decision only in exceptional circumstances, and then only for a period not exceeding one year. The principle of not extending the period of probation beyond two years as a general rule would not be compatible with an administrative practice whereby action by the Review Board was delayed.

The Applicant had completed more than two years of service on 15 March 1954. He was entitled to have his status reviewed. The decision to terminate his appointment was taken on 18 May 1954 and his employment continued until 30 June 1954. The Respondent has not submitted arguments showing that it was impossible to undertake, before that date, the review prescribed by a rule whose application the Applicant had requested on 8 April 1954.

5. The Tribunal cannot accept the Respondent's argument that such a review would have been an undefensible administrative action because the decision to abolish the Applicant's post had been taken previously.

The Respondent appears to disregard the fact that the review of a staff member's status results in a recommendation by the Review Board to the Secretary-General which, even if it is favourable, does not necessarily entail the granting of an appointment in the Organization by the Secretary-General. However, a review by the Review Board would have been of interest to the Administration in the conceivable event that a vacancy suitable for the Applicant had occurred before he left his post. Moreover, the result of such a review, if favourable, might have facilitated the Applicant's entry into the service of another agency.

The Tribunal therefore concludes that the Respondent has failed to abide by the obligations assumed by it under the transitional measure

contained in the Bulletin of 8 March 1954, and no acceptable explanation justifying its behaviour has been submitted.

6. It does not follow, however, that the Applicant was entitled to retain his appointment until his status had been reviewed by the Review Board without being subject to the Staff Rules relating to termination. In stipulating that holders of temporary-indefinite appointments shall be retained in their present appointment status, the transitional measure contained in the Bulletin of 8 March 1954 necessarily implies that the rules on termination applicable to such staff members continue in force. Those rules, prescribed by the Staff Rules, cannot be suspended by an administrative regulation.

7. Nor can the Tribunal find that non-observance of the obligation to review the Applicant's status voids the decision to terminate his employment.

The Tribunal notes that if such a review by the Review Board had resulted in a recommendation that the Applicant should be granted a permanent appointment, it would not have been binding upon the Secretary-General. Even if the Applicant had received such an appointment, the provisions of Rule 109.1 concerning the selection of staff members to be retained in the event of a reduction of staff would have left the Administration wide discretionary powers. In the absence, therefore, of any provision in the Staff Rules, it is impossible to conclude that a review by the Review Board is a condition on which the validity of the decision to terminate a staff member's employment depends.

8. The Applicant further argues that the administrative action, the aim and inevitable result of which was his replacement, had been decided upon without consultation with his immediate supervisors which alone could have enabled his case to be fairly reviewed.

The Tribunal is bound to point out that it is clear from the documents produced that the future of the Applicant's post had been discussed between the Director of the European Office of the Technical Assistance Administration and the Director of the Administrative Division, Technical Assistance Administration, as early as November 1953. It appears from the file that the Applicant's immediate supervisors had the most favourable opinion of his qualifications, services and abilities, and wished to retain him. There is no doubt that they did in fact fully inform the Administration. Their opinion was known, even though it did not prevail. In such matters it is for the Secretary-General, and not for the Tribunal, to make the choice. Similarly, the Tribunal is not required to express an opinion on the administrative value of the reorganization of the technical assistance service at Geneva, or on the opinions expressed in connexion therewith.

9. With regard to the complaint that the termination of the Applicant's appointment was irregular because it was not preceded by

a proper search for another post for the Applicant, the Respondent argues that, although it had no legal obligation in this respect, it explored every possible avenue to place the Applicant within the United Nations or with another international organization.

The Tribunal holds that it ensues from Rule 109.1 of the Staff Rules that if the necessities of the service require that the appointments of staff members be terminated as a result of abolition of posts or reduction of staff, the Administration is bound to make inquiries to ascertain whether there are any posts available which are appropriate to the abilities of the staff members concerned and in which they can be usefully employed. That obligation was implicitly recognized in the circular IC/Geneva/444, Secretariat European Office, of 17 March 1954, which, while recognizing the difficulty of making satisfactory arrangements in respect of staff on the senior administrative levels, states: "Every effort will be made to find for such officials other assignments in the Organization appropriate to their competence".

While the Applicant does not deny that some inquiries were made, he criticizes the Administration's action as "formal" and "belated".

