

The Tribunal was informed during the hearing that, since her termination, she has been employed only for a limited term on a temporary basis.

Consequently, the provision for indemnity for prejudice sustained as a result of lack of procedure should be applied.

15. The Tribunal, without deciding the merits of the case, decides that :

(a) The case should be remanded to the Review Board for reconsideration and further action ;

(b) The Applicant is ordered payment of compensation equivalent to three months' net base salary for loss caused by the procedural delay.

(Signatures)

CROOK
*Vice-President
and Acting President*

Sture PETRÉN
Vice-President

Jacob Mark LASHLY
Member

Mani SANASEN
Executive Secretary

Geneva, 9 September 1955

Judgement No. 60

Case No. 64 :
Ball

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

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President ; the Lord Crook, Vice-President ; Mr. Sture Petrén, Vice-President ; Mr. Jacob Mark Lashly, alternate ;

Whereas Elizabeth Ball, former member of the Industry Division of the Economic Commission for Europe at Geneva, filed an application with the Tribunal on 23 June 1955, requesting the Tribunal to order :

(a) The rescission of the Secretary-General's decision of 4 January 1955 terminating her appointment ;

(b) Reinstatement in her former post ;

(c) The award of compensation equivalent to her salary from the

effective date of her termination, 28 February 1955, until her reinstatement ;

(d) The award of \$300 in respect of costs ;

(e) In the event of non-reinstatement, the award of a sum equivalent to two years' salary as compensation ;

Whereas the Respondent filed his answer to the application on 22 July 1955 ;

Whereas the Tribunal heard the parties in public session, and witnesses in closed session, on 29 and 30 August 1955 ;

Whereas the facts as to the Applicant are as follows :

The Applicant first entered the service of the United Nations on 26 July 1948 under a contract for short-term employment as typist in the Stenographic Service of the European Office and served under a series of short-term contracts until 18 September 1948. On 4 November 1948, she returned to the United Nations under a new short-term contract, as Statistical Assistant in the Secretariat of the Economic Commission for Europe. On 1 January 1949, the Applicant received a temporary-indefinite contract as Computer Clerk. On 1 January 1951, following an abolition of post, the Applicant was transferred to the Stenographic Service of the European Office. On 1 June 1951 she was promoted and re-transferred to the Secretariat of the Economic Commission for Europe. On 5 August 1953, the Personnel Division informed the Applicant that the following recommendation of the Selection Committee presided by Mr. Moderow had been accepted by the Secretary-General : "Owing to the fact that, since her transfer to the Secretariat of the Economic Commission for Europe, Miss Ball has not been employed exclusively either as a secretary or as a statistical assistant, her record in the Service has not been entirely conclusive. The Committee, therefore, is of the opinion that she should be given a one-year probationary period." In September 1954 the Review Board presided by Dr. Kerno reviewed the Applicant's case and recommended the granting of a permanent appointment. On 4 January 1955, the Director of the European Office notified the Applicant that the Secretary-General was unable to offer her a career appointment and that her temporary-indefinite appointment was therefore terminated with effect as of 28 February 1955. On 5 January 1955, the Applicant requested the reconsideration of her case. On 12 February 1955, having received no reply, she submitted the matter to the Appeals Board. In its report transmitted to the Secretary-General on 24 February 1955, the Appeals Board recommended reversal of the decision of termination on the ground that the Review Board had not made a complete examination of the case. By letter dated 28 March 1955, the Director of the European Office informed the Applicant that the Secretary-General had decided

to maintain his decision of termination. On 23 June 1955, the Applicant instituted proceedings before the Tribunal.

Whereas the Applicant's principal contentions are :

1. In the letter of termination of 4 January 1955, the Director of the European Office stated that the decision of termination had been taken by the Secretary-General after consideration of the 1954 report of the Review Board presided by Dr. Kerno. The Board's report, however, contained the recommendation that a permanent appointment be granted to the Applicant.

