

VII. For the foregoing reasons, the application for revision is rejected.

(Signatures)

Francisco A. FORTEZA
Vice-President, presiding

Samar SEN
Member

Arnold KEAN
Member

New York, 6 October 1981

T. MUTUALE
Alternate Member

Jean HARDY
Executive Secretary

Judgement No. 278

(Original: English)

Case No. 261:
Tong

Against: The Secretary-General
of the United Nations

Termination of the indefinite appointment of a locally recruited staff member of a field office of the United Nations Development Programme (UNDP) on the ground of abolition of post.

The Applicant requests recognition of his entitlement to salary until his receipt of written notice of the termination of his appointment.—Staff Rule 109.3, paragraphs (b) and (c).—Closing of the UNDP office at Phnom Penh.—Exceptional character of the closing, brought about by events over which the parties had no control.—The Applicant's contract became ineffective by reason of force majeure.—Request rejected.—The delay in UNDP headquarters' notifying the Applicant of termination was inexcusable.—There is no justification for the practice of backdating official correspondence.

Applicant's claim for the recalculation of his termination benefits.—Decision of UNDP to pay the Applicant, a local employee, in dollars, the Cambodian riel having no value on the date of payment.—Use of the exchange rate in effect during the last month of the Applicant's service.—Claim rejected.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; Mr. Endre Ustor, Vice-President; Mr. Herbert Reis;

Whereas, on 21 April 1981, Eng Ngo Tong, a staff member of the United Nations Development Programme, hereinafter called UNDP, filed an application in which he requested the Tribunal:

“A. As a preliminary measure, to request the Respondent to produce certain files and documents which the Applicant believes to be pertinent to his case, and without which he cannot adequately present his claim; in particular:

- “(i) The file, if any, for the UNDP office in Phnom Penh covering the period preceding and following April 17, 1975;
 - “(ii) Cable No. 349 of 8 May 1975 from UNDP, New York, to UNDP, Bangkok;
 - “(iii) Memoranda or minutes, if any, of the meetings at UNDP Headquarters justifying the decision to close down the Phnom Penh office and abolish the Applicant’s post;
 - “(iv) The communications, if any, of the Resident Representative a.i., Phnom Penh, concerning the evacuation of international staff and their families, in March/April 1975 and the interim arrangements for the administration of the UNDP office;
 - “(v) The final report, if any, of the Resident Representative a.i., Phnom Penh, concerning the closing down of the office;
 - “(vi) Communications, if any, from the Resident Representative a.i., Phnom Penh, concerning the effect on local and semi-local staff of revisions in the operational rate of exchange after the riel was allowed to float in 1974;
 - “(vii) Records, notes or memoranda, if any, of UNDP’s efforts to trace local staff members after April 17, 1975.
- “B. To overrule the decision of the Secretary-General dated 20 January 1981 rejecting
- “(a) The Joint Appeals Board’s conclusion contained in paragraphs 44 and 45 that the UNDP Division of Personnel negligently failed to inform the Applicant, in July 1975, that his indefinite appointment had been terminated, and its recommendation that he be paid his salary and allowances for the period 17 April 1975 to 20 May 1976;
 - “(b) The Joint Appeals Board’s conclusion that the decision to apply a rate of exchange of 1650 riels to the dollar for the conversion of the Applicant’s termination benefits constituted non-observance of the provisions of UNDP Financial Rules and Administrative Field Manual, and its recommendation that the termination benefits, salary and allowances payable to the Applicant be computed and paid in dollars on the basis of a comparison with the salary and allowances of an internationally recruited staff member at a level equivalent to that which the Applicant had reached when his indefinite appointment was terminated.
- “C. To rule that the notice of termination, dated 17 April 1975, sent on 20 May 1976, and received by the Applicant on 16 October 1976, was illegal and invalid, and therefore violated the Staff Regulations and Rules and the Applicant’s Letter of Appointment; and
- “D. To order payment to the Applicant of his full salary and allowances for the period 17 April 1975 to 16 October 1976; less the amount already received by the Applicant; and
- “E. To order payment to the Applicant of an appropriate termination indemnity, less the amount already received by the Applicant; and
- “F. To order compensation to the Applicant for his prepaid air tickets lost in the closing of the UNDP office, Phnom Penh, in the amount of \$3,200; and

