

Hence, in the view of this Tribunal, the Applicant's behaviour has contributed to the fact that errors committed by the Administration were not detected earlier. It is expected from a staff member and particularly from one of the high expert level that he or she be sufficiently alert not only when his or her rights seem to be impaired. A staff member of the Applicant's calibre is not supposed to accept monies which—with the lowest measure of diligence—must be identified as overpayment.

As to the delays suffered by the Applicant due to the Administration's indecision and negligence, the Tribunal finds merit in the Respondent's arguments that by not accepting the settlement offered to her in 1982, the Applicant herself contributed to the procrastination of the case.

IX. Considering all the elements of the case, the Tribunal comes to the conclusion that the claim of the Applicant for interest and compensation above the amount of \$800—recommended by the Joint Appeals Board, accepted and paid on 21 January 1985 by the Respondent—cannot be upheld.

X. For these reasons, the application—without prejudice to the order made above under paragraph I—is rejected.

(Signatures)

Samar SEN
Vice-President, presiding
Endre USTOR
Member
Geneva, 12 June 1985

Herbert REIS
Member
R. Maria VICIEN-MILBURN
Executive Secretary

Judgement No. 347

(Original: English)

Case No. 332:
Sabatier

Against: The Secretary-General
of the United Nations

Request by a former staff member of UNICEF contesting the legality of the decision to terminate his appointment following the abolition of his post and requesting compensation for the prejudice suffered.

Conclusion of the Joint Appeals Board that there was no evidence that the abolition of the Applicant's post was contrived in order to get rid of him and that he had not suffered any particular financial loss.—Recommendation to reject the application.

Question of the legality of the termination of the Applicant's fixed-term contract.—Application of staff regulation 9.1 (b) and of staff rule 109.1.—Termination of a staff member is the exercise of discretion; however, it must not be exercised in an arbitrary or capricious manner.—The Tribunal holds that the principles defined in Judgement No. 54 (Mauch) as applying to staff regulation 9.1 (c) apply also to termination of a fixed-term appointment under staff regulation 9.1 (b).—Failure to follow a reasonable procedure or the assignment of specious or untruthful reasons may be evidence of bad faith or arbitrariness.—Consideration of the course of events leading to the Applicant's termination.—Applicant's good record of service.—Finding that there was no agreement between the parties on the Applicant's early retirement and that the termination had been decided unilaterally in the exercise of the Respondent's discretionary power.—The Tribunal finds no evidence of improper motives in the decision to abolish the Applicant's post.—Finding that the letter of termination improperly purported that the Applicant

had agreed to his early termination and that the Executive Director of UNICEF, when approving the decision, was not made aware of the Applicant's withdrawal of his offer to retire.—Finding that these shortcomings led to an arbitrary decision.—Conclusion that the termination was invalid and that the Applicant is entitled to an indemnity.—Assessment of the Tribunal's award based on the unexpired portion of the contract and not on the arbitrariness of the decision.—Applicant's claim on account of his household effects.—Claim rejected under article 7.1 of the statute.

Award of to the Applicant of nine months' net base salary, less termination indemnity already paid.—All other claims, including those for costs, rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Arnold Kean, Vice-President; Mr. Roger Pinto;

Whereas on 12 March 1984, at the request of Gilbert A. Sabatier, a former staff member of the United Nations, specifically recruited for the United Nations Children's Fund, hereinafter referred to as UNICEF, the President of the Tribunal, with the agreement of the Respondent decided, under article 7, paragraph 5 of its Statute, to extend the time-limit for the filing of an application until 1 June 1984;

Whereas on 29 May 1984, the Applicant filed an application in the pleas of which

1. he requested the Tribunal to take the following measures:

“...—Production by the JAB [Joint Appeals Board] of documentation supporting its conclusions particularly as it concerns: the fulfillment by the Respondent of its obligations under Staff Rule 109.1 (c) to undertake a bona fide search for an alternative post for the Appellant;

“—The provision of the real reason amongst a medley of contradictory ones trotted out by the Administration, for the decision to terminate the Appellant on 31 December 1981, in spite of a written notification to keep him in his job until 31 July 1982;

“—Production by the DPA [Division of Personnel and Administration] of documentation supporting the evidence of discussions having taken place at HQs [Headquarters] in June 1982 with the Director of DPA for the purpose of discussing 4 options, notably that of being put on special leave at HQs with full pay;

“—The hearing of the following witnesses: Mr. F Kronfol [Chief, Eastern Mediterranean, North Africa and Europe Section EM/NA/ES], Mr. H. Ruttinger [Vehicle Management Adviser/Senior Procurement Officer], Mr. P Singh [Chief, Personnel Services Section], all members of the UNICEF staff at HQs”;

2. he contested

“the legality of the procedure which led to his termination and consisted in advising him verbally that his function will cease on 31 December 1981 (without any reason given him for this decision) and urging him to take care of his own future, which readily indicated the Administration's unwillingness to reassign him in violation of Staff Rule 109.1 (c)”;

3. he claimed the following amounts

“in compensation of the prejudice sustained

<i>Claims</i>	<i>Estimated Amount</i>
9-Month Salary covering period 1 Nov. 1981 to 31 July, 1982 (including Assessment to cover U.S. Tax):	\$US 42,000
Less termination indemnity already received:	25,000
Differential between replacement cost of my lost household and compensation already received:	3,500
Expenses in connection with Appeals:	400
BALANCE CLAIMED:	<u>20,900</u> ;

4. he requested the Respondent

“to adjust Applicant’s pension benefits to reflect change in step level as normally reached in July 1982 and expected to be level 12 with payments to be made retroactively as from 1 August 1982”; and

5. he further expressed the wish

“In view of the absurdity and animosity displayed by the Respondent representative Mr. Singh in . . . his very personal rendition of the facts (remarks unbefitting a Chief of *Personnel Services* Section), to receive written assurance from the DPA that they will not adversely affect through disparaging advice possible Consultancy offers by other UN agencies.”;

