

cant's birth, by virtue of her own conduct the Applicant would not be entitled to reinstatement or to damages on account of the retirement forced upon her by the Respondent in October 1983. The Tribunal takes note of the fact that the Applicant told ICAO, when applying for employment in 1957, that she had been born in 1923. She continued to cite 1923 when filing her Participant's Declaration with the Joint Staff Pension Fund in 1958. On obtaining employment with FAO in Rome in 1951, she had likewise used as the year of her birth the year 1923 given in her Egyptian passport. For the sixteen years of ICAO employment from 1958 to 1974, as well as for the twenty-three years from her 1951 FAO employment until 1974, the Applicant either volunteered or made no objection to 1923 as the year of birth to be carried on the records of the employing organization. The Applicant sought for the first time only in 1974 to characterize the 1923 date as erroneous and to try to establish 1926 as the actual year of birth. Thus, the conduct of the Applicant has been, at the least, so negligent as to require a finding by the Tribunal of a lack of entitlement on her part to reinstatement or compensation for lack of due diligence by the Respondent. Too many years passed before the Applicant, who had attested to the accuracy of the statements made by her in applications for employment with United Nations agencies and to the Joint Staff Pension Fund, attempted to take corrective action.

V. The Tribunal has also considered the possible relevance of Judgement No. 459, *In re Zreikat* (1981), cited by both parties, in which the ILO Administrative Tribunal held that the date of birth warranted by a staff member in his application for employment settles in principle the date on which he is due to retire. That is certainly the general rule.

VI. Accordingly, and considering the failure of the Applicant to produce convincing proof that she was born in 1926, the Tribunal rejects the Applicant's request that the Respondent be ordered to rescind the retirement it compelled in October 1983 or to pay damages for the losses suffered by the Applicant by reason of premature retirement. All other pleas of the Applicant likewise fail.

*(Signatures)*

Endre USTOR

*President*

Herbert REIS

*Member*

*Geneva, 14 May 1984*

Roger PINTO

*Member*

Jean HARDY

*Executive Secretary*

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## Judgement No. 322

*(Original: French)*

**Case No. 314:**  
**Hecquet**

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

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*Request by a former staff member of the United Nations Centre for Human Settlements (Habitat) to rescind the decision to dismiss him for misconduct as disciplinary measure under staff rule 110.3 (b); request for reinstatement or compensation.*

*Conclusion of the Joint Appeals Board that proceedings of the Investigative Panel established under personnel directive PD/1/76 were flawed by a number of irregularities and that the decision to dismiss the Applicant was unjustified.—Recommendation that the Applicant be reinstated retroactively.—Recommendation rejected.*

*Consideration of the legality of the decision of dismissal.—Finding of the Tribunal that the proof of the Appellant's fault was provided.—Finding of the Tribunal that the Applicant was given an opportunity of defending himself and that the provisions of personnel directive PD/1/76 have been complied with.—General rule that the Tribunal cannot substitute its opinion for that of the Secretary-General as to the appropriate disciplinary measure.—Finding of the Tribunal that the decision of dismissal is not based on materially inaccurate facts and is not vitiated by any other flaw.—Requests for reinstatement, compensation and expenses rejected.*

*Application rejected.*

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THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Endre Ustor, President; Mr. T. Mutuale; Mr. Roger Pinto;

Whereas, on 21 May 1983, Albert L. Hecquet, a former staff member of the United Nations Centre for Human Settlements (UNCHS), filed an application which did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicant, after making the necessary corrections, again filed the application on 2 September 1983;

Whereas the pleas of the application read as follows:

"1. The Applicant appeals to the Administrative Tribunal to consider his case, made with great care and attention and in considerable detail to the Joint Appeals Board, and upheld by such Board, and order the Secretary-General to implement paragraphs 78 and 79 of the Board's report.

"2. The Applicant also urges the Administrative Tribunal to rescind the original decision of the Secretary-General against him, whereby he was dismissed by letter of 3 September 1980, signed by the Assistant Secretary-General for Personnel Services, for misconduct as a disciplinary measure under Staff Rule 110-3 (b), effective on the day of notice.

