

(Signatures)

R. VENKATARAMAN
President

Francis T. P. PLIMPTON
Vice-President

New York, 16 October 1974

Zenon ROSSIDES
Member

Jean HARDY
Executive Secretary

Judgement No. 195

(Original: English)

Case No. 191:
Sood

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

Termination of the employment of a staff member holding a fixed-term appointment.—Non-conversion of that appointment to a probationary appointment.

Request for rescission of the termination decision and for the reinstatement of the Applicant.—The Tribunal observes that the Respondent has met the request for rescission of the termination decision.—However, as a result of that decision the Applicant was not given the opportunity of being considered for conversion of his appointment into a probationary appointment.—The Tribunal interprets the plea for reinstatement to mean that the Applicant seeks the renewal of his appointment and/or its possible conversion.—The Tribunal finds that the Respondent accepted the recommendation of the Joint Appeals Board that the termination decision be rescinded without dissenting from the reasons on which it was based.—Principle set forth in Judgement No. 185.—Consequently, the reasons given by the Board for holding that the Applicant was denied due process must be assumed to have been accepted by the Respondent.—The parties must be restored to the status quo when a termination decision has been rescinded and the reasons for such rescission have not been challenged by the Respondent.—Nature of document 262/5 redefining the contractual policy for local staff.—This document created rights for staff members in this category even though they may not have been aware of its existence or of the rights it created.—The decision to terminate the Applicant's employment and the decision not to consider the possibility of converting his appointment in accordance with the terms of that document were taken simultaneously and on the basis of the same allegations.—Since the first of these decisions was taken without due process it follows that the second was also vitiated by lack of due process.—Conclusion of the Tribunal that by reason of a decision reached without due process the Applicant was deprived of the opportunity of the conversion of his appointment.—Propriety of compensation in lieu of specific performance.—Award to the Applicant of compensation in the amount of one year's net base salary.—Request for renewal of the Applicant's appointment.—Request rejected, since such renewal is a matter within the discretion of the Respondent.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Mr. Zenon Rossides; Sir Roger Stevens;

Whereas, on 3 September 1974, Balbir Kumar Sood, a former local staff member of the Office of the United Nations Development Programme, hereinafter called

UNDP, at New Delhi, India, filed an application the pleas of which he reformulated in written observations filed on 14 February 1975 and in a communication dated 7 March 1975;

Whereas the pleas, as reformulated, request the Tribunal:

“(1) To overturn the decision of the Resident Representative of the UNDP in New Delhi and, thereby, to reinstate the Applicant in his post as driver in the UNDP Office, with restitution of all allowances and privileges and reimbursement of those entitlements accorded to the date of termination; or,

“(2) Alternatively, to be awarded as compensation, an amount equivalent to five years net pay, taking into consideration two years without steady employment which the Applicant has been enforced to endure depending upon a decision on his case.”;

Whereas, the Respondent filed his answer on 31 October 1974;

Whereas, on 14 February 1975, the Applicant filed the above-mentioned written observations on the Respondent's answer;

Whereas the facts in the case are as follows:

The Applicant entered the service of the UNDP Office at New Delhi on 24 April 1967 as a driver under a short-term appointment for three months. After a three-month extension of this appointment, he was granted a fixed-term appointment for one year and one for six months and then received a succession of four one-year fixed-term appointments, the last of which became effective on 1 May 1972 and was due to expire on 30 April 1973. In his first performance report, dated 1 April 1969, and in his second performance report, which covered the period from April 1969 to March 1970, the Applicant received an over-all rating of “good”. In a third performance report, covering the period from April 1970 to March 1971, the Applicant was again given an over-all rating of “good”, but an Assistant Resident Representative, Mr. Manson, wrote the following comment:

“Although a competent driver, Mr. Sood has acted very irresponsibly on at least one occasion during the last year. His conduct is such that he requires to be supervised closely. There has been an improvement in his conduct during the last few months.”,

and the Resident Representative added:

“I would like to see an all-round improvement in the habits and conduct of this driver.”