Whereas the Respondent filed his answer on 25 September 1984;

Whereas the Applicant filed written observations on 21 October 1984 and subsequently;

Whereas the Applicant requested oral proceedings on 31 January 1985 and 19 February 1985;

Whereas the Tribunal heard the parties at a public session held on 23 May 1985;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 15 October 1974 as a Vehicle Management Adviser. He was initially offered a two-year fixed-term appointment at the P-4, step 4 level and was assigned to the Eastern Mediterranean Division of UNICEF at Beirut, Lebanon. On 5 March 1976 the Regional Director recommended that the Applicant’s appointment be extended for a further two years until 14 October 1978 on the ground that the Applicant had “given first class services in his field to Regional country programmes . . .”. In addition, in a memorandum dated 19 March 1976 addressed to a Senior Personnel Officer, the Vehicle Management Adviser at Headquarters “strongly” recommended the extension of the Applicant’s appointment “to enable him to further contribute to the much needed work of UNICEF in the field of transport management.”

On 14 July 1976 the Deputy Executive Director, Programmes and the Director, Division of Personnel and Administration issued directives on the “Interim Reorganization” of the Eastern Mediterranean Region to all Heads of Field Offices and all Regional Offices then working in that region. The Deputy Executive Director, Programmes and Mr. Fuad Kronfol, then Chief, EM/NA/ES had recently conducted a review of the region’s programmes and administrative problems in light of the situation in Lebanon and the resulting evacuation of most of UNICEF staff members assigned to the Regional and Area offices in Beirut. For practical reasons “there [would] be no regional office for the next

half year or so" and "in administrative terms, the Regional officers would be transferred to new duty stations for a period of not less than one year, effective 1 August 1976." The Applicant was to be re-deployed to Khartoum as of 1 August 1976.

In a telex dated 9 August 1976, the UNICEF representative in Egypt asked the Deputy Executive Director, Programmes and the Director, Division of Personnel and Administration at Headquarters to reconsider the decision to transfer the Applicant to Khartoum and suggested, considering the technical nature of the Applicant's post, that the Applicant be assigned to Cairo.

On 10 August 1976 the Director, Division of Personnel and Administration informed the Applicant that in light of "the first-class services" he had rendered to the regional country programmes, the Appointment and Promotion Committee had endorsed the recommendation to extend his fixed-term appointment for a further two years until 14 October 1978, and that the UNICEF Executive Director had approved the extension. In a memorandum dated 11 August 1976 the Director, Division of Personnel and Administration asked the Deputy Executive Director, Programmes, the Senior Personnel Officer at Headquarters, and the Chief, EM/NA/ES for their comments on the recommendation of the UNICEF representative in Egypt to reassign the Applicant to Cairo instead of Khartoum. In a cable addressed to him and received at the UNICEF Office in Amman, Jordan on 24 August 1976, the Applicant was subsequently informed by the UNICEF Representative in Egypt that "headquarters insisted on his transfer to Khartoum."

In a letter dated 30 August 1976 addressed to the Director, Division of Personnel and Administration, the Applicant set forth a series of work related and personal reasons that would not justify his assignment to Khartoum. In a reply dated 16 September 1976 the Director, Division of Personnel and Administration informed the Applicant that the decision conveyed in the memorandum of 14 July 1976 to assign him to Khartoum was "the result of a careful analysis of all factors—programme strategy and approaches, manpower deployment as well as administration aspects" and that it was the unanimous opinion of the Applicant's programming and vehicle management colleagues at Headquarters that "logically, [he] could best serve the Organization based in Khartoum". The Applicant was in fact transferred to Khartoum on 11 October 1976 and signed a new letter of appointment for a fixed-term of two years on 17 October 1976.

In a memorandum dated 11 May 1977 addressed to the Chief, EM/NA/ES at Headquarters, the Applicant stated his disagreement with what appeared to be Headquarters' decision to post him permanently in Khartoum and his reasons therefor. On 26 May 1977 the Chief, Recruitment and Placement Section cabled the Director, Division of Personnel and Administration as follows:

"CONFIDENTIAL SANDBERG WOULD GREATLY APPRECIATE YOU DISCUSSING WITH REMY [Regional Director, Eastern Mediterranean Region]/ KRONFOL FUTURE OF . . . SABATIER . . . DDD SABATIER WAS TRANSFERRED WITH HIS POST TO KHARTOUM ON 1 OCTOBER 1976. TO BE CONFIRMED FOR LONGER TERM ASSIGNMENT KHARTOUM. KINDLY ADVISE WHICH ACTIONS RECOMMENDED AT THIS STAGE."

In a memorandum dated 29 July 1977 addressed to the Regional Director and at his request, the Applicant set forth the various factors that militated against his continued presence in Khartoum beyond October 1977 which had been

originally set as the "tentative expiration date" of his assignment. The Applicant was subsequently transferred from Khartoum to Beirut, effective 1 February 1978.

On 21 December 1978 the Director, Division of Personnel and Administration informed the Applicant that

"On the recommendation of Dr. François Rémy and with the concurrence of the Division of Personnel Administration, the Appointment and Promotion Committee has supported the extension of your Fixed-Term appointment to the end of the month on which you reach the retirement age of 60 years, i.e., on cob [close of business] 31 July 1982. This recommendation has been approved by the UNICEF Executive Director."

On 6 January 1979 the Regional Director evaluated the Applicant's services in connection with the Annual Review of UNICEF staff members. He rated the Applicant's performance as "very good" and noted that the Applicant was "ready for transfer".

On 20 January 1979 the Applicant retroactively signed his last letter of appointment, for three years, nine months and seventeen days, due to expire on 31 July 1982. The minutes of a meeting of the UNICEF Appointment and Promotion Committee held in April 1979 record that the question of the Applicant's future assignment was under discussion between his supervisor and the Division of Personnel and Administration.

