

Judgement No. 300*(Original: English)***Case No. 277:**
Sheye**Against: The Secretary-General
of the United Nations**

Suspension without pay of a staff member of the United Nations Truce Supervision Organization (UNTSO) and non-renewal of his fixed-term appointment.

Request for rescission of the decision to suspend the Applicant without pay for a period of 3 months.—Argument based on the requirements of due process.—Consideration of the procedure followed.—Argument rejected.—Argument invoking a mistake of fact.—Consideration of the actions of which the Applicant is accused.—Argument rejected.—Allegation of prejudice.—Mitigation by the Respondent, acting on the recommendations of the Joint Appeals Board, of the disciplinary measure imposed on the Applicant.—Argument rejected.—Argument based on the severity of the disciplinary measure.—The Secretary-General's authority in disciplinary matters.—Argument rejected.

Complaint by the Applicant that the Respondent failed to reinstate him as he had undertaken to do following the recommendations of the Joint Appeals Board.—Delay on the part of the Administration in acting on the Board's report.—The delay, while perhaps excessive, was not intentional.

Request for rescission of the decision not to renew the Applicant's appointment.—Circumstances in which the Applicant's appointment expired.—The circumstances did not create a legal expectancy of renewal of the Applicant's appointment.

Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Endre Ustor, President; Mr. Samar Sen, Vice-President; Mr. Arnold Kean, Vice-President; Mr. Herbert Reis, alternate member;

Whereas on 10 February 1982, Flemming Sheye, a former staff member of the United Nations Truce Supervision Organization in Palestine (hereinafter referred to as UNTSO), filed an application, the pleas of which read:

“(a) to *affirm* the unanimous finding by the Joint Appeals Board (hereafter referred to as ‘JAB’) that he had removed the 47 Mhz radio set in good faith in order to repair it; and to *adjudge and declare* that the Respondent is not entitled to ‘reserve his position’ in the face of this JAB finding;

“(b) to *find* that the Respondent is not entitled to maintain the position that regardless of the Applicant's motive in removing the radio set, his actions constituted unsatisfactory conduct warranting disciplinary action;

“(c) to *adjudge and declare* that the Respondent's decision that the Applicant's ‘failure’ to give ‘priority’ to the repair and reinstallation of the set constituted ‘seriously negligent and unsatisfactory conduct’ is without foundation;

“(d) to *find* that the Respondent's decision to suspend the Applicant for three months without pay was legally defective and in any case that the penalty was grossly excessive in relation to his conduct;

“(e) to *adjudge and declare* that the omission of the Respondent to act on the recommendation of the JAB without undue delay, until four days before the expiry of his fixed-term appointment, constituted a denial of justice;

“(f) to *find* that the Applicant suffered injury as a result of the above actions and position taken by the Respondent, for which he should be compensated.”

“In addition the Applicant requests the Tribunal:

“(a) to *find* that the Respondent failed to reinstate the Applicant in line with the JAB’s recommendation and the Respondent’s own undertaking to do so, and that this failure constituted a wrongful act to the detriment of the Applicant; and

“(b) to *order* the Respondent to pay compensation to the Applicant in order to efface the consequences of this act.”

“Further, regarding the Respondent’s decision not to renew the Applicant’s appointment, the Applicant respectfully requests the Tribunal:

“(a) to *find* that the Applicant had a legal expectancy of renewal which the Respondent failed to honour;

“(b) to *find* that the Respondent’s decision not to renew the Applicant’s fixed-term appointment was actuated by prejudice; and

“(c) to *order* the Respondent to rescind this decision and to grant him a renewal of his appointment or, alternatively, to pay him prompt, effective and adequate compensation.”

Whereas on 30 October 1981, the Applicant requested a suspension of three months of the time-limit for filing his Application;

Whereas with the agreement of the Respondent, the President of the Tribunal extended the time-limit for filing the Application until 10 February 1982;

Whereas the Applicant filed his application on 10 February 1982;

Whereas the Respondent filed his answer on 10 May 1982;

Whereas the Respondent submitted additional documents on 15 September 1982;

Whereas on 21 September 1982, both parties submitted additional documents;

Whereas on the same day, the Tribunal put questions to the parties;

Whereas on 22 September 1982, the Respondent submitted written replies to the questions put to him by the Tribunal;

Whereas on the same day, the Tribunal heard the parties at a public session in the course of which the Applicant replied to the questions put to him on 21 September 1982 and the Respondent supplemented his written replies;

Whereas the facts in the case are as follows:

The Applicant joined the United Nations on 29 September 1977 as a Field Service Officer (Radio Technician) at the F.S. level with a one-year fixed-term appointment. He was assigned to UNTSO Headquarters at Jerusalem.

