

Judgement No. 128

(Original: French)

Case No. 129:
Al-Abed

Against: The Secretary-General
of the United Nations

Non-renewal of the fixed-term contract of a technical assistance expert.

Request for the rescission of the decision not to renew the contract.— Legal consequences of the fact of having given the Applicant to understand that his contract would be extended if he so desired.—Legal consequences of the authorization given to the Applicant to go on home leave and of the approval by the recipient Government of the extension of the contract.—The overriding interest of sound administration requires that contracts of appointment should be safeguarded by being in written form.—Conclusion that the Respondent was not obliged to renew the Applicant's contract.—True reason for the non-renewal of the contract.—Injury caused to the Applicant by the fact that the notification of the termination of his employment gave the impression that disciplinary action was being taken.—The Respondent disregarded the principle of good faith in relations between the parties.—This finding is sufficient to redress the injury sustained by the Applicant.

The remainder of the application is rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of the Lord Crook, Vice-President, presiding; Madame Paul Bastid; Mr. Louis Ignacio-Pinto;

Whereas, on 9 December 1968, Mohammad Kamal Al-Abed, former technical assistance expert of the United Nations, filed an application containing the following pleas:

“A. *Preliminary and provisional measures which the Applicant requests the Tribunal to order before proceeding to consider the merits:*

“1. Hearing of the testimony of Mr. Auguste Miceli, formerly an expert and Acting Principal Adviser for the Police Training Project at Kinshasa from 1 November 1966 to the end of May 1967, concerning:

“(a) The meeting of 12 January 1967 at which Mr. Andersen, the Deputy Resident Representative, announced that the Police Training Project would be continued until 31 December 1967 and offered all the experts, including the Applicant, an extension of appointment until the end of 1967, regardless of the date of expiration of their current contracts;

“(b) The approval of that extension by the Congolese Ministry of the Interior and the Ministry's desire to retain the services of the incumbent experts, including the Applicant;

“(c) The organization of the departure on home leave of the incumbent experts, correlatively with and in implementation of the extensions of appointment announced and decided on at the aforementioned meeting of 12 January 1967, according to a list approved by Mr. Andersen, the Deputy

Resident Representative, the Congolese authorities and the Administration of the Congolese National Police School;

“(d) The confirmation of the decision to extend the appointments of the experts at the meeting held in the office of the Deputy Resident Representative in March 1967.

“2. The communication to the Tribunal of the complete file of the case.

“3. The communication to the Applicant of a true copy of that file.

“4. The communication to the Applicant, as a matter of great urgency, of an up-to-date copy in French of the Staff Rules and Regulations of the United Nations.

“B. *Decisions which the Applicant is contesting and whose rescission he is requesting:*

“1. The decision to terminate the Applicant’s mission, dated 24 May 1967;

“2. The decision of the Secretary-General of the United Nations dated 6 September 1968 granting the Applicant an indemnity equivalent to the amount of termination indemnity to which he would have been entitled had his appointment been extended from 5 August 1967 to 31 December 1967.

“C. *Obligations which the Applicant is invoking and whose specific performance he is requesting:*

“1. The obligation to honour the commitment to employ him from 5 August 1967 to 31 December 1967 or, failing that, the obligation to pay him the salary for four months and twenty-six days;

“2. The Applicant’s entitlement to the salary for four months and twenty-six days also entitles him to:

“3. The post adjustment and assignment allowance which form an integral part of the salary for four months and twenty-six days;

“4. The obligation to pay him a compensatory indemnity for the remaining days of annual leave which he could not take because of the war in the Middle East in June 1967 and the rebellion of the mercenaries in the Congo in July 1967. These two events constitute a special and distinct case of *force majeure*. To the aforementioned days of annual leave should be added the annual leave due for the last five months of 1967 as a result of the confirmed extension of his contract;

“5. The obligation to calculate his repatriation grant on the basis of three years and five months of service instead of three years;

“6. It is, of course, understood that the obligations resulting from the extension wrongly contested by the Administration should be calculated on the basis of a Grade 4, Step VI, post, to which the Applicant became entitled on the day when his appointment was extended.

