

“to establish his status as a staff member on an extended probationary appointment”, his oral inquiries as to his entitlement met with a negative reply from the Administration.

In the view of the Tribunal, it follows from the absence of a “Personnel Action” form that even if the Applicant had made a formal request for home leave the response would not have been different. The Tribunal holds that the anomalous employment situation deprived the Applicant of his rights and that the Applicant is therefore entitled to reimbursement within the amount authorized by the Staff Rules, subject to proof that such expenses were incurred by the Applicant.

XII. As regards plea No. 6 for compensation for removal costs, the Respondent argues that “there is no evidence that [the Applicant] made any application with respect to removal costs”. On the analogy of the foregoing reasoning relating to home leave, the Tribunal awards reimbursement of the removal costs within the amount authorized by the Staff Rules, subject to proof that such expenses were incurred by the Applicant.

XIII. Plea No. 7 does not arise for consideration as the Tribunal has not ordered reinstatement of the Applicant and plea No. 7 A is covered by the decision in paragraph VIII above.

XIV. For the foregoing reasons, the Tribunal:

(1) Orders the Respondent to pay to the Applicant compensation in the amount of six months’ net base salary;

(2) Orders the Respondent to pay to the Applicant compensation for home leave as specified in paragraph XI above;

(3) Orders the Respondent to pay to the Applicant compensation for removal costs as specified in paragraph XII above;

(4) Rejects the Applicant’s other pleas.

(Signatures)

R. VENKATARAMAN

President

Francis T. P. PLIMPTON

Vice President

New York, 23 April 1975

Zenon ROSSIDES

Member

Jean HARDY

Executive Secretary

Judgement No. 199

(Original: English)

Case No. 190:
Fracyon

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

Non-renewal of fixed-term appointment.

*Staff Rule 104.12 (b) and corresponding clause in the letters of appointment of the Applicant.—
Review of the particular circumstances of the case.—The decision not to renew the Applicant’s appoint-*

ment was reached on the basis of confidential letters not disclosed to the Applicant and prior to the preparation of the last periodic report.—Right of the Applicant, by virtue of circular ER/12, to have his case given fair consideration with a view to a regular appointment.—Conclusion of the Tribunal that the Applicant was not given the fair consideration implied in circular ER/12 and that the Respondent disregarded the principle of good faith in relations between the parties.

Applicant's argument that the non-renewal of his appointment was the result of prejudice against him.—Conflicting evidence on this point.—Argument rejected.

Conclusion of the Tribunal that the application is well founded.—Difficulty of remanding the case and restoring the parties to the status quo ante.—Award to the Applicant of compensation equivalent to six months' net base salary.

Order that the last periodic report and certain confidential letters be excluded from the Applicant's Official Status file.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Mr. Francis T. P. Plimpton, Vice-President; Sir Roger Stevens;

Whereas at the request of Mansour Fracyon, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended successively to 10 August 1973, 30 November 1973, 1 January 1974, 31 March 1974, 6 May 1974, 31 May 1974, 15 June 1974, 27 June 1974 and 26 July 1974 the time-limit for the filing of an application to the Tribunal;

Whereas, on 24 July 1974, the Applicant filed an application in which he requested the Tribunal to order:

“1. Rescission of the decision, notified by Headquarters to the Director of the Teheran Information Centre in Administrative Report IC/71/1 of 8 January 1971 and reaffirmed in letter dated 2 February 1971 from Assistant Secretary-General, Director of Personnel, to applicant, not to continue applicant's employment: which decision, he submits (a) was adopted in disregard of certain required procedures as indicated in Parts III A and B, below, and (b) was the result of prejudice against him on the part of his direct supervisor;

“2. Institution of a fair and orderly review of the applicant's record of service and his suitability for employment as an information assistant in the sense of paragraph 9, third sentence, of circular ER/12 of 4 November 1970 of the Office of Public Information. The steps recommended by the Joint Appeals Board in its report on case No. 215, para. 55 (see annex 2), would be one way of carrying out such a review, acceptable to the applicant;

“3. The voiding and destruction of the applicant's periodic report for the period 1 March 1970–28 February 1971 (see annex 37 b);

“4. Insertion in the applicant's files of a statement to the effect that there is no obstacle to the applicant's employment by the United Nations, as indicated in para. 197, below;

“5. Payment of appropriate compensation to the applicant in case the Secretary-General decides, under article 9, para. 1, of the Tribunal's Statute not to take further action on a finding by the Tribunal that the present application is well founded (see Part III.C, below, paras. 199 to 200);

“6. Insertion of the ‘Considerations’ and ‘Conclusions and Recommendations’ contained in paragraphs 46 to 56 of the Joint Appeals Board's report on case No. 215, together with the dissenting opinion on the conclusions, in the files which

contain the documentation on the applicant referred to in para. 56 of the Board's report (see annex 2);

"7. In view of the nature of the case, the applicant requests the Administrative Tribunal to grant an oral hearing;

"8. The applicant requests the Tribunal to allow statements to be taken should any question arise concerning the matter mentioned in para. 94, below, or should the Tribunal wish to be informed on the substance of accusations made against him.";

Whereas the Respondent filed his answer on 25 October 1974;

Whereas the Applicant filed written observations on 18 February 1975;

Whereas the Tribunal heard the parties at a public session held on 3 April 1975;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Information Centre at Teheran, Iran, on 7 September 1968 as a locally recruited Information Assistant under a fixed-term appointment due to expire on 30 September 1968. The letter of appointment, as the letters of appointment subsequently accepted by the Applicant, contained the usual clause: "The Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations." In a letter of 2 October 1968 offering him the appointment on behalf of the Director of Personnel, the Office of Personnel had stated that the appointment might be extended for a further year upon completion of one year of satisfactory service. The appointment was renewed from time to time for periods of one or two months until 28 February 1969. On 1 March 1969 the Applicant received a fixed-term appointment for one year, as recommended by the Appointment and Promotion Panel and approved by the Secretary-General. On 12 February 1970 the Director of the Centre wrote to the Chief of the Centre Services, Office of Public Information, at Headquarters in New York, seeking his advice as to whether or not the Applicant's appointment should be renewed for another year. He praised the Applicant's excellent professional ability, his unusually good knowledge of English and Persian and his industry ("he is one of the most hard-working men I have met in my life") but expressed doubts as to the Applicant's ability to continue on three counts, namely his writing for publication under his brother's name and quoting United Nations officials without their authority, his problems with the rest of the staff when left in charge of the Centre, and his tendency to exhaust Centre funds on various enterprises during the absence of the Director. On 20 February 1970 the Chief of the Centre Services replied in part:

"It is indeed regrettable that a staff member with such intelligence, competence and initiative should not strictly conform to instructions and the staff rules. Quoting UN officials without their authority despite repeated warnings as well as engaging in outside activity without authorization, if substantiated, are serious matters regarding which we share your concern. Consequently, if you feel because of these infractions and the shortcomings referred to in your letter that it is in the best interest of the Centre not to offer Mr. Fracyon a new contract, we are prepared to give full endorsement to a recommendation from you to this effect."

With a confidential letter of 28 February 1970 to the Chief of the Centre Services, the Director enclosed a periodic report on the Applicant's performance from 7 September 1968 to 28 February 1970, in which the Director, as first reporting officer, gave the Applicant the middle rating for all items except for the items "industry" and "quantity of work accomplished", for which he gave the top rating. As second reporting officer, the Director rated the Applicant as "an efficient staff member giving complete satisfaction". At the end he added:

"During the period under report, the Staff Member has on the whole given

a good account of himself as an Information Assistant. His training and experience as a journalist and broadcaster and his contacts with the media have resulted in wider dissemination of information. During the Second International Asian Fair (Teheran: 5–24 October 1969), he showed much initiative in the coverage of the activities of various UN Agencies participating in the Fair and thus earned appreciation for the Centre's co-operation. During his lecture tours of the provinces and in his contacts with non-governmental organizations, his work has proved equally useful. However, in dealing with the Staff (not outsiders), he has been having some difficulties, and has sometimes, in his usual enthusiasm, tended to ignore normal administrative routines and information procedures.

"The shortcomings mentioned above have been thoroughly discussed with the staff member, as well as pointed out in writing. There is every hope that he will be able to get over them in due course."

However, in the accompanying confidential letter of 28 February 1970, the Director recommended that the Applicant be offered an appointment for six months rather than for another year, and said:

"I have, in the meantime, spoken to him more firmly than I had done so far and told him that the reason why we are not extending his contract for another year is that some of his activities are not in the best interest of the Centre. We would watch his behaviour during the next six months more closely and if he does not conform to our requirements in every respect we might then have to terminate him and recommend another suitable candidate to you . . .

"You will find enclosed herewith, Mr. Fracyon's Periodic Report which has been asked for by FOS [Field Operations Service] in their Administrative Report No. 70/6. In this Report I have referred to his difficulties in dealing with the staff, as well as his tendency to ignore 'normal administrative routines and information procedures', but any reference to the main problem—indulgence in outside activities, as such, without authorization, would call for elaborate inquiry, which obviously is not within our means. I have thus made no reference to it for the time being."

On 1 March 1970 the Applicant was granted a fixed-term appointment for six months. In a memorandum to the Director dated 2 March 1970, the Applicant recalled that the Director had previously indicated that the appointment would be renewed for another year, and asked for a firmer indication regarding further extension of his service. On 3 March 1970 the Director replied in part:

"As you are doubtless aware, the Organization is, in the first instance, under no obligation to renew a fixed-term contract beyond a specified period. Secondly, a renewal is always subject to satisfactory performance in every respect. I do not hesitate to say, while your work at this Centre, during the period of your last contract, has been of a high standard in many respects, some of your shortcomings noticed by us and repeatedly discussed with you, as well as pointed out to you in writing, have been the reason behind our decision to renew your contract for six months only. Not only it is hoped that the next six months will give you another opportunity to prove your worth in all respects, should you feel that you cannot serve the Organization beyond the proposed six months, the period of six months should be enough for you to decide your future plans.

"Personally, I hope that you will find it possible to sign the contract for six months as offered, so that, after such improvements as may result in your work and behaviour, we may be encouraged to renew your contract for a further period of time, if necessary."

On 17 March 1970, in a confidential letter to the Chief of the Centre Services, the Director complained that during his absence on a recent tour of the provinces the

Applicant, contrary to the Director's instructions and without consultation with the UNDP Resident Representative who was in charge, had written personal letters to high Government officials concerning the United Nations Interne Programme; the Director added:

"Both Mr. Shallon [the UNDP Resident Representative] and I agree that Mr. Fracyon, in spite of the good work he has been doing for the Centre during the past year and a half, remains a completely undisciplined person. Also, this is obviously a case of lack of judgement and lack of sense of proportion on his part, as well as a tendency to ignore instructions.

"I have spoken to Mr. Fracyon on the matter and told him how we look upon his action. I am not suggesting any disciplinary action in this regard and the above note is only intended for record."

In a further letter addressed on the same day to the Chief of the Centre Services, the Director stated that "in spite of his intelligence, enthusiasm and ability as a writer" the Applicant had "proved completely unreliable from the administration point of view", that "in spite of . . . repeated instructions" he had "been engaging himself in outside work", and that the Director was "always nervous about leaving the Centre in his hands when on travel or leave"; the letter continued:

"We have agreed to renew Mr. Fracyon for another six months, ending 31 August this year, but it will indeed strain my conscience to recommend him for a further extension. I, therefore, think that the Centre should get ready to do without him after the present six-month period. I, however, feel that his departure might lead to some repercussions in the Iranian circles not fully appreciative of our standards of efficiency. In order to avoid that, I would like to suggest that we abolish the post of Information Assistant and replace it with that of an Administrative Assistant."

