ADMINISTRATIVE TRIBUNAL

Judgement No. 410

Case No. 432: NOLL-WAGENFELD Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, Vice-President, presiding; Mr. Ahmed Osman; Mr. Jerome Ackerman;

Whereas, on 27 May 1987 Meike Angelika Noll-Wagenfeld, a staff member of the United Nations, filed an application, the pleas of which read as follows:

"(a) Not applicable.

(b) The Applicant contests, and - under article 9, paragraph 1 of the Statute of the United Nations Administrative Tribunal (UNAT) - requests the rescission of the following two decisions:

(i) The decision contained in the unsigned P.5 [Personnel] Action Form (P6E-741 mf) dated 6/7 November 1986 and transmitted to her by a memorandum of the 7 November, signed by Mr. F. Villanueva, Chief, Personnel Service of UNOG [UN Office in Geneva], who attached thereto also a copy of a memorandum to him from Mr. A. Niazi, Director, Internal Audit Division, of 20 October 1986 ...; and

(ii) The decision contained in the 'Notification Administrative' dated 8 January 1987, signed by Mr. Tholle, Executive Secretary of the United Nations Staff Mutual Insurance Society against Sickness and Accident ...

(c) The Applicant invokes the following obligations of the Respondent towards her and requests - under article 9, paragraph 1, of the Statute of the UNAT - the ordering by the Tribunal of their specific performance by the Respondent as

follows:

Concerning the salary and allowance entitlements of the Applicant ...

c1) The Respondent shall recontinue to pay, regularly and monthly, to the Applicant her salary at dependency rate (for son Oliver) and her dependency allowance (for daughter Dorothea) from the month following the Tribunal's judgement in the present case onwards;

c2) For the period from the month of December 1986 (inclusive) until the recontinuance of the regular monthly payments as stipulated in c1) above, the Respondent shall pay to the Applicant, in one single lump sum, the total amount accumulated by the monthly non-payment to the Applicant, from December 1986 until such recontinuance of her salary at dependency rate (for son Oliver) and of her dependency allowance (for daughter Dorothea); such single lump sum to be paid by the Respondent to the Applicant within a period not exceeding two (2) months following the date of the Tribunal's judgement in the present case, and in addition to it eight per cent (8%) interest thereon;

c3) In the case of the Respondent not respecting the Tribunal's order for recontinuance of his payments to the Applicant as specified in c1) above, the Respondent shall pay to the Applicant for each month of delay in the recontinuance of such payments ten per cent (10%) interest on each monthly sum due in accordance with c1) above, but not paid;

c4) In the case of the Respondent not respecting the Tribunal's order as specified in c2) above, the Respondent shall pay to the Applicant fifteen per cent (15%) interest on the total amount of the said single lump sum, instead of the eight per cent (8%) stipulated in c2) above;

Concerning the reimbursement action for 'overpayment to be recovered in 60 monthly instalments' ...

c5) The Respondent shall immediately, i.e. within one month following the date of the Tribunal's judgement in the present case, stop the continuance of this illegal, but still ongoing reimbursement of recovery action and shall notify the Applicant of such stoppage immediately in writing and not only by her pay slip showing such stoppage;

c6) For the period from the month of December 1986 (inclusive) until the actual stoppage of that reimbursement or recovery action by him, the Respondent shall, within a period not exceeding two (2) months following the date of the Tribunal's judgement in the present case, reimburse to the Applicant, in one single lump sum, the aggregated amount of all deductions made by him in the implementation of the contested decision referred to under b) i) of Section II hereof, together with eight per cent (8%) interest on the total amount of the said single lump sum;

c7) In the case of the Respondent not respecting the Tribunal's order for stoppage of the reimbursement or recovery action as specified in c5) above, the Respondent shall pay to the Applicant for each month of delay in the stoppage of that action ten per cent (10%) interest on the monthly sum continued to be illegally deducted from the Applicant's monthly salary, in addition to the reimbursement of such additional monthly sum within the framework of the payment of the single lump sum as stipulated in c6) above;

c8) In the case of the Respondent not respecting the Tribunal's orders as specified in c6) above, the Respondent shall pay to the Applicant fifteen per cent (15%) interest on the total amount of the said single lump sum, instead of the eight per cent (8%) stipulated in c6) above.

Concerning the directly related matter of the consequences with respect to the sickness and accident insurance ...

c9) Within one month following the date of the Tribunal's judgement in the present case, the Respondent shall vis-à-vis the United Nations Staff Mutual Insurance Society against Sickness and Accident recognize, in writing, the twins (son Oliver and daughter Dorothea) as the Applicant's dependent children so that the latter be as such reintegrated for the future in the sickness and accident insurance scheme of that Society within that same period of one month as stipulated above;

c10) The Respondent shall immediately, i.e. within one month following the date of the Tribunal's judgement in the present case, stop the continuance of the illegal, but still ongoing deductions from the Applicant's monthly salary of higher insurance premiums for the twins concerning the period from January 1982 to December 1986 and shall notify in writing the Applicant as well as the United Nations Staff Mutual Insurance Society against

Sickness and Accident immediately of such stoppage;

c11) For the period from the month of December 1986 (inclusive) until the actual stoppage of those deductions relating to the said sickness and accident insurance, the Respondent shall, within a period not exceeding two (2) months following the date of the Tribunal's judgment in the present case, reimburse to the Applicant, in one single lump sum, the aggregated amount of all such deductions made by him in the implementation of the contested decision referred to under b) ii) of Section II hereof, and in addition to it eight per cent (8%) interest thereon;

c12) In the case of the Respondent not respecting the Tribunal's order for the stoppage of those deductions as specified in c10) above, the Respondent shall pay to the Applicant for each month of delay in the stoppage of those deductions ten per cent (10%) on each monthly sum continued to be illegally deducted from the Applicant's monthly salary, in addition to the reimbursement of such additional monthly sum within the framework of the payment of the single lump sum as stipulated in c11) above;

c13) In the case of the Respondent not respecting the Tribunal's orders as specified in c11) above, the Respondent shall pay to the Applicant fifteen per cent (15%) interest on the total amount of the said single lump sum, instead of the eight per cent (8%) stipulated in c11) above.