On 9 May 1979 the Vehicle Management Adviser/Procurement Officer at Headquarters addressed a memorandum to the Director, Division of Personnel and Administration that read in part as follows:

"It would appear from the 1980 budget estimates for the Eastern Mediterranean Region that the post of Regional Vehicle Management Adviser under Regional Services is being abolished (para. 144—E/ICEF/AB/L 199) [Administrative Services and Programme Support Budget Estimates for the year 1980]. No doubt this decision was taken on the basis of reduced assistance for transport and transport related activity in the eastern part of the region and Turkey, where UNICEF assisted in the development of a viable Transport and Equipment Management Organization. (TEMO).

"However, Egypt and the Sudan, as well as the three countries of the North Africa Office, will continue to require full time vehicle management advisory services for some time to come . . .

"We therefore recommend:

"(a) Reinstatement of the post in the revised 1980 budget.

"(b) Locate the post in Cairo as the more central location.

"As you are aware, this post presently still located in Beirut is occupied by Mr. Gilbert Sabatier. I do not know what your intentions are regarding this staff member, but would recommend him to be considered first for the post at its new location in Cairo.

"As this matter will very much affect Mr. Sabatier in the not too distant future, early consideration of this recommendation would be appreciated".

In a reply dated 14 May 1979, the Senior Deputy Executive Director noted that as it was not possible to reinstate posts in revised budgets, the post, if subsequently approved, could be incorporated in the 1981 budget. In the meantime, it would have to be budgeted as a project post and since Cairo was a

“problem office” it might be advisable to locate the post somewhere else. In addition, he instructed the Vehicle Management Adviser/Procurement Officer at Headquarters as follows:

“You should follow up (a) creation of ‘L’ post [project personnel post], if that is not already done, through Kronfol; (b) timely information to Mr. Sabatier, i.e. 6 months before expiration of contract”.

On 10 September 1979 the Applicant addressed a memorandum to Mr. Fuad Kronfol who had then been elected Chairman of the UNICEF Global Staff Association and to the Executive Committee of the Association and copied it to the Director of Personnel and Administration, the Regional Director, the Director, Supply Division at Headquarters, the Vehicle Management Adviser/Procurement Officer at Headquarters and the Chairman of the Grievance Committee in Beirut. In this memorandum he explained the circumstances in which he had accidentally learned on return from a mission to Europe and New York that his post had been abolished in the “1980 Budget Estimates”. The Applicant asserted that the Regional Director had subsequently briefed him on the substance of talks conducted at Headquarters “to the effect that the abolition of [his] post was planned for 1980”. The Applicant questioned the real reasons behind the decision to abolish his post as it appeared that neither the Regional Director to whom he reported directly nor the Vehicle Management Adviser/Procurement Officer at Headquarters had been consulted. The Applicant described his work in the eighteen countries which he covered and the continuing need for transport assistance in the region. He asked the Global Staff Association to help him to obtain a transfer to Headquarters or to another region if the decision to abolish his post were maintained “bearing in mind that after 5 years in Beirut and mainly due to security reasons, I have been unable yet to move into permanent unfurnished quarters, my personal household still unpacked having been stranded at Beirut port (under fire) or in the UNRWA warehouse all that long while.”

On 20 December 1979 the Regional Director evaluated the Applicant’s services in connection with the Annual Review of UNICEF staff members and stated that the Applicant was “ready for transfer”. He recommended an “Inter-Regional Vehicle Management Officer or Member of a Supply Division for Procurement” type of post and commented that the Applicant had

“brought a very important contribution to the development of the Region and it is just because it has been agreed between ORDEM [Office of the Regional Director, Eastern Mediterranean] and HQ that we should readjust our technical regional functions, that the [Applicant’s] post will be abolished in 1980. Thus it is time for HQ to plan for the future of the staff member”.

In a memorandum dated 1 February 1980 addressed to the Vehicle Management Adviser/Procurement Officer at Headquarters, copied to the Regional Director and to the Director, Division of Personnel and Administration, the Applicant asserted that he was convinced that the decision to abolish his post was not related to “any changing nature of UNICEF cooperation” on transport. In this connection, the Applicant stated in part:

“What I have suspected all along instead and which Dr. Rémy confirmed to me on his return (via HQ-NY) from the 1979 Mexico Conference is that this move was engineered and recommended by Mr. Kronfol. It is also my conviction that it was based on personal feelings, in disregard of Dr. Rémy’s and your own views. Consequently, since it is

unfair and fails to comply with UN standing regulations in its form as well as in its substance, I am afraid I cannot accept separation as a settlement of my case.

"It makes no doubt to me that Mr. Kronfol's move (even if it appears late in its inception) was in answer to my rejection of his intention to assign me in Khartoum on a permanent basis (after what was originally meant as a temporary posting dictated by the Lebanese insecurity) and probably to some extent to my having challenged in a couple of occasions his authoritarian if not quite authoritative views on Transport in Sudan".

The Applicant also suggested that his regional duties could best be carried out from Rabat, North Africa, where he could operate the bulk of UNICEF Transport in the Eastern Mediterranean, fulfil the function of Supply Officer and handle Transport for the Dakar Office of the West and Central Africa Region as well.

In a "strictly personal and confidential" letter dated 8 February 1980 addressed to the Director, Division of Personnel and Administration, the Regional Director noted that he could understand the Applicant's bitterness about the abolition of his post and added:

"I have tried to convince Sabatier that he should not personalize his letter of protestation, but he is persuaded that it is Fuad Kronfol who has advised HQ in this direction.

"As I said above, the decision has been taken by Mr. Heyward, [Senior Deputy Executive Director]. However, it is true that Fuad Kronfol has few times explained to me that he did not understand the justification for a post for Regional Transport Officer in our Region, where we should have more 'imaginative' functions. For the sake of the record, I must say that for example the last visits of Sabatier in Morocco and Tunisia have been extremely fruitful and that he is one of the most demanded advisers within the Region.

