

(3) The Respondent has to pay 3,000 dollars to the Applicant.

(Signatures)

Suzanne BASTID

President

Francis T. P. PLIMPTON

Vice-President

New York, 18 November 1980

Francisco A. FORTEZA

Member

Jean HARDY

Executive Secretary

Judgement No. 265

(Original: English)

Case No. 251:
Kennedy

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

Termination of the employment of a staff member for abandonment of post.

State of the Applicant's health.—Staff Rule 106.2(a) (viii).—The Applicant did not have recourse to that Rule.—Difficulty of sustaining the view that the consultations which took place substantially met the requirements of that Rule.—Conclusion of the Tribunal that no proper assessment was made of the Applicant's state of health.—Consideration of the attitude and conduct of the parties and the degree of co-operation between the Applicant and the various United Nations doctors and administrative departments.—Difficulty of making the distinction between abandonment of post and "separation from service".—Staff member's entitlement to reasonable notice and the fixing of a specific date for separation for abandonment of post.—Date on which the Respondent finally elected to treat the Applicant's conduct as a repudiation of her contract of employment.—The Tribunal decides that the determination by the Secretary-General that the Applicant had abandoned her post was correctly made but that separation took effect from the aforementioned date and not retroactively, that a sum of \$2,000 shall be paid to the Applicant as compensation and that for pension purposes the Applicant shall be treated as having been separated from service on the aforementioned date.—Except to the extent of the above decision of the Tribunal, the application is rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, President; Mr. Samar Sen; Mr. Arnold Kean;

Whereas at the request of Iris Kennedy, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended successively to 31 December 1979, 29 February 1980, 30 April 1980 and 14 May 1980 the time-limit for the submission of an application to the Tribunal;

Whereas, on 15 May 1980, the Applicant filed an application in which she requested the Tribunal to order:

“(a) the recording of evidence of a witness, namely Alvan L. Barach, M.D., of the Presbyterian Hospital, New York 10022;

“(b) the rescission of the decision of the Secretary-General dated 4 May 1979 based on the recommendation of the Joint Appeals Board dated 27 February 1979;

“(c) the rescission of the administrative decision of 18 October 1972 to remove the Appellant from the payroll as of 2 October 1972;

“(d) the rescission of the administrative decision of 20 April 1973 sustaining the administrative decision of 6 March 1973 to separate the Appellant from the service of the United Nations for abandonment of post as of 3 October 1972;

“(e) the restoration as of 3 October 1973 [1972 ?] of the Appellant to the status of a UN Staff Member on permanent appointment, and thus her restoration as of that date to the payroll and to full sick leave entitlements under Staff Rule 106.2;

“(f) the institution of proper medical procedures under Staff Rule 106.2(a) (viii) to determine the question of her ability to travel to UN headquarters in New York, her place of employment in the service of the United Nations;

“(g) the institution of proper medical procedure under Staff Rule 106.2(a) (viii) to review authorization of her sick leave before 11 September 1972 and after 2 October 1972;

“(h) the payment of compensation in lieu of reinstatement in the sum equivalent to the Appellant's remuneration between the date of separation, namely 2 October 1972, and date hereof; and

“(i) the payment of pension contributions on the part of the United Nations for the period between date of separation and date hereof.”

Whereas the Applicant requested oral proceedings on 15 July 1980;

Whereas the Respondent filed his answer on 20 August 1980;

Whereas the Applicant filed written observations on 27 October 1980;

Whereas the parties submitted additional information at the request of the Tribunal on 3 November 1980;

Whereas the Tribunal heard the parties at a public session held on 4 November 1980;

Whereas additional information was submitted by the Respondent on 11 and 12 November 1980 and by the Applicant on 12 November 1980;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 4 March 1957 and received a permanent appointment on 1 March 1959. In 1972 she was working as a Clerk-Stenographer in the Department of Political Affairs, Trusteeship and Decolonization. While on authorized annual leave from 19 June 1972 to 17 July 1972 she travelled to Australia, her home country. On 17 July 1972 she cabled Headquarters requesting permission to continue on annual leave for the balance of her entitlement on the ground of her mother's illness. On the same day Headquarters cabled her that owing to work pressure it was impossible to grant her leave beyond 21 July 1972. On 20 July 1972 she cabled again, stating that in view of her mother's condition she was unable to return for the

moment. On 25 July 1972 the Officer-in-Charge of the Department's Administration wrote her the following letter:

“ . . .