On 11 June 1971 the watchman on duty saw the Applicant pouring petrol from the office jerrycan into his personal scooter. On 14 June 1971 Mr. Manson wrote the following letter to the Applicant:

“Mr. O. P. Khanna, Transport Supervisor, informed me that at 10.15 A.M. on 11 June 1971, you removed a jerrycan full of petrol from the store room in the absence of Mr. Afsar Khan, helper mechanic, who is normally working close by, and poured the petrol in your personal scooter. The watchman on duty, Mr. Dayal Singh, saw you putting the petrol into your scooter. He reported the matter to Mr. Khanna, who instituted inquiries. You subsequently confessed your guilt in the presence of Mr. O. P. Khanna, Mr. Dayal Singh and myself.

“Would you please explain in writing before noon on 15.7.71 the circumstances under which you used office petrol for your personal motor scooter.”

On 15 June 1971 the Applicant replied:

“. . . Sir, it so happened that in connexion with the purchase of my scooter, I had received some customers, who wanted to try my scooter, but fearing that the petrol may not run short and there being little time I took out the jerrycan

from the mechanic's room and poured some petrol into my scooter—in the very presence of the watchman—Shri Dayal Singh, as Mr. Afsar Khan was not present, with the intention of replacing the petrol after purchasing from the market. Sir, had there been any malafide intention, I would not have removed the petrol in the presence of anybody. I tried to contact Mr. Khanna, but as ill luck would have it I could not locate him at that moment and removed the petrol in good faith of informing Mr. Khanna as soon as he was available. Sir, as already informed your goodself personally I immediately told Mr. Khanna about this act when he came to his office, but before I could do so the said Mr. Dayal Singh had already reported the matter to Mr. Khanna.”

“ . . . ”

On 23 June 1971, in a letter to the Chief of the Personnel Division of UNDP, the Resident Representative a.i. recommended that the Applicant's one-year fixed-term appointment, which was due to expire on 30 April 1972, be terminated with effect from 11 August 1971 on the ground that the Applicant's conduct indicated that he did not meet the high standard of integrity required of a UNDP staff member. The Chief of the Personnel Division consulted the Chief of the Rules and Procedures Section of UNDP who, on 7 July 1971, advised him as follows:

“1. After reading the Resident Representative's a.i. letter of 23 June and all the statements attached thereto, I fail to be convinced that this is a case of deliberate theft. The staff member admitted having taken some petrol from a jerrycan, explaining, however, that he did it because he was in a hurry and needed petrol for his scooter which he was in the process of selling, and that he intended to replace the petrol. The point in his favor is that he did not hide while taking the petrol, but was on the contrary in full view of the guard who was at his post at the gate. I doubt therefore that we could prove this as a case of theft for which the staff member's termination is now requested.

“2. It is evident that Mr. Sood should be reprimanded in writing for borrowing petrol from the office without prior authorization. He should be requested to reimburse the cost of the petrol taken. He should also be made aware that any future action on his part which may lead the Resident Representative to doubt his honesty or should he, again, appropriate UNDP supplies without prior authorization, even with intent of returning them, would bring consideration for disciplinary action.

“3. In order to fully document the file in case of a recurring offence, I would suggest that the Assistant Resident Representative explains what he is referring to under Section C of the staff member's performance report signed on 10 March 1971, where he says ‘ . . . Mr. Sood has acted very irresponsibly on at least one occasion during the last year. His conduct is such that he requires to be supervised closely . . . ’. I may add that in view of this comment being made at the time the staff member's contract was due to expire, a six-month's extension might have been preferable rather than one year as requested and authorized.

“4. The possibility of a further extension of the staff member's appointment when it expires on 30 April 1972 should then be reviewed carefully in the light of the documents on file and of the new periodic report submitted.”

On 21 July 1971 the Chief of the Personnel Division informed the Resident Representative a.i. that he was in agreement with the approach outlined by the Chief of the Rules and Procedures Section. On 29 July 1971 the Resident Representative sent to the Applicant a letter of reprimand reading in part:

“Through this letter I wish to make it absolutely clear to you that any further action of a similar nature which would give me ground to doubt your honesty will

result in my recommending to UNDP Headquarters that serious disciplinary action be taken against you. I should also like to add that the possibility of a further extension of your appointment, which I note is due to expire on 30 April 1972, will be reviewed carefully in the light of the documents in your file and the contents of the performance report which will be submitted at that time."

On the same day Mr. Manson wrote to the Chief of the Personnel Division the following letter:

" . . .

