

Judgement No. 115*(Original: French)***Case No. 119:
Kimpton****Against: The Secretary-General
of the United Nations**

Request for the rescission of a decision refusing to employ a candidate on medical grounds.

Refusal of the Respondent to produce the application file of the Applicant.—Request that the Tribunal should render a summary judgement against the Respondent.—Request rejected, as the Statute and Rules of the Tribunal do not cover the case of “contempt of the proceedings” and failure to produce the application file could not influence the decision of the Tribunal.

The Respondent’s argument that the application is not within the competence of the Tribunal on the ground that the Applicant does not meet the conditions laid down in article 2, paragraph 2, of the Statute.—Interpretation of the said text.—The Applicant is neither a staff member nor a former staff member of the Secretariat of the United Nations and is not in one of the other situations referred to in the said article.—Absence of an offer of employment.—Absence of statutory or regulatory provisions governing the steps preceding recruitment.—The Tribunal is not competent.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; the Lord Crook, Vice-President; Mr. Héctor Gros Espiell; Mr. Zenon Rossides, alternate member;

Whereas on 6 December 1967 Jon R. Kimpton, the Applicant in this case, filed an application concerning the refusal by the Secretary-General to appoint him to a post in the United Nations;

Whereas the application did not satisfy all the formal requirements laid down in article 7 of the Rules of the Tribunal;

Whereas, pursuant to paragraph 10 of that article, the Executive Secretary of the Tribunal returned the application to the Applicant, calling upon him to make the necessary corrections within a period of one month;

Whereas, after making the necessary corrections, the Applicant re-submitted his application on 2 January 1968;

Whereas the pleas of the application read:

- “1. The Tribunal is requested to order that the following documents be made available for my inspection:
 - (a) All United Nations regulations concerning civil service recruitment by competitive examination;
 - (b) All United Nations regulations governing the procedure for character investigations of applicants;
 - (c) All regulations governing the responsibility of the Medical Director, Health Service, in conducting medical examinations;

- (d) My complete personnel file, including all reports resulting from investigation of my background.
- "2. The Tribunal is requested to rescind the following decisions made by staff members of the United Nations:
- (a) The decision of Dr. Sze, Medical Director, Health Service, which ruled me medically ineligible for employment;
 - (b) The decision of Sir Alexander MacFarquhar, Director of Personnel, giving effect to the ruling of Dr. Sze.
- "3. The Tribunal is requested to order the specific performance of Sir Alexander MacFarquhar in giving effect to my appointment to the United Nations Secretariat, retroactive to 3 June 1966.
- "4. In the event that the Secretary-General decides to pay compensation for the injury sustained, the Tribunal is requested to order the payment of two years salary in addition to the salary accrued retroactively since 3 June 1966."

Whereas the Respondent filed his answer on 26 January 1968;

Whereas in his answer the Respondent requests the Tribunal to decide, in accordance with paragraph 3 of article 2 of its Statute, that this application is not within its competence to adjudicate and also requests that, in the event that the Tribunal should reject that plea, the case should be remanded to allow the Joint Appeals Board to communicate its opinion as required by article 7 of the Statute of the Tribunal;

Whereas the Applicant filed written observations on 1 February 1968;

Whereas, on 12 February 1968, the Respondent filed an answer to the Applicant's written observations;

Whereas, in response to a request by the President of the Tribunal to produce additional documents, the Respondent supplied additional information on 23 February, 12 March and 22 March 1968:

Whereas the Applicant submitted a written statement on 4 March 1968;

Whereas on 25 March 1968, pursuant to article 10, paragraph 1 of the Rules, the President requested the Respondent to communicate to the Tribunal the Applicant's application file;

Whereas, on 26 March 1968, the Respondent communicated to the Tribunal certain documents taken from that file;

Whereas the Applicant submitted two written statements on 29 March 1968;

Whereas in one of those statements the Applicant requested the Tribunal to render a summary judgement against the Respondent if the latter fails to provide all the documents and information requested by the President;

Whereas the facts in the case, as set out in the report of the Joint Appeals Board, are as follows:

"By an application dated 30 December 1965, Mr. Jon R. Kimpton, a United States citizen, applied for employment with the Organization as a translator. He sat for an examination for English Translators on 18 February 1966 and was subsequently interviewed by the Board of Examiners on 7 April 1966.

"In a letter dated 4 May 1966, Mr. Elfaged Gobena, a Personnel Officer, informed Mr. Kimpton that 'you will soon receive a communication

from our Examinations and Training Section concerning the results of your examination for English translators which you took recently at the United Nations. In the meantime, I would like to clear a few points in order to complete your file. I would like to stress first of all, that this letter is not an offer of appointment and that I am not able at this time to tell you whether an offer of appointment will in fact be made to you in the future.' Mr. Kimpton was then asked to fill out forms for United States security clearance and to make arrangements for a full medical examination. He underwent the medical examination at the United Nations Health Service on 9 June 1966.