“I am very sorry to hear of your mother's illness, but before an extension of leave can be granted to you for compassionate reasons, the Office of Personnel asks for a medical certificate stating the nature of your mother's illness and the estimation of the approximate duration of such illness. It is only on the basis of this document that your leave can be granted or refused. I therefore advise you to send me such a certificate as soon as possible. In the meantime, you are in no way authorized to take the balance of your leave, which would be exhausted by 4 August. I wish to draw your attention to the fact that, should the Office of Personnel refuse to grant you an extension of leave for the lack of legitimate grounds, your not reporting for duty as expected will be considered as abandonment of post.”

On 1 August 1972 the Applicant forwarded a medical certificate of the same date from Dr. K. W. Hodby stating that she was suffering from asthma and unfit to travel. By a cable dated 3 August 1972 Headquarters asked the Applicant for an immediate reply to the letter of 25 July 1972 and reminded her of a reprimand she had received in 1971 “for similar unauthorized leave”. On 18 August 1972 the Applicant forwarded another medical certificate, dated 14 August 1972, from Dr. Hodby stating that she was still unfit for work; in her covering letter she acknowledged receipt on 5 August 1972 of the letter of 25 July 1972, explaining that she was quite sick herself and concluding that there was no question of abandonment of post. By a cable dated 24 August 1972 the Medical Director asked the Applicant for an additional report from Dr. Hodby and instructed her, if she still felt unable to travel, to contact immediately the United Nations Examining Physician at Perth, Dr. J. B. Mathieson. By a letter dated 4 September 1972 the Applicant replied that, although she was ill and confined to bed, she had made every effort to contact Dr. Mathieson but had been unable to do so as he was away, and that she would contact him as soon as he returned. By a cable dated 15 September 1972 Dr. Mathieson informed the Medical Director that he and Dr. Hodby felt that the Applicant could return to work on or about 2 October 1972, but that the opinion of a specialist was indicated and that he had referred the Applicant to Dr. A. Cohen, who would see her on 21 September 1972. On the same day Dr. Mathieson informed the Applicant of the appointment made for her to see Dr. Cohen. On 25 September 1972 Dr. Cohen submitted his report to Dr. Mathieson, in which he stated: “I believe that it will be quite safe for her to travel back to America at the time elected”. By a cable dated 28 September 1972 Dr. Mathieson informed the Medical Director that Dr. Cohen considered the Applicant fit to resume work any time after 2 October 1972, and that he and Dr. Hodby deemed it reasonable that she report for duty on 9 October 1972. On the same day Dr. Mathieson advised the Applicant accordingly. On 3 October 1972 the Applicant wrote to the Medical Director that she was still very unwell, that she had to commence a new course of treatment and that as soon as she felt stronger and able to travel she would contact him immediately. On 4 October 1972 she wrote to the Under-Secretary-General of her Department to request leave of one year on the ground of her ill health, which she felt would be adversely affected by the winter and pollution of New York, and to suggest that Dr. A. L. Barach, the specialist who had treated her there, be consulted; she added that she did not wish to relinquish her post after so many years in the service of the United Nations. On 5 October 1972 the Applicant wrote to Dr. Mathieson informing him of her condition and of her request for leave of absence. On 17 October 1972 the Medical Director advised

the Office of Personnel that, after speaking with Dr. Barach, he saw no special medical reason to support the Applicant's request and could approve sick leave only from 11 September 1972 to 2 October 1972, the period during which the Applicant had been under the supervision of Dr. Mathieson; to certify sick leave before 11 September 1972 he would require a further report from Dr. Hodby. On 18 October 1972 the Officer-in-Charge of the Department's Administration issued instructions that the Applicant be dropped from the payroll as of 2 October 1972, and informed the Office of Personnel that the Department was not prepared to recommend that the Applicant's request for leave of absence be granted. By a letter dated 1 November 1972 the Chief of Staff Services advised the Applicant that her request had been denied and asked to be informed of her plans by return mail. On 9 and 17 November 1972 Headquarters cabled the Applicant to "return to duty or advise". On 12 November 1972 the Applicant wrote to the Chief of Staff Services that it was her intention to return to her post as soon as possible but that she was still unwell and unable to travel. On 22 November 1972 the Medical Director cabled Dr. Mathieson to verify from Dr. Cohen and give their combined views on the following points:

"FIRST EVEN IF KENNEDY HAS MILD SYMPTOMS CAN SHE FLY NEW YORK NOW SECOND IS SHE ABLE TO WORK NOW EITHER ON FULLTIME OR PARTTIME BASIS QUERY. IF SHE CANNOT WORK NOW BUT COULD STILL TRAVEL HERE SHE COULD TAKE SICK LEAVE IN NEW YORK UNDER CARE OF HER PERSONAL PHYSICIAN WHO FEELS HER ASTHMA CAN BE CONTROLLED HERE."

