

ADMINISTRATIVE TRIBUNAL

Judgement No. 479

Cases No. 497: CAINE  
No. 511: CAINE

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

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

Whereas, at the request of Augustus Fahnwulu Caine, a former  
staff member of the United Nations, the President of the Tribunal,  
with the agreement of the Respondent, extended to 31 January 1989,  
the time-limit for the filing of an application to the Tribunal in  
case No. 497 (hereinafter referred to as "the first case");

Whereas, on 31 January 1989, the Applicant filed an  
application in the "first case", the pleas of which read in part as  
follows:

"II. PLEAS

7. The Applicant respectfully requests the Administrative Tribunal:

...

(8) To order the Secretary-General:

(a) To rescind his decision of 20 September 1988,  
arbitrarily and capriciously rejecting the  
unanimous recommendation of the JAB [Joint  
Appeals Board] to pay the Applicant  
compensation for the interest on the withdrawal  
settlement of his pension benefits due from the  
Pension Fund since the middle of 1982,  
constituting thereby a 'miscarriage of  
justice'.

- (b)To pay the Applicant compensation for the interest on the withdrawal settlement of his pension benefits due from the Pension Fund since the middle of 1982 as unanimously recommended by the JAB, as well as interest on the amount of the said compensation from the date of the Respondent's decision of 20 September 1988 until the date of actual payment of the said compensation.
- (9)To award the Applicant appropriate amount of damages to the extent of his salary and allowances, with interest, as well as contributions on his behalf and on behalf of the United Nations to the Pension Fund, with interest, retroactive from 29 May 1982, by virtue of the fact that the Administration wilfully kept him on the Payroll of the Organization with ulterior motives, as aforesaid, since 29 May 1982.
- (10)To award the Applicant appropriate and adequate compensation for the considerable financial loss and severe moral injuries suffered by him as a direct consequence of the arbitrary and capricious actions taken by the Respondent with ulterior motives, as aforesaid.
- (11)To award the Applicant appropriate and adequate compensation for the unreasonable delays in the JAB procedures, constituting thereby a 'denial of justice'.
- (12)To award the Applicant, as legal costs, US\$3,000.00, as well as appropriate amount representing his travel and other expenses in respect of which a statement of expenses shall be submitted to the Tribunal in the course of the proceedings."

Whereas the Respondent filed his answer on 31 March 1989;

Whereas the Applicant filed written observations on 30 May 1989;

Whereas, at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 December 1988, 31 January, 28 February, 30 April and 31 May 1989, the time-limit for the filing of an application in case No. 511 (hereinafter referred to as "the second case");

Whereas, on 31 May 1989, the Applicant filed an application in the "second case", the pleas of which read in part as follows:

"II. PLEAS

7.The Applicant respectfully requests the Administrative Tribunal:

...

(21)To order the Respondent, pursuant to article 9 of its Statute:

(a) To rescind his decision of 10 August 1988 to maintain his decision of 28 May 1982, summarily dismissing the Applicant from the service of the Organization.

(b) To reinstate the Applicant in the service of the Organization retroactive from 29 May 1982.

(c) To pay the Applicant his salary and allowances for the last two weeks of May 1982, which were arbitrarily and capriciously withheld by the Respondent on the pretext of the alleged irregularities in the secret social welfare payments made to the members of the Namibian groups rival to SWAPO [South West Africa People's Organization].

(d) To pay the Applicant his salary and allowances retroactive from 29 May 1982 until the implementation of the judgement on this case.

(e) To make appropriate contributions on behalf of the Applicant and of the Organization to the United Nations Joint Staff Pension Fund retroactive from 29 May 1982.

(22)To reinstate the Applicant in the medical and dental insurance programmes of the United Nations retroactive from 29 May 1982, but to be effective from the date of the judgement on this case.

(23)To award the Applicant appropriate and adequate compensation for considerable financial loss and severe moral injuries suffered by him during the last seven years as a direct consequence of the

Respondent's arbitrary, capricious, discriminatory and prejudicial decision of 28 May 1982, summarily dismissing him from the service of the Organization on the pretext of the alleged irregularities in the secret social welfare payments made to members of Namibian groups rival to SWAPO.

(24)To award the Applicant appropriate and adequate compensation for the unreasonable delays in the JAB procedures for over six years, thereby causing a 'denial of justice' in his appeal to the JAB.

(25)To hold oral proceedings on his case in order to hear the Applicant and other witnesses concerned."

Whereas, on 20 June and 20 July 1989, the Applicant amended his pleas, requesting the Tribunal:

"...

7. (25)To hold oral proceedings on the case in order to hear the Applicant and other witnesses, particularly the following:

...

(26)To award the Applicant as legal costs a sum of [US]\$3,000.00."

Whereas the Respondent filed his answer on 14 October 1989;

Whereas the Applicant filed written observations on 24 November 1989;

Whereas, on 19 March 1990, the President of the Tribunal ruled that no oral proceedings would be held in the cases;

Whereas, on 29 March 1990, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent and on 5 and 12 April 1990, the Respondent provided answers thereto;

Whereas, on 20 and 25 April and 2 May 1990, the Applicant commented on the Respondent's submissions;

Whereas the facts in the above mentioned cases are as follows:

Augustus Fahnwulu Caine entered the service of the United Nations on 21 October 1970. He was offered a probationary appointment at the P-5, step I level, as a Senior Political Affairs Officer in the Office of the Commissioner for Namibia (OCN), Department of Trusteeship and Non Self-Governing Territories. On 1 October 1972, he was granted a permanent appointment. On 1 October 1976, he was promoted to the D-1 level and on 1 January 1980, to the D-2 level. At the time of the events that gave rise to the present proceedings, the Applicant acted as Director of OCN. The Applicant was responsible in that capacity, for administering, in accordance with the U.N. Financial Rules and Regulations, the United Nations Fund for Namibia, a fund for the "provision of scholarships and of a comprehensive educational and training programme for Namibians with particular regard to their future administrative responsibilities in Namibia" (the Fund). The Applicant was one of two certifying officers for payment of scholarship and welfare funds to Namibian recipients.