"The letter from the Examinations and Training Section was sent to Mr. Kimpton on 3 June 1966. In that letter, the Chief of the Section stated that 'I am pleased to inform you that the Board of Examiners which interviewed you in April 1966 has recommended you for a Probationary Appointment in the English Translators Section.' Mr. Kimpton was advised to contact the Personnel Officer of the Office of Conference Services for 'any question on the matter of recruitment.'

"On 1 September 1966, Mr. Kimpton wrote to the Personnel Officer, Office of Conference Services, inquiring whether 'my appointment is still under consideration, and, if so, when I may expect a decision to be reached.' In a reply dated 28 September 1966, the Personnel Officer informed Mr. Kimpton that 'unfortunately, your file is not complete yet and we are therefore still unable to offer you a probationary appointment.' It was further stated that 'however, at this stage we would be able to consider you for a short-term appointment from now until the end of the 21st Session of the General Assembly, if you are interested in it.' It appeared from the record that Mr. Kimpton subsequently telephoned to say that he was not interested in short-term appointment.

"Following a further inquiry made by telephone on 6 January 1967, Mr. Kimpton was referred to the Medical Director, Health Service, who told him that he was rejected for employment on medical grounds. This was confirmed during an interview which Mr. Kimpton had with the Medical Director three days later.

"Mr. Kimpton has since addressed two letters to the Secretary-General, dated 14 January and 13 February 1967, requesting a review of his case.

"The substance of his complaint appears to be that he was arbitrarily denied employment with the United Nations, since the medical findings on which the decision was based had no present basis in fact and that the decision was further tainted by the use of confidential information concerning his psychiatric history of ten years ago, which he alleged to have been turned over to the United Nations by United States authorities after it had been obtained from him by deceptive means. He indicated that he would have no objection to an independent psychiatric examination in order to determine his medical fitness for employment.

"Replying on 6 February 1968 [*sic*] on behalf of the Secretary-General to Mr. Kimpton's first letter, the Acting Chief of Staff Services, Office of Personnel, reaffirmed that the denial of Mr. Kimpton's employment was based on a finding of medical ineligibility and pointed out that his concealment of information on the United Nations medical questionnaire also raised serious doubts about his suitability for employment with the Organization. The record does not show a reply to Mr. Kimpton's second letter."

Whereas the Applicant's principal contentions are:

1. Under article 2, paragraph 2 of its Statute, the Tribunal is open to any staff member of the Secretariat of the United Nations *and* to any other person who can show that he is entitled to rights under any contract or terms of appointment.

2. An applicant for employment enters into a relationship with the prospective employer which is a contract within the meaning of the above-mentioned provision of the Tribunal's Statute.

3. An applicant for civil service employment who has successfully competed in an examination may assert very strong rights to employment. The success of the applicant in competing with other applicants confers upon him an absolute right to employment unless the organization can demonstrate that he is clearly unfit for such employment, and it did not do so in the present case.

4. The interpretation of the Statute of the Tribunal proposed by the Respondent would result in administrative anarchy in the recruitment procedures and would thwart one of the basic principles of public policy since, if the Tribunal were not competent, the Respondent would be free to resort to discrimination of all kinds. Moreover, the Tribunal was set up in order to compensate for the immunity of the Organization by providing an internal mechanism for the redress of grievances.

5. The Statute of the Tribunal contains no provision for a case to be remanded to the Joint Appeals Board. The provisions of article 9, paragraph 2 of the Statute are not applicable since the prescribed procedure has been followed to the letter.

6. The argument on which the Joint Appeals Board relied to justify its refusal to receive the Applicant's appeal, namely that he did not have *locus standi* before that board, is patently absurd because it implies that appeals against inequities in the recruitment procedure can be made only by those who have not suffered from them.

7. In requesting the United States Government to initiate a security investigation of the Applicant and accepting information resulting from it the United Nations violated Article 100, paragraph 1 of the Charter. Furthermore, the Organization bears the responsibility for the damaging questions asked by the investigators and the deceptive practices they used, since the investigation was begun at its behest.

8. The decision of the Medical Director was arbitrary and was not based on the results of an appropriate examination, and the decision of the Director of Personnel supporting the Medical Director's decision was a violation of Article 101, paragraph 3 of the Charter.

Whereas the Respondent's principal contentions are:

1. Having never been a staff member of the United Nations, the Applicant is not a person entitled to invoke the jurisdiction of the Tribunal under article 2 of its Statute. A letter which merely informed the Applicant of the completion of an early step in the process of his possible recruitment is the only writing on which he relies to establish his status. Such a letter could not vest the Applicant with the rights and obligations of a staff member.