"I would like to explain in more detail the situation which led to the inclusion under Section C of staff member's performance report signed on 10 March 1971, where it was stated that 'Mr. Sood acted very irresponsibly on at least one occasion during the last year. His conduct is such that he requires to be supervised closely . . .'. During the absence of Dr. McDiarmid [the Resident Representative] on home leave, information was received that Mr. Sood had on several occasions picked up women, allegedly of ill-repute, and conveyed them to the compound of Dr. McDiarmid and installed them in the servants' quarters. When confronted with this allegation, he denied it but there were witnesses, and thus a sufficient weight of evidence to encourage us to believe that the allegation was based on the truth. In another incident in which petrol was obtained for cash at the local petrol station in New Delhi, it was clear that he obtained less petrol than was reflected on the petrol company's invoice. As usual he denied the charges but made good the discrepancy of petrol in his tank by paying cash to the Transport Officer.

"Unfortunately much of the evidence in both these cases is secondhand. However, we have sufficient grounds to believe that his conduct over the last year is not up to the standard required of one of our staff members.

"As far as the recent incident is concerned, I attach hereto a copy of the letter of reprimand which has been issued to the staff member in accordance with your recommendation in the hope that Mr. Sood would be wise enough to realise that this recent incident will be the last which Resident Representative would tolerate."

On 14 March 1972 Mr. Manson requested the approval of the Chief of the Personnel Division for extending the Applicant's appointment for one year on the basis of his "satisfactory performance". The Applicant's service from April 1971 to March 1972 was evaluated in a fourth performance report in which his over-all rating was "good"; in that report Mr. Manson made the following comment:

"Mr. Sood has shown some improvement in his conduct and habits during the last one year. He was closely watched by his seniors and has been advised to make further improvement. He is a competent and hard-working driver."

and the Resident Representative wrote:

"Although Mr. Sood has shown some improvement there is still room for more."

Effective on 1 May 1972 the Applicant's appointment was extended for one year. On 4 May 1972 an Assistant Resident Representative, Mr. Heyn, addressed the following memorandum to the Assistant Transport Officer:

"I should like to bring to your attention a matter which has concerned me for some time regarding the services of the office driver Mr. Sood. He has driven me to and from my residence on many occasions in the past, and on each occasion I have found his driving reckless and in excess of reasonable speed. I have requested Mr. Sood on at least two occasions, one of which my wife and child were in the car with me, to slow down and to drive more carefully in the future. I am sorry to say, however, that this has had no effect on his driving behaviour.

“I bring this matter to your attention reluctantly and only after a long period of observation. I am hopeful that for my own safety and those of others in this office something can be done either to correct this situation or to relieve Mr. Sood of his duties in this regard.”

On 27 July 1972 the Administrative Officer wrote to Mr. Manson the following “note for the file”:

“As I informed you verbally yesterday morning, I saw Mr. B. K. Sood, chauffeur, driving our office car bearing registration No. DLE 5941 with three girls sitting in the car at 8.15 A.M. near Gole Post Office. On reaching office I enquired from Mr. O. P. Khanna [the Assistant Transport Officer] as to whether he had assigned any morning duty to Mr. Sood, who, in turn, informed me that he had no other duty except to bring Mr. B. Radovic to the office at 8.45 A.M.—the usual pickup duty.

“I called Mr. Sood to my office to enquire as to where he was going in the morning at 8.15 A.M. He was hesitant to come out with the truth. When I told him that I had myself seen him driving the three girls he told me that the three girls came near his car and made a humble request that they were getting late for their college and that they be given a lift. He gave them a lift up to Sardar Patel Road.

“While he stated that he had given the lift, he was not supposed to start from the office that early. I feel that it was all preplanned. It is suggested that he be warned NOT to give lifts to people in the UNDP car without the prior permission of the office. We should keep this in mind while extending his contract in future.” The note bears the word “agreed” initialled by Mr. Manson and the words “Mr. B. K. Sood has been informed” signed by the Assistant Transport Officer on 7 August. On 9 August 1972 the Assistant Transport Officer sent the following note to the Administrative Officer and to Mr. Manson:

“This morning Mr. A. S. Bam telephoned from Bombay to Mr. B. Radovic and complained that no car reported to him on 29 July 1972 to take him to the airport and that he might have missed the flight. Mr. Bam was booked to leave for Bombay by IC flight leaving at 1735 hours. Mr. B. K. Sood was assigned this duty to report to Mr. Bam at 1600 hours at his residence.

