

Judgement No. 131

*(Original: French)*Case No. 131:
Restrepo*Against: The Secretary-General
of the United Nations*

Termination of the employment of a staff member holding a permanent appointment, on the ground of unsatisfactory service.

Request for the rescission of the termination decision.—Judicial precedents of the Tribunal in respect of permanent appointments.—Absence of any explicit indication of the reasons for the termination in the contested decision.—When the employment of a staff member who holds a permanent appointment is terminated, it is necessary to indicate explicitly the reasons for termination.—The procedural irregularity in this case does not suffice to justify the rescission of the decision contested because the Applicant was in fact aware of the real reason for her termination and consequently, when she exercised her right of appeal, she was in a position to argue her case properly.—Procedural error whereby the conclusions of the Appointment and Promotion Board were not initially communicated to the Applicant.—This error does not constitute a sufficient ground for rescinding the contested decision, since excerpts from the report of the competent Working Group and from the recommendation of the Board had been communicated to the Applicant.—The procedure subsequently followed before the Joint Appeals Board was correct.—Before a staff member holding a permanent appointment is terminated, the Secretary-General must follow a complete, fair and reasonable procedure.—The five-year review is a specific example of such a procedure.—The procedure before the Working Group was correct.—There is no allegation of prejudice.—The request is rejected.

The application is rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Héctor Gros Espiell, Vice-President, presiding; Madame Paul Bastid; Mr. Louis Ignacio-Pinto; Mr. Francis T. P. Plimpton, alternate member;

Whereas, at the request of Constanza Restrepo, a former staff member of the United Nations and the Applicant herein, the President of the Tribunal, with the agreement of the Respondent, extended successively to 31 July 1968, 30 September 1968, 30 November 1968, 31 January 1969, 28 February 1969 and 31 March 1969 the time-limit for the filing of an application to the Tribunal;

Whereas, on 31 March 1969, the Applicant filed an application requesting the Tribunal:

“1. To rescind the decision terminating my permanent appointment communicated to me in a letter dated 21 February 1967 from the Deputy Director of Personnel of the United Nations;

“2. To order my reinstatement;

“3. To order, in the event that the Administration exercises the option given under article 9.1 of the Statute of the Administrative Tribunal, the payment of compensation in an amount equal to two years' net base salary, based on the following considerations:

“(a) The difficulty and the time required in finding a job suitable for my background as a Spanish typist.

“(b) My age is 50.

“(c) The chances of finding other kinds of employment are slight.”;

Whereas the Respondent filed his answer on 9 June 1969;

Whereas the Applicant filed written observations on 22 July 1969;

Whereas, on 3 October 1969, the Respondent submitted a memorandum in reply to two questions put by the Tribunal;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 21 October 1958 as a Spanish typist at the G-2 level under a short-term appointment for the duration of the thirteenth session of the General Assembly. She re-entered the service on 5 February 1959 at the same level under a short-term appointment for three months which was converted to a probationary appointment on 5 May 1959. She was promoted to the G-3 level on 1 October 1959 and received a permanent appointment on 1 May 1961. During her employment with the United Nations, the Applicant served as a typist in the Spanish Typing Unit of the Stenographic Service, Office of Conference Services, except for an assignment for one year (1 February 1962-1 February 1963) as a clerk in the Official Records Editing Section, Office of Conference Services. The Applicant's services were evaluated in six periodic reports. Five of them related to her work in the Spanish Typing Unit and were prepared by the Supervisor of the Unit (or her assistant) as the first reporting officer and by the Chief of the Stenographic Service as the second reporting officer; they described the Applicant as “a staff member who maintains a good standard of efficiency” although, in two reports, this over-all rating was qualified by reservations as to output or quality of work. The sixth periodic report pertained to the Applicant's one-year assignment in the Official Records Editing Section and was prepared by the Chief of that Section as the first reporting officer and by the Director of the Language and Meetings Service as the second reporting officer; it described the Applicant as “a staff member who maintains only a minimum standard”. The Applicant's permanent appointment became due for the first five-year review in 1966. Working Group No. II of the Appointment and Promotion Panel carried out the review in December 1966. The Working Group had before it a joint recommendation by the Office of Conference Services and the Office of Personnel that the Applicant's permanent appointment be terminated on the ground that she had not maintained the required standard and that, on the basis of her past performance, it could not be expected that her performance would improve. In its report, dated 21 December 1966, the Working Group, by 4 votes in favour and 3 against, recommended approval of the joint recommendation. The Working Group's report was endorsed by the Appointment and Promotion Board and, on 21 February 1967, the Deputy Director of Personnel informed the Applicant that the Secretary-General had decided to terminate her permanent appointment as of that date in accordance with the provisions of Staff Regulation 9.1 (a) and to grant her compensation in lieu of notice under Staff Rule 109.3 (c). On 28 February 1967, the Applicant sent the Secretary-General a letter requesting that the administrative decision terminating her employment be reviewed. On the same day, she asked the Deputy Director of Personnel to communicate to her the recommendation of Working Group No. II of the Appointment and Promotion Panel. By a letter of 5 May 1967, the Deputy Director of Personnel communicated to the Applicant excerpts from the Working Group's report relating to her case; he also advised

