ADMINISTRATIVE TRIBUNAL

Judgement No. 887

Case No. 972: LUDVIGSEN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza; Mr. Kevin Haugh;

Whereas, on 22 April 1997, Lars P. Ludvigsen, a staff member of the United Nations Centre for Human Settlements (HABITAT) (hereinafter referred to as UNCHS), filed an application requesting the Tribunal, inter alia:

"... [T]o find:

(a) That the Administration acted negligently;

(b) That, as a result of this negligence, a number of important errors were committed by the Administration, in calculating and continuing to overpay the rental subsidy due to the Applicant;

(c) That the Applicant was unaware of the errors;

(d) That the Applicant acted in good faith at all times;

(e) That consistent with the conclusions and recommendations of the Joint Appeals Board, the Administrative Tribunal decide that the Applicant reimburses to the United Nations an amount equivalent to two years of overpayment;

(f) That, therefore, the Administrative Tribunal rescind the Secretary-General's

decision that the Applicant recover four years overpayment of rental subsidies;

...

(h) [To] order that the Respondent reimburse to the Applicant, in one lump sum, the amount recovered from him over and above the two years' repayment ...

(i) [To] find that recovery of these amounts should be effected by the Respondent under the provisions of staff rule 112.3, being the direct consequence of gross administrative negligence."

Whereas the Respondent filed his answer on 6 August 1997;

Whereas the Applicant filed written observations on 8 October 1997;

Whereas, on 14 July 1998, the Tribunal put questions to the Respondent, to which he provided answers on 16 July 1998, and to which the Applicant also responded on 15 July 1998;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNCHS at its Headquarters in Nairobi on 11 September 1982, on a one-year intermediate-term contract as a Junior Professional Officer at the L-2 level. His appointment was extended until 11 September 1985, when he received an eleven-month fixed-term appointment as a Human Settlements Officer at the P-2 level. He continued serving on a series of fixed-term contracts and was promoted to the P-3 level, on 1 October 1986. On 26 January 1989, the Applicant was reassigned to the UNCHS Office in Geneva. He was promoted to the P-4 level on 1 April 1993, and continues to serve in UNCHS in Geneva, as a Human Settlements Officer.

In a cable dated 30 January 1989, the Applicant suggested to the Chief of Administration of UNCHS in Nairobi that the United Nations Office in Geneva (UNOG) be authorized to calculate the Applicant's rental subsidy. On 1 February 1989, the Applicant rented a house in France on a two-year lease. On 6 February 1989, the Applicant sent the lease agreement by pouch to UNCHS Headquarters in Nairobi, along with a covering

memorandum stating that the rent was "F.Fr. 8,000.00", and suggesting again that UNOG be authorized to calculate his rental subsidy.

In May 1989, the Applicant received the first pay-slip to reflect the rental subsidy, as calculated by Nairobi Headquarters, for May and for the prior two months. On 29 May 1989, the Applicant cabled the UNCHS Finance Section in Nairobi, stating, “appreciate very much the rental subsidy you have allocated but think you might have made a mistake.” The Applicant did not obtain a reply. He continued to receive the rental subsidy until 1 March 1995, having informed the United Nations Office in Nairobi (UNON) in February 1995, that he had purchased a house.

An audit in 1995, by the Office of Internal Oversight Services (OIOS) revealed a number of rental subsidy overpayments in the Nairobi offices, the largest being the overpayment made to the Applicant, which over six years, amounted to nearly $150,000. On 26 January 1996, the Head of Staff Administration, UNON, informed the Applicant that he had been overpaid and that he would have to repay the overpayment.

On 20 February 1996, the UNON Finance Section sent the Applicant a month-by-month summary of the overpayments made to him of his rental subsidy. On 1 March 1996, the UNON Finance Section sent the Applicant a fax, confirming a telephone conversation in which the Applicant had been informed that he was required to make a lump-sum payment in the amount of $148,079.19, and that in the meantime, starting in March 1996, the Administration would subtract a percentage of his salary to commence recovering the overpayments. On 8 March 1996, the Applicant informed the Administration of UNON that he did not have enough savings to provide the requested lump-sum payment because he had just purchased a house.

Starting in March 1996, approximately 30 per cent of the Applicant’s monthly salary was deducted from his paycheck. The Applicant objected to such deductions by memoranda dated 9 May 1996 and 19 July 1996. On 22 July 1996, the UNON Finance Section informed the Applicant that it was seeking additional means of recovering the amount owed, including withholding the Applicant’s annual leave, his repatriation grant and the education grant. On

29 July 1996, the Head of Staff Administration, UNON, informed the Applicant that he would have to refund to the Organization the totality of overpayments. He suggested that the Applicant obtain a mortgage on his house to clear his indebtedness within one or two months. On 30 July 1996, the Applicant protested the withholding of the education grant, as such action was contrary to the UN rules and would cause serious harm to his daughters.