On the expiration of his initial appointment, the Applicant accepted a series of further fixed-term appointments, the last of which was to expire on 31 March 1981. During his period of employment with the United Nations, he was given two periodic reports. In the first one, he was granted an overall rating of “a very good performance”; in the second one, an overall rating of “an outstanding performance”.

On 5 May 1980, in the morning, the Field Service staff began a strike action of indefinite duration. On the same day, at approximately noon, the Applicant entered the Military Operations Room situated on the top floor of Government House at the UNTSO Headquarters and removed a 47.65 Mhz Motorola radio set which linked UNTSO to the United Nations Interim Force in Lebanon. Captain Villumsen, who was on duty in the Military Operations Room when the Applicant entered the room, subsequently stated: "The removal [of the set] was possible because (a) radio technicians [such as the Applicant] normally have free access [to the Military Operations Room] to do their work without any interference from [operations] officers and (b) [I] was busy talking on the phone." Upon removal, the set was taken by the Applicant to the workshop, located in a separate building about 100 meters from the main entrance of Government House.

Captain Villumsen was replaced as duty officer at Government House by Captain Planting who "noticed at 13.40 that the Motorola Radio for UNIFIL communications was missing". He "suspected that some sabotage had been done with the main antenna connections" and reported the situation to Mr. K. O. Hoiby, the Chief Communications Officer, and Mr. Gerald Dunn, the Chief Administrative Officer. Since the absence of the radio set had created some agitation among the personnel, Mr. Alan Dean, the Chairman of the Staff Committee on Strike Rules, volunteered to carry out enquiries among the staff as to the whereabouts of the set. Mr. Dean subsequently stated on 21 May 1980 that:

"RT [Radio Technician] Sheye advised me that he had been monitoring this particular frequency on the service monitor in the radio workshop and that he had noticed spurious emissions. He had decided to repair the set immediately in case the strike escalated. He had then gone to the operations room with the view to remove the set for repair. He told me that he waited in the operations room for the duty officer but the duty officer was engaged with another link. R/T Sheye then removed the set for repair because he wanted to return it back before 2 p.m. I asked him to confirm that the set would be replaced and he told me that as soon as he had fixed it he was going to put it back. . . ."

Apparently, Mr. Dean did not at the time inform the Chief Administrative Officer of his conversation with the Applicant.

The Chief Administrative Officer also summoned Mr. Sam Sherman, the Chairman of the International Staff Committee, and informed him about the disappearance of the radio set. In a memorandum dated 21 May 1980 to the Chief Administrative Officer, Mr. Sherman stated:

"4. . . . at 14.30 hours I phoned Mr. Sheye from the switchboard. He answered the phone immediately. I told him the General and the Chief Administrative Officer were getting rather excited about the 47.65 Mhz radio that had been removed from the Military Office. Mr. Sheye informed me the Radio was in the first Faraday cage in the Radio Workshop on the floor and he had finished with it. He informed me he would return immediately to instal it. I told him not to bother as I would do it immediately.

"5. I went to the Faraday cage in the Radio Workshop, collected the Radio and took it to the Military Office. I clipped the Radio on to the breadboard. I asked the Duty Officer to call BEIRUT-NAQOURA on that particular radio. He called

these stations immediately and they replied O.K. I left the Military Office at 1440 hours and went home.”

In the meantime, on 5 May 1980, the Chief Administrative Officer sent to Messrs. Buivan and Lansky, of the Field Operations Service, New York, the following cable:

“CONFIDENTIAL RE [Field Service] STRIKE ACTION. INCIDENT HAS ARISEN INVOLVING ILLEGAL INTERFERENCE WITH VITAL COMMUNICATIONS FACILITIES AS RESULTS OF WHICH SECURITY OF [United Nations] PERSONNEL SERVING IN MIDDLE EAST MISSION AREA WAS JEOPARDIZED FOR PERIOD OF THREE HOURS. REPORT FOR . . . ACTION UNDER CHAPTER X OF STAFF RULES, FOLLOWS BY SAFE HAND 8/9 MAY.”