On 23 March 1970, the Applicant submitted a rebuttal to the periodic report which he had signed on 15 March 1970, stating *inter alia* that the Director had agreed from the beginning to his writing under his brother's name because it served the Centre's interests by publicizing some matters which otherwise would not have received wide enough public attention. In a reply dated 24 March 1970 the Director denied that he had given the Applicant permission to write in the Press under his own name or under a name closely resembling his, stated that complaints by three staff members against the Applicant's behaviour towards them had been found, after investigation, to be justified, and said, with respect to the Applicant's outside work:

" . . . we find that you have been more and more interested in building yourself up than the Organization."

On 10 April 1970 the Applicant informed the Director that he had stopped writing features for the Press. On 5 May 1970 the Director informed the Chief of the Field Operations Service that since the receipt of his memorandum dated 24 March 1970, no articles signed under the name used by the Applicant for writing in the Press had appeared and that the Applicant's relations with the staff had shown much improvement. On 7 May 1970 the Chief of the Centre Services, who had been asked by the Applicant for advice as to whether to remain in the United Nations or to take another position, wrote to the Applicant:

" . . . There is no question here regarding your professional competence and diligence. The Director of the Centre himself has stressed this point on various occasions and your periodic report also reflects this fact. What you have, apparently, taken exception to is the extension of your appointment for six months only. It seems that the recommendation of the Centre Director on this point was motivated mainly by an infraction of the United Nations rules concerning 'outside activities'. As far as I can gather, you are not denying this but merely stating that

you did it with the knowledge of the Centre Director. Whether this is a valid justification or not, I would rather not discuss in this letter. But I dare say categorically that, on the one hand, a Director has no power to authorize infringements of the United Nations rules and regulations and, on the other, it is the duty of staff members to know what is and is not permissible under the rules. At any rate, this seems to be the main point of direct relevance in the case and it is my opinion that the question is not so complicated that it cannot be solved locally. You can certainly take the initiative in this respect and let your actions during the six months extension of your appointment speak for themselves."

He added:

"... in making your assessment you should not go on the assumption that your present post at the Centre will eventually pave the way to a professional appointment at the United Nations."

On 18 June 1970 the Assistant Secretary-General for Public Information indicated in a note that he was convinced that the periodic report was fair. On 30 June 1970 the Director wrote to the Chief of the Centre Services that the Applicant had discontinued his contributions to the Press in his brother's name, thereby setting aside the main cause for complaint against him, that his relations with the junior staff had improved and that, taking everything into consideration, it would be useful to continue him, but not on more than a six months' contract at a time. On 4 July 1970 the Director recommended to the Chief of the Field Operations Service that the Applicant's appointment be renewed for six months. On 27 July 1970 the Chief of the Field Operations Service informed the Director that his recommendation had been approved, that the Office of Personnel, however, had agreed to the proposal most reluctantly since it felt that there had been ample opportunity to observe the Applicant throughout his service and that six-month renewals after the initial period were not wholly justifiable, and therefore that a recommendation for a further extension of the appointment for a short term would not be entertained. On 3 August 1970 the Applicant accepted an appointment for a further six months beginning 1 September 1970. On 4 November 1970 the Chief of Centre Services issued a circular, ER/12, to Information Centres, including that at Teheran, providing for substantial changes as to the appointment of Information Assistants from the terms of the last circular, ER/13, of 1 December 1967. Whereas the latter had provided for the principle of rotation and for the return of Information Assistants to their original careers after two years of service, circular ER/12 provided that a regular appointment was to be offered, if warranted, after a year or two of satisfactory service. It included the following, repeated from part of paragraph 9 of circular ER/13:

"8. It is important that all candidates should clearly understand that appointment as an Information Assistant is not a stepping stone to a career in the Secretariat."

Paragraph 9 provided:

"9. Originally the principle of rotation was applied in the Information Assistants Programme and candidates were seconded to the United Nations for a period of two years after which they normally returned to their original careers. However, experience showed that this system did not provide continuity in the work of the Centre and it was, therefore, decided to discontinue it. It is now possible to offer a regular appointment, if warranted, after a year or two of satisfactory service."

Final selection of Information Assistants was to be made at Headquarters by the Appointment and Promotion Panel. Successful candidates were to be offered a fixed-term appointment for one year which, upon satisfactory service, might be extended as appropriate or converted into a probationary leading to a regular appointment. On 15 December 1970 the Director wrote to the Chief of the Centre Services that with the

passage of time it had become clearer that whatever qualities the Applicant might otherwise have, it would never be possible to establish a satisfying administrative relationship with him, that the Applicant had remained completely undisciplined, lacking poise and self-confidence, that he defied instructions, took independent decisions without the consent or knowledge of the Director, ignored or delayed assigned jobs in preference to chores of his own choice, was over-ambitious and had a penchant for personal publicity, and that he had once again started writing articles in the Press; the Director also referred to incidents of suspected misconduct on the part of the Applicant while admitting that an intensive inquiry would be needed to prove the charges, and to an incident which had allegedly involved the Applicant with the police a few days earlier and might have been detrimental to the Centre's reputation; the letter concluded with a proposal that the Applicant be advised that his contract could not be extended beyond 28 February 1971 because Information Assistants were normally employed for a period of two years which could be further extended only in special cases. On 21 December 1970, in a further letter to the Chief of the Centre Services, the Director alleged two additional charges of misconduct against the Applicant, enclosed two supporting statements and urged that Headquarters' decision be conveyed to the Centre at the earliest possible moment. On 28 December 1970, replying to the Director's letter dated 15 December 1970, the Chief of the Centre Services stated in part:

"It is regrettable that hopes held that Mr. Fracyon would improve have not borne fruit. In fact, it seems from your letter that the contrary is true and we, therefore, see no alternative but to agree with your recommendation regarding the non-renewal of Mr. Fracyon's contract.