In a memorandum dated 18 March 1982, the Director, Internal Audit Division (IAD), informed the Applicant that in conducting a preliminary audit of the administrative and financial aspects of OCN for the period 1980-1981, he had "identified serious deficiencies in internal control, including the lack of proper support documentation and no division of responsibilities in certain areas". In particular, he had noted that "substantial payments made during 1980-1981 for social and medical assistance" from the Fund "were not fully documented" and that consequently, he had been "unable to determine that the payments were made for the purposes intended and that the payees actually received the amounts disbursed". The Applicant was asked "to produce, as soon as possible, the appropriate evidence to justify and substantiate" payments made during the period under review to 35 individuals listed in an annex to the memorandum, "amounting to approximately US\$200,000". In a reply dated 18 March 1982, the Applicant informed the Director, IAD, that he had sought the Controller's assistance "to establish proper guidelines and

procedures", and that pending the establishment of such procedures, he was suspending all future payments to Namibians. In addition, he stated that the decision to provide assistance to the 35 Namibians listed in his memorandum had been taken "after careful consultation between [Mr. Ahtisaari] the [then] Commissioner for Namibia and the Rapporteur of the Fund for Namibia ...".

On 23 March 1982, the Applicant informed the Director, IAD, that he did not possess any written evidence concerning payments made to payees Nos. 1 through 22. He confirmed that those individuals had not submitted written requests for funds, asked for travel documents or requested return tickets from the U.S.A. overseas. Some evidence was available for 13 others and he would provide it to the Director, IAD, before departing on a mission. He stated however, that all cases listed in annex A had been "considered and verbally approved" by the then Commissioner for Namibia. On the next day, the Applicant provided to the Director, IAD, the two addresses "known to [his] office" for the first 22 individuals. Upon the Organizations's later investigation none of those individuals was found to have been residing at those addresses. He asserted that he had reason to believe that those individuals had been "brought here [to the U.S.A.] and returned by the Democratic Turnhalle Alliance [a Namibian group rival to SWAPO]." He also stated that "the practice of assisting needy Namibians and cashing their cheques was initiated as early as 1964 through arrangements made by [the] former Commissioner ... with the Chemical Branch Bank". This practice had been continued since. In this connection, the Applicant attached a copy of a letter dated 4 February 1981, in which he had allegedly sought the Bank's co-operation to cash cheques endorsed by payees and presented to the Bank by OCN. In response to a request by the Organization regarding this letter, an officer of the Bank, in a handwritten note at the bottom of the page, wrote: "To our knowledge we do not have this letter on file".

On 24 March 1982, the Secretary-General approved recommendations by the then Under-Secretary-General for

Administration, Finance and Management, that the Applicant be instructed to defer his mission overseas and remain at Headquarters and that the Applicant be relieved of his duties as Certifying Officer.

On 26 March 1982, Mr. Ahtisaari, the former Commissioner for Namibia, advised the Director, IAD, that he had no recollection of discussing with the Applicant payments to the 22 Namibians and that although he did not generally review welfare payments, in accordance with U.N. Financial Rule 110.2(a), Certifying Officers were responsible for submitting the appropriate support documentation to the Controller before authorizing any payments.

On 29 March 1982, the Applicant reiterated to the Director, IAD, that "certification for payments for all assistance to Namibians in particular the cases in question, was carried out on the instructions of the Commissioner for Namibia".

On 30 March 1982, the Director, IAD, asked Mr. Ahtisaari, what was his "understanding of the procedures followed in the management of the welfare programme, in particular, the selection, approval and payment to the first 22 individuals" listed in an annex to the 18 March 1982 memorandum to the Applicant. In a reply dated 5 April 1982, the former Commissioner for Namibia stated that when he assumed his functions, the Applicant "was already responsible, as Director of the Office, for the activities of the Fund for Namibia". In the absence of "special provisions for the management and administration of the Fund" in General Assembly resolution 3296(XXIX), paragraph 1, the Fund was "administered in accordance with the normal financial regulations of the United Nations". He stated his surprise at the auditors' finding, that the Applicant had "authorized 'welfare payments', extending, in some cases, over several years, to some Namibians" which by "nature and size" would "put these payments into the financial category of scholarships". In addition, he noted that the Applicant, "as Director of the Office, was authorized to decide on individual cases, [and] like any other certifying officer, he was required to maintain proper documentation". He asserted that he had

not instructed the Applicant to make payments to the 35 individuals listed by IAD, but noted that "as a senior United Nations official in whom, of course, [he] reposed the fullest confidence, [the Applicant] had full authority in regard to the scholarship programme and the making of any necessary social welfare payments."