2. In article 2, paragraph 2 (b) of the Statute of the Tribunal, the phrase "upon which the staff member could have relied" is crucial. Inasmuch as the Applicant is not asserting rights either as a successor to a staff member or as a

beneficiary under any staff member's contract, he must establish that he himself is or was a staff member in order to invoke the Tribunal's jurisdiction.

3. The United Nations Staff Regulations and Rules are applicable only to United Nations staff members. The appeals machinery described in chapter XI of the Staff Regulations and Rules, including ultimate recourse to the Administrative Tribunal, is not available to applicants for United Nations employment who have—for whatever reason—failed to become staff members of the United Nations.

4. Whether or not the extension of the Tribunal's jurisdiction would have a beneficial effect on the Organization's recruitment procedures is not an issue. There is no basis in the Statute of the Tribunal or in its history for inferring any intention on the General Assembly's part to vest the Tribunal with jurisdiction in respect of recruitment.

5. With regard to the Respondent's subsidiary plea: even before article 9 of the Statute of the Tribunal was amended so as to provide expressly for remanding cases at the Secretary-General's request, the Tribunal had already found it necessary, under article 7, to return a case to the Joint Appeals Board for observance of the proper and appropriate procedure.

The Tribunal, having deliberated from 8 to 24 April 1968, now pronounces the following judgement:

I. The Tribunal notes that, under article 10.1 of its Rules, the Respondent was requested to produce the application file of the Applicant.

The Respondent limited himself to communicating to the Tribunal certain documents taken from this file without producing all the documents mentioned in the report of the Joint Appeals Board.

The Tribunal draws attention to the fact that, under article 10, paragraph 2, of its Rules, cognizance of certain documents may be reserved to the Tribunal at the request of one of the parties and with the consent of the other parties. The Tribunal notes that the Respondent has not indicated his intention of availing himself of that provision in the present case.

In Judgement No. 15, the Tribunal made the following statement (paras. 24 and 25):

“The Tribunal does not feel that it is proper for it to take the initiative where the Secretary-General's obligation of confidence is involved. It must clearly be for the Secretary-General to decide what information and evidence he places before the Tribunal which can be subject to test and counter-argument by the Applicant. When Respondent does not, of his own initiative, produce such information and evidence, despite a number of requests by the Tribunal that a clear statement should be made, the Tribunal is left with no option but to proceed to a conclusion in the absence of such information and evidence.

“The Applicant cannot be penalized because certain information is regarded by the Respondent as confidential and the Applicant has no opportunity either of knowing what the reason is or of challenging it.”

The Applicant requests that, if the Respondent cannot show good reason for his refusal to produce the documents in question, the Tribunal should render a summary judgement against the Respondent and find for the Applicant.

The Tribunal points out that its Statute and Rules do not cover the case of “contempt of the proceedings”. It is not therefore possible to accede to the Applicant's request.

Furthermore, having regard to the circumstances of the case, the Tribunal considers that failure to produce the application file cannot cause it to reach any decision other than the one which it reached on the basis of the documents annexed by the parties.

II. The Respondent requests the Tribunal to decide, in accordance with article 2, paragraph 3, of its Statute, that this Application is not within its competence to adjudicate on the ground that the Applicant does not meet the conditions laid down in article 2, paragraph 2, of the Statute.

Article 2 of the Statute of the Tribunal provides as follows:

“1. The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words ‘contracts’ and ‘terms of appointment’ include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations.

“2. The Tribunal shall be open:

- (a) To any staff member of the Secretariat of the United Nations even after his employment has ceased, and to any person who has succeeded to the staff member’s rights on his death;
- (b) To any other person who can show that he is entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied.

“3. In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal.

“ . . . ”

III. The Tribunal notes that only the persons referred to in article 2, paragraph 2, of its Statute have access to the Tribunal. The Applicant believes he can rely on paragraph 2 (b), because, in his view, he can show that he is entitled to rights under a contract. But the Tribunal considers that, whereas paragraph 2 (a) of the Statute applies to staff members and former staff members of the Secretariat and to the beneficiaries of such staff members on their death, paragraph 2 (b) refers to any other beneficiaries of such staff members who can show that they are entitled to rights under any contract or terms of appointment upon which the staff member could have relied.

Furthermore, as the Tribunal has already indicated (Judgement No. 96, Camargo, para. II; Judgement No. 106, Vasseur, para. 1), paragraph 2 must be considered in its context and, in particular, in the light of article 2, paragraph 1, of the Statute, which provides that the Tribunal is competent “to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members”.