“D. *Amount of compensation claimed by the Applicant for the injury sustained:*

“For the *material* injury sustained by the Applicant as a result of the sudden and unexpected termination of his appointment and for the *moral* injury resulting from that termination, which occurred in the circumstances described below, the Applicant claims compensation equivalent to two years’ base salary, in accordance with article 9 (1) of the Statute of the United Nations Administrative Tribunal.”

Whereas the Respondent filed his answer on 24 February 1969;

Whereas the Applicant filed written observations on 12 May 1969;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 5 August 1964 under a one-year appointment as a Police Training Instructor and was assigned to the Police Training Project in Kinshasa (Democratic Republic of the Congo). His appointment was extended twice, the first time until 4 August 1966 and the second time until 4 August 1967. On 12 January 1967, the Deputy Resident Representative of the United Nations Development Programme called a meeting of the experts participating in the Project in order to inform them about the Project's future; at that meeting, the Deputy Resident Representative is said to have offered each of the experts an extension of his appointment until the end of 1967, and the Applicant is said to have accepted that offer; that arrangement was allegedly subsequently confirmed at a second meeting held on 20 March 1967. On 14 February 1967, the Applicant was authorized to take home leave, which he duly took from 25 February to 15 April 1967. Also on 14 February, the Acting Principal Adviser for the Project, acting on the instructions of the Deputy Resident Representative, sent the latter a confidential report concerning a financial transaction in which the wife of an expert was involved; the report also referred to the Applicant, without naming him, and concluded that he had been the "victim of a flagrant swindle". The confidential report having been transmitted to Headquarters, the Deputy Resident Representative sent the Chief of the Section for Africa, Bureau of Technical Assistance Operations, a memorandum dated 27 April 1967 in which, after having drawn attention to the report and to the fact that the contracts of the two experts concerned were soon due to expire, he inquired whether those contracts were to be extended until 31 December 1967. On 9 May 1967, the Technical Assistance Recruitment Service requested the Chief of the Section for Africa to inform the Deputy Resident Representative that in view of the information provided in his memorandum of 27 April 1967 the Recruitment Service had decided not to extend the appointments of the two experts. On 11 May 1967, the Chief of the Section for Africa transmitted that decision to the Deputy Resident Representative. On 24 May 1967, the latter sent the Applicant the following memorandum:

"Since your contract is about to expire on 4 August 1967, I would appreciate it if you would immediately get in touch with Miss Yannaki (Room 412) regarding the formalities to be completed before your departure from Kinshasa.

"As it is provided in the regulations of the United Nations Bureau of Technical Assistance that the leave period should be included in the duration of the contract, I wish to inform you that you will have a balance of 38 working days of leave by 12 June 1967. Consequently, instructions will be given to the Travel Office to ensure your repatriation on that date."

On 31 May 1967, the Applicant sent a memorandum to the Deputy Resident Representative protesting against that step. On 2 September 1967, he wrote to the Secretary-General requesting reconsideration of the administrative decision. In a reply dated 5 October 1967, the Chief of the Technical Assistance Recruitment Service reaffirmed, on behalf of the Secretary-General, the decision regarding non-renewal of the Applicant's appointment. In the meantime, on 3 October 1967, the Applicant had appealed to the Joint Appeals Board, which submitted

its report on 28 June 1968. The conclusions and recommendations set out in that report are the following:

“35. The present case is not simply a matter of non-renewal of a fixed-term appointment. In reliance of a promise made by the official in charge of the Police Training Project and by virtue of the positive action taken by the Administration to authorize his home leave, the appellant had a legitimate expectancy of the extension of his fixed-term appointment from 5 August 1967 through 31 December 1967. To the extent that the Administration was responsible for the inducement of that expectancy by its own words and action, it was under the moral obligation to carry out such an extension of appointment. The decision under appeal failed to fulfil that obligation. That decision, at the time when it was taken, was not attributable to considerations pertaining to reduction of staff; nor was it justifiable in terms of its true motive as disclosed in the proceedings. The Board therefore came to the conclusion that the appellant’s fixed-term appointment should have been extended until the end of the year 1967 in fulfilment of the obligation assumed by the Administration. On the other hand, the Board was convinced that, by the time when the extension of the appointment was to take effect in August 1967, the change of circumstances brought about by the retrenchment of the Project warranted the termination of the appellant’s extended appointment on the grounds of reduction of staff. In view of these findings, the Board unanimously recommends that the appellant be paid an indemnity equivalent to the amount of termination indemnity to which he would have been entitled under Annex III to the Staff Regulations, had his fixed-term appointment been extended until 31 December 1967 and then terminated forthwith on the grounds of reduction of staff in accordance with Staff Regulation 9.1 (b) and (a). The Board believes that the said recommendation has also effectively disposed of the appellant’s claim regarding commutation of his accrued annual leave, in respect of which the Board makes no separate recommendation for compensation, since the appellant suffered no actual loss in his entitlement to annual leave.”

