

XXI. The Tribunal, in earlier judgements, held that, where a party cannot be restored to *status quo ante*, compensation in lieu of specific performance may prove an adequate and proper relief.

This, in the Tribunal's view, applies to the situation arising through the violation of the Applicant's contractual rights now in question. As to the amount of compensation due to the Applicant on this account, the Tribunal finds a sum of one thousand dollars to be appropriate.

XXII. In conclusion, the Tribunal, rejecting all other claims by the Applicant, orders the payment to the Applicant of one thousand dollars.

XXIII. In view of the circumstances of the case, the Tribunal orders that the name of the Applicant be omitted from the published versions of the judgement.

(Signatures)

Suzanne BASTID

President

CROOK

Vice-President

Geneva, 16 March 1966.

Sture PETRÉN

Member

N. TESLENKO

Executive Secretary

Judgement No. 100

(Original : English)

Case No. 101 :
Mély

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

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

Termination ill-founded because the reason of "frequent absences from work", relied upon at the time of termination, was without foundation.—No purpose in pursuing other reasons which were mentioned later and were not brought to the attention of the Applicant at the appropriate time.

Consideration of other claims for compensation.

Claim based on the Applicant's right to expect to continue in the service of the United Nations for a period until normal retirement age rejected.

Claim based on the terms of the Certificate of Service issued to the Applicant rejected.

Claim based on the consequences of withdrawal of the Applicant's residence permit rejected.

Claim based on delay in settling the case rejected.

Award to the Applicant of the total amount of base salary, dependency allowance and non-resident's allowance for the period from the date of appointment to the date of the end of the contract, less the sums already paid.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of the Lord Crook, Vice-President, presiding ; Madame Paul Bastid, President of the Tribunal ; Mr. Sture Petré ;

Whereas, on 24 August 1965, Mrs. Simone Mély, a former staff member of the United Nations and the Applicant herein, filed the first two parts of an application instituting proceedings ;

Whereas, in pursuance of article 7, paragraph 10, of the Rules, the Executive Secretary of the Tribunal requested the Applicant to complete the application within a period of seven weeks ;

Whereas, on 11 October 1965, the Applicant filed the third and fourth parts of the application ;

Whereas, at the request of the Executive Secretary, the Applicant filed a revised text of the second part of her application on 25 October 1965 and clarified its meaning in a communication dated 29 October 1965 ;

Whereas the application, as completed and revised, requests the Tribunal :

Either

To award the Applicant a lump sum of 60,000 French francs in compensation for the moral and material injury caused to her when the Respondent terminated her before the expiry of her fixed-term appointment ;

Or

(a) To recognize that the application's pleas relating to the lack of validity of the Applicant's termination are well founded ;

(b) To confirm, if necessary, that the termination was not valid ;

(c) To order the rescinding of the decision to terminate the Applicant and her reinstatement as a staff member of the European Office of the United Nations, as well as the payment of compensation in the amount of 40,000 French francs for the injury sustained ;

(d) To fix at 60,000 French francs the amount of compensation to be paid to the Applicant for the injury sustained should the Secretary-General, within thirty days of the notification of the judgement, decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in her case ;

Whereas, on 17 December 1965, the Respondent filed his answer ;

Whereas, on 17 and 18 January 1966, the President requested the parties to submit written statements ;

Whereas, on 25 January 1966, the Respondent submitted the statement requested by the President and filed an additional document ;

Whereas, on 2 February 1966, the Applicant submitted the statement requested by the President, and asked the Respondent to file an additional document ;

Whereas, on 10 February 1966, the Respondent commented on the statement submitted by the Applicant on 2 February 1966 and filed several additional documents, including the document requested by the Applicant ;

Whereas, on that day, the Applicant commented on the statement and additional document submitted by the Respondent on 25 January 1966 ;

Whereas, on 15 February 1966, the Respondent filed several additional documents at the Applicant's request ;

Whereas the Tribunal heard the parties at a public session held on 28 February 1966 ;