The Tribunal is bound to note that while the approaches to other international organizations were made at the time of the Applicant's termination, it is clear from the file that several months before the decision the competent departments of the Secretariat were advised of the Applicant's forthcoming termination, the reasons for the termination, and the Applicant's qualifications. The Tribunal has no grounds for believing that the exchanges of correspondence regarding the attempt to find him a post in the United Nations does not reflect the truth. It is not in a position to determine whether other opportunities might have arisen at a certain stage.

Furthermore, it is bound to point out that, while these inquiries did not produce any proposal which the Applicant considered satisfactory, they nevertheless had some results.

The Tribunal accordingly does not consider that the Administration's action in this respect invalidates the decision to terminate the Applicant.

10. The Applicant has stated that on his appointment to the United Nations, which the Administration had pressed him to accept, he received tacit but undeniable assurances with regard to his career in the Organization; that his consent to the contract whereby he became a staff member was influenced by factors of greater substance than mere expectations; and that, even assuming his appointment could be terminated in the international public interest, he should be compensated for the serious loss he had sustained.

The Tribunal recognizes that the Applicant was urged to join the United Nations and that the terms employed by the Senior

Representative of the Technical Assistance Administration in his letter to the British Council, the Applicant's employer, were such as to imply a conviction on the part of that official that the Applicant would be perfectly suitable for the post—which was in fact the case—and that he could be employed on a long-term basis.

The Tribunal regrets that in his keen desire to secure the appointment of a capable person of proven ability the responsible official was not prompted by his knowledge of the financial basis of Technical Assistance to mention the problems which might arise with regard to continuity of employment even in the case of a person whose services were entirely satisfactory. The Tribunal points out that when the appointment was offered to the Applicant, who had recently completed several weeks' service in the employment of the United Nations, no indication was given that it was temporary.

Be that as it may, it does not appear that so far as the duration of his appointment was concerned the Applicant was explicitly given any specific undertakings disregard of which would engage the liability of the Respondent.

11. Lastly, the Applicant states that the nature of his post was changed and another staff member appointed to it owing to factors unrelated to budgetary reasons.

He maintains that the Administration wished to find a post in Europe for the official who superseded him, and describes what he terms the "strange circumstances" in which his successor was transferred.

The Tribunal notes that a reduction in the budget of Technical Assistance led to the abolition of some posts and to a reorganization of the services at Geneva which involved extending the duties of the Applicant's successor. Furthermore, the latter's professional qualifications and the length of service with the United Nations are not in question.

In these circumstances the Tribunal is not in a position to judge the circumstances in which the Applicant's successor took up his post, the importance of a knowledge of French in that post, or the administrative value of the reorganization effected.

In any case, it does not appear that reduction in strength as the result of budgetary limitations was wrongly stated as the reason for the Applicant's termination.

12. Lastly, the Applicant considers that certain manoeuvres—perhaps unknown to the Administration—militated against him. In his memorandum of 20 November 1954 he asks the Tribunal to institute an inquiry and states that he is prepared to produce certain documents and evidence.

It should be noted that in so doing the Applicant refers to the absence of any examination of his position and the inadequacy of the efforts made to find him employment.

The Tribunal, having already dealt with these two points, does not consider it necessary to institute the inquiry requested by the Applicant. Whatever the results of such an inquiry, the Tribunal does not see how they could affect the conclusions set forth in paragraphs 6 and 9 above.

13. For these reasons the Tribunal, while noting the failure to comply with an obligation under the Regulations, is bound to dismiss the application, there being no necessary legal connexion between such failure and the decision to terminate the Applicant.

(Signatures)

Suzanne BASTID
President

Sture PETRÉN
Vice-President

Djalal ABDOH
Member

Omar LOUTFI
Alternate Member

Mani SANASEN
Executive Secretary

New York, 14 December 1954

Judgement No. 56

Case No. 58 :
Aglion

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

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President ; Mr. Sture Petré, Vice-President ; Mr. Jacob Mark Lashly ; Dr. Djalal Abdoh, alternate ;

Whereas Raoul Aglion, Resident Representative of the Technical Assistance Board at Port-au-Prince, Haiti, filed an application to the Tribunal on 23 August 1954 requesting :

(a) The rescission of the Secretary-General's decision of 3 April 1952 terminating the Applicant for abolition of post ;

(b) The revalidation of the terms of the permanent appointment then improperly terminated and the appointment of the Applicant to a post at his administrative level in the Secretariat with the promotions and increments to which he has been entitled from April 1952 ;

(c) If, in the view of the Tribunal, the Applicant's appointment to