Judgement No. 249

(Original: English)

Case No. 242:
Smith

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

Request for rescission of a decision to withhold salary for participation in a collective work stoppage.

Events giving rise to the contested decision.—Lack of statutory or regulatory provisions regarding collective work stoppages.—Staff Regulation 1.2.—Staff Rules 101.2 (c) and 103.8.—Removal of the basis for payment of salary owing to unauthorized absence.—This situation is distinct from that of abandonment of post.—General Assembly resolution 31/193 B II, the basis of the Respondent's decision.—Applicant's contention that that resolution does not have the general applicability which the Respondent maintains it has.—Applicability of section II of resolution 31/193 B to the entire United Nations staff.—Confirmation of that interpretation by the travaux préparatoires.*—Contention rejected.—Applicant's contention that resolution 31/193 B II did not provide a legal basis for the Secretary-General's decision until it was incorporated into the Staff Regulations.—Previous judgements of the Tribunal relating to the applicability of General Assembly resolutions to the staff.—The resolution in question could be relied upon as a basis for the non-payment of salary even before being incorporated in the Staff Regulations.—Applicant's contention that the Respondent was estopped by his own conduct and by that of his representatives from relying on resolution 31/193 B II.—The fact that the Respondent did not press for General Assembly action to incorporate the text into the Staff Regulations did not affect his right to apply the resolution to the Applicant.—The fact that the Secretary-General had exercised his discretion earlier in favour of the staff in a particular situation did not deprive him of the right to apply the resolution to future unauthorized absences.—Contention rejected.—Applicant's contention that there was no unauthorized absence on her part.—Number of days which could be considered as authorized absence by the Applicant during the period in question.—Abatement of 25 per cent granted by the Respondent.—Contention rejected.—Application rejected.*

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Madame Paul Bastid, Vice-President; Mr. Francis T. P. Plimpton, Vice-President; Mr. Francisco A. Forteza, alternate member; Mr. Endre Ustor, alternate member;

Whereas at the request of Lucy B. Smith, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended by 15 days the time-limit for the filing of an application to the Tribunal;

Whereas, on 25 June 1979, the Applicant filed an application in which she requested the Tribunal:

"A. With respect to the applicability of General Assembly resolution 31/193 B (II), to *adjudge* and *declare* that:

"(i) the resolution in question does not provide the necessary legal basis for the Respondent's decision on the withholding of the Applicant's salary as it was intended to deal with specific staff actions in Geneva;

"(ii) further, the failure by the Respondent to comply with the conditions precedent to the applicability of the resolution deprived him of the appropriate legal basis for withholding the Applicant's salary;

"(iii) in the alternative, the Respondent was estopped by his conduct and by the conduct of his representatives from contending that the Applicant's participation in the staff meetings in question constituted unauthorized absence from work within the meaning of General Assembly resolution 31/193 B (II).

"B. With respect to the validity of the decision on the withholding of the Applicant's salary, to *hold* that:

"(i) The Respondent erred as a matter of law in characterizing the Applicant's participation in the various Staff Union meetings as 'unauthorized absence' and that this error of law vitiated the Respondent's decision;

"(ii) further, the decision of the Respondent imposed a penal sanction on the Applicant in violation of the procedural requirements for such a measure;

"(iii) and further, that the decision of the Respondent was tainted with illegality by virtue of:

"(*a*) his failure to take into account essential facts;

"(*b*) his failure to hold prior consultations with the Staff Council in accordance with Staff Regulation 8.2 and Staff Rule 108.1;

"(*c*) the *ex post facto* nature of the decision;

"(*d*) his improper motive.

"C. With respect to the implementation of the Respondent's decision, to *rule* that:

"(i) the decision of the Respondent was tainted with illegality by virtue of its arbitrary and capricious application;

"(ii) the decision of the Respondent was vitiated in whole or in part on the ground that the Respondent exceeded his authority in withholding the salary of the Applicant for the period of 23 January–12 February 1979.

"D. In view of the foregoing, to *rescind* the decision of the Respondent on the withholding of the Applicant's salary for the period of 23 January–12 February 1979 in whole; or in the alternative, for the periods of 25 January–12 February 1979; in the further alternative, 26 January 1979, the morning of 29 January 1979, the afternoon of 7 February 1979; in the last alternative 8–12 February 1979.

"E. To *order* the Respondent to restore to the Applicant all portions of the Applicant's salary illegally withheld;

"F. To *order* the Respondent to pay to the Applicant interest, at the prevailing savings bank rate, on the improperly withheld portions of the Applicant's salary as of the date when such salary was withheld;

"G. To *order* the Respondent to pay to the Applicant compensation in the amount of $1.00 for the pain and suffering incurred by the Applicant as a result of the withholding of her salary.";

Whereas the application included a request for oral proceedings;

Whereas the Respondent filed his answer on 16 August 1979;

Whereas, on 14 September 1979, the Respondent submitted additional information and documents at the request of the Applicant;

Whereas the Applicant filed written observations on 17 September 1979;

Whereas the Tribunal heard the parties at a public session held on 26 September 1979;

Whereas the Respondent submitted additional documents and information at the request of the Tribunal on 25 September and 1 October 1979;