"3. The Applicant requests the Administrative Tribunal to order the Secretary-General to reinstate him either to his previous post in the Field Service category or to another equivalent post commensurate with his experience and abilities and to effect such reinstatement retroactively in such a way that the Applicant would be treated as if he had had no break in service from 3 September 1980.

"4. The Applicant also requests the Administrative Tribunal without prejudice to paragraphs 1 to 3 above to:

"(a) Order the Secretary-General to pay to the Applicant the amount of money the Applicant would have earned from the date of his dismissal to the date of his reinstatement, the actual amounts to be worked out between the parties;

"(b) Ensure his reinstatement, without loss of benefits, to the UNJSPF (United Nations Joint Staff Pension Fund);

"(c) In the event of application of Chapter III, Article 7, paragraph 3 (d) of the United Nations Administrative Tribunal Rules, order the

Secretary-General to pay compensation to the Applicant in accordance with Article 9 of the Tribunal's Statute in the amount which the Applicant would have received had he remained in service up to the age of mandatory separation from service;

“(d) Order the Secretary-General to pay to the Applicant an indemnity of \$US 1,000 to cover the personal expenses of the Applicant in this case, but that, nevertheless, this amount be paid directly to the voluntary funds of UNICEF in lieu of the Applicant.”;

Whereas the Respondent filed his answer on 14 December 1983;

Whereas the Applicant filed written observations on 24 February 1984;

Whereas the facts in the case are as follows:

The Applicant, who had served as a Field Service Security Officer from 14 July 1969 to 15 September 1973, re-entered the service of the Organization on 15 September 1974 in the same capacity under a fixed-term appointment for one year. He received various assignments, the last one with the United Nations Centre for Human Settlements (UNCHS) at Nairobi, Kenya, as Chief of the General Services Section. His appointment was extended from time to time, the last time on 18 December 1979 until 30 September 1980.

On the night of 27 October 1979 an incident took place at UNCHS headquarters in the Kenyatta Conference Centre between the Applicant and Mr. Evans Gakuu, a Security Officer, in which both claimed to have been subjected to violence. On 29 October 1979 the Applicant explained the circumstances of the incident in a memorandum to the Chief of the Division of Administration, claiming that Mr. Gakuu had pushed him in the back. On the same day, in a letter also addressed to the Chief of the Division of Administration, Mr. Gakuu complained that the Applicant had assaulted him and had threatened to shoot him. On 30 October 1979 the Applicant commented on Mr. Gakuu's complaint at the request of the Chief of the Division of Administration. On 9 November 1979 the Chief of the Division of Administration instructed a three-member panel established under the authority of the Executive Director of UNCHS to conduct an investigation into the incident under the provisions of Personnel Directive PD/1/76 on “Disciplinary Procedure for Staff serving at Office away from Headquarters and Geneva”. On 15 November 1979 the Investigative Panel informed the two staff members of the allegations of misconduct made against them in connection with the incident and of the procedure to be followed under PD/1/76. The Panel received written statements from the parties and from witnesses, and interviewed the parties and some witnesses. In its report, dated 22 January 1980 and submitted to the Executive Director on 8 February 1980, the Panel reached the following conclusions:

“(a) The charges of serious misconduct made by Mr. Gakuu against Mr. Hecquet in that the latter wrongly struck him and used violence against him have been substantiated.

“(b) The validity of Mr. Hecquet's charges against Mr. Gakuu that the latter wrongly ‘pushed’ him causing him to fall, could not be ascertained by the Panel. However, the Panel is of the considered opinion that in view of the violence and abuse wrongly inflicted on Mr. Gakuu by Mr. Hecquet, if any such ‘pushing’ did take place as claimed by Mr. Hecquet, it could only have resulted from the provocation and use of physical violence wholly initiated by Mr. Hecquet in the first instance.

“(c) The Panel must also conclude that Mr. Hecquet's actions in contacting the Kenya Police authorities concerned in the incident, and

making untrue statements to the effect that the United Nations had initiated an investigation as to their 'unauthorized' presence in the building, his attempt to wrongly influence Superintendent Mwangangi by 'making her understand the consequences if she decided to take sides in the matter' and by offering this Police official employment with the United Nations, can only be considered as, at the very least, acts of bad judgement."

