ADMINISTRATIVE TRIBUNAL

Judgement No. 456

Case No. 485: KIOKO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, First Vice-President, presiding; Mr. Jerome Ackerman, Second Vice-President; Mr. Ahmed Osman;

Whereas, at the request of John Kioko, a former staff member of the United Nations Environment Programme, hereinafter referred to as UNEP, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 April 1988, 28 June 1988 and 14 November 1988 the time-limit for the filing of an application to the Tribunal;

Whereas, on 14 November 1988, the Applicant filed an application, the pleas of which read as follows:

> "10. With regard to its competence and to procedure, the Applicant respectfully requests the Tribunal: to find that it is competent to hear and to pass judgement upon the present application of article 2 under its Statute.
>
> 11. On the merits, the Applicant requests the Tribunal to find:
>
> (a) That the decision by the Administration to dismiss Applicant was not because of poor performance, but to solve a problem as a result of perceived disability on the side of the staff member;
>
> (b) That in arriving at the decision the Administration did not follow the Staff Rules and Regulations

(104.13 (c)) neither to the letter nor to the spirit;
(c) That the Administration, notwithstanding that it realized there were deficiencies in the procedure leading to the decision, made no effort to correct this before taking its final decision;
(d) That the decision by the Administration to grant a payment of six months as compensation in no way offsets the enormous consequences of termination for the staff member and his large family in an environment with high unemployment rates and low wages.

12. The Applicant respectfully requests the Tribunal to order the Administration:
(a) To re-instate Applicant in his former employment;
(b) To assign to him proper work commensurable with his physical condition as recommended by the UNEP physician;
(c) To compensate him adequately for the damages suffered because of decisions by the Administration."

Whereas the Respondent filed his answer on 31 March 1989;

Whereas, on 9 September 1989, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

John Kioko entered the service of UNEP on 11 February 1974. He was initially offered a three month fixed-term appointment at the G.3, step I level, as a Machine Operator/Clerk. On 1 April 1977, he was promoted to the G.4 level. He served on a series of fixed-term appointments until 1 September 1977, when he was offered a probationary appointment and 1 May 1978, when he was offered a permanent appointment.

On 5 June 1983, while returning to his house, the Applicant was assaulted by another individual and as a result of the incident, the Applicant lost his left eye. The Applicant's assailant was later convicted in a local court.

Since the Applicant had recently completed five years of service on a permanent appointment, under the terms of staff rule 104.13 (a)(ii), his appointment was subject to review by the

appointment and promotion bodies. Accordingly, on 17 June 1983, the Chief, Conference Services Section, recommended that there be "no change in [the Applicant's] contractual status". The recommendation was subsequently approved by the Chief, Administrative Service.

In a memorandum dated 21 September 1983, the Officer-in-Charge, Staff Services Unit, transmitted to the Chief, Recruitment Unit, the names of staff members whose supervisors had recommended that there be no change in their contractual status and asked him to submit the list to the Appointment and Promotion Panel (APP). The Applicant was one of the staff members on the list.

During October and November 1983, the Chief, Documents and Reproduction Unit, recorded in notes for the file, the unsatisfactory nature of the Applicant's performance during that period. A copy of each note was made available to the Applicant.

In a memorandum dated 2 November 1983, the Chief, Recruitment Unit, informed the Chief, Personnel Section, that the APP had deferred its review of the Applicant's permanent appointment pending receipt from the Administration of a performance evaluation report (PER) covering his period of service from April 1982 to October 1983.

The Applicant's performance during the period 16 March 1982 to 15 January 1984 was evaluated in a PER in which he received five "C" (good) ratings, and three "D" (fair) ratings. The Chief, Documents and Reproduction Unit, noted that the Applicant maintained "the minimal acceptable ... standard of efficiency" and that although he maintained "very good working relations with his colleagues", he continued "to have problems with his immediate supervisors". The Chief, Conference Services Section, rated his overall performance as "fair".