On 6 September 1968, the Acting Director of Personnel informed the Applicant of the Secretary-General’s decision as follows:

“ . . .

“The Secretary-General, after having re-examined your case in the light of the conclusions and recommendations of the Joint Appeals Board, has decided that you should be paid an *ex gratia* indemnity equivalent to the amount of termination indemnity to which you would have been entitled under Annex III to the Staff Regulations and under Staff Rule 209.5, if your fixed term appointment had been extended from 5 August 1967 to 31 December 1967 and terminated forthwith at the time when it was to take effect.

“The Secretary-General’s decision is based on the moral obligation which, in the view of the Joint Appeals Board, has been created by the particular circumstances of the case, and not on any legal obligation.

“ . . .”

On 9 December 1968 the Applicant filed the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The Applicant’s contract was extended *de jure* until the end of 1967:

(a) The contract was duly extended by mutual bilateral agreement at the meeting of 12 January 1967, and the commitment thus entered into was endorsed at the meeting of 20 March 1967;

(b) The first step towards implementating the decision to extend the Applicant's contract was taken, since the Congolese authorities were formally requested to approve the extension;

(c) The granting of home leave leaves no doubt regarding the extension of the Applicant's contract;

(d) The oral extension of the experts' contracts was consistent with the usual practice.

2. The argument based on the alleged reduction of staff invoked by the Administration to justify the termination of the Applicant's services is not valid, and even if it were, it would not free the Administration from its obligations.

3. The argument based on the alleged underemployment of the experts and the non-utilization of their services cannot be invoked in the case of experts of the Applicant's category; furthermore, that factor was not the Applicant's fault and if it had to be taken into consideration, it should have been so taken without discrimination.

4. Since the Applicant was prevented by reasons of *force majeure* from effectively benefiting from his accrued annual leave from 12 June to 16 July 1967, he is entitled to a compensatory allowance.

5. The indemnity recommended by the Joint Appeals Board is based on a fictitious argument. The Applicant is entitled to compensation in full for the material and moral injuries he has sustained.

Whereas the Respondent's principal contentions are:

1. The contested decision was valid as a proper exercise of the Secretary-General's authority to appoint staff:

(a) The Applicant had no right or entitlement to employment after the date of expiration of his contract; nothing short of an offer communicated in writing by an authorized official can give rise to an appointment; similarly, an appointment cannot result from exceptional permission to take home leave, from Government approval of an expert's contract or from the decision to continue a technical assistance project;

(b) No reason or procedure was legally required for the decision; the Secretary-General may properly take account of a candidate's financial activities and need not find misconduct or resort to disciplinary procedures; the Applicant cannot claim that he was wrongfully discriminated against when the staff was reduced, since the fact that he was already in United Nations service did not entitle him to an extension.

2. The Applicant's contractual rights were observed even if the contested decision is viewed as a termination.

3. The plea for compensation for the days of annual leave spent at Kinshasa was not submitted to the Joint Appeals Board.

The Tribunal, having deliberated from 8 to 22 May 1969, now pronounces the following judgement:

I. The Tribunal is of the opinion that only two points in the Applicant's pleas merit consideration, namely, point B, in which he requests the rescission of

the two decisions dated 24 May 1967 and 6 September 1968 respectively, and point D, in which he claims compensation for the material and moral injury sustained.

The preliminary and provisional measures which the Applicant requests the Tribunal to order in point A are no longer relevant: most of the requests under this heading have been met, as the Applicant recognizes in his written observations, and it is, furthermore, physically impossible to hear Mr. Miceli, since he died on 29 January 1969.