2. The Applicant does not dispute the Secretary-General's discretionary powers, under Staff Regulation 9.1 (c), to evaluate her professional competence, but contends that, in appraising her suitability for permanent appointment, he was wrongfully informed and misled. The error of fact arose as the result of the procedure followed by the review bodies, on whose recommendations the Secretary-General arrived at his decision to terminate the Applicant's appointment.

3. The Applicant contends that, in accordance with the practice followed in the courts of many countries, the Tribunal is empowered to rescind a decision which is based upon an error of fact.

4. The Selection Committee presided by Mr. Moderow recommended a probationary period and not a permanent appointment merely because it considered her record in the service inconclusive in view of her dual functions as stenographer and statistical assistant. This factor was incorrectly held against her by the Committee, which, moreover, relied upon certain erroneous appraisals of her work resulting from the recent reorganization of the Economic Commission for Europe. The unfavourable impression created by this recommendation of the Committee may have later influenced the Secretary-General to adopt an uncompromising attitude towards the Applicant.

5. When the Applicant's case came before the Review Board presided by Dr. Kerno in 1954, the Applicant was not accorded the necessary safeguards to defend her interests. Under the terms of circular ST/ADM/SER.A/267 of 6 July 1954, the Review Board should have at its disposal both the periodic reports and the opinions of the staff member's supervisors. In the Applicant's case,

(a) The Board considered a report which covered only one-third of her probationary period ;

(b) The Applicant's immediate supervisors, who alone were in a position to appraise her performance and who generally commended her work, were not consulted by the Board ;

(c) The only supervisor consulted had never dealt with the Applicant, had no means of checking her work and besides lacked a knowledge of the French language.

6. The Applicant invokes the charge of misuse of authority on the

ground that one of her supervisors entertained personal animosity against her and maintains that she has evidence to prove her contention.

Whereas the Respondent's answer is:

1. Under the provisions of Staff Regulation 9.1 (c) and the interpretation given to them by the Tribunal in previous judgements, the decision to terminate the Applicant's temporary appointment was entirely proper and not reviewable by the Tribunal except for improper motive. No evidence has been adduced by the Applicant to show that the Secretary-General's decision was based on improper motive, or that the Secretary-General acted arbitrarily or capriciously or without regard to her rights.

2. The Tribunal has recognized that, in the termination of temporary appointments, the Secretary-General has wide discretionary powers. He is not required to state a specific reason for his action or to follow a particular procedure; it is sufficient that the termination be found by him to be in the interest of the United Nations.

3. Regarding the Applicant's allegations concerning the proceedings before the Selection Committee presided by Mr. Moderow in 1953 and the Review Board presided by Dr. Kerno in 1954, the Respondent submits that the Tribunal has in similar cases refused to express any opinion on the internal administrative practices of the Secretariat, to appraise the methods followed by the bodies which the Secretary-General set up to advise him, or to give any view on the conclusions reached by such purely advisory bodies.

4. The responsibility for granting permanent appointments lies within the exclusive prerogative of the Secretary-General. Favourable opinions given by a staff member's immediate superiors cannot be accepted as the determining factor (or be deemed to imply improper motivation for termination), as the Secretary-General must take into account all the circumstances surrounding each case.

5. As regards the Applicant's allegation that the recommendation of the Selection Committee presided by Mr. Moderow for the granting of a probationary period, instead of a permanent appointment, was based upon a misunderstanding, the Respondent contends that it was very improbable that the Committee would have taken into account the quality of the Applicant's work only from the date of the reorganization of the Economic Commission for Europe and that its inquiries would have failed to cover the entire period of five years during which the Applicant had been employed in the United Nations.

6. With regard to the Applicant's argument that the Review Board presided by Dr. Kerno did not have a report concerning the whole probationary period, the Respondent replies that the Board was free, in the conduct of its review, to select whatever information it required.