On 1 February 1984, the Chief, Recruitment Unit, informed the Applicant that the APP would review his permanent appointment and

that he would be notified in case the Panel wished to interview him. On the next day, the Chairman of the APP, without notifying or interviewing the Applicant, informed the Executive Director that the Panel had:

> "unanimously decided that the case of John Kioko be reviewed by the Appointment and Promotion Board in accordance with staff rule 104.13(b)(iii[sic]) because the members were of the opinion that the staff member does not meet the high standards of efficiency, competence and integrity established in the UN Charter and therefore should be separated from services with UNEP."

In turn, the Appointment and Promotion Board (APB), after reviewing the Applicant's "performance and general conduct over the whole period of his employment with UNEP", without notifying the Applicant or affording him any opportunity to make any necessary presentation on his own behalf, unanimously endorsed the APP's recommendation. The Board's recommendation was transmitted to the Executive Director on 18 April 1984.

In a letter dated 15 May 1984, the Assistant Executive Director, Fund and Administration, informed the Applicant that the Executive Director had decided to accept the recommendation by the APB and APP to separate him from the service of UNEP in accordance with the provisions of staff regulation 9.1(a). The letter read in part as follows:

> "This letter constitutes formal notice of termination as required by staff rule 109.3 (a), such notice to be effective 18 May 1984. In cases of termination of staff members holding permanent appointments the required notice period is 3 months and the effective date of your termination were you to serve the notice period would have been 18 August 1984. The Executive Director has decided however to grant you compensation in lieu of notice under staff rule 109.3 (c) and your separation date will therefore be the same as the date of notice, namely 18 May 1984.
>
> You will also receive termination indemnity according to

> Annex III, paragraph (c) of the Staff Regulations and will receive payment for accrued annual leave within the limits set by the Staff Rules."

On 7 June 1984, the Applicant requested the Secretary-General to review the administrative decision to terminate his permanent appointment. Having received no reply from the Secretary-General, on 21 August 1984, the Applicant lodged an appeal with the Headquarters Joint Appeals Board (JAB). On 31 March 1986, the Secretary of the Headquarters JAB informed the Applicant that his appeal had been transmitted, pursuant to staff rule 111.2 (c), to the recently established Joint Appeals Board in Nairobi. The Nairobi JAB adopted its report on 23 June 1987. Its conclusions and recommendations read as follows:

> "Conclusions and recommendations
>
> 11. The Panel concludes that the appellant had no expectancy of renewal of his appointment following the mediocrity he had shown in the exercise of his activities for the whole of the past 10 years and lack of goodwill to improve his performance and attitude.
> The Panel further considers that there is no evidence that the contested decision was motivated by prejudice or any other extraneous factor. The Panel finally concludes that the appellant has no grounds to claim an additional compensation on or above that which had been granted to him in lieu of notice under staff rule 109.3 (c).
> Accordingly, the Panel makes no recommendation in support of the appeal."

On 30 October 1987, the Assistant Secretary-General for Human Resources Management informed the Applicant that:

> "The Secretary-General, having re-examined your case in the light of the Board's report, has decided, in conformity with the Board's recommendation, to maintain the contested decision. At the same time, the Secretary-General has decided, in view of procedural deficiencies in the review of your permanent appointment, to grant you compensation in an amount equivalent to six months' net base salary at the rate

in effect at the time of your separation from service."

On 14 November 1988, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The authority to terminate permanent appointments for unsatisfactory services has not been delegated to the Executive Director.

2. Since the Applicant's supervisor and the UNEP Administration had agreed, in June 1983, that no change was warranted in the Applicant's contractual situation, the APB had no reason to recommend termination of the Applicant's appointment.

3. The performance evaluation report prepared in January 1984 was not required.

4. The APB went beyond its mandate in recommending the termination of the Applicant's appointment.

5. The decision by the Respondent to terminate the Applicant's appointment is based on incorrect procedures and the Applicant was deprived of due process.