Whereas the Applicant submitted additional information at the request of the Tribunal on 2 October 1979;

Whereas the facts in the case are as follows:

On 15 December 1978 from 9.30 a.m. to 1 p.m. and from 2 p.m. to 5 p.m. and on 16 December 1978 from 9.30 a.m. to 1 p.m. several Electoral Units of the Department of Conference Services (DCS) of the United Nations held Electoral Unit meetings to protest various grievances relating to working conditions and more particularly the introduction of word processing machines embodying video display terminals (VDT). On 15 December 1978 the Joint Advisory Committee (JAC) agreed on five points to settle the substantive issues. By a letter dated 16 December 1978 its Chairman conveyed to the Secretary-General the Committee's proposals on these points; the proposals concerning point 3 read:

> "3. Word processing machines
>
> "(*a*) Given the unresolved questions related to possible health hazards associated with VDTs, an immediate new study with staff participation will be done to find if there are other types of word processing machines without video screens which could be safely introduced in DCS.
>
> "(*b*) Permanent contracts shall be held secure and renewal of short-term and fixed-term contracts will be based on satisfactory work performance and will not be made conditional upon the staff member's agreement to work on the word processing machines. In discussions on such contract renewals, the staff members concerned may, if they so desire, be accompanied by their Unit representatives to ensure that the terms of the previous sentence are observed.
>
> "(*c*) There will be no penalty or discrimination against those Conference Typists who opt not to volunteer to work on the word processing machines.";

the letter continued:

> "A sixth point of great concern to the staff representatives was also discussed by the Joint Advisory Committee. They proposed that 'given the legitimate grievances of the staff, no penalty or discrimination should be imposed on those staff members who have participated in the action meeting called by the Staff Union.' The representatives of the Secretary-General in the Committee could not agree to a joint recommendation on that question in view of the provisions of General Assembly resolution 31/193 B II of 22 December 1976. The Committee requested its Chairman to meet with you in order to convey the importance that the staff representatives attach to that issue."

By a letter dated 16 December 1978 the Secretary-General informed the Chairman of the Staff Committee that he had approved the proposals of the Joint Advisory Committee concerning the five points; he added:

> "As regards the sixth point I wish to inform you that in view of the particular situation relevant to the staff meetings held for the discussion of the above matters,

there will be no withholding of salaries, nor will there be imposed any penalty or reprisal on any staff member who participated in these meetings."

Shortly after the conclusion of that Agreement the implementation of point 3 gave rise to renewed controversy. On 22 December 1978 the Under-Secretary-General for Administration and Management addressed to the Under-Secretary-General for Conference Services the following guidelines on transfer and recruitment of staff for work on the word processing machines:

". . .

"I see no reason for not transferring the 18 conference typists who have volunteered to work on the word processing equipment to the new functions on 1 January 1979. If any of the 18 have changed their mind since volunteering their decision not to serve should be honoured.

"Since you indicate there are 29 vacancies in the typing units, and only several typists on short-term appointments for the General Assembly who are competent enough to be offered longer term contracts, I see no reason why these few should not be recruited against the vacant regular posts in the typing pools in which they now serve. The criteria for selecting those to be offered contracts should be the same as has been used in previous years. Willingness to work on word processing equipment is not one of the criteria.

"The remaining vacancies, i.e., 29 minus the number filled by the recruitment of short-term General Assembly staff members, should be reserved for the recruitment of staff members for work on the word processing equipment.

"I note your statement about the planned introduction of 26 new word processing stations during 1979. In my opinion, the study of word processing equipment which we have agreed to undertake should be completed within the next several months. During this period, those vacancies in the conference typing units which occur from normal losses should be reserved for the recruitment of new staff members for work on the word processing equipment."

On 3 January 1979 the Chairman of the Staff Committee questioned the conformity of these guidelines with the Agreement in a letter to the Secretary-General reading:

"With reference to your letter of 16 December, agreeing to the recommendations of the Joint Advisory Committee regarding staff-management relations in the Department of Conference Services, we are in receipt of a memorandum from Mr. Davidson to Mr. Lewandowski which appears in contradiction to the spirit of our agreement and which is causing a great deal of distress amongst the members of the typing pools affected.

"The entire thrust of the recent staff action relative to the VDT's was to ensure that despite the introduction of VDT's, the current typing pools would not be phased out and that posts within the pools would continue to be filled in the normal way as vacancies occurred. Paragraph 3(*b*) of the JAC Agreement makes no sense whatever unless understood within the framework of maintaining the viability of the present typing pool arrangements.

"Mr. Davidson's memo makes clear that of 29 vacancies now existing in the typing units, only 'several' short-term typists will be offered longer term contracts within the French, Spanish and English pools. In the past there were seven to eight

short-term typists extended in each of the pools. The remaining vacancies, about 22, will be 'reserved for the recruitment of staff members for work on the word processing equipment'. Moreover, during the period of the new study which was agreed to, Mr. Davidson says that 'those vacancies in the Conference Typing Units which occur from normal losses should be reserved for the recruitment of new staff members for work on the word processing equipment'.

