Judgement No. 143

(*Original: French*)

Case No. 115: Roy

Against: **The Secretary General of the International Civil Aviation Organization**

Discharge for misconduct of an ICAO staff member holding a permanent appointment.

Request for oral proceedings.—The request is rejected as oral proceedings were held during the first phase of the case.

The correct procedure was followed by the Respondent in implementing Judgement No. 123 whereby the case was remanded for correction of the procedure.—The parties agree in principle that the termination of the Applicant's services should be considered as having taken place by mutual agreement and not by discharge for misconduct.—Disagreement remains concerning the date which is to be deemed to be the date of termination and the amount of the indemnity to be paid.—The real date of termination of the Applicant's services is 22 July 1966.—Implications of postulating a fictitious date.—Decision of the Tribunal that the termination of the Applicant's services should be deemed to have taken place by mutual agreement on 22 July 1966.—Award to the Applicant of an indemnity equal to nine months' salary, plus interest at 6 per cent per annum.—In the event of termination of service by mutual agreement, the Secretary-General may pay an additional indemnity.—Award to the Applicant of an additional indemnity equal to 50 per cent of nine months' salary.

The other pleas are rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Francis T.P. Plimpton; Mr. Francisco A. Forteza; Mr. Vincent Mutuale, alternate member;

Whereas on 29 May 1967 Mrs. Irene Lois B. Roy, a former staff member of the International Civil Aviation Organization, hereinafter called ICAO, filed with the Tribunal an application contesting the Respondent's decision to discharge her from service as a disciplinary measure;

Whereas, without deciding on the merits of the case, the Tribunal by its Judgement No. 123, dated 31 October 1968, ordered that:

(1) The case should be remanded for correction of the procedure in accordance with article 9, paragraph 2, of the Statute of the Tribunal;

(2) The Applicant should be paid as compensation a sum equivalent to two months of her net base salary for the loss caused to her by the procedural delay;

(3) The Applicant should be paid $400 as costs;

Whereas on 15 September 1970 the Applicant filed a statement in which she asked that the following measures should be taken:

> "(i) Rescission of the Secretary General's decision as from the date on which he rendered a final decision, i.e. 27 May 1970, with termination by 'mutual agreement' instead of 'misconduct';

"(ii) Payment of an indemnity equal to nine months' salary as provided for in paragraph 10.1, article V, part III of the ICAO Service Code;

"(iii) Payment of a further indemnity of an additional 50% provided under paragraph 12, article V, part III of the ICAO Service Code in cases of termination by mutual agreement between the Secretary-General and the staff member concerned in the case of a staff member holding a permanent contract of employment;

"(iv) Payment of full salary from the effective date of dismissal, to wit: from 22 July 1966 to 27 May 1970. This should include the 6% increase granted 1 May 1967, to which I would have been entitled as a permanent ICAO staff member, and $300 annual language supplement which was also part of my salary at the time of dismissal—with interest thereon at the current rate;

"(v) An *ex-gratia* payment as compensation for damages suffered:

"(*a*) To my reputation by being dismissed improperly for 'misconduct';

"(*b*) For loss of salary due to the fact that I was unable to procure other employment;

"(*c*) For the worry I have been put through during the past four years while waiting for this matter to be finally settled;

"(*d*) For losses sustained in not being able to complete my service with ICAO until the date on which I would have been entitled to a full retirement pension.

"I respectfully request that this *ex-gratia* payment be set at an amount equivalent to two years' salary."

Whereas the Respondent filed his answer on 16 November 1970;

Whereas the Applicant submitted written observation on 30 November 1970;

Whereas the Applicant, on 2 March 1971, requested oral proceedings;

Whereas the facts in the case, subsequent to Judgement No. 123, are as follows:

In a letter to the Secretary General dated 22 November 1968 the Applicant contested the version of the incident of 6 June 1966 given in the memorandum of 7 June 1966 from her supervisor. On 20 December 1968 the Secretary General appointed Mr. R. G. Pouliot, a staff member of ICAO, to conduct an investigation into the incident of 6 June 1966, having regard to the provisions of article V, paragraphs 4 to 6, of part III of the Service Code. The investigation was conducted on 12 February and 2 May 1969 in the presence of the Applicant and her counsel, who had every opportunity to explain their case, to call witnesses and to question the witnesses called by the Respondent, and to produce documents. On 16 May 1969, Mr. Pouliot submitted his report, in which he concluded that the incident of 6 June 1966 had taken place substantially as described by the Applicant's supervisor in his memorandum of 7 June 1966. On 18 June 1969 the Secretary General sent the Applicant a copy of the report and of the verbatim record of the two hearings of the investigation, and a list of other complaints made against the Applicant which he proposed also to take into account when he reached his decision; he invited the Applicant to send him her submissions on the matter by 1 August 1969. The Applicant submitted her observations in a

letter to the Secretary General dated 29 July 1969. On 6 November 1969 the Secretary General informed the Applicant that he had decided to maintain the disciplinary measure of discharge for misconduct of which she had been notified on 22 June 1966. On 21 November 1969 the Applicant appealed to the Advisory Joint Appeals Board, which gave its opinion (No. 36) on 20 May 1970. The sections of the opinion entitled "Findings and Conclusions" and "Recommendation" read as follows:

"*Findings and conclusions*

"14. Examining the record at the disposal of the Board, including the result of the fresh investigation carried out in accordance with the requirements of the Service Code, the Board finds no grounds to vary its findings and conclusions recorded in paragraphs 23 to 27 inclusive of Opinion No. 30 . . ., except to the extent that in respect of paragraph 23 (9), there is considered to be less room for doubt, although by no means certain, that the Appellant's place in the roster for the day in question was as stated by the witnesses testifying against her. Accordingly, the statement in (iv) under paragraph 27 needs modification. . . . The Board *reiterates* its findings and conclusions as stated in paragraphs 23 to 27 inclusive of the said Opinion No. 30, and *adopts* them, as modified, for the purposes of this opinion.

"*Recommendation*

"15. Consequently, the Board finds no justification for departing from its original recommendation made in paragraph 29 of Opinion No. 30. The Board *recommends* that the Secretary General rescind his decision of 6 November 1969 and, in order to mitigate the effects of the over-severe action taken against the Appellant by discharging her for misconduct, exercise his discretion and negotiate the termination of the Appellant's services by 'mutual agreement', thus attracting the provisions of paragraphs 10.1 and 12, article V, part III of the Service Code.

"In view of the time that has elapsed since the Appellant was discharged, in part the result of lack of due process, the Board also *recommends* that the Secretary General offer a date of termination of the Appellant's services and indemnities in keeping with the spirit of the Board's conclusions."

In a letter dated 27 May 1970 the Secretary General asked the Applicant whether she agreed that the termination of her services from 22 July 1966 should be by mutual agreement and not by discharge for misconduct and that ICAO should pay her an indemnity equal to nine months' salary. On 10 June 1970 the Applicant agreed that the termination of her services should be by "mutual agreement". However, she asked that the date of termination should be 27 May 1970, the date of the Secretary General's latest decision, that she should be paid her full salary from 22 July 1966 to 27 May 1970, and that certain additional indemnities should be granted to her. On 11 June 1970 the Secretary General notified the Applicant that, as his proposals of 27 May 1970 had not been accepted by her, he reaffirmed the discharge for misconduct as from 22 July 1966; he added that he would vary this decision in accordance with the terms of his letter of 27 May 1970 if, before 30 June 1970, the Applicant accepted the terms specified in that letter without any qualification and in writing. On 29 June 1970 the Applicant notified the Secretary General that, as she had informed him on 10 June 1970, she accepted the Secretary General's offer of 27 May 1970 to the effect that the termination of her services should be by mutual agreement and not by discharge for misconduct, but that she could agree to neither the date for the termination

of her services, which, in her view, should be 27 May 1970, nor the amount of the indemnity proposed. On 30 June 1970 the Acting Secretary General informed her that the Secretary General's decision of 11 June 1970 was final. On 15 September 1970 the Applicant filed the above-mentioned statement.

Whereas the Applicant's principal contentions are:

1. In his proposals of 27 May 1970 the Respondent disregarded the recommendations of the Advisory Joint Appeals Board with regard to both the date of termination of the Applicant's services and the amount of the indemnities.

2. The Applicant maintains the claims for indemnities submitted in her original application, bearing in mind the injustice and loss of reputation which she has suffered and the financial losses which she has sustained as a result of the Secretary General's hasty and unfounded decision, taken without proof and without her case receiving a fair hearing.

3. Because of her dismissal for "misconduct" and because the Respondent delayed in providing her with a reference, the Applicant was unable to find employment. She cannot be completely rehabilitated until justice has been done.

4. Legally speaking, the Applicant is merely suspended from her duties. She is therefore still in the employ of ICAO. She could not be dismissed until the proper procedure had been gone through and she was not guilty until proved otherwise.

Whereas the Respondent's principal contentions are:

1. The staff member who was appointed to carry out a fresh investigation of the Applicant's conduct on the day of the incident carried it out with scrupulous regard for the observance of correct administrative procedure. After the investigation the Secretary General showed equal regard for the observance of correct administrative procedure in his actions in relation to the Applicant.

2. The investigating officer made every effort to elucidate the circumstances in which the incident took place and to ascertain whether the Applicant's statements regarding the reasons for her late arrival on the day of the incident were true.

3. The findings and conclusions of the Advisory Joint Appeals Board are not consistent with the clear testimony of witnesses other than the Applicant and are therefore unacceptable.

4. The Applicant is neither under suspension, nor in the employment of ICAO.

The Tribunal, having deliberated from 5 April 1971 until 15 April 1971, now pronounces the following judgement:

I. The Applicant has submitted to the Tribunal a request for oral proceedings. The Tribunal recalls that oral proceedings were held during the first phase of the present case and considers that further oral proceedings are not justified. The Tribunal therefore rejects the requests.