With regard to point C concerning the obligations whose specific performance the Applicant is requesting, the plea for compensation in respect of the leave which he was unable to take as a result of events in 1967 is not receivable, because it was not submitted to the Joint Appeals Board; the other pleas are linked to the pleas made under point B.

The Tribunal is thus primarily called upon to rule on the validity of the Respondent's decision dated 24 May 1967 to terminate the Applicant's services as of 4 August 1967, and on the validity of the Respondent's decision dated 6 September 1968 to pay the Applicant the indemnity recommended by the Joint Appeals Board on an *ex gratia* basis.

II. In his application and written observations, the Applicant has set out the grounds he invokes in support of his request for the rescission of the two above-mentioned decisions. His principal contention is that when he was serving in the Police Training Project at Kinshasa, an oral promise that his contract of employment would be extended from 5 August to 31 December 1967 was made to him by the Deputy Resident Representative of the United Nations Development Programme at a meeting of all the experts assigned to that Project, which was held at Kinshasa on 12 January 1967. The Applicant accepted that extension. On 14 February 1967, he was given permission to go on home leave from 25 February to 15 April 1967. On 20 March 1967, during his absence, a second meeting took place at Kinshasa at which the Deputy Resident Representative gave the other experts confirmation of the decision of 12 January 1967 to extend their contracts of employment.

According to the Applicant, the offer to extend the contracts of the Project experts made on 12 January 1967 and accepted by the Applicant constitutes a formal contractual undertaking which committed the Respondent to continue the Applicant's appointment beyond the date of expiration of his contract. In the Applicant's view, the justification for regarding such a promise as valid, even when made orally, is to be found in the consistent practice of the Administration, under which there is no need whatsoever for minutes or a record of a meeting in order to make such action legally valid. The Applicant also points out that he was authorized to take home leave less than six months before the date of expiration of his contract, which implied that his employment would be continued after 4 August 1967. Finally, he points out that the Resident Representative requested the approval of the Congolese Government for the extension of the Project until 31 December 1967.

The Applicant thus holds that his contract was extended beyond 4 August 1967 and infers that this imposes a number of obligations on the Respondent, of which he requests the specific performance.

The Respondent does not deny that the two meetings of 12 January and 20 March 1967 were held by the Deputy Resident Representative, or that the Deputy Resident Representative offered the experts an extension of their contracts. But he disputes the view that preparatory measures intended to ensure the continuation of a project sufficed to extend a fixed-term contract, and holds that the contractual relationship ceased with the expiration of the Applicant's contract on 4 August 1967.

III. The Tribunal notes from the file that, on 14 February 1967, the date on which the Applicant was authorized to go on home leave, the Acting Principal Adviser for the Project prepared, on the instructions of the Deputy Resident Representative, a confidential report concerning a financial transaction in which the wife of another expert was said to have been involved; the Applicant, without being named, was also referred to in the report as the victim of a "flagrant swindle". This confidential report was submitted to Headquarters. The Chief of the Section for Africa, Bureau of Technical Assistance Operations, received a memorandum dated 27 April 1967 from the Deputy Resident Representative drawing his attention to the report, indicating that the contracts of the two experts concerned were about to expire and raising the question of their possible extension. The Technical Assistance Recruitment Service informed the Deputy Resident Representative on 11 May 1967 that, in view of the information provided in his memorandum of 27 April 1967, the Recruitment Service had decided not to extend the appointment of the two experts. On 24 May 1967, the Deputy Resident Representative notified the Applicant of the conditions under which he was to leave Kinshasa on 12 June 1967, because of the expiration of his contract and the need to take the thirty-eight working days' leave he had accrued. The Applicant protested against this decision to the Deputy Resident Representative in a memorandum of 31 May 1967. He then addressed a letter to the Secretary-General of the United Nations, requesting him to reconsider his decision. The Secretary-General having refused to do so, the Applicant appealed to the Joint Appeals Board, which concluded in its report that by sending the Applicant on home leave after the oral offer made by the Deputy Resident Representative, the Administration had given the Applicant a "legitimate expectancy of the extension of his fixed-term appointment from 5 August 1967 through 31 December 1967", and that consequently the Respondent was under the moral obligation to carry out such an extension. Rejecting the Respondent's argument based on the reduction of staff, the Joint Appeals Board concluded that the Applicant's fixed-term contract should have been extended from 5 August to 31 December 1967. However, in view of the retrenchment of the Project as a result of circumstances arising after the offer made by the Deputy Resident Representative but before the date on which the extension would have taken effect, the Joint Appeals Board nevertheless recognized that the immediate termination of the extended appointment was warranted, and at the same time recommended that the Administration should pay the Applicant an indemnity equivalent to the amount of termination indemnity to which he would have been entitled under Annex III to the Staff Regulations, had his appointment been extended until 31 December 1967 and then terminated forthwith.