“G. To rule that the exchange rate of 1650 riels to the dollar was not applicable to transactions outside the Khmer Republic; and in any case became obsolete on 17 April 1975; and that the operative date for exchange rate purposes is the date of payment; and

“H. In the absence of a realistic rate of exchange for the riel, to calculate Applicant's entitlements in terms of equity, based on the quantum of goods and services a staff member of the Applicant's rank and seniority could expect to purchase, by reference to the salary and allowances of internationally recruited staff members at a F.S. level or locally recruited staff members at a G.S. level; and

“I. To order adequate compensation to the Applicant for the erosion in his entitlements caused by administrative delays, such compensation being calculated by reference to the cost-of-living index used by the United Nations; and

“J. To order reimbursement of expenses reasonably incurred by the Applicant in prosecuting this Appeal, such as cables, typing and postage.

“Because of the difficulties experienced in obtaining information pertinent to this Appeal, the Applicant requests that oral proceedings be held and witnesses called, in particular:

“Mr. Fernand Scheller, former UNDP Resident Representative, a.i., Phnom Penh;

“Mr. Jacques Godfrin, former Assistant Resident Representative, Phnom Penh;

“Dr. Michael Irwin, former Director, Division of Personnel, UNDP;

“Mr. Andrew J. Joseph, Regional Director, Bureau for Asia and the Pacific;

“Mr. Athanase Constantinidis, Senior Policy Co-ordination Officer, Division of Personnel, UNDP.”;

Whereas the Respondent filed his answer on 15 July 1981;

Whereas the Applicant filed written observations on 26 August 1981;

Whereas the Applicant submitted a statement of expenses on 1 September 1981;

Whereas on 11 September 1981 the Applicant, with reference to his request for the hearing of witnesses, indicated under article 15, paragraph 2, of the Rules the points to which the evidence was to refer;

Whereas the Applicant submitted additional information on 22 September 1981;

Whereas, at a public session held on 22 September 1981, the Tribunal heard the parties and two witnesses, namely Mr. Constantinidis and Mr. Carlos Vegega, Assistant Administrator for the UNDP Regional Bureau for Latin America;

Whereas, on 24 September 1981, the Applicant amended plea H of his application to read:

“H. In the absence of a realistic rate of exchange for the riel, to calculate the Applicant's entitlements in terms of equity, based on the quantum of goods and services a staff member of the Applicant's rank and seniority could expect to purchase, by reference to the percentage change in the Post Adjustment Index for Professional salaries at the same period.”

Whereas the Respondent submitted comments on amended plea H of the application on 5 October 1981;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Technical Assistance Board Office in Phnom Penh, Cambodia (now Democratic Kampuchea), on 15 February 1964. After serving under a succession of fixed-term appointments, he received on 1 May 1967 an indefinite appointment at the GS-5 level as an accounting clerk/typist "in the Secretariat of the [Phnom Penh] Office of the United Nations Development Programme". The letter of appointment specified that he was a local recruit and that in case of termination of the appointment the Administrator of UNDP would "give the staff member notice not exceeding 30 days". The Applicant was promoted to Administrative Assistant at the GS-6 level on 1 May 1969 and to Senior Administrative Assistant at the GS-7 level on 1 May 1972.