Whereas during the public session questions were asked and answered and the Applicant filed additional documents ;

Whereas the facts in the case are as follows :

The Applicant is a French national who, on 24 March 1961, when she was in Cambodia, entered the service of the United Nations as a senior secretary at the Regional Office of the United Nations Technical Assistance Board at Phnom Penh. She received a short-term appointment which, after an extension, was converted on 27 June 1961 into a one-year fixed-term appointment with retroactive effect as from 1 June 1961. On 18 August 1961, i.e. nine months and thirteen days before the date of the expiry of her appointment, the Regional Representative of the Technical Assistance Board at Phnom Penh notified her of her termination in a letter which read as follows :

“ I regret to inform you that I have decided, with the agreement of United Nations Technical Assistance Board Headquarters, to terminate your contract as from the 19th of this month.

“ Under the terms of your contract, you are entitled to thirty days' notice—for which we prefer to substitute the payment of one month's salary—and forty-five days' indemnity at the rate of five days' salary for each month of uncompleted service, as provided for in Staff Rule 109.3, Annex III (b), plus payment for the number of days of leave to which you are entitled by virtue of the number of months which you have actually spent in the employ of the United Nations since the starting date of your present contract.

“ Enclosed you will find a cheque for 40,069.84 riels, which represents the total salary and indemnity referred to above.

“ You will, I am sure, readily understand why I have had to take this decision ; although I appreciate your professional qualifications, I cannot continue to employ a secretary who is too frequently absent when I must be able to rely on her unfailing services. ”

In a letter of 19 August 1961, the Regional Representative, referring to a previous communication in which he had requested the issue of a Cambodian residence permit to the Applicant, informed the Cambodian authorities that “ the person concerned has left our employ as from today, Saturday, 19 August 1961 ”. On 23 August 1961, the Regional Representative gave the Applicant the following certificate of service :

“ I, the undersigned, hereby certify that Mrs. Simone MÉLY was employed by us from 24 March to 19 August 1961 as a director's secretary (*secrétaire de direction*).

“ Mrs. Mély is a qualified secretary and is fully proficient in shorthand and typing.

“ In witness whereof I hereby provide her with this certificate for all proper purposes. ”

On 6 January 1962, the Applicant, who had returned to France in the meantime, sent a communication to the Senior Director of the Technical Assistance Board in which she protested against her termination and requested reinstatement with an indemnity or the payment of “ substantial indemnity ”. Following a lengthy ex-

change of correspondence with various representatives of the United Nations, the Applicant took her case to the Joint Appeals Board at Geneva. After considering the case and hearing the representatives of the parties, the Board filed a report on 24 February 1965 containing the following conclusions and recommendations :

“ V. *Conclusions and recommendations*

“ After due consideration, the Joint Appeals Board has unanimously adopted the following conclusions and recommendations :

“ The Board considers that the Applicant’s termination was not valid because the reason officially given, i.e. too frequent absence, was unfounded, as the Secretary-General’s representative indeed acknowledges himself in his answer (document I.2. para. 9). The Board feels that it is not called upon to consider whether there were other, more valid reasons for terminating the Applicant’s appointment, since such reasons were not mentioned in the letter of termination dated 18 August 1961 and were not brought to the attention of the Applicant at the appropriate time.

“ The Board therefore considers that the appeal entered by the Applicant is well founded. It recommends that the Secretary-General should pay the Applicant the following sums :

“ (a) The total amount of base salary, dependency allowance and non-resident’s allowance payable to the Applicant, in accordance with the terms of the letter of appointment dated 27 June 1961, for the period from the date of her appointment to the end of her contract on 31 May 1962, less the sums already paid to her up to and at the time of her termination ; the amount payable to the Applicant should be increased proportionately if there have been salary increases affecting the staff of the Regional Office at Phnom Penh during the period of her contract ;

“ (b) As interest for delayed payment, 5 per cent *per annum* of the sums payable to the Applicant under paragraph (a) above for the whole period from the time when the sums in question would have been due the Applicant under the terms of her contract to the time when they are actually paid to her ;

“ (c) In view of the delay in settling the case, a sum equal to that specified in paragraph (b) above.