Between 6 and 7 May 1980, while the strike action was continuing, the Chief Administrative Officer asked the Chief Communications Officer and Captains Villumsen and Planting to write reports on the various incidents that had taken place on 5 May 1980.

On 7 May 1980, the Chief Administrative Officer addressed to Field Operations Service, New York, a memorandum entitled “Incident Involving Illegal Interference with UNTSO Communications Facilities”, together with reports by the Chief Communications Officer and by Captains Villumsen and Planting.

On 15 May 1980, the Assistant Secretary-General for Personnel Services cabled as follows to the Chief Administrative Officer:

“CONFIDENTIAL DUNN RE YOUR MEMO 7 MAY TO BUIVAN ON INCIDENT INVOLVING ILLEGAL INTERFERENCE WITH UNTSO COMMUNICATIONS FACILITIES 5 MAY/80. PLEASE REQUEST STATEMENT FROM [FIELD SERVICE OFFICER] FLEMING SHEYE WITHIN 48 HOURS AND OTHER EVIDENCIARY MATERIAL IN ACCORDANCE WITH PD/1/76 WHICH INFORMATION SHOULD BE FORWARDED TO HEADQUARTERS WITHOUT DELAY. VIEW SERIOUSNESS OF PATENT MISCONDUCT, YOU AUTHORIZED TO SUSPEND SHEYE WITHOUT PAY WITH IMMEDIATE EFFECT PENDING FURTHER INSTRUCTIONS.”

On 16 May 1980 the Chief Administrative Officer informed the Applicant in writing that he was being suspended from duty without pay pending investigation under Rule 110.4 of the Staff Rules, on the following grounds:

“1. An investigation establishes that at approximately noon on 5 May 1980, you entered the Military Operations Office and removed the Motorola set linking the Military Office, via OP LAB, with UNIFIL Headquarters. The removal was clearly not for repair/Maintenance of the set which at the time was in perfect working condition. You were identified by the officer on duty, Captain T. C. Villumsen.

“2. As a result of the removal of the Motorola set, the Military Office was without emergency contact with UNIFIL Headquarters until it was returned at approximately 1500 hrs.

“ . . .

“4. You are required to submit a written statement within 48 hours giving a full account of the incident and, if relevant, persons from whom inquiry might be made.”

On 17 May 1980, the Applicant replied to the Chief Administrative Officer and denied any "wrong doing" or "interference with UNTSO communications facilities". He added that he requested the Chief Administrative Officer "to kindly revise the administrative action of suspension without pay to *suspension with full pay* pending the investigation of the matter". On 19 May 1980, the Applicant submitted to the Chief Administrative Officer a written statement which read in part:

"2. On Friday, 2 May 1980, I had on an Oscilloscope in the service-monitor which is able to pick up the transmitted signals on all VHF-UHF sets used in Government House—noticed a strong spurious on top of the transmitted 47 Mhz signal. However, there appeared little distortion to hear on the voice signal itself. This kind of spurious causes interference outside the transmitter channel itself.

"3. Bearing in mind the recently adopted vote of UNTSO Staff for an indefinite withdrawal of labour and the fact that concurrent with this decision, the Chairman of UNTSO International Staff Committee, Mr. S. Sherman, insisted that the essential communications to be left functioning were to be at their optimum operating level, I considered it absolutely essential that the fault was corrected. Furthermore, according to the International Communication Regulations governing the functioning of radio transmitters, it was incumbent upon me to ascertain where the fault lay and take appropriate corrective measures.

"4. In view of this, about noon, 5 May 1980, I entered Military Office to take out a 47 Mhz Motorola, check it for a suspected fault, and if necessary, repair or replace. Present in the Military Office was Captain T. Villumsen who was busy taking notes from a telephone conversation; obviously over a bad line, since he indicated that I should be quiet. I removed the Motorola set, making no effort to disturb him to give an explanation for my action, because a 45 Mhz communications facility, which is used as a back-up for the 47 Mhz set, was still available on the same desk. In fact, in conjunction with a modification of the 47 Mhz link, this 45 Mhz set was recently the only link to OP LAB for several days, if not weeks.

