

UNITED NATIONS
ADMINISTRATIVE
TRIBUNAL



Distr.
LIMITED

AT/DEC/383
29 May 1987

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 383

Case No. 408: RAO

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Arnold Kean, First Vice-President, presiding;
Mr. Endre Ustor; Mr. Roger Pinto;

Whereas on 6 May 1986, Krishnamurthy Seshagiri Rao, a former staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, filed an application that did not fulfil the formal requirements of Article 7 of the Rules of the Tribunal;

Whereas at the request of the Applicant, and with the agreement of the Respondent, the President of the Tribunal extended to 5 November 1986 the time-limit in which to file an application;

Whereas on 4 November 1986, the Applicant filed a corrected application, the pleas of which read as follows:

"A. Preliminary Measures:

1) The Applicant requests the Tribunal to requisition from UNICEF copies of the consecutive nine Fixed-Term one Probationary and the final Permanent Appointment letter together with the various Performance Evaluation Reports in evidence of Applicant's dedication to the work of UNICEF, his consistently satisfactory performance and 'demonstrated ability' to carry out higher level of responsibility as recognized by his various superiors including the Regional Director of UNICEF as against no conclusive evidence at all for the absolutely unsustainable charge of unsatisfactory

service to the extent of terminating the Applicant's Permanent Appointment.

2) The Applicant requests the Tribunal to requisition from UNICEF original or certified copies of the following documents also:

- a) The log book in respect of the UNICEF car No. TMU 7093 that met with an accident on 1 March 1981 as mentioned [in] the statement made on behalf of the Secretary General ...
- b) Depositions of Mr. M.A. Durbin and K. S. Srinivasan dated 24 April 1982 as mentioned in ... the statement made on behalf of the Secretary-General ...
- c) Mr. Sundararaman's reply to Mr. S. Guhaprasadam's memorandum dated 28 December 1974.
- d) Comparative study mentioned in ... the statement made on behalf of the Secretary-General ...

3) In view of the nature of the case, the Applicant requests that oral proceedings be held by the Tribunal for the purpose of interrogating witnesses/experts and hearing the parties under Article 15 of the Rules of the Tribunal.

4) The Applicant requests that he also be given the opportunity to examine the following witnesses before the Tribunal:

- a) Mr. K. Sathyamoorthi Holla, Additional Civil Judge, Kolar, Karnataka State, India
- b) Mr. Ramnath Dore, the Chairman of the 'Court of Enquiry'
- c) Mr. C. V. Madhavan, UNICEF/Madras
- d) Mr. Padamjit Singh, Chief Personnel Services Section, UNICEF/New York
- e) Mr. M. P. Sinha, UNICEF/New Delhi
- f) Mr. K. S. Srinivasan, UNICEF/Madras
Mr. M. A. Durbin, UNICEF/Madras
- h) Mr. David Ahimaz, UNICEF/Madras
- i) Mr. K. S. Raman, Convenor, Grievance Committee, UNICEF/Madras
- j) Mr. J. Raman, Member, Grievance Committee, UNICEF/Madras
- k) Mr. Michael K. Corbett, UNICEF/New Delhi
- l) Mr. D. P. Haxton, UNICEF/New Delhi
- m) Mr. S. Guhaprasadam, UNICEF/Madras
- n) Mr. Muhtesip, UNICEF/New Delhi

B. Substantive Measures

The decisions which the Applicant is contesting and whose rescission he is requesting under Article 9, Paragraph 1 of the United Nations Administrative Tribunal Statute are:

- 1) Decision of the Executive Director, UNICEF, to terminate the Applicant's Permanent Appointment without indemnity on 1 December 1982 contained in Assistant Personnel/Training Officer's letter dated 1 December 1982 ...; and
- 2) Decision of the Secretary-General that the above contested decision of the Executive Director, UNICEF, be maintained as contained in the letter of Assistant Secretary-General for Personnel Services dated 25 March 1986 ...

C. Obligation Invoked

The obligations which the Applicant is invoking and whose specific performance he is requesting under Article 9, Paragraph 1 of the Statute are given hereunder and the Applicant is requesting the Tribunal:

- 1) To order the Respondent to reinstate the Applicant into the service of the United Nations with UNICEF/Madras or in any one of the UNICEF offices in India for duties appropriate to his qualifications and experience, or

To order the Secretary-General [to] reinstate the Applicant into the service of the United Nations system, i.e. any one of the offices of the various UN organizations in India or anywhere else.

- 2) To order payment of full salary to the Applicant from the date of termination of his Permanent Appointment to the effective date of reinstatement less such amounts as already paid to the Applicant by way of termination indemnity.
- 3) To order reimbursement of expenses reasonably incurred by the Applicant in pursuing this application and the appeal submitted to JAB, such as long-distance telephone calls, preparation of documentation, postage, etc., as may be determined by the Tribunal.
- 4) To order removal from the Applicant's file of all improper and adverse material such as the report of the Court of Enquiry.