"The net effect of this stated policy which is to be implemented even before the new study is completed will be to reduce and eventually eliminate the present typing pools, a course of action which totally negates the spirit and intent of our agreement of 16 December 1978.

"You can well appreciate that the staff of the typing pools are very much agitated by this latest development which seems directly contrary to our agreement. It would appear that despite the past expression of staff concern on this issue, the matter is still unresolved. We hope that by early attention to the problem further upset can be avoided."

On 12 January 1979 the Secretary-General replied:

"I wish to acknowledge your letter of 3 January 1979, which was received in my office during my absence on official business abroad. I have noted your reference to Mr. Davidson's memorandum of 22 December 1978 to Mr. Lewandowski and your view that this is in contradiction to the spirit of the agreement reached at our meeting of 16 December 1978 and of my letter to you of that date.

"Mr. Davidson has reported to me on the discussions which took place in his office on 9 January and has not failed to inform me of the intensity of the staff representatives' feelings on the questions at issue. He has further reported to me your view, which is also implied in the last sentence of your letter to me, that a continuation of the job action of last month during the General Assembly session may be expected, unless the position of the staff, as set out in your letter and in the discussions with Mr. Davidson, is accepted.

"It should be stated, first of all, that there appears to be no basis for the contention that the Administration is acting contrary to the provisions of the agreement reached on 16 December 1978 by proposing to transfer to work on the word-processing machines staff members from the typing pools who have freely volunteered to do such work. Moreover, I cannot agree that the proposal to recruit qualified typists externally, who agree in advance as a condition of employment to work on the machines if and when they are required to do so, in any way conflicts with this agreement.

"Our agreement dealt with two matters—the study of alternative types of equipment which we agreed to undertake with staff participation, and the position of members of the typing pools employed at the time of our discussions in mid-December. We gave specific commitments with regard to all three classes of employees in the pools at that time—permanent, fixed-term and short-term—as set out in article 3(*b*) of the agreement. These commitments have been honoured in all respects, to the best of my knowledge.

"In the discussions which took place in my office on the evening of 14 December, the principal, if not the sole, concern which was expressed was that currently

employed staff should not be pressured or harassed or deprived of an opportunity of continued employment if they are unwilling to work on the machines. There was some discussion of the question of existing vacancies and reference was made to the need to set aside a sufficient number of vacant positions to staff the word-processing machines, while protecting the rights or expectations of staff members on short-term contracts for the General Assembly. It was agreed that offers of continuing employment to such short-term staff members should not be made conditional upon willingness to work on the machines. Apart from that, I do not recall that there was any objection to the idea that the Administration should be free to recruit from the outside persons willing to work on the machines. There was also no suggestion that staff members who had already volunteered to work on the machines should not be equally free to transfer to such work, if they wished to continue to exercise that option. The emphasis throughout the discussion was on individual freedom of choice without pressure or harassment from any quarter and I believe that the Administration has scrupulously honoured its commitment in that regard.

"I recognize that it might be argued that the recruitment and training of additional staff at the same time as the study is progressing could be considered prejudicial to the conduct of a proper study of alternative equipment. You have my assurance that there is no desire or intention on the part of the Administration to prejudice the outcome of this study, which we have agreed to undertake with staff participation. I am confident that with goodwill and a reasonable degree of flexibility on both sides it should be possible to reach agreement as to the type of equipment best suited to our needs, from the point of view of safety as well as that of effective performance. However, I believe it is self-evident that the Administration has a responsibility to ensure that staff which is newly recruited should be prepared to work on whatever type of word-processing equipment is finally agreed to. In view of the limited number of staff who can be trained at any one time, and the priority to be given to currently employed staff members who have volunteered, it is unlikely that the newly recruited staff members will be eligible for training for some weeks or months and in the intervening period, until they can be referred for training, they will be assigned to normal work in the typing pools. It is my hope that the study will be completed during this period.

"I must finally express my deep concern with respect to your suggestion that there may be a repetition of the disruption of the work of the General Assembly, unless the position of the staff in this matter is accepted. Under the circumstances in which the United Nations Organization presently finds itself, staff action to disrupt further the work of the Organization at this time cannot but increase our difficulties in coping with the many other problems that we face. As one who has consistently tried to defend and advance the interests of the staff throughout my term as Secretary-General, I must urge you in the staff's own interest to reflect seriously on the implications of such a reaction by the staff. There is, I am convinced, a special responsibility on the part of all of us—staff, Administration and Member States alike—to act with a full sense of our responsibility, not just to ourselves, or even to the Organization, but to the purposes which we are here to serve and for which the Organization stands. Any irresponsible action at this time could well lead to

consequences more serious than any of us can foresee; and I would be failing in my duty if I did not say to you, as the elected Chairman of the Staff Committee, that you have a special obligation to provide leadership that will safeguard rather than diminish the viability of the Organization that all of us are pledged to serve."