"5. On my way down to the Radio Workshop, I was asked to come to the Staff Committee's Office as soon as possible. (Strike action was already in force from 1030 hrs LT, 5 May 1980). Approximately one hour later, I entered a Faraday-cage in the Radio Workshop to check the Motorola set thoroughly. I gave the set a quick tune-up and adjusted the deviation which was double of nominal value, checked the signal on the service-monitor and found it OK. At this time I again was asked to come to the Staff Committee's Office; shortly after 1400 hours I left the Staff Committee's Office to rush home to give some money to my wife who had an urgent appointment at 1430 hours, and it was my intention to return to Government House immediately to re-install the Motorola.

"6. I had just gone into my apartment, when Mr. Sherman, Chairman of UNTSO International Staff Committee, called me and asked me of the whereabouts of the Motorola set. I told him it was placed just inside the door on the floor of the cage ready for installation and that I would be returning soon. Mr. Sherman informed me that the re-installation of the set was considered urgent and that since the fault had now been rectified, he would re-install the set and hence my immediate return to Government House was not required.

“7. I removed the set not to interfere with UNTSO communications as alleged, but with the best of intentions to keep the communications unimpaired during the job action, and I am amazed that the Administration has found fit to accuse me of wrongdoing and punish me with suspension without pay instead of commending me for my exemplary conduct.

“ . . .

“14. To bring the charges of serious interference with UNTSO communications into the right perspective, it must not be overlooked that this 47 Mhz link has been subject of numerous complaints over the past two years due to severe radio interference causing unpleasant noise and over long periods unreadability of the received signal. This has been partly rectified with the modification referred to in para 4. If the log book in the Military Office is checked over the past two years, this point would be verified.

“ . . .

After the Applicant, who had waived the right to be heard in person, had submitted written replies to questions put to him by the Chief Administrative Officer, the latter transmitted to him on 26 May 1980 a document entitled “Report Following Investigation of Interference with UNTSO Communications on 5 May 1980”. Section D of the Report, entitled “*Confirmation of charges*” reads:

“1. The result of the investigation supports the initial allegation that Mr. Sheye had deliberately and without necessity interrupted a vital link in UNTSO’s communication facilities that, in case of an emergency, could have had serious repercussions.

“2. However, it can be concluded that Mr. Sheye acted on specific instruction from the Staff Committee in an overall plan to disrupt what is considered as essential communications facilities in order to give a strike action more effect.

“3. This Investigation report is forwarded to the [Assistant Secretary-General for Personnel Services] for the appropriate administrative action.”

Section C of the same report, entitled “*Evaluation of the circumstances*”, reads:

“1. . . . There is sufficient evidence to show that Mr. Sheye removed the set not with the intention to carry out a repair but rather to wilfully interrupt the emergency link between the two missions.

“2. The evidence is provided mainly by the statement made by Mr. Hoiby in his memorandum of 20 May 1980 (Annex 12). According to him, Mr. Sheye told him on the day following the incident that he had removed the set specifically because he had felt it was in line with the wishes of the Staff Committee and it would make the strike action more effective. . . .”

In the memorandum of transmission of the Report, the Applicant was required to submit any comments he may have on the report and any pleas he should wish to make by 12.00 hours Wednesday 28 May 1980. These comments were submitted by the Applicant to the Chief Administrative Officer on 30 May 1980 and transmitted to the Secretary-General with the Investigation Report. On 16 June 1980 the Assistant Secretary-General for Personnel Services addressed to the Applicant the following letter:

“I refer to the investigation that has been carried out with regard to the disciplinary charge brought against you for having interfered with UNTSO communications facilities by the removal from its Military Operations Office in Government House, Jerusalem, of the Motorola radio set linking that Office with UNIFIL Headquarters at Naqoura, on 5 May 1980.

“Upon completion of the investigation at UNTSO, you were provided with the investigation report and given the opportunity to submit written comments thereon. Both the report and your statement have been submitted to the Secretary-General.

“Following a further review of your case in the light of those submissions and taking into account all the circumstances of the case, the Secretary-General has determined that you deliberately and without necessity interrupted a vital link in UNTSO’s communications facilities—an action which, in case of an emergency, could have had serious repercussions. Before making that determination, the Secretary-General gave particular attention to your explanation that you had removed the radio set for the purpose of repair, but he came to the conclusion that you in fact did not remove the set in order to repair it or for any other proper reason. He does not, however, consider that there is sufficient basis for the finding in the investigation report that you had acted on specific instruction from the Staff Committee.