5) Should a suitable post in keeping with his qualifications and experience be not available anywhere and the Applicant has to be only compensated by payment of money instead of being reinstated, the Tribunal may consider the exceptionality of the case in fixation of the amount of compensation on the following grounds:

- a) The very abnormal successive delays caused by the Respondent have already been abusive and bordered on denying due process and justice to the Applicant. Five years and seven months have elapsed since the unfortunate accident occurred on 1 March 1981 and the Applicant put under continued financial difficulties, socio-economic degradation and the consequent mental torture destroying or very adversely affecting his family situation particularly the situation of his children of school-going age.
- b) The fact that UNICEF is very well aware of their error of administrative judgement and perhaps their repentance in this regard was overtaken by the pride of very high status of the decision makers as compared to the Applicant, only a driver so that the offer made by them in July 1985 after about four years as mentioned in ... of the JAB Report ... to settle the case outside the due process was too very little and humiliating. This, however, clearly indicates that the Applicant was considered even by them as entitled to be compensated if not reinstated.
- c) The Applicant still maintains a sense of belonging to the United Nations Children's Fund and prefers reinstatement over a compensation in terms of money."

Whereas the Respondent filed his answer on 12 February 1987;
Whereas the Applicant filed written observations on 26 March 1987;
Whereas on 27 March 1987, the presiding member of the panel ruled that no oral proceedings would be held in the case;
Whereas on 12 May 1987, the Applicant submitted additional documents;

Whereas the facts of the case are as follows:

Mr. K. Seshagiri Rao was recruited by UNICEF on 2 July 1973 as a Driver/Messenger at the ND-2/Step I level in the South India Office,

Madras. He was initially offered a three-month fixed-term appointment that was successively extended for further fixed-term periods. On 1 July 1978, his appointment was converted to a probationary appointment and on 1 January 1979 to a regular appointment.

On 3 June 1980, the Assistant Personnel Officer informed the Applicant, on behalf of the Regional Director, that following the review conducted by the Appointment and Promotion Committee, it was the Regional Director's intention to approve his promotion. The letter reads in part as follows:

"... the Regional Director has asked me to convey to you his appreciation of the quality of your performance in your current duties. He believes that you have demonstrated the ability to carry a higher level of responsibility and therefore, considers that you are eligible for promotion when an appropriate posting becomes available, either through a transfer to another higher-graded post, or through reclassification of your existing post ...

I extend congratulations on this recognition of your contribution to UNICEF's work."

Indeed, the Applicant was promoted to the ND-2A Step 11 level effective 1 January 1980. On 1 July 1980, the Applicant was granted a permanent appointment.

On 1 March 1981, the Applicant was driving three UNICEF staff members from Madras to Koppa on a field trip. When he reached Kolar, near Bangalore, an accident occurred. Two of the passengers who travelled in the rear seat of the car died. The passenger travelling in the front seat with the Applicant was seriously injured and listed in critical condition for a long period of time. The Applicant was also severely injured and hospitalized.

In a cable dated 17 March 1981, the Officer-in-charge, New Delhi, asked the Personnel Officer at Headquarters, for her advice on whether there were "GROUNDS TO SUSPEND [THE APPLICANT] FROM DUTY IN ACCORDANCE WITH STAFF RULE 110.4 SUBSEQUENT TO ARREST AND RELEASE ON BAIL WHICH MAY INVOLVE REVOKING OF DRIVING LICENCE." In a reply dated 18 March 1981, the

Personnel Officer at Headquarters stated that in order to suspend the Applicant pending investigation, approval was required from the Executive Director. For this purpose, full details of the accident should be furnished to Headquarters in order to determine whether or not the accident had been caused by the Applicant's negligence.

On 19 March 1981, the Applicant was arrested by police officials of the Kolar Rural Police Station. He was immediately released after posting a surety bail bond executed jointly by himself and Mr. Ramnath Dore, the Regional Programme Officer. On 20 March 1981, the Applicant was discharged from the hospital and returned to his private residence in Madras to convalesce.

On 15 April 1981, the Regional Programme Officer wrote a memorandum to the Regional Director concerning the accident. He reported his own views on the Applicant's conduct. He also questioned the veracity of a statement by the Applicant that there was a yellow truck coming down the same road from the opposite direction into his lane, and that this had caused the accident. He wrote a brief report and recommended that the Applicant be placed on sick leave, initially for three months. Then, "another judgement" could be made on how to proceed.

On 8 October 1981, the Applicant informed the Regional Programme Officer that he had been summoned to appear in Court by the Chief Judicial Magistrate at Kolar and by the Motor Accidents Claims Tribunal in Kolar at the Court of the District Judge. He intended to appear with an advocate.

On 24 December 1981, the Programme Administration Officer in South India informed the Applicant that in order to ensure that he remained on full pay status, annual leave had been credited for each full day of sick leave taken, when his entitlement to sick leave with full pay had expired.

On 3 March 1982, the Assistant Personnel and Training Officer, New Delhi, wrote to the Chief, Personnel Services Section at Headquarters and requested his concurrence to "suspend Mr. Rao as per the existing rules, pending trial in the court of law". In a reply dated 30 March 1982, the Personnel Officer at Headquarters stated that the Office of Personnel

Services believed it was too late to suspend the Applicant for an accident which happened in early 1981 on the ground that a National Court had not completed consideration of the case. She added: "ASSUMING THAT RAO IS NOT ON EXTENDED SICK LEAVE WE WILLING RECOMMEND TO EX [EXECUTIVE] DIR [DIRECTOR] TERMINATION FOR UNSATISFACTORY SERVICE IF YOU CAN FULLY JUSTIFY IT."