Whereas the Respondent's principal contentions are:

1. It was within the delegated authority of the UNEP Executive Director to terminate the Applicant.

2. The decision to terminate the Applicant's permanent appointment was properly grounded on his failure to maintain the standards of efficiency, competence, and integrity required under the Charter.

3. The decision to terminate the Applicant was taken only after a complete, fair and reasonable procedure had been followed prior to the termination.

4. The procedural deficiency does not vitiate the decision and the compensation of six months' net base salary is more than

adequate.

The Tribunal, having deliberated from 23 October to 2 November 1989, now pronounces the following judgement:

I. In this case, the Applicant challenges the Respondent's decision to terminate the Applicant's permanent appointment because of the Applicant's alleged failure to maintain the standards of efficiency and competence required by the Organization. There is no issue as to the Applicant's integrity. However, the Applicant claims that the decision was not on the basis of poor performance but because of a physical impairment suffered by him when he lost the sight of one eye. He also challenges the validity of the procedure followed in arriving at the decision to terminate him. As will be seen, the questions raised as to procedure present the most troublesome issues in this appeal.

II. The Applicant's termination did not occur in the normal fashion. That is to say, although he was terminated because his services were deemed unsatisfactory, the procedure provided for in ST/AI/222 was not followed. Instead, the termination decision was made as a consequence of the five-year review, under staff rule 104.13 (b)(ii), of the Applicant's permanent appointment. But even so, the circumstances were extraordinary. As set forth in the recitation of the history and facts of the case, when, in the course of the five-year review, the Applicant's department was asked for its assessment of the Applicant, it replied in favorable terms. Ordinarily, the department's reply would, under staff rule 104.13 (c)(ii) simply have been reported to the APB and then routinely submitted to the Secretary-General with no further action being taken to alter the status of the permanent appointment.

III. In this case, however, despite the department's recommendation of no change in status based on its affirmation that the Applicant had maintained the requisite standards of suitability, which was submitted to the APP on 21 September 1983, the latter panel on 2 February 1984, received a performance evaluation report on the Applicant covering the period from 16 March 1982 to 15 January 1984. That report gave the Applicant an overall "fair" rating, and though critical of the Applicant's performance in some respects, did not rate any individual features below "fair". Performance reports for two prior two-year periods were similar in tenor, i.e., critical of him, but rating his performance adequate. No rebuttal of any of these reports was initiated by the Applicant. The APP, following its review of the relevant documents, recommended that the Applicant's case should be reviewed by the APB under staff rule 104.13 (c)(iii). Contrary to the department's 21 September 1983 evaluation and recommendation that no change be made in the Applicant's status, the APP thought that the Applicant did not meet the requisite standards of efficiency and competence and should therefore be separated from U.N. service.

IV. On 18 April 1984, the APB unanimously endorsed the APP's recommendation to terminate the Applicant's appointment for unsatisfactory service and, in turn, this recommendation was endorsed by the Executive Director of UNEP. The Applicant was told of the decision to terminate him with compensation in lieu of notice on 15 May 1984.

V. The difficulty with the foregoing is that the Applicant received no notification from the APP, the APB or anyone else that consideration was being given to his possible termination for unsatisfactory service. None of the last three performance reports he received indicated either partial or total unsatisfactory

performance ratings. For all he knew, the 21 September 1983 recommendation for continuation of his permanent appointment was being routinely processed. He was not given any opportunity to make any presentation on his own behalf before the APP or the APB before the termination recommendation was submitted to and carried out by the Executive Director of UNEP.