(d) Not applicable.

(e) The Applicant also requests, in accordance with the Tribunal's Statute and pertinent case law, under the title of 'any other relief' (see sub-paragraph (e) of paragraph 3 of article 7 of the UNAT's Rules), the following:

Concerning compensation for damages ...

e1) The Respondent shall - for the non-observance and violation of procedural rules, moral damages and the Applicant's costs for the present litigation - pay, as compensation for all the damages suffered by the Applicant and imposed upon her by the contested decisions taken and implemented, on behalf of the Respondent, by his officials at the UNOG Administration, to the Applicant, within the period of two (2) months following the date of the Tribunal's judgement in the present case,

- Either one single lump sum corresponding to three months net salaries of the Applicant,

-Or, if the Tribunal prefers to fix for each one of the three elements (referred to above) individually an amount for compensation, those amounts as fixed by the Tribunal;

e2) In the case of the Respondent not respecting the Tribunal's order or orders as specified in e1) above, the Respondent shall pay to the Applicant for each month of delay in the payment of the sum or the amounts as specified in that (those) order(s) also fifteen per cent (15%) interest on the said sum or the said amounts due, but not paid within the period ordered by the Tribunal;

Concerning request for no prolongation of the time-limit for submission of the Respondent's answer ...

e3) The President of the Tribunal is kindly requested by the Applicant to ensure that the Tribunal's Executive Secretary transmit the present application as soon as possible to the Respondent and not grant any waiver with regard to any prolongation of the statutorily fixed time-limit for submission of the Respondent's answer, if the Respondent should request such a prolongation, in order to guarantee that the Applicant will receive from the Tribunal a definitive decision in her present case in as short a period of time as possible."

Whereas in a memorandum dated 22 September 1987, the Respondent informed the Executive Secretary of the Tribunal that after reviewing the application, the Respondent had decided to:

"(a) [Suspend] ... recovery action in this case until the Tribunal has delivered its judgement; and

(b) [Reverse] ... the decision to seek repayment from Applicant of the insurance subsidy (2351.65 Swiss Francs) paid by the UN from January 1982 to December 1986 to the Insurance Society since Respondent [understood] that, if Applicant's request had been denied in 1982, she would have had the option of placing the children as dependents under her husband's ITU [International Telecommunications Union] insurance at the subsidized rate."

and further asked the Applicant to indicate the "effect if any" of

the Respondent's decision on her pleas;

Whereas in a memorandum dated 30 October 1987, the Applicant informed the Executive Secretary of the Tribunal what pleas she would maintain and what pleas she would amend "under the express reservation" that she would reconsider her amendments, when filing her written observations on the Respondent's answer;

Whereas the Respondent filed his answer on 30 November 1987;

Whereas the Applicant filed written observations on 24 February 1988, in which she amended her pleas as follows:

"...

re plea b.ii): It is true that the Applicant had indeed envisaged to abandon this plea, as she had been informed that the Respondent has 'reversed' and thus annuled his decision in this respect (...), which has been confirmed in ... of the Respondent's answer. However, the Applicant - up to the date of signature of her present observations - has not been able to find out from her monthly pay slips that reimbursement has been made to her of the respective amounts already deducted on the basis of the contested decision, later 'reversed' by the Respondent himself and she has neither been informed by the Respondent's Administration or the Insurance Society of the modalities envisaged or taken as to such reimbursement. Consequently, the Applicant maintains this plea in the sense that she now requests the Tribunal to simply confirm, in its Judgement, this subsequent 'reversal' by the Respondent of the earlier decision rightly contested by the Applicant.

...

re plea c.5): This plea is indeed abandoned ...

re plea c.6): This plea is fully maintained, too, with only one (factual) modification consisting in the insertion therein, at the end of second line, after the words 'by him', the words 'in August 1987'.

re plea c.7): This plea is indeed abandoned ...

re plea c.8):This plea is fully maintained with only the same modifiying insertion as stated under 're plea c.6' above (...).

...

re plea c.10):This plea is indeed abandoned, in spite of what has been maintained above under 're pleas b.ii)'.

re plea c.11):This plea is maintained with the following three inserted modifications:

i)in the second line thereof, after the words 'actual stoppage', insert the words 'since August 1987' (...);

ii)in the seventh line thereof, after the words 'made by him', insert the words 'until July 1987 inclusively'; and

iii)in the eighth line thereof, after the last word 'hereof', insert the words 'and later annulled by the Respondent himself'.

re plea c.12):This plea is indeed abandoned, in spite of what has been maintained above under 're plea b.ii)'.

re plea c.13):This plea is fully maintained (however with the modifications inserted above under 're plea c.11)' (...).

...

re plea e.3):This plea has not 'been abandoned', but has become 'obsolete' (...)."

Whereas, on 21 March 1988, the President of the Tribunal, under article 10 of the Rules of the Tribunal, put questions to the parties;

Whereas, on 29 March 1988, the Applicant submitted written replies to the questions put to her by the Tribunal;

Whereas, on 30 March 1988 and 5 April 1988, the Respondent submitted written replies to the questions put to him by the Tribunal;

Whereas, on 14 April 1988, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put further questions to the Respondent, to which the Respondent replied on 21 April 1988 and 22 April 1988;

Whereas, on 22 April 1988, the Applicant submitted written comments on the answers provided by the Respondent;

Whereas at the request of the Tribunal, on 28 April 1988, the Respondent submitted additional documents;

Whereas, on 28 April 1988, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas, on 3 May 1988, the Applicant submitted additional written comments on the Respondent's submissions.