"I believe it will be time now to inform Sabatier of the view of HQ for his future, with the alternative which I discussed in Mexico with Mr. Heyward to have him re-posted somewhere for inter-regional advisory post in his specialized field".

On 25 February 1980 Mr. Horst Ruttinger, then Senior Transport Management Officer at Headquarters acknowledged the Applicant's memorandum of 1 February 1980 and stated in part:

"As you know, when we learned of the proposal to discontinue the Regional Transport Management Officer's post in ORDEM/Beirut, I suggested your transfer to Cairo in letter . . . to Mr. Sandberg, . . . but was told that Cairo is not a suitable place for stationing the RTMO [Regional Transport Management Officer] at the present time. Nevertheless, I am still of the opinion that transport management advisory service is desirable in the Eastern Mediterranean region, including North Africa. Mr. Hall, Chief—Budget Section, assured me that the RTMO post in Beirut has been approved throughout 1980. No doubt DPA in consultation with the Regional Director will take this matter up at the appropriate time and I shall be ready for discussions with DPA and will bear in mind comments made in your above-mentioned letter".

On 29 April 1980, motivated by a cable from the Regional Director concerning the Applicant's request for home leave, a Personnel Officer at

Headquarters addressed a confidential memorandum to the Director, Personnel and Administration, that read in part as follows:

"Mr. Sabatier's post of Vehicle Management Adviser was abolished in the Beirut Staffing Table Authorization and he is now a supernumerary in Beirut only to the end of 1980. He has a Fixed-Term appointment to 31 July 1982 (date of retirement). Mr. Sabatier has been storing his personal effects in the UNRWA warehouse since the last evacuation of the Beirut staff in 1977 and because of his indefinite future he has been postponing taking them out, but now UNRWA is pressuring him to remove his effects from their warehouse. Dr. Rémy, in a meeting on 14 April 1980 suggested that Mr. Carl Graham [Recruitment Officer] be approached to try and place Mr. Sabatier in the Kampuchea Operation before the end of this year I believe that even if Mr. Sabatier is considered for Kampuchea it will be a temporary solution. He has a contract to the end of July 1982 and if we do not find a longer term placement for him then his case may have to be reviewed in the light of other possible solutions".

In a letter dated 7 May 1980 addressed to the Senior Transport Management Officer at Headquarters, the Applicant thanked him for his help, insisted that he could not understand the rationale for the abolition of his post and reiterated that "rather than learning of it from a passing and vague explanation in some budget book" he should have been officially notified of the decision.

In a memorandum dated 28 May 1980 from the Recruitment Officer to the Acting Director, DPA, the Recruitment Officer summarized the record of the Applicant's employment to that date and stated in part:

"On the basis of the record, it would be difficult to justify early termination of his contract. Long-term assignment as a VMA [Vehicle Management Adviser] at another station seems unlikely due to his level and lack of vacancies. Two possibilities borne out by his P.11 and other documentation are:

"1. Assignment to Abidjan until the end of 1980 to stand in for . . . followed by transfer to NYHQ Supply Division, Procurement Section/Engineering.

"2. Transfer to NYHQ Supply Division in near future, probably to Procurement Section."

In a cable dated 2 July 1980 addressed to the Regional Director, the Chief, EM/NA/ES stated:

"CONCERNING SABATIER DUE TO LEAVE THIS YEAR APPARENTLY POST CAN EXCEPTIONALLY BE MADE AVAILABLE FOR HIS CONTINUATION AS REGIONAL VEHICLE MANAGEMENT ADVISER ON SUPERNUMERARY BASIS UNTIL HE REACHES RETIREMENT AGE MID 1982. PLEASE ADVISE YOUR DECISION ON NEED FOR SERVICES BEYOND 1980. . . ."

The Regional Director replied on 4 July 1980 as follows:

"DEPARTURE OF RVMA HAS NEVER BEEN REQUESTED BY ME BUT IMPOSED BY BUDGET DECISION. THUS SABATIER'S EXTENSION IN BEIRUT WELCOME SINCE HIS SERVICES ARE REQUESTED BY MANY OFFICES AND ADDITIONALLY HE CAN MAYBE GIVE HANDS TO NEIGHBOURING REGIONS. . . ."

On 11 July 1980 the Acting Director, Division of Personnel and Administration recorded in a note for the file the substance of a discussion held with the Applicant on 8 July 1980. The note read as follows:

"I met with Mr. Sabatier on 8 July 1980. I confirmed to him that if it were acceptable to him, with the concurrence of Dr. Remy, we are offering to continue him in his present post in Beirut as Regional Vehicle Management Adviser until he retires in July 1982.

"After discussion about the lack of other alternatives he accepted this and is planning to return to Beirut shortly."

In a letter dated 12 November 1980 addressed to the Chief, Recruitment and Placement Section, the Applicant requested a transfer from Lebanon, "more precisely out of the Beirut Office, even if remaining in the E.M. [Eastern Mediterranean] Region". He cited in support of his request professional, personal and security reasons. He added after a lengthy explanation that "[The Regional Director] who is fully aware of all these facts and conditions has told me that he plans to discuss this request for transfer with all concerned during his forthcoming visit in H.Q. N.Y. . . .". In a cable dated 6 December 1980 the Chief, Recruitment and Placement Section at Headquarters stated that she was "very concerned", was "consulting other colleagues" and would reply as soon as possible.

On 29 December 1980 the Applicant addressed a memorandum to the Regional Director which read in part as follows:

"My original inquiry referred to the possibility of a transfer which I believed I was eligible for.

"The possibilities which you have conveyed to me instead (actually, an offer to terminate my function even if on amicably agreed terms) all involve a change in my status which was not the aim of my letter of 12 November 1980 to Ms. J. Campbell [Chief, Recruitment and Placement Section].