Consequently a series of negotiations on the question of whether the Agreement was being violated by the Administration took place but no settlement was reached. On 23 January 1979 in the late afternoon the Electoral Units concerned resumed their meetings to protest their grievances and discuss the Administration's alleged failure to implement the Agreement. On 24 January 1979 further Electoral Unit meetings were held. On the same day the Under-Secretary-General for Administration and Management issued the following Information Circular (ST/IC/79/10):

"1. Staff members are reminded of the decision of the General Assembly contained in its resolution 31/193 B(II) of 22 December 1976 concerning non-payment of salary to staff members in respect of periods of unauthorized absence from work. The text of that resolution, which has been incorporated into the Staff Regulations of the United Nations as paragraph 10 of Annex I, reads as follows:

" 'No salary shall be paid to staff members in respect of periods of unauthorized absence from work unless such absence was caused by reasons beyond their control or duly certified medical reasons.'

"2. The Secretary-General has determined that recent job actions constitute unauthorized absences within the meaning of the above-mentioned decision of the General Assembly and the Staff Regulations, and that their provisions must be applied to the staff members concerned. Administrative measures will therefore be taken to withhold payment of salary in respect of their periods of unauthorized absence."

Apparently incensed by this Information Circular, the Electoral Units concerned continued their meetings, with interruptions, until 12 February 1979. During that period the Staff Council held its regular meetings and called Extraordinary General Meetings of the Staff Union on 26 and 29 January 1979. On 31 January 1979 the Applicant, a Conference Typist holding a permanent appointment, was advised by the Executive Officer of the Department of Conference Services that, in conformity with the instructions received from the Office of Personnel Services, it had been determined that as of 29 January 1979 at close of business, she had absented herself from work without prior authorization for 28 hours; this period was considered unauthorized absence and the salary related thereto would be deducted from her paycheck in February. On 12 February 1979 the staff and the Administration arrived at the following Agreement within the Joint Advisory Committee:

"1. The Secretary-General will appoint an independent party of high international standing, not a member of the United Nations Secretariat, to inquire into problems of staff-management relations affecting Units 42, 43 and 45 of the Department of Conference Services.

"2. The staff of the Units referred to will return to work immediately with the assurance that, without prejudice to the applicability of General Assembly resolution 31/193 B (II), there will be no other penalty; nor will there be any reprisal taken against any staff member for having participated or not participated in staff actions.

"3. The party appointed to conduct the inquiry will report his/her findings

and recommendations directly to the Secretary-General not later than one month from the date of appointment."

Statements of clarification were made by the representatives of the Secretary-General and by the Chairman of the Staff Committee. On 13 February 1979 the Chairman of the Staff Committee addressed the following request to the Secretary-General:

"Now that staff members in the Department of Conference Services have returned to work, I should like to request that you exercise compassion in the application of General Assembly resolution 31/193 B (II) by ensuring that salary deductions are spread over several months so that no staff member would be without money at the end of February. I would also request that those staff members who wish to charge annual leave or accumulated CTO [compensatory time off] be allowed to do so.

"In addition, it would seem only fair that those staff members of the Department of Conference Services who participated in the Extraordinary General Meeting of 26 and 29 January 1979 not be docked pay for their attendance at these meetings since other staff members were not docked. Likewise, the Staff Representatives and Alternates of DCS should not be docked for periods of time spent attending Staff Council meetings.

"This request is made without prejudice to the staff position that the circular ST/IC/79/10 of 24 January has been inappropriately applied; nor does it prejudice any arguments the staff might present to the Administrative Tribunal.

". . ."

On 14 February 1979 the Executive Officer of the Department of Conference Services advised the Applicant as follows:

"1. Further to the advice which you were given under date of 31 January last, the Department of Administration and Management has determined that a partial deduction for unauthorized absence from work must be made from the February mid-month salary advance representing a portion only of the total that will have to be deducted covering the period of unauthorized absence beginning 23 January 1979. The deduction amounts to 25% of your mid-month salary advance unless the total amount to be deducted is less than that amount, in which case the total deduction will be withheld from your end February pay check.

"2. Further deductions will be made as required by installments over subsequent pay periods in order to ease, insofar as possible, the impact on your take-home pay. Our records indicate you have been absent without authorization for 12 days and - hours, as of 8 February 1979, c.o.b."

On 24 February 1979 the Applicant requested the Secretary-General to review the administrative decision announced in Information Circular ST/IC/79/10 and to return to her all pay which had been withheld as a result of the application of this circular; she also requested that a waiver of proceedings through the Joint Appeals Board be granted allowing her to submit her case, at the appropriate time, directly to the Tribunal. On 26 February 1979 the Secretary-General responded to the request of the Chairman of the Staff Committee with a letter reading:

". . .

"As you know, a partial deduction was made with respect to the mid-February salary cheques and further deductions will have to be made until the process is completed. These deductions will be spread over time so as to minimize any adverse impact on the finances of the individuals affected. It has been decided that deductions should be made from mid-month salary advances rather than from end-of-month payments so as to avoid any confusion between the deduction being made on account of the work stoppage and all other deductions which are normally made at the end of the month. This will mean that the next deductions will not be made at the end of February, as originally planned, but rather in mid-March and mid-April.

"It will not be possible to accede to your request that deductions from salary should be replaced by equivalent deductions from annual leave entitlements or accumulated compensatory time off. Charging annual leave or compensatory time, as you request, instead of withholding salary for the time of the unauthorized absences, would not seem to be consistent with General Assembly resolution 31/193 B (II) or the corresponding Staff Regulation which states that 'No salary shall be paid to staff members in respect of periods of unauthorized absence from work. . .'.