Whereas the facts in the case are as follows:

Meike Angelica Noll-Wagenfeld (née Wagenfeld) Senior Legal Officer at the United Nations Office in Geneva, has been a staff member of the United Nations since 1 October 1975 and is the holder of a permanent appointment. On 30 April 1976, the Applicant married Alfons Aloys Eugen Noll, who at the time was also a staff member of the United Nations. On 8 September 1978, the Applicant gave birth to their first child, Nathalie Erika Elizabeth, and claimed her as a "dependent child" for purposes of the UN Staff Regulations and Rules, namely to receive payment of her salary and post adjustment at the dependency rate. However, on 23 November 1978, Mr. Noll, the Applicant's husband, with the Applicant's concurrence, requested the Chief, Personnel Administration Section, UNOG to make the necessary arrangements in order that the child Nathalie be considered as his dependent, and not the Applicant's, and asked for payment of his salary at the dependency rate from the date of their daughter's birth, as this was "financially more advantageous" to them, his grade being P-5. He stated in this regard:

"5. ... You will realize that I am most interested in getting this change made in the immediate future, in view of my transfer to ITU [International Telecommunications Union] envisaged for the beginning of next year, as only with the

> dependency allowance for our daughter being given to me would I receive there the considerably higher salary paid to a staff member with a dependent child."

On 1 March 1979, the Applicant's husband transferred to the ITU, a specialized agency of the United Nations participating in the United Nations common system. Having claimed the child Nathalie as his dependent, Mr. Noll received his salary and post adjustment at the dependency rate. The Applicant at UNOG was paid her salary at the single rate.

In 1980, the Secretary-General, in connection with changes introduced to facilitate the employment of spouses in the UN system, amended staff rule 104.10 on Family Relationships. The Secretary-General reported the amendment to the Fifth Committee in his report dated 15 August 1980 (A/C.5/35/9) and the General Assembly took note of the amendment in its decision 35/445 of 17 December 1980. Staff rule 104.10 provides, inter alia, that:

> "(d) The marriage of one staff member to another shall not affect the contractual status of either spouse but their entitlements and other benefits shall be modified as provided in the relevant Staff Regulations and Rules. The same modifications shall apply in the case of a staff member whose spouse is a staff member of another organization participating in the United Nations common system. ..."

On 24 December 1981 the Applicant gave birth to two children, Oliver Alfons and Dorothea Angelika. Under cover of a note dated 18 January 1982, the Administrative Officer of the Division of Human Rights, UNOG, transmitted to a Personnel Assistant of the Personnel Division at UNOG the form "Status Report and Request for Payment of Dependency Benefits" in which the Applicant listed her twin children as her dependents. In the note, the Administrative Officer confirmed that the Applicant "wishe[d] to claim dependency allowance on behalf of her two children, Oliver and Dorothea" and stated that her husband would "claim from his organization dependency allowance on behalf of their eldest daughter Nathalie." From then on, the Applicant was paid her salary and post adjustment at the dependency

rate and she received a dependency allowance for her daughter Dorothea Angelika.

The Applicant asserts that in September 1982 a Personnel Officer at UNOG notified her that she could not continue to claim her twin children as her dependents and that she would have to reimburse all amounts received on that account since December 1981, because her husband, who was employed at the ITU, was already receiving dependency benefits in respect of their first child Nathalie. Since the Applicant did not agree with the Personnel Officer, she consulted the Principal Legal Officer, UNOG, to seek his views on the matter. The Applicant asserts that the Principal Legal Officer concurred with her interpretation of the Staff Rules and stated that he would take up the matter with the Office of Personnel Services. The Applicant states that she never heard from the Principal Legal Officer or from the Office of Personnel Services and assumed the question had been settled to everyone's satisfaction.

The Principal Legal Officer at UNOG later stated in a letter to the Applicant dated 14 November 1986 that:

> "I have looked at the notes I took after our meeting on 17 September 1982 and, at your request, I am able to attest:
>
> - That you informed me that Personnel Administration had warned you that only your husband, staff member of the ITU, receiving a higher salary than yours, had a right to payment of post adjustment [at the dependency rate]. You asked my views on this question.
>
> - That I then told you, on the understanding that my opinion could not be considered as an authoritative legal opinion, that on the basis only of staff regulation 3.4 and staff rule 103.7, the payment of post adjustment at single rate was only applicable if both husband and wife are staff members of the United Nations.
>
> Under the circumstances, I thought that it was only for your husband, who received his post adjustment at the dependency rate at the ITU, to do what was necessary vis-à-vis the ITU, if he thought so.
>
> ..."

(Translation by the Tribunal)

During 1986, the Internal Audit Division conducted an audit of staff members who claimed and received dependency benefits. Since the Applicant's husband works for a specialized agency of the UN, participating in the UN common system, the auditors sought information from the ITU concerning Mr. Noll's dependency status; namely, at what salary rate (dependency or single) he was being paid since his transfer to ITU. Earlier, in October 1983 a similar inquiry of ITU had been made by a Personnel Officer of UNOG and the latter was informed that Mr. Noll was being paid at the dependency rate.

In a memorandum dated 20 October 1986, the Director, Internal Audit Division, informed the Chief, Personnel Service, UNOG, that Internal Audit had noted that the Applicant was being paid her salary and post adjustment at the dependency rate, notwithstanding the fact that her husband, a staff member of the ITU, was being paid his salary and post adjustment at the dependency rate as well. He quoted staff rule 104.10(d) and stated in this regard:

"3. ... since the staff rule [103.7(b)(ii)] provides for only one staff member to receive salary and post adjustment at the dependency rate, it will be necessary to promptly discontinue paying her salary and post adjustment at the dependency rate and initiate recovery action of all amounts erroneously paid.

