notes that if his appointment had been extended until 31 March 1974 and if he had completed five years of service he would have been entitled to the retirement benefits provided for under the pension scheme. The Tribunal notes that the Applicant has obtained refund of his own contributions under article 32 of the Pension Fund Regulations. The Tribunal observes, however, that the Applicant's entitlement to a retirement benefit might have been affected by changed personal circumstances and, on the basis of the principle that damages should not be remote or indirect, the Tribunal rejects the request.

XX. The Applicant requests $1,500 as reimbursement of his judicial costs.

The Tribunal notes that the Applicant could have availed himself of the assistance of a member of the panel of counsel.

Having regard to its resolution of 14 December 1950 and considering the special nature and circumstances of the case, the Tribunal orders the Respondent to pay the Applicant $800 as costs.

(Signatures)

R. VENKATARAMAN
President

Roger STEVENS
Member

Suzanne BASTID
Vice-President

Jean HARDY
Executive Secretary

New York, 11 October 1974

Judgement No. 193

(Original: English)

Case No. 186:
Addo

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

Request that the Tribunal declare receivable an appeal submitted to the Joint Appeals Board after the expiration of the required time-limit.

Date of notification of the contested decision and of the appeal submitted to the Joint Appeals Board. —Staff Rule 111.3 (c) *and* (d).*—Question whether the Board acted correctly in deciding that none of the reasons offered by the Applicant for not meeting the required time-limit amounted to exceptional circumstances.*

The Applicant cannot plead ignorance of the Staff Rules requirements for appeals.—Examination of the correspondence exchanged between the Applicant's solicitors and the Respondent.—Conclusion of the Tribunal that the decision of the Board not to waive the time-limits is supported by the record.—Application rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Mr. Francis T. P. Plimpton, Vice-President; Mr. Zenon Rossides;

Whereas on 20 December 1973, Alexander H. K. Addo, a former staff member of the United Nations, filed with the Tribunal an application which did not fulfil all the formal requirements of article 7 of the Rules;

Whereas the Applicant, after making the necessary corrections, again filed the application on 19 March 1974;

Whereas the pleas of the application read:

"*(a)* Preliminary measures

"The Applicant requests that the Tribunal obtains the originals of the following documents from the Respondents:

"(i) A letter dated 10th March 1971 from J. C. Armah esq., Applicant's former Solicitor to the Secretary-General.

"(ii) The original of the letter dated 26th February 1972 from Jimmy Alarah esq., another Solicitor of the Applicant to the Secretary-General.

"(iii) A letter dated 7th May 1971 ref. KC/A-10/JCA/CF written by J. C. Armah esq., aforesaid to the Secretary-General.

"(iv) The original of the letter dated 22nd October 1971 from the Applicant to the Secretary-General.

"The Applicant respectfully requests that the Tribunal obtains the following from the Joint Appeals Board:

"(v) The original of the Record of Proceedings in the case intitled 'The Republic *vrs* Alex Harry Addo' which had been initiated by the Accra UNIC Director.

"(vi) The original of the letter dated 26th February 1972 from Jimmy Alarah esq., another Solicitor of the Applicant to the Secretary-General.

"(vii) The originals of all Periodic Reports on the Applicant from the Chief of Personnel.

"(viii) Record of Proceedings of the Board on case before the Board including all correspondence to and to/from the Board and the parties and their Counsel.

"(ix) Letter dated 11 July 1972 from Applicant to Joint Appeals Board.

"(x) Memo ref. Adm 530/77 dated 28th February 1970 from UNIC Director Accra to Chief, Centre Services, OPI, United Nations, New York.

"*(b)* The substantive decision which the Applicant is contesting is his purported summary dismissal for serious misconduct but as a preliminary issue in respect of which the present appeal is brought is the majority decision of the Board which held that the Applicant's appeal to that Board was not receivable as having been filed outside the statutory limit already referred to above.