On 27 November 1972 Dr. Mathieson replied:

"DR COHEN CONTACTED WHO ADVISED HE SAW MISS KENNEDY A SECOND TIME SOME FIVE WEEKS AGO. HE COMMENCED HER ON STEROID THERAPY. SHE WAS TO REPORT BACK TO COHEN BUT FAILED TO DO SO. DR HODBY HAD NOT SEEN HER FOR TWO MONTHS. PROBABILITY IS SHE COULD RETURN TO NEW YORK BUT COHEN UNWILLING TO CERTIFY ON THESE LINES WITHOUT RE-ASSESSMENT."

On 28 November 1972 Headquarters cabled the Applicant as follows:

"...
"IN LIGHT EXCHANGE CORRESPONDENCE BETWEEN DR. MATHIESON AND UN MEDICAL DIRECTOR, DECISION TO DENY YOUR REQUEST FOR LEAVE WITHOUT PAY IS CONFIRMED. YOU MUST THEREFORE REPORT FOR DUTY WITHOUT DELAY. IF YOU BELIEVE YOU ARE UNABLE TO TRAVEL TO NY IMMEDIATELY, PLEASE SEE URGENTLY DR. COHEN WHO SHOULD THEN CABLE HIS OPINION YOUR FITNESS TO TRAVEL TO [the Medical Director]".

On 4 December 1972 the Applicant replied:

"CONFINED BED THEREFORE UNABLE TRAVEL LONG DISTANCE TO CITY CONSULT DOCTOR. WILL GO IMMEDIATELY FEELING STRONGER".

By a cable dated 7 December 1972 the Medical Director requested Dr. Mathieson to ask Dr. Cohen to see the Applicant at her home and to cable his report. On 19 December 1972 Dr. Mathieson replied:

“... DR COHEN UNABLE LOCATE KENNEDY AT HOME. LATER HE WAS ADVISED SHE HAD GONE TO MANDURAH 50 MILES FROM PERTH TO ESCAPE SUMMER HEAT AND WOULD CONSULT DOCTOR THERE. KENNEDY NOT VERY COOPERATIVE. IF YOU WISH HER TO SEE DR COHEN I SUGGEST YOU DIRECT HER ACCORDINGLY”.

On 21 December 1972 the Applicant sent to the Medical Director a medical certificate of that date from Dr. M. Canning stating that she was not fit to travel by air and was being admitted to a hospital under the care of Dr. T. Welborn. On 28 December 1972 the Chief of Staff Services cabled the Applicant that since she was not hospitalized she had to contact Dr. Cohen at once and that if his medical report was not received within one week she would be separated for abandonment of post. By a cable dated 3 January 1973 the Medical Director asked Dr. Mathieson to contact Dr. Welborn and to cable his (Dr. Welborn's) opinion on the exact degree of the Applicant's disability at the moment. On the same day the Applicant cabled the Chief of Staff Services that she had consulted an independent physician. By a cable dated 5 January 1973 Dr. Mathieson informed the Medical Director that the Applicant had consulted Dr. Welborn as a private patient but had not been hospitalized and that as soon as he received Dr. Welborn's reply to his inquiries he would cable. On 30 January 1973 an Australian law firm addressed itself to the Chief of Staff Services on behalf of the Applicant; on the same day this law firm wrote to Dr. Welborn and to Dr. Cohen. By a cable dated 2 February 1973 the Applicant was advised that in view of insufficient information regarding the extent of her disability the Medical Director was unable to approve her sick leave and that if she failed to report for duty by 12 February 1973 she would be separated for abandonment of post without further notice. On 14 February 1973 the Chief of Staff Services informed the above-mentioned law firm that there was no provision in the Staff Regulations and Rules for the intercession by outside lawyers on behalf of a staff member. On 20 February and 2 March 1973 respectively this law firm forwarded a certificate from Dr. Welborn dated 15 February 1973 and a certificate from Dr. Canning dated 20 February 1973, in which it was stated that the Applicant was suffering from bronchial asthma and a depressive psychosis. By a letter dated 6 March 1973 the Officer-in-Charge of Personnel Services advised the Applicant that as she had neither reported for duty nor otherwise contacted the United Nations Medical Examiner in Perth nor the Medical Director of the United Nations, and in the absence of a contraindication on medical grounds for her travel back to Headquarters, the Assistant Secretary-General for Personnel Services had authorized her separation for abandonment of post as of 3 October 1972. On 3 April 1973 the Applicant requested in a letter to the Secretary-General that the administrative decision to terminate her permanent appointment for abandonment of post be reviewed. By a reply dated 20 April 1973 she was advised that the Secretary-General had decided to maintain the decision and on 17 September 1973 she lodged an appeal with the Joint Appeals Board. The Board submitted its report on 27 February 1979. The Board's conclusions and recommendations read as follows:

“Conclusions and recommendations

“97. The Board finds that the appellant abandoned her post when she absented herself from work from 2 October 1972 to 6 March 1973 without authorization despite the Administration's repeated requests that she return to duty. For this reason the Board recommends that the decision which separated the appellant from service for abandonment of post be maintained, and consequently also the decision which

removed her from the payroll as of 2 October 1972.

“98. With regard to the appellant’s claim for reimbursement of the financial expenses incurred in connexion with this case, the Board trusts that the Administration will honour any financial obligation which might devolve upon it, such as the reimbursement of the medical expenses incurred by the appellant to comply with the Administration’s requirement that she see Dr. Cohen.

“99. The Board finds further that the request made by the appellant in connexion with the decision that denied her sick leave for the period prior to 11 September 1972 is unfounded and therefore recommends that this decision be maintained.”

On 4 May 1979 the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had re-examined her case in the light of the Board’s report and had decided

“... to accept the Board’s recommendations as set out in paragraph 97 of the Report, i.e. to maintain the decision which effected your separation from service for abandonment of post with effect from 3 October 1972. The Secretary-General has also decided in accordance with the expression of trust contained in paragraph 98 of the Report to authorize your reimbursement in the sum of \$40.50 which represents \$31.50 paid by you to Dr. Cohen and \$9.00 paid by you for related laboratory tests. In regard to the recommendation contained in paragraph 99 of the Report the Secretary-General has decided to treat your absence from 14 August through 10 September 1972 as though you were on sick leave even though you had failed to produce satisfactory medical certification for that period.”

On 15 May 1980 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The Applicant’s substantial compliance with the directives of the Administration and the Medical Director, and also her regular and repeated attempts to provide all reasonable proof of her physical inability to return to work, militate against reaching the conclusion that she intended to abandon her post.

2. The facts, far from pointing to such an intention, demonstrate that the Applicant, throughout, had the intention of returning to work as soon as she was medically fit to do so.

3. The Applicant was not competent to determine the state of her own health and was therefore compelled to act on qualified medical advice given to her and certified, irrespective of whether the Administration was willing to accept such advice and certification or not.

4. The Applicant had been advised that she was not fit to return to work. Her absence should at least be treated as leave without pay. Staff Rule 106.2(a) (iv) should have been applied in the first instance.

5. Even though the Administration may have determined that the Applicant was not entitled to sick leave, the medical certificates that she was not fit to return to work at the relevant time are conclusive in establishing that her absence was not an abandonment of post.

6. Under Staff Rule 106.2(a) (viii) the case should have been referred to an independent practitioner or otherwise to a medical board acceptable both to the Secretary-General and the Applicant.

7. By disregarding the fact that the issue is a medical issue, and devising an administrative issue that is not sustained by either the nature of the problem or its factual elements, the Administration failed in its responsibility to admit the right of the Applicant to her own physician and specialist and to have contradictory opinion resolved in a proper medical review.

8. The record provides substantial and irrefutable proof of the Applicant's constant and continuous efforts to co-operate with the requirements of maintaining communication with United Nations Headquarters, of compliance with the orders issued by the Medical Director directing her to the United Nations examining and consultant physicians, and of compliance in turn with the orders of those Administration-selected physicians.

9. The allegation by the Administration of the Applicant's having been "generally unco-operative" in her attitude toward the United Nations Examining Physician is entirely without foundation.

