ADMINISTRATIVE TRIBUNAL

Judgement No. 425

Case No. 450: BRUZUAL

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, Vice-president, presiding; Mr. Jerome Ackerman; Mr. Francisco A. Forteza;

Whereas at the request of Peter Celestin J. Bruzual, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit in which to file an application until 30 November 1987;

Whereas, on 25 November 1987, the Applicant filed an application, the pleas of which read as follows:

"Section II: Pleas

1. That the Secretary-General's decision, as communi- cated in Mr. Elissejev's [Director for Policy Co-ordination] letter of 20 August 1987, to dismiss [the] appellant for serious misconduct or for misconduct (whichever the decision really means) with effect from 8 December 1985 (which is assumed to be the effective date intended) be rescinded and that Mr. Bruzual be restored to his permanent contract position with the United Nations as a Senior Security Officer, Category S-3. The effective date of his restoration would be to date of his original suspension without pay, namely, 5 August 1985, and the present plea is that he receive full pay and allowances from that effective date (taking into consideration the adjustment made to restore him to pay status for the period 14 October 1985 through 8 December 1985.) (...)

2. If the Tribunal does not order No. 1 above, in line with the conclusion of the JAB [Joint Appeals Board] Panel that the Bruzual case should have been referred to the Joint Disciplinary Committee in accordance with the principle of

equal treatment, that the case, in fact, now be so referred by order of the UNAT [United Nations Administrative Tribunal].

3. That the Tribunal in its decision made clear to the Secretary-General and to the JAB that the belated/cosmetic reinstatement for pay purposes 'for almost two out of four months to compensate for the Administration's delay in coming to a final decision' does not cure the injustice done to Mr. Bruzual and the effect it had and is having on his life and career (...).

4. That the UNAT hold that equal treatment was further denied to Mr. Bruzual when his treatment and the obstacles put in his way are compared with the treatment and relief granted hundreds of UN staff members by the Administration during the so-called period of amnesty, 1 January 1987 through 31 March 1987. Under that 'agreement', even if the allegations against Bruzual (a) that he had been tardy and (b) that they had been first uncovered by the United Nations had been proved, Bruzual's subsequent actions and the restoration of the less-than-$900 (which he admitted was due to the UN and which he duly paid) would have been treated as a 'voluntary submission' and the 'disparity would be considered the result of an error made by the staff member.' (...).

5. That the UNAT find, on another ground, that reversable error exists in this case, because the Secretary-General's Director of Personnel shunted aside Mr. Bruzual's request for a review by the Secretary-General under staff rule 111.2 (a) by asserting that, if a staff member so desired, he 'may file an appeal against a disciplinary action directly with the Joint Appeals Board without first seeking an administrative review.' And, further that 'your letter has been forwarded to the Secretary, Joint Appeals Board ...' (...).

6. That the Tribunal order the United Nations to reimburse [the] Applicant for 1985 income taxes, which Applicant duly requested and which are due to [the] Applicant. (Note: The United Nations refused to so reimburse [the] Applicant stating that the 'United Nations will not entertain your request for reimbursement of 1985 income taxes.' (...).

7. If the Tribunal finds this application well founded but does not order the specific relief requested above, the Tribunal is requested to order compensation to the Applicant under article 9 of its Statute of the equivalent of two years' net base salary of the Applicant, plus such additional amount as it considers justified in this exceptional case.

8. The Tribunal is further requested to order such other relief, based on its findings and jurisprudence or as it otherwise finds desirable and necessary."