On 17 April 1975 the UNDP office in Phnom Penh was forced to close as a result of the internal conflict in Cambodia. The Applicant and his family managed to cross into Viet Nam, arriving in Saigon on 6 June 1975. From there he addressed a communication to the UNDP Resident Representative in Laos in which he renewed an application he had previously submitted for the post of Administrative Assistant in Vientiane. By cables dated 19 and 26 June 1975 the Resident Representative replied that another candidate had been designated and that he was informing Headquarters of the Applicant's communication. On 2 July 1975 the Chief of the Recruitment and Development Branch of the UNDP Division of Personnel sent the following cable to the Applicant's address in Saigon:

"DP136 COPY REIFENRATH [RESIDENT REPRESENTATIVE IN LAOS] POSITION ADMINASST LAOS MEANWHILE FILLED ARE AWARE REINFENRATHS STRONG SUPPORT BUT REGRET ADVISE NO OTHER OPENINGS IMMEDIATE FUTURE AVAILABLE."

On 31 July 1975 the Applicant acknowledged the cable and asked to be advised if other openings were available. On 9 February 1976 he wrote to the UNDP Division of Personnel through the International Committee of the Red Cross (ICRC), requesting assistance in connection with air tickets and a laissez-passer. On 20 May 1976 the Chief of the Policies and Procedures Section of the UNDP Division of Personnel sent him through ICRC the following reply:

"... In view of the fact that your indefinite appointment was terminated on 17 April 1975 as a result of the cessation of UNDP activities in Khmer Republic. I am very sorry to state that we were unable to obtain approval for the issuance of a new Laissez-Passer to you.

"We are, of course, very sympathetic to your situation and would like to assist you to the extent possible, but we must follow the relevant Rules and Regulations established by the UN General Assembly on this subject. In this connection, I confirm that you are entitled to a termination indemnity salary in lieu of termination notice of your indefinite appointment, as well as cash commutation of accrued leave and we are prepared to effect payment upon receipt of your advice on the bank account to which we should deposit the monies due.

"...

"Also enclosed is a formal letter of termination which we were unable to transmit at an earlier date for reasons outside our control."

The formal letter of termination, dated 17 April 1975 and signed by the Director of the UNDP Division of Personnel, read in part:

"I regret to inform you that due to unforeseen circumstances, the UNDP Office in Phnom Penh ceased to be operational on 17 April 1975.

"In view of the above, we have no option but to terminate your Indefinite Appointment for abolition of post under the provisions of Staff Regulation 9.1 (c). As it is not possible to give you the 30-day period of notice prescribed in your Letter of Appointment, you will receive compensation in lieu of 30 days' notice under the provisions of Staff Rule 109.3 (c), and your separation date will therefore be the same as the date on which the UNDP ceased to be operational, namely, 17 April 1975. You will also receive a termination indemnity of 8 months base salary in accordance with Annex III of the Staff Regulations.

"In the absence of your annual leave records, which were maintained locally and which are now unavailable to us, it has exceptionally been decided that you should receive the maximum amount of commutation permitted under Staff Rule 109.8, i.e. for 60 days 'accrued' annual leave.

" . . . "

On 18 October 1976 the Applicant sent the following cable to the UNDP Division of Personnel:

"RECEIVED URLETS 17 APR 1975 AND 20 MAY 1976 ON 16 OCT 1976 VIA ICRC HANOI STOP SHOULD NOT TERMINATION LETTER BE EFFECTIVE FROM THE DATE OF RECEIPT BY ME STOP PENDING CLARIFICATION EYE WISH TO GIVE NOTICE OF APPEAL IN ACCORDANCE WITH STAFF RULES STOP LETTER FOLLOWING STOP CAN UNDP ASSIST US WITH REPATRIATION PLEASE ACKNOWLEDGE TO MY ADDRESS 81 LE QUANG HIEN CHOLON VIETNAM"