“According to the office records, Mr. Sood reported to Mr. Bam at 1600 hours and after waiting for about 45 minutes he returned to office at 1700 hours. On enquiring, Mr. Sood has stated that 1615 hours Mr. Bam’s servant informed him that boss had already left for airport by an IAC car. On further enquiring from him as why he waited after 1615 hours, Mr. Sood has not given any satisfactory reply.

“This is not the first time when he has done such type of mistakes. There were many complaints against him earlier too of this nature.”

The note bears the following comment, dated 9 August, written by the Administrative Officer and initialled by him and by Mr. Manson:

“I shall mention about all these lapses on the part of Mr. B. K. Sood while writing the report for considering him for permanent appointment in this office. He is incorrigible.”

In a fifth performance report, covering the period from April 1972 to August 1972, the Applicant’s over-all rating was lowered to “below standard”; an Assistant Resident Representative, Mr. Matthews, commented:

“There have been several complaints against Mr. B. K. Sood for malpractices. He has been warned many times verbally as well as in writing. Mr. Sood was caught red-handed while taking petrol from the office for his own purposes, for

giving lifts to girls in the office car, for his rash and negligent driving, misusing the car for private ends, losing spare parts on one or two occasions while on tour.”, and the Resident Representative added:

“Mr. Sood has not displayed the sense of responsibility and conduct expected of an employee of the United Nations.”

On 26 September 1972 the Resident Representative transmitted the last performance report and the three above-mentioned communications of 4 May 1972, 27 July 1972 and 9 August 1972 to the Chief of the Personnel Division and asked for his authorization “to terminate Mr. Sood’s appointment with appropriate notice, for unsatisfactory service”. On 8 November 1972 the Chief of the Personnel Division recommended to the Deputy Administrator of UNDP that the Applicant’s fixed-term appointment be terminated for unsatisfactory service in accordance with Staff Regulation 9.1 (b). The Deputy Administrator approved that recommendation on 16 November 1972 and, on 5 January 1973, the Resident Representative sent the following notice of termination to the Applicant:

“I hereby inform you that the Administrator has decided to terminate your Fixed Term Appointment with the United Nations Development Programme in accordance with the provisions of Staff Regulation 9.1 (b) for unsatisfactory service.

“This letter constitutes formal notice of termination of your Appointment as required by Staff Rule 109.3 (b), such notice to be effective 5 January 1973 c.o.b.

“In view of the fact that your services will not be required during the notice period, the Administrator has decided to grant you compensation in lieu of thirty days’ notice under Staff Rule 109.3 (c), and your termination date will therefore be the same as the date of notice, namely 5 January 1973.

“The Administrator has decided that you should receive termination indemnity in accordance with Annex III, paragraph (b) of the Staff Regulations. You will also be paid for any accrued annual leave within the limits set by the Staff Rules.”

On 7 January 1973 the Applicant contested his last performance report in a letter to the Resident Representative reading in part:

“ . . .

“Sir, I beg to refer to the ‘Performance Report’ for the period from April, 1972 to August, 1972, issued to me on 25th of September, 1972, and am much pained to note the remarks given under head ‘General Remarks’. Sir, these remarks are not only exaggerated but to a great extent baseless and apt to mar the career of this poor appellant, who has been serving your organization since 1967 with sincerity, honesty and punctuality.

“At the out-set, your goodself will observe that the words ‘several complaints of malpractices’ have been used, just to bring ill fame to the appellant, without adducing any cogent proof or reasons for the same. If the appellant was ever caught for malpractices, he would have been brought to book by the authorities long back.

“Secondly, the allegation that he was caught red-handed while taking petrol from the office for his own purposes, it may be pointed out that the same does not relate to the period under report. Sir, it was on the 11th June, 1971, when this unhappy incident took place and it was all in good faith that with the intention of replacing the next day, I took out a little quantity of petrol for use in my scooter in the very presence of the watchman. Sir, if I had any mal-fide, I would not have removed the petrol in the presence of other staff. Sir, I have already given my detailed explanation to the authorities, who were fully convinced and had dropped

the matter with a warning to me. *I had already paid the petrol cost to the Finance Section.*

“Regarding giving lifts to girls in the office car, I again venture to mention Sir, that there has not been any such occasion when I have given lifts to girls and I am rather shocked to read this baseless, unwarranted and uncalled for allegation.

