

ADMINISTRATIVE TRIBUNAL

Judgement No. 382

Case No. 372: NOBLE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Luis de Posadas Montero, Vice-President,
presiding; Mr. Roger Pinto; Mr. Jerome Ackerman;

Whereas at the request of Miriam P. Noble, a staff member of
the United Nations, the President of the Tribunal, with the
agreement of the Respondent, successively extended the time-limit in
which to file an application until 29 November 1985, 20 December
1985 and 20 January 1986;

Whereas on 23 January 1986, the Applicant filed an
application the pleas of which read as follows:

"6. Applicant requests the Tribunal to rule that:

(a) The review of leave records which was recommended by
the Joint Appeals Board on 31 May 1985, should be
expedited and that it should be carried out not
only by the Executive Office of the Department of
Technical Co-operation for Development (DTCD), but
also by the Audit Section of the Administrative
Management Service (AMS), if found necessary;

(b) In the computation of the leave records, due account should be
taken of leave with full pay due to illness, under
staff rule 106.2, and all the half days to leave
wrongfully charged to Applicant as so-called
unauthorized absences;

7. Furthermore, and as substantive measures, Applicant requests
the Tribunal to determine and rule that:

(a) The decision to withhold her salary payments between
19 August 1981 (retroactively) and 31 August 1982,

and subsequent withholdings between August 1982 and August 1985 in the amount of \$45,639.63, was not only illegal but was also inhuman and should be revoked;

(b) Applicant is entitled to reimbursement and restitution in the amount of \$50,000.00 as well as adequate and equitable compensation for the disruption of her livelihood and for the personal financial embarrassment and losses she incurred as a result of the illegal and inhuman act of withholding her salary payments over such a long period, even extending beyond the time (by 150 1/2 days) when recovery of all alleged indebtedness had been realized;

(c) Subsequent action by the Respondent to withdraw monies from her bank account and again from her salary entitlement following repayment by the Bank, was illegal and should be revoked, and the amount (of \$620.99) be refunded."

Whereas the Respondent filed his answer on 3 September 1986;
Whereas the Applicant filed written observations on 9 January 1987;

Whereas the Respondent submitted an additional document on 25 March 1987 and the Applicant commented thereon on 22 April 1987;

Whereas in reply to questions put by the Tribunal, the Respondent submitted additional information and documents on 8 May, 13 May and 20 May 1987;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 3 September 1963. She was initially offered a short-term appointment as a Conference Typist at the G-2, step III level, at the English Typing Unit in the Office of Conference Services. Her appointment was converted to a fixed-term appointment on 18 December 1963, and to a probationary appointment on 18 June 1964. On 1 June 1964 she was promoted to the G-3 level and effective 1 September 1965 her appointment became permanent.

On 16 September 1967 the Applicant was transferred to the

Office of the Controller and on 1 October 1967 to the Financial and Administrative Management Section, Office of Technical Co-operation (OTC), Department of Economic and Social Affairs. On 1 May 1969, she was reassigned to the Section for Asia and the Far East. The Applicant continued to work within OTC and subsequently within the Department of Technical Co-operation and Development (DTCD), when that Department took over OTC's functions in 1978. On 15 September 1980, the Applicant was reassigned to DTCD/PID (Programme and Implementation Division), Development Advisory Services, on 25 July 1983 to the Policy Co-ordination Branch, PPDPD (Policy Programming and Development Planning Division) and on 1 December 1986 to the Executive Office, DTCD, where she continues to work until this date.

The Applicant's service record shows that during the past twelve to thirteen years of her employment with the United Nations, she developed continuing, as distinct from isolated or occasional, problems concerning her inability to report to work on time.

In a memorandum dated 5 May 1978, the Medical Director informed the Executive Officer, DTCD, that he had interviewed the Applicant and had concluded that "for medical reasons in her case it would be justifiable to come to work late at 10.30 a.m.". He noted, however, that there was "no medical reason why she could not work a full day from that time up to 6.30 p.m." He recommended that, if possible, "the Applicant should be allowed to work at those hours" for medical reasons.

Four years later, on 3 May 1982, the Executive Officer, DTCD, asked the Medical Director to examine the Applicant and provide him with an evaluation of her current medical condition, because she was not observing the working hours that the Department had, on an exceptional basis, authorized for her on the Medical Director's advice.