Whereas the Respondent's principal contentions are:

1. The opinion of the three doctors regarding the Applicant's fitness to return to duty after 2 October 1972 was unanimous and its validity cannot be questioned. Furthermore, even though a medical board was not formally constituted, the procedure followed to arrive at the medical determination in question satisfied the requirements of Staff Rule 106.2(a) (viii), as it afforded an independent medical review of the Applicant's sick leave claim, and the medical determination as such is not reviewable by the Tribunal. As to the Applicant's request that Dr. Barach be consulted, it cannot be admitted that a staff member, after having been informed of the results of a joint medical review of his sick leave claim, and when such results are not to his liking, would then have the right to name another doctor of his choice and to demand the constitution of another medical board to review the first board's opinion. Furthermore, Dr. Hodby, who shared in the medical consensus regarding the Applicant's fitness to return to work after 2 October 1972, had been her personal physician since 1963.

2. Even before receiving the first medical certificate, the Medical Director had taken the initiative of endeavouring to obtain objective information on the Applicant's health condition, in view of her complaints of continued illness, even though the burden of proof as to new developments in the state of the Applicant's health which would justify her continued absence from work after 2 October 1972, lay with the Applicant. The Medical Director's persistent efforts at obtaining a reassessment of the Applicant's condition were unsuccessful, however, due to lack of co-operation on her part. The Medical Director's opinion that the certificates submitted by the Applicant after 2 October 1972 were insufficient to permit him to certify sick leave for that period, is not subject to review by the Tribunal. In view of the Applicant's failure to fulfil her obligation under Staff Rule 106.2(a) (viii) to undergo, for purposes of reassessment of her condition after 2 October 1972, examination by the physician designated by the United Nations or by the independent specialist, she is barred from invoking the proviso at the end of that Staff Rule: no claimant could be heard to invoke a procedure as of right and at the same time withhold the co-operation which is necessary on his part to implement the procedure.

3. The medical review procedure is also inapplicable to the Applicant's sick leave claim for the period 1 August to 11 September 1972. In any event, the Applicant was paid full salary and emoluments as though she had been on properly certified sick leave during the period in question.

4. The decision denying the Applicant's request for special leave was a proper

exercise of the Secretary-General's discretionary authority under Staff Rule 105.2(a).

The Tribunal, having deliberated from 29 October 1980 to 19 November 1980, now pronounces the following judgement:

I. The principal arguments of the parties revolve on three connected issues: (a) the state of the Applicant's health from 17 July 1972 to 6 March 1973, (b) the degree of co-operation between the Applicant and the various doctors and administrative units of the United Nations dealing with the Applicant's requests, representations and complaints, and (c) whether the decision to treat her as having abandoned her post was consonant with all the circumstances of the case and whether sufficient justification existed to uphold that such abandonment must be deemed to have taken place on 2 October 1972.

II. On the question of the Applicant's health enough evidence has been adduced to establish that she was suffering from intermittent attacks of asthma and related complaints throughout and beyond the period from 17 July 1972 to 6 March 1973. The Respondent relied on the telegram sent on 28 September 1972 by Dr. Mathieson, the United Nations Examining Physician at Perth, to conclude that the Applicant was fit to travel to New York about the beginning of October 1972. However, Dr. Cohen's report that the Applicant could travel "at the time elected" remains ambiguous and in any event the file does not show that Dr. Mathieson ever examined the Applicant before he sent his telegram of 28 September 1972. Furthermore, the exchange of telegrams and letters that followed indicate that Dr. Irwin, the Medical Director at New York, was prepared to entertain requests for leave, etc. from the Applicant provided she supported them by acceptable medical certificates: these however could not be produced either because the doctors were not available at the relevant times or because the Applicant did not report to them with promptitude on the ground that she was too sick or too disturbed to do so.

III. Staff Rule 106.2(a) (viii) reads:

"A staff member may be required at any time to submit a medical certificate as to his or her condition or to undergo examination by a medical practitioner named by the Secretary-General. Further sick leave may be refused or the unused portion withdrawn, if the Secretary-General is satisfied that the staff member is able to return to duty, provided that, *if the staff member so requests*, the matter shall be referred to an independent practitioner or a medical board acceptable to both the Secretary-General and the staff member". [emphasis added].

IV. Considering that the Medical Director at New York would not accept the certificates which the Applicant was forwarding from her own doctors and considering further that the Applicant seems to have lost confidence in Dr. Cohen, the doctor named by Dr. Mathieson on behalf of the Administration for examining and reporting on her condition, it was incumbent on the Applicant to take recourse to Staff Rule 106.2(a) (viii) and to request that the matter "be referred to an independent practitioner or a medical board acceptable to both the Secretary-General and the staff member". No such request was however forthcoming from the Applicant.