"However and although no explanation was given me for the rejection of my request, I would consider any such proposals as HQ might put forward in connexion with settling the difficulties I outlined in the aforementioned letter, provided they are fair and in no way detrimental to my interest.

"Accordingly, I would expect the Division of Personnel Administration to write to me officially in this respect and to amplify, in particular, on the terms and conditions of the early retirement option they seem prepared offering me".

In a cable dated 6 January 1981 addressed to the Director, Personnel and Administration, the Regional Director stated:

"I AM PREPARING AGENDA FOR DISCUSSIONS IN BEIRUT AND HOPE YOU CAN BRING SOME RECOMMENDATIONS OR DECISIONS ON DIFFERENT CASES. FIRST ONE BEING SABATIER'S CASE. AAA AFTER MY DISCUSSIONS WITH YOU AND YOUR STAFF IN DECEMBER, I CONVEYED TO HIM FEW PROPOSALS. BBB SABATIER WILL BE SIXTY YEARS OLD IN JULY 1981 AND HE IS READY FOR IMMEDIATE TRANSFER EVERYWHERE WITHIN THE REGION OR OUTSIDE OF REGION. HIS PREFERENCE WILL BE CAIRO AS JUDGED APPROPRIATE BY . . . OR FOR PROFESSIONAL REASONS IT WOULD BE MOROCCO. CCC AFTER MY TRIPS TO NORTH AFRICA I CAN ASCERTAIN THAT HIS SERVICES ARE NECESSARY THERE FOR SIX TO NINE MONTHS. DDD IF YOU COME WITH PROPOSALS FOR AMICABLE SETTLEMENT AND EARLY RETIREMENT, LET US SAY FOR NINE MONTHS, HE WILL BE READY TO DISCUSS. EEE WE CAN USE HIS SERVICES AS CONSULTANT FOR NORTH AFRICA IF HQS CAN PROVIDE FUNDS FOR IT."

On 14 March 1981 the Applicant addressed a memorandum on his "status" to the Principal Officer at the Office of the Regional Director in which he reiterated the reasons for his request for a transfer from Lebanon. He also asked, in connection with a conversation held with him the previous day in his office, why past correspondence with the Chief, Recruitment and Placement Section had remained unanswered and why the Regional Director's "previous offer of a settlement [could not] be put officially to [him] in writing."

In a letter dated 21 April 1981 addressed to the Director of Personnel and Administration the Applicant insisted that more than the abolition of his post it was his "person who is aimed at"; that "no attempt was made . . . either in New York or in Beirut to reassign [him] to other posts or function" as evidenced by many applications for vacant posts which were turned down. He described once again the circumstances in which he had found out about the decision to abolish his post and raised questions about the motivations for the decision. Furthermore, he asserted that he had been given to understand, after discussions in New York during his home leave, that the decision to abolish his post has been rescinded and his post reinstated. However, this did not seem to be the case and he therefore added:

"Consequently and to call off the confusion, I would be grateful if you have all necessary arrangements made for my early retirement as from 31 October 1981.

". . ."

On 26 May 1981 the Principal Officer cabled the Director, Personnel and Administration as follows:

"SABATIER REQUESTED

"AAA SEPARATION FROM UNICEF EFFECTIVE 31 OCT. 1981 . . .

"BBB HOME LEAVE FROM 6 JUNE TO 13 JULY 1981

"CCC . . . RECOMMENDED FAVOURABLE CONSIDERATION AS SPECIAL CASE REQUESTS FOR HOME LEAVE AND SHIPMENT".

In a cabled reply dated 29 May 1981 the Director, Division of Personnel and Administration stated:

"IN VIEW CURRENT CIRCUMSTANCES IN BEIRUT WE EXCEPTIONALLY AUTHORISE HOME LEAVE IN JUNE THOUGH THIS IS NOT DUE UNTIL SEPTEMBER 1981 AND WE AGREE MR SABATIER WILL NOT SERVE SIX MONTHS BEYOND RETURN DATE FROM HOME LEAVE BEFORE LEAVING ORGANIZATION."

On 29 May 1981 the Applicant informed the Principal Officer that he had "given further thought to the whole question of [his] status" and wished to "drop" his previous request for early retirement on 31 October 1981. On 1 June 1981 the Applicant addressed a telex to the Director, Division of Personnel and Administration which read as follows:

". . . I ASKED EARLY RETIREMENT IN CONVERSATION WITH HIM [Principal Officer] DID NOT OFFER RESIGNATION ASSUMING THEREBY I ENTITLED TO TERMINATION INDEMNITY AS WELL AS REPATRIATION GRANT STOP IF SUCH NOT ACTUAL UNDERSTANDING WOULD REMAIN IN POST TILL 31 DECEMBER . . . STOP KINDLY CONFIRM AGREEMENT. . . ."

On 10 June 1981 the Director, Division of Personnel and Administration informed the UNICEF Executive Director of the circumstances in which the Applicant's post had been abolished and his employment situation. In addition he stated:

"The Recruitment and Placement Section has tried to identify other suitable posts for him but has been unable to do so owing to very limited number of vehicle management adviser posts at the senior officer level.

"The difficulty of transferring Mr. Sabatier, and that he is redundant in Beirut has been discussed with him on several occasions. He has become embittered over both the abolishment of his post and our inability to find another suitable post for him resulting in conflicts with some senior colleagues in Beirut.

"In view of the above, it is recommended in the interests of the Organization, to terminate Mr. Sabatier's service on 31 October 1981 in accordance with Staff Regulation 9.1 (b) with five months termination indemnity plus one month in lieu of notice in accordance with the Staff Rules.

"This proposal was discussed with Mr. Sabatier who has agreed to his termination as of the above date."

On 24 July 1981 the Director, Division of Personnel and Administration addressed a letter to the Applicant that read as follows:

"I am writing to you to confirm what was agreed regarding your employment with UNICEF.

