

work. The Applicant has produced no evidence to show that this assessment was a distortion of truth. Nor is there any evidence before the Tribunal to substantiate the Applicant's allegation that the Liaison Officer was prejudiced against him.

The Tribunal therefore rejects the plea that the Liaison Officer's report was either vindictive or motivated by extraneous considerations.

VI. The Applicant also asks the Tribunal to request "Mr. Eric Bayerl, who was [the Applicant's] immediate Supervisor in UNTSO Jerusalem, to submit a report on my performance". The Respondent points out that Mr. Eric Bayerl was a junior level officer and was not entrusted with the responsibility of reporting on the performance of the Applicant. In view of the earlier finding that there was no contractual obligation, either express or implied, to renew the fixed-term appointment of the Applicant, the views of Mr. Eric Bayerl have no relevance to the case.

VII. The Tribunal notes that the Applicant had an exceptionally good record during his service with UNMOGIP when he lived together with his family and that problems arose when he was separated from his family during his service with UNTSO. The Applicant charges that he was not allowed to take his family with him to successive duty stations while other staff members had been permitted to do so. He therefore characterizes the Chief Administrative Officer's action as "discrimination, humiliation and having an ulterior motive". The Respondent states that the Applicant was advised not to bring his family to Damascus owing to the uncertainty of the duration of his assignment and that he was advised not to bring them to Amman owing to the political situation; in his statement to the Joint Appeals Board, he also stated that staff members whose families stayed with them were those having longer-term assignments.

The Tribunal recognizes that the movement of dependants with a staff member to duty stations must be subject to the exigencies of the Field Service. The Tribunal therefore holds that the Applicant's charge of "discrimination, humiliation and having an ulterior motive" made against the Respondent in this respect is unfounded.

VIII. For the foregoing reasons, the application is rejected.

(Signatures)

R. VENKATARAMAN

President

Francis T. P. PLIMPTON

Vice-President

Geneva, 5 April 1973

Roger STEVENS

Member

Jean HARDY

Executive Secretary

Judgement No. 174

(Original: French)

Case No. 165:

Dupuy

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

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

An original decision to terminate the employment of the Applicant was superseded by a decision

suspending her without pay pending investigation and was hence inappropriate.—Request for rescission of a second termination decision.—Request rejected, the decision having been superseded by a decision to reinstate the Applicant.

Request for rescission of the decision terminating the employment of the Applicant for abandonment of post.—Argument that the Applicant had not been reinstated and consequently could not have abandoned her post.—Conditions which the Applicant allegedly attached to her acceptance of reinstatement.—Consideration of these so-called conditions.—Conclusion of the Tribunal that the Applicant was in fact reinstated.—Argument that the reinstatement of the Applicant took place on her terms and that consequently the Administration's delay in replying to a letter from the Applicant concerning her absence amounted to tacit approval of that absence.—The so-called silence of the Administration lasted only one day.—Silence, even if prolonged, does not mean consent when it is contrary to the intent and declarations of the parties.—The Respondent's silence while he was considering the Applicant's case cannot be construed as implicit approval of anything at all.—Argument that termination for abandonment of post is neither authorized by nor provided for in the Staff Rules.—References in the Staff Regulations and Rules confirming the long-standing practice of regarding unauthorized absence, in certain circumstances, as abandonment of post and cause for separation.—Allegation of prejudice.—The allegation cannot be accepted.—Right of the Applicant, as a result of her reinstatement, to receive in principle her full salary for the periods during which she worked for ILO and the French Embassy.—Award to the Applicant of the difference between the salary she would have received during those periods and the salary she received from ILO and the French Embassy.—Obligation of the Respondent to calculate the Applicant's leave entitlement for those periods and to pay her the cash equivalent thereof.—Obligation of the Respondent to recalculate the salary due to the Applicant in such a way as to include in it the annual increment she would have received had she not been suspended.—Award to the Applicant of interest at the rate of 6 per cent per annum on the sums owing to her in application of the Judgement.—The rest of the application is rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Francis T. P. Plimpton, Vice-President; Sir Roger Stevens;

Whereas, at the request of Mrs. France Dupuy, a former staff member, recruited at the local level, of the United Nations Development Programme, hereinafter called UNDP, the President of the Tribunal, with the agreement of the Respondent, extended to 28 April 1972 and again to 30 June 1972 the time-limit for the filing of an application to the Tribunal;

Whereas on 22 June 1972 the Applicant filed an application with the Tribunal which did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, having made the necessary corrections, the Applicant resubmitted her application on 23 August 1972;

Whereas the pleas of the application are as follows:

“(a) Preliminary or provisional measures

“The Applicant requests the Tribunal to order that she be furnished with the complete official file of the Joint Appeals Board on her case. The Applicant respectfully requests the Tribunal to permit her to be furnished with additional documents the existence of which might be suggested by a reading of the file. The Applicant further requests the Tribunal to permit her to supplement or modify the pleas and explanatory statement after she has studied those documents.

“(b) Contested decisions the rescission of which is requested

“(i) *Rescission* of the termination decision of 8 April 1969 the effect of which was deferred until 2 October 1969 . . . if the Tribunal accepts our main

thesis . . . or, alternatively, *rescission* of the termination decision of 29 November 1969 . . . if the Tribunal accepts either of our alternative theses . . . ;

“(ii) In consequence of the rescissions requested under (i), *reinstatement* of the Applicant in UNDP, at the grade and level she had on 2 October 1969, and in a place to be determined by contract between UNDP and the Applicant;

“(iii) In consequence of the rescissions requested under (i), *retroactive payment* to the Applicant of the net amount of her *salary* and allowances at the same rate as at 2 October 1969, from that date until the effective date of reinstatement.