In an interview conducted by the Director, IAD, and an Audit Officer, the Applicant admitted that he had personally picked up cheques for 22 Namibians at the Cashier's Office, that he had personally handed each cheque to each payee and that, although he sometimes counter-signed the cheques, he never endorsed them. Furthermore, he asserted that he did not personally witness the endorsement of the cheques. He alleged that, after picking up the cheques from the Cashier's Office, a representative of the payees would collect them from him, and would later return with them endorsed so that the Applicant could arrange for them to be cashed. On occasion, he obtained cash from the bank and handed it to the representative of the proper payees, who in turn, did not sign a receipt.

The Director, IAD, subsequently conducted interviews with Ms. M.L. Murphy, an Administrative Officer in OCN, Mrs. C. Gottesman, an Administrative Assistant and a secretary. Ms. Murphy stated that she had not "at any time seen or spoken to the individuals listed in Annex I of the 18 March 1982 memorandum ..." with the possible exception of one person who might be a student. She noted that the Applicant had directed that with respect to recipients being handled by him "no payment should be made while he was away" and that all papers relating to the payments were, in fact, kept solely by him because he said that they were "politically sensitive". Mrs. Gottesman indicated that she had no knowledge of the 22 Namibians, nor did she ever see or speak to them. A former secretary in OCN, stated that she never saw or spoke to the individuals, but informed the Applicant when the cheques were available at the Cashier's Office.

In the meantime, as part of the investigation, the Director,



IAD, retained a handwriting expert to examine the endorsements on all cheques made out to the alleged Namibian recipients.

On 30 March 1982, the Secretary-General appointed a high level Commission of Inquiry (the Commission), composed of the Under-Secretary-General for Political Affairs, the Legal Counsel and the Assistant Secretary-General for Financial Services. The Commission was asked to investigate, "in order to ascertain the responsibility, if any, attaching to the officials involved", in view of the fact that some US\$200,000 had been expended without support documentation and because the Applicant had stated that the payments in question "were considered and approved by Mr. Ahtisaari [the Special Representative of the Secretary-General for Namibia and former Commissioner for Namibia] - a statement which is disputed by Mr. Ahtisaari himself".

The Commission met seven times between 6 April and 26 May 1982 and interviewed relevant witnesses. The Commission concluded that on the basis of the extensive interviews conducted, the Applicant had "knowingly falsified the signature of recipients of cheques in an approximate amount of US\$200,000 and knowingly misrepresented, to the Internal Audit Division and to the Commission, that he had not so falsified" and that he had "therefore, engaged in serious misconduct within the meaning of United Nations staff regulation 10.2 ...".

Although the Commission was "satisfied that Mr. Ahtisaari had no knowledge of the payments in question or that he had ever discussed or approved them ... as the Head of the Office, ... he must bear some measure of responsibility for the failure to exercise the necessary degree of supervision and oversight which might have prevented the commission of the irregularities". Although the Commission did not interview the approving officers, "inasmuch as there appeared to be no documentation supporting the obligation documents and requests for payment made by the certifying officer, the Commission feels that some measure of responsibility may attach also to the approving officers concerned". The Commission also considered a report dated 25 May 1982, from the handwriting expert in

which he stated that "the 441 questioned endorsements contain significant identifying characteristics found in the standards. These findings lead to the conclusion that the Augustus F. Caine of the standards wrote the 441 endorsements".

On 28 May 1982, the Secretary-General accepted the conclusions of the Commission and decided that the Applicant be summarily dismissed, effective at the close of business on that day.

On the same date, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had decided to dismiss him with effect from 28 May 1982, under staff regulation 10.2, for serious misconduct and that this decision was based upon the report of the Commission. The Applicant was also advised that if he returned to the U.N. the full amount of the misappropriated funds, the U.N. would refrain from any further action against him.

On 4 June 1982, the Applicant wrote to the Secretary-General stating that he had not been given an opportunity to respond to the Commission's report and that he requested the Secretary-General to withdraw his decision until he had been given the opportunity to respond to the charges against him. He also requested the Secretary-General to submit his appeal in this case, the "second case" directly to the Administrative Tribunal.

On 4 June 1982, the Administrative Officer of OCN issued a P.35 form (Personnel Payroll Clearance Action Form) which was signed by the Director, OCN, attesting that the Applicant had separated from service on 28 May 1982. The form was also signed by a Personnel Officer at the Office of Personnel Services. The Office of Financial Services declined to fill in Section III (the financial section) of the form, until the Applicant had made restitution of the allegedly misappropriated amounts.

On 11 June 1982, the Director, Division of Personnel Administration, transmitted to the Applicant a copy of the Commission's report and informed him that his request for direct submission of his appeal to the Tribunal would be considered in the

light of the contents of his appeal to the Joint Appeals Board (JAB) "in order to determine whether the requirements for such exceptional agreement have been met". On 28 June 1982, the Applicant lodged an appeal to the JAB in the "second case".

On 14 July 1982, the Applicant informed the United Nations Joint Staff Pension Fund (UNJSPF) that he wished to either take, or consider taking, a withdrawal settlement and requested details of the amount of such benefit. On 28 July 1982, the Secretary of the UNJSPF informed the Applicant the amount of his deferred retirement benefit and that his withdrawal settlement amounted to US\$70,760. On 5 August 1982, the Applicant informed the UNJSPF that he had elected to take a withdrawal settlement.