VI. This represents a clear failure on the part of the Administration to observe a fundamental procedural protection accorded to staff members under the applicable Staff Rules and Administrative Instructions, including the Manual for the APBs away from Headquarters, governing five-year reviews and terminations for unsatisfactory service. The Tribunal has stressed repeatedly the valuable nature of procedural rights granted to staff members in connection with termination of permanent appointments and the importance attached to their strict observance. E.g. Judgements No. 98, Gillman (1966);No. 131, Restrepo (1969); No. 157, Nelson (1972); and No. 184, Mila (1974). Here, the Applicant received none of the procedural due process protection before the APB to which he was entitled, and the Administration has acknowledged this deficiency.

VII. To be sure, the APP and the APB had before them performance evaluation reports disclosing the shortcomings in the Applicant's performance over a lengthy period of time and the absence of any comments thereon by the Applicant. The Applicant claims that he did submit some comments which were not included in his file. As a practical matter, unfavorable inferences against the Applicant might perhaps be drawn from his file. But the language of the JAB report suggests that it may have gone further and considered the criticisms against the Applicant as having been admitted by him. In addition, the JAB seems erroneously to have looked upon this case as similar to cases involving renewals of fixed-term appointments, and to have

made other factual errors acknowledged as such by the Administration. Be that as it may, there is no excuse for the failure to notify the Applicant and give him an opportunity to respond to the proposal to terminate his permanent appointment for unsatisfactory service.

VIII. The Applicant was, of course, under no obligation to initiate rebuttals with respect to the various criticisms levelled at him in the performance reports. He may have felt that, since he did not face any threat of adverse action, there was no need for him to do so. Regardless of the Applicant's wisdom or lack thereof in following that course, he was still entitled to due process in the form of notice and an opportunity to respond.

IX. The Applicant argues that the Executive Director of UNEP did not have a delegation of authority to terminate him for unsatisfactory service. Although Annex V of ST/AI/234 reserved that authority to the Secretary-General, the Respondent alleges that the situation is different when a termination occurs in the course of the five-year review, on the theory that it is an incident of the appointment process under staff rule 104.13 and therefore part of the appointment delegation to the Executive Director. The Tribunal notes that although the Secretary-General eventually ratified the Executive Director's action on 30 October 1987, it does not deem it essential now to resolve either this issue or the Applicant's contention regarding the scope of the APB's authority under staff rules 104.13 (c)(ii) and 104.14 (f)(ii)(B) following a departmental recommendation for no change in status. The Tribunal considers that the basic question is whether the Applicant's rights to due process were infringed. The Respondent may, however, in the future wish to clarify the authority delegated to the Executive Director, as well as the authority of APPs and APBs, in similar situations involving

five-year review of permanent appointments. The Respondent has recognized that these matters were not foreseen, and future confusion might be avoided by such clarification.

X. The Respondent relies on the Tribunal's Judgement No. 98, Gillman (1966). The Respondent makes the point that in that case the Tribunal concluded that the composition and procedures followed by a working group of the APB represented, in principle, the complete, fair and reasonable procedure which must be carried out prior to the termination of a permanent appointment. That case, of course, was decided prior to the issuance of ST/AI/222, but it nevertheless contemplated adherence to proper procedures. It recognized that such procedures could be accorded by a working group of the APB. In Gillman, however, there is no indication that the Applicant failed to receive notice and an opportunity to present her position to the APB. Moreover, in that case, the Tribunal did not consider that the Applicant had received the complete, fair and reasonable procedure to which she was entitled because the APB working group failed to take into account all the facts in the case. It follows therefore that the Tribunal's decision in Gillman does not aid the Respondent in this case.

XI. The Applicant claims that the Administration acted improperly in preparing and submitting to the APP the last performance evaluation report covering the period from 16 March 1982 through 15 January 1984, a period of less than two years. Under ST/AI/240/Rev.1, performance evaluation reports, except for special reports, were to be prepared at three-year intervals. The Respondent points out that, under the version of ST/AI/240 in effect immediately prior to Rev.1, the intervals were two years and the last performance evaluation report was probably prepared with this in mind. Indeed, that report dealt in large part with the period

prior to August 1983 when Rev.1 became effective. The Tribunal does not consider that the three-year interval provided for by ST/AI/240/Rev.1 necessarily prohibits the preparation of a performance report covering a shorter period, if there is a good reason to do so. Here, the Administration's action was entirely proper since a five-year review was under way and apparently had been somewhat delayed by the injury sustained by the Applicant in early June 1983. The Tribunal therefore does not find any impropriety in the preparation and consideration of the last report.