“(c) Obligation the performance of which is requested

“With respect to the period 5 August 1968–25 September 1969, during which the Applicant was suspended pending investigation in accordance with Staff Rule 110.4, the Applicant requests that the subsequent administrative decision granting partial retroactive payment of her emoluments (. . . letter terminating appointment of 29 November 1969) be supplemented by the payment of such emoluments (net salary and allowances) for the period *1 January-21 March 1969, during which she was temporarily employed at the ILO Office at Yaoundé.*

“In support of this request, the Applicant merely emphasizes at this stage that contrary to the claims of the Administration, she had duly informed UNDP of her temporary employment with ILO-Yaoundé (see in particular copy of a letter from the Applicant to the Director of the local ILO office sent to Mr. Birt, Chief of Personnel, UNDP, on 21 March 1969 . . .), and that UNDP had never raised any objection to such employment or the remuneration relating thereto.

“Since, further, the Applicant was thus employed by an organization of the ‘United Nations family’, linked to the United Nations by agreements for co-operation in the matter of personnel, such lack of objection can only be interpreted as the tacit, but clear, agreement of UNDP and the Secretary-General, in keeping with the Staff Rules concerning outside employment and remuneration. The Administration’s refusal to pay salary for this period, and the attitude of the Joint Appeals Board in this respect . . . are therefore groundless.

“(d) Amount of compensation claimed in the event that the Secretary-General decides, as an alternative to reinstatement, to pay compensation for the injury sustained in accordance with the option given to him under article 9, paragraph 1 of the Statute.

“In that event, the Applicant requests:

“(i) Payment of the net amount of her salary and allowances for the period from 2 October 1969 to the date on which the Secretary-General takes his decision in accordance with article 9.1 (see (b) (iii) above);

“(ii) Her net salary and allowances retroactively for the period 1 January-21 March 1969 (see (c) above);

“(iii) *Termination indemnity in accordance with annex III to the Staff Regulations* and Staff Rule 109.4, calculated to the date of effective application of the Secretary-General’s decision in accordance with article 9, paragraph 1 of the Statute;

“(iv) A sum corresponding to *accrued annual leave*, calculated to the date of effective application of the Secretary-General’s decision in accordance with article 9, paragraph 1 of the Statute;

“(v) As moral damages, considering in particular the very long period of uncertainty and anxiety during the ‘suspension’, subsequently recognized as groundless by UNDP itself, and in keeping with the Tribunal’s previous decisions (see in particular Judgement No. 92 in the Higgins case), the Applicant respectfully requests the Tribunal to order the Secretary-General to pay her the sum of \$US 1,000.

“(e) Other relief, should the Secretary-General refuse reinstatement

“Taking account of the damage to her professional reputation which inevitably results from such a series of measures against her, the Applicant requests that the Secretary-General or the Administrator of UNDP be required by the Tribunal to send her a certificate which she could show to any one concerned, stating that while she was employed with UNDP, from May 1966 to. . . [the date of effective application of the Secretary-General’s decision in accordance with article 9, paragraph 1 of the Statute] her performance and conduct were satisfactory.”;

Whereas on 20 October 1972 the Applicant requested oral proceedings;

Whereas the Respondent filed his answer on 24 November 1972;

Whereas on 2 February 1973 the Executive Secretary of the Tribunal informed the Parties that the President had decided that the circumstances of the case did not warrant oral proceedings;

Whereas the Applicant filed written observations on 16 February 1973;

Whereas the facts of the case are as follows:

The Applicant, a national of France residing in Cameroon, who had joined the UNDP Office at Yaoundé on 3 May 1966 as a secretary, received, after several short-term contracts, a one-year contract ending on 30 September 1967. On 23 May 1967, the Resident Representative stated in his report on the Applicant for the period 3 May 1966 to 1 May 1967:

“Highly competent in shorthand and typing: rapid and clean. Minute and attentive in work. Her French is excellent and she possesses the basic knowledge of English. Her general cultural background has facilitated her comprehension of UNDP activities often of a complex nature and helped her to adapt herself rapidly and discharge her duties intelligently. She is most co-operative.”

On 1 October 1967 she received an indefinite appointment. Under the terms of that contract, “the United Nations reserves the right to terminate this contract upon 30 days’ notice”. The Applicant received leave without pay from 28 November 1967 to 5 January 1968 (following her annual leave from 13 November 1967 to 27 November 1967) in order to accompany her husband who was taking his own leave in France. For health reasons, the Applicant’s leave without pay was extended to 22 January 1968. On 5 December 1967, the Resident Representative wrote to the Chief of the UNDP Personnel Branch:

“Mrs. F. Dupuy has occupied the post of senior secretary since May 1968 [sic]. She is of French nationality, has a baccalauréat diploma and a solid background in French and English. She also works well in the latter language. She has a high record of performance and is a person of superior professional competence.

“At the time of her appointment, she accepted the post of senior secretary at the initial grade with the hope that after a period of trial she would be reclassified. She has now proved her merit and in recognition of this I should like to recommend that her contract be revised with a view to reclassifying her at a higher grade on renewal of her current contract in May 1968.

“On 1 May 1968 she will be entitled to annual increment, i.e., Grade 6, Step

III. I should like to have your authorization to grant her Grade 6, Step IV, at that date."

The Chief of the Personnel Branch replied that he was pleased to hear of the "excellent performance" of the Applicant but that it was not possible to grant more than one step per year. From 21 March to 18 June 1968 the Applicant received maternity leave. Her baby was born on 7 May 1968 and her leave was extended on the advice of her doctor until 30 June 1968 as sick leave. On 29 July 1968 she requested the Acting Resident Representative for leave without pay from 5 August to 15 September 1968 in order to be able to accompany her husband who had been summoned to France as a matter of urgency. On 31 July 1968 the Acting Resident Representative approved the request. On 1 August 1968, however, he informed the Applicant that owing to the shortage of staff he could not grant her request for leave; he therefore asked her to reconsider her request for leave until she could be replaced and added:

"Should you persist in your intention of taking unpaid leave immediately, I shall regard your refusal as constituting a serious infringement of office discipline and a complete lack of any normal sense of responsibility which you ought to display. I should accordingly be compelled to terminate your contract with our Organization.