In a reply dated 7 June 1982, the Medical Director stated that after a medical examination and a discussion with the Applicant, he had found "no convincing medical reason" to justify why the Applicant could not continue to work from 10.30 a.m. to

6.30 p.m. He concluded that there was no "medical reason for her recent tardy attendance".

In a memorandum dated 12 July 1982, the Executive Officer, DTCD, informed the Applicant that he had learned that she did not observe the adjusted work schedule that the Department had exceptionally authorized for her on medical grounds since May 1978.

He noted that she was arriving at work between 12:00 and 12.30 p.m., and asked her to provide him with a written explanation concerning her "unauthorized lateness and hence absences". In addition, he had ascertained that she had refused to sign the leave reports prepared by the Department to record her "unauthorized absences" between 10:30 a.m. and the time in which she actually arrived at work. The Medical Director had certified that there was no medical reason to justify her late arrivals and consequently her case would be referred to the Office of Personnel Services (OPS), for appropriate action under the relevant Staff Regulations and Rules. Indeed, on 13 July 1982, the Executive Officer, DTCD, wrote to the Personnel Officer, OPS, to recommend that the Applicant's permanent appointment be terminated for unsatisfactory services.

In August 1982, in accordance with usual practice, the Payroll Unit instructed the Chemical Bank to automatically credit the Applicant's account at the UN branch of the Bank with her end-of-August salary. The Director of the Accounts Division stated during the course of the Joint Appeals Board (JAB) proceedings that on 27 August 1982, the Payroll Unit wrote to the Chemical Bank cashier to instruct her to recall the Applicant's salary. Nevertheless, on 31 August 1982, the Bank credited the Applicant's account. On 2 September 1982, pursuant to UN instructions, the Bank reversed the deposit and debited the account for the amount of \$620.99. The Applicant received a debit advice from Chemical Bank that stated "RE-RECALL END AUG. 1982 AUTOMATIC DEPOSIT". She was not officially informed by the Administration that this action had been envisaged and taken.

In a memorandum dated 3 September 1982, the Executive

Officer, DTCD, informed the Applicant, that he had been apprised that during the past year, namely from 19 August 1981 to 31 August 1982, she had been absent from the office without proper justification for a total of 91 days. He listed a series of dates and stated:

"... These periods of absence as listed below in detail are not covered by either certified sick leave or annual leave. They are, therefore, unauthorized absences and any payments made to you by the Organization for these periods will have to be recovered ...

We are sending your leave records to the Internal Audit Division for auditing. In the meantime, your salary is being withheld until the situation is regularized and/or any over-payment recovered."

Payment of the Applicant's salary was suspended from that date. The Applicant, however, continued to report to work.

In a memorandum dated 21 September 1982, the Applicant explained to the Executive Officer, DTCD, that she had been unable to maintain the 10.30 a.m. - 6.30 p.m. adjusted work schedule because she suffered from "insomnia and dizzy spells" in the mornings. She also gave him her reasons for not signing her leave reports. On 28 September 1982, the Applicant wrote to the Internal Audit Division concerning her leave records which had been forwarded to that Office for an audit. She asserted that there were "discrepancies in the recording of leave taken" and requested that the audit of leave reports that had not been signed by her, nor cleared by the Medical Service, be held in abeyance because she was in the process of contesting the unsigned leave reports and resubmitting those that had not been cleared by the Medical Service.

On 1 October 1982, the Applicant informed the Executive Officer, DTCD, that she contested the accuracy of several dates listed in his memorandum of 3 September 1982 that had been charged as annual leave. In addition, she stated that since the auditing of her leave reports had not been finalized, it seemed "unfair that payment of [her] salary should be withheld prior to a determination

of the status of [her] leave record".

On 11 October 1982, the Executive Officer, DTCD, informed the Applicant that, since the review of her leave reports conducted by the Executive Office showed that she had exceeded her annual leave by 91 days, he could not certify the continued payment of her salary until the unauthorized period of leave was administratively covered.