"While Mr. Fracyon will be informed through the Administrative Report that it is not our intention to recommend the extension of his contract, I regret that a memorandum on the lines . . . you have proposed cannot be forwarded to him. The rotation system which limited the appointments of Information Assistants to a maximum of two years has long been discontinued and it is now possible for Information Assistants to hold even regular appointments. Please refer in this connection to ER 12 of 4 November 1970 . . .

"It is not unlikely that Mr. Fracyon may feel that his contract should be renewed and, consequently may make written representations to this effect as he, undoubtedly, has the right to do."

On 5 January 1971 the Chief of the Centre Services clarified that statement in a reply to the Director's letter of 21 December 1970. On 2 January 1971 the Director wrote to the Applicant that it was understood that he had recently been involved in some offence and had had to appear before the police to answer investigation of charges, and asked him to submit under Staff Rule 104.4 (d) a note giving the details of the case. On 8 January 1971 the Field Operations Service officially informed the Director that:

"The Fixed-Term appointment of Mr. M. Fracyon is due to expire on 28 February 1971 and will not be extended. Please notify him accordingly."

On 12 January 1971 the Director informed the Applicant, who had been away at a seminar in Isfahan, that it had been decided not to renew his contract. The Applicant requested postponement of the "decision terminating my appointment" by a cable to the Director of Personnel dated 13 January 1971; he followed this with a letter dated 14 January 1971 requesting that "no final decision be made about my separation until such time when all the facts, including the contents of the previous memoranda written by Mr. Rashed about me are ascertained". On 13 January 1971 the Applicant replied to the Director's letter of 2 January 1971 that an incident involving two of his friends had occurred four months before and had been brought to the knowledge of the Director at the time, that he had not been involved in any offence and no charges had

been made against him, and that he had never been, before or during his service with the United Nations, arrested, charged, or summoned before a court as a defendant in a criminal or other proceedings, or convicted, fined or imprisoned for any offence whatsoever; he insisted that an inquiry be made about him through the official channel and that the reply be put on his record; no such inquiry was apparently made. On 19 January 1971 the Director signed a periodic report covering the Applicant's service from 1 March 1970 to 28 February 1971 which was sent to the Chief of the Centre Services on the same day. As first reporting officer the Director gave the Applicant the middle rating on six items and the lowest on three ("judgement", "reliability" and "personal relations with others") and added this comment:

"The staff member is gifted with many good qualities of a professional journalist, translator and public relations man, and has for his work in these related fields earned much appreciation for himself and the Centre, from various sources. His perennial difficulty, however, arises from certain lack of respect on his part for the Staff Regulations governing a staff member's conduct, as well as for the responsibilities of his immediate superiors under whose direction and supervision he is required to work. He is an enthusiastic worker, although sometimes this enthusiasm appears to be misdirected, and his work has not always been free from errors of judgement and superficialities. He thus needs considerable supervision and guidance, but his disregard for instructions and rather violent reactions to any criticism, however much helpful, of his work and behaviour, have proved bigger handicaps in establishing a workable administrative relationship with him. Also as time passed, it was felt that the staff member himself did not look upon his present position as one providing enough leeway for exercising his initiative or for realizing his ambitions to rise in his UN official career at his desired speed. It is believed that the staff member, with his professional training and background, might still be found useful to the Organization, as a free-lance translator and writer."

As second reporting officer the Director rated the Applicant as a staff member who maintains a good standard of efficiency. On 26 January 1971 the Director sent to the Chief of the Centre Services the following observations regarding the periodic report:

"I have to add a brief remark to my comments under Section II where I had put a cross against the statement: 'A staff member who maintains a good standard of efficiency', that this statement refers to staff member's efficiency in work only and has no bearing on his conduct, which has been fully described under Section I, especially under paragraph E. I should indeed have checked 'On the whole an unsatisfactory staff member', but you will forgive me if I say that I tried to avoid that as I have no intention of prejudicing Mr. Fracyon's future with the Ministry of Information."

On 2 February 1971 the Chief of the Centre Services replied:

"I believe you are at liberty to include any remarks in the periodic report before passing it on to the staff member for signature and giving him a copy thereof in accordance with the established practice. Otherwise, your letter [of 26 January 1971] may be attached to the periodic report and form a part of it provided Mr. Fracyon is so informed and a copy of your letter is given to him."

On 6 February 1971 the Director transmitted the periodic report to the Applicant under a letter reading in part:

"I take this opportunity of pointing out that there is no intention on our part of conveying the information contained in the report to any outside authority, unless specifically requested. I would also like you to know that we have already informed the Pars News Agency, where you held a career job, that you would be available for return to the Agency on 1 March 1971. Also, in view of your ability

as a writer, we have made it clear to the Regional Information Officer, Eastern Mediterranean Region, UNICEF, and the UNICEF Area Representative for Iran and Iraq, that there will be no objection on our part to their giving you writing assignments, as and when they desire. We shall follow the same practice in the case of any other UN Agency which may wish to avail itself of your services in this manner. We are doing this in the hope that you will be able to leave this Centre on 28 February 1971, with some good will or at least with an awareness that there is no ill will on our part against you.

“ . . . As far as the present Director is concerned, you did not, at any time during the past five months or so, express to him, orally or in writing, any interest in a renewal of your contract beyond the present date of expiry, while it was clearly to your advantage to do so. Thus, it is a matter of deep regret to me personally that no way could be found of renewing your contract and of continuing our association which had proved fruitful in many ways.”

On 10 February 1971 the Applicant submitted a lengthy rebuttal to the periodic report. On 12 February 1971, in a letter addressed to the Chief of the Centre Services, he pointed out *inter alia* that the periodic report had been made after the decision not to renew the appointment and he denied that he had expressed no interest in a renewal; he continued:

“ . . . One of the most recent occasions on which the Director and I discussed the matter was in late October 1970, only two days after his return from his ‘private’ tour of Hamadan and Kermanshah with his family. He told me that I had improved my performance and conduct, that he was pleased with me, and that he was willing to renew my contract ‘for one year, or even two years’.