"I am sure therefore that you will reconsider your request."

On 2 August 1968, the Applicant wrote to the Acting Resident Representative informing him of her surprise at his change of attitude and giving him the names of persons qualified to replace her. In her letter she criticized one of her colleagues who, she said, had resigned on 1 August 1968 in order to force the Acting Resident Representative to withdraw his approval of the Applicant's request for leave without pay. That resignation was subsequently withdrawn. On 2 August 1968, the Acting Resident Representative, acknowledging receipt of the Applicant's letter, stated:

". . . I am sorry that you are adopting this very threatening attitude to my aforementioned letter. All the measures concerning you taken in the letter were brought to your attention in accordance with orders given by me as Chief of Office. I readily admit that I changed my mind concerning your departure. I had to do so because of the pressure you exerted on the Office by insisting on leaving with or without my consent.

"I am however very surprised to note that you are now bringing charges of a personal rather than an official nature against certain members of our Office; charges which, for the sake of propriety, are not worthy of a secretary of your standing.

"I regret therefore to inform you that I have no alterations or additions to make to the decision taken in my aforementioned letter of 1 August."

On 4 August 1968, the Applicant left for France. On 6 August 1968, the Acting Resident Representative recommended the Chief of the Personnel Branch to terminate her appointment and, on 8 August 1968, he informed the Applicant that it had been decided to terminate her appointment from that date. On 18 August 1968, the Applicant requested the Acting Resident Representative to reconsider his decision; she reminded him that she had suggested two secretaries to act as her replacement, one of whom had been hired on 2 August 1968, and she also mentioned that her services had always been satisfactory. On 28 August 1968, the Chief of the Personnel Branch informed the Acting Resident Representative, in reply to his communication of 6 August 1968, that it would be preferable to suspend the Applicant pending investigation. On the same day, the Chief of the Personnel Branch sent the Applicant a letter informing her that, in accordance with Staff Rule 110.4, she had been suspended from duty without pay pending investigation from the day of her unauthorized departure, and inviting her to submit a written explanation of the reasons for her action. The

Applicant took cognizance of this letter on 16 September 1968 when, having returned to Yaoundé, she went to the UNDP Office to resume her duties. On the following day she sent the Chief of the Personnel Branch the explanations he had requested; she said that, as the Acting Resident Representative had, on 31 July 1968, granted her request for leave without pay, it had been too late to cancel the arrangements for her journey when he had informed her, on 1 August 1968, that he had changed his mind; she said that two new facts had taken place on 2 August 1968 and supplied (1) the death certificate of her grandmother, who had died on 27 July 1968 at Saujon (France)—the Applicant's place of residence in France; and (2) a statement dated 1 August 1968 from the doctor of the Yaoundé Child Medical Centre (*Centre de médecine infantile de Yaoundé*) to the effect that, for lack of adequate facilities in Cameroon, her three-month old baby should have her skull X-rayed in France; and (3) a record, dated 21 August 1968, of an X-ray made at Royan (France) showing a malformation; she added that the Acting Resident Representative had told her that she had to choose between her family and the office. The explanations were communicated to the Deputy Resident Representative (who was Acting Resident Representative at the time of the events), who submitted his own version of the incident in comments to the Chief of the Personnel Branch on 18 October and 6 November 1968; according to him, the question of the Applicant's daughter had not been raised on 2 August 1968 or before her departure for France. On 27 November 1968, the Chief of the Personnel Branch proposed that the Resident Representative should permit the Applicant to resume her work with pay immediately after the Deputy Resident Representative had been re-assigned, on the understanding that in future she would adhere to the prescribed leave schedule. It appears that on 17 January 1969 the Resident Representative had not yet been able to put the proposal to the Applicant since he did not know the date of the Deputy Resident Representative's transfer. In the meantime the Applicant had, on 2 January 1969, accepted temporary employment with the Area Office of the ILO (International Labour Organisation), which was prepared to offer her a permanent contract. The Applicant having repeatedly requested to be informed of the result of UNDP's investigation, the Chief of the Personnel Division informed her, on 24 February 1969, that the question would be settled soon; on the same day, he requested the Resident Representative to obtain from the ILO an official letter requesting the Applicant's transfer. On 14 March 1969, the Chief of the Personnel Division cabled the Resident Representative that Headquarters was agreeable to the Applicant's transfer to the ILO and prepared to restore her to full pay status for the period from 2 August 1968 to 2 January 1969, the date on which she had begun to work for the ILO. Having been informed of this offer, the Applicant wrote to the Director of the ILO Area Office, on 21 March 1969, telling him that the question of her transfer to the ILO had never been raised officially, that in order to facilitate settlement of her problem she would not do any more work for the ILO and that she intended to claim payment in full of the sums owing to her to the date of official notification of UNDP's decision. On 4 April 1969, the Chief of the Personnel Division sent the Resident Representative a cable in which he expressed disappointment that the Applicant had not accepted the offer of transfer and requesting him therefore to negotiate an agreed termination with her in accordance with Staff Regulation 9.1 with effect from the date of receipt of the cable. On 8 April 1969 the Resident Representative wrote to the Applicant informing her "that it [had] been decided to terminate [her] contract"; he indicated that the Applicant's emoluments for the period 16 September 1968 (date of her return from leave without pay) to 8 April 1969 would be paid, less the period during which she had worked for the ILO, and that in addition she would receive one month's salary in lieu of notice and two months' termination indemnity. On 15 April 1969, the Applicant sent a letter to the Secretary-General requesting that the decision be reviewed. On 28 April 1969, having received no reply to that letter, she submitted an appeal to the Joint Appeals

Board against the decision to terminate her appointment. On 6 May 1969, the Chief of the Personnel Division sought the advice of the Rules and Procedures Section, Office of Personnel, United Nations, as to whether the Personnel Division had acted correctly in seeking an agreed termination in the Applicant's case. On 12 May 1969, the Chief of the Rules and Procedures Section replied in a memorandum in which he concluded:

"6. Had our views been taken on this case at the outset we would have recommended separation for abandonment of post, or dismissal. Having taken no measure against her for almost a year, UNDP will have to decide between reinstatement or an agreed termination with full indemnities. Every month that passes by will increase your liability towards her. If she refuses a separation I suggest that your office demand of her to report back for duty right away, failing which she should be separated for abandonment of post. If she returns you will have to put up with her for a while until she evokes a new reason for her separation which, judging from her behaviour, I have no doubt will happen quite soon."