XII. With respect to the Applicant's assertion that the decision to terminate him was motivated by prejudicial and extraneous factors, no evidence submitted by the Applicant to the Tribunal supports this contention. On the contrary, the Applicant's treatment by his department within UNEP, if anything, appears to have been generous and understanding, as reflected by the ratings he received in his performance evaluation report. Generous treatment also appears in the initial assessment and recommendation made by the department in connection with the five-year review. This hardly seems consistent with improper motivation on the part of the Applicant's department. Similarly, the evidence shows that the Applicant's department gave due consideration to the Applicant's handicap after he suffered the loss of an eye. There is no evidence that he was terminated because of that event.

XIII. The Tribunal notes with dismay that although the termination occurred in mid-May 1984 and was challenged by the Applicant in timely fashion, the JAB report was not issued until 23 June 1987. In addition, there appears to have been unexplained delay on the part of the JAB in making documents to which the Applicant was entitled available to him. The Tribunal recalls its previous expressions of disapproval with regard to unjustified delays in the

processing of applications before JABs. This is especially deplorable in cases involving termination of employment.

XIV. In view of the lapse of three years before the JAB report and the egregious failure by the APP and APB to conduct a "thorough, searching and balanced" review, the Tribunal does not consider it appropriate in this case to proceed under article 18 of its Rules. (See Judgement No. 184, Mila, paras. III and XIII, (1974)). For that would compound the prior delay with further delay. Because of the complete failure of notice and opportunity for the Applicant to respond to the proposal to terminate his permanent appointment prior to the action taken by the Executive Director on 15 May 1984, the Tribunal finds that the application is well founded and will order the rescinding of the Respondent's decision to uphold the Applicant's termination.

XV. In accordance with article 9.1 of the Tribunal's Statute, the Tribunal, in the circumstances of this case, fixes the amount of compensation to be paid to the Applicant for the injury sustained, should the Respondent decide that the Applicant shall be compensated without further action being taken in this case, as an amount equivalent to eighteen months net base salary at the rate in effect at the time of his separation from service. The Tribunal does so, on the understanding that the Applicant has received, or will also receive, the benefits provided for in the letter to him dated 15 May 1984 from the Assistant Executive Director for Fund and Administration. If the Applicant has received the six months' net base salary provided for in the letter dated 30 October 1987 to the Applicant from the Assistant Secretary-General for Human Resources Management, which acknowledged procedural deficiencies in the review of the Applicant's permanent appointment, that amount should be credited against the eighteen months salary provided for herein.

XVI. For these reasons, the Tribunal decides:

(1) That the decision by the Executive Director, communicated to the Applicant by the Assistant Executive Director for Fund and Administration on 15 May 1984, is hereby rescinded;

(2) That the amount of compensation to be paid to the Applicant, in accordance with article 9.1 of the Statute of the Tribunal, should the Secretary-General decide, within 30 days from the date of the notification of this judgement, that the Applicant shall be compensated, without further action being taken in his case, shall be 18 months net base salary at the rate in effect at the Applicant's separation from service.

(3) If the Applicant has received the amount corresponding to six months net base salary, in accordance with the decision by the Secretary-General on 30 October 1987, that amount shall be credited against the 18 months salary set forth above;

(4) All other pleas are rejected.

(Signatures)

Roger PINTO
First Vice-President

Jerome ACKERMAN
Second Vice-President

Ahmed OSMAN
Member

New York, 2 November 1989

R. Maria VICIEN-MILBURN
Executive Secretary