On 15 November 1982, the Executive Officer, DTCD, approved the Applicant's request for fourteen days of special leave without pay starting 22 November 1982. In addition he noted:

"As we informed you before, you have overdrawn on your annual leave up to 91 days as of 31 August 1982. This is totally irregular, and until the Organization recovers the overpayments to you in this connexion, your salary will continue to be withheld."

On 16 November 1982, the Executive Officer, DTCD, informed the Applicant that it had come to his knowledge that she arrived at work every day "barely at noon". Since she had been authorized to arrive at 10.30 a.m., "those late arrivals after 10.30 a.m. [would] be charged as half-day absences, now and in the future".

On 30 March 1983, the Personnel Officer, OPS, asked the Medical Director whether the Applicant would qualify for a disability benefit. The Medical Director gave a negative response, but stated however, that the Applicant should continue to work on the adjusted schedule of 10.30 a.m. to 6.30 p.m.

On 11 May 1983, the Applicant requested the Executive Officer, DTCD, to provide her with a detailed explanation of how he had calculated that she had 91 days of excess leave, including copies of all the relevant leave cards which had been used for the calculation.

On 19 May 1983, the Administrative Officer, Executive Office, DTCD, reminded the Applicant that she was expected to work from 10.30 a.m. to 6.30 p.m. He added that: "any infractions of this schedule will be treated as leave without pay".

On 16 June 1983, the Applicant requested the Secretary-

General to review the administrative decision to withhold her salary since August 1982. Not having received a reply, on 16 August 1983, the Applicant lodged a preliminary statement of appeal with the JAB, in which she requested suspension of action under staff rule 111.2(f). On 16 September 1983, the Applicant completed her statement of appeal.

On 5 December 1983 - i.e. some fifteen months after payment of her salary had been suspended - the Applicant informed the Alternate Secretary of the Joint Appeals Board that she had received a cheque for the amount of US\$ 3,256.10 from the Administration as a partial rebate on salary payments withheld since August 1982. She asserted that she had accepted this sum, in light of her "destitute financial situation", but this acceptance should "in no way be construed as an indication of agreement to accept any lesser amount ..." nor as a "departure from the terms set out in [her] claim for settlement of approximately 15 months salary..." The amount represented two and a half months of salary from 15 April to 30 June 1983. The Applicant was asked to sign a "Request for Salary Advance" for this amount, but refused to do so.

On 3 August 1984, the Board adopted its report, hereinafter referred to as the "first report", on the Applicant's request for recommendation to suspend action on the decision which caused her to receive reduced and irregular salary payments. Its recommendations read as follows:

"Recommendations

17. The Panel recommends that in the future action should be suspended on the decision not to handle the appellant's earnings by the usual payrolling methods but by calculating her earnings at the end of each month and issuing cheques accordingly. The suspension should be maintained until the end of September 1984 so that the appellant will be regularly receiving monthly payments at the normal amounts through that month."

On 24 September 1984, the Assistant Secretary-General for Personnel Services transmitted the Board's report to the Applicant

and informed her that the Secretary-General, having examined her case in the light of the Board's report had decided that she "should be paid at the same intervals as other staff, on the understanding that deductions [would] be made, if appropriate, for unauthorized absences".

The Board continued consideration of the case. On 28 September 1984, it adopted a further report, the "second report" on the Applicant's request for suspension of action on the decision which caused her to receive reduced and irregular salary payments. The Board recommended that, "as a further interim measure, the suspension of action which it had proposed in its report of 3 August 1984 be maintained through November 1984".

On 8 November 1984, the Assistant Secretary-General informed the Applicant that the Secretary-General had reiterated his decision of 24 September 1984.

The Board continued its consideration of the merits of the case. It adopted its report on 5 March 1985.