On 11 August 1982, the Secretary of the UNJSPF informed the Applicant that, before any action could be taken by his office to effect payment, his office was required to receive documentation from the Office of Financial Services, indicating that he had separated from service and reporting the corresponding pension contributions. On 15 October 1982, the Applicant wrote to the Secretary-General demanding, inter alia, release of the appropriate forms to the UNJSPF. Having received no reply, on 23 January 1983, the Applicant reiterated this request.

In a letter dated 28 February 1983, the Controller advised the Applicant that as it had been established that he had "knowingly falsified the signatures of recipients of cheques in an approximate amount of US\$200,000", no action was intended to be taken in connexion with any pension entitlements he might have until he paid back to the U.N. the misappropriated funds. In a reply dated 18 March 1983, the Applicant stated that it was "very irregular to withhold payment of [his] pension and [he] demand[ed] it". Similar requests were made by the Applicant on 22 June 1983 and 9 September 1983. On 28 September 1983, the Controller responded that the Organization was not in a position to accede to his request.

The Applicant did not raise the issue again until 3 April 1987, when he advised the UNJSPF that, as he had reached retirement

age, he wished to be advised of the documents required to avail himself of his retirement benefits. He also stated that he rescinded his original decision to take a withdrawal settlement.

On 14 May 1987, the Secretary of the UNJSPF informed the Applicant that no payments could be made until the appropriate documents had been received from the United Nations.

On 19 May 1987, a prior counsel for the Applicant requested release of the P.35 form and reiterated those requests on 20 July and 1 October 1987. On 1 November 1987, the Applicant having received no reply to his communications, lodged an appeal with the Headquarters JAB in the "first case".

The JAB adopted its report on the "first case" on 26 August 1988. Its conclusions and recommendations read as follows:

"Conclusions and Recommendations

25. The Panel concludes that the Organization erred in declining to transmit the appellant's P.35 form and separation notification to the UNJSPF after the appellant had been summarily dismissed from the Organization.
26. The Panel also concludes that effective the date of his summary dismissal, the appellant was no longer a staff member entitled to continued Pension Fund contributions by the Organization. He was, however, a former staff member, and as such, he was entitled to the release of his pension.
27. Accordingly, the Panel recommends that the Organization transmit to the UNJSPF the necessary documents to release the appellant's pension.
28. The Panel recommends further that the Organization compensate the appellant for the interest he would have earned at the prevailing United Nations Credit Union savings account rate during the period in question on the sum he would have been entitled to withdraw from the UNJSPF in mid-1982 had the Organization fulfilled its obligation to transmit the appellant's separation forms to the UNJSPF.
29. The Panel makes no further recommendation in support of this appeal."

On 20 September 1988, the Officer-in-Charge of the Department

of Administration and Management informed the Applicant that the Secretary-General had decided to accept the JAB recommendation to transmit the P.35 form to the UNJSPF but had decided not to accept the recommendation to pay interest since the Applicant had filed his "appeal against the contested decision only after four and a half years and therefore payment of interest is inappropriate under either the Staff Rules or the Financial Rules".

On 31 January 1989, the Applicant filed with the Tribunal the application referred to above in the "first case".

The JAB adopted its report on the "second case" on 9 August 1988. Its conclusion and recommendation read as follows:

"Conclusions and recommendation

85. Based upon the foregoing, the Panel concluded that the Secretary-General's findings were based upon correct and complete information, after a thorough audit and investigation which provided to the appellant all of the protections of due process.
86. The Panel concluded further that the Secretary-General did not err in his finding that the appellant's misconduct was patent and clearly incompatible with his continued service in the Organization.
87. Accordingly, the Panel makes no recommendation in support of the Appeal."

On 10 August 1988, the Officer-in-Charge of the Department of Administration and Management informed the Applicant that the Secretary-General had decided to maintain the contested decision in the light of the Board's report.

On 31 May 1989, the Applicant filed with the Tribunal the application referred to above in the "second case".

Whereas, in the "first case", the Applicant's principal contentions are:

1. The Respondent was legally required to submit the forms attesting to the Applicant's separation from service to the Pension

Fund pursuant to the applicable Regulations and Rules.

2. The Applicant is entitled to receive interest on his withdrawal settlement.

3. The Applicant is entitled to damages for the material and moral injuries suffered by him as a direct consequence of the Respondent's arbitrary and capricious actions following his forced separation from the Organization.

4. The Applicant is entitled to appropriate and adequate compensation for unreasonable delays in the JAB procedures, constituting a "denial of justice".

5. The Applicant is entitled to compensation and emoluments because the Organization's records show that he continued in its employ after his purported dismissal.

Whereas, in the "second case", the Applicant's principal contentions are:

1. The Respondent violated the Applicant's fundamental right to due process of law, fair play and impartiality in the administration of justice.

2. The Respondent attempted in vain to prosecute the Applicant on alleged criminal charges.

3. The Respondent failed to review the Applicant's appeal to the JAB fairly, independently and impartially pursuant to the applicable Regulations and Rules.

4. The JAB failed to review the Applicant's appeal fairly, independently and impartially pursuant to the applicable Regulations and Rules.

5. The Respondent failed to establish that the Applicant had a patent intent to commit the alleged irregularities justifying his summary dismissal from the service of the Organization.

6. The Applicant is entitled to compensation for unreasonable delays in the JAB procedures, causing a "denial of justice".

Whereas, in the "first case", the Respondent's principal contentions are:

1. Failure by the Organization to issue a P.35 form, immediately upon, or shortly after, the summary dismissal of the Applicant in an attempt to recover misappropriated funds, does not entitle the Applicant to damages.