On 24 October 1976 the Applicant requested in a letter to the Secretary-General that his termination be deemed effective 16 October 1976, the date on which he had received the termination notice. On 24 November 1976, having received no reply, he lodged a first appeal with the Joint Appeals Board. On 6 January 1977 the Applicant was offered a fixed-term appointment for one year as Administrative Assistant with the UNDP office in Jakarta, Indonesia; he accepted the appointment which, however, did not materialize. On 31 January 1977, in reply to the Applicant's letter of 24 October 1976, the Assistant Secretary-General for Personnel Services advised him that the Secretary-General had decided to maintain the date of 17 April 1975 as the relevant date of the termination of his appointment. On 6 April 1977 the UNDP Division of Personnel, replying to a query from the Applicant, cabled him that his termination benefits would be paid at the exchange rate of 1650 riels to the dollar "which was in effect at time separation from service April 1975". The Applicant was subsequently advised that, at that rate of exchange, those benefits would amount to approximately 825 dollars. On 16 April 1977 the Applicant contested the application of the rate of exchange of 1650 riels to the dollar for the conversion of his termination benefits. On 23 May 1977 the Assistant Secretary-General for Personnel Services informed him that the Secretary-General had decided to take no further action on the matter. On 11 August 1977 the Applicant received a fixed-term appointment as Administrative Assistant in the UNDP office in Dacca, Bangladesh, from where he was subsequently transferred to UNDP Headquarters in New York. On 4 October 1977 he lodged a second appeal with the Joint Appeals Board, on the question of the exchange rate at which his termination benefits should be computed. The Board submitted

its report on 7 March 1980. The Board's conclusions and recommendations read as follows:

“Conclusions and recommendations

(i) The first appeal

“44. The Board finds that the UNDP Division of Personnel was negligent in failing to inform the appellant, when communications between it and the appellant were re-established in July 1975, that his indefinite appointment with UNDP had been terminated on 17 April 1975. Accordingly, the Board finds that the termination of the appointment became effective only on 20 May 1976, when the Division sent to the appellant the letter dated 17 April 1975 by which the Director of the Division notified him of the termination of the appointment.

45. The Board recommends to the Secretary-General that, in addition to termination benefits, the appellant be paid his salary and allowances for the period 17 April 1975 to 20 May 1976. It further recommends to the Secretary-General that its finding that the effective date of the termination of the appellant's indefinite appointment was 20 May 1976 be reflected in the computation of the termination indemnity which, according to the letter of 17 April 1975 from the Director, UNDP Division of Personnel, was due to the appellant under Annex III to the Staff Regulations.

“(ii) The second appeal

“46. The Board decides that the appeal is not frivolous.

“47. The Board finds:

“(a) That, in the light of the usual practice in the interpretation and implementation of the provisions of UNDP Financial Rules 114.6 and 114.7 and of page V-B-1 of the UNDP Administrative Field Manual, the rate of exchange applicable to the conversion into dollars of the appellant's termination benefits and of his salary and allowances for the period 17 April 1975 to 20 May 1976 should have been the operational rate of exchange of the riel, if any, in effect on 6 April 1977;

“(b) That, actually, there was no such operational rate of exchange in effect on that date;

“(c) That, accordingly, the decision to apply a rate of exchange of 1650 riels for one dollar to the conversion of the appellant's termination benefits constituted non-observance of the provisions of UNDP Financial Rules 114.6 and 114.7 and of page V-B-1 of the UNDP Administrative Field Manual; and

“(d) That, in addition, that decision led to a result which was incompatible with the object and purpose of Staff Rule 109.3 (c) and 109.8 and of Annex III to the Staff Regulations.

“48. The Board recommends to the Secretary-General that the termination benefits due to the appellant and his salary and allowances for the period 17 April 1975 to 20 May 1976 be computed and paid in dollars on the basis of a comparison with the salary and allowances of an internationally recruited staff member at a level equivalent to that which the appellant had reached when his indefinite appointment was terminated.”

On 20 January 1981 the Assistant Secretary-General for Personnel Services advised the Applicant that the Secretary-General, having re-examined his case in the light of the Board's report, had decided:

“(a) With regard to the first appeal, to maintain the contested decision and to grant you an *ex gratia* payment in the amount of one thousand dollars,

“(b) With regard to the second appeal, to maintain the contested decision.”