Its conclusions and recommendations read as follows:

"Conclusions and Recommendations"

119. The Panel concluded that:

- (i) The appellant's absences from work due to arrivals after the beginning of the working hours established for her were unauthorized absences and were therefore subject to the principle that no salary should be paid for such absences;
- (ii) These absences due to arrivals long after the beginning of the working hours authorized for the appellant could not be considered as justified by the appellant's medical problems as the Medical Director had advised that he could find no medical reason for such readiness [sic] tardiness;
- (iii) These absences did not lose their character of unauthorized absences not even if she had worked a full eight-hour day as claimed;
- (iv) It was legitimate for the Administration to implement the principle that unauthorized absences should not be

paid for by charging half a day's leave for every day on which the appellant arrived for work more than two hours after the beginning of her working day; such a charge to leave was therefore warranted whenever the appellant arrived after 12:30 p.m. as her authorized working hours commenced at 10:30 a.m.;

- (v) There was some uncertainty whether the principle that half days leave should be charged only for arrivals more than two hours after the beginning of the appellant's authorized working hours had been consistently followed; a review of the appellant's leave records should therefore be carried out to verify that half day's charges to leave had been made only for arrivals after 12:30 p.m. and to take corrective action where necessary;
- (vi) If the Administration intends to continue exercising its authority to charge half a day's leave whenever the appellant arrives at work two hours later than the beginning of the working hours established for her, the Administration should arrange for properly observing and recording of her arrival time.

120. The Panel recommends that the Administration review the leave records of the appellant for the period August 1981 to the present with a view to make certain that half day's charges to leave were made only in cases in which the appellant was reported in the relevant attendance sheets or similar primary sources as having arrived at a time later than 12:30 p.m. and that, if cases are found of charges of half days to leave not meeting this condition, the corresponding salary be restituted and any other entitlements which might have been suspended be restored."

On 31 May 1985 the Assistant Secretary-General for Personnel Services transmitted the Board's report to the Applicant and informed her of the Secretary-General's decision in a letter that reads in part as follows:

"The Under-Secretary-General for Administration and Management, on behalf of the Secretary-General, has taken note of the Board's report and, in the light of the Board's report, has decided to accept the recommendation made in paragraph 120 which reads as follows:

'The Panel recommends that the Administration review the leave records of the appellant for the period August 1981 to the present with a view to make certain that half day's charges

to leave were made only in cases in which the appellant was reported in the relevant attendance sheets or similar primary sources as having arrived at a time later than 12:30 p.m. and that, if cases are found of charges of half days to leave not meeting this condition, the corresponding salary be restituted and any other entitlements which might have been suspended be restored.'

While agreeing with the Board's conclusions and recommendations, the Under-Secretary-General has also noted that, as stated in information circular ST/IC/81/25, chronic non-compliance with working hours may warrant action in conformity with staff regulations 9.1 and 10.2."

On 10 July 1985, the Administrative Manager of the UN Branch of the Chemical Bank informed the Treasurer of the United Nations that the Bank would charge the UN General Fund Deposit Account "to reverse a credit made to [the U.N.] account on September 2, 1982". He added: "This Credit was a result of your asking us to recall an automatic salary deposit to your UN employee Miriam Noble, which we did as a courtesy to the United Nations". Since the Applicant had contested this action before the New York State Banking Commission and succeeded, the Bank had "no other alternative but to return the funds to her account". When the Treasurer was notified that the UN account had been debited by Chemical Bank for \$620.99, the Payroll Unit, recovered the amount from the Applicant's 30 August 1985 salary without notifying the Applicant in advance.

In a letter dated 26 September 1985 addressed to the Secretary-General, the Applicant appealed against the decision taken by the Payroll Unit to deduct the amount of \$620.99 from her end of the month salary ending on 30 August 1985 "without justification and without prior notice". This deduction represented "the same amount which the State Banking Commission requested the Chemical Bank to repay [her] ... around July/August 1985 for wrongful withdrawal of this sum from [her] account with the Bank".

On 23 January 1986, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Respondent illegally withheld the Applicant's salary and illegally instructed the Chemical Bank to withdraw monies from her account in order to recover salary paid for past service before verifying the accuracy of the Applicant's leave records.
2. The Respondent took action to withhold salary payments without prior notice to the Applicant and in contravention of staff rule 103.18(b)(ii).
3. The Respondent failed, despite repeated requests by the Applicant, to provide her with monthly statements of earnings and deductions from which she could ascertain that the deductions were properly made for alleged "unauthorized absences."
4. The Staff Rules allow for flexible hours under exceptional circumstances. The Applicant's flexible hours were required by her medical condition.