4. Since the Office of Personnel Services appears to have authorized these payments, you may wish to review your procedures and controls to avoid a repetition in the future."

On 7 November 1986 the Chief, Personnel Service, UNOG, transmitted to the Applicant the memorandum from the Director of Internal Audit Division and notified her that, in accordance with his instructions, administrative action had been taken to discontinue payment of her salary and post adjustment at the dependency rate, as well as to initiate recovery action of all amounts erroneously paid. He enclosed a copy of a Personnel Action

form dated 6 and 7 November 1986 implementing that decision, with effect from 24 December 1981.

On 4 December 1986, the Applicant asked the Secretary-General to review the administrative decision conveyed to her by the Chief, Personnel Service, UNOG, in his memorandum of 7 November 1986. In case the Secretary-General should decide to maintain the contested decision, the Applicant requested the Secretary-General's agreement for submission of the appeal directly to the Administrative Tribunal under article 7 of its Statute.

On 2 February 1987, the Secretary-General agreed to the Applicant's request to submit her application directly to the Tribunal.

On 27 May 1987, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The administrative decision taken to recover the overpayments in 60 monthly installments is null and void because:

(a) It did not properly state the total amount of the overpayment nor the individual amount of the 60 monthly installments;

(b) It was not signed nor taken by the competent authority - the Secretary-General himself - as provided in ST/AI/234;

(c) It cannot have retroactive effect; it can only order the discontinuance of payments for the future, with the effective date being the date of the decision itself.

2. Only the Secretary-General or the Under-Secretary-General for Administration and Management are competent to decide upon recovery under staff rule 103.18(b) and ST/AI/234. The Respondent is bound by ST/AI/234 in accordance with the principle that any authority is bound by its rules as long as they have not been amended or abrogated.

3. The Applicant was not consulted by the Respondent prior to initiating recovery action under staff rule 103.18 and this

constituted a denial of due process.

4. Staff rule 104.10 is not applicable to the Applicant because her marriage took place prior to 1 January 1980, the effective date of the provision in question. The rule was intended to apply prospectively to marriages taking place after 1 January 1980. Otherwise the rule has retroactive effect. In addition, the rule properly interpreted would not prohibit payment to the Applicant of her salary at the dependency rate.

5. The Secretary-General is not authorized to extend the restrictive effect of the conclusion of a marriage between UN staff members to marriages between a staff member and a staff member of another member organization of the common system, until that principle is incorporated to the Staff Regulations by the General Assembly. In the absence of action by the General Assembly the last sentence of staff rule 104.10 is invalid to the extent that it imposes anything on an organization such as the ITU.

6. The enforcement of staff rule 104.10 violates the principle of the protection of the family as set forth in article XVI of the Universal Declaration of Human Rights, and discriminates against females.

Whereas the Respondent's principal contentions are:

1. Dependency benefits of staff members depend, inter alia, on the earnings of spouses, whether employed in the UN, with a common system organization, or even in private employment. The Administration was thus entitled to take into account the status and earnings of Mr. Noll, the Applicant's husband and Legal Adviser of the ITU, an international organization which is part of the common system.

2. The extent of permissible recovery from staff in respect of erroneous payments by the Administration will depend upon all the circumstances of the case, including the conduct of both the Applicant and the Respondent. In this case, the Respondent has suspended all recovery action pending the Tribunal's adjudication.

3. The practice has been that decision making power in respect of staff rule 103.18(b) is delegated to the Office of Personnel Services. In practice there exists a delegation of authority from the Secretary-General to the Under-Secretary-General for Administration and Management in respect of all personnel questions.

4. The Secretary-General, as custodian of public funds, is entitled to seek recovery of salary and emoluments erroneously paid to staff by the Administration.

5. The Applicant's claim for damages in having to respond to the Secretary-General's demand for repayment of improperly paid dependency benefits has no foundation in law and should be rejected.

The Tribunal, having deliberated from 28 April 1988 to 13 May 1988, now pronounces the following judgement:

I. The Applicant has presented to the Tribunal a lengthy series of contentions, both procedural and substantive, attacking the determination by the Administration that, in view of the dependency payments to her husband by the ITU, she was and is ineligible to receive the dependency benefits paid to her by the UN with respect to two of her three children, and must therefore reimburse the UN for the overpayments she received. The Applicant also challenged originally a decision with respect to payment of health insurance premiums for the two children, but that decision has been revoked by the Respondent and need not be addressed further by the Tribunal. The Tribunal notes, however, that if the amounts with respect to those premiums deducted from the Applicant's compensation prior to revocation of the decision, which should have been returned to her, have not yet been returned to her, they should be taken into account in arriving at the balance owing to the UN by the Applicant under this judgement.

II. The Applicant devotes part of her extensive brief to arguing the notion that the Staff Regulations and the Staff Rules apply only to the Applicant and not to her husband. But this is not the point at all. Persons who are not employed by the UN are often indirectly affected by and affect the rights of staff members under the Staff Regulations and the Staff Rules merely by reason of their relationship to a member of the staff of the Organization. See ST/IC/80/2, para. 12. Hence the entitlements of the Applicant depend upon the provisions of the Regulations and Rules applicable to her at any given time, not on whether the Regulations and Rules are or are not directly applicable to her husband.