Whereas the Respondent filed his answer on 31 May 1988;

Whereas the Applicant filed written observations on 28 July 1988;

Whereas, on 26 September 1988, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent and on 7 October 1988, the Respondent provided answers thereto;

Whereas the Tribunal heard the parties at a public hearing on 17 October 1988;

Whereas, on 18 October 1988, the Respondent submitted an additional document;

Whereas the facts in the case are as follows:

Peter Celestin J. Bruzual, a national of Trinidad and Tobago, as well as a permanent resident of the United States of America, entered the service of the United Nations on 19 August 1968, as a Security Officer in the Office of General Services. He initially served on a series of short-term and fixed-term appointments until 24 March 1969, when he was granted a probationary appointment. On 1 August 1970, his appointment became permanent. At the time of the events that gave rise to the present proceedings, the Applicant worked as a Senior Security Officer at the Special Services Unit of the Security and Safety Service, Office of General Services.

Since the Applicant is a permanent resident of the United States of America, he is subject to payment of United States taxes on his UN earnings.Whenever any staff member paid from the regular budget is subjected to both staff assessment and to national income taxation in respect of the salaries and emoluments paid to him or her, by the United Nations, the Secretary- General is authorized, under staff regulation 3.3(f), to refund to him or her, by way of double taxation relief, the amount of staff assessment collected

from him or her under the Staff Regulations and Rules, provided that "the amount of such refund shall in no case exceed the amount of his income taxes paid and payable in respect to his United Nations income."

As far as United States citizens or permanent residents of the USA are concerned, the procedure set forth in information circulars issued from time to time, requires that such staff members annually submit a copy of their income tax returns to the Income Tax Unit of the United Nations, along with a "Request for Settlement of Income Tax" form. The staff member certifies on this form (a) that any cheque received from the United Nations in response to his requests has been or will be used promptly and solely to meet his income tax obligations; (b) that he will provide the United Nations, upon request, with acceptable proof of taxes paid, or other documents as may be required to verify the computation of his taxes; (c) that he will notify the United Nations promptly if for any reason it is necessary for him to file a return which is different from the return he has submitted and furnish a copy of the new return to the United Nations; (d) that he will refund to the United Nations any over-payment of tax, together with any interest received as a result of any such over-payment; (e) that he has utilized all exemptions and deductions to which he is entitled; (f) that any funds received from the UN for the purpose of meeting income tax liabilities of previous years have been paid to the appropriate tax authorities and that any part of such money refunded to him by the tax authorities, has been refunded to the UN. The staff member also certifies that the signed copy of the income tax return that he submits to the United Nations is a true, correct and complete copy of his final return and correctly reflects his income tax liability for the particular year and is the basis on which settlement for that year is requested. The United Nations then reimburses the staff member the amount of tax he or she paid.

On 17 February 1984, the Applicant submitted a Request for Settlement of Income Tax form, attaching a signed copy of his income

tax return for 1983 for which he made all the certifications listed above. The Applicant had declared a taxable income of $51,720.43 and a tax liability of $12,702.18. In accordance with the procedure set forth above, the United Nations then reimbursed him $11,909.43 for federal income tax in respect of his UN income and $5,238.74 for New York State income tax.

On 15 April 1985, the Internal Revenue Service (IRS) sent the Applicant a notice assessing him an additional $3,337.95 in self-employment (social security) tax for the 1983 tax year. The Applicant, being a citizen of Trinidad and Tobago employed in the US by the UN, is not subject to the self-employment tax applicable to US citizens. Since the assessment notice did not apply to him, he brought it to the Payroll Unit and requested a letter certifying that he was not a US citizen. He was given a form letter to that effect.

However, in reviewing the IRS document, the Payroll Unit discovered that the amounts of taxable income and tax liability shown on the IRS notice for 1983 were different from the amounts declared by the Applicant on his Request for Settlement form for the same year. The Applicant had reported taxable income of $51,720.43 and tax liability of $12,702.18 to the United Nations, and taxable income of $48,563.90 and tax liability of $11,444.00 to the IRS.

On 13 June 1985, the Director of the Accounts Division wrote to the Controller describing these discrepancies and notified him that, based on the amounts reported to the IRS, the United Nations should have reimbursed the Applicant $11,099.00, and not $11,909.43. The Applicant had been overpaid by the United Nations the sum of $810.43 in respect of his federal tax returns. The matter was referred to the Internal Audit Division (IAD), which conducted an audit investigation.