On 3 August 1996, the Applicant requested the Secretary-General to limit the recovery of overpayments to the last two years and to suspend the recovery action. Also, on 3 August 1996, the Applicant informed the Chief, Administrative Law Unit, that he was appealing the decision to recover the overpayments. On 6 August 1996, the Applicant further requested that the Secretary General review the administrative decision to recover the totality of overpayments in one or two months. The Applicant reiterated his request to the Secretary-General on 23 September 1996, based on communications from the UNON Administration subsequent to his August 1996 requests for review.

On 24 September 1996, the Applicant lodged an appeal with the Joint Appeals Board (JAB) requesting a suspension of action of the administrative decision to recover six years overpayment of rental subsidy. The JAB adopted its report on 14 October 1996. Its consideration and recommendation read, in part, as follows:

> "8. The Panel ... found that the Appellant had met the conditions to be granted a suspension of action in accordance with Article 14 of the Rules of Procedure, namely that the administrative decisions have not been implemented and that implementation would cause irreparable damage to the staff member.
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> 9. Consequently, the Panel unanimously recommends that the request for suspension of action be granted and that the Secretary-General instruct UNCHS (Habitat)/UNON to suspend the above-mentioned administrative actions until a final decision has been taken on the merits of the case."

On 30 October 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him of the Secretary-General's decision "not to grant [the Applicant's] request for suspension, pending

appeal, of action on the decision to recover overpayments from you by monthly deductions", but "to suspend action to recover monies from you by any other means until a decision has been taken in your case after a recommendation from the Geneva [JAB]."

On 4 November 1996, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 11 December 1996. Its conclusion and recommendations read as follows:

> "62. The panel unanimously concluded that the Appellant met the conditions for his liability to the United Nations to be limited to two years of overpayment as the overpayment was due to the negligence of the Administration and not of the recipient.
>
> 63. The panel, following earlier UNAT judgements, therefore unanimously recommends that the Secretary-General only seek reimbursement from the Appellant to the Organization of an amount equivalent to two years overpayment of rental subsidy.
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> 64. In view of the managerial record of the Office in Nairobi, as well as its sometimes threatening manner towards the Appellant, the panel also recommends that the modalities of repayment be the subject of discussions between the Administration in Geneva, the Appellant and a third, disinterested party.
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> 65. In view of the large potential financial loss to the United Nations, the panel also recommends that the Secretary-General consider the imposition of financial sanctions on members of the UNCHS Administration, in accordance with Staff Rule 112.3 and after a careful enquiry into individual responsibility by the OIOS."

On 3 February 1997, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

> "... The Secretary-General, while agreeing that the Administration's negligence resulted in the overpayment of rental subsidy, does not share the Board's view on the recovery amount, and disagrees with the Board's view that you met the conditions for your liability to the United Nations to be limited to two years of overpayments. In order to meet those conditions, it is necessary that the staff member was, in good faith, unaware of the error. Although the Board has not found

bad faith on your part, the large amount of rental subsidy involved, including the fact that your subsidy was higher than your rent and that it was based on a rental calculated in Swiss francs rather than in French francs over some six years, it is inconceivable that you would not have realized that the massive subsidy you were receiving was an error.

The Secretary-General is bound to ensure that public money is expended only for its intended purpose and there is no reason why you should be permitted to retain the sums which were paid to you in error. We have taken account of the fact that, on one occasion in 1989, you sent a cable to the Chief of Finance to check the amount of the subsidy. In our view, this shows that you were aware that something was wrong but does not excuse a reasonable staff member acting in good faith to have again raised the issue after a reasonable period of time of continuing to receive large overpayments. As a result we consider that the fact that you raised the issue in May 1989 would only warrant waiver of recovery for a reasonable period which at the most is two years. The Secretary-General, however, considers that the balance is to be recovered as it is not reasonable that a staff member in your situation was not aware of an error during the remaining four years.

Taking into account the above-mentioned considerations, the Secretary-General has decided that the total amount of US$98,600 will be recovered from you. The total amount of US$28,600 was already recovered from you from March 1996 to January 1997. Moreover, you will forfeit the repatriation grant (approximately US$30,600 at the end of 1997). The remaining sum (US$39,400) will be recovered from you in equal monthly amounts from February to December 1997. However, if you agree to carry to the end of 1997 the balance of sixty days of annual leave which you had accumulated at the end of 1996 and forfeit the payment for those days (approximately US$22,400) or if you agree to forfeit any other entitlements, such as monies related to home leave, or if you choose to make a lumpsum payment at any time, you can inform the Head of UNOG Administration in writing so that this can be taken into account in the calculation of the monthly amount which will be deducted from your salary from February to December 1997. The Secretary-General has been informed that your contract with UNCHS has been extended for one more year, i.e. until 31 December 1997. ..."

On 22 April 1997, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant cannot be held responsible for the overpayments of rental

subsidy, which were attributable not to him but rather, to the Administration's own gross negligence. The Applicant acted in good faith at all times in connection with his rental subsidy.