III. The central substantive question in this case turns on the applicability and meaning of staff rule 104.10(d) which provides in pertinent part:

> "The marriage of one staff member to another shall not affect the contractual status of either spouse but their entitlements and other benefits shall be modified as provided in the relevant Staff Regulations and Rules. The same modifications shall apply in the case of a staff member whose spouse is a staff member of another organization participating in the United Nations common system. ..."

The Applicant suggests that the above-quoted last sentence is invalid to the extent that it in any way influences or imposes anything on any other organization, such as the ITU, or the latter's staff members or draws any benefit from the fact that such staff members belong to another organization such as the ITU. The Applicant forgets that the ITU and the United Nations participate in the UN common system. The Applicant retreats slightly from her suggestion by recognizing that the situation may be otherwise in the face of legislative action by the General Assembly. And indeed the answer to the Applicant's contention on this point, in the Tribunal's view, is whether General Assembly legislative action has authorized staff rule 104.10(d) as a valid exercise of the Secretary-General's authority.

IV. The scope and purpose provision of the Staff Regulations states:

> "The Staff Regulations embody the fundamental conditions of service and the basic rights, duties, and obligations of the United Nations Secretariat. They represent the broad principles of personnel policy for the staffing and administration of the Secretariat. The Secretary-General, as the Chief Administrative Officer, shall provide and enforce such staff rules consistent with these principles as he considers necessary."

The question then is whether staff rule 104.10(d) is consistent with "... the broad principles of personnel policy ...". If it is, it quite plainly has been authorized by the General Assembly, the highest legislative organ of the United Nations, and it is of no consequence to its validity that the Staff Rule indirectly affects a staff member of the ITU, or, for that matter, anyone else. The Tribunal finds that staff rule 104.10(d) is entirely consistent with "the broad principles of personnel policy" referred to above. One principle of personnel policy embodied in the Staff Regulations under Chapter III by the General Assembly is that duplicate benefit payments to UN staff members are disfavoured, and its corollary is that equality as between staff members who receive dependency benefits is favoured. Although, as expressed in staff regulations 3.4(b) and 3.4(c), the General Assembly focused on particular forms of potential benefit duplication, that, contrary to the Applicant's arguments, does not mean that every other specific form of potential duplication is automatically precluded from being addressed by the Secretary-General. The Tribunal need not consider whether as an abstract proposition, the Secretary-General would have authority to promulgate the Staff Rule at issue in this case. In the Tribunal's view, the General Assembly having reflected in staff regulations 3.4(b) and 3.4(c) a principle of personnel policy disfavouring duplication of benefit payments and inequality as between staff members regarding dependency benefits, the

Secretary-General clearly has authority to elaborate this principle in the Staff Rules by applying it to other specific forms of potential duplication, subject, of course, to action by the General Assembly following a report to it under staff regulation 12.2 then in force. See Judgement No. 337, Cordovez (1984).

V. It is not for the Tribunal to impose artificial restrictions on the rule-making authority invested in the Secretary-General by the General Assembly, as the Applicant seems to contend. Only in the presence of a clear and convincing inconsistency between a Staff Rule and the "broad principles of personnel policy", a specific legislative act or provision of the UN Charter, or perhaps another Staff Rule, would a serious question as to validity be raised. Nothing of that sort is involved in this case. The Tribunal emphatically rejects the Applicant's notion that before the Secretary-General could properly adopt staff rule 104.10(d), it was first necessary for the General Assembly to have included in the Staff Regulations a specific principle relating to the effect of marriages between UN staff members and staff members of other organizations in the common system.

VI. Beyond this, it appears that the General Assembly considered staff rule 104.10(d) but took no action to revoke or modify it. See General Assembly decision 35/445 (17 December 1980). The procedure for review of Staff Rules in staff regulation 12.2 in force at the time was followed when the 1980 amendment reflected in section 104.10(d) was adopted. See A/C.5/35/9, Report of the Secretary-General to the Fifth Committee (15 August 1980). This shows not only that the General Assembly did not find any inconsistency between staff rule 104.10(d) and the "broad principles of personnel policy", but also that the General Assembly found no other cause for dissatisfaction with the rule. It follows from the foregoing that the Applicant's arguments regarding her understanding of the meaning and the application of staff regulation 3.4 resulting

from its hierarchical preeminence and her other contentions as to the invalidity of staff rule 104.10(d) are without merit.

VII. The Applicant argues that staff rule 104.10(d) should not be applied to her because her marriage occurred prior to 1 January 1980, the effective date of the provision in question. Her argument is that staff rule 104.10(d), to the extent that it deals with marriages between staff members of the UN and staff members of other organizations within the common system, was, though it does not say so, intended to apply only prospectively to marriages occurring after 1 January 1980. Stated differently, the Applicant's argument is that, since her marriage occurred before 1 January 1980, she was exempt from application of the rule, as amended, and the fact that the two children for which she claimed and received dependency benefits were born after January 1, 1980 should not adversely affect her asserted exemption. The Tribunal does not agree with the Applicant's contentions in this regard. The Tribunal finds no evidence of any intention by the Secretary-General to create a privileged group of staff members entitled to continuation of duplicate dependency benefits because of the happenstance that their marriage occurred before 1 January 1980. Accordingly, the Tribunal finds that not to be a reasonable interpretation of staff rule 104.10(d). Nor is there an improper retroactive application of the amendment to staff rule 104.10(d). In the Applicant's situation, the duplicate benefit payments which she seeks to perpetuate were directly occasioned, not by her earlier marriage, but by an event which occurred long after 1 January 1980 -- the birth of her twin children in late 1981.