The auditors interviewed the Applicant on 27 June, 3 and 8 July 1985. On the first interview, the Applicant was asked to fill out a questionnaire regarding his 1983 tax returns. He stated in the form that he had purchased a house in 1983, financed with a

mortgage from the "Cross (?) Mortgage Co." He also stated that all the information was submitted "to the best of [his] recollection", and that since he had not prepared the tax returns himself, if there had been a mistake or omission, he was prepared to reimburse the United Nations.

On 3 July 1985, the Applicant filled in and signed another questionnaire in which he alleged that, on 9 August 1984, he had filed an amended return for the taxable year 1983, without notifying the United Nations or refunding the overpayment to the United Nations. He reiterated that he had become an owner of his house in the "early part of 1983", with a mortgage from the Cross Island Mortgage Co. He certified that this information was correct to the best of his knowledge and submitted a copy of his alleged amended tax return, dated 9 August 1984. On a third interview, on 8 July 1985, the Applicant was asked to explain why he had not originally claimed the additional deductions shown on the copy of the alleged amended return. He stated that it was the first time he had owned a house and had not been aware that mortgage interest and real estate taxes were deductible. The Applicant was asked to provide certified copies of the actual returns he had filed with the IRS for 1981, 1982 and 1983. He agreed to do so. He was warned of the seriousness of having failed to reimburse the UN the amount of the tax refund paid to him by the taxing authorities after filing the alleged amended return, and he was advised to seek the assistance of a member of the panel of counsel.

In reviewing the alleged amended return dated 9 August 1984, the auditors noted that it set forth a tax liability which, in total, was identical to that claimed by the IRS in their 15 April 1985 notice to the Applicant, despite the IRS' erroneous inclusion of self-employment tax. Furthermore, in verifying the date of purchase of his house with the Office of the City Register, Queens County, the IAD established from the mortgage deed that the Applicant had purchased his home in 1976 and not 1983 as he had stated in the interviews.

After the Applicant submitted the alleged amended return to the Tax Unit, he was asked to reimburse the United Nations $872.40, representing the over-payment of $810.43 for federal tax and $61.97 for New York State tax. The Applicant paid this amount on 16 July 1985.

On 17 July 1985 the Applicant informed IAD that his attorney had advised him not to answer any more questions. He was, however, asked to confirm the date of purchase of his house, because of his earlier statement that he could not recollect all the details. He replied that he was sure of the date and did not wish to change any of the facts stated in previous interviews.

On 23 July 1985, the Director of the IAD submitted his report on the investigation. He summarized the contents of the discussions held with the Applicant at the different interviews. He also stated that in reviewing Mr. Bruzual's alleged amended return and IRS official notice, "it was noted that the amended return, dated 9 August 1984 and allegedly submitted on that date, contained information which was provided by the IRS in their 15 April notice." He concluded "... it would appear that the alleged return may have been filed subsequent to the receipt of the 15 April 1985 IRS notice and not on 9 April 1984." In addition, "on receipt of the evidence that he had purchased [his] house in 1976, [IAD] had intended to ask him to request copies of his filed returns since 1976 but decided that it would no longer be necessary since it has already been established beyond a reasonable doubt that he did commit a serious misconduct."

The IAD referred the case to the Director, Division of Personnel Administration (DPA) for appropriate action.

On 2 August 1985, the Officer-in-Charge, DPA, Office of Personnel Services (OPS) transmitted to the Applicant a copy of the IAD report, and advised him that unless he could prove to the satisfaction of the Organization that the matters contained in the report did not fully and accurately reflect the truth, his behaviour "would constitute a violation of the standards of integrity expected

of international civil servants as well as serious misconduct". He was asked to submit his comments or explanations by 16 August 1985, and advised to avail himself of the assistance of counsel. He was informed that the Secretary-General had decided to suspend him from duty without pay under staff rule 110.4, effective from the date of receipt of that memorandum, without prejudice to his rights, pending completion of the investigation of the charges against him.