On 15 February 1980 the Investigative Panel sent a copy of its report to each of the two parties involved, asking that any answer to charges or any further submission they might wish to be considered by the appropriate authorities be submitted to it by 28 February 1980. On 5 March 1980 the Panel advised the Executive Director that the two staff members had informed it orally that they had no further submissions to make. On 6 March 1980 the Executive Director forwarded the report of the Investigative Panel to the Assistant Secretary-General for Personnel Services "for consideration and appropriate action", stating that he concurred in the findings of the Panel. In a separate letter of the same date, the Executive Director advised the Assistant Secretary-General as follows:

"I have carefully considered the contents of the report, and taking into account also the location of UNCHS in Nairobi, the fact that it is a relatively new organization, and other special circumstances, I have come to the conclusion that the services of Mr. Hecquet be placed back with the Field Services Unit and a substitute be immediately appointed to be in charge of the Security Services of the UNCHS.

"I would like to mention that Mr. Hecquet has discharged his duties as Security Chief for the Centre in a very able and disciplined manner since he took over in the middle of last year. A number of cases of petty theft which were taking place in the Centre between January and the middle of last year were completely stopped, resulting in greater confidence among the staff of the Centre in our headquarters.

"I feel this should be taken into account in whatever action you may deem fit to take against him."

On 25 July 1980 the Assistant Secretary-General for Personnel Services recommended to the Secretary-General that the Applicant be dismissed for misconduct as a disciplinary measure under Staff Rule 110.3 (b). The Secretary-General accepted that recommendation and on 3 September 1980 the Assistant Secretary-General for Personnel Services sent the following notice of termination to the Applicant:

"I regret to inform you that the Secretary-General has decided that you be dismissed for misconduct as a disciplinary measure under staff rule 110.3 (b).

"Such decision was adopted as a result of the incident of 27 October 1979 and following an investigation conducted by an *ad hoc* Investigation Panel. The record shows that you were provided with ample opportunity to defend yourself and that, after the Panel report was communicated to you, you informed the Panel that you had no further submission to make.

"The report was forwarded to the Office of Personnel Services by Dr. Arcot Ramachandran, Executive Director, UNCHS, with a statement to the effect that he concurred in the findings of the Panel. He also made a very positive evaluation of your performance in UNCHS before the incident of

27 October 1979, and he recommended that such performance be taken into consideration in the final decision to be adopted.

"On the basis of the Panel findings, the Secretary-General concluded that the acts proven to have been committed by you constitute highly serious misconduct, show an utter disregard for your duties as a supervisor in charge of security and reveal a fundamental lack of integrity making you unsuitable for continued retention as a staff member. He therefore decided that you be dismissed for misconduct, effective on the date of notice, and that you be given compensation in lieu of thirty days' period of notice in accordance with staff rule 109.3 (b) and (c). This letter constitutes your written notice of termination.

"In view of your previous record, and bearing particularly in mind Dr. Ramachandran's recommendation, the Secretary-General also decided to grant you a termination indemnity up to the maximum which is allowed under Annex III, paragraph (c), of the Staff Regulations."

The Applicant, who had left Nairobi for home leave on 2 July 1980 and had subsequently been reassigned to the United Nations Truce Supervision Organization (UNTSO), received the notice of termination upon reporting for duty in Jerusalem on 29 September 1980. On 3 October 1980 he lodged an appeal with the Joint Appeals Board. The Board submitted its report on 2 November 1982. The Board's conclusions and recommendations read as follows:

*"Conclusions and recommendations"*

*"Conclusions"*

"78. The Board concludes:

"(i) that the procedures applicable to this appeal had not been followed to the letter;

"(ii) that there had been serious flaws in the "evidence-gathering" process resulting in an incomplete investigation;

"(iii) that the Investigative Panel had failed to investigate inconsistencies and inaccuracies in statements of witnesses;