On 5 April 1982, the Regional Personnel Officer recommended to the Regional Director the holding of a "formal investigation" in which the Applicant would be "confronted with available evidence regarding his misdemeanour and given opportunity to defend himself." He suggested that the investigation be held in Madras and that the Regional Programme Officer, Mr. Ramnath Dore, act as Chairman. He concluded:

"After doing the investigation, formal report will be made through you with our recommendation for disciplinary action to the Executive Director."

On 15 April 1982, the Applicant reported to the Office and presented a medical certificate that stated he was fit to work. On 20 April 1982, Mr. Dore, who then exercised the functions of Zone Office Representative in South India, informed the Applicant that he was not in a position to allow him to report to work until he received approval from New Delhi. On the same date, he wrote a letter to the Applicant that reads as follows:

"The Regional Director, UNICEF, ROSCA [Regional Office for South and Central Asia], has constituted a 'Court of Enquiry' to investigate into the accident to UNICEF administrative vehicle No. TMU 7093, that occurred on Sunday, 1 March 1981, near Kolar, in which, you were involved. The Court of Enquiry will commence its sitting in this office at 2 p.m. on Saturday, 24 April 1982. You can attend the enquiry and if you wish you may be assisted by any colleague from this organisation."

The "Court of Enquiry" met three times on 24, 25 and 26 April 1982. It was constituted of Mr. Ramnath C. Dore, Zone Office Representative, who acted as Chairman, Mr. M. P. Sinha, the Assistant Personnel Officer at the

New Delhi Office, and Mr. K. S. Raman, member of the UNICEF India Staff Association. The Applicant attended the first meeting of the Court of Enquiry with no counsel. He did not attend the rest of the meetings, and when summoned, wrote to the Chairman that on 25 April 1982, he would be in a position to give reasons for not attending the Court of Enquiry after consultation with his lawyer.

In a letter dated 26 April 1982 addressed to the Zone Office Representative, the Applicant explained that he had not attended the "Court of Enquiry" because it was not legally constituted under the UN Staff Regulations. In addition, since he had not been charged with any crime, he could not rebut anything. Since a case had been filed against him in Court by the police and the case was "Subjudice", his lawyer had advised him that he could not be tried in two courts at the same time. Furthermore, no staff member of the UNICEF Madras Office had been willing to represent him in the proceedings before the Court of Enquiry.

The Court of Enquiry prepared a report and concluded as follows:

"Irrespective of the fact whether a truck was coming in the opposite direction and even if there was no traffic at the time of the accident, the speed at which he was driving deduced at approximately 120 kilometres per hour average ... cannot be termed as 'safe driving'.

...

Notwithstanding the fact that Mr. K. S. Rao did not participate in the enquiries on 25 and 26 April 1982 ... the enquiry came to the conclusion that:

'4. A CONTRIBUTING CAUSE TO THE ACCIDENT WAS THE DRIVING OF MR. K. S. RAO AT A HIGH SPEED AND HIS NOT OBSERVING NORMAL SAFETY PRECAUTIONS'."

On 28 April 1982, the Regional Director informed the Chief, Personnel Services Section at Headquarters of the investigation and its results and officially requested him to seek the Executive Director's permission to summarily dismiss the Applicant, immediately.

On 12 May 1982, the Chief, Personnel Services at Headquarters cabled the Applicant as follows:

"FOLLOWING RECEIPT ALL RELEVANT INFORMATION WE FOUND PANEL ESTABLISHED TO INVESTIGATE CIRCUMSTANCES OF TRAGIC ACCIDENT IN 1981 PROPERLY CONSTITUTED. HOWEVER, BEFORE FINDINGS ACTED UPON WE ARRANGING SHARE REPORT WITH YOU. PLEASE ARRANGE TO HAVE YOUR COMMENTS SENT TO US BY 31 MAY 1982. MEANTIME YOU PLACED ON SPECIAL LEAVE WITH PAY FROM 15 OCTOBER [1981] UNTIL FURTHER NOTICE. THIS WITHOUT PREJUDICE TO FINAL DECISION IN YOUR CASE."

In a letter dated 14 May 1982, the Officer-in-charge, UNICEF, New Delhi, transmitted the cable to the Applicant as well as a copy of the report of the "Court of Enquiry". The Applicant subsequently requested an extension of the time-limit in which to file his comments on the report until 30 June 1982 and it was granted, on condition his comments reached the Madras Office by 18 June.

On 15 June 1982, the Applicant wrote to the Chief, Personnel Services at Headquarters and provided him with detailed comments concerning the report. The Applicant raised the question of the constitution of a "Court of Enquiry" under the UN Staff Regulations and Rules. He asserted that Mr. Ramnath Dore, the Zone Office Representative who was prejudiced against him was not qualified to chair the meetings. He also stated that he had not felt well on 25 and 26 April and had therefore been unable to attend those meetings. He requested that the whole proceeding be set aside and that a new enquiry be conducted in order that he could cross examine the witnesses.