"The Executive Director has decided to terminate your fixed-term appointment under the provisions of Staff Regulation 9.1 (b). Consequently, this letter constitutes the official notice of termination as provided under Staff Rule 109.3 (b) which requires that 30 days' written notice be given to staff holding fixed-term appointments. We are issuing this notice well in advance of the required notice period. This termination will become effective on 31 October 1981. In keeping with normal practice in such matters, you are expected to be on duty during the last month of this notice period.

"On termination, you will receive an indemnity payment equivalent to five months' salary calculated on the basis of your pensionable remuneration after deduction of staff assessment as provided under Annex III of the Staff Regulations. A letter will be sent to you shortly giving full details of your final entitlements.

"I wish to thank you for your service during your period of employment with UNICEF and wish you success in the future."

On 26 August 1981 the Applicant asked the Secretary-General to review the administrative decision to terminate his appointment under Staff Regulation 9.1 (b) prior to its expiration date. On 22 October 1981 having received no answer from the Secretary-General, he lodged an appeal with the Joint Appeals Board. The Board adopted its report on 1 June 1983. Its conclusions and recommendation read as follows:

"Conclusions and Recommendation"

"35. The Board found no evidence that the abolition of the appellant's post was contrived in order to get rid of him. The Board did not find that the appellant suffered any particular financial loss in the termination of his fixed-term appointment. Consequently the Board decided to make no recommendation in favour of the appellant.

"36. The Board wished, however, to add a final comment. The appellant's file shows that when he first came to the Organization he was enthusiastic and eager to work in international assistance. As a staff

member providing help in his field of expertise, he was dedicated, hard-working, and effective; his services were welcomed by the recipient governments and sought after by others in need of such assistance. Yet in 1981 the appellant left the Organization with feelings of bitterness, anger, and a strong sense of having being unfairly treated. The actual events which resulted in these feelings were indubitably beyond any individual's control: many other staff members shared with the appellant the hardship and danger of life in Beirut; the exigencies of the service, not any personal considerations, had dictated the decision to abolish his post. However, beside these external factors, the Board noted gaps in communication and an absence of obviously needed clarification between the appellant and the Administration. The Board wondered whether in its face-to-face dealings with the appellant the Administration might not have displayed a greater degree of sensitivity in this difficult situation. In the opinion of the Board, these ill feelings and the loss of good will on the part of a staff member who had served the Organization well could have been lightened or avoided by a deeper sympathy and compassion on the part of the Administration."

On 19 July 1983 the Assistant Secretary-General for Personnel Services informed the Applicant that

"The Secretary-General has taken note of the Board's report and of its decision not to make a recommendation in favour of your appeal.

"Having re-examined your case in light of the Board's report, the Secretary-General has decided to maintain the contested decision."

On 29 May 1984, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to abolish the Applicant's post was taken without proper consultation with the Regional Director, Eastern Mediterranean Region and the Headquarters Vehicle Management Adviser. It was wrong, groundless and hypocritical. The Applicant was never informed of the reasons to abolish his post.

2. The Respondent made no serious effort to find suitable posts which could have effectively been used by the Applicant and therefore failed to fulfil its obligations under Staff Rule 109.1 (c).

3. The Respondent's decision to transfer the Applicant to Khartoum implied that he would perform the functions of a consultant and not of a Regional Vehicle Management Adviser and this constituted an attempt to change his status as Regional Vehicle Management Adviser. His objections to this transfer created ill-will on the part of the Chief, EM/NA/ES, who engineered a vendetta against the Applicant, leading to the termination of his contract.

Whereas the Respondent's principle contentions are:

1. The Secretary-General's decision to terminate the Applicant's fixed-term appointment for abolition of post was a proper exercise of discretionary power under Staff Regulation 9.1 (b).

2. In terminating the Applicant's fixed-term appointment the Respondent scrupulously observed the terms of his appointment.

The Tribunal, having deliberated from 22 May to 13 June 1985, now pronounces the following judgement:

- I. The Applicant contests "the legality of the procedure which led to his termination, and consisted in advising him verbally that his function will cease

on 31 December 1981 (without any reason being given him for this decision) and urging him to take care of his own future". At the time of termination the Applicant held a fixed-term appointment, due to expire on 31 July 1982 when he would reach the age of retirement. Evidence shows that on 24 July 1981 the Director, Division of Personnel and Administration, gave notice of termination of the Applicant's contract, effective 31 July 1982. This date is the basis on which the Applicant is now claiming nine months' salary from 1 November 1981 to 31 July 1982.

II. The Applicant was terminated under Regulation 9.1 (b) and Rule 109.1 of the Staff Regulations and Rules of the United Nations (relating to abolition of posts and reduction of staff). Termination of a staff member is, as the Respondent asserts, the exercise of a discretionary power. It must not however be exercised in an arbitrary or capricious manner. The Tribunal, in Judgement No. 54 (*Mauch*, 1954) stated as follows:

"5. It should be noted that Staff Regulation 9.1 (c) does not require the Secretary-General to state a specific reason or follow any particular procedure for termination of temporary-indefinite appointments. It is sufficient that the termination be found by him to be in the interest of the United Nations. While the measure of power here was intended to be left completely within the discretion of the Secretary-General, this would not authorize an arbitrary or capricious exercise of the power of termination, nor the assignment of specious or untruthful reasons for the action taken, such as would connote a lack of good faith or due consideration for the rights of the staff member involved."

The judgement quoted referred to Regulation 9.1 (c), and the Tribunal considers that these principles apply equally to termination of a fixed-term appointment under Regulation 9.1 (b).

III. Failure to follow a reasonable procedure, or the assignment of specious or untruthful reasons may be evidence of bad faith or arbitrariness and it is therefore necessary to examine the course of action taken by the Administration in terminating the Applicant.