Upon receipt of that advice, the Chief of the Personnel Division, on 13 May 1969, repeated the instructions he had given the Resident Representative in his cable of 4 April 1969. On 23 May 1969, having learnt that the Resident Representative had departed from those instructions by failing to refer, in his letter of 8 April 1969 to the Applicant, to an "agreed" termination, he cabled him to "take appropriate remedial action to convey that we propose agreed termination which subject staff member's concurrence". Accordingly, the Resident Representative instructed a member of his Office to enter into negotiations with the Applicant and, on 27 May 1969, he informed the Chief of the Personnel Division of the terms on which the Applicant intended to negotiate. On 2 June 1969, the Chief of the Personnel Division communicated proposals for settlement to the Applicant indicating that they constituted "our definitive, final position on an agreed termination arrangement"; he emphasized that she herself had precipitated the situation when she had proceeded on leave without any authorization and against the specific, written instructions of the Acting Resident Representative and that she must know that, *prima facie*, that provided grounds for separation or dismissal for abandonment of post. On 13 June 1969, the Applicant replied, denying that she had been guilty of abandonment of post. On 24 June 1969, the Chief of the Personnel Division asked the Applicant to let him know whether she accepted or rejected the proposals of 2 June 1969. On 24 August 1969, the Applicant replied that she rejected the proposals and requested to be informed of the administrative decision which would be taken by Headquarters on her case. On 22 September 1969, the Chief of the Personnel Division instructed the Resident Representative to advise the Applicant to resume her post forthwith. Accordingly, on 25 September 1969, the Resident Representative informed the Applicant—who was then working at the French Embassy—that Headquarters had decided to reinstate her immediately in her post and asked her to discuss the procedures of her reinstatement with the Deputy Resident Representative. On the same day, the Applicant went to the UNDP Office and had an interview with the Deputy Resident Representative in the course of which, asked whether she was planning to take leave in the near future, she refused to reply, stating that the question was not one to be put to her at the time of her reinstatement. The Deputy Resident Representative pointed out that he was asking the question because the whole matter had started with a leave question and because he presumed she had not been on leave in Europe since September 1968. She declined to reply and he did not press the point. In fact, the Deputy Resident Representative and another member of the staff had heard that the Applicant and her husband would be going to Europe on leave in October for three or four months. The Deputy Resident Representative had been informed of that by a source which was confidential but considered reliable. Other information came from conversations held by the Applicant in a Yaoundé store, during

which she was alleged to have bragged that she had forced the United Nations to reinstate her and that she would soon be going on leave again.

The Applicant resumed her work on Friday, 26 September 1969. She sent two letters dated that day, one to the Resident Representative and the other to the Chief of the Personnel Division; in the first, received on 9 October 1969, she confirmed that she had resumed her duties, and in the second, received in New York on 10 October 1969, she requested confirmation of the reinstatement decision, said that she had in fact resumed her duties with the UNDP Office and added:

“However, I would point out that the decision of Headquarters to reinstate me came without prior notice after a waiting period of nearly 14 months and I had already made other plans. Consequently, having shown the greatest goodwill by complying with your orders immediately, I must inform you that I shall be unable to perform my duties at Yaoundé as from 2 October 1969 until 1 January 1970 when I shall again be available.”

The Applicant worked in the UNDP Office up to and including 30 September 1969. On 29 September 1969, the Chief of the Personnel Division had sent the Resident Representative the following cable:

“Dupuy reinstated with repeat with pay. Except in ILO and Embassy employment periods, normal leave accrual applies also from date of suspension onwards and should be debited absence in Europe which you mention. We confirm leave without pay also applies French Embassy employment. . . . Staff member must now report for duty forthwith.”

On 30 September 1969, the Deputy Resident Representative summoned the Applicant in order to explain the contents of the cable to her and told her that since 1 October was a holiday she would receive written confirmation of the terms and conditions of her reinstatement on 2 October 1969. The Applicant did not report for duty on 2 October 1969 or thereafter and the written confirmation of 2 October 1969 was delivered to her husband on 6 October 1969. On 8 October 1969, the Resident Representative cabled the Chief of the Personnel Division that the Applicant had been absent from work for the week of 2 to 8 October without having called or informed him verbally or in writing of the reasons for her absence. On 9 October 1969, the Chief of the Personnel Division sent him the following cable in reply:

“Please contact Dupuy urgently and formally request her submit immediately written explanation for her absence from work without permission since 2 October. Further formally instruct her resume duty forthwith and advise her that failure to comply will indicate to UNDP that she has abandoned her post therefore separated effective date she commenced unauthorized leave and no repeat no termination indemnity applied.”