In a cable dated 9 July 1982, the Chief, Personnel Services at Headquarters, informed the Regional Personnel Officer that Personnel Services intended to recommend the termination of the Applicant's appointment for unsatisfactory service. In this connection, he asked him to provide him with more evidence from the Applicant's file that would support termination on those grounds. In a reply dated 13 July 1982, the Regional Personnel Officer in New Delhi informed the Chief, Personnel

Services Section at Headquarters, that the Applicant's file did "not support consistent unsatisfactory performance" since there were "good and bad reports" for the same period. Accordingly, he recommended that the decision to terminate the Applicant be based "more on findings of inquiry into March 1981 accident".

On 23 August 1982, the Chief, Personnel Section at Headquarters recommended to the Regional Director and the Regional Personnel Officer that the Applicant's permanent appointment be terminated for unsatisfactory service, under Staff Regulation 9.1(a) and that "the proceedings should be based primarily on the findings of the enquiry into the March 1981 accident." He suggested that the case be submitted to the General Service Appointment and Promotion Committee, GSAPC, in New Delhi.

In a memorandum dated 1 September 1982, addressed to all members of the General Service Appointment and Promotion Committee in New Delhi, the Regional Personnel Officer set forth the proposal by the Director of Personnel and Administration at Headquarters to terminate the Applicant's appointment for unsatisfactory service under Staff Regulation 9.1. The proposal was made "as a result of the findings of the investigation into the automobile accident which occurred on March 1, 1981, near Kolar". The Committee was asked to "base its review on the Report of the Investigation held in Madras on April 24, 25 and 26, 1982".

On 1 September 1982, the Applicant was officially informed that UNICEF was making a formal proposal to terminate his permanent appointment for unsatisfactory service under Staff Regulation 9.1 "as a result of the findings of the investigation into the automobile accident which occurred on 1 March 1981, near Kolar". He was provided with a copy of ST/AI/222 and was asked to submit written comments by 7 September 1982. In a reply dated 4 September 1982, the Applicant stated that all his comments were contained in his letter of 15 June 1982 to the Chief, Personnel Services at Headquarters. He also asked to appear personally before the Committee. His request was granted.

The General Service Appointment and Promotion Committee in New Delhi met on 22 September 1982. The minutes of the meeting record that, by a vote of 4 to 1, the Committee recommended the termination of the Applicant's permanent appointment for unsatisfactory service "based on the findings of the investigation into the automobile accident which occurred on 1 March 1981". The majority of the members of the Committee recommended that the Applicant should first be offered an agreed termination since there was a criminal case pending in the Kolar Court and UNICEF's actions should in no way prejudice the Court proceedings. Furthermore, given the delays in the handling of the case, due process would be better served by the offer of an agreed termination.

On 30 September 1982, the Regional Personnel Officer informed the Applicant of the Committee's recommendation and advice in the following terms:

"It might also interest you to note that the Committee advised that the following steps be taken with regard to implementing its recommendation:

1. 'Keeping in view the interest of the staff member and that of UNICEF, the Committee recommended that 'agreed upon termination' be discussed first with Mr. Rao. The Committee recommended this in the light of the fact that a criminal case against Mr. Rao arising out of the accident is pending in the Kolar Court and UNICEF's decision should not be seen as prejudicial to the proceedings of the Court.
2. 'If Mr. Rao rejects the offer of 'agreed upon termination', the Committee recommends straight termination of the staff member's permanent appointment'."

On 18 October 1982, the Applicant requested the Secretary-General pursuant to Staff Rule 111.1 "to stay the operation of the proposal to terminate [his] permanent appointment in the UNICEF." In a letter dated 19 October 1982, addressed to the Regional Personnel Officer, New Delhi,

the Applicant rejected the offer of an agreed termination and requested that the order of termination be withheld until the conclusion of the Indian judicial process and the disposal of his appeal to the Secretary-General under Staff Rule 111.1.

In a cable dated 22 October 1982, the Regional Director informed the Chief, Personnel Section at Headquarters of the Applicant's reaction to the recommendation of the GSAPC and recommended that the Executive Director accept the Committee's advice to terminate the Applicant's appointment.

In a memorandum dated 4 November 1982, the Director, Division of Personnel Administration recommended to the Executive Director the termination of the Applicant's appointment for unsatisfactory service under Staff Regulation 9.1, (a), and that no termination indemnity be paid, as provided for in Annex III(c) to the Staff Regulations. Termination would take effect immediately, with compensation paid in lieu of the three months notice required by Staff Rule 109.3. On 19 November 1982, the Executive Director approved the recommendation. In a cable dated 24 November 1982, the Chief, Personnel Service at Headquarters conveyed to the Regional Director the Executive Director's decision to terminate the Applicant's permanent appointment. On 1 December 1982, the Assistant Personnel/ Training Officer, New Delhi, informed the Applicant of the Executive Director's decision in the following terms:

"After due consideration of the recommendation of the General Service Appointment and Promotion Committee (as communicated to you in our letter ... dated 30 September 1982) and your comments thereon, the Executive Director has decided to terminate your services without indemnity, for unsatisfactory services with immediate effect, under regulation 9.1(a) of the Staff Rules. You will, however, be paid compensation in lieu of three months notice. This payment may be collected from our South India Office, Madras upon presentation of this letter."