7. Regarding the alleged failure of the Review Board presided by

Dr. Kerno to consult the Applicant's immediate supervisors, the Respondent points out that the Board apparently heard a number of superior officers and that the opinions of the Applicant's immediate supervisors were not ignored.

8. As to the Applicant's allegation that one of her supervisors was prejudiced against her, the Respondent denies any knowledge of such a sentiment and affirms that, even if it existed, it could not have influenced the Secretary-General's decision.

The Tribunal having deliberated until 9 September 1955, now pronounces the following judgement:

1. The Applicant's submission is that the decision of dismissal has been vitiated by improper motive, on the ground of the animosity of her immediate supervisor.

She pointed out that the Administration dealt with her case in an unusual way, thus giving rise to the suspicion that there was improper motive. The Applicant was convinced that the Administration concealed certain documents for the purpose of keeping secret the real reason of her termination and she requested the Tribunal to order the production of such documents.

The Tribunal has received detailed information by testimony of witnesses on the incidents which were alleged to have occurred involving her superior. Even if there had been animosity on the part of this supervisor, the Tribunal considers that no proof has been adduced to show that such animosity could have motivated the termination. Moreover, the facts brought before the Tribunal are not such that the Tribunal finds it necessary to order the production of new documents.

2. The Applicant contends that the proceedings of the Review Board were not held in conformity with the procedure laid down by the Secretary-General. Consequently, it is alleged that the dismissal is vitiated by error of fact or misleading information. The Applicant claims that, in conformity with the practice followed by the courts in many countries, an administrative decision based on error of fact must be annulled.

3. The Tribunal observes that the Secretary-General's decision of 5 August 1953, taken on the proposal of the Moderow Committee, to give the Applicant one year's probation, was not the subject of an appeal either before the Appeals Board or the Tribunal. The Tribunal, therefore, is not called upon to rule on that matter.

4. The position of the Applicant was considered by the Review Board established in conformity with Staff Rule 104.13 in force since March 1954 which stated:

"Review Board

"(a) A Review Board shall be established. It shall be composed

of a Chairman appointed by the Secretary-General, three members appointed by the Secretary-General from among senior officials of the Secretariat, and one member appointed by the Secretary-General from among staff members nominated by the Staff Council. Such alternates as may be necessary shall be appointed in the same manner.

“(b) The function of the Board shall be :

“(i) To consider the suitability of staff members for Permanent Appointment, except those at the Director level and above, and to recommend to the Secretary-General in each case the granting of a Permanent Appointment, the granting of one additional year of probation or separation from the service.”

The Secretary-General has enunciated principles which are to be followed by the Board in dealing with cases. In view of the importance thereof for the staff, the circular of 6 July 1954 containing these principles was distributed to each staff member. Consequently, it is the Tribunal's view that each staff member is entitled to expect a correct application of this circular. This circular, while giving a wide discretion to the Board to determine the procedure to be followed in each case, made certain stipulations as to the documents to be made available and the consideration to be given to them. The following are relevant extracts :

“The Board will have to satisfy itself that candidates have demonstrated, during their period of probation, their suitability as international civil servants and have shown that they meet the high standards of efficiency, competence and integrity established in the Charter.”...

“The Board will accordingly consider the candidate's performance, and the industry he has shown, during his probationary period.”...

“The Review Board will make any inquiries it considers necessary to ascertain the qualities and qualifications of candidates. It has at its disposal the candidates' files and periodic reports, the opinions of supervisors and the Bureau of Personnel. It may question supervisors, representatives of the Bureau of Personnel and any other person it sees fit to summon. It will find it useful to examine the candidates themselves, and to become acquainted with their work as far as possible. The Board will have to reach its conclusions independently and will not be bound by supervisors' reports except in so far as it considers that they correctly indicate the candidate's performance and conduct in the post assigned to him during the probationary period.”... (ST/ADM/SER.A/267)

The obligation of the Administration as to furnishing the documents to the Board was therefore established by the circular.

