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

Z. ROSSIDES
Alternate Member

CROOK
Vice-President

Jean HARDY
Executive Secretary

H. GROS ESPIELL
Member

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 deprival 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The principal request is rejected.—The decision concerned in the subsidiary request is rescinded.—Should the Secretary-General decide to exercise the option given to him under article 9.1 of the Statute of the Tribunal, the Applicant is awarded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;

Whereas, on 15 August 1967, Marion O. Josephy, a staff member of the United Nations, filed an application requesting the Tribunal to order:

1. The rescinding of an administrative decision (P-5 Action No. C5-0338), dated 22 September 1965, authorizing the withholding of her salary increment with effect from 1 September 1965; and, as a corollary, the rescinding of an administrative decision (P-5 Action No. C6-1162), dated 3 June 1966, changing the date of the next increment to June 1967;

2. Alternatively, the rescinding of P-5 Action No. C6-1162 only;

Whereas the Respondent filed his answer on 21 September 1967;

Whereas the Applicant filed written observations on 27 October 1967;

Whereas the Respondent, at the request of the President, submitted a written statement on 19 January 1968;

Whereas, on 5 February 1968, the Applicant submitted comments on the Respondent's written statement;

Whereas the facts in the case are as follows:

The Applicant, who had entered the service of the United Nations on 9 September 1957, received a permanent appointment on 1 September 1959 and has been serving in the Library as a clerk-typist since 1 November 1961. She was due for a salary increment to G-3, step VIII, on 1 September 1965. By a letter of 11 June 1965, the Deputy Director of the Library warned the Applicant that unless her record of habitual tardiness improved over the coming months, she had to expect to be rated as "insufficiently punctual" in her next periodic report, and that he would probably be forced to withhold her normal salary increment. The Applicant was on annual leave from 2 August 1965 to 16 September 1965 and on certified sick leave from 20 to 24 September 1965. The withholding of her salary increment with effect from 1 September 1965 was authorized by P-5 Action No. C5-0338, dated 22 September 1965; it was indicated on the form that the increment was withheld "in accordance with Staff Rule 103.8 (*a*) as staff member is insufficiently punctual". Nevertheless, the Applicant's Statement of earnings and deductions for September and October 1965 showed her as having achieved step VIII at the G-3 level. Her Statement of earnings and deductions for November 1965, however, showed a change in her step from step VIII back to step VII, with the increment she had received in September and October deducted from her salary. By a memorandum of 9 May 1966 addressed to the Executive Officer of the Office of Conference Services, the Deputy Director of the Library requested that the Applicant's increment "be reinstated as of 1 June 1966" on the grounds that, according to her supervisor, the situation which had prompted the withholding action had improved. Reinstatement of the increment as of 1 June 1966 was approved by P-5 Action No. C5-1088, dated 13 May 1966 and signed on behalf of both the Director of Personnel and the Department concerned; the date of the next salary increment was indicated on the form as "September 1966". Subsequently, P-5 Action No. C6-1162, dated 3 June 1966 and signed on behalf of the Director of Personnel, changed the date of the next salary increment to "June 1967"; the action was described as "correction" of the relevant date shown on P-5 Action No. C5-1088. On 30 June 1966, the Applicant addressed to the Director of Personnel a letter stating *inter alia* that she had not received a copy of P-5 Action No. C5-0338 until May 1966 and requesting (1) that the decision of 22 September 1965 to deduct from her earnings the amount of the increment from September 1965 to June 1966 be reviewed, and (2) that the decision of

3 June 1966 whereby the date of her next salary increment was changed to June 1967 be reviewed and that her next salary increment be reinstated as of September 1966. In a reply dated 8 August 1966, the Chief of the Staff Services of the Office of Personnel informed the Applicant that her request could not be granted; the reply concluded as follows:

> "You are well aware that in accordance with Appendix B of the Staff Rules 'salary increment within the level shall be awarded annually' which means that the required period be counted beginning the date of reinstatement, in your case it should be 1st June 1966, therefore the P-5 No. C5-1088 which erroneously showed your next salary increment as September 1966 was corrected by the P-5 C6-1162."