On 13 January 1982, the Applicant lodged an appeal with the Joint Appeals Board.

On 23 December 1982, the Additional Chief Judicial Magistrate in Kolar absolved the Applicant from any negligence in respect of the accident that occurred on 1 March 1981. The judge held that although the prosecution had examined five witnesses all of them had pleaded "total ignorance about the incident". The witnesses had "simply stated that because police asked them to sign on paper, they signed." Under the circumstances, the judge held that the prosecution had not "proved the guilt of the accused [the Applicant] beyond any reasonable doubt", and he was acquitted.

The Joint Appeals Board adopted its report on 30 September 1985. Its conclusions and recommendations read as follows:

"43. The Panel finds that the term 'Court of Enquiry' indicated by the New Delhi Office, UNICEF and by the UNICEF Office in Madras in their communication to the appellant dated 20 April 1982 is a misnomer. In the view of the Panel, it would have been more appropriate to term it as an Investigation Committee.

44. The Panel finds that the 'Court of Enquiry' set up to investigate the cause of the accident to UNICEF car No. TMU 7093 was not a Disciplinary Committee in terms of Staff Rule 110.2, but the findings of this Court of Enquiry were the basis on which the GSAPC, New Delhi reached its decision to terminate the appellant for reasons of unsatisfactory service.

45. The Panel finds that UNICEF Administration had failed in not informing the appellant of the composition of the 'Court of Enquiry' and thus denied the appellant the opportunity to object ab initio to the committee being chaired by Mr. Ramnath C. Dore, the Zone Office representative, UNICEF, Madras and also explain his reasons for such an objection.

46. The Panel finds that the UNICEF Administration had erred procedurally in nominating Mr. Ramnath C. Dore as Chairman of the 'Court of Enquiry' in view of the strained relations that existed between him and the appellant for many years which resulted in the appellant complaining to the Personnel Officer, UNICEF, New Delhi, once on 25 September 1978 and again on 5 October 1978 jointly with the other staff members of UNICEF, Madras.

47. The Panel finds that the fact that Mr. Ramnath Dore was the Chairman of the 'Court of Enquiry' precluded any one from the Madras UNICEF Office volunteering to act as the Counsel for the appellant fearing a setback on their career prospects. The Panel finds that this had placed the appellant in a particularly disadvantageous position in that he was not afforded the necessary facilities to seek an appropriate counsel from among the UNICEF Madras staff to represent and defend him at the 'Court of Enquiry' held at Madras.

48. The Panel finds that the performance and conduct of the appellant, as evident from his official status files, had been consistently satisfactory in that he as a driver, had rendered accident free service over a period of nearly eight years. The Panel further finds that because of his proven satisfactory service, the appellant had been given a regular appointment and later a permanent appointment and promotion to the next higher level with periodic within grade salary increments and bonuses for accident free services.

49. The Panel finds that the Additional Chief Judicial Magistrate, Kolar, had investigated the accident of 1 March 1981 in which the appellant was involved and acquitted the appellant as the alleged guilt of the appellant was not proved nor supported by evidence beyond reasonable doubt.

50. The Panel notes with great regret that the automobile accident of 1 March 1981 had caused the death of two staff members of UNICEF and injuries to the appellant and one other staff member of UNICEF necessitating their hospitalization and absence from duty for a prolonged period. The Panel also notes that the UNICEF car was damaged beyond economic repairs. However, the Panel is unable to find sufficiently conclusive evidence to determine that the appellant's services were unsatisfactory to the extent of terminating his permanent appointment.

51. The Panel therefore recommends that the appellant be reinstated in any one of the UNICEF Offices in India, and considered for duties appropriate to his qualifications should a post of a driver be not available, after appropriate adjustment of the amount paid to the appellant consequent on his termination.

52. Finally, the Panel regrets to find that UNICEF Administration instituted the investigation procedure to ascertain the cause of the accident after a lapse of more

than one year from the date of the unfortunate accident. The respondent could have been much more expeditious in initiating the investigation procedures.

53. The Panel makes no further recommendation in respect of the appeal."

On 25 March 1986, the Assistant-Secretary-General for OPS, informed the Applicant, that:

"... The Secretary-General, having re-examined your case in the light of the Board's report, has decided that the contested decision be maintained and that no further action be taken on your case.

The Secretary-General's decision ... to terminate your permanent appointment was a valid exercise of his discretion under the Staff Regulations and Rules and was not vitiated by any procedural or other defects ..."

On 4 November 1986, the Applicant filed the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Respondent committed a fundamental mistake of procedure in constituting a "Court of Enquiry" to investigate the accident since such Court could not be regarded as, nor substituted for a disciplinary committee in terms of Staff Rule 110.2.

2. The Respondent used the findings of the "Court of Enquiry" as a basis to terminate the Applicant's appointment for unsatisfactory service and by doing so caused a complete failure of justice.