Whereas the Respondent's principal contentions are:

1. The fundamental obligation of the staff members is to work. Receipt of salary is the counterpart for work performed. Therefore, unauthorized absence from work leads a staff member to lose the right to payment of salary.
2. Not having challenged the Medical Director's determination as provided in the Staff Rules, the Applicant is precluded from doing so at this stage.
3. The withholding of the Applicant's salary occurred as a consequence of her unauthorized absences. She therefore bears all responsibility for any resultant financial embarrassment.
4. The demand for a refund of a deposit temporarily withdrawn from the Applicant's bank account is either unjustified because the deposit was promptly restored, or subsumed in her principal claim for restoration of her entire salary.
5. Since the Applicant's behaviour for the last decade was characterized by chronic lateness in arriving to work, she herself must bear the responsibility to prove affirmatively her attendance.

The Tribunal, having deliberated from 5 May 1987 to 25 May 1987, now pronounces the following judgement:

I. With respect to the Applicant's request for an expedited review of leave records by the Executive Office of DTCD and by Administration and Management Services, the review having already been completed, there is no occasion for further action by the Tribunal. However, to the extent the Tribunal's determination with regard to the merits of the Applicant's claim requires an additional review of daily attendance and leave records, that should be done as promptly as possible in view of the lengthy period which has already elapsed in this case and in view of the Tribunal's determination with regard to the payment of interest.

II. In challenging the recommendation of the Joint Appeals Board which was adopted by the Secretary-General, the Applicant urges that the Board erred in not recognizing an entitlement on the part of the Applicant to report late for work because of (a) the Applicant's alleged illness, or (b) her theory that the lateness was due to causes beyond the Applicant's control. The Tribunal rejects the Applicant's claim in this regard and finds that the Joint Appeals Board was correct in concluding that, in the absence of appropriate certification by the Medical Director, alleged illness could not be assigned as justification for the Applicant's frequent lateness in reporting to work. Just as the Joint Appeals Board concluded that it was not in a position to, in effect, second guess the Medical Director, the same is true of the Tribunal. Under the applicable Staff Regulations and Rules, the determination whether leave is to be attributed to illness is, in the first instance, to be made by the employee's management and, if the matter is disputed, by the Medical Director whose determinations are final except to the extent that review by a Medical Board is provided for.

III. In this case, the Medical Director recommended and the Administration adopted a work schedule for the Applicant which permitted her to begin work at 10:30 in the morning. This recommendation was reiterated when the matter was reconsidered by the Medical Director. As far as the Tribunal is concerned, that is conclusive. Cf. Judgement No. 69, Coutsis; Judgement No. 129, Gallianos. It may be observed moreover that a letter in the record from the Applicant's physician to the Medical Director dated December 19, 1985 appears to the Tribunal to be a wholly insubstantial basis for establishing a recognizable illness justifying repeated lateness, and the Applicant's personnel file contains a recent determination by the Medical Director that calls upon the Applicant to work the same hours schedule as other employees.

IV. Thus the Tribunal, like the Joint Appeals Board, considers that the Applicant's absences from work due to arrivals after the beginning of the working hours established for her were unauthorized absences. The Tribunal agrees that paragraph 10 of annex I to the Staff Regulations and staff rule 105.1(d) clearly mandate the principle that no salary should be paid for such absences. Under the circumstances of this case, where an alleged illness not verified by the Medical Director is advanced as the reason for the absence, the Tribunal will not consider the absence as having been caused by reasons beyond the control of the staff member.

V. As presented to the Tribunal, this case involves sharp dispute as to the amount of time to be charged against the Applicant for unauthorized absences. The Tribunal is, however, unable at this time to resolve this issue because the record, as it now stands, does not reveal the facts sufficiently to show precisely what is in dispute and because neither party has yet had the benefit of the Tribunal's views as to the guiding legal principles. It will be

recalled that the Joint Appeals Board recommended a prompt review of the relevant records by the Administration. The results were transmitted to the Applicant on February 24, 1986 and in early July 1986, she was informed regarding the manner in which the Administration intended to implement the Secretary-General's decision accepting the Joint Appeals Board's recommendations. She also received reimbursement from the Administration of what it perceived as over-withholding of her prior earnings. Thereafter, the Applicant presented the results of her own review of the records, and these differed in a number of important respects from the Administration's review. So far as the Tribunal is aware, the differences are unresolved.