On 13 October 1969, the Resident Representative had a memorandum handed to the Applicant in which he asked her to inform him in writing of the reasons for her absence from the Office since 2 October 1969 without authorization and without having notified or warned the Office; he also asked her to resume her post immediately and warned her that if she did not it would mean that she had abandoned her post. According to the Resident Representative's messenger, who personally handed the memorandum to the Applicant, she was in the course of packing her cases, apparently for a long journey. In a letter to the Resident Representative dated 13 October 1969 but received on 29 October 1969, the Applicant asserted that she had given all the necessary explanations concerning the terms of her reinstatement in her letter of 26 September 1969 to the Chief of the Personnel Division, so that she could not be charged with abandoning her post, and she added that “the UNDP Office at Yaoundé was aware of the fact that commitments had arisen since the date of my dismissal (8 April 1969) and, at our first interview on 25 September 1969 [the Deputy Resident Representative] was fully in-

formed of them". On 30 October 1969, the Chief of the Personnel Division proposed that the Administrator of UNDP should separate the Applicant from the service as of 2 October 1969 since she had not resumed her duties by 27 October 1969 or given a satisfactory reason for her absence. The Administrator gave his approval on 31 October 1969 and on the same day the Chief of the Personnel Division instructed the Resident Representative to advise the Applicant formally that she had been separated from UNDP for abandonment of post. The Applicant had, however, left Yaoundé for France and it was not until 29 November 1969 that the Resident Representative, at the insistence of Headquarters, informed her that the Personnel Division considered her to be separated from UNDP for having abandoned her post without prior authorization and for having refused to accede to the request which had been made to her to resume her duties and furnish written explanations. In the meantime, the Applicant had written two letters to the Chief of the Personnel Division; in the first, dated 13 November 1969, she informed him that her effective reinstatement could take place on 1 January 1970 only, and in the second, dated 24 November 1969, she claimed \$40,000 in damages from UNDP. On 9 December 1969, the Applicant made it known that she intended to submit an appeal against the decision notified to her on 29 November 1969. Having been informed of the procedure to be followed, the Applicant sent the Secretary-General a letter dated 13 February 1970, requesting that the decision be reviewed and seeking permission to submit an application directly to the Tribunal. After receiving a negative reply, the Applicant filed her second appeal. The Joint Appeals Board submitted its report on 27 September 1971. The Board's conclusions and recommendations read as follows:

"Conclusions and recommendations

"70. The Board finds that the decisions of termination notified to the appellant in the letters of 8 August 1968 and 8 April 1969, which were not authorized and were never put into effect, did not injure the appellant and accordingly do not give rise to any right to compensation for damages. The Board finds further that the appellant is not entitled to termination indemnity in respect of these notifications of termination, since her appointment was not in fact terminated.

"71. The Board considers that the appellant's arrears of salary and her leave entitlement during the period of suspension were correctly calculated by the respondent.

"72. Lastly, the Board finds that the appellant abandoned her post when, after voluntarily resuming work on 26 September 1969 and working for three days, she failed to come to work on 2 October 1969 or thereafter and did not respond to a request that she return to duty. Moreover, the Board considers that the appellant never tried in good faith to reach agreement with the respondent concerning the date on which she would resume work. The Board accordingly finds that her separation from service for abandonment of post was proper.

"73. Consequently, the Board makes no recommendation in support of these appeals."

The alternate member elected by the staff attached to the report a dissenting opinion which reads as follows:

"In accordance with Staff Rule 111.3 (j), I should like to avail myself of the privilege of having my dissenting opinion included in the report of the Board.

"In my opinion the case of Madame Dupuy has to be considered in the light of the accepted practice at the duty station. Replying to a question on this point the representative of the Secretary-General informed the Board that:

"In view of the fact that there is difficulty in getting suitable adequately trained local staff in Yaoundé, a practice—reluctantly accepted by the UNDP

Office in Yaoundé—has been to employ local French nationals. These staff members do usually take their annual leave to accompany their husbands to France annually and are occasionally granted SLWOP for that purpose provided the exigencies of the service allow it.’

“Because it was the accepted practice for French nationals to accompany their husbands each year on leave to France, their annual departure would appear to have been accepted as a right leading to a justified expectation. Taking this into account, the overnight reversal of his decision by the Acting Resident Representative was arbitrary and unreasonable, in that it suddenly disregarded an established practice of permitting husbands and wives to take annual leave together. The refusal of leave also created an impossible family situation for the staff member who had already made plans for departure to France with her husband. The fact that she found several qualified persons to replace her in her absence testified to her sense of responsibility towards her job.

“When Mrs. Dupuy was finally reinstated in September 1969 it is clear that as a result of the long suspension and the series of administrative failures involved there no longer existed an atmosphere of mutual trust and goodwill which was necessary to the satisfactory solution of the problem that had been created by them.

“First, it is clear from the letter of the Rules and Procedures Section that while reinstating the staff member the Administration had the intent to terminate her as soon as adequate grounds could be found and it was even predicted that the appellant would soon provide the grounds. Second, when the Deputy Resident Representative interviewed the appellant in connexion with her reinstatement, although he questioned the staff member about her leave plans he ‘did not press the point’ when he received no clear answer from her even though he had heard she was going to France. In view of the letter from the Rules and Procedures Section he should have warned her that her appointment would be terminated if she took leave without prior authorization. Both events leave in doubt the good faith of the Administration in ordering the reinstatement and suggest that the Deputy Resident Representative willingly let the staff member create a situation which provided the Administration with grounds for her termination. Finally, on 13 October when the staff member was ordered to return to duty immediately and for the first time warned of the consequences of non-compliance, the Administration was acting with the full knowledge that the staff member was going on leave to France with her husband, as was the usual practice, and could not comply without creating family difficulties.

“On both occasions there were serious administrative shortcomings. In the first instance the reversal of the decision to grant leave was arbitrary, unreasonable and inconsiderate and led to an unwarrantedly long period of suspension of the staff member. In the second instance the Deputy Resident Representative failed to deal candidly with the staff member and thereby helped to create the situation in which the staff member could be charged with ‘abandonment of post’.