“After careful weighing of all the circumstances of the case, the Secretary-General considers your conduct in taking upon yourself to interrupt a vital communications facility of UNTSO to be a particularly serious breach of duty in the context of peace-keeping operations. In his opinion, such an action on the part of a United Nations official, with potential harm to the security of United Nations personnel and peace-keeping forces in the area, cannot be condoned or excused. The Secretary-General has therefore decided that you be dismissed for misconduct as a disciplinary measure under staff rule 110.3 (b).

“The dismissal is effective on the date of this notice. You will be given compensation in lieu of the 30 days’ period of notice in accordance with staff rule 109.3 (b) and (c).

“As you have been suspended from duties without pay pending investigation since 16 May 1980, the suspension is hereby lifted and your pay status will be reinstated for the period from that date until the effective date of dismissal.

“In view of your previous record of excellent performance, the Secretary-General has decided to grant you a termination indemnity up to the maximum of 50% that is allowed under Annex III, paragraph (c), of the Staff Regulations.”

On 16 June 1980 the Applicant sent the following cable to the Secretary-General:

“In accordance with the provisions of Staff Rule 111.3 (a) I hereby request that the decision to dismiss me for misconduct under Staff Rule 110.3 (b) as conveyed to me in [Assistant Secretary-General for Personnel Services’] letter of 19 June 1980 be reviewed. Letter follows”.

On 21 June 1980, the Applicant wrote to the Secretary-General a letter reiterating his request for review of the decision to dismiss him for misconduct. On 26 June 1980, the Assistant Secretary-General for Personnel Services informed the Applicant that the procedure for initiating his appeal was governed by paragraph (c) rather than paragraphs

(a) and (b) of Staff Rule 111.3. Accordingly, no prior review was required before submitting the matter to the Joint Appeals Board.

On 4 July 1980, the Applicant filed an appeal before the Joint Appeals Board. On 15 December 1980, the Board submitted a unanimous report to the Secretary-General. In the conclusions of the report, the Board stated *inter alia*:

“The Board has unanimously concluded that it is more probable than not that Mr. Sheye removed the 47 Mhz radio in good faith, for the purpose of adjusting it to eliminate a spurious emission.”

The recommendations of the Board read:

“(a) Mr. Sheye’s dismissal for misconduct should be rescinded, with the consequence of his reinstatement in the service of the United Nations.

“(b) Consideration should be given to what measures, if any, should be taken in respect of Mr. Sheye’s fully established and partially admitted negligence, which fell short of misconduct.

“(c) Mr. Sheye has orally made a claim for the loss of wages during the working days he spent on his voyage to and from New York for the purpose of appearing before the Board. Though there are no precedents in the Administrative Tribunal or the Board for such a claim, the Board considers that in principle witnesses who are not staff members and who appear before the Board at its request should be compensated for loss of wages or salary directly resulting from their appearance. Upon submission of adequate proof of loss by Mr. Sheye, this claim should be taken into account in the financial settlement consequent upon his reinstatement.”

On 26 March 1981, the Assistant Secretary-General for Personnel Services transmitted to the Applicant the Joint Appeals Board Report and communicated to him the Secretary-General’s decision. The letter of transmission stated that:

“I enclose herewith a copy of the Report dated 15 December 1980, submitted to the Secretary-General by the Joint Appeals Board on your appeal concerning the decision to dismiss you for misconduct as a disciplinary measure under Staff Rule 110.3(b).

“The Secretary-General, having considered the Board’s Report and the documentation concerning your case, has:

(a) taken note of the above-mentioned report of the Joint Appeals Board;

(b) noted that the Joint Appeals Board, in its conclusions, differs with the conclusion of the UNTSO investigation that you did not remove the 47 Mhz set in order to repair it or for any other proper reason, and reserved his position in this regard;

(c) found, after examination of the evidence, that, regardless of what your motive was, your actions resulted in the interruption of a vital link in the UNTSO communications facilities, which could have had serious repercussions; and determined that such actions by a qualified and experienced UNTSO radio technician constituted unsatisfactory conduct warranting disciplinary action;