VI. Although the Tribunal will, therefore, not consider at this time the quantum issue, it will deal with the legal principles governing that issue. Moreover, with the benefit of the Tribunal's determination regarding those principles, the parties may, by applying them in good faith, be able to avoid any need for further proceedings before the Tribunal.

VII. Under the Staff Rules and particularly administrative instruction ST/AI/221, it is clear that the responsibility for adequate record keeping concerning punctuality and attendance of staff members, as well as leave, rests with the Administration. If the Administration has been remiss in carrying out its responsibilities with the result that its records are inadequate or unavailable, the burden of such managerial deficiencies must be suffered by the Administration and may not be shifted to the staff member. This is especially true here where the staff member has a long history of problems with punctuality. Contrary to the Administration's argument that, in the circumstances of this case, the Applicant should bear the burden of proving the time she arrived each day, in such a case it is incumbent on the employee's management to keep accurate arrival, departure and attendance

records. To suggest that management's responsibilities should be transferred to the staff member in cases of this type is analogous to placing the fox in charge of the chicken coop. That does not mean, however, that if a staff member makes his or her own records recognizing lateness or absence available to the Administration and the latter is satisfied as to their accuracy and wishes to utilize them, in whole or in part, to fill gaps in or clarify the Administration's records, the Administration is precluded from doing so. It follows that before the Administration may charge a staff member for time not worked due to lateness or other absence, and treat that as an indebtedness, the Administration must have adequate evidence of the facts. It is far from clear to what extent the Administration has such evidence here.

VIII. Before reaching the main question of the lateness properly chargeable to the Applicant, the Tribunal will address ancillary matters raised by the Applicant. The Applicant has made contentions regarding her work schedule that were rejected - in the Tribunal's opinion correctly - by the Joint Appeals Board. First, the Applicant claimed, without adequate supporting evidence, that for a period of time she was authorized by her Executive Office to report for work at 12:30 p.m. rather than 10:30 a.m. Second, the Applicant claimed that regardless of how late she arrived for work, she remained long enough after others left to work a full day, and therefore made up for all of her lateness. The Joint Appeals Board correctly recognized that it is simply not possible to verify the number of hours claimed to have been worked by the Applicant with perhaps a few exceptions mentioned below. But more importantly, the Administration - not the Applicant - was entitled to determine the Applicant's work schedule. To hold that an employee may avoid the consequences of lateness or unauthorized absence by unilaterally arranging his or her work schedule to comprise the proper number of hours, would be tantamount to transferring to the employee the power to authorize and establish the work schedule. This the Tribunal

obviously cannot do.

IX. With respect to those instances in which there is sufficient evidence that on certain days she made up for all or part of her lateness by working a specified number of longer hours with the knowledge and consent or at the direction of those for whom the Applicant worked, it would obviously be unfair and improper to charge the Applicant for the lateness thus made up.

X. In view of what has been said above, the Applicant's generalized claim for overtime compensation must also be rejected. As the Joint Appeals Board noted, payment or other compensation for overtime may be given only pursuant to Staff Rules and other applicable provisions on overtime. Appendix B to the Staff Rules prescribes that overtime means excess time "worked ... provided that such work has been authorized by the proper authority." There is no evidence that the Applicant's alleged overtime was authorized by the proper authority in advance or after the fact.

XI. The Tribunal turns now to the central question of what may properly be charged against the Applicant. To begin with, if the records which should have been kept by the Administration or which are available to the Administration do not (a) show clearly that the Applicant reported for work later than 10:30 a.m. and (b) make possible a reasonable determination of approximately when she reported or whether she was on some unauthorized absence unrelated to lateness for all or part of the day in question, no charge may be made against her for that day. If, on the other hand, the records reveal at approximately what time the Applicant reported for work later than 10:30 a.m. or that she reported after 12:30 p.m., or that she was on some other unauthorized absence unrelated to lateness for all or part of the day, a corresponding adjustment in the amount of the Applicant's salary is appropriate. In the Joint Appeals Board report and in the arguments of the parties, it is assumed that

unless the Applicant reported for work more than two hours after 10:30 a.m., she should not suffer any reduction in salary but if she reported after 12:30 p.m. she should be charged with a half-day of absence. In the Tribunal's view, that is not a proper interpretation in this case of the Staff Regulations and Rules or of administrative instruction ST/AI/221. The Tribunal considers ST/AI/221 not as establishing a two hours grace period for lateness, but as a disincentive for lateness of more than two hours. Although the Tribunal recognizes that ST/AI/221 may not have been designed to deal with chronic or excessive employee lateness, it is applicable to such cases.