“With regard to negligent driving, I beg to submit, Sir, that this allegation too is far from truth and I wish to draw your kind attention to the office records for the past 5 years, when this appellant was continuously being given ‘Awards for safe driving’ by your organisation. Sir, if this humble petitioner was a negligent driver during these years, then how and why he was being awarded for safe driving continuously for 5 years. Sir, in view of this glaring fact on record, this allegation too deserves expunction, being baseless.

“ . . . ”

On 9 January 1973 the Resident Representative replied:

“I have carefully considered the contents of your letter and must regretfully inform you that I still consider that your services have been unsatisfactory and below the standards required in our office. Therefore, my decision about termination of your services remains unchanged.”

In three letters to the Secretary-General dated 2 February, 3 February and 16 March 1973 respectively, the Applicant requested a review of the decision to terminate his appointment. By a letter dated 15 March 1973 he was notified that the Secretary-General had decided to maintain that decision. On 2 April 1973 the Applicant lodged an appeal with the Joint Appeals Board, which submitted its report on 28 March 1974. The Board’s conclusions and recommendations read as follows:

“Conclusions and recommendations

“53. The Board finds that in the consideration of the charges which led to the termination decision, the appellant was denied due process. The Board also finds that the circumstances of the case did not suggest any reason that would warrant the taking of the contested action, bordering on disciplinary dismissal, less than four months before the expiration of the appellant’s fixed-term appointment.

“54. In view of these findings, the Board recommends to the Secretary-General that the decision of termination be cancelled to allow the appellant’s fixed-term appointment to run its course and that, consequently, the appellant receive his full salary and allowances (including pension entitlements) up to the date of expiration of his fixed-term appointment, less the amounts of termination indemnity and compensation in lieu of notice already paid him.

“55. The Board further recommends that the Secretary-General give due consideration, on the basis of an impartial review of a fair and accurate record of the appellant’s performance, to the possible conversion of his fixed-term appointment to a nine-month probationary appointment leading to a permanent appointment or, alternatively, that the Secretary-General pay the appellant, as compensation for the damage he suffered, an *ex gratia* indemnity equivalent to six months’ base salary.”

On 12 June 1974 the Assistant Secretary-General for Personnel Services communicated the final decisions of the Secretary-General to the Applicant in the following letter:

“ . . . ”

“The Secretary-General has examined your complaint in the light of the Board’s Report and the recommendations made in paragraphs 54 and 55 therein. The Secretary-General has decided to rescind the termination of your appointment and to pay you your full salary and allowances (including pension entitlements) up to 30 April 1973, the expiration date of your fixed-term appointment, less the

amounts already paid to you as termination indemnity and compensation in lieu of notice.

“However the Secretary-General has decided to reject the Board’s recommendation in paragraph 55, relating to an *ex gratia* payment for not having given due consideration to a possible conversion of your fixed-term appointment and take no action in this sense. This recommendation implies that you had a legitimate expectancy of conversion of your appointment from fixed-term to probationary leading to a permanent appointment. The Board did not make any findings of facts normally leading to an expectation of this kind. Furthermore, implying that such expectancy existed as a matter of fact is contrary to the nature of fixed-term appointments which, under Staff Rule 104.12 (b), do not carry any expectancy of extension or of conversion to any other type of appointment.”

On 3 September 1974 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant’s principal contentions are:

1. The allegation of unsatisfactory service is self-contradictory:

(a) The Applicant was granted a safe driving bonus regularly;

(b) He received commendation certificates from many high officials he had the opportunity to serve;

(c) The over-all rating of the Applicant in his last performance report is the result of sheer misrepresentation and concocted allegations made against him by the Assistant Transport Officer;

(d) The Applicant received every year salary increments awarded on the basis of satisfactory service;

(e) The Applicant never committed any traffic or other offence during his service with UNDP and always maintained good relations with all his colleagues.