IV. The Applicant served UNICEF as a Regional Vehicle Management Adviser (RVMA) in the Eastern Mediterranean Region. He served under a number of consecutive fixed-term contracts, beginning with a two-year contract on 15 October 1974 and successively renewed; his final contract started on 15 October 1978 and was due to expire on the date of his retirement on 31 July 1982. He was stationed in Beirut, except from 1 October 1976 to 1 February 1978, when he was in Khartoum.

V. It is not in dispute that at all relevant times the Applicant was an efficient officer, whose performance evaluation reports were consistently of a high level and whose services were in demand by governments.

VI. UNICEF's budget estimates for 1980 did not provide for the post of RVMA in Beirut. The Applicant has expressed the belief, in his written submissions and confirmed in the course of oral proceedings, that this was a decision

"representing at best a capricious reaction by Mr. Kronfol out of pique at my refusal to be continued in Khartoum . . .".

However, in answer to the question whether the decision was taken maliciously, he replied: "I am not quite sure that there was any malice in the decision". At the same time, he asserts that the decision was taken "unbeknown to Mr. Sandberg, Dr. Rémy and Mr. Ruttinger." In his letter of 1 February 1980 to Mr.

Ruttinger, he states that he suspected that the abolition of his post was not connected with "any vague change in the nature of UNICEF co-operation on transport" but was "engineered and recommended by Mr. Kronfol" and "based on personal feelings". He states in his application that Dr. Rémy "confirmed to me verbally (without my even asking) that Mr. Kronfol . . . had masterminded the whole plot".

VII. The Applicant, in his pleas, does not request the Tribunal to quash the decision not to provide for the post of RVMA, Eastern Mediterranean Region, though he evidently regarded it as a reflection on his work and reputation. He recites it as the first of a series of events which led to his termination before the expiration of his current fixed-term contract, which he requests the Tribunal to hold illegal. In his voluminous correspondence, he asserts on many occasions his belief that he was the victim of machinations from many quarters. In a memorandum of 14 March 1981 to Mr. Farooqui he writes:

"I have strong reasons to believe I am being made the victim of some sort of machination which I cannot believe is the result of budgetary cuts".

VIII. Despite the lack of budgetary provision for his post, the Administration was in a position to continue the Applicant as RVMA in Beirut until 31 July 1982, on which date he would reach the age of retirement. According to a note for the record dated 11 July 1980, the Applicant was so informed verbally by the Acting Director, Division of Personnel and Administration.

IX. The Applicant wrote on 12 November 1980 to the Chief, Recruitment and Placement Section, requesting a transfer from Beirut to some other duty station from which he could carry out his duties in the Region, mentioning Cairo, Dakar and Rabat as possibilities and referring to the dangerous security situation in Beirut and "the lack of valid business reasons for my stationing there".

X. Although there were several vacant posts for which the Applicant was eligible and for which he applied, the Administration did not accommodate him. There is nothing on record to show that his requests were seriously considered.

XI. On 21 April 1981 the Applicant wrote a letter to the Director of Personnel and Administration at Headquarters in which he emphasized that his services were "needed" by many offices, e.g. in Morocco, Tunisia, Egypt, the two Yemens, Turkey, Jordan and possibly other Arab countries; and referred to the abolition of his post as:

"still lingering over me like a Damocles sword just because of New York on-again off-again intentions or the zigging and zagging in ORDEM".

The letter continues:

"Consequently and to call off the confusion, I would be grateful if you would have all necessary arrangements made for my early retirement as from 31 October 1981. However, inasmuch as this decision for all practical purposes is being imposed on me, I am determined to bring to light and before the highest instances in the U.N. system and if necessary outside the Organization what I have every reason to consider as the real motive behind H.Q.'s plans for me".

In the same letter, he complained that another person had been placed in Islamabad as Transport Management Adviser, without the Applicant being considered for the post.

XII. UNICEF's Principal Officer in Beirut wrote to the Applicant on 12 May 1981 referring to the Applicant's letter of 21 April to the Director of Personnel and Administration at Headquarters and to subsequent discussions between the Applicant and the writer. The letter stated:

"(a) You have requested voluntary early retirement from UNICEF service as from 31 October 1981",

and discussed the relaxation of the relevant rules to permit him to take home leave in New York although he would not continue in service for the required six months beyond his proposed return from home leave. The letter asked for confirmation of "our common understanding of the discussions".

XIII. On 22 May 1981 the Applicant replied to the Principal Officer stating that he had just read the performance evaluation report for the period September 1978 to December 1980. In this report the Regional Director stated that the Applicant's performance was "very good" and that there was a great demand for his services. After referring again to the "real motive behind the abolition of my post", and to the lack of an explanation, despite the demand for his services in the Region, the Applicant's letter continued:

"Keeping the foregoing in mind, I would say para. (a) of your memo calls for some clarification. I am not the one who has decided to leave my post, UNICEF instead has decided to remove it from me. Consequently, my wish to leave the Organization by 31 October 1981 couldn't be construed as a voluntary decision; simply, it is based on personal convenience in consideration of the following factors:

"(a) the next quarterly rent for my apartment is due 1 December 1981 and I am not eager to pay for 2 extra months unnecessarily;

"(b) my desire not to vegetate in Beirut longer than needed, especially considering the growing insecurity in the country;

"(c) the period October-December being the most favourable in the US to secure employment, I would prefer to be there during that period;

"(d) finally, I would rather avoid relocating in New York in the midst of the winter.

"However, if for some reason UNICEF considered my decision to be a voluntary one, then I would be prepared to rescind it and to continue functioning until 31 December 1981 . . .".

XIV. The Tribunal finds that neither the Applicant nor the Respondent acted as if, or asserted that, a valid agreement for early retirement had replaced the fixed-term contract which, apart from earlier termination, would have continued until 31 July 1982.