5. As regards the opinions of supervisors required, the Tribunal

notes that the Applicant, member of the Pool of the Industry Division, was assigned to a certain superior officer and worked almost exclusively for the Electric Power Section. This superior would have been the most competent official to give an opinion on her work even if, according to the Table of the Division submitted to the Tribunal, and from the strictly administrative point of view, this official was not her supervisor.

The Tribunal notes that the periodic report on the Applicant for 1954, which was drawn up some time after the meeting of the Review Board, was signed by Mr. Suica, the superior officer concerned, and by the head of the administrative unit of the Applicant, and that in so doing, the Administration recognized that Mr. Suica was a supervisor of the Applicant during the year 1954.

In the view of the Tribunal the lack of consideration of any opinion of this superior officer by the Review Board was not in conformity with a sound interpretation of the guidance given by the Secretary-General to the Board.

6. The only report as to her probationary period which was before the Committee was that on the period August 1953 until 31 December 1953. For the greater part of the probationary period—that is to say, from January to August 1954—no written report was supplied to the Review Board by the Administration. Thus, there was no written report for the complete period of probation on which the Board was called upon to make its review of the Applicant's case. In fact, the written report covering the complete probationary period was not available until the Periodic Report of January 1955, covering the year 1954, was completed. The Tribunal observes that this was favourable to the Applicant and that it is possible therefore that had the report as to the period January to August 1954 been available to the Review Board, it might have influenced a minority of the Board who had opposed the granting of a permanent appointment.

7. It is clear therefore that the Review Board had not observed all of the procedure set out by the Secretary-General.

On the other hand, the final decision of the Secretary-General, in this case, had been taken after the Appeals Board, in its favourable report, had pointed out in the most precise terms the extent to which the circular had not been observed. From the oral explanations of the Respondent, it is clear that the final decision was not taken until after further consultation with Geneva had produced a communication, from which the following was read:

“It was not that the Applicant lacked technical qualities but it became clear that her efforts were not sustained during a period of time sufficiently long to enable her supervisors to acquire sufficient confidence in her in this respect.”

The Secretary-General, though fully informed by the favourable report

of the Appeals Board of the serious lack in the information submitted to the Review Board, made a deliberate decision to terminate. It is common ground in the written submissions made by both parties in this case that the decision was taken under Staff Regulation 9.1 (c) whereby the Secretary-General is entitled to terminate an appointment if such action is, in his opinion, in the interest of the United Nations.

8. Consequently, the Tribunal has no option but to dismiss the claim.

(Signatures)

Suzanne BASTID
President

CROOK
Vice-President

Sture PETRÉN
Vice-President

Mani SANASEN
Executive Secretary

Geneva, 9 September 1955

Separate opinion by Jacob Mark Lashly

1. The Applicant, holding a temporary-indefinite contract, was terminated by action of the Secretary-General upon 4 January 1955 effective 28 February 1955. The proceedings before the Tribunal are being conducted by the parties upon the basis of a normal termination under Staff Regulation 9.1 (c), whereas the termination order was made at the end of a Review Board proceeding to consider whether the Applicant was eligible for a permanent appointment under the provisions of Staff Regulation 4.5 (b) and the Staff Rules promulgated by the Secretary-General to implement this process (ST/SGB/94/Amend.1, page 7, 8 March 1954). The Review Board, in 1953, recommended a probationary period of one year for the Applicant, which recommendation was followed. At the end of the probation period, which expired on 5 August 1954, she was again called before the Review Board which, having re-examined her case, recommended her for a permanent appointment by a majority vote of three members of the Board to two. The Secretary-General nevertheless made a decision of termination of the Applicant's appointment upon the above-mentioned date. The Applicant referred her case to the Joint Appeals Board, which, after certain criticisms of the action of the Review Board, recommended to the Secretary-General that he consider the viewpoint expressed in its report and reverse his decision to terminate the Applicant's contract. On 25 March 1955 the Secretary-General informed the Applicant that he would maintain his original decision and terminate her temporary appointment effective 28 February 1955. The formal decision of the Secretary-General was as follows :

“Decision of the Secretary-General

“Her appointment is to be terminated. The Secretary-General’s reasons are that, after six years of service and one previous year of probation, there are still reservations regarding her meeting the standard for career staff.”