The Applicant requested, and was granted, two extensions of the time in which to respond. In his reply dated 19 September 1985, he admitted that he had failed to "promptly" notify the UN that he had filed an amended tax return. He asserted that by seeking assistance from the UN to avoid paying the self-employment tax and by later handing the amended tax return to IAD on 3 July 1985, he had in fact fulfilled his obligation to notify the UN of the amended return. In addition, he had refunded the UN the over-payment of $872.40 in July 1985 after the IAD had interviewed him. He explained the misrepresentation as to the date of purchase of his house as "confusion". He stated that their present house "... is the first home we have ever 'owned'; it is still not 'ours'...". It was only when a friend who assisted him and his wife in financial matters pointed out to them that there were certain possible deductions that they had "missed", that he realized the mortgage was deductible. He stated that his 1981, 1982 and 1984 returns were "as indicated on the returns I filed with the United Nations." He asked the Director, DPA, to take into consideration his "loyal and effective service with the UN for some 17 years", and to lift his suspension without pay. He stated that although at times he was "confused and from memory answered some questions inaccurately ..." he had tried to "cooperate with the United Nations in getting this matter settled."

Having reviewed the charges and the response, including a letter dated 21 September 1985 from the Applicant's counsel to the Director, DPA, OPS, on 14 October 1985, the Assistant Secretary-General for Personnel Services recommended that the

Applicant be summarily dismissed for serious misconduct in accordance with staff regulation 10.2. The recommendation was independently reviewed by the Legal Counsel and the Under-Secretary-General for Administration and Management. The final decision was not taken until 8 December 1985.

On 18 December 1985, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had decided to summarily dismiss him for serious misconduct, in accordance with staff regulation 10.2, effective 8 December 1985, and that the Secretary-General had also decided "exceptionally" that, for the period 14 October until 8 December 1985, his suspension pending investigation should be with pay.

On 31 December 1985, the Applicant asked the Secretary-General to review the administrative decision to summarily dismiss him. In a reply dated 20 January 1986, the Assistant Secretary-General for Personnel Services informed the Applicant that since a staff member may, under staff rule 111.2(b), file an appeal against a disciplinary action, directly with the Joint Appeals Board (JAB) without first seeking administrative review, his letter had been forwarded to the Secretary of the JAB. On 6 February 1986, the Applicant informed the Assistant Secretary-General for Personnel Services that he was well aware of his rights but still sought administrative review. Having received no reply, on 6 March 1986, the Applicant lodged an appeal with the JAB. The Board adopted its report on 18 June 1987. Its conclusions and recommendation read as follows:

"Conclusions and recommendation

28. The Panel first concludes that, in light of the evi- dence presented to it, the appellant's behaviour constitutes a violation of the standards of behaviour or conduct of international civil servants as well as misconduct.

29. The Panel concludes next that the Administration has correctly advised the appellant that he could file an appeal against disciplinary action directly with the JAB under staff rule 111.2(b), without first seeking an administrative

review, and that this did not constitute a lack of due process.

30. The Panel further concludes that the decision to suspend the appellant without pay was not tainted by prejudice because the appellant was reinstated for pay purposes for almost two out of four months to compensate for the administration's delay in coming to a final decision.

31. The Panel, however, concludes that in accordance with the principle of equal treatment, the appellant's case should have been referred to the JDC [Joint Disciplinary Committee] for advice, before a decision to take disciplinary action was taken. The Panel strongly feels that in cases where a staff member is suspected of fraudulent behaviour, the decision to accord the staff member the benefits of staff rule 110.3(a) should not be based on the rank of the staff member, but solely on strength of the evidence.

32. Therefore, the Panel recommends that the decision of 8 December 1985 to summarily dismiss the appellant for serious misconduct be rescinded and that instead the appellant be dismissed for misconduct under staff rule 110.3(a), effective on the same date."