On 29 May 1981 the Applicant wrote a memorandum to the Principal Officer indicating that he wishes to "drop my previous request for early retirement by 31 October 1981", and on 1 June 1981 he telexed the Director of Personnel Administration at Headquarters to the effect that he had

"ASKED FOR EARLY RETIREMENT IN CONVERSATION WITH [MR. FAROOQUI] AND DID NOT OFFER RESIGNATION ASSUMING THEREBY I WAS ENTITLED TO TERMINATION INDEMNITY AS WELL AS REPATRIATION GRANT STOP IF SUCH NOT ACTUAL UNDERSTANDING WOULD REMAIN IN POST TILL 31 DECEMBER AS STATED MY RVMA 226 OF 22 MAY STOP KINDLY CONFIRM AGREEMENT".

The reference was to his letter of 22 May 1981, quoted in paragraph XIII above.

XV. There is nothing before the Tribunal to show that any acknowledgement or reply was sent to the Applicant's letter of 22 May to the Principal Officer or to his telex of 1 June to the Director, Division of Personnel and Administration. The next communication by the Administration was dated 24 July 1981 and somewhat surprisingly purported to "confirm what was agreed regarding your employment with UNICEF". This was signed by the Director, Division of Personnel and Administration.

XVI. The Tribunal is unaware of any agreement having been reached and therefore, to describe the letter of 24 July 1981 as a confirmation of what had been agreed is, in the Tribunal's view, less than candid. In fact, it gave the Applicant "the official notice of termination as provided under Staff Rule 109.3 (b)". This was not a termination agreed by both parties but a unilateral termination in exercise of the Respondent's discretionary power under the Staff Rules.

XVII. The Applicant contests "the legality of the procedure which led to his termination and consisted in advising him verbally that his function will cease on 31 December 1981 (without any reason given him for this decision) and urging him to take care of his own future . . .". The Applicant claims salary from 1 November 1981 to 31 July 1982. The Tribunal holds that this claim means that the Applicant is contesting the legality of his termination, with effect from 31 October 1981, as conveyed to him in the Respondent's letter of 24 July 1981.

XVIII. The contested decision was stated to have been made in exercise of a power under Staff Rule 109.1 (c) which bears the heading "Abolition of posts and reduction of staff". The Applicant was greatly disturbed by the abolition of his post and has challenged its validity, principally on the ground that it was the consequence of a vendetta engineered by the Chief, EM/NA/ES who allegedly had a "pique" against the Applicant because of his previous reluctance to continue in Khartoum. The Tribunal finds no evidence, other than the Applicant's own assertions, to support this surmise, and agrees with the Joint Appeals Board's finding that there is no evidence that the abolition of the Applicant's post was contrived in order to get rid of him.

XIX. The Tribunal finds, however, that when the Applicant withdrew his alleged offer of early retirement on 31 October 1981, the Administration acted as if this withdrawal had not taken place and hastened to give the Applicant notice of termination under Rule 109.3 (b). The letter containing the notice of termination was inaccurate in purporting to confirm what the Applicant had agreed to, whereas the reality was that he had sought to withdraw his offer, or to deny that he had acted voluntarily in making it. Furthermore, the approval of the Executive Director of UNICEF for the Applicant's termination had been obtained by means of a memorandum of 10 June 1981 from the Director, DPA, which stated that the Applicant had agreed that his services should be terminated on 31 October 1981, but without disclosing that he had withdrawn his offer to retire on that date. This memorandum did not state that the Applicant's fixed-term contract would in any event expire on 31 July 1982, when he would reach the age of retirement. The Tribunal finds that these shortcomings led to an arbitrary decision.

XX. The Tribunal holds that the termination of the Applicant's fixed-term contract was not in accordance with the provisions of Staff Regulation 9.1 (a) and (b). Accordingly, the termination was invalid and the Applicant is entitled to an indemnity. Bearing in mind all the circumstances of the case, and

in accordance with its previous Judgements No. 113, para. XIII (*Coll*, 1967) and No. 172, para. XVI (*Quémerais*, 1973), the Tribunal considers the Respondent should pay to the Applicant nine months' net base salary from 1 November 1981 to 31 July 1982, less \$25,000, being the amount of the termination indemnity already paid.

XXI. The Tribunal decides to base the assessment of its award on the Applicant's claim in respect of the unexpired portion of his fixed-term contract, rather than awarding him damages for the arbitrariness of the decision which terminated his contract.

XXII. Under article 7.1 of its Statute, the Tribunal rejects the Applicant's claim for the differential between the replacement cost of his lost household effects and the compensation already received, since that claim was not submitted to the Joint Appeals Board.

XXIII. The Tribunal notes that the Applicant's failure to make use of the services of counsel increased the difficulty of the case for both the Applicant and the Respondent.

XXIV. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant nine months' net base salary from 1 November 1981 to 31 July 1982, less \$25,000 (U.S.) being the amount of the termination indemnity already paid.

XXV. All other pleas, including the claim to costs, are rejected.

(Signatures)

Samar SEN
Vice-President, presiding
Arnold KEAN
Vice-President
Geneva, 13 June 1985

Roger PINTO
Member
R. Maria VICIEN-MILBURN
Executive Secretary

Judgement No. 348

(Original: French)

Case No. 334:
Luqman

Against: The Secretary-General
of the United Nations

Request by a former staff member of UNIDO for correction of his date of birth used in administrative records, and for compensation for losses sustained on account of retirement imposed by the Organization before retirement age.

Conclusion of the Joint Appeals Board that, despite the absence of clear rules, allowing a change of the date of birth 12 years after recruitment would not contribute to the fair administration and to proper application of the Staff Regulations and Rules.—Recommendation to reject the application.

Applicant's claim for a modification of his date of birth.—The Tribunal observes that there do not seem to be any rules or guidelines concerning correction of basic data provided by staff members.—Duty of staff members, under staff rule 104.4 (a), to supply such data on appointment, which entails the obligation to ensure that the information is correct.—Finding that