"*(c)* The Applicant invokes the exercise of the Tribunal's discretionary powers in his favour by:

"(i) reversing the Board's majority decision that the Applicant's Appeal is not receivable;

"(ii) holding that the circumstances of the Applicant's case are so exceptional as to fall within provisions of Staff Rule 111.3 *(d)* in law and in fact;

"(iii) accordingly formally granting the Applicant extension of time and

"(iv) remitting the case to the Board for determination on its merits.";

Whereas the Respondent filed his answer on 10 June 1974;

Whereas the facts in the case are as follows:

The Applicant, who had been an employee of the United Nations Information Centre in Accra, Ghana, from 13 August 1963 as a locally recruited Driver, having received a regular appointment as of 1 August 1965, was involved on 14 September 1970 in a quarrel with two of his colleagues, in which he inflicted injuries on them which required hospital treatment. The Director of the Centre, who had witnessed the incident, reported it to the local police on the same day. On 15 September 1970 he cabled Headquarters, requesting authorization to suspend the Applicant immediately and recommending his dismissal from the service. On the same day Headquarters cabled its agreement to immediate suspension of the Applicant and requested the Director to forward as soon as possible a written report, the police report and any other evidence available. On 18 September 1970 the Director sent the following letter to the Applicant:

> "I wish to inform you that as from today 18 September 1970, you are suspended from your duties pending an investigation into an incident which occurred in the Centre on 14 September in which you were involved.
>
> "You will be duly notified of the action taken by Headquarters."

The police report, dated 18 September 1970, was subsequently sent to Headquarters, together with statements made to the police by the Director and by the two victims, and the Director of the Centre, upon instructions from Headquarters, asked the police to take the case to court. By a letter dated 9 October 1970 and delivered to the Applicant on 19 October 1970 the Director of Personnel informed the Applicant that:

> ". . . in accordance with the second paragraph of Staff Regulation 10.2, the Secretary-General has decided to summarily dismiss you for serious misconduct, effective 15 September 1970, the date on which you were suspended from duty without pay."

The local police court rendered its judgement on 30 December 1970, acquitting the Applicant of the charge of assault filed against him. On 10 March 1971, a local solicitor sent to the Secretary-General, on behalf of the Applicant, a letter in which he contested the summary dismissal. He referred to a United Nations Personnel Action Form received by the Applicant on 21 January 1971 which notified the Applicant that, based on adverse reports contained in a memorandum of 7 August 1970 from the Director of the Centre to Headquarters, he would not receive the usual salary increment. The solicitor's letter assumed that the summary dismissal had been based on the memorandum, and pointed out that Headquarters had rejected the Director's recommendation in the memorandum that the Applicant be dismissed and had revoked the Director's suspension of the Applicant. As to the Applicant's clash with his colleagues, the solicitor's letter referred to the local court's judgement of 30 December 1970 acquitting the Applicant of the charge of assault. On 26 April 1971 the Chief of Staff Services, Office of Personnel, replied that the summary dismissal had taken place as a result of the Applicant's misconduct in assaulting his colleagues on 14 September 1970. On 7 May 1971 the solicitor wrote again to the Secretary-General, contesting the decision of dismissal on the ground that it disregarded the opinion of a competent judicial tribunal which had cleared the Applicant of any fault. In a reply dated 8 June 1971, the Chief of Staff Services explained that the Secretary-General's administrative decision to dismiss the Applicant summarily for misconduct had had nothing to do with the jurisdiction of the local court and that the court's decision was of no relevance in the exercise of the Secretary-General's discretion under his administrative powers, and he added: "If Mr. Addo so wishes, there are administrative channels of appeal open to him". The Applicant appears to have taken no further action until, on 26 February

1972, another local solicitor acting for him wrote to the Secretary-General reiterating the Applicant's claim, complaining as to the exact payments due to the Applicant, and asserting that the Respondent should have awaited the local court's decision before determining to dismiss the Applicant and that he had not been given the opportunity to be heard. The solicitor also acknowledged that much time had been wasted in the prosecution of the claim, but he contended that the delay was accounted for by the law's delay in the local court, by communication difficulties, and by the time consumed in correspondence between the Applicant's former solicitor and the Respondent. The letter ended with an appeal to the Secretary-General to grant the Applicant an extension of time within which to lodge his appeal. In a reply dated 4 April 1972 the Officer-in-Charge of the Office of Personnel stated that it was not within the power of the Secretary-General to waive the time-limits for appeal, and that only the Joint Appeals Board, in exceptional cases, could waive the time-limits set forth in the Staff Rules. The letter enclosed a copy of chapter XI of the Staff Regulations and Rules concerning appeals and advised the applicant to proceed with his appeal before the Joint Appeals Board, submitting in the first instance the question of the receivability of his appeal. On 11 July 1972 the Applicant sent to the Board an application for extension of time within which to lodge an appeal. On 12 September 1973 the Board submitted its report, the concluding section of which read as follows:

"*Considerations*

"29. The appeal concerned the suspension notified to the appellant on 18 September 1970, the summary dismissal notified to the appellant on 19 October 1970, and various payments made to the appellant on 21 January 1971. Yet the appeal had not been lodged with the Joint Appeals Board until 11 July 1972, which was well beyond the time-limits established in Staff Rule 111.3 *(b)* and *(c)*.

"30. The Board observed that the appellant had first asserted his claims through his solicitor on 10 March 1971, which was beyond the time-limit of one month in respect of all the contested decisions. Although the appellant in connexion with an earlier appeal in 1969 had been provided with a copy of chapter XI of the Staff Regulations and Rules by the Secretary of the Board who had drawn his attention to the time-limits in question, the Board considered that, in view of the appellant's separation from service with the Organization and the instituting of the local court proceedings, the appellant might well have been confused as to the proper channel for contesting the decisions. It noted, however, that the Chief, Staff Services, Office of Personnel, in his letter of 8 June 1971 to the appellant's solicitor, had made it clear that there were administrative channels of appeal open to the appellant, and that the appellant had nevertheless waited some nine months more before raising the matter again. In the Board's view none of the reasons offered by the appellant for this delay were 'exceptional circumstances' which, under Staff Rule 111.3 *(d)*, would warrant a waiver of the time-limits prescribed for the procedure of appeal. In particular, the Board did not regard the obtaining of the certified copy of the court record as a justification for the delay, especially since the proceeding had been concluded on 30 December 1970 and the appellant had not explained why he could not have secured the certified copy soon thereafter.

"31. Accordingly, the Board *decides not to entertain the appeal,* on the ground that it is not receivable.

"32. The Board wishes to add, *obiter,* that, while it did not look into the merits of the case, its examination of the texts of the contested decisions revealed some obvious administrative errors. The representative of the respondent acknowledges that the date of 15 September 1970, which was given in the notice of dismissal as the date on which the appellant was suspended from duty and consequently as the effective date of dismissal, is a typographical error and that the respondent in-

tended the date to be 18 September 1970. The representative of the respondent also agrees that the appellant must be regarded as having been on duty on 16, 17 and 18 September 1970 (Wednesday, Thursday and Friday). The Board is confident, therefore, that the respondent will wish to pay the appellant the salary and allowances owing to him for these three additional working days.

"33. The Board also considers that the dismissal decision communicated to the appellant on 19 October 1970 should not have been made retroactive to 18 September 1970. The representative of the respondent asserts that it is established practice to make a summary dismissal following a suspension from duty without pay effective on the date of suspension, as the dismissal is deemed to confirm and render permanent the decision to discontinue the use of the individual's service by the Organization. The Board cannot agree, however, that the suspension in the present case was 'without pay', since the letter notifying the appellant of his suspension makes no reference to his pay status and the appellant was in fact paid his salary and allowances through mid-October 1970, only to have the amount covering the period of 16 September through 19 October deducted from his final payments.

"34. In this connexion the Board notes that, according to Staff Rule 109.10 *(v)*, the date on which entitlement to salary, allowances and benefits shall cease, in the case of summary dismissal, shall be 'the date of dismissal'. Moreover, the Board notes that suspension pending investigation may be authorized only under the authority of Staff Rule 110.4, which contains the express provisos that suspension may be 'with or without pay' and that it shall be 'without prejudice to the rights of the staff member'. The Board is of the opinion that suspension 'without pay', being a sterner measure than suspension 'with pay', must be specified in the communication to the staff member if it is the intention of the Secretary-General. If later on the dismissal was to apply retroactively to the date of suspension 'with pay', the decision would, as regards the sums due to the staff member and his rights, place him in the same situation as if he had been suspended 'without pay'. The differentiation between suspension 'with pay' and 'without pay' would then become meaningless. Indeed the situation of the staff member suspended 'with pay' would be even less favourable, as he would have had no warning of the possible financial implication of the decision to suspend him.