On 20 August 1987, the Assistant Secretary-General for Human Resources Management[1] informed the Applicant that:

"The Secretary-General has re-examined your appeal in the light of the Board's report, which undertook a full and complete hearing of your appeal according you the same rights of due process as would have occurred had your case initially been considered by a Joint Disciplinary Committee. The Secretary-General has confirmed his original decision that you were guilty of fraud and behaviour that constitutes serious misconduct. He noted, however, that the JAB recommended that you be dismissed for misconduct rather than serious misconduct. Since acceptance of that recommendation would have to be preceded by another full hearing pursuant to staff rule 110.3(a) - which hearing would serve no useful purpose after the JAB proceeding - the Secretary-General has decided to accept that recommendation only to the extent of giving you the benefit of the principal practical consequence of such a recommendation, i.e., that you be paid compensation in lieu of three months notice of termination, which payment would have been payable pursuant to staff rule 109.3 if you had been dismissed for misconduct.

[1] Successor of OPS

...".

On 25 November 1987, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The decision by the Secretary-General to summarily dismiss the Applicant should be rescinded and he should be reinstated to full employment.

2. The Respondent denied the Applicant due process in not referring the case to the Joint Disciplinary Committee in accordance with staff rule 110.2.

3. The Applicant was denied equal treatment in that he was not allowed to benefit from an amnesty programme instituted by the Secretary- General for other staff members who had tax problems.

4. The Applicant was held to a stricter standard of proof than required by an agreement between the Administration and the staff instituting the amnesty programme.

Whereas the Respondent's principal contentions are:

1. The UN Charter and the Staff Regulations oblige the Secretary-General to select and retain staff of the highest standards of integrity and, therefore, he has the responsibility of determining definitively whether a staff member meets that standard.

2. The summary dismissal of the Applicant was preceded by ample opportunity for the Applicant to state his case and the actual decision was not improperly motivated.

3. The claim that the Secretary-General has improperly withheld reimbursement of 1985 taxes is not properly before the Tribunal.

The Tribunal, having deliberated from 12 October 1988 to 27 October 1988, now pronounces the following judgement.

I. The Applicant in this case, who had an excellent record of performance, challenges the Secretary-General's decision dated 20 August 1987 confirming his "original decision that [the Applicant was] guilty of fraud and behaviour that constitutes serious misconduct". The earlier decision was dated 18 December 1985. Under it, the Applicant was summarily dismissed for serious misconduct in accordance with staff regulation 10.2.

The summary dismissal was based on findings that (1) the Applicant had filed a US income tax return in respect of 1983 which was different from that furnished to the United Nations and which entitled the Applicant to receive tax refunds which he did not promptly remit to the United Nations; (2) the Applicant provided false certifications to the United Nations regarding these transactions, misrepresented facts surrounding the purchase of the Applicant's home and his claims for deductions, and (3) the Applicant failed to furnish information required to determine the correctness of tax reimbursements paid to him by the UN and to establish his integrity in connexion with these matters.

The Applicant also contests the Secretary General's decision to reject the Joint Appeals Board (JAB) conclusion that the case should have been referred to the Joint Disciplinary Committee (JDC). In addition, the Applicant urges that the Secretary-General's decision to pay additional compensation to the Applicant was inadequate and that the Applicant was denied equal treatment in not receiving the benefits of a so-called tax amnesty programme. Finally, the Applicant disputes the Secretary-General's unwillingness to review his summary dismissal under staff rule 111.2(a), and asks for reimbursement of 1985 income taxes as well as other relief.

II. The UN tax reimbursement system has previously been described by the Tribunal. Cf. Judgement No. 237, Powell (1979), paragraphs VIII-XIII (1979). In brief, all UN employees are subject to staff assessment -- a percentage of their salaries related to national

income tax liabilities. All staff assessment thus withheld is placed in a so-called equalization fund held by the UN. The operation of this fund is described in Financial Rules 105.2-105.5. It can be seen from these rules that any over-reimbursement of staff members causes direct financial loss to the taxing country and also might have a possible adverse effect on other Member States.