“In conclusion, because the first decision to deny the appellant leave was arbitrary and unreasonable, and this was followed by a series of administrative blunders which created serious difficulties and anxiety for the staff member; because this chain of events served to destroy the atmosphere of mutual trust and goodwill necessary to heal the breach between the injured staff member and the Administration; because the circumstances surrounding the reinstatement left doubts as to the good faith of the Administration, I consider (a) that the reinstatement did not constitute a genuine redress for the illegal terminations in the first instance and the unwarrantedly long suspension; and (b) that the grounds for the

second termination are vitiated by the expressed intent of the Administration to terminate the staff member as soon as cause could be found, and at the same time by its failure to warn the staff member of the consequences which would flow if she followed the usual practice of again taking leave with her husband to France.

“I therefore cannot join in the decision of the Board to make no recommendation in support of these appeals.”

On 17 November 1971, the Director of Personnel of the United Nations informed the Applicant that, after reconsidering her case, the Secretary-General had decided to maintain the decision to separate her from UNDP service for abandonment of post. On 22 June 1972, the Applicant filed the above-mentioned application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. As main thesis: the reinstatement agreement of 26 September 1969 was never validly concluded:

(a) The termination of 8 April 1969 remains in effect: the Applicant replied to the offer of reinstatement by conditional acceptance; since UNDP did not accept her conditions concerning the effective date of reinstatement and payment in full of the sums owing to her, there was no agreement of will and thus no valid reinstatement so that, since the termination of 8 April 1969 had never been expressly abrogated, the Applicant had no post to abandon;

(b) No grounds were given for the termination of 8 April 1969, which must therefore be declared null and void;

(c) The prolonged suspension and the termination of 8 April 1969 were vitiated by prejudice;

(d) The case abounds in procedural defects, such as the failure to communicate to the Applicant the Deputy Resident Representative's comments of 18 October 1968 and the fact that the termination of 8 April 1969 was not preceded by disciplinary proceedings.

2. As first alternative thesis: the reinstatement agreement of 26 September 1969 was concluded in accordance with terms proposed by the Applicant—UNDP's delay in replying to the Applicant's counter-proposals being tantamount to implicit acceptance—but was breached unilaterally by UNDP.

3. As second alternative thesis: the reinstatement agreement of 26 September 1969, concluded in accordance with terms proposed by UNDP, was followed by arbitrary separation of the Applicant. The Applicant's counter-proposals are thus interpreted as a request for leave, implicitly accepted, given the delay in replying to them, and the termination is null and void as it arbitrarily abrogates this tacit granting of leave. The choice of the ground “abandonment of post” is proof of an additional action *ultra vires*, for there is no such ground for termination in the Staff Rules. Furthermore, the complaint related to conduct and disciplinary proceedings should have been initiated. Lastly, the clearly determined will to dismiss the Applicant was present before the reinstatement.

Whereas the Respondent's principal contentions are as follows:

1. The Respondent's decision of 8 April 1969 was revoked by the reinstatement of the Applicant on 26 September 1969, so that the question of the legality of the said decision has become pointless.

2. The abandonment of post on 2 October 1969 provided legitimate grounds for terminating the Applicant's indefinite appointment in the interests of the Organization under Staff Regulation 9.1 (c):

(a) The Applicant abandoned her post on 2 October 1969;

(b) Under the Staff Regulations and Rules, the Respondent's decision of 29 No-

ember 1969 to terminate the Applicant's appointment was properly grounded on abandonment of post;

(c) The Applicant was duly reinstated on 26 September 1969: the Resident Representative's letter of 25 September 1969 to the Applicant and the Applicant's two letters of 26 September 1969 constituted an agreement for reinstatement on 26 September 1969, which is confirmed by the acts of the parties—that is, the resumption by the Applicant of her duties on 26 September 1969 with the manifest consent of the Resident Representative;

(d) UNDP at no time agreed with the Applicant to fix 1 January 1970 as the date of her reinstatement;

(e) UNDP did not tacitly authorize the Applicant to take leave from 2 October 1969 until 1 January 1970.

3. The Respondent's decision of 29 November 1969 to terminate the Applicant's employment was not motivated by prejudice.

4. Having accepted, without the prior consent of UNDP, employment with the ILO during the period of her suspension, the Applicant has no entitlement to any salary from UNDP for the period of such outside employment.

The Tribunal, having deliberated from 28 March to 6 April 1973, pronounces the following judgment:

I. The Applicant first asks that she be furnished with the official file of the Joint Appeals Board. The necessary was done.

II. The Tribunal notes that the purported decision to terminate the Applicant taken by the Acting Resident Representative on 8 August 1968 was not only unauthorized but highly questionable. That official had at first approved the Applicant's request for leave without pay to accompany her husband on his leave in France. The Respondent admits that such periods of leave without pay were normal; it is very possible that the Acting Resident Representative changed his mind after another secretary had resigned, which resignation was subsequently withdrawn; the Applicant had supplied the names of two possible replacements, one of whom was in fact engaged, thus negating the Acting Resident Representative's claim that there was a shortage of staff; the Applicant's grandmother had just died and a sworn doctor had just issued a certificate to the effect that the Applicant's child should be X-rayed in France. The Tribunal finds that it is unlikely that these facts were not known to the Acting Resident Representative or that the Applicant invented what she claims the Representative said, namely that she must choose between her family and the office.

The decision of 8 August 1968 was, however, superseded by the decision of 28 August 1968 suspending the Applicant without pay pending investigation, which was tantamount in effect to conceding that the first decision was inappropriate.

III. The Applicant requests rescission of the Resident Representative's termination decision of 8 April 1969, which terminated her employment on that date with the proviso that she would receive her full salary from 16 September 1968 (the date on which she returned from leave) until 8 April 1969, less the period during which she worked for the ILO. In fact, the Resident Representative had been instructed by the Chief of the Personnel Division to negotiate an agreed termination with the Applicant, but he apparently misunderstood his instructions. In any case, the Applicant protested against the decision of 8 April 1969 which, moreover, was never put into effect; after abortive attempts to reach agreement with her, the Resident Representative, on the instructions of the Chief of the Personnel Division, informed her on 25 September 1969 that Headquarters had decided to reinstate her forthwith. That decision, followed by the Applicant's return to work on 26 September 1969, had the effect of superseding the decision of 8 April 1969.