V. On the other hand, the Respondent's view that consultation among Dr. Hodby (a private practitioner under whose care and treatment the Applicant had been for some time), Dr. Cohen and Dr. Mathieson substantially met the requirements of Staff Rule 106.2(a) (viii) is difficult to sustain: the documents give no indication of how or where such consultation took place. Nor do they establish that the three doctors either jointly or separately examined the Applicant soon before Dr. Mathieson sent the telegram of 28

September 1972 stating that the three doctors considered it reasonable that she should "report duty New York October 9". At the oral hearing counsel for the Respondent could not throw any light on the nature, extent and details of such examination and consultation as might have taken place.

VI. The Tribunal accepts that the Respondent was within his rights to insist that reports about the Applicant's health and fitness to travel must be certified by a medical practitioner named by the Secretary-General. However, it cannot be held that a medical board "acceptable to both the Secretary-General and the staff member" was in effect established. Such a conclusion is fortified by the absence of any request by the Applicant that such a board should be formed; indeed, given the personal attitude of the Applicant towards Dr. Cohen and the alleged lack of co-operation by the Applicant referred to by Dr. Mathieson, it is doubtful if a board composed of Drs. Cohen, Mathieson and Hodby would have been acceptable to the Applicant in terms of Staff Rule 106.2(a) (viii).

VII. In the event the Respondent's contention that the Applicant had no right to ask that the Medical Director (Dr. Irwin) should be guided by the opinion of her personal physician in New York (Dr. Barach), rather than by what had been transmitted by Dr. Mathieson, lacks substance. Not only did the Joint Appeals Board hold that Dr. Irwin had consulted Dr. Barach but in fact several references had been made to such a consultation by both the parties. Dr. Barach's denial, made many years later, that he or his nurse was consulted by Dr. Irwin in 1972 does not however explain why he did not write to the Medical Director about the Applicant's state of health when requested by her to do so early in October 1972. On 2 March 1973 Dr. Barach advised the Applicant's personal physician on how best to treat her. The conclusion is inescapable that either because of the nature of the Applicant's ailment and treatment or because of the difficulties of long-distance correspondence and consultation, no proper assessment of the Applicant's state of health and fitness to travel was made.

VIII. In these circumstances, the attitude and conduct of the parties become relevant not simply to decide if sufficient care and attention was paid in dealing with each stage of this case but also in determining if the repeated declarations of the intention of the Applicant to resume her work in New York as soon as she was physically fit to do so is consonant with the course of action she pursued in meeting the requirements of the Staff Regulations and Rules.

IX. The Joint Appeals Board has taken the view that the Applicant's behaviour as against her declarations was such that the Secretary-General's decision that she had abandoned her post was to be upheld. A detailed examination of the conduct of the Applicant at different dates tends to establish that while until the middle of December 1972 she tried to meet the wishes of the Medical Director as also the instructions issued to her from time to time, she began to behave from mid-December in a manner inconsistent with the discipline and loyalty required by the Organization. She did not notify either Headquarters or Dr. Mathieson that she was going to Mandurah, 50 miles away from Perth, with the result that when Dr. Cohen wished to examine her urgently at her home at Mosman Park (Perth area) on 17 December 1972, he could not locate her. She sought private medical advice and attention but took no action to carry out her obligations under the Regulations and Rules. Finally, she asked a law firm to pursue her case with the United Nations rather than respond to the many requests Headquarters made in order to accommodate such genuine problems and difficulties as she might be facing.

X. The Applicant's pleas that she took these measures because of her poor health

and disturbed state of mind could have received some support if she had supplied the Tribunal with some definite and dependable information of her movements and medical treatment. For several weeks she did not apparently consult any doctor: the argument that perhaps she did not need to as she could follow a specific course of treatment without such consultation would imply, in the absence of any evidence to the contrary, that during such periods she might well have been fit to travel to New York. Yet she did not even respond to several urgent messages sent from New York.