"(iv) that the conclusions reached by the Investigative Panel were not supported by the evidence;

"(v) that the decision to dismiss the appellant was based on the findings and conclusions of the Investigative Panel, which Headquarters had failed to review critically;

"(vi) that the decision to dismiss the appellant was unjustified;

"(vii) that the decision to dismiss the appellant had terminated unjustly his career of ten years of loyal and competent service, had caused considerable hardship for the appellant and his family, which was aggravated by the fact that he found himself at 50 years of age with no prospect for regular employment in his field anywhere, and no entitlement to social security in his home country;

"(viii) that the administrative mismanagement of the case by the Administration had caused additional hardship and expense to the appellant as well as to the Organization.

*"Recommendations"*

"79. Accordingly the Board strongly recommends that the Secretary-General

"(a) rescind the decision of dismissal;

“(b) reinstate the appellant in the Field Service retroactively from September 1980; and

“(c) ensure that the appellant will be able to resume participation in the United Nations Joint Staff Pension Fund.”

On 2 May 1983 the Assistant Secretary-General for Personnel Services advised the Applicant that the Secretary-General had taken the following decisions in the case:

“The Secretary-General has noted the contents of the Board’s report, including its concern with some inconsistencies in the testimony of witnesses, particularly relating to the testimony of police Superintendent Mwangangi. The Secretary-General finds generally that the testimony of the witnesses was reliable, and he finds particularly that Superintendent Mwangangi’s testimony was credible, notwithstanding the fact that it was presented in an interview with the Panel rather than in an official police report and that Superintendent Mwangangi put the incident at Saturday, 22 October, when in reality it occurred on Saturday, 27 October 1979. On the basis of the record taken as a whole, the Secretary-General has concluded that you did indeed strike a subordinate.

“In view of the foregoing, the Secretary-General finds that the charge of physical assault has been substantiated. Furthermore, the Secretary-General finds that the decision to dismiss you was reasonable in the circumstances, taking into account the seriousness of the incident and your position of special trust as Chief of the General Service Unit of UNCHS with responsibility for security matters.

“In the circumstances I must inform you that the Secretary-General, having re-examined your case in the light of the Board’s report, has decided not to accept the Board’s recommendation, to maintain the contested decision and to take no further action in your case.”

On 21 May 1983 the Applicant filed the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The Secretary-General’s decision has not taken into account the many years of satisfactory service by the Applicant, and the incident was the first blemish on an otherwise spotless record. Likewise no consideration seems to have been given to the age of the Applicant and the consequence of his having, as an expatriate, to return to his country in order to seek alternative employment.

2. The Secretary-General has not given proper consideration to the possibility of another, but lesser, penalty. Even the Executive Director did not contemplate such drastic action as dismissal.

3. The Secretary-General has not paid sufficient attention to the contradictory nature of the testimony in relation to the case.

Whereas the Respondent’s principal contentions are:

1. The termination of the fixed-term appointment held by the Applicant was properly grounded on unsatisfactory conduct and in accordance with the Staff Regulations and Rules.

2. The Applicant was accorded due process. No deviation from the procedure established by the 1976 Directive took place and even if such deviations existed they were not of sufficient importance to invalidate the disciplinary proceedings. The Administration did not fail to review critically the Executive Director’s findings and conclusions.

The Tribunal, having deliberated from 3 to 15 May 1984, now pronounces the following judgement:

I. As to the facts, the Tribunal notes that the report of the Investigative Panel dated 22 January 1980 establishes, *inter alia*, that the Applicant did strike a subordinate. The Tribunal also notes that the report of the Joint Appeals Board dated 2 November 1982 expresses doubts about the actual occurrence of the acts with which the Applicant has been charged. However, the Tribunal considers that the testimony of witnesses provides proof of the act of violence with which the Applicant has been charged. The Tribunal observes that, when the Applicant received a copy of the report of the Investigative Panel on 15 February 1980, he did not submit any answer to the charges brought against him or any further submission, although he had been asked to do so.