her that her case had been re-examined very carefully following her letter of 28 February 1967 to the Secretary-General, but that no grounds had been found to change the decision terminating her appointment. The Applicant having filed an appeal with the Joint Appeals Board, the Board submitted its report on 26 February 1968. The concluding section of the report read as follows:

“Conclusions and Recommendations

“20. The appellant sought a reversal of the decision to terminate her permanent appointment on the ground that it was vitiated by improper motive resulting from personal prejudice on the part of her immediate supervisor. She has, however, failed to substantiate her allegations. The Board found nothing in the evidence that would indicate that any element of prejudice had influenced or entered into the finding of unsatisfactory services made by the Appointment and Promotion bodies. The affirmative finding of cause for termination was made after full examination of the facts and in accordance with due process. In the view of the Board, the Secretary-General’s decision, based upon such a finding, must accordingly be upheld. The Board therefore unanimously decided to make no recommendation in support of the appeal.”

On 8 March 1968, the Acting Director of Personnel informed the Applicant that, after re-examining her case in the light of the Board’s report, the Secretary-General had decided to maintain his decision to terminate her appointment under Staff Regulation 9.1 (a). On 31 March 1969, the Applicant filed the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The Applicant’s permanent appointment was terminated without any reason. The letter of termination refers to Staff Regulation 9.1 (a), but there is no evidence indicating the grounds for termination either prior to or after the Secretary-General’s decision. In Judgement No. 85, the Tribunal ruled that a mere reference to Staff Regulation 9.1 (a) in the letter of termination was a non-disclosure of grounds of termination.

2. A complete, fair and reasonable procedure should have been carried out prior to the decision of termination:

(a) With regard to the procedure prior to the Appointment and Promotion Board and the procedure before the Board, no evidence shows that procedures required by Administrative Instruction ST/ADM/SER.A/437 and Personnel Directive No. 11/58 were fulfilled;

(b) The procedure before Working Group No. II was incomplete: the procedure prescribed by Administrative Instruction ST/ADM/SER.A/437 was not complied with; the Working Group does not seem to have given sufficient consideration to or have made a special effort to inquire into some of the statements made by the Applicant; and the person who was most qualified to testify concerning the Applicant’s work was not interviewed by the Working Group.

3. The evidence relating to the Applicant’s work given before the Working Group was inaccurate and not consistent with the facts or with the written evidence recorded in the periodic reports:

(a) The contents of the joint recommendation submitted to the Working Group were contrary to the periodic reports;

(b) The statements made before the Working Group were inconsistent with the periodic reports;

(c) Evidence of the Applicant's satisfactory service as manifested by the award of annual increments was ignored.

4. The decision of termination was not consistent with the Administration's previous decisions concerning the Applicant's promotion and the award of her permanent appointment.

5. The interpretation and application of Staff Rule 111.1 (b) by the Joint Appeals Board was incompatible with Staff Regulation 11.1.

Whereas the Respondent's principal contentions are:

1. The evaluation by the Secretary-General of the Applicant's services as unsatisfactory is not reviewable by the Tribunal.

2. The Secretary-General's decision was not arbitrary or motivated by prejudice or other extraneous factors. The Applicant's periodic reports contained unfavourable comments, and the grant of annual increments did not preclude a determination of unsatisfactory services. Moreover, although submission to the Appointment and Promotion Board is not a prerequisite for termination under Staff Regulation 9.1 (a), the Secretary-General's decision was reached only after a report by the Board, which took account of the Applicant's over-all record.

3. No procedural right of the Applicant was violated. The Applicant was orally informed of the joint recommendation; the notice of termination referred to Staff Regulation 9.1 (a), and it is evident from the surrounding circumstances that the Applicant knew that the decision was based on the ground of unsatisfactory services; the Applicant had been informed of the "adverse evidence" presented to the Working Group; the Working Group gave adequate consideration to the various points raised by the Applicant; the Applicant did not request the Working Group to interview her immediate supervisor, and her entire case before the Joint Appeals Board rested on the allegation of personal animosity on the part of such immediate supervisor.