3. The Respondent acted illegally by disregarding the Applicant's performance evaluation reports which showed that his performance had been satisfactory.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's appointment pursuant to Staff Regulation 9.1(a) was in conformity with the procedure laid down

in Administrative Instruction ST/AI/222 and was taken following a fair and proper review of his case, which guaranteed due process.

2. The Secretary-General's decision to dismiss the Applicant for unsatisfactory service was within his discretion and was justified by the evidence against the Applicant.

The Tribunal, having deliberated from 12 May 1987 to 29 May 1987, now pronounces the following judgement:

I. Staff Regulation 9.1(a) authorizes the Secretary-General to terminate the appointment of a staff member who holds a permanent appointment, if the services of the individual concerned prove unsatisfactory.

II. The Tribunal has repeatedly held that the evaluation of the performance of a staff member lies within the Secretary-General's discretionary authority.

III. The Tribunal has also stated in several cases (Judgement No. 98: Gillman, 1966; No. 131: Restrepo, 1969; No. 157: Nelson, 1972; No. 184: Mila, 1974; and No. 219: Pochonet, 1977) that in view of the "very substantial rights given by the General Assembly to those individuals who hold permanent appointments in the United Nations Secretariat, ... such permanent appointments can be terminated only upon a decision which has been reached by means of a complete, fair and reasonable procedure which must be carried out prior to such decision."

IV. The procedures carried out for the purpose of advising the Secretary-General in the evaluation of the performance of the services of the Applicant, in particular of his role in the tragic car accident of 1 March 1981, were as follows:

(a) The investigation conducted more than one year later by the so-called "Court of Enquiry" held in Madras from 24 to 26 April 1982, which came to the unanimous conclusion that "a contributing cause to the accident was the driving of [the Applicant] at a high speed and his not observing normal safety precautions."

(b) The meeting of the GSCAP held on 22 September 1982, which, "based on the findings of the investigation into the automobile accident", recommended by a majority vote of 4 to 1 the termination of the Applicant's permanent appointment for unsatisfactory service, with the following proviso:

"1. Keeping in view the interest of the staff member and that of UNICEF, the Committee recommends that 'agreed upon termination' be discussed first with Mr. Rao. The Committee recommends this in the light of the fact that: (i) a criminal case against Mr. Rao arising out of the accident is pending in the Kolar Court, and UNICEF's decision should not be seen as prejudicial to the proceedings of the Court; and (ii) given the delay in the handling of this case, due process will be better served by offering 'agreed upon termination'.

2. If Mr. Rao rejects the offer of 'agreed upon termination', the Committee recommends straight termination of the staff member's permanent appointment."

(c) The procedure before the Joint Appeals Board which in its report adopted on 30 September 1985 recommended that:

"... the appellant be reinstated in any one of the UNICEF Offices in India, and considered for duties appropriate to his qualifications should a post of a driver be not available, after appropriate adjustment of the amount paid to the appellant consequent on his termination."

V. The special feature of the present case is that the Applicant who is charged with unsatisfactory service on the one hand, has a good record of service on the other.

The Joint Appeals Board found:

"... that the performance and conduct of the appellant, as evident from his official status files, had been consistently satisfactory in that he as a driver, had rendered accident-free service over a period of nearly eight years. The Panel further finds that because of his proven satisfactory service, the appellant had been given a regular appointment and later a permanent appointment and promotion to the next higher level with periodic within-grade salary increments and bonuses for accident-free services."

VI. According to the Respondent this contradiction is more apparent than real. In his submission "a single malfeasance, such as the accident of 1 March 1981, can constitute a sufficient basis for 'unsatisfactory services' within the meaning of Staff Regulation 9.1(a)."

VII. In the Tribunal's view the real problem is precisely whether the Applicant did or did not commit a malfeasance. This is not a hollow question: even if it cannot be forgotten that two of the Applicant's passengers found their death in the accident, obviously properly-driven cars can also be involved in an accident and in very serious ones at that.

VIII. The "Court of Enquiry" undertook an apparently impossible task. It had to establish the circumstances of an accident which occurred almost 14 months before the enquiry. It never visited the place of the accident. It did not know the condition of the road at the time of the accident. It did not possess a diagram or sketch showing the tyre prints of the vehicles involved. It did not speculate whether the UNICEF car was hit by another one (the yellow truck) or not, and how it happened that "everything in the car was damaged except the right side" as stated by Mr. Durbin, [UNICEF staff member, Madras], who was on the site of the accident the morning after. No attention was given to Mr. Durbin's statement that "it looked to him as if the car had drifted off the road, hit a milestone that caused it to go over its left side, and then it went on its roof"; nor to his statement that "I could not see any other paint marks of any other vehicle. If another vehicle was involved there would have been some paint marks. Also, there would have been damage to the right side instead of to the left." There is no trace that the wrecked car was checked to find out whether it suffered from some mechanical failure which could have caused or contributed to the accident.

IX. Notwithstanding these difficulties the "Court of Enquiry" was able to give a definitive answer to the question mentioned above (under VII) in finding that "a contributing cause to the accident was the driving of [the Applicant] at a high speed and his not observing normal safety precautions".