“ . . . Also, the Director never told me about the new OPI regulations favoring the keeping on of Information Assistants on regular appointment, until I learned about them recently through somebody else. When the Director told me on 12 January 1971 that ‘Headquarters’ was not renewing my contract beyond 28 February 1971, I asked him why and he said he did not know. I mentioned the new regulations and he said that they would apply only to my ‘successors’.”

On 27 February 1971 the Applicant submitted, in further rebuttal of the periodic report, copies of nine various documents and three “Appendices”. On 28 February 1971 he left the service of the Organization upon the expiry of his appointment. On 13 March 1971 the Director wrote a confidential letter to the Chief of the Centre Services enclosing comments on the Applicant’s letter of 12 February 1971. On 20 April 1971 the Director wrote another confidential letter to the Chief of the Centre Services containing further comments on the Applicant’s letter of 27 February 1971. There is no evidence that either of those letters was communicated to the Applicant. On 16 June 1971 the Assistant Secretary-General for Public Information recorded his appraisal of the periodic report in the following statement:

“The relations between the Centre Director, Nazri Rashed and the Information Assistant, Mansour Fracyon, appear to have been marred by misunderstanding and possibly some friction and it is quite likely that such an atmosphere may have adversely affected the performance of the Information Assistant as well as his general conduct at the Centre. However, in the absence of uncontested evidence that this situation has influenced the ratings in the report, I am inclined to accept it as a factual evaluation of Mr. Fracyon’s performance.

“At any rate, if there has been any lack of objectivity in Mr. Rashed’s evaluation, this factor has not influenced our decision not to extend Mr. Fracyon’s fixed-term contract.”

In the meantime the Applicant had lodged an appeal with the Joint Appeals Board on

14 February 1971. The Board submitted its report on 15 August 1972. The Board's conclusions and recommendations read as follows:

"Conclusions and recommendations

"53. The Board finds that, in view of the statement of policy on the appointment of information assistants circulated to the Centre Directors and Information Officers in November 1970, the appellant had a reasonable expectancy that he would be considered on the basis of his record of service for continuation in his post as information assistant at the Teheran Centre. The Board finds further that the respondent had a corresponding obligation to carry out a fair review of the appellant's service record before deciding whether or not to continue him in his post.

"54. The Board finds that the respondent did not adopt a procedure that would ensure a fair review of the appellant's service. The Board finds further that the appellant was deprived of due process when the decision not to continue him in service was taken on the basis of a recommendation supported by secret and unsubstantiated allegations concerning the appellant's conduct. The Board finds that the manner in which the allegations were made, but not substantiated, reflected unfavourably upon the conduct of this matter by the Director of the Teheran Centre, but that, on the other hand, the appellant has not submitted unmistakable proof that the contested decision was motivated by prejudice.

"55. The Board recommends that a proper review of the appellant's record of service and of his suitability for employment as information assistant should be carried out on the spot by an officer who is not a member of the Office of Public Information or the Office of Personnel. The Board recommends further that if the results of that review are favourable to the appellant he should be considered for appointment as information assistant at the Teheran Centre when a vacancy arises or for any other post in the Secretariat for which he may be qualified.

"56. The Board recommends further that all documents relating to the unsubstantiated allegations concerning the appellant's conduct, including the periodic report on his performance during the last year of his service, should be removed from the official status files maintained at Headquarters and at Teheran and should be placed on the appellant's non-privileged confidential file."

The Alternate Member appointed by the Secretary-General appended to the Board's report the following dissenting opinion:

"1. In accordance with Staff Rule 111.3 (*j*), I hereby submit a separate and dissenting opinion on the conclusions reached by the Board. While I sympathize with the dilemma with which the Board was faced during its deliberations, it is my judgement that sufficient information was available to enable it to reach a fair and equitable decision. The present appeal is not so different from others where the Board did not have in its possession all information concerning the appeal. The case as presented by the appellant and contested by the respondent clearly indicated that a central factor fundamental to the case was the clash of personality between Messrs. Fracyon, the appellant, and Rashed, head of the United Nations Information Centre at Teheran, Iran.

"2. Enough information was available to determine that Mr. Rashed was not candid in his treatment of the case. On the one hand, he was appreciative of the professional competence of Mr. Fracyon and on the other, he had serious doubts about his integrity and suitability for continued employment as an International Civil Servant. However, there were clear indications that for reasons not clearly stated, Mr. Rashed was reluctant to make a definitive judgement on the non-renewal of Mr. Fracyon's short-term contract. When he finally decided to recom-

mend the non-renewal of the last six months short-term contract, he requested Headquarters not to disclose that he was responsible for that decision. The contradictory statements contained in Mr. Rashed's confidential memoranda to Headquarters and those contained in Fracyon's periodic reports may be explained by the possibility that an element of timidity characterized Mr. Rashed's behaviour.

"3. The information available to the Board also revealed that Mr. Fracyon must have been a rather difficult person: Careful study of the rebuttals to his periodic reports would establish this fact. His rebuttals were too argumentative and equally contained allegations against Mr. Rashed's behaviour. Fracyon himself admitted taking certain actions which would normally be considered contrary to staff rules and regulations. It was very difficult however to establish whether some of these actions were undertaken with the full knowledge of Mr. Rashed. The picture of Mr. Fracyon created by his rebuttals was one which would raise doubts in the mind of any reasonable person about his suitability to work with Mr. Rashed. It is because of this general assessment of the case presented to the Board that I dissent from the Board's conclusion that a further review should be undertaken.

"4. In my judgement, such a review will not add substantially to any better understanding of the appeal of Mr. Fracyon. Therefore, I now make the following recommendation regarding the submission made by the appellant to the Board.