"I have carefully considered your request that I should exercise compassion in the application of General Assembly resolution 31/193 B (II) and I am prepared to do so. Without prejudice to the position which the Administration may take in future, it is recognized that there may be room for argument as to the applicability of General Assembly resolution 31/193 B (II) and the corresponding Staff Regulation to all of the periods of absence on the part of staff members attending meetings and participating in the work stoppage during the period between 23 January and 12 February. Instructions covering the present situation will therefore be issued providing for an abatement of 25% in the total amount which, by a strict and literal interpretation of the expression 'unauthorized absences from work' would have to be deducted in respect of each of the staff members of the Department of Conference Services who was absent on job action for part or all of the period 23 January to 12 February when the job action was terminated. This abatement will be applied to the amount remaining to be deducted and will be reflected in the statements forming part of the mid-month pay cheques for March and April. Should questions arise following the issue of the mid-March statements as to the accuracy of an individual statement or the way in which the abatement has been calculated or applied, these should be directed to the Executive Office, Department of Conference Services, which will deal with such individual inquiries in conjunction with the Office of Personnel Services and the Accounts Division, Office of Financial Services."

On 27 February 1979 the Under-Secretary-General for Administration and Management issued an Information Circular (ST/IC/79/15) outlining the arrangements for the settlement of the job action and containing in an annex the exchange of correspondence between the Secretary-General and the Chairman of the Staff Committee regarding the manner in which the deduction of salary was to be effected. On 23 March 1979 the Assistant Secretary-General for Personnel Services advised the Applicant that the Secretary-General maintained the position outlined in his letter of 26 February 1979 to the Chairman of the Staff Committee as his final decision in the matter and that, in the event that she wished to appeal that decision, the Secretary-General agreed that she might submit her application directly to the Tribunal. On 25 June 1979 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. As to the applicability of General Assembly resolution 31/193 B II:

(*a*) The resolution in question does not provide the necessary legal basis for the Respondent's decision as it was intended to deal with specific staff actions in Geneva;

(*b*) Further, the failure by the Respondent to comply with the conditions precedent to the applicability of the resolution deprived him of the appropriate legal basis for withholding the Applicant's salary;

(*c*) In the alternative, the Respondent was estopped by his own conduct and by the conduct of his representatives from contending that the meetings in question constituted unauthorized absence from work.

2. As to the validity of the decision on withholding of salaries:

(*a*) The Respondent erred as a matter of law in characterizing the Applicant's participation in the various Staff Union meetings as "unauthorized absence from work" and this error of law vitiated the decision in question;

(*b*) In adopting the decision to withhold the Applicant's salary, the Respondent imposed a penal sanction on the Applicant in violation of the procedural requirements for such a measure;

(*c*) (i) The decision to withhold the Applicant's salary for the period 23 January-12 February 1979 on account of unauthorized absence from work was invalid to the extent that it failed to take into account essential facts;

(ii) The decision of the Respondent on withholding of salary was tainted with illegality by reason of the failure of the Respondent to hold prior consultations with the Staff Council in accordance with Staff Regulation 8.2 and Staff Rule 108.1;

(iii) The decision of the Respondent on General Assembly resolution 31/193 B II was tainted with illegality by virtue of its ex post facto application;

(iv) The decision of the Respondent on the application of the General Assembly resolution in question was tainted with illegality by his improper motive.

3. As to the application of the decision on withholding of salaries:

(*a*) The decision of the Respondent on the withholding of salaries was tainted with illegality by virtue of its arbitrary and capricious application;

(*b*) The decision of the Respondent was vitiated on the ground that the Respondent exceeded his authority in withholding the salary of the Applicant for the period 23 January-12 February 1979.

Whereas the Respondent's principal contentions are:

1. According to the inter-governmental organization labour law principles applicable to the present case:

(*a*) No right to salary exists during periods of collective work stoppages or other job actions, i.e. strikes, and no prior action on the part of the employer Organization is a prerequisite to withholding salary in respect of such periods;

(*b*) The right of association of employees under inter-governmental organization labour law does not imply the right to be paid while exercising that right.

2. General Assembly resolution 31/193 B II was declaratory of inter-governmental organization labour law and directed the Respondent to apply that law to staff members

participating in collective work stoppages. General Assembly decision 33/433 emphasized the importance of resolution 31/193 B II by incorporating it into the Staff Regulations.

3. The Applicant's failure to perform her official duties for a period of 13 days 3½ hours constituted unauthorized absence from work within the meaning of General Assembly resolution 31/193 B II and paragraph 10 of Annex I to the Staff Regulations.

4. The withholding of the Applicant's salary was not arbitrary or improperly motivated.

5. Consultation with the staff was not required prior to withholding salary pursuant to General Assembly decisions.

6. The withholding of the Applicant's salary was not a "disciplinary measure" within the meaning of the Staff Regulations and Rules.

7. No statements or actions of the Respondent or his representatives estopped the Respondent from determining that the Applicant's failure to perform her official duties during a period of 13 days 3½ hours was an unauthorized absence from work within the meaning of General Assembly resolution 31/193 B II and paragraph 10 of Annex I to the Staff Regulations.