"35. Finally, the Board notes that there were some 10 days between the date the decision was taken and the date the staff member was notified of it. Though this delay can be explained by the time required for the correspondence to arrive at Accra, the staff member could have been forewarned, remembering that the suspension followed an exchange of cables between the Director of the Centre and Headquarters.

"36. In conclusion, the Board recommends that, taking into account the circumstances of the case, the appellant should be paid his salary and allowances from 16 September 1970 through 19 October 1970."

The Member elected by the Staff dissented from paragraphs 29, 30 and 31 of the Board's conclusions and recommendations and appended to the report a dissenting opinion reading as follows:

"1. I concur completely with the Board's Considerations (paragraphs 32 to 36).

"2. I am, however, unable to support the majority decision of the Board which considers, in paragraph 31, that '. . . the Board *decides not to entertain the appeal,* on the ground that it is not receivable'. I believe that the appeal is receivable on the ground that appellant's case falls within the provisions of Staff Rule 111.3 *(d)*

in law and in fact, warranting the waiver of the time-limit rule for appeals. It appears to me that the waiver of the time-limit rule (under Staff Rule 111.3 *(d)* is warranted as an exceptional measure because the record shows that no investigation was made under Staff Rule 110.4, regarding the suspension of appellant for 'serious misconduct'. Besides, if appellant's request for a waiver of the time-limit rule is denied, he has no other forum in which to present his case.

"3. Finally, it must be pointed out that the local police court acquitted and discharged appellant of the charge of unlawfully assaulting his colleagues, and this had been the basis for his summary dismissal. Therefore, it is clear that the summary dismissal of appellant was administratively erroneous because it disregarded the opinion of a competent, judicial tribunal which had cleared the appellant of any fault.

"4. For all the foregoing reasons, I believe that the appeal is receivable and that the time-limit rule should be waived. Appellant should not only have his 'day in court' outside the confines of the United Nations, but also within the United Nations system of administration of justice, in other words, the Joint Appeals Board."

On 16 October 1973 the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had decided to take note of the Board's decision not to entertain the appeal on the grounds that it was not receivable, and to order a change in the effective date of the Applicant's summary dismissal from 16 September 1970 to 19 October 1970. On 20 December 1973 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. When the dismissal letter was received, one month had elapsed since the "effective" date of dismissal, so that it was impossible to meet the one-month time-limit.

2. Since the Director of the Centre had referred to a suspension "pending an investigation", it was reasonable for the Applicant to wait for such an investigation to be carried out.

3. By his failure to specify the nature of the serious misconduct in the dismissal letter, the Respondent himself led the Applicant to be dilatory.

4. Since it was the Respondent—through the Director of the Centre—who initiated the local criminal proceedings, he was bound to await the outcome of those proceedings before dismissing the Applicant. Since this was not done, the act of dismissal itself was a nullity against which time cannot run.

5. It was reasonable for the Applicant to apply for a copy of the result of the trial of the local court, and there was a delay in getting a copy of the record of proceedings due to inefficient personnel and the volume of work.

6. In his exchange of correspondence with local solicitors acting for the Applicant, the Respondent tacitly encouraged the Applicant to waste time and he cannot now be heard to complain that the Applicant has wasted time.

7. In his letter of 8 June 1971 the Respondent hinted about administrative channels of appeal but, by not mentioning what these processes were or furnishing the Applicant the Rules relating to these processes sooner than he did, he contributed to the delay. Nor could the Applicant be presumed to know those Rules simply because he had previously filed an appeal on an entirely different matter.

8. The appeal will raise very serious questions touching upon the very foundations of justice and the rule of law. Time does not run and should not run in the face of the injustice done to the Applicant.

9. All the matters referred to by the Applicant are matters of record so that there is no risk that the evidence for the other side may have been destroyed or may otherwise be difficult to collect as a result of the delay.