The Applicant was informed that the Respondent had accepted the recommendations of the Joint Appeals Board and agreed to pay him, *ex gratia*, the indemnity proposed by the Board, in accordance with Annex III to the Staff Regulations and rule 209.5 of the Staff Rules. It was stated in the letter of notification addressed to the Applicant by the Acting Director of Personnel that the

Respondent's decision was "based on the moral obligation which . . . has been created by the particular circumstances of the case, and not on any legal obligation".

Having rejected the settlement of the case in the terms of this decision by the Respondent, the Applicant filed an application to the Tribunal, relying on the grounds set out above.

IV. In support of the decisions which he took in this case, the Respondent argues that the decision not to renew the Applicant's fixed-term appointment was a matter within the Respondent's discretion, and that once the Applicant's contract had expired, he no longer had any right or entitlement to employment. The Respondent invokes the clause of the Applicant's contract which states: "This project appointment is for a fixed term of one year from the effective appointment date shown above. It therefore expires without prior notice on the fourth day of August 1967. . . . This appointment carries no expectancy of renewal or conversion to any other type of appointment in any activity of the United Nations."

On the strength of this clause, the Respondent holds that only a written offer of appointment by the responsible official can be regarded as valid, and states that in this specific case he was not under a legal obligation to state the reasons for his decision or to initiate any kind of procedure.

V. With respect to point D of the Applicant's pleas, the Tribunal notes that the Applicant bases his plea for compensation for material injury on loss of earnings resulting from his rejection of the offer of a position as lucrative as the one he occupied in the United Nations; he states that he also sustained a loss of 600,000 Congolese francs in connexion with the sale of his car on his departure; in addition, personal effects were sold at very low prices, raising the total to 800,000 Congolese francs; if account is taken of further expenditure in the Congo and in Syria as a result of the promise to extend his contract, the material injury sustained allegedly amounts to an over-all total of \$4,000. The moral injury sustained is stated to consist in the disclosure of a personal matter on which a pejorative construction was placed in a confidential report by the Administration, thus reflecting upon the Applicant's honour.

VI. With respect to the Respondent's decision of 24 May 1967, the Tribunal considers that there is no justification for the Applicant's contention that it was nugatory in view of the extension of his contract.

The fact that the Deputy Resident Representative called meetings of the experts associated with the Project on 12 January and 20 March 1967 and gave them to understand that their contracts would be extended to 31 December 1967 if they so desired is not sufficient to constitute a contractual obligation which is definitively binding upon the Respondent. The statements of the Deputy Resident Representative could at most constitute a proposal made to the experts subject to the approval of the Respondent, who alone has authority to engage staff for employment by the Organization.

Moreover, the fact that, a few weeks after the meeting of 12 January 1967, the Applicant was authorized to go on home leave from 25 February to 15 April 1967 and the fact that the Congolese Government approved the extension of the experts' contracts or the continuation of the Project do not suffice to give legal force to an oral promise which did not emanate from the authority competent to conclude the contract and of which, moreover, no minute or record was kept. The overriding interest of sound administration requires that contracts of appointment and any subsequent amendments to such contracts should be safe-

guarded by being in written form. In the circumstances of the case, it is therefore impossible to consider that the Respondent was under an obligation to renew the Applicant's contract.

The Tribunal having reached the conclusion that the Respondent was not obliged to renew the Applicant's contract, the Respondent's decision of 6 September 1968 is not open to criticism as being based on a "moral obligation . . . and not on any legal obligation".