The Applicant having filed an appeal with the Joint Appeals Board, the Board submitted its report on 24 March 1967. The concluding section of the report read as follows:

> "*Conclusions and Recommendations*
>
> "32. In conclusion, the Board upholds the administrative decision to withhold the appellant's salary increment, which it considers to be based on a proper exercise of the discretionary authority vested with appellant's supervisors in the Library, despite its findings of the procedural defects noted in paragraph 25 above.[1] So far as the date of next salary increment is concerned, the Board is of the opinion that P-5 No. C5-1088 represented an equitable solution consistent with established administrative practice. The Board therefore unanimously recommends that the subsequent P-5 Action (No. C6-1162), purporting to be an amendment thereto, be cancelled and that the date of the appellant's salary increment to G-3, step IX, be reverted to September 1966."

On 15 May 1967, the Acting Director of Personnel informed the Applicant that the Secretary-General had decided to accept the Board's recommendation upholding the administrative decision to withhold her salary increment, but was unable to accept the Board's recommendation that the date of her following salary increment be advanced to September 1966 instead of June 1967. On 15 August 1967, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. P-5 Action No. C5-0338 dated 22 September 1965 was improperly applied as a disciplinary measure, thereby contravening the spirit of Staff Rule

[1] Paragraph 25 reads: "Another factor that the Board took into consideration in assessing the validity of the withholding action was what appeared to be procedural defects in the implementation of the administrative decision. The Board noted that the P-5 Action authorizing the withholding of the salary increment due on 1 September 1965 was not initiated until 22 September 1965. The decision was thus given a retroactive effect after the increment had already become effective under Staff Rule 103.8 (c). The Board believes that good administrative practice would have ensured that the withholding action was taken before the staff member's entitlement to annual salary increment became due. Such timely action would seem all the more desirable when dealing with cases involving the question of punctuality. The Board is further of the opinion that, inasmuch as the withholding action is in the nature of a disciplinary penalty, it would be more in acccord with due process if advance notice is given to the staff member before such an action is actually taken. In the present case, though the appellant had been warned, she had not been told that the threatened action was to be carried out. Instead, her statements of earnings for the months of September and October 1965 credited her with the normal salary increment. The record therefore seems to support the appellant's allegation that she was not made aware of the withholding action until she received the end of November pay statement, which showed that the increment was withdrawn, along with deduction of the amounts of increment already granted to her."

103.8 (*a*), Appendix B of the Staff Rules and the procedures set out in chapter X of the Staff Rules concerning disciplinary measures. Withholding of a salary increment is a measure provided for in the Staff Rules for a specific situation, namely, "unsatisfactory services" where the fact of a staff member's services being unsatisfactory is duly certified by his supervisors. It is highly questionable whether this provision is at all appropriate for dealing with cases of tardiness in isolation from the issue of how satisfactory the staff member's services might be. If it is only a question of conduct, disciplinary procedure is indicated as foreseen in the first paragraph of Staff Regulation 10.2, with the safeguards contained in chapter X.

2. Moreover, P-5 Action No. C5-0338 was contrary to the intentions described in the warning letter of 11 June 1965 which made the withholding of salary increment conditional to non-improvement of tardiness. It is clear from that letter that disciplinary measures were not desired by the Library and that conflict with established procedures for disciplinary action was not intended. The subsequent decision to reinstate the salary increment expressed the Administration's own recognition of the unnecessary nature of the punishment, but was virtually annulled by the decision of 3 June 1966 to change the date of the next salary increment to June 1967.

3. P-5 Action No. C5-0338 was also vitiated by procedural defects, namely, *ex post facto* initiation and application of withholding of salary increment after the increment had already become effective. Furthermore, the condition provided for in the Staff Rules for enabling withholding of salary increment, namely, certification of unsatisfactory service, was not present; indeed, direct certification of the contrary was made.

4. As to the alternative claim, the effect of P-5 Action No. C6-1162 dated 3 June 1966 was to subject the Applicant to a recurring penalty for a fault which has long been corrected and has never caused neglect of her official duties. Furthermore, P-5 Action No. C5-1088 dated 13 May 1966 appeared to reflect the wishes of the Applicant's supervisors since it was initiated by the Library with the approval of the Office of Personnel; there was no mistake in setting the date of the next salary increment at September 1966 and the subsequent action, which purported to be a technical correction of that date, was not required under established administrative practice.

Whereas the Respondent's principal contentions are:

1. The decision to withhold the salary increment was not a disciplinary measure and was consistent with the Staff Regulations and Rules, including applicable procedural requirements:

(*a*) Punctuality is an element of "satisfactory service" and neither the letter nor the spirit of the Staff Regulations and Rules would be served by an interpretation requiring disciplinary proceedings under chapter X in cases of habitual tardiness;

(*b*) The decision to withhold the salary increment was not vitiated as "*ex post facto*" as that term is used to describe a certain kind of retroactive measure which is generally considered to be invalid;

(*c*) The Staff Rules do not prescribe any procedure to be followed prior to a decision not to award a salary increment other than that it normally be based on evaluation by supervisors. Unpunctuality has always been a valid reason for withholding a salary increment; the Applicant was fairly warned that continued tardiness would cause her to lose her increment, and she has had opportunity to contest.