As to this latter "contributory cause", the Tribunal has found nothing in the records of what is meant by "normal safety precautions", which the Applicant did not observe. Was the car not equipped with seat-belts, or did he or his passengers not use them? Is the use of such belts compulsory in India or on the road from Madras to Kolar? Nothing has been mentioned about such or similar precautions.

X. There remains the mention of high speed. Obviously a driver, whether he is employed by an international organization or not, has to observe the local traffic regulations. What local regulations, if any, were in force at the time and place of the accident, and whether the Applicant complied with them was not discussed in the course of the investigation. Was there a legal speed limit? This question was not raised and consequently not answered.

XI. Had the Applicant driven too fast at the critical point of the journey? The "Court of Enquiry" based its conclusion on two elements.

One is the evidence given by Mr. C.V. Madhavan, Programme Assistant, the surviving passenger of the car, in a confidential letter dated 23 April 1982. According to this letter, Mr. Madhavan stated, inter alia: "I remember I heard an exploding noise. I very well remember the car was going at a speed of 110-120 k.p.h. ... After the impact, I don't remember anything ... From the time of [the] accident, around 12.40 p.m. on 1.3.81, it seems I was unconscious ... I don't remember anything between the time of [the] accident and 12 May 1981 as to what happened ...".

This letter was read out before the "Court of Enquiry" and on this occasion Mr. Madhavan said he had nothing to add. He did not say, and was not asked, how he established the speed of the car at 110-120 k.p.h.

XII. In his appeal to the Joint Appeals Board dated 13 January 1983, the Applicant submitted that the statement by Mr. Madhavan

"... that the vehicle was proceeding at 110/120 k.p.h. is devoid of any merit inasmuch [as] it is not based on any reading of the speedometer, in view of the fact that the

speedometer was not within the view of the said Mr. C.V. Madhavan. Mr. C.V. Madhavan was seated on the left side of the front seat of the car and the speedometer is located on the right extreme of the car and as such not within the direct vision of the passenger on the extreme left in the normal course. And there is no evidence that the said C.V. Madhavan took any pains to ascertain the speed of the vehicle at any point of time, much less at the time of [the] accident ..."

XIII. The statement of the Respondent dated 30 November 1983 does not comment on this aspect of the matter, it merely observes that according to Mr. Madhavan "the only eye witness to the accident", "the car was being driven ... at a speed of 110-120 km. per hour, which was well above the normal speed limit".

The Applicant states in his submission of 13 January 1983 that "the speed at which he [was] driving cannot average more than 64 km. per hour" which cannot be called unsafe "considering the fact [that] the vehicle was the latest model of Peugeot 504 and maintained with considerable care by ... UNICEF and was proceeding in the best of the National Highways in India."

XIV. The second element on which the "Court of Enquiry" based its conclusions is the "comparative study of the log of the journey from the starting time to the site of the accident" prepared by the "Court" 14 months after the accident.

The Applicant, in his Counsel's submission of 11 March 1985 to the JAB, described this study as "based only on the conjecture solely aimed at substantially reducing the time and thereby increasing the average speed so that it could be concluded that a contributing cause to the accident was the speedy driving of the car by the Appellant ..."

XV. Indeed, it is difficult to comprehend how the "Court" believed itself able to prepare a reliable log of the journey based on the vague and uncertain statements of the Applicant and Mr. Madhavan, the two living witnesses. Some data of the "study" are inexplicable. How could the "Court" assume the departure from Madras at 9 a.m. instead of 8.30 a.m. as stated by both the Applicant and Mr. Madhavan and how was it able to establish that the approximate time of the car's arrival at Ranipet (where

the travellers had a coffee break) was 11 a.m., when the Applicant said that it was at 10.30 a.m. and Mr. Madhavan said that "he does not remember the exact time". And further: the time of the accident was put at 12.50 p.m. by the Applicant, 12.40 p.m. by Mr. Madhavan and by the "Court" inexplicably at 12.32 p.m.!

XVI. Reasonable questions were asked in the Applicant's submission of 11 March 1985 to the JAB: Why did the investigation not include a re-run by making a trip to Kolar? Why did it not ask for an expert opinion? Why did the members of the "Court of Enquiry" not study the log book of the car in question and in it the data of similar trips made in the past? No answers were given by the Respondent.

XVII. On the basis of the foregoing the Tribunal finds that the proceedings of the "Court of Enquiry" were not able to establish beyond doubt that the Applicant committed a malfeasance which was a contributory cause of the accident of 1 March 1981.

XVIII. The second procedure has also not produced sufficient evidence.

The GSAPC - according to its report of 29 September 1982 - was presented with a brief summary of the case, mostly on the basis of the "Court of Enquiry's" report. In the course of its only meeting, held on 22 September 1982, it heard the Applicant and his counsel and the members of the "Court". The report of the GSAPC did not add much to the findings of the "Court of Enquiry". The Committee was apparently not deeply convinced of the Applicant's guilt, as it recommended - as a first step - the offer to the Applicant of "an agreed upon termination", on the grounds, inter alia, that "thereby due process will be better served."

XIX. The Tribunal concludes that - as amply demonstrated above - the investigation of the accident by the "Court of Enquiry" carried out more than one year after the event was far from complete and that the proceedings before the GSAPC were not able to cure the deficiency of that investigation.