“ *Note.* The Applicant’s salary at Phnom Penh was paid partly locally in Cambodian riels and partly in France in French francs. Since the Applicant is now residing in France, the Board further recommends that as a special accommodation the sums payable to the Applicant should be paid in French francs, the rate of exchange to be used for the conversion of Cambodian currency into French currency being the official United Nations rate in force in 1961-62.

“ The Board does not feel bound to recommend the payment to the Applicant, in addition to the sums specified in paragraphs (a), (b) and (c) above, of any compensation in respect of the paid leave which the Applicant would have been able to take at the end of her contract if she had worked throughout its duration.

“ The Board does not consider that the wording of the certificate dated 23 August 1961 is such as to give grounds for the award of damages to the Applicant.

“ It is the opinion of the Board that the passage in Staff Regulation 9.1 (a) providing that certain termination cases must be brought before a special advisory board does not apply in the present case. ”

By a letter dated 2 June 1965, the Secretary of the Joint Appeals Board informed the Applicant that :

“ ...the Secretary-General has decided to accept the Appeal Board's conclusion that Mme. Mély's termination was ill-founded and to award her an amount of compensation consisting of salary, non-resident's allowance and dependency allowances for six months, such amount to be reduced by any payments made to her at the time of her separation from the service, and to be paid in French Francs at the rate of exchange in effect in August 1961. ”

On 24 August 1965, the Applicant took her case to the Tribunal in the circumstances indicated earlier.

Whereas the Applicant's principal contentions are :

1. Following the proceedings before the Joint Appeals Board, the Secretary-General himself decided that the Applicant's termination before the expiry of her one-year contract had been ill-founded. He should therefore have rescinded the termination and reinstated the Applicant as a member of the United Nations Secretariat. In merely ordering the payment of compensation, the Secretary-General failed in his duty to draw the logical inferences from a decision he himself had taken.

2. Although the Joint Appeals Board had recommended that the Applicant should receive the entire salary due her for the duration of her contract, together with interest for late payment, i.e., a total of approximately 18,000 French francs, the Secretary-General arbitrarily fixed the amount of compensation to be paid at 5,618.18 French francs. He was unable to cite any regulation or statutory provision in support of his decision and acted as if the Tribunal had already ordered the rescinding of the Applicant's termination and fixed the amount of compensation to be paid in the event that he should exercise his power under article 9, paragraph 1, of the Statute of the Tribunal.

3. The amount of compensation fixed by the Secretary-General, namely, 5,618.18 French francs, is clearly insufficient to repair the injury sustained by the Applicant as a result of her invalid and arbitrary termination. In assessing the extent of the injury, the following factors should be taken into account :

(a) The Applicant, whose competence had been recognized by her supervisors, could have expected to continue her career as an international civil servant with distinction until the normal retirement age.

(b) The consequences of the Applicant's termination were aggravated by the terms of the Certificate of Service issued to her, which prevented her from finding other employment. The Certificate in no way reflected the laudatory reports she had received and, in violation of Staff Rule 109.11, omitted any reference to her official conduct.

(c) The Applicant was deprived of her Cambodian residence permit following notification of the termination of her services to the Cambodian authorities by the Regional Representative of the Technical Assistance Board. Accordingly, she had to give up her apartment, sell her property at a loss and return to France with her family at her own expense, whereas, having been recruited on an international

basis, she would certainly have been repatriated at the expense of the United Nations upon her retirement.

(d) The Respondent's delay in settling the case aggravated the emotional distress caused to the Applicant by her unjustified termination.