VIII. The Applicant next advances a hypertechnical and highly tenuous argument as to the meaning of the words "same modifications" in staff rule 104.10(d). The Applicant would have the Tribunal thwart the plain meaning and intention of staff rule 104.10(d) by holding that it did not enlarge at all the scope of the preexisting

provisions of chapter III of the Staff Rules. The Applicant would have the Tribunal give no effect whatever to the obvious purpose of staff rule 104.10(d) of treating the situation of a staff member married to a staff member of another organization within the common system in the same fashion as UN staff members married to each other. This the Tribunal will not do. Instead the Tribunal holds that the Respondent has correctly interpreted staff rule 104.10(d). Equally without merit is the Applicant's related contention that there was some legal necessity for the Secretary-General to accompany the Staff Rule amendment which resulted in the second sentence of staff rule 104.10(d) with corresponding changes in chapter III of the Staff Rules. No such further amendments were required. The meaning of staff rule 104.10(d), as it was amended in 1980, should have been crystal clear to any reasonable person, let alone a skilled attorney such as the Applicant.

IX. If there was even the slightest question as to how the Administration interpreted staff rule 104.10(d), it was dispelled by ST/AI/273 which had been issued before the amendment of staff rule 104.10(d), and which stated, in paragraph 7:

> "The provisions of the Staff Regulations and Rules which apply in cases where both spouses are staff members of the United Nations Secretariat or where one of them is a United Nations staff member and the other is a staff member of another organization participating in the United Nations common system are indicated below ..."

The succeeding subparagraphs of the instruction specifically identified the effect on, among other things, staff assessment, dependency allowances, and post adjustment. ST/AI/273, taken together with staff rule 104.10(d), with which it was entirely consistent and therefore valid (see Judgement No. 337, Cordovez (1984)), clearly and unequivocally placed the Applicant on notice that her view regarding entitlement to dependency benefits with respect to her two youngest children was not shared by the

Administration. Moreover, in view of the advice that the Applicant received from the Principal Legal Officer, as stated in the last sentence of his letter quoted above, the Applicant and her husband should have considered ITU staff regulation 3.5(b), which the Tribunal understands was adopted in 1960 and which expressly provides:

"(a)...

(b) The family rate of post adjustment shall apply if a staff member has a spouse or child in respect of whom staff assessment at the dependency rate is applicable, regardless of where the dependants reside. When a staff member's spouse is also a staff member of the Union, the United Nations or a Specialized Agency, the adjustment shall be paid at the family rate in respect of a child only to the official having the higher grade."

The Applicant was plainly aware in 1978 when her husband was preparing to transfer from the UN to the ITU of the prohibition against duplicate dependency payments when both spouses are employed by the UN. At that time, her then oldest child became a dependent of her husband (rather than erroneously continue as her dependent) so that her husband could derive the related dependency benefits in his employment by the ITU. Subsequently, when ST/AI/273 was issued and staff rule 104.10 was amended in 1980, the Applicant must be taken to have been aware not only of the meaning of the amendment, but also the reasons for it. In these circumstances, if the Applicant felt, as she now argues, that her views were correct and those of the Administration wrong, it was incumbent on her, instead of acting on the basis of her own mistaken legal judgement, to submit the issue to the Administration for an authoritative written determination which specifically addressed the language of the staff rule, and ST/AI/273. Under ST/AI/234, paragraph 13, such a determination would have been within the responsibility of the Office of Human Resources Management[1]. If the determination had

[1] Successor of OPS

been unfavorable, the Applicant could have pursued appropriate appeal procedures including an appeal to this Tribunal. Had her views eventually been sustained, she would have received the benefits to which she was entitled retroactively.

X. In circumstances such as those presented here, the Tribunal holds that it is inappropriate for a staff member to apply for and receive benefits from the Organization before obtaining such an authoritative determination sanctioning receipt. There is no valid reason for the Applicant to have had the free use of the UN's funds prior to such a determination.

XI. Equally inappropriate is the Applicant's apparent theory that if there was some impropriety in her seeking and obtaining benefits, it was up to the Administration to discover this and notify her. Cf. Judgement No. 346, Chojnacka (1985). The Organization is entitled to a higher standard of conduct from the staff, particularly attorneys. In addition, the Tribunal rejects her theory that she could properly rely on informal advice from a member of the Legal Staff outside of the Office of Human Resources Management. The Tribunal notes, moreover, that the Principal Legal Officer, UNOG, specifically pointed out to the Applicant that his opinion should not be considered "authoritative", and that his informal advice was based only on staff regulation 3.4 and staff rule 103.7. No mention was made by the Principal Legal Officer, UNOG, of any consideration of the key staff rule involved, staff rule 104.10(d), or ST/AI/273. Hence, it is difficult to see how the Applicant could, in any event, have reasonably relied on the advice from the Principal Legal Officer, UNOG. Administrative chaos would result if staff members could with impunity obtain benefits from the Organization based on their own or other unauthorized individual notions of how the Staff Regulations and Rules should be interpreted, regardless of the manner in which they are interpreted by the Administration.

XII. In the Applicant's initial submission, other arguments are advanced which, because of their lack of merit, can also be disposed of quickly. First, the Applicant claims that the enforcement of staff rule 104.10(d) against her, which she characterizes as denying her any right to salary at dependency rate, would violate a principle of protection of the family as set out in article XVI of the Universal Declaration of Human Rights. The Tribunal notes that, in reality, the application of staff rule 104.10(d) in this case, far from undermining the protection of the family, will simply prevent a duplication of dependency benefits and maintain equality as between UN staff members. It is difficult to take seriously the Applicant's invocation of the Universal Declaration; even more so, her suggestion of divorce as the solution to the quest for duplicate benefits. The Secretary-General would not be powerless to deal with attempted wilfull evasions of the Staff Rules.