II. After the disciplinary measure dated 3 September 1980 had been taken against him, the Applicant went to Nairobi at the end of October to conduct a personal investigation because, according to his communication of 7 November 1980 addressed to the Assistant Secretary-General for Personnel Services, he was convinced that the facts were completely false. In view of the seriousness of the Investigative Panel's conclusions, the Tribunal cannot but be surprised at such a belated denial.

III. The Tribunal believes that the Applicant cannot seriously contend that he was not given an opportunity to defend himself properly against the charges made during the procedures instituted against him. He duly received a copy of the conclusions of the Investigative Panel on 15 February 1980 and, at the same time, was advised that he had until 28 February 1980 to answer the charges against him. The Tribunal considers that the Executive Director, by expressly concurring with the findings of the Investigative Panel in his communication of 6 March 1980 to the Assistant Secretary-General for Personnel Services, complied with the provisions of Personnel Directive PD/1/76, paragraph 2 c (ii) and (iii), of 1 January 1976.

IV. As to the law, since the existence of misconduct has been ascertained and since the disciplinary procedure guaranteeing the rights of the defence has been duly followed, it is not for the Tribunal to substitute its opinion for that of the Secretary-General as to the seriousness of the misconduct or the appropriate disciplinary measure. The Tribunal finds that the Secretary-General's decision is not based on materially inaccurate facts and is not vitiated by any other flaw. The Applicant's pleas for the rescission of the said decision are therefore rejected.

V. Consequently, the Tribunal rejects all the other pleas of the Applicant to the effect that the Secretary-General be ordered to implement paragraphs 78 and 79 of the report of the Joint Appeals Board, to reinstate him in a post in the Organization retroactively to 3 September 1980, to pay him the amount of money he would have earned from the date of his dismissal to the date of his reinstatement and to ensure his reinstatement, without loss of benefits, in the United Nations Joint Staff Pension Fund.

The Tribunal also rejects the Applicant's alternative request that the Secretary-General be ordered to pay him compensation in the amount which he would have received had he remained in service up to the age of mandatory separation from service.

Lastly, the Tribunal decides that there is no ground for paying an indemnity to cover the expenses of the Applicant, who fails in all his requests.

VI. The application is rejected.

(Signatures)

Endre USTOR  
President

T. MUTUALE  
Member

Geneva, 15 May 1984

Roger PINTO  
Member

Jean HARDY  
Executive Secretary

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### Judgement No. 323

(Original: English)

Case No. 308:  
Mills

Against: The Secretary-General  
of the United Nations

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*Request by a former staff member of the United Nations concerning the reimbursement of the United States income tax on a partial lump-sum withdrawal benefit from the Staff Pension Fund, in implementation of Judgement No. 320.*

*Applicant's contention that under Judgement No. 320 he was entitled to the reimbursement of the tax he would have paid had he retired on the date of his transfer to FAO, rather than the smaller amount reimbursed by the Respondent, representing the amount of tax he actually paid.—The Tribunal recalls that in his original application the Applicant requested the payment of the smaller of two amounts.—Application of the principle ne ultra petitem and of the principle of unjust enrichment.—The Tribunal holds as obvious that the reimbursement of tax must take place in accordance with Staff Regulations.*

*Application rejected.*

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THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,  
Composed of Mr. Endre Ustor, President; Mr. Luis M. de Posadas  
Montero; Mr. Roger Pinto;

Whereas, on 22 February 1983, Victor Moore Mills, a former staff member of the United Nations, filed an application in which he requested the Tribunal to grant the following relief:

“1. Order rescission of the decision of the Secretary-General rejecting the Applicant's request for tax reimbursement on a partial lump-sum withdrawal benefit from the United Nations Joint Staff Pension Fund, conveyed to the Applicant by the Assistant Secretary-General for Personnel Services in her letter of 14 September 1982;

“2. Order the Secretary-General to reimburse the Applicant forthwith by payment of the smaller of the following two amounts:

“(a) The tax the Applicant would have paid on the lump-sum, as calculated by the Secretary of the Joint Staff Pension Fund, to which the Applicant would have been entitled had he retired on 26 April 1979 on separation from service in the United Nations, or