4. There is no basis for the contention that Staff Rule 111.1 (b)—which was duly reported to the General Assembly—violates the provisions of Staff Regulation 11.1.

The Tribunal, having deliberated from 1 to 10 October 1969, now pronounces the following judgement:

I. The Applicant first of all requests the rescission of the decision terminating her permanent appointment, communicated to her in a letter dated 21 February 1967 from the Deputy Director of Personnel.

II. The Applicant held a permanent appointment as from 1 May 1961.

In one of its earliest judgements, the Tribunal stated: "This type of appointment has been used from the inception of the Secretariat to ensure the stability of the international civil service and to create a genuine body of international civil servants freely selected by the Secretary-General". In the same judgement, the Tribunal also stated: "Permanent appointments cannot be terminated except under staff regulations which enumerate precisely the reasons for and the conditions governing the termination of service" (Judgement No. 29, *Gordon*).

In another judgement, the Tribunal stated: "In addition, having in mind the very substantial rights given by the General Assembly to those individuals who hold permanent appointments in the United Nations Secretariat, the Tribunal has considered that such permanent appointments can be terminated only upon a decision which has been reached by means of a complete, fair and reasonable

procedure which must be carried out prior to such decision" (Judgement No. 98, *Gillman*).

III. In his letter to the Applicant of 21 February 1967, the Deputy Director of Personnel informed her that the Secretary-General had "decided to terminate [her] permanent appointment in accordance with the provisions of Staff Regulation 9.1 (a)", without explicitly indicating the reasons for the termination.

The first paragraph of Staff Regulation 9.1 (a) defines three cases in which the Secretary-General may terminate the appointment of a staff member who holds a permanent appointment.

As it has stated in previous cases, the Tribunal considers that, when the appointment of a staff member who holds a permanent appointment is terminated, it is necessary to indicate the provision on which the termination is based, and also to indicate explicitly and specifically the facts which constitute grounds for the termination; the reasons for termination must be disclosed to the person concerned in the letter informing him of the decision (Judgement No. 85, *Carson*). If the Secretary-General acted otherwise, he would not only be disregarding Staff Regulation 9.1 (a) but, allowing the terminated staff member to be kept in ignorance of the reasons for his termination, would at the outset be depriving him of the right to file an appeal with a full knowledge of the facts.

IV. The explanation given by the Respondent on 3 October 1969, when the Tribunal asked him to explain why the reasons for the termination had not been specified in the letter of 21 February 1967, does not constitute a satisfactory reply and shows only that this was a practice followed at the time by the Office of Personnel.

V. Bearing in mind the circumstances of the case, however, the Tribunal considers that this procedural irregularity does not suffice to justify the rescission of the decision contested.

It is clear that at the time of her termination the Applicant knew—although not officially—that her services were considered unsatisfactory. In her letter of 28 February 1967 requesting that the decision terminating her appointment should be reviewed, she said: "If the termination is on the ground of unsatisfactory service, I believe that this appraisal is in error...", thus proving that she presumed that this was the reason for the termination. In fact, however, it was not merely such a presumption which existed at that date; for the Applicant was then fully aware that her services were considered unsatisfactory. In a letter of 4 November 1966 from Mr. Victor Morozov, Administrative Officer in the Office of Personnel, the Applicant had been informed that her permanent appointment would shortly be reviewed after five years of service, and on 5 December 1966 Mr. Morozov had invited the Applicant to his office and informed her "of the joint recommendation of the Office of Conference Services and the Office of Personnel to terminate her permanent appointment at the time of the five-year review on the basis of her unsatisfactory service".

In its report of 21 December 1966, Working Group No. II stated that the Applicant had been interviewed for approximately two hours on 15 December 1966. As is shown by paragraphs 9, 10 and 11 of the report, the Applicant's attention had been drawn to questions relating to her output. This is confirmed by the written statement dated 18 December 1966 which the Applicant herself submitted to the Working Group in connexion with her interview of 15 December and which shows that she was aware of the nature of the questions under consideration.

This being so, there is no doubt that the Applicant was in fact aware of the real reason for her termination and that consequently, when she exercised her right of appeal, she was in a position to argue her case properly.

VI. The conclusions of the Appointment and Promotion Board of 2 February 1967, approving the recommendation of Working Group No. II of 21 December 1966, had not been officially communicated to the Applicant when the letter of 21 February 1967 informing her of the Secretary-General's decision to terminate her appointment was sent to her.