"5. As regards the appellant's request that the Board should rescind the decision not to extend his short-term contract, I find it difficult to concur. While I agree with the Board that the appellant had a reasonable expectancy for renewal, I fail to see how the respondent was obligated to renew the short-term contract. Furthermore, there was no conclusive evidence that Mr. Rashed's recommendation regarding the non-renewal of Mr. Fracyon's contract was influenced by prejudice. The fact that Rashed on two previous occasions recommended renewal should suggest that he was not rash in reaching his final decision for non-renewal. Obviously, Mr. Rashed was impressed by the professional competency of Mr. Fracyon but as intimated above, deeply worried about his suitability as an International Civil Servant.

"6. Since I do not find the respondent obligated either to renew Fracyon's contract or to consider him as a suitable candidate for a post in the Centre, I can neither assert that a regular review should have been conducted nor recommend that one be undertaken with regard to his suitability for employment.

"7. As regards the appellant's periodic report dated 19 February 1971 for the period 1 March 1970 to 28 February 1971, I have the following observations: the appellant was notified on 8 January 1971 that his contract would not be renewed. Owing to the fact that the periodic report was prepared following the notification for non-renewal, it would appear that the assessment contained in that periodic report was mainly to justify the decision for non-renewal of the contract. This conclusion could be reached also from the general tense relationship between the appellant and Mr. Rashed as noted above. It has also been pointed out that Mr. Rashed made contradictory statements to Headquarters and to Mr. Fracyon. The concern here is not to underline the reasons for Rashed's contradictions. What is of importance is that there was reasonable doubt as to whether the preparation of the report was free of bias. It is my conclusion that the circumstances surrounding the case would in fact show the report was not unbiased. In this regard, I recommend that the last periodic report be withdrawn from all files and if possible destroyed.

"8. Neither Mr. Rashed nor the representative of the respondent denied that

Mr. Fracyon was highly competent for his job. It is not conclusive whether Mr. Rashed's assessment of Mr. Fracyon was anchored mainly on his doubts about his suitability as an International Civil Servant or the evident clash of personality. In view of this lingering doubt, I feel compelled to recommend that a statement be placed in the appellant's official status file to the effect that there is no obstacle to his future employment with the United Nations if he should be judged suitable for the post being considered."

On 21 February 1973 the Assistant Secretary-General for Personnel Services communicated the decisions of the Secretary-General to the Applicant in the following letter:

“ . . .
 “The Secretary-General has reviewed the case in the light of the Board's majority report and of the dissenting opinion filed by one Member of the Board. The Secretary-General has found no grounds to justify acceptance of the majority recommendation based on the existence of a legitimate expectation of renewal of your fixed-term contract. He has therefore decided to maintain the decision not to extend your fixed-term appointment beyond 28 February 1971. Consequently he rejected the recommendation set out in Paragraph 55 of the Board's report to the effect that a review of your record of service and of your suitability for employment be carried out on the spot, and that if the results of that review are favourable, you should be considered for further employment with the Organization.

“The Secretary-General has decided, however, to accept the recommendation of the Board contained in Paragraph 56 of its report to the effect that all documents relating to allegations concerning your conduct, including the periodic report covering the last year of your service, should be removed from your official status file and should be placed in your non-privileged confidential file.”

On 24 July 1974 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. Despite his fixed-term contract, the Applicant had a reasonable and legitimate expectancy to be considered for a regular appointment upon the expiry of his contract, in view of the following:

(a) The Applicant was covered by Office of Public Information circular ER/12 of 4 November 1970 whereby the “rotation” policy for the appointment of Information Assistants was abandoned and a new policy adopted which made it possible for the first time for the incumbents of the category of posts occupied by the Applicant to be offered a “regular appointment, if warranted, after a year or two of satisfactory service”;

(b) There had never been any doubt about the Applicant's professional qualifications;

(c) The “year or two” of service referred to in circular ER/12 was meant to be in the nature of a probationary period designed to culminate in a fair, orderly and objective review procedure compatible with basic standards of due process; the procedure followed in arriving at the decision not to continue the Applicant's employment and not to offer him a regular appointment, however, cannot be called fair and did not meet the basic requirements of due process or of an orderly, objective review:

- (i) The second periodic report on the performance of the Applicant was not completed in time to be available at Headquarters, together with the Applicant's rebuttals, before a decision was taken on whether or not to offer him a regular appointment;
- (ii) The question of whether or not to grant the Applicant a regular appointment should have been referred to the Appointment and Promotion Panel at Head-

quarters, all the more so as the Applicant's original appointment had been approved by that Panel;

- (iii) In view of the specific circumstances of the case, the Applicant was entitled to know the grounds on which it was decided not to continue his employment, but he was not permitted to know these grounds. In fact, the Respondent took his decision at the request of the Director, who forwarded to Headquarters not only a very damaging, clearly excessive and biased description of the Applicant's behaviour and an "impression" and "suspicion" of misconduct, but also four specific wrongful charges against the Applicant, three of which were never brought to the Applicant's attention: The Respondent appears to have been influenced by these accusations to such an extent that he decided not to continue the Applicant's employment without even asking for a rebuttal.

2. The Director's actions towards the Applicant were motivated by personal prejudice arising from a clash of personalities.

3. The second periodic report, prepared after the decision not to continue the Applicant in service had already been taken, was written by the Director with the same prejudiced attitude which had prompted his confidential recommendations which led to that decision.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right or legal expectancy to be considered for continued employment upon the expiry of his fixed-term contract:

(a) Circular ER/12 does not give rise to any legal relations, including legal expectancies, between the Administration and the staff. It was addressed to "Centre Directors/Information Officers" (and not Information Assistants) and its manifest purpose was to explain to those parties the revised policy of the Administration on the Information Assistant Programme;

(b) The terms of circular ER/12 preclude the existence of any legal expectancy. Paragraph 8 means that all candidates shall clearly understand that an appointment as an Information Assistant shall not give rise to a legal right or any legal expectancy of continued employment, and paragraph 9 is in essence an enabling text which renders permissible what circular ER/13 had declared impermissible—the continuation of the employment of Information Assistants "after a year or two of satisfactory service";

(c) The Applicant failed to perform all his duties in a satisfactory manner. The Administration's contested decision was based upon an assessment of the Applicant's over-all performance during the entire period of his employment. The assessment made by the Director that the performance of the Applicant was not in all respects satisfactory does not misrepresent the facts on which it is based and was not motivated by prejudice.