2. The Applicant was unlawfully dismissed from service on 5 January 1973, all of a sudden without even issuing any formal notice of termination, on a flimsy excuse of unsatisfactory service, without assigning any valid reasons and grounds.

3. The circumstances of the termination of the Applicant’s appointment make it impossible for him to find a suitable job in a period of unprecedented unemployment.

4. The Applicant’s dismissal has been mainly due to the vilification campaign, ill will, personal prejudice and planned attempt of the Assistant Transport Officer. The allegations contained in the last performance report, if relevant at all, have not been substantiated or have not even been brought to the knowledge of the Applicant for his explanations.

5. Termination of the employment contract as of 5 January 1973 according to Staff Regulation 9.1 (b) remains a matter of controversy. In view of the failure of the Resident Representative to substantiate the allegations he made in justification of the cessation of the services of the Applicant, and of the lack of due process which characterized his handling of this question, the Applicant should be duly reinstated as a *bona fide* staff member with full rights and entitlements.

6. The Applicant has a right or legal expectancy to the renewal or conversion of his contract. It is standard practice in UNDP and the entire United Nations system that a staff member’s fixed-term appointment is normally renewed if his performance rating is good, if he is willing to remain with the Organization, and if the post he has been employed to occupy continues to exist. Furthermore, under the directive of 1 June 1972 concerning redefinition of contractual policy for local staff, the Applicant, but for the unsubstantiated allegations made against him, would have been considered for conversion of his fixed-term appointment to a probationary appointment leading to a

permanent appointment. Independently of that directive, however, a legitimate expectancy of renewal was created in view of the Applicant's lengthy service and the manner in which he discharged his duties.

Whereas the Respondent's principal contentions are:

1. Termination of the employment contract as of 5 January 1973 according to Staff Regulation 9.1 (b) is no longer a matter of controversy since the termination decision has already been cancelled by the Respondent.

2. The Respondent has no obligation with respect to the Applicant's employment after the expiration of his contract (30 April 1973):

(a) The Applicant had no right or legal expectancy to the renewal or conversion of his contract. Although it was certainly a matter of sound administration that the Applicant should be given an impartial evaluation of his performance for the possible conversion of his fixed-term appointment to a permanent one, no question of due process was relevant in this context. On the contrary the Respondent had full discretion to decide whether or not the Applicant's contract should be converted to a permanent appointment, and had no obligation to follow any particular procedure. The Secretary-General becomes bound to renew or convert a fixed-term appointment after its expiration only when a contractual agreement has come into existence by means of some written statement directed to the staff member, containing words that can be reasonably interpreted as a promise of continued employment. In the Applicant's case, no situation qualifiable as a promise or contractual agreement for the conversion of his contract ever existed. No right of the Applicant to the conversion of his contract into a permanent appointment was ever created and consequently the Respondent never had any obligation of due process towards him;

(b) The Respondent is not liable to pay any damages besides the salary and allowances until the expiry of the Applicant's contract. The mere fact that the Respondent decided to terminate the contract prematurely, but then cancelled that decision, cannot create any liabilities which go beyond the *restitutio in integrum* of the situation which would have existed if the Respondent had simply let the contract run until its date of expiry;

(c) The Respondent cannot be held liable to pay any *ex gratia* indemnity. By definition an *ex gratia* payment cannot be made as a compensation for damage.

The Tribunal, having deliberated from 4 to 18 April 1975, now pronounces the following judgement:

I. The Applicant, after over five and a half years' service as Driver at the UNDP Office at New Delhi on short and fixed-term appointments, was terminated by the Resident Representative under Staff Regulation 9.1 (b) for unsatisfactory service on 5 January 1973, adverse allegations having also been made as to his conduct. The fixed-term appointment thus terminated was due to expire on 30 April 1973. At the time of his termination the Applicant was eligible for consideration under the new policy described in document reference 262/5 dated 1 June 1972, entitled "Redefinition of Contractual Policy for Local Staff", whereby local staff members who have served not less than four one-year terms on fixed-term appointments may be recommended for conversion to a nine-month probationary appointment leading to a permanent appointment.