8. The granting of a 25% abatement in the amount of salary withheld from staff members of the Department of Conference Services participating in the job action of 23 January to 12 February 1979 did not invalidate the decision to withhold the remainder.

The Tribunal, having deliberated from 25 September to 8 October 1979, now pronounces the following judgement:

I. The Applicant requests the Tribunal to order reimbursement of her salary withheld as a result of the events which took place at Headquarters from 23 January to 12 February 1979 on the grounds that General Assembly resolution 31/193 B II did not provide the necessary legal basis for the Respondent's decision, that the Respondent was estopped by his conduct from legally invoking that resolution and that in any event the conditions laid down by the resolution were not met.

II. The Tribunal notes that the events which gave rise to the contested decision are bound up with a series of problems involving various units of the Department of Conference Services in connexion with the installation of word processing machines with video display terminals. Following the Secretary-General's approval on 16 December 1978 of the proposals of the Joint Advisory Committee, the Chairman of the Staff Committee denounced certain subsequent acts of the Respondent as contravening the spirit of that agreement. On the failure to reach agreement in the negotiations on that subject, the units concerned called meetings on the evening of 23 January 1979 with a view to formulating their demands. These meetings and other manifestations of collective action to induce the Respondent to accede to the demands of various units of the Department of Conference Services continued until 12 February 1979 when an agreement was reached in the Joint Advisory Committee. The terms of that agreement stated that the staff of units 42, 43 and 45 of the Department of Conference Services "will return to work immediately". It is disputable, therefore, that the action involved a work stoppage, though subject to the maintenance of essential services.

The Applicant, who is reported to be a willing and co-operative staff member, admits to having participated in the action and it has not been established that she was called upon to perform essential services for which, had it been the case, she would have been paid in the normal way.

III. The Tribunal notes that the Staff Regulations and Rules covering staff relations (chapter VIII) contain no provision regarding collective work stoppages in support of claims against the Administration. The Tribunal is aware that the staff has resorted to this means of pressure on various occasions and that such conduct *per se* has not been considered by the Respondent as grounds for terminating the employment of the persons concerned or for the imposition of disciplinary measures.

The Tribunal notes, however, that Staff Regulation 1.2 provides that "the whole time of staff members shall be at the disposal of the Secretary-General. The Secretary-General shall establish a normal working week". Staff Rule 101.2(*c*) states that "a staff member shall be required to work beyond the normal tour of duty whenever requested to do so". It is therefore apparent that "work" is the fundamental obligation of staff members. Receipt of salary is, moreover, the essential counterpart to work performed. In respect of salary and wage increments, Staff Rule 103.8 provides that they are only granted to staff members with "satisfactory performance and conduct . . . in their assignments".

The unauthorized absence from work or attendance at the place of work while failing to perform duties removes the basis for payment of salary. As a result, the staff member loses his right to payment of his salary. However, his presence at his place of work and the objective of the work stoppage distinguish this situation from that of abandonment of his post which, according to the Tribunal's jurisprudence (Judgement No. 220, *Hilaire*), amounts to an admission of separation from service.

IV. The Applicant contends that General Assembly resolution 31/193 B II which reads as follows:

> "Decides that no salary shall be paid to staff members in respect of periods of unauthorized absence from work unless such absence was caused by reasons beyond their control or duly certified medical reasons"

does not provide the necessary legal basis for the decision taken in respect of the Applicant.

The Tribunal notes that, by Information Circular ST/IC/79/10 of 24 January 1979, the Under-Secretary-General for Administration and Management reminded staff members of the decision of the General Assembly contained in that resolution, indicated that the text of the resolution had been incorporated into the Staff Regulations, and announced the Secretary-General's decision to withhold salaries in respect of the job actions. Moreover, when an agreement to return to work was reached on 12 February 1979, it was formally stipulated that "the staff of the Units referred to will return to work immediately with the assurance that, without prejudice to the applicability of General Assembly resolution 31/193 B (II), there will be no other penalty; nor will there be any reprisal taken against any staff member for having participated or not participated in staff actions". Finally, in his letter of 13 February 1979, the Chairman of the Staff Committee requested the Secretary-General to "exercise compassion in the application of General Assembly resolution 31/193 B (II)".

It is obvious, therefore, that the Respondent based his decision on the resolution of the General Assembly. The Tribunal notes, however, that in his letter of 13 February 1979, the Chairman of the Staff Committee declared that the request for certain arrangements "is made without prejudice to the staff position that the circular ST/IC/79/10 of 24 January has been inappropriately applied; nor does it prejudice any arguments the staff might present to the Administrative Tribunal." These arguments must therefore be examined by the Tribunal.

V. First, it is maintained in the application that the resolution in question was adopted by the General Assembly with a particular situation in mind concerning the General Services staff at Geneva, and hence does not have the general applicability which the Respondent contends it has. The Tribunal recognizes that this resolution was adopted following consideration by the Fifth Committee of the report of the Joint Inspection Unit concerning the strike which took place at the United Nations Office at Geneva from 25 February to 3 March 1976. But the text is worded in general terms without reference to a particular situation. While section I of resolution 31/193 B concerns the Geneva situation, section II which consists of only one paragraph quoted above is a general provision applicable to the entire United Nations staff.