The fact that these conclusions were not initially communicated to the Applicant constitutes another procedural error which, again, was not satisfactorily explained in the memorandum of 3 October 1969 submitted by the Respondent in reply to the questions put by the Tribunal.

It seems that this too was a practice followed at the time by the Secretariat, although not invariably, since the Tribunal has in the past dealt with cases in which the Director of Personnel communicated the recommendations of the Working Group and the subsequent conclusions of the Board to the persons concerned (Judgement No. 98, *Gillman*).

However, in the view of the Tribunal, this procedural error does not constitute a sufficient ground for rescinding the decision to terminate the appointment, since excerpts from the report of Working Group No. II and from the recommendation of the Board had been communicated to the Applicant by the letter of 5 May 1967 from the Deputy Director of Personnel.

This being so, while it is true that when the Applicant availed herself of her first administrative remedy she was not officially aware of the reasons for her termination and had also not been officially informed of the conclusions of the Appointment and Promotion Board, the fact remains that on 11 July 1967, when she filed an appeal with the Joint Appeals Board, she knew what had gone before the termination decision and on what grounds that measure was based.

Moreover, the full text of the report of Working Group No. II—excerpts from which had been communicated to the Applicant on 5 May 1967, as noted above—was submitted on 7 February 1968 to the Joint Appeals Board, which examined it before preparing its report of 26 February 1968.

Consequently, the Tribunal considers that that error was corrected by the procedure subsequently followed before the Joint Appeals Board.

VII. The Tribunal does not consider itself competent to rule on the question whether or not the Applicant's services were satisfactory, since the Secretary-General's appraisal in that respect is final (Judgement No. 98, *Gillman*), but his decision must be reached by means of a complete, fair and reasonable procedure.

VIII. Consequently, it is necessary to consider whether the procedure followed for the termination of the Applicant's appointment was complete, fair and reasonable.

IX. The Applicant's appointment was terminated following a procedure initiated as part of the five-year review of permanent appointments.

This procedure, which is provided for in the Staff Rules (Rule 104.13), is designed to determine "whether the staff member concerned has maintained the standards of efficiency, competence and integrity established in the Charter" (Staff Rule 104.14 (f) (ii) (B)).

Since this is a procedure that may lead to the termination of the appointment of a staff member holding a permanent appointment, which can be terminated

only under the provisions of Staff Regulation 9.1, it is necessary that the five-year review system provided for in the Staff Rules and the proceedings before the Appointment and Promotion Board and the Working Group should constitute the complete, fair and reasonable procedure which must be carried out prior to the termination of the appointment of any staff member holding a permanent appointment.

The Tribunal has stated previously that, in view of the composition of the Working Group and the procedure which it follows in arriving at a recommendation, there are grounds for concluding that the examination of a staff member's services reports by the Working Group and by the Board is in principle a specific example of the complete, fair and reasonable procedure which one is always entitled to require should be carried out prior to the termination of a staff member's appointment under Staff Regulation 9.1 (a).

X. The Tribunal notes that the examination of the Applicant's case by Working Group No. II fulfilled all these conditions and that the procedure followed permitted adequate consideration of the unfavourable judgements concerning the Applicant's work formulated by the competent officers of the Office of Conference Services and the Office of Personnel (report of Working Group No. II, para. 7).

The examination of the case was reasonably detailed. The Applicant, who had been informed on 4 November 1966, by a letter from Mr. Morozov, of the procedure that was to be followed, also knew from 5 December 1966 onward, following an interview she had with him, what would be the gist of the joint recommendation of the Office of Conference Services and the Office of Personnel, based on the fact that her services did not come up to the standard. That being so, she was in a position to argue her case fully to Working Group No. II when it interviewed her on 15 December 1966. Furthermore, she had the opportunity to explain her position in writing in the memorandum she submitted to the Working Group on 18 December 1966.

XI. Having found that the procedure before Working Group No. II prior to the termination of the appointment was correct and that during the present proceedings the Applicant has neither alleged nor sought to prove that in this case the decision contested involved an element of prejudice or any other extraneous motives, the Tribunal has no occasion to consider the contentions in the application relating to the quality of the Applicant's services, on which the Secretary-General has full discretion and authority to make the final judgement.

XII. Since there are no grounds for rescinding the decision contested, the Tribunal has no occasion to comply with the requests made in paragraphs 2 and 3 of the pleas in the application.

XIII. For these reasons, the application is rejected.

(Signatures)

H. GROS ESPIELL
Vice-President, presiding

Suzanne BASTID
Member

Louis IGNACIO-PINTO
Member

Francis T. P. PLIMPTON
Alternate Member

Jean HARDY
Executive Secretary

New York, 10 October 1969.