On 21 April 1981 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. In the matter of the date of termination:

(a) The termination of the Applicant was legally defective:

- (i) The Applicant was entitled to notice on or before the date of termination;
- (ii) The notice of termination dated 17 April 1975 was legally invalid;
- (iii) The Respondent negligently failed to notify the Applicant in July 1975 that his post had been abolished, and was therefore estopped from serving a notice of termination dated 17 April 1975 in May 1976.

(b) The decision to terminate the Applicant was unconscionable.

2. In the matter of the rate of exchange: the Respondent used an inapplicable rate of exchange to calculate the Applicant's termination benefits and the Applicant suffered damage thereby:

(a) The operational rate of exchange listed on document UNDP/PROG/XR/30 dated 3 April 1975 was inappropriate for the purpose of calculating entitlements outside the country at a different date;

(b) No operational rate of exchange was available on the date when the Respondent proposed to pay the entitlement;

(c) The Applicant suffered damage as a result of the application of an inappropriate rate of exchange to the calculation of his termination entitlements. This damage was compounded by the delay in serving him with a notice of termination, by the delays in the appeals process and by the inexcusable delay in the transmission to him of the Secretary-General's decision after the Joint Appeals Board had completed its report.

Whereas the Respondent's principal contentions are:

1. In the matter of the date of termination: The effective date of the termination of the Applicant's indefinite appointment was 17 April 1975, the date on which the UNDP office in Phnom Penh was closed by forces beyond the control of the United Nations, and the forcible closure of the office relieved the Administrator of any obligation to give notice of termination in a case of *force majeure* where the very circumstances which rendered the Administrator powerless to give written notice constituted actual notice of termination to the Applicant. The Applicant did have notice which was adequate in the special circumstances of the case and he has in fact received payments in an amount going beyond that required under the Staff Regulations and Rules.

2. In the matter of the rate of exchange: The use of the operational rate of exchange of 1650 riels to one dollar in calculating the Applicant's entitlements was neither unreasonable nor arbitrary and was appropriate in the circumstances. The alternative methods of calculation suggested by the Joint Appeals Board and by the Applicant are as unrealistic as they are contradictory.

The Tribunal, having deliberated from 21 September to 7 October 1981, now pronounces the following judgement:

I. This case arises from an appeal by the Applicant from a decision of the Secretary-

General rejecting Joint Appeals Board recommendations for (a) the payment of salary and allowances until 20 May 1976 when UNDP sent to the Applicant a letter notifying him of the termination of his appointment; and (b) the recalculation of the salary and allowances claimed by the Applicant in the context of the disappearance of an exchange rate for the Cambodian riel. With respect to (a) the Secretary-General made an *ex gratia* payment of 1,000 dollars. The various pleas made by the Applicant to the Tribunal relate, on the one hand, to his asserted entitlement to salary until his receipt of written notice of the termination of his appointment and, on the other, to the method of calculating the salary and allowances due him upon termination.

The Applicant claims that, following the closure on 17 April 1975 of the Office of the United Nations Development Programme in Phnom Penh where he had been employed, he was entitled to payment of salary and allowances until he received, on 16 October 1976 in Saigon where he had gone, a letter from UNDP Headquarters stating that his appointment had been terminated as of 17 April 1975. Citing Staff Rule 109.3 (c), the Respondent claims that the link of employment between UNDP and the Applicant had been broken with the permanent closing of the Phnom Penh Office on 17 April 1975 and that the payment due the Applicant was accordingly limited to salary and allowances for the period of thirty days from that date in lieu of written notice of termination of the Applicant's appointment, together with such uncontested amounts as termination indemnity and accrued annual leave.