XII. In a memorandum dated April 18, 1984, to the Chief, Administrative Review Unit, OPS, that is part of the record of the JAB proceedings, the Executive Officer of DTCD, makes it plain that in arriving at the amounts being charged against the Applicant for lateness, he was purporting to follow the principles set forth in ST/AI/221, which he believed sanctioned half-day charges if she arrived by a minimum of two hours after 10.30 a.m. At an earlier date the Executive Officer appears to have had an even more stringent view that less lateness would justify a half-day charge. In response to an inquiry by the Tribunal, it was advised on 13 May 1987 by the current Executive Officer of DTCD that ST/AI/221 was not thought applicable by the then Executive Officer when he determined the half-day charges to be imposed because of the extraordinary extent of the Applicant's lateness. The Tribunal rejects as contrary to the record, this suggestion that the Administration was not purporting to apply ST/AI/221. In fact the Administration did invoke ST/AI/221. Likewise, without merit is the associated contention that the Executive Officer could properly establish his own ad hoc monetary penalty rules for charging the Applicant with half-day absences for her lateness for any amount of time of two hours or less.

XIII. Although the Tribunal recognizes that in cases of occasional tardiness by employees which are tolerated by the Administration - and the Tribunal does not suggest that the Administration acts unreasonably in so doing - the Administration need not make a corresponding reduction in the employee's salary. But this is not necessarily the case when an employee's lateness is frequent and persists despite repeated admonitions. In such situations the principle of paragraph 10 of annex I to the Staff Regulations is, in the reasonable discretion of the Administration, fully applicable if the Administration wishes to apply it, and the Administration could clearly do so in this case. Of course, in such cases the Administration may also invoke proper procedures for appropriate disciplinary action.

XIV. Hence, on each day that the Applicant reported between 10:30 a.m. and 12:30 p.m., the Administration in this case may, except as indicated in paragraph IX, treat whatever the actual period of lateness is, (one hour, for example, if she reported at 11:30 a.m.) as non compensable time. To be sure, on days when the Applicant reported after 12:30 p.m., and before 2:30 p.m., the Administration may, also except as indicated in paragraph IX, charge her with a half-day of absence. If the Applicant was later than 2:30 p.m, the charge should correspond with the actual amount of lateness. For example, if she arrived at 3:30 p.m., the charge would be half-day plus one hour. In this connection, the Tribunal notes the persistently erroneous reading of ST/AI/221 by the Applicant's Executive Officer with only occasional lapses into accuracy. The Administrative Instruction does not sanction half-day of absence charge for less than or for exactly two hours of lateness. It sanctions such a charge only for more than two hours of lateness. Thus, if the record shows that the Applicant reported at or before 12:30 p.m., ST/AI/221 does not warrant a charge of half-day of absence; as noted above, the charge for that day should be for the actual amount of lateness. To facilitate calculation, it

would be reasonable to treat any fractional period of a quarter of an hour as a quarter of an hour.

XV. With regard to the Applicant's claims concerning the procedure followed by the Administration in withholding payment of her salary for the lengthy period it did, the Tribunal disagrees with the conclusions reached by the Joint Appeals Board and finds substantial merit in the Applicant's position. Although the Tribunal does not suggest that the Administration is without authority to withhold from the pay of staff members amounts properly determined to have been owing to the Organization, this is an authority that must be exercised in strict conformity with the applicable rules. In addition, because of its potentially harsh consequences, such authority should be resorted to sparingly. Plainly it should not be employed and the Tribunal does not interpret the Administration's authority as a vehicle for withholding a staff member's entire salary (as was done in this case for over a year) while the staff member continues to work uncompensated, in order that the Administration may recover amounts thought to be owing to it because of lateness. It is incomprehensible that a staff member's tardiness problems should ever be permitted to reach a point where the amounts sought to be withheld would even remotely approach such dimensions. Normally, managerial record-keeping should be current and accurate, and management so alert in attending to such problems promptly that if salary deductions are warranted, they would be fairly modest in amount and would be arranged for in a manner to avoid undue hardship. In this case, there is no satisfactory explanation of why it took until the latter part of 1982 for the Administration to come to grips with the alleged indebtedness dating back to 1981 of 91 days and the accuracy of the computation leading to that figure is questionable.