2. The contested decision was not motivated by prejudice.

3. The case does not involve any issue of due process. As the Applicant had no legal right or legal expectancy upon the expiry of his fixed-term contract, the Tribunal is not concerned with the procedures observed by the Administration in respect of his separation from service at that time.

4. The periodic report on the Applicant's service from 1 March 1970 to 28 February 1971 was not motivated by prejudice and does not misrepresent the facts on which it is based.

The Tribunal, having deliberated from 3 to 24 April 1975, now pronounces the following judgement:

I. The Applicant claims that the non-renewal of his fixed-term appointment is a violation of his rights.

All letters of appointment signed by the Applicant stated that they were subject to the Staff Regulations and Rules. Staff Rule 104.12 (b) provides in part:

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

Furthermore, each such letter of appointment contained the usual clause:

“The Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the United Nations.”

The decision whether or not to renew a fixed-term appointment is within the discretion of the Secretary-General and, in the absence of countervailing circumstances, non-renewal will not give rise to any rights on the part of the staff member. The particular circumstances of this case should therefore be reviewed, with special reference to the handling of the matter by the Director of the Centre, whose recommendations led to the decision not to renew the Applicant's appointment.

II. In his confidential letter to the Chief of the Centre Services dated 12 February 1970, the Director criticized the Applicant on three grounds as to which he was said to have been warned either orally or in writing; the letter itself was confidential and was not communicated to the Applicant.

III. The Applicant's periodic report covering the period from 7 September 1968 to 28 February 1970 was favourable (“An efficient staff member giving complete satisfaction”) and stated that there was every hope that in due course the Applicant would get over his short-comings in dealing with other staff members and his tendency to ignore normal administrative routines and information procedures. However, in the accompanying confidential letter of 28 February 1970 to the Chief of the Centre Services, the Director recommended a six months' extension of the Applicant's appointment rather than a year's and stated that he had omitted from the periodic report any reference to the “main problem”, namely the Applicant's “indulgence in outside activities . . . without authorization”. This letter was not communicated to the Applicant.

IV. The Director's two confidential letters of 17 March 1970 to the Chief of the Centre Services concerning the writing by the Applicant, contrary to instructions, of personal letters regarding United Nations matters to high Iranian government officials, recite that the matter was mentioned to the Applicant, but neither of the letters themselves appears to have been communicated to the Applicant. There is also no indication that the Applicant knew of the Director's characterization of him as a “completely undisciplined person” or of the Director's recommendation that there should be no extension of the Applicant's appointment.

V. The Director's confidential letter of 15 December 1970 to the Chief of the Centre Services contained numerous strongly adverse characterizations of the Applicant, as well as an unsubstantiated claim of incidents of suspected misconduct. There is no evidence that the Applicant was warned regarding these charges at the time, still less that he was informed of the contents of the letter.

VI. It should be noted that in that letter the Director suggested that the Applicant be notified that Information Assistants are normally appointed for two years, that the period can be further extended only in special cases and that, since the Applicant's appointment had covered a period of two years and six months, it could not be extended beyond 28 February 1971. As pointed out by the Chief of the Centre Services, such a statement would have been contrary to circular ER/12 of 4 November 1970 from him to Centre Directors, including the Director himself.

VII. The Director's confidential letter of 21 December 1970 contained two additional charges of misconduct against the Applicant; neither this letter nor the statements enclosed in it appear to have been communicated to the Applicant.

VIII. The decision of the Field Operations Service not to renew the Applicant's appointment expiring on 28 February 1971, communicated to the Applicant on 12 January 1971, was reached on the basis of the Director's confidential letters not disclosed to the Applicant, and prior to the periodic report on the Applicant's service from 1 March 1970 to 28 February 1971.

IX. The Respondent concedes that the periodic report covering the period from 1 March 1970 to 28 February 1971 regrettably repeated unfavourable assessments of the Applicant's performance included in the preceding periodic report for the period from 7 September 1968 to 28 February 1970.

X. The Director's confidential letter of 26 January 1971 to the Chief of the Centre Services, stating that he had not checked in the periodic report "On the whole an unsatisfactory staff member" to avoid prejudicing the Applicant's future, was apparently not communicated to the Applicant or attached to the periodic report, although the Director was told by the Chief of the Centre Services, in a letter of 2 February 1971, to include his remarks in the periodic report or to give the Applicant a copy of the letter of 26 January 1971.

XI. The Applicant claims that, when he was told on 12 January 1971 that Headquarters was not renewing his appointment, he had asked why and had been told by the Director that he did not know and that the new circular ER/12 of 4 November 1970, favouring the retention of Information Assistants, did not apply to persons already employed. The Applicant's claim is not challenged by the Respondent. The first statement was, to put it mildly, disingenuous, and the second statement was, in the Tribunal's judgement, clearly incorrect since nothing in circular ER/12, either in principle or in wording, indicates that it is not applicable to an incumbent Information Assistant.

XII. By substituting the possibility of regular appointments for the rotation policy previously prescribed in circular ER/13, circular ER/12 undoubtedly made possible what had hitherto been impossible and opened opportunities of further employment to the Applicant which were not available to him until that time. As the Chief of the Centre Services recognized in his confidential letter to the Director dated 28 December 1970, the Applicant had the "right" to apply for a renewal of his appointment. In the view of the Tribunal, the Applicant was entitled by virtue of circular ER/12 to have his case given fair consideration—which it did not receive.

XIII. The Director's letter to the Applicant dated 6 February 1971 implied that the Applicant's own lack of interest in renewal had been in part responsible for the non-renewal of his appointment and stated that it was a matter of deep regret to the Director personally that no way of renewing the appointment could be found. These remarks were totally at variance with the facts of the situation and the Director's own recommendation to Headquarters.