II. The Applicant requests the Tribunal to overturn the decision of the Resident Representative and thereby reinstate the Applicant in his post as Driver at the UNDP Office with restitution of all allowances and privileges and reimbursement of those entitlements accorded to the date of termination. The Tribunal observes that the Applicant's request for rescinding the termination decision had been met by the Respondent through his acceptance of the Joint Appeals Board's recommendation that

the decision of termination be cancelled to allow the Applicant's fixed-term appointment to run its course. The payment of full salary and allowances up to 30 April 1973 had the effect of reinstating the Applicant until the expiry of his fixed-term appointment. However, as a result of the termination decision the Applicant has not been given the opportunity of being considered for conversion of his fixed-term appointment into a nine-month probationary appointment leading to a permanent appointment in accordance with document reference 262/5.

III. The Tribunal interprets the plea for reinstatement to mean that the Applicant seeks the renewal of his appointment and/or the possible conversion of his fixed-term appointment in accordance with the policy described in document reference 262/5 as recommended by the Joint Appeals Board.

IV. Since the termination of the Applicant's last fixed-term appointment has been cancelled the Tribunal finds it unnecessary to examine in detail the allegations which led to the termination decision or the circumstances attending its execution. The Tribunal notes, however, that the Respondent accepted the recommendation of the Joint Appeals Board that the termination decision be cancelled without dissenting from the reasons on which it was based. In its Judgement No. 185 (*Lawrence*), the Tribunal observed as follows: "This is thus a rescission effected by the competent authority who, having expressed no reservations concerning the reasons given by the Joint Appeals Board, must be assumed to have accepted the reasons derived from the irregularity of the decision."

On the basis of the principle stated above, the Tribunal holds that the reasons given by the Joint Appeals Board for holding that the Applicant was denied due process must be assumed to have been accepted by the Respondent.

V. The Respondent contends that he was under no obligation to renew or convert the fixed-term appointment and that a premature termination of a fixed-term contract even where proven or admitted as wrong cannot create an obligation to renew or convert that contract. While recognizing the principle that a fixed-term appointment does not carry any expectancy of renewal or conversion to any other type of appointment, the Tribunal wishes to point out that where a termination decision has been cancelled and the reasons for such cancellation have not been challenged by the Respondent, the parties should be restored to *status quo* and due consideration should be given to the rights of the staff member as if there had been no termination decision, nor reasons for such action. In Judgement No. 185 (*Lawrence*) the Tribunal held as follows:

"It is for the Tribunal to determine whether, by that decision, the Respondent drew all the necessary legal inferences from the rescission and went as far as was required in restoring the *status quo*."

The Tribunal has to examine the case in the light of the principle set out above.

VI. The Tribunal has carefully examined document reference 262/5 dated 1 June 1972 redefining the contractual policy for local staff. It is marked "confidential" and did not come officially to the knowledge of the Applicant. On those grounds, it might be agreed that it could not create any expectancy. On the other hand it does not fall into the same category as the Field Administrative Handbook which was referred to in Judgement No. 145 (*de Bonel*) and which contained *inter alia* the following notation:

"It is designed to assist United Nations field offices, particularly special missions and information centres, . . . in the application of (a) Staff Regulations and Rules, and (b) Financial Regulations and Rules, and to provide brief explanations of administrative policies, procedures and practices affecting them."

On the contrary, document reference 262/5 is in the opinion of the Tribunal unmistakably a document enunciating a new policy of providing a uniform and more equitable

career prospect for local staff, and designed to bring about a fundamental change in the future conditions of employment of precisely that category of staff into which the Applicant fell. It is the view of the Tribunal that document reference 262/5 created rights for staff members in this category even though they may not have been aware of the existence of the document or of the rights which it created.

VII. The Tribunal notes moreover that the position of the Applicant in relation to document reference 262/5 dated 1 June 1972 was considered by the Respondent at the time when the recommendation which led to the Applicant's termination was formulated. In his letter dated 26 September 1972, the Resident Representative referred to an earlier letter dated 22 September 1972 on the subject of redefinition of contractual policy for local staff, in which he had indicated that he would be writing separately about Mr. B. K. Sood. Later on in the letter of 26 September 1972 he wrote:

"I am now convinced that if we are serious about applying Administrator Peterson's instructions to give permanent appointment only to fully satisfactory staff members, we should terminate Mr. Sood's services."