10. If the application is turned down, the Applicant has no other forum to present his case.

Whereas the Respondent's principal contentions are:

1. The application is not receivable, in so far as it asks the Tribunal to examine the substantive aspects of the summary dismissal, because it does not comply with the requirements of article 7 of the Tribunal's Statute.

2. The Joint Appeals Board's decision not to entertain the appeal was in accordance with Staff Rule 111.3: While the Applicant received notification of his summary dismissal on 19 October 1970, he addressed himself to the Board on 11 July 1972; he first asserted his claim through his solicitor on 10 March 1971, a date already well beyond the one-month time-limit; when the Organization in the letter of 8 June 1971 informed the Applicant's solicitor that there were administrative channels of appeal open to the Applicant, he nevertheless waited for nine months more before raising the matter again; those very long delays were not due to any "exceptional circumstances"; the Applicant knew from the beginning what the misconduct was for which he was dismissed, and he was also well acquainted with the procedures concerning the Board; finally, the decision of the Accra court was delivered as early as 30 December 1970 and, whatever the difficulties may have been in obtaining a certified copy of the record, they could not justify the Applicant's delay in *initiating* the appellate proceeding until long after the Applicant knew of that decision. No pro forma failure to carry out a formal investigation *before* a summary dismissal could justify the Applicant's delay in appealing the dismissal until long after he had received notice of it.

3. The application is unfounded on the merits:

(a) The Applicant's summary dismissal was warranted by precise and concrete evidence and was not due to general allegations of dissatisfaction made by the Director of the Centre;

(b) The Applicant's summary dismissal fell within the powers granted to the Secretary-General by Staff Regulation 10.2. Those powers are not conditioned on the outcome of any criminal proceedings that may take place in a local forum whenever an act of serious misconduct, warranting summary dismissal, might also constitute a violation of the local criminal law.

The Tribunal, having deliberated from 23 September to 16 October 1974, now pronounces the following judgement:

I. All of the documents which the Applicant requested be obtained by the Tribunal have been furnished by the Respondent or by the Joint Appeals Board, except for one letter from the Applicant himself to the Respondent which the Respondent has been unable to locate and which apparently was never received.

II. The Applicant was summarily dismissed by the Secretary-General pursuant to the second paragraph of Staff Regulation 10.2, which reads:

> "He [the Secretary-General] may summarily dismiss a member of the staff for serious misconduct."

The dismissal was as of 15 September 1970 by a letter dated 9 October 1970, received by the Applicant on 19 October 1970.

Staff Rule 111.3 *(c)* provides:

> "*(c)* An appeal against the Secretary-General's decision on disciplinary action shall be addressed to the Secretary of the Joint Appeals Board within one month from the time the staff member received notification of the decision in writing."

No appeal was addressed by the Applicant to the Joint Appeals Board until 11 July 1972. Staff Rule 111.3 *(d)* reads as follows:

> *"(d)* An appeal shall not be receivable by the Joint Appeals Board unless the above time limits have been met, *provided that the Board may waive the time limits in exceptional circumstances."* [Emphasis supplied]

The issue in this case is whether the Joint Appeals Board acted correctly in deciding that none of the reasons offered by the Applicant for not meeting the required time-limit amounted to exceptional circumstances, and in rejecting the application as not receivable.

III. It should first be noted that the Applicant cannot plead ignorance of the Staff Rules requirements for appeals. He had been a member of the staff and subject to its Rules since 13 August 1963 and, at the end of the letter dated 6 October 1965 which effected his regular appointment, he signed the following on 20 October 1965:

"To: Secretary-General

> "I hereby accept the appointment described in this letter, subject to the conditions therein specified and to those laid down in the Staff Regulations and the Staff Rules. I have been made acquainted with these Regulations and Rules, a copy of which has been transmitted to me with this letter of appointment."

Also, as the Joint Appeals Board noted, he had been provided, in connexion with an earlier appeal to the Board, with a copy of the applicable Staff Regulations and Rules and had had his attention called to the time-limits. Furthermore, his familiarity with appellate procedures was shown by his appeal to the Joint Appeals Board on 30 May 1970 to obtain payment for overtime worked between 1963 and 1966.