2. The Applicant's conduct bars any entitlement that may have existed to payment of interest on account of failure to promptly issue a P.35 form.

3. Retention of the Applicant's name in computerized payroll records subsequent to the date of his summary dismissal does not entitle the Applicant to pay and allowances for that period.

4. Award of profit costs should be limited to cases where an Applicant is represented by a person entitled to practice law for reward.

Whereas, in the "second case", the Respondent's principal contentions are:

1. The U.N. 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 him to state his case and the actual decision was not improperly motivated.

The Tribunal, having deliberated from 27 April to 18 May 1990, now pronounces the following judgement:

- I. Two appeals by the Applicant are before the Tribunal. Case No. 511 involves the Applicant's summary dismissal for serious

misconduct. Case No. 497 involves alleged wrong-doing by the Administration with respect to delaying access by the Applicant to his Pension Fund account following his termination. The two appeals are therefore related and the Respondent has requested that they be joined and considered together by the Tribunal. The Tribunal considers joinder appropriate and will address both cases in this Judgement. The Tribunal deals first with case No. 511.

II. The Applicant in this case challenges the Secretary-General's decision dated 10 August 1988, maintaining his original decision of 28 May 1982, summarily dismissing the Applicant for serious misconduct. The basis for the decision was the Secretary-General's conclusion that the Applicant had misappropriated US\$207,582 of the funds of the Organization during 1980 and 1981. This was said to have been accomplished by the Applicant obtaining from the Organization over 400 cheques payable to non-existent persons, whose names the Applicant falsely endorsed on the cheques. The Applicant then allegedly presented the cheques for and received payment; in some cases placing his own name on cheques as a second endorser. The Secretary-General's original determination of serious misconduct also said that the Applicant had falsely denied during investigation of the matter having forged any endorsement signatures on the cheques. In maintaining his original decision of 28 May 1982, the Secretary-General acted consistently with and evidently concurred in the conclusions reached by the Joint Appeals Board (JAB) which, as reflected by its report, carefully analyzed the documentary evidence, the testimony of witnesses and the arguments presented to it.

III. As is clear from the Tribunal's jurisprudence and in particular from its recent decisions in Judgement No. 429, Beyele (1988); Judgement No. 425, Bruzual (1988); Judgement No. 424, Ying (1988); and Judgement No. 445, Morales (1989), the Secretary-General has broad discretion to determine what constitutes serious misconduct and to summarily dismiss staff members who engage in it. Contrary to



the Applicant's assertions, the Respondent is not required to establish beyond any reasonable doubt a patent intent to commit the alleged irregularities, or that the Applicant was solely responsible for them. The Tribunal's review of such cases is limited to determining whether the Secretary-General's action was vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact. The Applicant maintains that prejudicial and extraneous factors motivated his dismissal, that he was also prejudiced by significant procedural irregularities and that there was a fundamental mistake of fact, namely, that, contrary to the Secretary-General's and the JAB's views, the Applicant had not misappropriated any of the Organization's funds. The Tribunal will examine each of these issues.

IV. The Tribunal turns first to the factual issues. The Applicant, who was Director of the Office of the Commissioner for Namibia (OCN) and who was entrusted with substantial authority and responsibility in that post, was, among other things, in charge of the distribution of scholarship assistance payments and social welfare payments to Namibians in the U.S. from U.N. funds specifically established for such purposes. Even before the tenure of the then incumbent Commissioner for Namibia during 1980 and 1981, the Applicant had similar responsibilities and authority with regard to such payments. Although numerous beneficiaries of such payments were dealt with by OCN and furnished proper documentation to OCN regarding their identity, addresses, activities and needs, the Applicant claims that during 1980 and 1981 and in prior years a number of Namibians who were entitled to payments from U.N. funds were handled by him secretly.

The Applicant says that this covert group of Namibians, consisting of some 35 individuals, were politically unpalatable to the South West Africa People's Organization (SWAPO) in Namibia and that it was essential that payments to them be cloaked in secrecy.

This was allegedly to avoid repercussions from SWAPO and its supporters if it became known that these individuals were receiving payments from the U.N. The Applicant contends that all of the funds he is charged with misappropriating were secretly disbursed by him to these individuals and that this was done on the verbal instructions of the Commissioner in keeping with long-established practices.

The Tribunal notes that, on 19 March 1982, a few days before the Applicant gave this explanation, he had written to the Assistant Secretary-General, Office of Financial Services (OFS), referring to the serious deficiencies found by the auditors and stating "what is needed most urgently is some kind of financial control mechanism which would ensure at all times that the financial rules and regulations are being followed". This statement is not at all consistent with the position taken later by the Applicant regarding the allegedly long authorized practice of secret payments which he claims he was following; nor could it be reconciled with the prior knowledge about and approval of the secret payments he later attempted to impute to the Assistant Secretary-General, OFS, regarding the approving officers or with his allegations regarding the conduct of the Assistant Secretary-General, OFS, himself.