2. The evidence indicated that the Applicant was sharply critical of the procedure before the Review Board whose duty it was to consider her suitability for permanent appointment. The only periodic report as to her second probationary period which came before the Board was that covering the period from August 1953 to 31 December 1953. For the greater period of her probation, that is, between January 1954 and August 1954, no written report was placed at its disposal. The report containing the results of the second half of her probationary period did not become available until some time in January 1955, when it was prepared covering the entire year 1954. At that time the Applicant had already been terminated. The evidence also disclosed that the Applicant was a member of the Pool of the Industry Division and was assigned almost exclusively to a superior officer in charge of work in the Electric Power Section although she also did work for other officials for some parts of 1954. Especially did it appear that this superior officer was the one most familiar with her work and qualifications during the later portions of her second probation period, that is, during the first half of the year 1954, but for some reason he was not called before the Board and the report bearing his favourable comments did not appear until after her termination.

Upon the other hand the Chief Clerk for whom she had done no work in this period and who, consequently, was less familiar with the quality of her work, was called. A later episode developed which, when it became known to her, led the Applicant to believe that this person had been, possibly for some time, unfriendly towards her. The incident involving the Chief Clerk which disturbed her came about through his having made an oral report to one of their superiors to the effect that two former co-workers had told him that they had found life difficult in the same office with the Applicant, and had asked to have their offices changed so as to be removed from close contact with her. The episode seems to have taken place or, at least, not to have come to light until after her termination, but the Applicant took it to mean the previous existence of a hostile state of mind on the part of the Chief Clerk which, in some way unknown to her, might have found its way into the decision of the Secretary-General from which she has appealed.

3. While it is regrettable that the Review Board appears to have failed to take advantage of all of the sources of vital information concerning the suitability of the Applicant for a Permanent Appointment, no specific procedure has been supplied by the Regulations or

Rules governing the details of its work, and a very wide latitude has been given it in its selection of the sources from which it may choose the material for the conduct of its investigations. (See circular 6 July 1954, ST/ADM/SER.A/267). The report of the Review Board involved in the decision under consideration here was favourable to the Applicant by a majority of three members to two, of the five comprising the Board. Obviously the greatest benefit which the Applicant could have gained by a more orderly procedure would be the favourable vote of one or both of the minority members. Whether greater unanimity in support of its favourable report would have resulted from a different manner of conducting the investigation, or whether a unanimous report of the Board if obtained would have influenced the decision of the Secretary-General in her favour, are matters which lie in the realm of speculation.

4. This Tribunal has repeatedly held that the Secretary-General is invested with discretionary powers in the termination of temporary appointments, and this applies in the present case, whether the proceedings be considered to be under Staff Regulation 9.1 (c), "in the interest of the United Nations", or whether it be ruled under Staff Regulation 4.5 (b), wherein it is provided that "The Secretary-General shall prescribe which staff members are eligible for permanent appointments." In either case, it is clear that the General Assembly intended to assign to the Secretary-General discretionary powers commensurate with the great responsibilities imposed upon him by virtue of his office and the duties assigned to it. The evidence fails to establish any causal connexion between such irregularities as may be found to have occurred in the preliminary proceedings, and the decision of the Secretary-General, nor is there any substantial proof that any motive of animosity or prejudice entered into or influenced his decision. It follows that the Application here must fail.

Separate opinion,

(Signature)

Jacob Mark LASHLY

Geneva, 9 September 1955