2. The decision setting the date of the Applicant's subsequent salary increments was consistent with the applicable Staff Rule and was not arbitrary, discriminatory, or mistaken:

(*a*) It is against regular United Nations Personnel practice to grant two step raises in a period of less than one year, whether or not an increment has been delayed at a supervisor's recommendation;

(*b*) In any event, differing views on whether or not the one year requirement should have been waived do not relate to the question at issue since the Tribunal must determine whether the Applicant's rights were violated by the Secretary-General's decision rather than whether a contrary decision could have been justified.

The Tribunal, having deliberated from 16 to 24 April 1968, now pronounces the following judgement:

I. The Applicant contends that the withholding of her salary increment by the decision of 22 September 1965 constituted a disciplinary measure within the meaning of chapter X of the Staff Regulations, and that the procedure there prescribed for disciplinary measures—i.e. reference to the Joint Disciplinary Committee—was not followed.

Staff Regulation 10.2, under chapter X, reads as follows:

> "The Secretary-General may impose disciplinary measures on staff members whose conduct is unsatisfactory.
>
> "He may summarily dismiss a member of the staff for serious misconduct."

However, Staff Rule 110.3 (*a*) goes on to define "disciplinary measures" as follows:

> "(*a*) Disciplinary measures under the first paragraph of Staff Regulation 10.2 shall consist of written censure, suspension without pay, demotion or dismissal for misconduct, provided that suspension pending investigation under Rule 110.4 shall not be considered a disciplinary measure."

Obviously, withholding of salary increment does not fall within that definition. Furthermore, the Tribunal observes that the conditions for the award of salary increments are set forth in specific provisions of the Staff Regulations and Rules, and that the present application has to be considered on the basis of those provisions.

In view of the foregoing the Applicant's contention fails.

II. The Applicant attacks as illegal the decision of 22 September 1965 (P-5 Action No. C5-0338) which ordered the withholding of her salary increment as from 1 September 1965, a date already past.

The Applicant's main argument is that the salary increment had actually become effective on 1 September 1965, and that a later decision to withhold the increment was *ex post facto* and illegal.

Appendix B to the Staff Rules, governing Headquarters salary scales for the general service category applicable to the Applicant, reads in part as follows:

> "*Increments*: Salary increments within the levels shall be awarded annually, on the basis of satisfactory service."

Rule 103.8 (*a*) provides:

> "(*a*) Satisfactory service for the purpose of awarding a salary increment shall be defined, unless otherwise decided by the Secretary-General in any

particular case, as satisfactory performance and conduct of staff members in their assignments as evaluated by their supervisors."

It follows that only if the Applicant, during the twelve months ended 31 August 1965, had produced "satisfactory service", namely, "satisfactory performance and conduct" as evaluated by her supervisors, would she have been entitled to a salary increment as from 1 September 1965. In fact, however, her service during such twelve months had not been satisfactory as evaluated by her supervisors.

It should be noted that the Applicant on 11 June 1965 was in effect warned by the Deputy Director of the Library that unless her record of habitual tardiness improved over the coming months, he would probably be forced to withhold the salary increment—which is what in fact occurred.

It should also be noted that the Applicant's periodic report covering the period 1 July 1964-30 September 1966 stated:

> "During the first half of this period staff member was habitually late in the morning. Following disciplinary action [*sic*] in September 1965 she has corrected this habit and now reports promptly. In other respects her punctuality has always been satisfactory."

The Applicant therefore cannot claim that her service during the twelve months ended 31 August 1965 had been duly certified as satisfactory and that the requirements for awarding the increment had been met.

It is true that the formal action ordering the withholding of the increment as from 1 September 1965 was not taken until 22 September 1965. That delay is, in the view of the Tribunal, subject to criticism from the procedural viewpoint. Ideally, if a staff member is not to receive an increment by reason of unsatisfactory service, formal action should be taken before the date on which the first instalment of the increment would be payable. The Tribunal recognizes that mechanical problems are involved in the preparation and transmission of personnel action forms, but staff members should not be subjected to the unpleasantness of receiving an incremented payment and then having it later withdrawn and required to be refunded.