V. The Applicant's conduct came to the attention of the Administration as a result of an audit conducted a short time prior to 18 March 1982 by the U.N. Internal Audit Division (IAD). The auditors confronted the Applicant with the substantial payments to numerous purported recipients which had occurred over the two-year period in question but for which the auditors were unable to find supporting documentation of the type required by the applicable Financial Regulations and Rules of the U.N. (see, generally, rules 108 and 110) governing certifying officers, of which the Applicant was one. The auditors were also dissatisfied with the apparent absence of required internal controls and proper procedures in connection with these disbursements of U.N. funds. They asked the Applicant to furnish them with all documentation he had supporting

the payments, but the Applicant had no files on any of the recipients and no documentation other than some miscellaneous obligation documents and his memoranda requesting payment which he used to obtain the cheques. The Applicant had obviously certified the requests for cheques on the basis of his alleged private knowledge of the existence of the beneficiaries and their entitlement to the funds. He alleged that this was done pursuant to verbal instructions he had received from the Commissioner. In answer to a question by the Tribunal, the Respondent informed it that the approving officers involved lent their authority to the issuance of the cheques in reliance on the Applicant's certification alone.

VI. The Applicant obtained the cheques himself and allegedly had them endorsed in his presence by the recipients or turned them over to a representative of the recipients who took them to the recipients, had them endorsed and then returned them to the Applicant. The Applicant then cashed the cheques at the bank or allegedly assisted recipients or their representative in cashing them, sometimes signing his name as a second endorser. After he cashed cheques, he allegedly turned the cash over to the recipients or to their representative in his office. As much as US\$4,000 was involved on such occasions. The Applicant never obtained signed receipts from any of the recipients or from their representative for the cash he allegedly gave them. Even if a confidential operation had been ongoing, there is no apparent reason why the Applicant could not or would not have kept detailed secret files on each of the cases, fully explaining and documenting each transaction, with the files kept secure in a locked file or safe.

VII. The auditors requested the Applicant to furnish evidence to confirm the existence of the recipients and their receipt of the funds. There was plainly no concealment from the Applicant of adequate notice. But nothing was forthcoming from the Applicant other than his own ipse dixit and his assertion that he had been

authorized by the Commissioner. The Commissioner both verbally and in writing denied ever having authorized payments to any of the names in question and made it clear that he would not have considered any payment requests in the absence of appropriate documentation.

VIII. In essence, the Applicant's contentions as to the facts depend entirely on whether his statements are to be believed.

IX. Although the issuance of any further cheques to the 35 recipients was immediately stopped as a result of the audit investigation, no communication was ever received by the U.N. from any of the alleged recipients -- either in person or in writing -- complaining about discontinuance of payments, and none of the 35 recipients ever appeared. Despite intimations to the contrary by the Applicant, the Tribunal finds no evidence that the Applicant ever made any attempt to communicate with any of the alleged recipients in order that they might substantiate his claims.

X. At a later date, the Applicant contended that all of the alleged recipients had been spirited out of the country by an alleged agent of the South African Government, apparently because revelation of the payments to them would have caused a scandal or endangered them in some fashion had they remained in the country. The Tribunal finds that here again no evidence besides the Applicant's words was offered in support of these claims.

XI. The circumstances regarding the payments that were uncovered by IAD plainly established a prima facie case of irregularities of so serious a nature as to warrant summary dismissal by the Secretary-General if no satisfactory explanation was immediately forthcoming from the Applicant.

XII. It bears emphasis that, even though the Secretary-General could reasonably have considered the Applicant's explanations and

lack of evidence as totally insufficient, the Secretary-General went beyond his obligation to afford the Applicant due process by designating an ad hoc Commission of Inquiry (the Commission) to investigate and report. The Tribunal does not find that this action divested the Secretary-General of his right under staff regulation 10.2 to dismiss the Applicant summarily for serious misconduct following the report of the Commission.

XIII. As a result of the Commission's inquiries, an outside handwriting expert, who had been retained earlier, completed preliminary work to determine whether the handwriting characteristics of the endorsements on the cheques indicated that they had been written by the same person and whether the Applicant might have been that person. The opinion of the handwriting expert was that the Applicant had forged the endorsements on over 400 of the cheques.

XIV. The Commission learned from other staff members in OCN that none had ever seen any of the alleged recipients or any documentation relating to them. It may be noted, in addition, that another certifying officer in OCN established that numerous recipients for whom payments were handled by her, and who were not affiliated with SWAPO, routinely furnished the information and documentation required by OCN as a prerequisite to scholarship or social welfare benefit payments. Following the report of the Commission, which concluded that the alleged recipients were non-existent and that the Applicant had forged their signatures and misappropriated the funds, the Secretary-General, in his discretion, decided to dismiss the Applicant summarily for serious misconduct.

XV. On the record of this case, the Tribunal cannot conclude that the Secretary-General was acting on a mistake of fact in summarily dismissing the Applicant. Given the evidence, the Secretary-General was not obliged to believe the Applicant's assertions. Indeed, the discretionary authority of the Secretary-General would have permitted

summary dismissal for serious misconduct solely on the basis of the repeated flagrant violations of U.N. financial regulations that were initially discovered by the auditors and which the Applicant admitted having committed, without having regard to whether there was proof that he had forged endorsements on the cheques. In the Tribunal's view, a staff member, particularly one occupying the position and the level of the Applicant, who engages in such conduct purportedly at the verbal direction of a superior without obtaining specific and unambiguous written instructions verifying his authority to do so, is per se guilty of serious misconduct if he is unable to establish promptly by clear and convincing evidence that the alleged payments were authorized, were actually made and were received by persons entitled to receive them.