(d) found that even if you did in fact remove the set for repair, you failed to give priority to the repair and reinstallation of the set, thus causing a prolonged interruption of a vital communications link, and determined that such failure constituted seriously negligent and unsatisfactory conduct;

(e) taking into account the terms of the Board's report and all the circumstances of the case, particularly your prior record, decided:

- “(i) that you be reinstated in the service of the Organization for the duration of your fixed-term appointment;
- “(ii) that, in view of your seriously negligent and unsatisfactory conduct, you be suspended without pay for three months from 17 June 1980 to 16 September 1980;
- “(iii) that you be paid full salary and allowances for the period 17 September 1980 to 31 March 1981, the date of expiration of your fixed-term contract; and
- “(iv) that, in view of your reinstatement, any amounts you received as termination payments be recovered.”

On 26 April 1981, the Applicant, whose appointment had already expired on 31 March 1981, wrote a letter to the Assistant Secretary-General for Personnel Services which stated:

“With reference to your letter of 26 March 1981 which I received on 10 April 1981 stating my reinstatement in the services of the Organization I hereby apply for an extension of my contract with the United Nations which expires 31 March 1981.

“Taking the events of the past 9 months into account I should more specifically apply for a permanent contract at my former duty station, UNTSO HQ., Jerusalem, so as to alleviate the mental strains imposed upon myself and my family by the effect of a permanent assignment. . . .”

On 28 May 1981, the Director of Personnel Administration addressed a letter to the Applicant which read in part:

“I wish to refer you to Staff Rule 104.12(b) which stipulates, *inter alia*:

“The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment’.

“The same proviso is made under para. 3 of your own letter of appointment.

“Since your services are no longer required by the Organization I regret having to inform you that it is not intended to offer you a further appointment with the United Nations.”

On 10 February 1982, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent cannot reserve his position with respect to an issue of fact: the unanimous conclusion of the Joint Appeals Board that the Applicant removed the 47 Mhz set in good faith for the purpose of repair—the determination of which is crucial to the legality of imposing disciplinary measures on the Applicant. Accordingly, the first issue that must be settled by the Tribunal is whether or not the Applicant removed the set in good faith, for the purpose of adjusting it to eliminate a spurious emission.

2. The Respondent cannot properly set aside the motives for the Applicant's conduct and yet proceed to impose disciplinary measures on him since the propriety of his conduct depended upon these motives. The reasons advanced by the Respondent for the decision that his removal of the set constituted unsatisfactory conduct warranting disciplinary action are untenable and should be dismissed as lacking in substance.

3. The Respondent's decision that Applicant's failure to give priority to the repair and reinstallation of the set constituted seriously negligent and unsatisfactory conduct has not been properly founded, in fact or legal reasons.

4. The Respondent's decision to suspend him for unsatisfactory conduct was intolerably excessive in relation to the Applicant's conduct in question. The Respondent was either mistaken as to the facts or disregarded them, and therefore the disciplinary measure was invalid.

5. The Respondent's delay in implementing the remedy of reinstatement until four days before the expiration of the Applicant's contract resulted in a miscarriage of justice. Payment of the salary the Applicant would have received had he been reinstated was not tantamount to reinstatement.

6. The Applicant had a legal expectancy of renewal of his appointment created by the letter of 26 March 1981 informing him that he would be reinstated. Therefore the decision not to renew his appointment was vitiated by serious legal defects.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's decision to suspend the Applicant for three months without pay was a valid exercise of his discretion, under Staff Regulation 10.2 and Staff Rule 110.3(b), to impose disciplinary measures.

2. The Applicant had no legal or legally cognizable expectancy of continued United Nations employment beyond the expiration date of his fixed-term contract.

3. The Applicant had no legal entitlements in excess of those already paid to him.

The Tribunal, having deliberated from 21 September to 15 October 1982, now pronounces the following judgement:

I. The main thrust of the Application is directed against the decisions of the Secretary-General by which

—he suspended the Applicant without pay for a period of three months because of the latter's "seriously negligent and unsatisfactory conduct";

—he did not in fact reinstate the Applicant in the service of the Organization, contrary to his written promise; and

—he denied the Applicant's request to renew his appointment after its expiration on 31 March 1981.