XIV. Noting the failure of the Director to disclose to the Applicant unsubstantiated accusations of misbehaviour and to give him an opportunity to answer them, his intended misstatement to the Applicant regarding the non-applicability of circular ER/12, his lack of candour and equivocal and dubious behaviour towards the Applicant, and the Respondent's decision on 8 January 1971 not to renew the Applicant's appointment on the basis of charges contained in confidential letters from the Director not disclosed to the Applicant and without awaiting the periodic report for the period from 1 March 1970 to 28 February 1971, the Tribunal finds that the Applicant was not given the fair consideration implied in circular ER/12 and that the Respondent

disregarded the principle of good faith in relations between the parties referred to in the Tribunal's Judgement No. 128 (*Al-Abed*).

XV. The Applicant also claims that the non-renewal of his fixed-term appointment was the result of prejudice against him on the part of the Director. In this connexion the Tribunal notes that there is conflicting evidence.

XVI. Certain actions of the Director would appear to support the Applicant's claim. The Director's letter of 17 March 1970 in which he said that it would be a strain on his conscience to recommend the Applicant for a further extension was written only two weeks after he had written to the Applicant: "Personally, I hope that . . . after such improvements as may result in your work and behaviour, we may be encouraged to renew your contract". Furthermore, the Director's suggestion in the same letter that the post of Information Assistant might be abolished and replaced by that of an Administrative Assistant in order to get rid of the Applicant is not in keeping with the best standards of administrative ethics. Both in his letter of 17 March 1970 and in that of 15 December 1970, the Director reported suspicions of the Applicant based on hearsay, which he admitted could not be substantiated without investigation. In his letter of 21 December 1970 enclosing supporting statements, the Director made certain allegations about the Applicant's conduct which were not fully corroborated by the statements themselves. In the periodic report of 19 January 1971 covering the period from 1 March 1970 to 28 February 1971, the Director lowered the Applicant's ratings for industry, output, judgement, reliability and personal relations after recommending on 15 December 1970 non-renewal of the Applicant's appointment on grounds which only affected certain of these ratings.

XVII. Other actions of the Director, however, indicated the desire to accord full recognition to the Applicant's merits. His professional qualities and skill in public relations were stressed in both his periodic reports. Despite the doubts expressed in the letter of 17 March 1970 quoted above, the Director recommended a further extension of the Applicant's appointment for a period of six months from 1 September 1970. There is evidence that, until the time when he decided to recommend non-renewal, the Director made genuine efforts to indicate to the Applicant how his alleged shortcomings could be overcome. As his letter of 26 January 1971 containing observations on the Applicant's last periodic report indicates, the Director refrained from making notations which in his view would have prejudiced the Applicant's future with the Ministry of Information.

XVIII. Having carefully examined the relevant material, the Tribunal concludes that, while it is clear that there was a clash of personalities and that in many of his dealings with the Applicant the Director was unduly suspicious and evasive, the evidence before it does not establish that, in recommending that the Applicant's appointment should not be renewed, the Director was motivated by prejudice. The Applicant's claim of prejudice is accordingly rejected.

XIX. In the light of the conclusions reached in paragraph XIV above, the Tribunal finds that the application is well founded and that it could order remand of the case so that a proper review of the Applicant's record of service and his suitability for the post of Information Assistant may be carried out. But considering the possibility of such an exercise proving infructuous, even if the result of the review is favourable to the Applicant, due to the non-availability of a post of Information Assistant in Teheran, and considering the lapse of time which renders the restoration of the parties to *status quo ante* difficult if not impossible, the Tribunal considers, on the analogy of its rulings in Judgements Nos. 68 (*Bulsara*) and 92 (*Higgins*), that a compensation in lieu of specific performance is a proper remedy in this case.

XX. Taking into account that the Applicant was on successive fixed-term appoint-

ments for periods ranging from one month to one year and that his continuance in service was contingent on a result favourable to him in the review to be undertaken under circular ER/12 and on the availability of a post of Information Assistant in Teheran, the Tribunal fixes the compensation for the injury suffered by the Applicant at six months' net base salary and orders accordingly.

XXI. As the Tribunal has found that the periodic report for the period from 1 March 1970 to 28 February 1971 was prepared after the decision not to renew the Applicant's appointment and that certain of the Applicant's prior ratings seem to have been systematically lowered to justify the decision against renewal of appointment, the Tribunal orders in respect of plea No. 3 that the said periodic report be excluded from the Applicant's Official Status file.

XXII. Under plea No. 4 the Applicant requests the insertion in his files of a statement to the effect that there is no obstacle to his employment with the United Nations. The Tribunal has no powers to order such a measure. However, in view of the fact that unsubstantiated allegations concerning the conduct of the Applicant were included in confidential letters not brought to the notice of the Applicant and that such material is likely to prejudice the Applicant's prospects of employment with international organizations, the Tribunal directs that those letters be excluded from the Applicant's Official Status file.

XXIII. As the Tribunal has ordered that the Applicant should be compensated in lieu of specific performance, the Applicant's plea No. 5 based on the exercise by the Secretary-General of his option under article 9, paragraph 1, of the Statute of the Tribunal does not arise.

XXIV. The other pleas do not call for a ruling by the Tribunal.

(Signatures)

R. VENKATARAMAN
President

Francis T. P. PLIMPTON
Vice-President

New York, 24 April 1975

Roger STEVENS
Member

Jean HARDY
Executive Secretary

Judgement No. 200

(Original: English)

Case No. 179:
Dearing

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

Request for the reopening of a case by the Advisory Board on Compensation Claims.

Discretion of the Secretary-General with regard to the reopening of a case under article 9 of Appendix D of the Staff Rules and his obligation not to exercise it unjustly or unreasonably.—Judgement No. 103.—Consideration of the validity of the recommendation of the Advisory Board to reject the request for reopening of the case.—Difference of opinion between the Medical Director and the United Kingdom Medical Board regarding the assessment of the percentage of disability.—Arbitrary rejection of the report