II. In its Judgement No. 123 the Tribunal considered the legality of the Respondent's decision to discharge the Applicant for misconduct with effect from 22 July 1966 and concluded that the correct procedure had not been followed. The Tribunal decided to remand the case for correction of the procedure.

The procedure subsequently followed by the Respondent is set out above. The Tribunal considers that it is in conformity with the provisions of the ICAO Service Code and that the rights of the Applicant have been respected.

III. The procedure having been followed, there ensued the exchange of correspondence referred to above, between the Respondent and the Applicant, namely, the Respondent's letter of 27 May 1970, the Applicant's letter of 10 June 1970, the Respondent's letter of 11 June 1970 and the Applicant's letter of 29 June 1970.

This exchange of correspondence shows that the Respondent and the Applicant agree in principle that the termination of the Applicant's services should be considered as having taken place by mutual agreement and not by discharge for misconduct; the only areas of disagreement which remain concern the date which is to be deemed to be the date of termination and the amount of the indemnity to be paid.

IV. With regard to the date which is to be deemed to be the date of termination of the Applicant's services, the real date was, of course, 22 July 1966 and the Applicant has never since worked for ICAO. Consequently, if a fictitious date were to be postulated—such as that requested by the Applicant, 27 May 1970 (the date of the Respondent's first letter concerning the termination of the Applicant's services by mutual agreement)—it would follow that the Applicant would have to receive, in respect of a period of almost four years, her normal salary for work which she did not do. Moreover, to pay the salary as an indemnity would go beyond the provisions of article V, paragraphs 10, 11 and 12, of part III of the Service Code, which determine the maximum indemnities payable on termination of service by mutual agreement. The Tribunal therefore orders that the termination of the Applicant's services should be deemed to have taken place by mutual agreement on 22 July 1966. This decision is, of course, without prejudice to the determination, referred to in paragraph VI below, of any compensation which might be due to the Applicant on account of the disciplinary measure of discharge for misconduct which is now agreed to have been unduly severe.

V. Under the provisions of article V, paragraph 10.1, of part III of the Service Code, termination of service by mutual agreement entitles the Applicant, having regard to her length of service, to an indemnity equal to nine months salary. The Tribunal orders that this sum shall be paid to her, plus interest at 6 per cent per annum from 22 July 1966 to the date of the payment, because of the long period of time which has elapsed since the beginning of the case.

VI. Under article V, paragraph 12, of part III of the Service Code, the Applicant claims a further indemnity equal to 50 per cent of the indemnity provided for in paragraph 10.1 of that article. She also claims an indemnity equivalent to two years' salary.

The Applicant considers that this compensation is due to her because of the long time it has taken to settle the case and the injury caused by a disciplinary measure which is now agreed to have been unduly severe.

In its Judgement No. 123 the Tribunal, as it is authorized to do by its Statute, awarded the Applicant compensation equivalent to two months' salary for loss caused to her by procedural delay. As the case now stands, the Tribunal recognizes that this compensation alone cannot adequately compensate the Applicant for the losses she, as the holder of a permanent contract, sustained throughout almost five years as the result of discharge, which is deemed to have been too severe a measure. The Tribunal notes that the Service Code provides, in article V, paragraph 12 of part III, that in the event of termination of service by mutual agreement an additional indemnity may be paid by the Secretary General. The Tribunal

considers that the Service Code thereby authorizes, within certain limits, the payment of compensation appropriate to the injury suffered in each individual case.

Having regard to the circumstances of the case, the Tribunal considers that a sum equal to 50 per cent of nine months of the Applicant's salary would provide adequate compensation for the injury which she has suffered, and orders that this sum should be paid to her by the Respondent over and above what is provided for in paragraph V above.

VII. For these reasons, the Tribunal orders that:

(1) The termination of the Applicant's employment shall be deemed to have taken place by mutual agreement on 22 July 1966;

(2) The Respondent shall pay the Applicant the sums specified in paragraphs V and VI above;

(3) The other pleas of the Applicant are rejected.

(*Signatures*)

Suzanne BASTID
Vice-President, presiding

Francisco A. FORTEZA
Member

Francis T. P. PLIMPTON
Member

Jean HARDY
Executive Secretary

Geneva, 15 April 1971

STATEMENT OF MR. VINCENT MUTUALE

I have participated in the consideration of the case and in the preparation of the judgement, which I should have signed with the other members of the Tribunal if I had not been obliged to leave Geneva.

(*Signature*)
Vincent MUTUALE

Geneva, 8 April 1971

Judgement No. 144

(Original: English)

Case No. 141: Samaan

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

Request by a former staff member of the United Nations Emergency Force for payment of repatriation travel that was not undertaken.

Contention by the Respondent that the Tribunal is not competent on the grounds that the UNEF Staff Regulations for Local Employees excluded the application of the United Nations Staff Regulations and Rules and that the Applicant was not a staff member of the United Nations or an "other person" entitled to seek remedy before the Tribunal.—Non-existence of the internal appeals procedure provided for under