VII. The decision of 24 May 1967 was taken by the Respondent to notify the Applicant of the conditions under which his employment would be terminated. In particular, it specified how the leave to which he was entitled would be taken and, on this basis, ruled that his repatriation would take place almost two months before the normal expiration of his contract. The decision was worded as follows:

"Since your contract is about to expire on 4 August 1967, I would appreciate it if you would immediately get in touch with Miss Yannaki (Room 412) regarding the formalities to be completed before your departure from Kinshasa.

"As it is provided in the regulations of the United Nations Bureau of Technical Assistance that the leave period should be included in the duration of the contract, I wish to inform you that you will have a balance of 38 working days of leave by 12 June 1967. Consequently, instructions will be given to the Travel Office to ensure your repatriation on that date."

The Respondent, both in the Joint Appeals Board and in his answer, has given as the reason for the non-renewal of the Applicant's contract the desire to reduce the scope of the Project and hence the number of experts. The Tribunal notes, however, that the Congolese Government's consent to this policy was not given until the beginning of June 1967, i.e. after the decision in question had been taken. It is clear from the file that the true reason for the non-renewal of the Applicant's contract was a private financial transaction which was the subject of the confidential report of 14 February 1967.

It is therefore indisputable that the Respondent's decision not to renew the contract was based on the Applicant's "conduct". As was pointed out by the Joint Appeals Board, the very circumstances in which he was informed of the expiration of the contract, as well as the fixing of the date on which his services were to be terminated, may have contributed to the impression that disciplinary action was being taken.

VIII. The Joint Appeals Board therefore rightly stated in its report that the decision:

". . . was not so much based on the exigencies of the service as on extraneous considerations with disciplinary implications. On a mere suspicion of the appellant's involvement in the incident referred to above, it was decided not only to withhold the extension of his appointment but also to have him separated from the service as soon as his accrued annual leave permitted. Thus, the accrued leave was used as a device to reduce the duration of the appellant's fixed-term appointment and to hasten his repatriation. He was in fact served notice to be ready to leave Kinshasa within less than three weeks after the notice."

The Applicant no doubt discussed the actions imputed to him with certain staff members as early as the beginning of February. The affair had attracted considerable attention, but the Applicant apparently did not have an opportunity

to discuss his conduct with his superiors before he received notification of the termination of his services, or even after such notification.

It is indisputable that the terms of the notification of 24 May 1967 and the circumstances in which that notification was made were, having regard to the functions performed by the Applicant, likely to cause him injury.

The Respondent no doubt caused the injury in the exercise of contractual rights and in giving notice of the date of the termination of the Applicant's employment, but it is none the less true that, in so doing, he disregarded the principle of good faith in relations between the parties.

IX. Considering the rules applicable to fixed-term contracts, considering the decision taken by the Respondent on the recommendation of the Joint Appeals Board and the indemnity awarded in that connexion, considering also that the allegations of material injury are unfounded because they are linked to the date on which the Applicant's services were terminated, a date which the Respondent was in any case entitled to fix as he did, the Tribunal decides that the finding in the preceding paragraph of the Judgement that the Respondent disregarded the principle of good faith is sufficient to redress the injury sustained by the Applicant.

X. The remainder of the application is rejected.

(Signatures)

CROOK
Vice-President, presiding
Suzanne BASTID
Member

Louis IGNACIO-PINTO
Member
Jean HARDY
Executive Secretary

Geneva, 22 May 1969.

Judgement No. 129

(Original: English)

Case No. 128:
Gallianos

Against: The Secretary-General
of the United Nations

Request for rescission of a decision taken by the Secretary-General on the recommendation of the Advisory Board on Compensation Claims.

Request for the rescission of the decision not to renew the Applicant's contract.—The request is not receivable as it was raised beyond the time-limits prescribed in article 7, paragraph 4, of the Statute of the Tribunal.

Claim for compensation for damages arising from non-employment by another organization.—The Tribunal cannot take cognizance of this claim as it was not subject to prior internal procedures.

Principal request for the rescission by the Tribunal of the decision based on the recommendation of the Advisory Board on Compensation Claims and for a ruling that the illness from which the Applicant was suffering was attributable to the performance of official duties in the service of the United Nations.—Conclusion of the