The *travaux préparatoires* confirm that interpretation. The origin of the text was a proposal by the representative of Japan, who stated clearly that the amendment was meant to become section II of part B of the draft resolution "since it was intended to apply to all duty stations and all levels." The representative of Japan added that "it should not affect the Secretary-General's discretionary powers under the existing Staff Regulations and Staff Rules". Moreover, replying to questions put by the representative of Upper Volta, the representative of Japan stated that, in his view, the Secretary-General would exercise discretion in determining to whom the provision would apply. The Tribunal also notes that the French delegation, in abstaining in the vote, indicated that in its opinion the text was unnecessary and all that was needed was to apply the existing regulations judiciously.

It is therefore clear, in the view of the Tribunal, that resolution 31/193 B II, which was adopted without opposition, applies to the entire United Nations staff.

As a resolution of the General Assembly this text did not have to be submitted in advance to the Staff Committee: Staff Regulation 8.2 and Staff Rule 108.1 envisage prior consultation with the staff on matters to be regulated by the Secretary-General and not on those falling within the competence of the General Assembly.

VI. The Applicant maintains, moreover, that the resolution in question did not provide a legal basis for the Secretary-General's decision until it was incorporated into the Staff Regulations. According to the application, not until 11 June 1979 was the resolution incorporated into the Staff Regulations as paragraph 10 of Annex I as a result of General Assembly decision 33/433 of 20 December 1978. In her written observations, however, the Applicant states that the Respondent took action to incorporate the text on 31 January 1979 and backdated the decision to 1 January 1979.

The Tribunal observes that soon after its adoption resolution 31/193 B II was brought to the attention of the staff through Information Circular ST/IC/77/3 dated 17 January 1977, paragraph 21. At the thirty-third session of the General Assembly, the representative of Japan in the Fifth Committee asked the Director of Personnel on 12 December 1978 why the Assembly had not yet been given an opportunity to consider a relevant staff regulation in pursuance of resolution 31/193 B II. On 14 December 1978 the Committee approved the text of a new provision to be incorporated into the Staff Regulations as paragraph 10 of Annex I entitled "Salary scales and related provisions".

The General Assembly took the relevant decision on 20 December 1978. The decision was brought to the attention of the staff in Information Circular ST/IC/79/5 dated 22 January 1979, paragraph 11. The text of the Staff Regulations as amended by the Assembly at its thirty-third session was notified to the staff in a Secretary-General's Bulletin dated

31 January 1979. This bulletin indicated that the amendment was effective from 1 January 1979.

VII. The Tribunal finds that, whatever the date on which the amended Staff Regulations may have been issued, the circular of 22 January 1979 addressed to the staff contained the text which was to become paragraph 10 of Annex I of the Staff Regulations. Thus, even before the text was published in its final form, it was officially brought to the staff's attention both in 1977 and in 1979. Moreover, the circular of 1979 clearly indicated that what was involved was the incorporation into the Staff Regulations of a decision taken earlier by the General Assembly.

The Tribunal has consistently maintained that the resolutions of the General Assembly constitute, as far as the staff members to whom they apply are concerned, conditions of employment to be taken into account by the Tribunal (Judgements No. 67, *Harris* et al., para. 5; No. 236, *Belchamber*, para. XVI; No. 237, *Powell*, para. XI). The Tribunal therefore holds that resolution 31/193 B II could be relied upon as a basis for the non-payment of salary in circumstances such as those of the present case, even before being incorporated in the Staff Regulations pursuant to General Assembly decision 33/433.

VIII. The Applicant contends further that the Respondent was estopped by his own conduct and by the conduct of his representatives from relying on resolution 31/193 B II. She argues that the Respondent, by failing to take any steps for two years to incorporate resolution 31/193 B II into the Staff Regulations, demonstrated his intention not to act on it. She also argues that, following discussions relating to the application of resolution 31/193 B II subsequent to the events of 15 and 16 December 1978, which constituted a collective work stoppage, the Secretary-General admitted that no salary was to be withheld "in view of the particular situation relevant to the staff meetings held for the discussion of the above matters". Lastly, the Applicant relies on certain statements of the Under-Secretary-General for Administration and Management concerning the legitimacy of the exercise by the staff of the right to hold meetings and on the provision of certain facilities by the Respondent for such meetings which, the Applicant contends, were intended to improve the relationships with the Administration.

IX. The Tribunal, having determined that a resolution of the General Assembly was binding on the Applicant, observes that the fact that the Respondent did not press for General Assembly action to incorporate the text into the Staff Regulations did not affect his right to apply the resolution to the Applicant.

Concerning the work stoppage of 15 and 16 December 1978 which led to an agreement expressly stating that there would be no withholding of salaries, the Tribunal holds that it was for the Respondent to judge in the exercise of the discretion vested in him how the General Assembly resolution would be applied. The fact that the Secretary-General had exercised his discretion earlier in favour of the staff in a "particular situation" did not deprive him of the right to apply the resolution to future unauthorized absences.