XVI. The Applicant's claim that prejudicial or extraneous factors motivated his dismissal rests on his assertion that the then incumbent Commissioner mistakenly believed that the Applicant had helped defeat his candidacy for re-election. Apart from pure speculation and conjecture, the Applicant, almost entirely on the basis of his own self-serving assertions, asks the Tribunal to draw highly tenuous inferences in his favour. The Tribunal finds not the slightest evidentiary support for this claim of prejudicial or extraneous factors.

XVII. As to alleged procedural irregularities, the Applicant makes a number of contentions, none of which have merit or are supported by the evidence. The IAD plainly had authority under U.N. Financial Rules 110.41 and 106.4 to audit the expenditure of trust funds controlled by the U.N. There is no regulation or rule requiring the sort of advance authorization or subsequent report that the Applicant claims was called for. Nor for obvious reasons is there any requirement that IAD always notify its targets in advance.

XVIII. The Applicant argues that he was not accorded due process in

connection with the audit and the ensuing investigation by the Commission. As indicated above, the evidence gathered by IAD was such that the Secretary-General could properly have summarily dismissed the Applicant without seeking the advice of a Commission, and none of the Applicant's due process contentions are meritorious, or justified by the evidence.

XIX. The Tribunal finds that the Applicant was accorded ample opportunity to understand the exact nature of the conduct that was being questioned and he had adequate opportunity to explain it both to IAD and to the Commission.

XX. The Applicant claims irregularities in the proceedings conducted by the JAB, some of which relate to the Respondent's alleged unwillingness or failure to make available to him information requested by his counsel (much of which the Tribunal finds irrelevant or immaterial). Here again the Applicant's contentions are without merit. The Tribunal finds that the JAB conducted its proceedings properly. With respect to the alleged irregularity in failing to make available to the Applicant the original cheques, the Tribunal finds that, under the circumstances, a reasonable explanation was advanced by the Respondent: the original cheques were in the possession of the New York District Attorney's Office in connection with a possible criminal proceeding against the Applicant. It would have been highly questionable for the Respondent to have allowed the original cheques to be removed from his possession or control, and the Respondent made photocopies of the cheques available to the Applicant.

XXI. Whether the Applicant's superior may have been technically responsible for inadequate supervision of the Applicant is of no consequence with regard to whether the Applicant was guilty of serious misconduct.

XXII. The Applicant has requested the Tribunal to make findings on a number of points despite the absence of evidence supporting the requests or the irrelevance of the requests. For example, the Applicant asks the Tribunal to find that IAD was not authorized to conduct the surprise audit referred to above without the knowledge of or prior consultation with the United Nations Council for Namibia. The Tribunal finds no evidence to support such a determination and considers that whether the United Nations Council for Namibia had knowledge of or was consulted prior to the audit is irrelevant and immaterial.

XXIII. The Applicant has also requested the Tribunal to find that the Respondent acted unlawfully in not reporting to the United Nations Council for Namibia or to any other organ of the U.N. on the findings, considerations and recommendations of IAD and the Commission with regard to the alleged secret social welfare payments by the Applicant. In the opinion of the Tribunal, there was no such obligation on the part of the Respondent.

XXIV. The Applicant also asks the Tribunal to determine that the Respondent arbitrarily and capriciously attempted to procure criminal prosecution of the Applicant. There is no evidence which would support any such determination. On the contrary, there was reasonable cause for the Respondent to have brought the matter to the attention of the appropriate authorities. The Tribunal therefore denies the request.

XXV. The Applicant asks the Tribunal to determine that the JAB wilfully and unreasonably delayed the Applicant's appeal for over six years. There is no evidence which would support any such determination and it is therefore denied. The Tribunal's review of the record establishes to its satisfaction that the JAB acted properly and took reasonable steps in an effort to expedite the



appeal. However, the Applicant's assertion of undue delay by the Respondent has merit. The Tribunal deplores the delay of two years by the Respondent in submitting to the JAB his answer to the appeal.

In the circumstances of this case, the Tribunal is unable to find that the Applicant was materially injured by this delay. Accordingly, the Tribunal will award no damages with respect to it, but again urges that the Administration take appropriate measures to avoid such delay in the future.

XXVI. The Applicant has requested that the Tribunal hold oral proceedings in order to hear the Applicant and other witnesses. The Tribunal is satisfied that the record in this case is adequate to enable it to reach a decision and therefore denies the request.

XXVII. The Tribunal deals now with case No. 497. In this case, the Applicant appeals against a decision of the Secretary-General dated 20 September 1988, in which the Secretary-General accepted a JAB recommendation to transmit a P-35 form to the U.N. Joint Staff Pension Fund (UNJSPF) to enable the Applicant to receive his pension entitlement and also decided not to accept the JAB recommendation with regard to the payment of interest. In addition, the Applicant claims that the failure of the Respondent to transmit the form when this was first requested by the Applicant in 1982, was arbitrary and capricious entitling the Applicant to damages and that, by reason of the Applicant's continued appearance on the payroll records of the Organization, the Respondent was obliged to pay the Applicant his salary and allowances as well as make required contributions to the Pension Fund during the period subsequent to 28 May 1982. The Applicant also seeks legal costs of US\$3,000 as well as travel and other expenses.

XXVIII. Soon after the Applicant's summary dismissal for serious misconduct on 28 May 1982, the Administration made clear to him that it expected him to reimburse the Organization for the funds he had

misappropriated. This the Administration plainly had the right to do. Rule 114.1 of the Financial Regulations and Rules of the U.N., which was as much a part of the Applicant's contract of employment as other Staff Regulations and Rules, provides:

"Every official of the U.N. is responsible to the Secretary- General for the regularity of the actions taken by him or her in the course of his or her official duties. Any official who takes any action contrary to these Financial Rules, or to the Administrative Instructions issued in connection therewith, may be held personally responsible and financially liable for the consequences of such action." See, also, staff rule 112.3.