XVI. Fairly interpreted, staff rule 103.18 requires that before

any withholding from a staff member's salary, the fact of indebtedness to the Organization and the amount should be established. In the absence of extraordinary circumstances, the staff member should be notified and be given an opportunity to have any comments he or she may wish to make considered before the proposed deduction occurs. It is not normally enough for the Administration to believe, even in good faith, that an indebtedness exists though the amount is uncertain. If an audit of some sort is required in such cases to establish the amount, the audit should be conducted before -- not after the staff member's salary is withheld.

The withholding of an employee's compensation to satisfy an indebtedness, though permissible, is generally recognized under the law as a drastic remedy which should be and is surrounded by safeguards against undue hardship to the employee. The reason is clear. Employees are normally dependent on their salary for the daily necessities of life and it is ordinarily unjust in the extreme for an employer to accept the fruits of an employee's labor while withholding compensation because of a suspected indebtedness or an actual undefined indebtedness.

XVIII. Yet, that is what the Administration did here. The Applicant was deprived of her entire salary for over a year while she continued to work. The Tribunal regards this as extraordinary conduct on the part of the Administration since only 91 days were claimed by it to be owing by the Applicant. It is no answer that latenesses by the Applicant may have continued to occur during this period. The point is that she also performed work for which she received no current pay, and she suffered the total withholding with no adequate advance justification. That the amounts withheld were excessive is evident both from the fact that the Administration has made retroactive payments to the Applicant of several thousands of dollars and from the fact that, to a significant degree, the amount thought by the Administration to be owing was based on the mistaken reading of ST/AI/221 referred to above and on other possible

deficiencies in the records.

XVIII. As part of its efforts to recoup from the Applicant, the Administration directed the bank in which it and the Applicant maintained accounts to reverse a deposit made by the Organization in the Applicant's account and to credit that amount back to the Organization. The bank did so. On protest by the Applicant, the bank subsequently returned the funds to her. The amount was later deducted by the Administration from the Applicant's salary. It is difficult to understand how the Administration could have thought it proper, without resort to applicable judicial procedures, for the bank to transfer to the Organization funds owed by the bank to the Applicant. The Tribunal holds that nothing in the employment relationship between the Applicant and the Organization authorizes such unilateral action.

XIX. Having regard to the highly unusual nature of this case, the Tribunal deems it appropriate to observe that nothing in this judgement is to be taken as condonation - much less approval - of the manner in which the Applicant dealt with her responsibilities as a staff member. There are permissible and impermissible steps that may be taken in attempting to remedy problems caused by employees. In this case, the Administration unfortunately opted for the latter.

XX. In view of the foregoing, the Tribunal determines that:

(a) The Administration acted in gross derogation of the Applicant's rights under her contract of employment in its prolonged withholding of the Applicant's pay, and in the procedures it followed in making other deductions for lateness, as well as in its direction to the bank;

(b) In consequence of the Administration's actions, the Tribunal awards the Applicant US\$ 7,000.00 in damages;

(c) In conformity with the principles set forth above in paras. VII through XIV, the Administration should recalculate the

amount, if any, owing to it with respect to non-compensable time after July 31, 1981, for which the Applicant was paid, and after taking into account the amounts previously paid to the Applicant, promptly pay her the amounts, if any, for each pay period that should have been paid to her, plus interest at the rate of nine per cent per annum from the respective dates when she should have received payment;

(d) If the parties are unable to concur on the quantum within 90 days from the date of the Tribunal's judgement, the Tribunal will resolve any such remaining disputed issues upon request of either party;

(e) All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Roger PINTO
Member

Jerome ACKERMAN
Member

Geneva, 25 May 1987

R. Maria VICIEN-MILBURN
Executive Secretary