With regard to the statements of the Under-Secretary-General for Administration and Management relied upon by the Applicant, the Tribunal notes that, though he clearly stated on 26 January 1979 during a Staff Union meeting that he did not deny the staff's right to hold meetings, he added that that did not mean "that meetings that last day in and day out and that are staff meetings disguised as job actions can be accepted without recognizing the fact that there is a resolution passed by the General Assembly by which the Administration is bound that unauthorized absences from work shall not be paid for". It is therefore not possible to maintain that the Respondent allowed uncertainty to continue about the possible application of the resolution.

Lastly, the granting of physical facilities for staff meetings by the Respondent cannot reasonably be held to deprive him of the right to apply the General Assembly resolution.

In conclusion, the Tribunal holds that the arguments which the Applicant has sought to draw from the doctrine of estoppel in order to challenge the applicability of General Assembly resolution 31/193 B II are without foundation.

X. It is finally argued in the application that there was no "unauthorized absence" on the part of the Applicant and that the withholding of all or part of her salary was invalid in the light of the wording of the resolution itself.

The Applicant states that the Under-Secretary-General for Administration and Management himself recognized the difficulty of determining what actually constituted unauthorized absence. Again, in disputing the 25 per cent abatement granted by the Respondent, she maintains that in the absence of a text defining "unauthorized absence", the Respondent should have refrained from withholding salaries.

The Tribunal will proceed to examine whether or not the Applicant's absence could be regarded as authorized under certain circumstances.

It is clear, first, that since an impending snow storm in the afternoon of 7 February 1979 caused the Respondent to authorize most of the staff to go home, the Applicant could legitimately avail herself of that authorization.

The meeting on Friday, 26 January 1979, which lasted all day, and the meeting during the morning of Monday, 29 January 1979 were, under the terms of the Statute of the Staff Union, "extraordinary staff meetings"; they were undoubtedly particularly long; the Respondent himself, however, held that attendance at those meetings could not be described as unauthorized absence and the Tribunal recognizes that that interpretation, based as it is on provisions concerning staff members' right of association, must be accepted.

With regard to the unit meetings, the Tribunal finds that their objective was in fact organized work stoppage and that accordingly participation could not be considered as authorized absence inasmuch as no provision concerning unit meetings allows for their having such an objective.

The Applicant, finally, seems to consider in her alternative pleas that the communication sent to her on 14 February 1979 by the Executive Officer of the Department of Conference Services, which advised her that, for salary payment purposes, she had been absent without authorization for 12 days as of 8 February 1979 stated the Administration's final view on the matter, and that the decision to withhold her salary for the period from 8 to 12 February 1979 should be rescinded. The Tribunal holds, however, that since there is no evidence that the Applicant resumed work prior to the agreement of 12 February 1979, her claim is unfounded.

In conclusion, the Tribunal considers that throughout the period under consideration there were only two days of authorized absence. Thus, on the basis of the final computation of 13 days and 3½ hours of absence, salary should have been withheld for 11 days and 3½ hours of unauthorized absence.

XI. Following discussions with the Chairman of the Staff Committee, the Respondent decided that an abatement of 25 per cent would be applied to the period of unauthorized absence and that the amount of salary withholding would be determined accordingly.

The Applicant contends that in the absence of rules governing the application of General Assembly resolution 31/193 B II the withholding of salary was arbitrary and that the abatement of 25 per cent had no rational basis.

The Tribunal realizes that there are difficulties in determining the duration of unauthorized absence in the event of a collective work stoppage, particularly when certain forms of authorized absence provided for by existing rules have to be taken into account. In the Applicant's case, however, the 25 per cent abatement exceeded what could legitimately be considered authorized absence. In these circumstances, the Tribunal, bearing in mind the fundamental considerations set out in paragraph III above, decides that the claim for reimbursement of the salary withheld is unfounded.

XII. The application is rejected.

(Signatures)

R. VENKATARAMAN
President

Francisco A. FORTEZA
Alternate Member

Suzanne BASTID
Vice-President

Endre USTOR
Alternate Member

Francis T. P. PLIMPTON
Vice-President

Jean HARDY
Executive Secretary

New York, 8 October 1979

Judgement No. 250

(Original: French)

Case No. 238:
Sforza-Chrzanowski

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

***Non-renewal of the fixed-term appointment** of a technical assistance expert of the United Nations Industrial Development Organization.*

***Request that the Tribunal recognize that** the Applicant's separation from service was not normal **because of pressure brought to bear on him to** leave his post in Seoul before the date of expiry of his **appointment.—Administrative measure terminating** not the contract of service of the Applicant but his **assignment.—Discretionary power vested in the** Secretary-General.—The Applicant has not substantiated **his allegation that the reasons adduced to justify** the measure taken in his case were not valid.—Letter **addressed by the Applicant to the Assistant Minister** for Economic Affairs of the Government of Korea.— **The Administration could legitimately take it into** consideration when it decided to terminate the Applicant's **assignment.—Request rejected.—Request that the** Tribunal recognize that the procedure leading to classification **in the category of persons rejected permanently** for future employment with the Organization **was not applied in the Applicant's case.—The** request does not arise and is rejected, the prescribed **procedure eventually having been applied in his** case.—Application rejected.*