Accordingly, the Applicant's request that the latter decision be rescinded must be rejected.

IV. The Applicant requests further that the decision of 29 November 1969 terminating her appointment from 2 October 1969 for abandonment of post be rescinded. She argues that she was not reinstated on 26 September 1969 and that there could, therefore, be no abandonment of post. She claims that what she calls the offer of reinstatement was followed by her "conditional acceptance" and that the conditions she made—namely that, having made other arrangements, she could not work from 2 October 1969 to 1 January 1970 and that she should be paid full salary for the period of suspension—were not met, so that there was no reinstatement. The Applicant did not, however, mention these so-called conditions either at her interview with the Deputy Resident Representative on 25 September 1969 (in the course of which he told her that the period during which she had worked for the ILO would be considered leave without pay) or while she worked at UNDP on Friday, 26 September, Monday, 29 September and Tuesday, 30 September.

The Administration became aware of the so-called conditions when the Chief of the Personnel Division received, on 10 October 1969, a letter from the Applicant dated 26 September 1969 in which she said that she had received from the Resident Representative a letter of 25 September 1969 "informing me of my *immediate reinstatement*" and in which she said "*I solemnly and sincerely accept my reinstatement and, in accordance with the instructions in the aforementioned letter, I reported at the UNDP Office this morning, 26 September 1969, and effectively resumed my duties*". [Emphasis added]. She then explained why she could not work from 2 October 1969 to 1 January 1970. On 9 October 1969, the Resident Representative received from the Applicant a letter, also dated 26 September 1969, confirming that "*in accordance with your instructions I have in fact resumed my duties from today at the UNDP Office at Yaoundé*" [Emphasis added] and stating that a copy of the letter she had that day sent to UNDP in New York was enclosed. The Respondent maintains that no copy was enclosed with the letter.

The Tribunal must first observe that it seems somewhat unlikely that letters received by UNDP in New York on 10 October 1969 and by the Resident Representative in Yaoundé on 9 October 1969 were posted at Yaoundé on 26 September 1969 as the Applicant claims.

Be that as it may, to construe as a counter-proposal the Applicant's reference to her absence from 2 October 1969 to 1 January 1970 would not only be inconsistent with the fact that the Applicant did not mention this point in the course of the interview of 25 September 1969, during which she refused to say anything at all about the question of leave, or during the days on which she worked at UNDP, i.e., 26, 29 and 30 September, but would also be inconsistent with the unequivocal phrases in the letters of 26 September 1969 in which the Applicant said that she had accepted "immediate reinstatement" and that she "had effectively resumed her duties" on 26 September 1969.

The Tribunal therefore concludes that the Applicant was in fact reinstated on 26 September 1969.

V. The Applicant next points out that her reinstatement on 26 September 1969 was on her terms and that in consequence the Administration's delay in replying to her letter of 26 September 1969 concerning her absence from 2 October 1969 to 1 January 1970 amounted to tacit approval of that absence. According to the Applicant, the delay was of 17 days, in other words, the period between 26 September 1969 and 13 October 1969, the date of the letter in which the Resident Representative requested the Applicant to resume her post forthwith and to provide explanations for

her absence. But, if 9 October (the day on which the Applicant's letter was received) and 13 October (the day on which the Resident Representative wrote to the Applicant) are excluded, there remain only 10, 11 and 12 October 1969. However, 11 October was a Saturday and 12 October a Sunday, so that the total time which elapsed between the receipt by the Resident Representative of the Applicant's letter of 26 September 1969 and the Resident Representative's letter to the Applicant dated 13 October 1969 is only one working day, namely 10 October 1969. Accordingly, the Resident Representative's so-called "silence" lasted only one day and cannot be interpreted as implicit acceptance of 1 January 1970 as the date of the Applicant's reinstatement.

Even assuming that the Applicant's letter of 26 September 1969 reached the Resident Representative on the same day, so that 17 days would have elapsed between the date of its receipt and the Resident Representative's letter of 13 October, such delay could not be interpreted as implying that the Resident Representative agreed to fix 1 January 1970 as the date of reinstatement. Silence, even if prolonged—and a period of 17 days cannot be regarded as a prolonged period—does not mean consent when it is contrary to the intent and declarations of the parties. The Resident Representative and the Applicant had agreed by their letters of 25 and 26 September 1969 to fix 26 September 1969 as the date of reinstatement and that agreement was confirmed by the actions of the parties.

The Applicant also claims that the period of one and a half months which elapsed between her letter of 13 October 1969 to the Resident Representative explaining the reasons for her absence and the Resident Representative's letter to her of 29 November 1969 informing her of her termination constituted tacit acceptance of 1 January 1970 as the date of her reinstatement. The Respondent had no obligation to reply promptly to the Applicant's letter or even to reply to it at all, and his "silence" while he was considering the Applicant's case could not be construed as implicit approval of anything at all.

VI. The Applicant next contends that her letter of 26 September 1969 to the Chief of the Personnel Division constituted a request for leave without pay for the period 2 October 1969 to 1 January 1970, that the Respondent's delay in replying to her was tantamount to approval and that the subsequent termination was therefore null and void. For the reasons set forth above, the Tribunal holds that the so-called delays did not amount to approval of a request for leave or to acceptance of a so-called counter-proposal.

VII. The Applicant further claims that termination for "abandonment of post" is neither authorized by nor provided for in the Staff Rules and that for a grievance of that nature disciplinary proceedings ought to have been initiated. Although termination for abandonment of post is not expressly provided for in the Staff Rules, annex III, paragraph (d) to the Staff Regulation provides that no termination indemnity shall be paid to a staff member who abandons his post, and Staff Rule 109.5 (f) stipulates that no repatriation grant shall be paid to a staff member who abandons his post. These references confirm the long-standing Administration practice of regarding unauthorized absence, in certain circumstances, as abandonment of post and cause for separation. The prohibition against paying termination indemnity to a staff member who abandons his post would be meaningless if abandonment of post was not a distinct and independent reason for termination.