II. The Applicant was first employed by the United Nations as a local clerk/typist at the Technical Assistance Board Office in Phnom Penh in 1964. He continued in this employment and, with effect from 1 May 1967, received an indefinite appointment at the GS-5 level in the Office of the United Nations Development Programme in Phnom Penh. His letter of appointment, dated 31 May 1967, recites his appointment as an accounting clerk/typist locally hired for an indefinite period. The letter of appointment contains two further provisions, one concerning non-expectancy of renewal of appointment or of conversion to any other appointment in UNDP, the other stating entitlement in case of termination to notice not exceeding thirty days. These two provisions read as follows:

“This Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations Development Programme. This appointment may also be terminated prior to its expiration date in accordance with the relevant provisions of the United Nations Staff Regulations and Staff Rules, in which case the Administrator of the United Nations Development Programme will give the staff member notice not exceeding 30 days.”

The letter of appointment likewise contains provision to the effect that this appointment is:

“subject to the terms and conditions specified herein as amended by or otherwise provided in the United Nations Staff Regulations and Staff Rules, together with such amendments as may from time to time be made to such Staff Regulations, such Staff Rules and such directives.”

III. The governing Staff Rule concerning notice of termination, contained in Rule 109.3 (b) requires a 30-day written notice in the following terms:

“A staff member whose temporary appointment is to be terminated shall be given not less than 30 days’ written notice of such termination or such notice as may otherwise be stipulated in his or her letter of appointment.”

In its subparagraph (c), the same Rule states:

“In lieu of these notice periods, the Secretary-General may authorize compensation calculated on the basis of the salary and allowances which the staff member would have received had the date of termination been at the end of the notice period.”

This latter provision was invoked by UNDP when, on 20 May 1976, it informed the Applicant that among the termination benefits which it proposed to pay to him was “a termination indemnity salary in lieu of termination notice of your indefinite appointment . . .”. The question therefore arises whether in the extraordinary circumstances of this case, the Applicant was entitled to consider the relations between the UNDP and himself as continuing until he received from UNDP a written notification that his appointment had been terminated.

IV. In this case a date of special importance in the tragic developments that have taken place in Cambodia is 17 April 1975. On that day armed forces of the Khmer Rouge entered Phnom Penh and forced the closure of the UNDP Office there. The pleadings attest to the dedication of the Applicant until the very day of the 17th of April. Both the hostilities and the attitude of the new authorities in Cambodia brought about the closing of the UNDP Office as of 17 April 1975, all of whose international staff were evacuated to Bangkok. Among the twenty or so locally hired employees of the UNDP Office, only the Applicant and two or three other persons appear to have succeeded in escaping. The Applicant managed to reach Saïgon about 6 June. In that same month, the Applicant telegraphed the UNDP Office in Vientiane, Laos, from Saïgon, renewing an earlier request for an assignment.

V. The Tribunal considers that, taking into account his eight years of service with UNDP Phnom Penh with the requisite qualification for work as a clerk/typist and accounting clerk/typist, the Applicant must have known or is chargeable with having known that, under his contract, his status as a local employee entitled him to be employed in Cambodia only. He could not have been unaware of the distinction in the Phnom Penh Office between the international staff and those locally hired. Indeed, his awareness that his employment with UNDP had come to an end with the forcible closing of that office is confirmed by his efforts, on arriving in Saïgon in June 1976, to find employment with UNDP at one of its offices elsewhere in Southeast Asia. During this period he could not reasonably have considered that, from his Saïgon place of temporary residence, his employment with the Development Programme was continuing.

Based on the character of the events that brought about the forcible closing of the UNDP office in Phnom Penh on 17 April 1975, the Respondent contends that it was impossible for UNDP to provide its local employees with written notice of termination of their appointment. The Respondent observes that as of the date of the closure of the Phnom Penh Office, there was no possibility of conducting any UNDP activity in Cambodia or of sending any mail into Cambodia and that the local employees of the Phnom Penh Office had disappeared. Testimony during the oral proceedings underscored the exceptional character of the closing of the UNDP Office in Phnom Penh; the Tribunal was told that this is the only instance in which a UNDP Office has been withdrawn and permanently closed.