XI. On 28 December 1972, the Chief of Staff Services instructed the Applicant by cable that she must contact Dr. Cohen at once and that, if his medical report was not received "within one week from to-day", she would be separated for abandonment of post. On 2 February 1973 another cable warned her that if she failed to report for duty by 12 February 1973 she would be separated "for abandonment" of "post without further notice as previously indicated" in the telegram of 28 December 1972. However, the earlier telegram did not mention any specific date for her return. Finally, on 6 March 1973 a letter from the Officer-in-Charge of Personnel Services "separated" her retroactively from 3 October 1972, although no indication had been given earlier that in the event of the Secretary-General having decided that she had abandoned her post, his decision would be effective from 3 October 1972.

XII. Counsel for the Respondent suggested at the oral hearing and in response to questions from the Tribunal that the distinction between abandonment of post and separation was a difficult one to make. The procedure and grounds for the "separation from service" of staff members holding permanent appointments are given in Staff Regulation 9.1(a) but no such provision exists for "abandonment of post". The pattern set for the separation of staff members holding permanent appointments includes some basic principles and the Tribunal is of the opinion that in a case such as this the staff member was entitled to reasonable notice and the fixing of a specific date for separation for abandonment of post.

XIII. The Officer-in-Charge of the Department's Administration decided that the Applicant be "dropped from payroll as of 2 October 1972", but this decision was not communicated to her for some time and in any event, this cannot be treated as notice, especially since as late as 9 and 17 November 1972, Headquarters was asking the Applicant to "return to duty or advise". It was not until 2 February 1973 that any communication which might be considered as notice was sent to the Applicant; this was the cable informing her that unless she returned to duty by 12 February 1973 she would be separated for abandonment of post without further notice; however this cable still left open the possibility of her returning to New York and resuming her post. On 6 March 1973, the Respondent finally elected to treat her conduct as a repudiation of her contract of employment as distinct from threatening to do so. The contract should normally end with such an election and not retroactively. The Respondent would have been within his rights to make such an election earlier but did not choose to do so. Furthermore, from what counsel for the Respondent said at the oral hearing, it would seem that had the Applicant returned to New York any time before the final decision was communicated to her on 6 March 1973, a way could have been found not to treat her as having abandoned her post.

XIV. For the foregoing reasons, the Tribunal decides:

- (i) that the determination by the Secretary-General that the Applicant had abandoned her post was properly made but that her separation took effect from 6 March 1973 and not retroactively from 3 October 1972;

- (ii) that a sum of \$2000 shall be paid to the Applicant as compensation for her separation made erroneously with effect from 3 October 1972 instead of from 6 March 1973;
- (iii) that for pension purposes the Applicant shall be treated as having been separated from service on 6 March 1973 and that all sums due to the Staff Pension Fund in consequence of the change in the date of her separation shall be paid by the Respondent.

XV. Except to the extent indicated in paragraph XIV above, the Application is rejected.

(Signatures)

Suzanne BASTID
President

Arnold KEAN
Member

Samar SEN
Member

Jean HARDY
Executive Secretary

New York, 19 November 1980

Judgement No. 266

(Original: French)

Case No. 247:
Capio

Against: The Secretary-General
of the United Nations

Request for recognition of the Applicant's right to be considered for promotion in accordance with the rules in force prior to the adoption of General Assembly resolution 33/143.

Applicant's assertion that the system introduced by the Secretary-General pursuant to resolution 33/143 runs counter to the Charter and the Staff Regulations.—Powers of the General Assembly and the Secretary-General in relation to personnel matters.—Judgement No. 162.—Guidelines established by the General Assembly in resolution 33/143 for the movement of staff from the General Service to the Professional category.—Their implementation by the Secretary-General in Administrative Instruction ST/AI/268.—Concerns of the General Assembly.—Recognition by the Tribunal that the General Assembly was entitled to demand the introduction of a new system and that the Secretary-General exercised his discretion in setting up a system of selection by competitive examination.—Transitional measures introduced by the Respondent.—Question whether the Applicant was entitled to benefit from them.—Applicant's contention that she has an acquired right to the retention for her benefit of the previous promotion system.—The nature of that system.—Information supplied by the Respondent on the status of the Applicant.—Applicant's contention based on the fact that the procedure for her promotion had been initiated prior to the adoption of resolution 33/143 and that the Department had formulated its recommendations prior to the issue of the administrative instruction establishing the new system.—Benefits and advantages granted to staff members under the old promotion system for services performed.—Applicability in that context of the judicial precedents established by the Tribunal with regard to respect for acquired rights.—Applicant's right to have her suitability for promotion evaluated according to the method used previously.—Application of transitional measures has failed to ensure respect for the Applicant's acquired rights.—Applicant's