In this case the administrative ineptitude was compounded. Not only was the formal action taken after 1 September 1965, but the Applicant was paid the increment for two months without any notice that the increment was not actually due, and only learned of the decision when she received her November 1965 Statement of earnings and deductions which debited her with the two months' incremental payments. She was apparently not given a copy of the formal action of 22 September 1965 until May 1966.

Although those procedural irregularities are to be regretted, the Tribunal is of the opinion that they are not such as to affect the validity of the decision of 22 September 1965 which, as stated above, otherwise complied with the conditions of substance set forth in the Staff Regulations and Rules.

Accordingly the Tribunal rejects the claim that the decision of 22 September 1965 withholding the salary increment as from 1 September 1965 was illegal.

III. In her alternative claim the Applicant requests the Tribunal to order the rescinding of the decision of 3 June 1966 (P-5 Action No. C6-1162) by which the Director of Personnel, as a "correction", changed to June 1967 the date of the Applicant's next salary increment. That date had been given as September 1966 in P-5 Action No. C5-1088 of 13 May 1966 which reinstated the salary

increment as of 1 June 1966 and was signed on behalf of both the Director of Personnel and the Department concerned.

The obvious intent of the Department concerned, in signing P-5 Action No. C5-1088 of 13 May 1966 which provided, on account of the Applicant's improved service, for the reinstatement as of 1 June 1966 of her salary increment to step VIII, was to limit to 9 months (September 1965 through May 1966) the deprival of her step VIII increment which by the decision of 22 September 1965 had been withheld as from 1 September 1965. This is evidenced by the fact that P-5 Action No. C5-1088 fixed the Applicant's next salary increment date, for step IX, as September 1966. Assuming satisfactory service, the Applicant on 1 September 1966 would thus have been entitled to the next salary increment to step IX, and on successive 1st days of September would have been entitled to successive increments, all without having lost but nine months of salary increment—the nine months of step VIII withheld from 1 September 1965 to 31 May 1966.

However, the action of the Director of Personnel in P-5 Action No. C6-1162 of 3 June 1966, by changing to June 1967 the Applicant's next salary increment date, in effect deprived the Applicant of the nine months of step VIII from 1 September 1965 to 31 May 1966 withheld by the decision of 22 September 1965, and of the nine months of step IX from 1 September 1966 to 31 May 1967 to which, assuming satisfactory service, she would under the terms of P-5 Action No. C5-1088 have been entitled. This eighteen months' deprival, nine more than intended by the Department concerned, could never be recouped by the Applicant.

Put differently, by P-5 Action No. C5-1088 of 13 May 1966, the Department decided, by reason of the Applicant's improved services, to restore the Applicant as of 1 June 1966 to the salary increment of step VIII (she having thus lost since 1 September 1965 nine months of step VIII), and to permit her to resume her normal course and become entitled, on 1 September 1966, assuming satisfactory service, to the step IX salary increment. Instead, the Director of Personnel, by P-5 Action No. C6-1162 of 3 June 1966, postponed until 1 June 1967 her entitlement to the step IX salary increment—a delay of nine months of step IX increment to be added on to the nine months' deprival of step VIII increment envisaged by the Department in P-5 Action No. C5-1088 of 13 May 1966. This additional nine-month delay could never be made up by the Applicant—obviously she would not be entitled to her step X salary increment until 1 June 1968, and so on; on each 1 June she would have lost nine months of the then current salary increment to which she would otherwise have become entitled on the preceding 1 September.

The Director of Personnel, therefore, by P-5 Action No. C6-1162 of 3 June 1966, without the concurrence of the immediate supervisors of the Applicant, assumed to "correct" the decision of P-5 Action No. C5-1088 of 13 May 1966 by increasing the Applicant's deprival of salary increment to eighteen months instead of the nine therein contemplated.

IV. The Respondent, although not contending that the decision of 13 May 1966 was contrary to the Staff Regulations or Rules, does claim that it would be against "regular United Nations Personnel practice" to grant two step raises within one year. In fact, the decision of 13 May 1966 did involve two raises within twelve months of its date, namely, the deferred raise, after nine months of deprival, to step VIII on 1 June 1966 and the regular raise to step IX—assuming satisfactory service—on 1 September 1966.