IV. The first letter from the Applicant's solicitor to the Secretary-General, dated 10 March 1971, was written almost five months after the Applicant had received notice on 19 October 1970 of his dismissal for serious misconduct and more than two-months after the local police court on 30 December 1970 had rendered its judgement acquitting him of the assault charge. The delay until the police court judgement was rendered might be explained, but there is no explanation for the subsequent two-month delay.

V. The confused attempt in the solicitor's letter of 10 March 1971 to ascribe the Applicant's dismissal as of 15 September 1970 to a partially disapproved memorandum of 7 August 1970 is hardly defensible, since the dismissal notice specifically referred to 15 September 1970 as the date on which he was suspended, and since the suspension notice specifically referred to the incident of 14 September 1970. Also, the Applicant certainly knew why he was dismissed.

Be that as it may, the Respondent's letter to the Applicant's solicitor of 26 April 1971 clearly stated that the basis for the dismissal was the assault of 14 September 1970.

The solicitor's letter to the Respondent of 7 May 1971 again claimed that the dismissal illegally disregarded the court's judgement; the Respondent's reply of 8 June 1971 pointed out that the dismissal was a decision by the Secretary-General in the exercise of his discretion under his existing administrative powers, having no relevance to the court's jurisdiction or decision, and added:

> "If Mr. Addo so wishes, there are administrative channels of appeal open to him."

VI. Despite the Respondent's pointing out to the Applicant's solicitor in the letter of 8 June 1971 the possibility of administrative channels of appeal, the Applicant apparently took no action for more than eight months—an unexplained delay—until another solicitor on his behalf wrote the Respondent on 26 February 1972, repeating the Applicant's contentions, acknowledging the delays in prosecuting the claim and attempting to account for them, and asking for an extension of time within which to lodge an appeal. The Respondent's reply of 4 April 1972 pointed out that the Secretary-

General could not grant such an extension and that only the Joint Appeals Board could do so in exceptional cases, and advised the Applicant, if he so wished, to proceed with his appeal before the Board and to submit to the Board, in the first instance, the question of the receivability of his appeal. The Respondent enclosed in his reply a copy of the applicable Staff Rules as to appeals.

VII. In spite of this specific advice on 4 April 1972 the Applicant took no action until 11 July 1972—an unexplained delay of some three months (and a delay of a year and a month since he had been reminded on 8 June 1971 of the possibility of administrative appeal)—when he finally, almost one year and nine months after his receipt on 19 October 1970 of the notice of summary dismissal for serious misconduct, applied to the Joint Appeals Board for an extension of time within which to submit an appeal.

VIII. As stated above, Staff Rule 111.3 *(d)* grants the Joint Appeals Board the power to "waive the time-limits in exceptional circumstances". In the present case, the Board decided not to waive those time-limits, finding that the reasons offered by the Applicant for the delays did not constitute "exceptional circumstances". The Tribunal regards that decision as fully supported by the record.

IX. The application is accordingly rejected.

(Signatures)

R. VENKATARAMAN
President

Zenon ROSSIDES
Member

Francis T. P. PLIMPTON
Vice-President

Jean HARDY
Executive Secretary

New York, 16 October 1974

Judgement No. 194

(Original: English)

Case No. 187:
Witmer

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

Withdrawal of an offer of employment as technical assistance expert for medical reasons relating to a previous period of service by the Applicant.—Request for compensation for breach of contract.

Absence of a letter of appointment.—Judgement No. 142.—Examination of all the circumstances relating to the candidacy of the Applicant.—Invocation by the Respondent of Staff Regulation 4.6.—Having been asked to undergo a medical examination as a prior condition to his appointment and having undergone that examination satisfactorily, the Applicant had fulfilled the conditions stipulated in the offer of appointment.—Denial of clearance to the Applicant by the Medical Director on the basis of his medical record during a previous period of employment.—Authority of the Medical Director to make recommendations of this nature and right of the Secretary-General to act on such recommendations.—The Respondent acted negligently in making an offer of appointment apparently subject to a new medical examination when he knew that whatever his health condition at the time the Applicant could not have been granted an appointment on account of his past medical history.—Principle of estoppel prevents the Respondent from raising objections based on the Applicant's medical history and disregarding the latest favourable medical report.—Conclusion of the Tribunal that the Applicant had become entitled to the