III. In order to obtain reimbursement for taxes, a staff member must submit to the UN a form which, among other things, requires the staff member to certify certain facts forming the basis for reimbursement. These include a certification that the copy of the tax return submitted to the UN is a true copy of that going to the tax authorities and that tax liabilities have been minimized by filing joint returns and claiming all allowable exemptions and deductions. In addition, it must be certified that proper use has been made of UN tax reimbursement cheques (i.e., solely for the purpose of meeting income tax liabilities by paying taxes), and that no part of the reimbursed amount has been refunded by the appropriate tax authorities which has not been repaid to the UN.

IV. In the Spring of 1985, the Applicant received from the US Internal Revenue Service (IRS) a notice of deficiency asserting that he had underpaid his 1983 taxes by over $3,000 because he neglected to include a self-employment tax on his 1983 return. It appears that the IRS was mistaken in seeking to collect a self-employment tax from the Applicant. To try to get the situation corrected, the Applicant sought assistance from appropriate UN officials and gave them a copy of the communication he had received from the IRS. When the UN officials compared the data on the IRS form with UN records, they discovered a discrepancy between the tax shown as having been paid on the former, and the tax liability reported to the UN by the Applicant for purposes of reimbursement. Since the latter figure was greater than the former, inquiries and requests for data were directed to the Applicant by the Administration.

V. The Applicant attempted to explain the discrepancy by saying that in August 1984, he had filed an amended 1983 tax return to reflect a deduction for mortgage interest on a home purchased in 1983, a deduction that he said he was unaware of in 1983. He said that he had forgotten to furnish a copy of the amended return to the UN and had also forgotten to turn over to the UN the related tax refund. He then furnished to the UN a copy of the purported amended return and gave the UN a cheque for the amount of the related tax refund.

VI. The amended return which the Applicant claimed he filed in August 1984, by a strange coincidence, produced a tax liability for 1983 in exactly the same amount as the IRS notice showed due for that year. Yet that notice was not received by the Applicant until long after the claimed filing of the amended return and the amount claimed by the IRS included over $3,000 in self-employment tax for which the Applicant was not liable. Moreover, the IRS records that were later made available to the UN failed to confirm the filing of any amendment of the 1983 return in 1984 or at any other time. And it turned out that the home, which the Applicant claimed was purchased in 1983, had actually been purchased several years earlier.

VII. It can be seen from the foregoing that the alleged facts which were of key importance to the Applicant's claim of innocent forgetfulness did not withstand close scrutiny.

VIII. The JAB reviewed the facts carefully and concluded that the Applicant had indeed been guilty of misconduct in having filed income tax returns for 1982 and 1983 with the IRS that were different from the returns purportedly filed which the Applicant submitted to the UN and which provided the basis on which he received reimbursement for taxes paid. The JAB also found that,

contrary to the Applicant's claim, he had not filed with the IRS an amended return dated 9 August 1984, but in fact on 28 June 1985, one day after he had been interviewed by UN auditors regarding the propriety of his tax reimbursements, he filed an amended return with respect to 1982. The seemingly extraordinary coincidence noted above with regard to the amount of the tax liability shown by the purported amended 1983 return was never satisfactorily explained by the Applicant. The inference properly drawn from that, and from the absence of proof that an amended return was actually filed with the IRS in 1984, was that the Applicant had engaged in fraudulent manipulations. In addition, the JAB noted that the Applicant had furnished other false information during the course of the investigation by the UN auditors and found that the Applicant's behaviour constituted "a violation of the standards of conduct of international civil servants as well as misconduct". The JAB also concluded that the initial decision to suspend the Applicant was not tainted by extraneous considerations, prejudice or a lack of due process. However, the JAB recommended that, because it thought that the Applicant had not received equal treatment with respect to referral of the case to a JDC, his dismissal should be for misconduct rather than "serious" misconduct.