II. As to the decision of the Secretary-General to suspend the Applicant without pay for a period of three months and his finding that the Applicant's conduct was "seriously negligent and unsatisfactory", the Applicant admits that "the Respondent has the right to determine what constitutes unsatisfactory conduct". He contends, however, that the Respondent's finding was legally defective inasmuch as it was reached without due process, that the decision was based on a mistake of fact and failure to take into account essential facts and that, further, it was tainted by prejudice and extraneous considerations.

III. As the Respondent denies the Applicant's allegations, the Tribunal must examine these one by one.

IV. The Respondent's complaint against the Applicant was first investigated in proceedings instituted by UNTSO on 15 May 1980 in accordance with Personnel Directive 1/76. The investigation resulted in a report which together with the comments of the Applicant was submitted through the Chief Administrative Officer to Headquarters. On the basis of this report the Applicant was dismissed for misconduct. Against this decision, taken by the Assistant Secretary-General for Personnel Services, the Applicant lodged an appeal to the Joint Appeals Board. The latter dealt with the Applicant's case at great length and in all details. While the Joint Appeals Board's conclusions differed widely from those of the UNTSO investigation, it found nevertheless "that the investigation was conducted in substantial conformity with the applicable Personnel Directive (PD/1/76)". Thus the Applicant's case was examined in two instances and with particular thoroughness by the Joint Appeals Board. The Board's report dated 15 December 1980 was considered by the Secretary-General and led to the decision contained in a letter dated 26 March 1981, the text of which has been reproduced above *in extenso*.

V. The Applicant contends that the Respondent is mistaken in concluding that the removal of the 47.65 Mhz set constituted "unsatisfactory conduct warranting disciplinary action"—as stated in point (c) of the letter of the Assistant Secretary-General for Personnel Services of 26 March 1981. The Applicant asserts in this connexion that the Respondent failed to appreciate the significance of the fact that his motives in removing the set were innocent and hence his conduct was not blameworthy.

This contention of the Applicant, however, misrepresents the position of the Respondent who, as clearly expressed in the aforementioned letter of 26 March 1981, objects not to the removal as such of the radio set but to the fact that the Applicant—even if he removed the set in good faith—"failed to give priority to the repair and reinstallation of the set." The Tribunal finds it indefensible that the Applicant, having removed the set and adjusted it, failed to reinstall it before going home, when to do so could have taken only minutes. The Applicant in his letter of 21 June 1980 to the Secretary-General admitted that: "where [he] failed was in not leaving a note for the duty officer giving the reason for the removal of the set—and thus causing the whole incident". The Joint Appeals Board rightly points out that

"[the Applicant's] negligence in that respect is obvious and requires no comment. Yet that failure on his part would not have led to serious consequences and would not have put Mr. Sheye and all those who have considered and dealt with the case to so much trouble if Mr. Sheye had replaced the set promptly."

The Applicant is in error when he believes that if it is admitted that the Applicant removed the radio set in good faith then the case against him collapses and he cannot be charged with unsatisfactory conduct. It is not alone the act of removal of the set but that action, together with the omission of reinstallation and the causing thereby of a prolonged interruption in the UNTSO communications facilities, which led the Respondent to find that the Applicant's conduct constitutes a cause for disciplinary measures.

VI. The Applicant bases his allegation that the Respondent's decision contained in the letter of 26 March 1981 is tainted by prejudice and extraneous considerations on the following ground: the Applicant was dismissed upon the premise that he deliberately interrupted UNTSO's communications facilities. After the Joint Appeals Board unanimously concluded "that it is more probable than not that Mr. Sheye removed the 47 Mhz radio in good faith, for the purpose of adjusting it to eliminate a spurious emission" the Respondent altered his decision of dismissal, but "reserved his position" in regard to

that conclusion of the Board. The Tribunal is unable to view the Respondent's attitude as indicating prejudice against the Applicant or based on extraneous considerations. In fact, the Respondent took note of the Joint Appeals Board's conclusions and changed his decision. He withdrew the dismissal of the Applicant and imposed on him a disciplinary measure of lesser severity. The mere fact that the Respondent "reserved his position" on the question of the innocence of the Applicant, and that the latter considers the reduced penalty still unduly severe, does not prove prejudice against the Applicant nor reliance on extraneous considerations.

VII. For the foregoing reasons the Tribunal holds that the decision of the Secretary-General to impose upon the Applicant disciplinary measures does not suffer from denial of due process, is not based on a mistake of fact, and is not motivated by prejudice or other extraneous considerations.