No basis for any such "regular practice" as applied to the present case can be found in the Staff Regulations or Rules. The clause from Appendix B to the Staff Rules, quoted under II above, as to salary increments being "awarded annually", would appear to have mandatory positive implications more than negative implications. In any event it clearly has no application to a case where, as here, a staff member's salary increment has been withheld at the beginning of a twelve-month period (1 September 1965) because of unsatisfactory service, and then, because the unsatisfactory service has been cured, restored (1 June 1966) within the period, with provision that normal rhythm shall be resumed and that the next increment shall be awardable at the beginning (1 September 1966) of the *next* twelve-month period.

It would be wholly inadmissible for the clause mentioned above to be held to prevent the limiting of an increment deprival to nine months where, as here, the staff member's superiors have determined that the fault has been remedied, and to require, contrary to the superiors' decision, that the deprival be in effect extended to eighteen months.

In point of fact the normal increment year for the Applicant was the twelve-month period beginning 1 September and ending 31 August; it was on each 1 September that, assuming satisfactory service, her salary increment was "awarded annually". During the twelve-month period beginning 1 September 1965 and ending 31 August 1966 she was awarded by P-5 Action No. C5-1088 of 13 May 1966 only *one* raise, the reinstatement on 1 June 1966 of her step VIII increment for the three months ended 31 August 1966. P-5 Action No. C5-1088 was therefore entirely within the "awarded annually" concept in fixing the Applicant's next salary increment date in the *next* twelve-month period, namely September 1966.

The Respondent evidently attempts to apply the "awarded annually" clause to the twelve-month period from 1 June 1966 to 31 May 1967, within which P-5 Action No. C5-1088 of 13 May 1966 provided for the 1 June 1966 to 31 August 1966 three-month step VIII increment and, assuming satisfactory service, the 1 September 1966 to 31 May 1967 nine-month step IX increment. It is true that there were thus two raises within that twelve-month period. The Tribunal notes, however, that if there had been satisfactory service throughout and no prior deprival of the step VIII increment, the Applicant during the twelve-month period 1 June 1966 to 31 May 1967 would have received, as a matter of the normal course of the ordinary annual awards, the last three months of her step VIII increment and the first nine months of her step IX increment. In fact this was exactly what P-5 Action No. C5-1088 of 13 May 1966 contemplated; surely no violation of any negative implications in the "awarded annually" clause was thereby involved.

The Tribunal accordingly rejects the Respondent's contention and decides that the P-5 Action No. C6-1162 of 3 June 1966 was without legal foundation and that the Applicant's next salary increment date was properly fixed at September 1966 by P-5 Action No. C5-1088 of 13 May 1966.

V. For the above reasons, the Tribunal:

(*a*) Rejects the application as regards decision P-5 No. C5-0338 dated 22 September 1965;

(*b*) Decides that decision P-5 No. C6-1162 dated 3 June 1966 is rescinded with all the legal consequences flowing therefrom; and

(*c*) Fixes the amount of compensation to be paid to the Applicant, should the Secretary-General decide to exercise the option given to him under article 9.1

of the Statute of the Tribunal, at a sum equal to the net amount of the additional financial advantage which the Applicant would have derived, or would derive, if the date of her next salary increment had not been changed from September 1966 to June 1967.

(*Signatures*)

Suzanne BASTID
President

Francis T. P. PLIMPTON
Member

H. GROS ESPIELL
Member

Jean HARDY
Executive Secretary

Geneva, 24 April 1968.

Judgement No. 117

(*Original: English*)

Case No. 118: van der Valk

Against: **The United Nations Relief and Works Agency for Palestine Refugees in the Near East**

Termination on the ground of abolition of post of the temporary indefinite contract held by a staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East.

Contention that the abolition of the Applicant's post was unwarranted.—Regulation 9.1 of the International Staff Regulations of UNRWA.—Limits of the discretionary powers of the Administration.—Nature of the Agency.—Refusal of the Tribunal to substitute its judgement for that of the Administration in respect of reorganization of posts.

Argument that, in the case of abolition of post, the more senior staff should be preferred to others.—There is no such obligation in the absence of specific provisions to that effect.—Obligation of the Agency to try to find alternative employment for the Applicant.—The Agency complied with this obligation.

Argument relying on improper motivation and prejudice.—The Tribunal is unable, having regard to the circumstances of the case, to find that the termination of the services of the Applicant was actuated by such motives.

The application is rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of the Lord Crook, Vice-President, presiding; Mr. R. Venkataraman, Vice-President; Mr. Francis T. P. Plimpton;

Whereas, on 31 January 1967, Pieter C. van der Valk, the Applicant in the present case and, at the time, a staff member of the United Nations Relief and