Whereas the Respondent's principal contentions are :

1. Since the Respondent has acknowledged that the Applicant's termination was ill-founded, the only question remaining to be settled is the amount of compensation to which she is entitled. Her request for reinstatement as a member of the Secretariat is pointless, since her fixed-term contract would have expired on 31 May 1962 in any event. Moreover, she did not apply to the Joint Appeals Board either for the rescinding of her termination or for reinstatement.

2. The amount of compensation requested by the Applicant exceeds the maximum established by article 9, paragraph 1, of the Statute of the Tribunal. The arguments she cites to justify that amount are without foundation for the following reasons :

(a) The Applicant, having had a fixed-term contract, could not have expected either the extension of her contract or the granting of a different type of contract.

(b) The Certificate of Service issued to the Applicant was in no sense unfavourable to her. Reference to her official conduct was omitted in order to protect her interests. Moreover, if she felt that the Certificate was not in keeping with Staff Rule 109.11, she should have requested, at the appropriate time, that it be revised.

(c) Since the Applicant was locally recruited, her contract did not entitle her to reimbursement of her repatriation expenses. Furthermore, the United Nations cannot assume responsibility for the withdrawal of the Applicant's Cambodian residence permit.

(d) The Applicant has not proved that the delay in settling the case has caused her injury. What is more, the Applicant herself is largely responsible for that delay.

3. The Applicant should have been quickly able to find other employment suited to her knowledge and abilities after her termination by the United Nations. The amount of compensation awarded her by the Secretary-General, namely, salary for six months of the nine months and several days which remained before the expiry of her fixed term contract, therefore, seems both reasonable and fair.

The Tribunal, having deliberated until 16 March 1966, now pronounces the following judgement :

I. There is no conflict that the termination of the Applicant on 19 August 1961 was ill-founded.

The Regional Representative wrote to the Applicant, on 18 August 1961, a letter purporting to terminate her contract as from the following day, on the grounds that, while appreciating her professional qualification, he could not "continue to employ a secretary who is too frequently absent" when he "must be able to rely on her unfailing services".

On her termination, she was paid : 1 month's pay in lieu of notice ; 45 days' termination indemnity under Staff Rule 109.3, Annex III (b) ; 12 ½ days' pay for annual leave accrued but not taken.

In the subsequent proceedings before the Joint Appeals Board, the Respondent "acknowledged from the outset that the Regional Representative committed an

error of judgement in giving too frequent absence as the reason for termination" since, in fact, the amount of sick leave she had was less than the number of days permissible under the relevant provisions of the Staff Rules, and her file contained no evidence that entitlement to sick leave was challenged at any time.

In fact, on 10 August 1961, the Regional Representative had cited in the appropriate personnel action form, submitted to the Technical Assistance Board in New York, that the proposed reason for termination was "unsatisfactory behaviour".

In justification for the proposed action, the Regional Representative referred to previous correspondence, and said that he would "prefer to avoid dismissal by misconduct"; asked authority to terminate her immediately, and make the payments referred to above, since he felt that "her further contacts with this office might be detrimental to the smooth running and might even cause damage to the reputation of our organization". It was for this reason that he was given authority by cable, on 17 August 1961, to terminate her services forthwith.

The Respondent, having admitted the "error of judgement" of the Regional Representative, claimed before the Joint Appeals Board in February 1965 that the Applicant's services were not satisfactory in that her conduct and her general behaviour in the discharge of her duties were below the standard set in the first sentence of Staff Regulation 1.4, and that the Secretary-General would, therefore, be justified, under Staff Regulation 9.1 (b), in terminating the Applicant's fixed-term appointment before its expiration date, on the ground that her services proved unsatisfactory.

II. The Tribunal notes that on 5 June 1962, in a letter to a legal representative of the Applicant, the Senior Director of the Technical Assistance Board stated: "In August 1961, Mme. Mély's supervisor determined that her services were not satisfactory inasmuch as her frequent absences from work and her manner of behaviour were disruptive to the smooth working of the office".