In other words, the decision to terminate was taken explicitly in the context of document reference 262/5; the decision to terminate and the decision not to consider the possibility of converting the Applicant's fixed-term appointment in accordance with the terms of that document were taken simultaneously and on the basis of the same allegations. Furthermore since, as noted above, the first of these decisions was taken without due process, it follows, in the Tribunal's view, that the second of these decisions was also vitiated by lack of due process. In this connexion the Tribunal endorses the following views of the Joint Appeals Board:

"The Board felt that the lack of due process which vitiated the termination decision similarly vitiated the review of the appellant's performance which the Resident Representative conducted, in connexion with the redefinition of the contractual policy for local staff brought to his attention by the confidential memorandum of 1 June 1972, in order to determine whether the appellant's fixed-term appointment, which had already been renewed more than four times, should be converted to a nine-month probationary appointment leading to a permanent appointment. There were in the appellant's file confidential memoranda which should have been removed when the charges that they contained failed to be substantiated. There were also repeated assertions, which have been proven to be contrary to the truth, that the appellant had received many written warnings. In the view of the Board, the appellant had a right to be duly considered for the possible conversion of his fixed-term appointment to a permanent one, following an impartial evaluation of his performance, on the basis of a fair and accurate record."

VIII. The Tribunal accordingly finds that, by reason of a decision reached without due process, the Applicant was deprived of the opportunity of the conversion of his fixed-term appointment due to expire on 30 April 1973 to a nine-month probationary appointment leading to a permanent appointment in accordance with the policy described in document reference 262/5 dated 1 June 1972. In the circumstances, the Tribunal could under article 9 of its Statute order that the Respondent give due consideration, on the basis of an impartial review of a fair and accurate record of the Applicant's performance, to granting him a probationary appointment leading to a permanent appointment under document reference 262/5.

IX. Considering the lapse of time and the other circumstances of the case, the Tribunal holds that compensation in lieu of specific performance is a proper remedy. The Tribunal notes that the Applicant had been in continuous service for over five and a half years with a rating of "good" during most of the period. He was granted safe driving bonuses every year and was commended for his driving efficiency by high

officials of UNDP. He suffered the injury of termination through lack of due process and this resulted in a change of his position to his detriment in that he was excluded from consideration for a probationary appointment. Considering these circumstances the Tribunal awards as compensation one year net base salary to the Applicant.

X. As regards the Applicant's request for renewal of appointment, the Tribunal holds that since the renewal of a fixed-term appointment or its conversion to another type of appointment is a matter within the discretion of the Respondent, the Tribunal cannot order renewal of the Applicant's appointment. The request is therefore rejected.

XI. For the foregoing reasons the Tribunal:

(1) Orders the Respondent to pay to the Applicant the compensation awarded under paragraph IX above;

(2) Rejects the Applicant's other pleas.

(Signatures):

R. VENKATARAMAN
President

Zenon ROSSIDES
Member

New York, 18 April 1975

Roger STEVENS
Member

Jean HARDY
Executive Secretary

Judgement No. 196

(Original: French)

Case No. 193:
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**Against: The Secretary-General
of the United Nations
and the United Nations
Joint Staff Pension
Board**

Request by a retired staff member of the United Nations for compensation for the damage suffered by him as a result of an unjustified delay in the payment of his pension lump-sum benefit.

The Tribunal notes that the application is directed against both the Secretary-General and the Joint Staff Pension Board and that the two Respondents have submitted a joint answer.—Decision of the Tribunal to consider the facts in the case without pronouncing on their imputability to one or other of the Respondents.

Subject of the application.—Importance which the date of payment may have at a time of monetary instability and in the light of article 48 (b) of the Pension Fund Regulations.—Previous judgments of the Tribunal and the ILO Administrative Tribunal relating to currency devaluations.—Question whether any statutory provision required payment on a specific date.—Applicant's argument that that date would normally be the date on which the periodic benefit is payable.—This argument rejected in view of the requirement relating to certification by the Secretary of the Board.—Applicant's argument that if payment is made after the due date, the rate of exchange to be applied to the transfer of funds should be that which was in effect on the due date.—This argument rejected in the light of article 48 (b) of the Pension Fund Regulations.—Question whether the date of payment was unduly delayed by reason of the conduct of the Respondents.—Separation notification sent to the Pension Fund.—Unusual