If an applicant cannot invoke in his favour any right arising from a contract of employment or terms of appointment and cannot allege non-observance of the provisions of the Staff Regulations or of the applicable Rules, it is obvious that the Tribunal is not competent to hear and pass judgement upon his application.

This interpretation, which derives from the terms of article 2, is corroborated by the preparatory work on the Statute of the Tribunal, as expressly indicated in paragraph 6 of the report which the Secretary-General submitted to the General Assembly at its fourth session (A/986). There is no basis therefore for a claim that the Tribunal has general competence to hear disputes which may arise in connexion with the various steps preceding the appointment of staff members of the Secretariat of the United Nations or to supervise the application of the internal rules which the Secretary-General may introduce, in the exercise of his discretionary power, to regulate these steps.

IV. The Tribunal finds that the Applicant is neither a staff member nor a former staff member of the Secretariat of the United Nations, and that he is not in one of the other situations referred to in article 2, paragraph 2, of the Statute.

In fact, the only document on which the Applicant bases his claim of entitlement to rights is the letter which the Chief of the Examinations and Training Section sent to him on 3 June 1966. This letter contains the following passage:

“I am pleased to inform you that the Board of Examiners which interviewed you in April 1966 has recommended you for a Probationary Appointment in the English Translators section.

“A copy of this letter is being forwarded to the Personnel Officer of Conference Services for action. If you have any queries on the matter of recruitment, you may write to him directly.”

It is obvious that this letter does not constitute an offer of employment. Moreover, an earlier letter of 4 May 1966 in which the Personnel Officer indicated that the Applicant would soon receive the communication of 3 June, contains the following passage:

“I would like to stress, first of all, that this letter is not an offer of appointment and that I am not able at this time to tell you whether an offer of appointment will in fact be made to you in the future.”

Again, on 28 September 1966, in reply to an inquiry by the Applicant, the Personnel Officer informed him that his file was not yet complete and that the Organization was therefore unable to offer him a probationary appointment.

All this evidence shows that there was never at any time an offer of employment made by a competent authority. The situation is different therefore from that which existed in the previously mentioned Camargo and Vasseur cases. In the Camargo case, there was an offer made by the Director of Personnel of the United Nations. In the Vasseur case, a letter from the Deputy Chief of the Recruitment Services, sent on behalf of the Secretary-General, confirmed the offer of an appointment. The situation is different, however, in the present case. Following a technical examination and an interview, the Chief of the Examinations and Training Section sent to the Applicant the above-mentioned letter of 3 June 1966, as a sequel to the letter of the Personnel Officer dated 4 May 1966 which indicated clearly to the Applicant the various formalities and requirements with which he had to comply. It is quite clear that these communications constitute neither an offer of employment nor notice of a future appointment and therefore cannot create any right. For any right to exist in this case, the steps preceding recruitment would have had to be governed by the Staff Regulations or the Staff Rules. In the absence of such statutory or regulatory provisions, it is clear that no right

capable of being invoked before the Tribunal can have arisen for the benefit of the Applicant.

V. Consequently, the Tribunal, under article 2, paragraph 3, of its Statute, declares itself not competent to hear and pass judgement upon the present application.

(Signatures)

Suzanne BASTID
President

CROOK
Vice-President

H. GROS ESPIELL
Member

Z. ROSSIDES
Alternate Member

Jean HARDY
Executive Secretary

Geneva, 24 April 1968.

Judgement No. 116

(Original: English)

Case No. 116:
Josephy

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

Request for the rescinding of decisions relating to the withholding of a salary increment.

Principal request for the rescinding of the decision to withhold the salary increment.—The contention that this decision constituted a disciplinary measure falling within the competence of the Joint Disciplinary Committee is rejected.—Contention that the aforesaid decision was illegal, as it was taken ex post facto.—The requirements for awarding the increment had not been met on the effective date of the decision.—Procedural irregularities regrettable but not such as to affect the validity of the decision.—The claim is rejected.

Subsidiary request to order the rescinding of the decision changing the date of the next salary increment.—This decision increased the Applicant's deprivation of salary increment to eighteen months instead of the nine initially contemplated by the department concerned.—The Respondent's contention based on the annual nature of normal salary increments.—The contention is rejected.—The aforesaid decision is without legal foundation.

The principal request is rejected.—The decision concerned in the subsidiary request is rescinded.—Should the Secretary-General decide to exercise the option given to him under article 9.1 of the Statute of the Tribunal, the Applicant is awarded compensation at a sum equal to the net amount of the additional financial advantage which she would have derived if the date of her next salary increment had not been changed.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; Mr. Héctor Gros Espiell;
Mr. Francis T. P. Plimpton;