XXIX. The record shows that the Administration wanted the Applicant to agree to make reimbursement and hoped that funds credited to his pension account could be used for this purpose. Not long after the Applicant's dismissal, the Administration declined to complete the P-35 form, submission of which to the Pension Fund was one of the prerequisites to any payment by the Fund to the Applicant. The Administration's view was that, prior to completion of the P-35 form, the Applicant would have to arrange for restitution. This was communicated to the Applicant on 28 February 1983, following earlier unsuccessful attempts by him to obtain a withdrawal settlement of some US\$70,000 from the Pension Fund.

XXX. Although the Applicant reiterated his objection to the withholding of his pension on a few occasions in 1983, he did not appeal the issue until over four years later in 1987. On 1 November 1987, the Applicant appealed to the JAB with regard to this matter, initially asking that his appeal be submitted directly to the Tribunal. However, after the Administration in March 1988 informed the JAB that the Secretary-General had determined that consideration by the JAB would be useful, the Applicant in May 1988, changed his earlier request and instead asked that the case be taken up by the JAB without delay. The JAB did so and adopted its report on 26 August 1988.

XXXI. In Judgement No. 358, Sherif (1985), the Tribunal was faced with a somewhat similar situation. However, in that case, the Organization had failed to complete and transmit to the Pension Fund a Separation Notification form (PF/4) after having issued the P-35 form in accordance with ST/AI/155/Rev.1 of 3 July 1974, and notified Mr. Sherif of this. (See Sherif, page 7). The PF/4 form is a purely ministerial separation notice form, containing only separation date, dates of contributory service and contributions paid to the Pension Fund during the staff member's employment. In that case, the Tribunal noted that the Respondent could not justify his unwillingness to complete and transmit the form under any Staff Rule or Instruction.

XXXII. The Respondent contends that a different result should have been reached by the JAB in this case, arguing that the P-35 form stands on a significantly different footing, and that the purpose of the form is primarily to ensure that the financial affairs of the separated staff member vis-a-vis the Organization are in order. In the Applicant's case they were not, since he owed the Organization US\$207,582. However, the JAB concluded that the Administration had acted improperly in refusing to transmit the form to the Pension Fund promptly even if it was unable to complete a section of the form relating to financial clearance.

XXXIII. Since the Respondent decided to accept the JAB recommendation to transmit the P-35 form, it is unnecessary for the Tribunal in this case to express an opinion with regard to the JAB's legal analysis of ST/AI/155.

XXXIV. The Tribunal recalls its Judgement No. 358, Sherif (1985) in which it stated in paragraph XII:

"The Tribunal notes with regret that neither the Staff Rules nor the Regulations and Rules of the Pension Fund provide for

measures enabling the Administration to withhold or deduct amounts owed by a staff member other than from salaries, wages and other emoluments."

XXXV. The Tribunal notes that no action appears to have been taken by the Respondent with respect to these recommendations. The Tribunal reiterates that it is undesirable to leave in doubt the relationship between the Organization's duty to inform the UNJSPF of a staff member's separation from service, and the staff member's duty to make restitution to the Organization when a debt is owing.

XXXVI. In the circumstances of this case, the Tribunal finds that the course followed by the Respondent was by no means arbitrary or unreasonable. Accordingly, the Tribunal sees no justification for any award of damages to the Applicant for the delay in the release of his pension entitlements. Moreover, the Tribunal notes that more than four years elapsed between the time that the Applicant was made aware of the Administration's position and the date of his appeal to the JAB. Given this lapse by the Applicant, there is likewise no justification for any award of compensation to him with respect to that period, particularly in view of the nature of the serious misconduct for which he was summarily dismissed. Finally, the Tribunal does not consider unreasonable the period between the date of the JAB report, the Secretary-General's decision to accept it in part, and the date of its implementation. Hence, no interest will be awarded to the Applicant with respect to that period.

XXXVII. With respect to the Applicant's claim relating to retention of his name in the Organization's payroll records after his summary dismissal, the Tribunal is entirely in accord with the conclusions reached by the JAB on this issue for the reasons stated by it. The Applicant's status as a person summarily dismissed for serious misconduct was not affected by the presence of his name in the memory banks of the Organization's computer. Accordingly, this claim being utterly without merit, it is denied by the Tribunal and the Tribunal

finds it unnecessary to consider the question of whether the claim would be time-barred on account of staff rule 103.15 as the Respondent argues.

XXXVIII. The Applicant has asserted that the Administration has failed to make clear the amount he allegedly misappropriated, and the number of fictitious recipients. This assertion is not borne out by the evidence, which shows the number to have been 35 and the amount to be US\$207,582, and the Tribunal finds that as of the date of the Applicant's separation from the U.N. he was indebted to the Organization in that amount.

XXXIX. In view of the foregoing, the Tribunal:

1. Rejects the applications in cases Nos. 511 and 497 in their entirety;
2. Denies the request for counsel fees and expenses.

(Signatures)

Roger PINTO  
President

Jerome ACKERMAN  
Vice-President

Francisco A. FORTEZA  
Member

Geneva, 18 May 1990

R. Maria VICIEN-MILBURN  
Executive Secretary