Thus, the reason of "frequent absences from work" was still relied upon by the Respondent on 5 June 1962. And the question of "manner of behaviour" was brought to her attention for the first time on that date. That is to say, more than nine months after Mrs. Mély's separation from service, this allegation, as to which she had had no opportunity of rebuttal, was first raised in a letter sending a copy of the Staff Regulations and Rules to permit of her use of "the appeals procedure established for United Nations staff members".

III. The Joint Appeals Board of Geneva, in its report of 24 February 1965, finding that the termination was ill-founded—as has been admitted since by the Respondent—did not feel itself "called upon to consider whether there were other, more valid reasons for terminating the Applicant's appointment, since such reasons were not mentioned in the letter of termination dated 18 August 1961 and were not brought to the attention of the Applicant at the appropriate time".

With this view, the Tribunal finds itself in agreement, and equally, sees no purpose in pursuing any such considerations further.

The Joint Appeals Board went on to recommend, *inter alia* :

"...that the Secretary-General should pay the Applicant the following sums :

"(a) The total amount of base salary, dependency allowance and non-resident's allowance payable to the Applicant, in accordance with the terms

of the letter of appointment dated 27 June 1961, for the period from the date of her appointment to the end of her contract on 31 May 1962, less the sums already paid to her up to and at the time of her termination; the amount payable to the Applicant should be increased proportionately if there have been salary increases affecting the staff of the Regional Office at Phnom Penh during the period of her contract;

“(b) As interest for delayed payment, 5 per cent per annum of the sums payable to the Applicant under paragraph (a) above for the whole period from the time when the sums in question would have been due the Applicant under the terms of her contract to the time when they are actually paid to her.”

On 2 June 1965, Mrs. Mély was informed by the Secretary of the Joint Appeals Board of the decision which the Secretary-General had taken in the matter of her appeal after receiving the recommendations of the Joint Appeals Board, in the following terms:

“...the Secretary-General has decided to accept the Appeals Board's conclusion that Mme. Mély's termination was ill-founded and to award her an amount of compensation consisting of salary, non-resident's allowance and dependency allowances for six months, such amount to be reduced by any payments made to her at the time of her separation from the service, and to be paid in French francs at the rate of exchange in effect in August 1961.”

IV. The Applicant, in her pleas to the Tribunal, urges that the Secretary-General, by this action, had acted as though this Tribunal had received the application; recognized that it was well founded; had ordered the rescinding of the decision of termination, and had then fixed the amount of compensation to be paid for the injuries sustained given that, within thirty days of the notification of the judgement, he had decided, in the interest of the United Nations, that the Applicant should be compensated without further action being taken in her case.

Whatever the merit of this argument may be, the Tribunal is unable to understand the fixation by the Secretary-General, (since the termination of the appointment due to expire on 31 May 1962 had been admitted by himself to be ill-founded), of an amount relating to six months, since no indication was given by him of any precise reason for the selection of the period.

Since the reason for termination, admitted to be ill-founded, was still being repeated as late as 5 June 1962—a date subsequent to that on which, in the normal way, the Applicant's contract would have expired on 31 May 1962—the Tribunal accordingly awards her the total amount of base salary, dependency allowance and non-resident's allowance, in accordance with the terms of the letter of appointment dated 27 June 1961, for the period from the date of her appointment to the date of the end of her contract on 31 May 1962, less the sums already paid to her up to and at the time of her termination, less also the amount paid to her in accordance with the letter of 2 June 1965, referred to in paragraph III above, the amount payable being increased proportionately in respect of any salary increases affecting the staff of the Regional Office at Phnom Penh during the period of her contract.

V. The Applicant has invoked various additional grounds in support of her claim for compensation.

The Applicant claims that she could have expected to continue her career as an international civil servant until the normal retiring age. But the Applicant in

fact held a fixed-term appointment of one year as to which form of appointment the Staff Rules state as follows :

“ The Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment. ” (Staff Rule 104.12 (b))

“ A temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment. ” (Staff Rule 109.7 (a))

The Applicant was unable to cite any other rules applicable during the contract.