VIII. The Applicant complains also that the disciplinary measure imposed upon him is grossly excessive in relation to his conduct and violates the general principle of law that the punishment should be proportionate to the act in question. The Applicant refers in this connexion to the recommendation of the Joint Appeals Board according to which the Applicant's dismissal for misconduct should be rescinded, and

"(b) Consideration should be given to what measures, if any, should be taken in respect of Mr. Sheye's fully established and partially admitted negligence, which fell short of misconduct".

IX. The Tribunal observes in this respect that the reports of the Joint Appeals Board are advisory and that the Respondent is entitled to reach different conclusions from those of that body on a consideration of all the facts and circumstances of the case.

The Tribunal notes further that it has in its jurisprudence consistently recognized the Secretary-General's authority to take decisions in disciplinary matters, and established its own competence to review such decisions only in certain exceptional conditions, e.g. in case of failure to accord due process to the affected staff member before reaching a decision (Judgement No. 210, *Reid*, III).

As the Tribunal has found that such conditions are not present in the Applicant's case, it cannot entertain the Applicant's claim for rescission of the Respondent's decision on the ground of the severity of the penalty. In this connexion the Tribunal observes that the fact that the Applicant's undisciplined behaviour occurred while serving in a body of a military character justifies the severity of the disciplinary measure.

X. The Applicant complains that the Respondent failed to reinstate him in the service notwithstanding the following passage in the Respondent's letter of 26 March 1981:

"[The Secretary-General . . . has . . . decided] . . .

"(i) that you be reinstated in the service of the Organization for the duration of your fixed term appointment . . ."

In fact, this complaint is addressed to the delay of the Administration in acting on the Report of the Joint Appeals Board dated 15 December 1980. The decision of the Secretary-General by which he accepted that part of the Joint Appeals Board's recommendation was communicated to the Applicant in the above-mentioned letter dated 26 March 1981 and reached the Applicant after 31 March 1981, the date when the contract expired.

The Tribunal notes the Respondent's defence that the delay in making and communicating the decision was not intentional but was caused by the careful consideration being given by the Secretary-General to the report of the Joint Appeals Board. The Tribunal remarks that, while the delay in question was perhaps longer than required by good administration, there is no ground for the allegation of the Applicant that the Respondent has evolved "a practice by which the Administration can simply sit on the recommendations of the Joint Appeals Board . . . until the short time contracts have expired".

XI. The Applicant's request concerning the Respondent's decision not to renew the Applicant's appointment which expired on 31 March 1981 was not dealt with by a joint appeals body provided for in the Staff Regulations and therefore—in view of the provision of article 7, paragraph 1, of the Statute of the Tribunal—doubts have arisen as to the receivability of this request by the Tribunal. These doubts have, however, been dispelled by the subsequent agreement of the Respondent.

XII. The Applicant alleges that he had a legal expectancy of the renewal of his appointment because the Respondent wrote a letter to him on 26 March 1981, i.e. four days before the expiration of his fixed-term appointment, informing him that he was to be reinstated in the service of the Organization for the duration of his fixed-term appointment. The Applicant asserts that since the Applicant's contract was to expire on 31 March 1981, this communication created in him a legitimate expectation that his fixed-term appointment would be renewed.

The Applicant further alleges that the Respondent's refusal to renew his appointment merely on the ground that his services were no longer required by the Organization was based on prejudice, the more so as the Organization was evidently in need of "qualified and experienced radio technicians".

XIII. The Tribunal finds that neither the text of the letter dated 26 March 1981 nor any other circumstances which were referred to by the Applicant created for the Applicant a legal entitlement to the renewal of his fixed-term appointment. The above-mentioned letter of the Respondent clearly expressed that the Applicant's reinstatement in the service of the Organization was ordered "for the duration of [his] fixed-term appointment". The Tribunal holds that the Respondent was not bound by any contractual or statutory provision to renew the Applicant's fixed-term contract nor has the Tribunal found any evidence of prejudice on the part of the Respondent in this respect.

XIV. For the reasons stated above all claims of the Applicant are hereby rejected.

(Signatures)

Endre USTOR
President

Samar SEN
Vice-President

Arnold KEAN
Vice-President

New York, 15 October 1982

Herbert REIS
Alternate Member

Nicholas TESLENKO
Acting Executive Secretary