IX. There is ample evidence supporting the findings by both the JAB and the Secretary-General of impropriety on the part of the Applicant in connexion with his reimbursement from the UN for alleged income tax payments. The Tribunal is particularly impressed in this regard by the evidence of different tax returns, the delay in refunding to the UN monies admittedly owing to it, misrepresentation regarding the date of acquisition of the Applicant's home, and misrepresentation regarding the filing of amended tax returns by the Applicant. The Tribunal will not lightly overturn consistent factual or credibility determinations by the Secretary-General and a JAB in connexion with fraud against the Organization. Based on its own review and in the absence of

compelling evidence of mistake, prejudice or other extraneous considerations, none of which are present here, the Tribunal concurs in the factual and credibility findings in this case.

X. The Tribunal has held consistently that the Secretary-General has broad discretion with regard to disciplinary matters and this includes determinations of what constitutes serious misconduct as well as the appropriate discipline. There is not the slightest question that tax fraud, as well as wrongful certifications related to tax reimbursement, may reasonably be regarded as serious misconduct warranting summary dismissal and that the Secretary-General acts well within his discretion in so determining. Cf. Judgement No. 424, Ying (1988) and cases cited therein.

XI. In this case, the JAB believed that the case should have been referred to the JDC because, as the Tribunal has been informed by the Respondent, in the recent past a case involving a higher level UN official charged with fraud in the receipt of an education grant was referred by the Secretary-General to the JDC. This led the JAB to consider the failure by the Secretary-General to refer the Applicant's case to a JDC as unequal treatment. The Tribunal however, finds that the JAB's analysis on this point was flawed, and that therefore, its recommendation that the dismissal be for misconduct rather than "serious misconduct" was erroneous. To begin with, once the Secretary-General properly concludes, as here, that summary dismissal for serious misconduct is warranted, staff regulation 10.2 makes it plain that there need be no referral to the JDC. But it is still within the discretion of the Secretary-General in any given case, where referral to the JDC is not required, to decide whether he would be aided by such a referral. That discretion is, of course, not unlimited however and may not abused on the basis of favoritism. As the Respondent pointed out in the oral proceedings, the question whether to utilize the JDC in serious misconduct cases is decided on the basis of such considerations as

whether the facts are unclear, the documentary evidence is insufficient, or there is doubt as to intent. Thus, the fact that the Secretary-General may so conclude in an individual case does not mean that he is required to reach the same conclusion in every other arguably similar case. If it did, staff regulation 10.2 would become a dead letter. The Tribunal also notes that information was furnished by the Respondent during the oral proceedings showing the absence of favoritism on the basis of rank in the disciplinary action taken in fraud cases.

There may well be different considerations prompting the Secretary-General to utilize the JDC procedure in one case involving serious misconduct and not in another. Tax fraud cases may have implications and potential consequences that are entirely different in scope and nature from other types of serious misconduct, and there may even be such differences as between tax fraud cases themselves. It is not for the Tribunal to question exercises of discretion by the Secretary-General in serious misconduct cases, as to whether it would be of assistance to utilize the JDC procedure in the absence of evidence of personal prejudice or similar arbitrary and capricious considerations. Nothing of that sort has been shown here.

XII. The Applicant argues that, because of the relatively small amount of money said to be involved and to have been repaid, his conduct should not have been treated as serious misconduct. There is no merit to this contention. It makes no difference how much is involved in tax fraud against the Organization. Such fraud is, per se, serious misconduct which warrants summary dismissal. Equally important, the amount is immaterial when, as here, certifications by a staff member to the Organization with respect to tax reimbursement are proven false. Because the integrity of the entire tax reimbursement system is dependent on the ability of the Organization to rely with confidence on the certifications furnished by staff members (see Report of the Secretary-General A/42/437(1987), they

are responsible personally and unqualifiedly for false or inaccurate certifications. Cf. Judgement No. 424, Ying (1988). The Secretary-General may properly conclude that this, independently, is serious misconduct warranting summary dismissal, and that, in order to close the door on inventive and imaginative explanations that fertile minds always seem able to devise, false certifications will not be excused at all, and that only in the presence of strong evidence of innocence will an excuse be considered for inaccurate certifications.