XIII. Next, the Applicant contends that staff rule 104.10(d) discriminates against staff members who are married to staff members employed by the UN or by an organization in the common system. The argument is that if a staff member's spouse is not employed by the UN but is in a private business, staff rule 104.10(d) will not apply. This issue is not before the Tribunal in this case and there is no need for the Tribunal to express any opinion with respect to it. The Tribunal notes, however, that under ST/IC/80/2 paragraph 12, there are limitations related to the earnings of a privately employed spouse that govern the eligibility of a staff member for claiming dependency benefits, and the Tribunal finds, contrary to the Applicant's contention, that staff rule 104.10(d) does not discriminate improperly against married staff members. The amendment of the rule was, in fact, adopted in part to encourage the employment of women and to combat sex discrimination. It also serves the beneficent purpose of avoiding duplication of benefits and promoting equality as between staff members. That the

Secretary-General or the General Assembly might adopt language broader in scope than the present language of staff rule 104.10(d) in no way lessens the validity of the Staff Rule as it presently exists.

XIV. Finally, the Applicant advances the claim that the application of staff rule 104.10(d) to her case amounts to discrimination against women because, she alleges, in most cases the husband will be the spouse having the higher salary level within the meaning of staff rule 103.17(c) and thus the only one entitled to dependency benefits. This argument is insufficient to overcome the express anti-discrimination purpose of staff rule 104.10(d) which the rule is reasonably calculated to achieve. The Tribunal finds no unlawful discrimination against anyone arising out of this Staff Rule which is aimed at avoiding duplication of benefits and assuring equality of treatment of staff members.

XV. In her observations on the Respondent's answer, the Applicant advances what she describes as a very important and new additional argument. Here she claims that the duplication of benefits which staff rule 104.10(d) attempts to eliminate should nevertheless be permitted because of her hypothetical conclusion that if staff regulation 3.4(c) and staff rule 103.23(b) were applicable to her in this case, they would sanction the duplication of benefits she received. The Tribunal holds that the Applicant's hypothetical contentions regarding staff rule 103.23(b) do not remove the barrier against her receipt of duplicate benefits established by staff rule 104.10(d).

XVI. Having disposed unfavorably to the Applicant of all of her substantive arguments, the Tribunal turns now to the Applicant's procedural contentions. The Applicant first maintains that the contested decision provides for an effective date of 24 December 1981, the date of the birth of the two children as to whom the

determination of duplicate benefits was made. The Applicant argues that the administrative decision can only order the discontinuance of payments for the future with the effective date being the date of the decision itself. She opposes an effective date which relates to the time in the past when the event occurred giving rise to the benefits being discontinued. There is no merit to this contention. It was entirely proper for the contested decision to describe the effective date as the date of the birth of the two children since that is what precipitated the payment of the benefits to which the Applicant was not entitled.

XVII. Next, the Applicant complains because of insufficient detail spelled out in the contested decision with regard to the amount of overpayment and the amount of each of the monthly installments for recovery of the overpayment. The Tribunal regards this as a minor procedural matter which appears to have been easily rectified by the Administration. Obviously the practice, which should normally be followed by the Administration, is to advise a staff member in reasonable detail with respect to an alleged overpayment and the manner in which recovery will be achieved. See Judgement No. 382, Noble (1987). The Tribunal finds no significant lack of due process or prejudice to the Applicant from this minor procedural irregularity, cf. Judgement No. 306, Gakuu (1983), particularly since the Applicant was herself in a position to know the difference in her compensation resulting from receipt of dependency benefits.

XVIII. Although the Applicant argues that the contested decision relating to dependency benefits was unsigned, and transmitted to her by a signed memorandum, the Tribunal, upon examination of the original document, finds it to have been duly signed.

XIX. The Applicant's main procedural argument is that the decision to recover the overpayment to her was not signed by the competent authority. For the reasons explained below, the Tribunal rejects

this argument. However, in view of the number of technical procedural contentions of the Applicant allegedly involving deprivation of due process, the Tribunal notes preliminarily that when, as here, a staff member has received funds from the Organization to which the staff member is not entitled because of a staff rule such as 104.10(d), and has done so on the basis of her own interpretation of the rule, which is in conflict with an official interpretation of the Administration, the right of the Organization to recover overpayment under staff rule 103.18 will not be defeated by purely technical procedural arguments in the absence of a compelling showing of substantial prejudice resulting from the alleged procedural deficiency.

XX. In this case the Applicant challenges the validity of the decision to recover the overpayments because it was not signed by the proper person. She argues that only the Secretary-General or his delegate, the Under-Secretary-General for Administration and Management, was competent to decide upon recovery of overpayment under staff rule 103.18(b)(ii) and administrative instruction ST/AI/234. Although the latter administrative instruction indicates that, in the absence of agreement of the staff member, a deduction for indebtedness to the United Nations must be authorized by the Secretary- General or, if the matter is delegated, to the Under-Secretary-General for Administration and Management, the Administrative Instruction on this point is plainly inconsistent with staff rule 103.18, and the latter therefore takes precedence. The Staff Rule does not require authorization by the Secretary-General in cases of indebtedness to the United Nations. The Secretary-General's authorization is required only in the case of deductions for indebtedness to third parties.

XXI. The fact that the deduction for overpayment was in the first instance authorized not by the Secretary-General or by the Under-Secretary-General for Administration and Management, but as a

routine matter by the Assistant Secretary-General for Personnel Services, or his subordinates, is scarcely a matter of great moment. To be sure, it would doubtless be desirable to correct the apparent error in the Administrative Instruction for the sake of clarity, but this does not rise to the level of nullifying the decision regarding recovery of overpayment especially since, as is clearly the case here, no prejudice at all to the Applicant can be discerned. The underlying purpose of the identification in the Staff Rules of an official designated to make a decision regarding recovery of overpayments is to assure that the official or an appropriate delegate gives consideration to the question whether overpayments should be recovered. In short, the Applicant is entitled to consideration of the matter by the appropriate official, and having received that, she has no basis for complaint.