VIII. The file does not show that the Applicant's termination was motivated by prejudice, as she claims. Whatever may have been the personality differences between certain UNDP officials in Yaoundé and the Applicant, the separation from service resulting from the Resident Representative's letter of 29 November 1969 was clearly justified by the Applicant's unauthorized and deliberate absence from work from 2

October 1969. However deplorable it may be, the fact that the Administration in New York hesitated for 14 months provides proof of a desire to reach a solution acceptable to the Applicant, as is proved by her reinstatement from 26 September 1969.

IX. The reinstatement of the Applicant, which put an end to her suspension without pay, meant in effect that she should not have been suspended and that in principle she should be paid her full salary for that period, less appropriate deductions.

The Administration treated the periods during which the Applicant worked at the ILO and the French Embassy as periods of leave without pay and credited her with no salary or leave accruals for those periods. Staff Rule 101.6 does, of course, provide that staff members shall not engage in any outside employment without the prior approval of the Secretary-General and in the present case the Applicant did not obtain such approval for her work at the ILO or the French Embassy. However, the Respondent was clearly aware that the Applicant was working at the ILO and he saw no objection to it since he tried to facilitate her transfer to that organization, and there is no record of any objection on his part to the Applicant's work with the French Embassy. It would be an anomaly if, having been paid, say, 50,000 CFA francs for one month's work with the ILO, the Applicant were to be deprived of all her rights against UNDP, whereas if she had done nothing during that month she would have received some 85,000 CFA francs from UNDP and full leave accrual. Under the circumstances, the Tribunal rules that the Respondent shall pay the Applicant the difference between the salary she would have received at UNDP for the periods during which she worked at the ILO and the French Embassy and the salary she received from the ILO and the French Embassy during those periods. Similarly, the Respondent shall calculate the Applicant's leave entitlement for those periods and pay the cash equivalent thereof to the Applicant. The Applicant's request to be paid full salary for those periods, without any deduction, is rejected.

X. If she had not been suspended, the Applicant would normally have received a salary increment on 1 July 1969. Staff Rule 103.8 (a) provides:

“(a) Satisfactory service for the purpose of awarding a salary increment shall be defined, unless otherwise decided by the Secretary-General in any particular case, as satisfactory performance and conduct of staff members in their assignments as evaluated by their supervisors.”

In the present case, the Applicant's performance and conduct were not evaluated by her supervisors as of 1 July 1969. The absence of an evaluation was due to the suspension of the Applicant by the Respondent, a suspension which the Respondent admitted was erroneous by reinstating the Applicant on 26 September 1969 with pay. The Tribunal notes further that on 5 December 1967, the Applicant's then supervisor had recommended that she should receive *two* annual increments on 1 May 1968 in view of her excellent record of service. For these reasons the Tribunal rules that the Respondent shall recalculate the salary due to the Applicant for the period 1 July 1969 to 2 October 1969 in such a way as to include in it a one-step increment from 1 July 1969, and shall pay to the Applicant the sums owing to her in consequence.

XI. In view of what the Joint Appeals Board called “the administrative errors committed by UNDP in its relations with the appellant”, with whom it had “dealt in a remarkably inept and clumsy way”, and in view further of the long delays in the settlement of the case, the Tribunal rules that the Respondent shall pay to the Applicant interest at the rate of 6 per cent per annum, from 2 October 1969 until the date of payment, on the sums owing to her in application of this judgement.

XII. For these reasons:

1. The Respondent shall pay to the Applicant the sums provided for in paragraphs IX and X above, plus the interest thereon provided for in paragraph XI.

2. In other respects, the Application is rejected.

(Signatures):

Suzanne BASTID
Vice-President, presiding
 Francis T. P. PLIMPTON
Vice-President
 Geneva, 6 April 1973

Roger STEVENS
Member
 Jean HARDY
Executive Secretary

Judgement No. 175

(Original: English)

Case No. 152:
 Garnett

Against: The Secretary-General
 of the United Nations

Request for interpretation of Judgement No. 156.

Staff Rule 103.9 (i).—Recomputation effected by the Respondent pursuant to Judgement No. 156.—Question whether post adjustment should be taken into account in the computation of the "salary" received by the staff member in the post to which he or she has been promoted.—No basis for the Applicant's contention that the term "salary" means in this case only base salary.—General rule implicit in paragraph 9 of annex I to the Staff Regulations, that post adjustments are factors in calculating Professional category salaries.—The purpose is to ensure that a staff member shall not suffer financially by reason of a promotion.—Need to include all sums actually received in comparing remuneration in the new position with remuneration in the old.—Since the salaries of both General Service and Professional staff are related to the cost of living, to omit post adjustment would be to compare unlikes.—Conclusion of the Tribunal that post adjustment should be taken into account in calculations under Staff Rule 103.9 (i).—Contention of the Applicant relating to the methods used by the Respondent in making the recomputations called for by Judgement No. 156.—Consideration of those methods.—Conclusion of the Tribunal that the recomputation of the Applicant's salary made by the Respondent complied with Staff Rule 103.9 (i).—Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mme Paul Bastid, Vice-President, presiding; Mr. Francis T. P. Plimpton, Vice-President; Mr. Mutuale-Tshikantshe;

Whereas, on 6 October 1971, Miss Betty Garnett, a staff member of the United Nations, filed an application requesting the Tribunal:

"1. To rescind the decision not to adjust my salary, in order that, during the period 1 September 1969 to 1 September 1970, that is, the first year following my promotion from G-5 step IX to P-2 step I, my salary would remain equivalent of one full step more than I would have received without promotion and this in accordance with the provisions of Staff Rule 103.9 (i);

"2. To order that the necessary measures be taken so that my salary during