The Tribunal accordingly rejects the claim that the Applicant had any right to expect to continue in the service of the United Nations for a period until normal retirement age.

VI. The Applicant also claims further compensation because the terms of the Certificate of Service issued to her were such as to prevent her from finding further employment. The Tribunal notes that, at the time of the issue of the Certificate of Service on her separation, she did not ask for a statement referring to the quality of her work and her official conduct in accordance with Staff Rule 109.11. The Applicant produced no evidence that she had applied for other posts while in Cambodia or in France during the period 1961-1965, and had been refused employment because of the nature of the Certificate of Service.

The Tribunal accordingly rejects this further claim.

VII. The Applicant, in another claim, alleges that, because of her termination, she was deprived of her residence permit, accordingly had to surrender her apartment, sell her property, and return to France “ with her entire family ” at her own expense, whereas she had been in receipt of a non-resident’s allowance, having been recruited on an international basis, and “ would have been repatriated at the expense of the United Nations when she retired ”.

The Tribunal finds that the Applicant was recruited as a local recruit, at a local scale of salary, for a fixed term—expiring on 31 May 1962—and that she accepted the appointment “ subject to the conditions specified ” on 27 June 1961.

The Tribunal accordingly rejects this further claim for compensation.

VIII. Finally, the Applicant claims compensation because the delay in settling the case aggravated the emotional distress caused by her unjustified termination.

The Tribunal, having examined the complete exchange of letters, finds that the two parties were both dilatory in this case. The Tribunal notes that five months elapsed before the Administration informed the Applicant,—who had indicated her intention of contesting the decision on termination,—of the remedies available to her under the Staff Regulations and Rules. Furthermore, the Administration replied in English to several letters in French from the Applicant and her Counsel. It is difficult to see why these replies were not drafted in French, since French is a working language of the United Nations, and Headquarters at New York is well equipped to deal with correspondence in that language.

Since, however, the responsibility for the delay rests with both parties, the Tribunal rejects the claim for compensation on this ground.

IX. The Tribunal orders, as to the Applicant’s ill-founded termination, the payment to the Applicant of the total amount of base salary, dependency allowance and non-resident’s allowance, in accordance with the terms of the letter of appointment dated 27 June 1961, for the period from the date of her appointment

to the date of the end of her contract on 31 May 1962, less the sums already paid to her up to and at the time of her termination, less also the amount paid to her in accordance with the letter of 2 June 1965, referred to in paragraph III above, the amount payable being increased proportionately in respect of any salary increases affecting the staff of the Regional Office at Phnom Penh during the period of her contract ; such amount to be paid in French francs at the rate of exchange in effect in August 1961.

X. The Tribunal rejects all other claims.

(Signatures)

CROOK

Vice-President, presiding

Suzanne BASTID

President of the Tribunal

Geneva, 16 March 1966.

Sture PETRÉN

Member

N. TESLENKO

Executive Secretary

Judgement No. 101

(Original : English)

Case No. 103 :
Rau

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

Grant to a staff member of the United Nations Children's Fund of a probationary appointment and later a fixed-term appointment.—Non-renewal of the fixed-term appointment.

Principal request for rescission of the decision by which a probationary appointment was converted into a fixed-term appointment.—The Applicant accepted the fixed-term appointment offered her and her request is directed against a decision which was not contested by her at that time under the applicable appeals procedure.—Request not receivable.

Subsidiary request for rescission of the decision refusing a renewal of the fixed-term appointment.—Secretary-General's discretionary power as to the decision to be taken at the expiry of this type of appointment.—Grounds relating to the Applicant's conduct and work given to support the decision not to renew the appointment.—Discrepancies between the written evaluation in the periodic reports of the Applicant's performance and the oral testimonies.—The Respondent having had at his disposal in the Joint Appeals Board's report all the facts relating to the manner in which the Applicant's service had been evaluated, the conclusion finally reached by him was a matter within his discretion.—Request rejected as ill-founded.

Application rejected.