XXII. In this regard while it is desirable that the appropriate official consider the matter before overpayments are recovered and this would normally be the practice, it is not necessarily fatal to the validity of the decision if the appropriate official considers the matter even after implementation of recovery. For if the appropriate official decided, even after recovery had been implemented, that it should not have been, he could and doubtless would reverse it retroactively. By the same token, the appropriate official can properly ratify an overpayment recovery decision with which he is in agreement after having considered it, and no prejudice to the Applicant results from this.

XXIII. Here the Applicant had the benefit of consideration of the matter by the Under-Secretary-General for Administration and Management, to whom the Secretary-General has affirmed that personnel matters, including matters of this nature, have been delegated in practice. Contrary to the Applicant, the Tribunal does not read the Secretary-General's affirmation in the narrow terms she suggests. But even if it did, the affirmation would be sufficient.

For the Under-Secretary-General independently ratified the decision regarding recovery of overpayments -- not a surprising outcome under the circumstances of this case.

XXIV. The Tribunal notes that in connection with her erroneous contention that authorization by the appropriate official must necessarily precede a decision to recover overpayments in order for the decision to be valid, the Applicant apparently misconstrues the meaning of the words "from time to time" in ST/AI/234, and repeats this in her final submission to the Tribunal. In context, those words simply mean that the Secretary-General may make numerous and general delegations -- not that each delegation must be limited in terms or to a specific period of time.

XXV. Indeed, even if the erroneous aspect of Administrative Instruction ST/AI/234 were regarded as having a binding effect despite the clear language of the more authoritative applicable Staff Rule, the Tribunal finds that the subsequent approval of the decision to recover the overpayments by the Under-Secretary-General for Administration and Management cured whatever procedural irregularity might have been entailed originally.

XXVI. From the preceding determinations in this judgement alone, the Respondent would be entitled to recover from the Applicant the entire amount of the disputed overpayments received by her with respect to dependency benefits, subject, of course, to the possible adjustment referred to in paragraph I regarding insurance premiums. In an effort to avoid this result, the Applicant has advanced a series of contentions aimed at persuading the Tribunal that her conduct was entirely innocent and in good faith and that it was the Administration that was entirely at fault. She also urges equitable and other considerations in her effort to retain some or all of the overpayments. The Tribunal is unable to agree with the Applicant's assertions (cf. Chojnacka, supra), but, as indicated below, has

taken into account the contributory negligence of the Administration.

To begin with, contrary to the Applicant's contentions, the Tribunal finds her receipt of dependency benefits for her two children to have resulted from a decision on her part to proceed with successive applications for benefits on the basis of her own interpretation of the Staff Regulations and Rules and to do so without her first seeking an authoritative determination from the Office of Personnel Services. Nor is there any indication that she suggested that her husband seek such a determination from the ITU with respect to its staff regulations.

XXVII. The overpayments are therefore recoverable by the Organization under staff rule 103.18 and there is accordingly no need in this case to consider the doctrine of unjust enrichment which the Applicant argues about extensively, on the mistaken notion that it would be the only basis for recovery by the Organization.

XXVIII. Although the overpayments to the Applicant were precipitated and perpetuated by both action and inaction on her part, the Administration is by no means blameless. Indeed, its negligence reached an astonishing level. The Tribunal is unable to understand and has received no satisfactory explanation from the Administration, why after the issue was first raised with the Applicant in September 1982, it took until 1986 before action was initiated to recover the overpayment. As best the Tribunal can ascertain, there appears to have been no comprehension on the part of those who contributed to, or were responsible for the delay, as to the existence or the meaning of staff rule 104.10(d) or ST/AI/273, and this is deplorable.

XXIX. Nevertheless, the Tribunal does not suggest that the Administration's negligence absolves the Applicant of responsibility. And as explained above, contrary to her

contentions, it surely does not demonstrate that her position is correct. Her entire position regarding entitlement to dependency benefits hinges on a highly strained and unrealistic analysis of the Rules and Regulations that is more in the nature of a search for loopholes than a straightforward approach to the normal meaning of words.

XXX. The Respondent has called to the attention of the Tribunal a communication dated 30 July 1987 announcing a determination by the Under-Secretary-General for Administration and Management to review the policy regarding recovery of overpayments to staff members, and pending elaboration of such policy "to limit to two years recovery of overpayments made to staff members in cases where such overpayments are due to action of [the] Administration and not of [the] recipient and to suspend recovery beyond two years". The Tribunal understands that pending its judgement in this case, recovery action has been suspended by the Administration, and that, quite properly, the Applicant has ceased being paid at the dependency rate. Although, for the reasons set forth above, it is questionable that the Applicant's situation would come within the Administration's interim policy, the Tribunal has concluded, without in any way signifying approval of the Applicant's conduct, that, because of the Administration's own negligence and subsequent contributory failure to act until 1986, the Applicant should receive the benefit of the interim policy announced by the Under-Secretary-General for Administration and Management. Cf. Judgement No. 124, Kahale, paragraph. I (1972).

XXXI. Consequently, the Tribunal orders that the decision concerning salary overpayments appealed from be rescinded except with respect to recovery of overpayments from the Applicant for the last two years of salary overpayments at a reasonable monthly rate to be determined by the Administration, and that any amounts of salary overpayments previously recovered and not returned to the

Applicant be applied as credits against the amount recoverable.

XXXII. In all other respects, the application is rejected.

(Signatures)

Roger PINTO
Vice-President, presiding

Ahmed OSMAN
Member

Jerome ACKERMAN
Member

Geneva, 17 May 1988

R. Maria VICIEN-MILBURN
Executive Secretary