The Tribunal notes that the closing of the Phnom Penh office was brought about by events over which the parties had no control, that such closing appeared to be definitive and that the Applicant himself recognized that it was impossible for him to carry out his duties at Phnom Penh under his contract. In these circumstances the Tribunal finds that the contract with a locally recruited staff member became ineffective by reason of *force majeure* and that the Applicant's claim to payment of salary until he received written notification of the termination of his appointment is without foundation.

VI. The Tribunal is, however, compelled to address a certain aspect of the conduct of UNDP and its staff in respect of the Applicant. Testimony given before the Tribunal reveals that Mr. Fernand Scheller, who had been UNDP Resident Representative, a.i., in Phnom Penh, and had been evacuated to Bangkok through the French Embassy in Phnom Penh, came to UNDP Headquarters in May 1975, the month following the forced closure of the Phnom Penh office. Documents produced by the Applicant show that as early as 3 July the same year, Mr. Scheller wrote to the Applicant in care of the UNDP Resident Representative in Vientiane saying that he, Mr. Scheller, had sent to New York "recommendations for the continuation of your career" and asking if the Applicant had information concerning other persons formerly appointed locally at the Phnom Penh office. However, the file available to the Tribunal does not contain any communication concerning the Applicant from Mr. Scheller to UNDP.

In addition to Mr. Scheller's letter, there were communications from various other UNDP authorities to the Applicant in Saigon. These included a telegram of 19 June 1975 from the Resident Representative in Vientiane regretting the absence of an available post in Laos, and, worthy of special note, a telegram of 2 July 1975 from Mr. Youkel, the UNDP Chief of Recruitment, New York, saying that UNDP had no opening available.

In view of these communications to the Applicant, especially the Headquarters telegram of 2 July to the Applicant at his Saigon address, the Tribunal finds incomprehensible the fact that some eleven months elapsed until, on 20 May 1976, UNDP Headquarters finally wrote to the Applicant in Saigon informing him that his appointment had been terminated as of 17 April 1975 consequent to the cessation of UNDP activities in Phnom Penh and stating his entitlement to termination pay along with a request for his instructions as to the bank to which UNDP should deposit the moneys due him. Enclosed with this letter of 20 May 1976 was a letter bearing the date of 17 April 1975 from the Director, UNDP Division of Personnel, addressed to the Applicant in Phnom Penh stating that his appointment was terminated on that day and offering to make payment for a termination indemnity including thirty days in lieu of notice of termination and eight months base salary in accordance with Annex III of the Staff Regulations, plus two months accrued annual leave. Testimony before the Tribunal indicates that this letter bearing the date 17 April 1975 could not have been written on that date and was in fact back-dated.

The Tribunal considers that the delay of eleven months until Headquarters wrote to this former local employee is inexcusable. Further, as a matter of sound administration, there appears to be no justification whatever for the practice of back-dating official correspondence of the Respondent. The *ex gratia* payment by the Secretary-General seems to be an attempt to take account of these factors.

The Tribunal also notes the efforts made by UNDP to find suitable employment for the Applicant, which resulted in his being appointed by UNDP in the field on 6 January

1977 and his current employment by UNDP at Headquarters under a permanent appointment at the G-5 level.

VII. The Applicant also claims that the exchange rate used by UNDP in computing his termination benefits was inappropriate and has offered various methods for their recalculation. The facts involved in this aspect of the case are also exceptional. They show that the Cambodian riel was depreciating rapidly in the last years prior to the closure of the office in Phnom Penh, to the point that the exchange rate used by the Respondent in April 1975 was 1650 riels for one U.S. dollar. With the installation of the new authorities in Phnom Penh on 17 April 1975, the riel ceased to have any value and no other currency was established. This continued to be the situation in January 1978 when Headquarters informed the Applicant of the specific amount due him.