XX. As to the fairness of the procedure before the "Court of Enquiry" and the GSAPC, the Tribunal must observe the following:

It is not contested by the Respondent that the personal relations between the Applicant and Mr. Ramnath C. Dore were strained since 1978, when the Applicant participated in a joint complaint lodged with the Grievance Committee by several staff members against the behaviour of Mr. Dore. The Joint Appeals Board rightly found on this ground that "the UNICEF Administration had erred procedurally in nominating Mr. Ramnath C. Dore as Chairman of the 'Court of Enquiry'."

The Respondent submits, however, that as head of the Madras Office, Mr. Dore was not an improper choice to head the investigation. In any event - the Respondent believes - the GSAPC was appraised of the Applicant's objection against Mr. Dore's role and was able to take account of it in evaluating the report of the "Court of Enquiry".

In this connection the Tribunal observes that the report of the GSAPC does not reflect that the Committee has dealt with this aspect of the matter.

XXI. The ambivalent attitude of one member of the "Court of Enquiry" is remarkable. Mr. K.S. Raman, Chairperson of the UNICEF India Staff Association, subscribed to the report of the "Court" on 26 April 1982, and on 5 May 1982 cabled Mr. Haxton, Regional Director, inter alia, as follows:

"... MAY EYE SUBMIT AS CHAIRPERSON THAT SUBJECT ENQUIRY BE NOT CONSIDERED AS AN INVESTIGATION UNDER RULE ONE HUNDRED AND TEN POINT FIVE STOP EYE SUBMIT THAT THIS ENQUIRY BE NOT USED AS SUBSTITUTE TO SATISFYING REQUIREMENTS UNDER DUE PROCESS STOP MY ABOVE SUBMISSION IS SOLELY MOTIVATED BY MY DESIRE TO LET STAFF MEMBER HAVE FAIR TRIAL AND OPPORTUNITY FOR DEFENCE STOP HOPE YOU WILL TAKE THIS IN THE SPIRIT OF OUR MUTUAL UNDERSTANDING LESS STAFF ASSOCIATION PARTICIPATION IN ENQUIRY BE MISUNDERSTOOD. REGARDS K.S. RAMAN, CHAIRPERSON INDIAN STAFF ASSOCIATION."

XXII. The Tribunal does not find any explanation of the particular features of the confidential letter of Mr. C.V. Madhavan dated 23 April 1982, on which the investigation heavily relied.

According to the remark made on the bottom of the letter it was "typed on 22.4.82". Copies were sent to Zone Office Representative, S.I.O. [South India Office], Mr. M.P. Sinha, [Assistant Personnel Officer, New Delhi], and Mr. K.S. Raman - but not to the Applicant.

Though the letter was - as noted - typed on April 22 and dated April 23, 1982, nevertheless its paragraph 2 contains the following peculiar sentences:

"This statement is given voluntarily by me during the enquiry conducted by UNICEF officials on 24 April 1982 and I was not coerced to make the statement. This is the first statement of its kind to [the] office as I was not asked by [the] office to give this type of a statement but I am doing this on my own." (emphasis added)

The last paragraph of this letter reads as follows: "I have preferred a claim for compensation as per Staff Regulations - addressed to R.D. [Ramnath Dore] through ZOR [Zone Office Representative] - and hope my request is receiving consideration, despite the fact that S.I.O paid my salaries and medical bills".

According to the Applicant:

"The last paragraph of the confidential statement of Mr. Madhavan clearly reflects the incentive for making the whole statement. Mr. Madhavan's motive in making this statement was based on the incentive of expected favourable consideration of his compensation claim pending with the ZOR who, as [the] Chairman of the 'Court of Enquiry' wanted such a statement in order to achieve the objective of punishing the Appellant for the serious written complaints filed against him (the ZOR) by the Appellant in the past."

While this statement was included in the Applicant's submission to the Joint Appeals Board dated 11 March 1985, the Respondent did not attempt to dispel the shadow of the doubt thrown on the fairness of the procedure.

XXIII. In conclusion, the Tribunal finds that the decision of 25 March 1986 of the Secretary-General, maintaining the decision of 1 December 1982

which terminated the Applicant's appointment for unsatisfactory services, was not reached by means of a complete, fair and reasonable procedure. Consequently, the said decision is hereby rescinded. The Tribunal orders the reinstatement of the Applicant into the service of UNICEF for duties appropriate to the Applicant's qualifications and experience - not necessarily automobile driving.

The Tribunal awards to the Applicant US\$ 560.00 as costs.

All other pleas of the Applicant are rejected.

XXIV. According to article 9, paragraph 1 of its Statute, the Tribunal fixes the equivalent of two year's net base salary of the Applicant as compensation to be paid to the Applicant for the injury sustained, should the Secretary-General, within 30 days of the notification of the judgement, decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in his case.

(Signatures)

Mr. Arnold KEAN
First Vice-President

Mr. Endre USTOR
Member

Mr. Roger PINTO
Member

Geneva, 29 May 1987

R. Maria VICIEN-MILBURN
Executive Secretary