XIII. With respect to the Applicant's claim that the Secretary-General acted improperly in declining to review the summary dismissal under staff rule 111.2(a) before submission of the matter to the JAB by the Applicant, the Tribunal has reviewed and is in accord with the conclusion of the JAB that this contention is without merit. Cf. also Judgement No. 424, Ying (1988).

XIV. Finally, with respect to the Applicant's claims that the Secretary- General denied equal treatment in not according to the Applicant the benefits of a tax amnesty programme announced in December 1986, see ST/IC/86/67, the authoritative document describing the programme, the Tribunal has reviewed the findings and the conclusions of the JAB and agrees with them. The Tribunal sees no merit in the Applicant's contention that he voluntarily brought to the attention of the Administration his over- reimbursement and made prompt refund. In fact, the Administration learned of the situation only because the Applicant brought to its attention an entirely different self-employment tax problem on which he sought assistance from the Administration. It was as a result of analysis of data furnished by the Applicant in connexion with the self-employment tax problem that the Administration discovered that the Applicant had been over-reimbursed. In short, the Applicant inadvertently caused his own undoing. This is vastly different from voluntarily revealing a problem and seeking amnesty for it.

XV. The Secretary-General has also faulted the Applicant for his failure to produce IRS certified copies of tax returns filed by the Applicant. To some extent this failure was overcome by IRS summary transcripts which were obtained and which were considered by the JAB. However, the Secretary-General is correct in insisting that the Applicant is obliged to obtain and furnish certified copies of tax returns upon request. The terms of the certifications make this clear. In view of obstacles, which in the past, have prevented or hindered the Organization in obtaining access to data from tax authorities, it appears to the Tribunal that the interests of the Organization in discovering and deterring fraud cannot be adequately protected unless each staff member receiving tax reimbursement is held fully accountable for the furnishing of proper substantiating evidence when asked to do so. The burden of any failure to do so must, therefore, be borne by staff members and in this case by the Applicant. The Tribunal considers that there is no valid reason why the Organization should not on a routine and confidential basis obtain certified copies of tax returns with respect to staff members receiving tax reimbursement, in order to be able to verify the accuracy of staff members' certifications. The Tribunal appreciates that with the passage of time it may become difficult for staff members to obtain certified copies of their tax returns from the IRS or local tax authorities, but this does not relieve them of the responsibility and shift it to the Organization. Accordingly, it may be prudent for staff members who wish to avoid potential future problems in responding to tax inquiries by the Organization, to request from the taxing authorities simultaneously with the filing of their tax return, or any amendment thereof, a copy with each page certified and retain it among their records against the possibility of an inquiry from the Organization.

XVI. With respect to the Applicant's claim for damages related to the alleged delay in the decision, the Tribunal notes that under all

of the circumstances, particularly the time needed to investigate and the failure to furnish IRS certified copies of returns, there was no unreasonable delay. Moreover, the Secretary-General's decision, following the JAB recommendation to pay the Applicant salary in lieu of notice of termination, was more than adequate compensation to the Applicant for any possible delay.

XVII. With respect to the claim that the Secretary-General has improperly withheld reimbursement of 1985 taxes, the Tribunal agrees with the contention of the Respondent that since this matter has not been subject to the advice of a JAB it is not properly before the Tribunal under article 7.2 of the Tribunal's Statute.

XVIII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Roger PINTO
Vice-President, presiding

Jerome ACKERMAN
Member

Francisco A. FORTEZA
Member

New York, 27 October 1988

R. Maria VICIEN-MILBURN
Executive Secretary