As a local employee, the Applicant was entitled to payment of salary in local currency and had no right to any payment in dollars. Consequently, he was entitled to payment of amounts due him on separation in local currency only. There being no value to the riel as of the date of payment and no new local currency having been established, UNDP decided to pay him in U.S. dollars and used an exchange rate of 1650 riels to the dollar, the rate applicable to the final month of the Applicant's employment at the Phnom Penh office.

Given the status of the Applicant as a local employee, the Tribunal is unable to find a legal basis for overruling the decision of the Secretary-General not to accept the recommendation of the Joint Appeals Board that the Applicant should receive his benefits in dollars "on the basis of a comparison with the salary and allowances of an internationally recruited staff member at a level equivalent" to that of the Applicant at the time of his termination. The same considerations require that the Tribunal reject the claims of the Applicant to recalculation of the termination payment based upon such factors as inflation and the purchasing power of the Applicant's salary when he received it in riels.

VIII. The Tribunal accordingly makes the following rulings with regard to the pleas of the Applicant.

As to plea A, seeking the production by the Respondent of certain documents, the Tribunal observes with regard to (i) that the substance of the material sought was provided by witnesses in the oral proceedings held on 22 September 1981. (ii) The Respondent produced this document. (iii) The Respondent produced a UNDP internal memorandum dated 26 June 1975; testimony given by a witness, Mr. Vegega, of UNDP, suggests that the decision to regard the Phnom Penh Office as permanently closed was reached at a meeting chaired by the UNDP Administrator in May 1975. (iv) through (vii) These requests were not pursued by the Applicant beyond asking the Tribunal, in the written observations, to determine what, if any, of this material is necessary and proper to the presentation of the Applicant's case. The Tribunal does not consider that these materials, to the extent they exist, would have altered either the presentation of the case or the judgement.

Pleas B, C, D, E and I relate to the claim of entitlement to payment of salary until receipt of written notice of termination; pleas G and H relate to the claim of recalculation of termination benefits. These have been addressed above. Plea F is not receivable under article 7 of the Tribunal Statute as it was not considered by the Joint Appeals Board.

For the foregoing reasons, the application is rejected and the request for costs under plea J is denied.

(Signatures)

Suzanne BASTID
President

Herbert REIS
Member

Endre USTOR
Vice-President

Jean HARDY
Executive Secretary

New York, 7 October 1981

Judgement No. 279

(Original: English)

Case No. 255:
Mahmoud

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

Request by a former locally recruited staff member of the United Nations Children's Fund (UNICEF) in Beirut for the payment of a daily subsistence allowance.

Situation in Beirut when the Applicant left to spend her annual leave in Paris.—No security measures had yet been put into effect by UNICEF.—Circumstances in which the Applicant left Paris for Cairo, was recruited by the UNICEF Cairo Office and discovered that two other persons of Egyptian nationality, recruited locally at Beirut and assigned to Cairo, were drawing daily subsistence allowances.

The Applicant's argument that her appointment in Cairo should be treated as identical to that of all the other UNICEF staff members who had been transferred from Beirut to Cairo.—Differences between the Applicant's situation and that of the other staff members.—Argument rejected.—Applicant's argument that her assignment to Cairo was a decision taken at the initiative and in the interest of UNICEF.—Circumstances of the assignment.—Argument rejected.—Applicant's claim that there was discrimination against her.—Consideration of the allegations.—Claim rejected.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Madame Paul Bastid, President; Mr. Samar Sen; Mr. Herbert Reis;

Whereas at the request of Mrs. Nahed Mahmoud, a former staff member of the United Nations specifically recruited for the United Nations Children's Fund, hereinafter called UNICEF, the President of the Tribunal, with the agreement of the Respondent, extended successively to 31 January 1980, 22 February 1980, 15 April 1980, 16 May 1980, 30 June 1980 and 31 July 1980 the time-limit for the filing of an application to the Tribunal;