2. In the alternative, the Applicant should not be required to refund more than the last two years' worth of overpayments. Limiting recovery to two years is the Administration's prevailing practice, as set forth in a 30 July 1987 communication from the UN Controller to the Accounts Division, and is supported by the case law of the Tribunal.

Whereas the Respondent's principal contentions are:

1. The Applicant did not acquire title to the amounts paid to him in error and the Applicant's retention of those amounts would result in unlawful enrichment.

2. The Applicant failed to exercise due diligence in accepting monies well in excess of his entitlement.

3. The Secretary-General's decision to limit recovery of overpayments to four years with a reasonable schedule of repayments did not violate the rights of the Applicant. The policy of limiting recovery of overpayments to two years is only applied where the recipient of the overpayments is genuinely not aware of the error, which was not the case here.

The Tribunal, having deliberated from 14 July to 4 August 1998, now pronounces the following judgement:

I. The central issue raised in these proceedings is whether the Applicant is entitled to benefit from the doctrine of equitable limitation on recovery in relation to significant overpayments made to him by way of rent subsidy paid to him for almost a six year period

commencing in February 1989. He had been transferred at that time from UNCHS (HABITAT) Headquarters in Nairobi to Geneva. He rented a house in France and claimed a rental subsidy, to which he was entitled, under the UN regulations in force. On 30 January 1989, he cabled the Chief Administrator in Nairobi suggesting that the United Nations Office in Geneva (UNOG) be authorized to calculate his entitlement. He did not receive a response.

. He submitted a copy of his lease agreement, with a covering memorandum of 6 February 1989, to the Chief of Administration in Nairobi, specifying a monthly rent of Ffr. 8,000 (which was correct) and again suggested that UNOG be authorized to calculate his subsidy. He again received no response.

In May 1989, a rental subsidy appeared for the first time on his pay slip. It appeared as two items, one for May 1989 and the other for the period running from 26 February through 30 April 1989. It transpired that the staff in Nairobi concerned with the calculation of his entitlement and its payment had been grossly negligent and had calculated and paid him a rent subsidy in Swiss Francs rather than French Francs. This situation persisted for almost the next six years, notwithstanding that the Applicant had cabled UNCHS on 29 May 1989, acknowledging receipt of the rental subsidy and pointing out, in rather vague terms, that "[the Administration] might have made a mistake".

Over the next six years, the Respondent paid to the Applicant a total overpayment of nearly US$150,000. On average, the Applicant, because he was paid Swiss Francs instead of French francs, was paid over four times the rent subsidy to which he was entitled. His subsidy was at times considerably more than his actual rent.

II. The Applicant maintains that he received these payments innocently and that he was not aware he was being overpaid. After the overpayments came to light and were being investigated, he explained to the Administration that the "mistake" he had in mind in his cable of 29 May 1989, was that he might have been overpaid. This is the only explanation consistent with his contention that, because a later payment showed a reduction, he believed that the problem had now been rectified and that the subsidy was correctly calculated. However, the amount received was completely disproportionate to the amounts he should

have received, under the existing rules.

III. The Tribunal is satisfied that the decision in Judgement No. 410, Noll-Wagenfeld (1988) is readily distinguishable from the present case. The judgement in Noll-Wagenfeld did not address the situation where a recipient of overpayments is found to have received and retained such overpayments with knowledge that he or she was not entitled thereto. In Noll-Wagenfeld the Applicant consistently maintained that she was legally entitled to the payments made and that, thus, they did not constitute "overpayments".

IV. The Respondent argues that the Applicant cannot be considered to have received these overpayments innocently, that he must have been adverted to the mistake, and because he had received them and retained them with full knowledge that he was not entitled to receive such payments, he cannot invoke an equitable doctrine that recoupment be limited to the final two years of overpayment. The Respondent submits that to allow this would be to condone unjust enrichment.

V. The Tribunal is satisfied that an equitable remedy cannot be invoked or applied in a case where the party seeking to invoke such doctrine has not been an innocent participant, as to do so would offend one of the major maxims of equity that "He who seeks equity must come with clean hands."

VI. The question now to be determined by the Tribunal is whether the Applicant received and retained the overpayments innocently as he maintains, or with the knowledge that he was retaining monies belonging to the Respondent to which he was not entitled, as maintained by the Respondent. The Tribunal cannot be satisfied that the overpayments were received and retained innocently by the Applicant. After all, a subsidy is by definition a part payment to cover an expense. When the Applicant was receiving an amount that, at times, was more than his rent, how could he conceivably have believed that, insofar as it exceeded his actual rent, it was his entitlement? The Tribunal is satisfied that he must have known and did know that

there was a significant error in the calculation and that it was in his favour. He cannot have believed that he was entitled to receive his entire rent, together with a large surplus or profit as “a rent subsidy”. Indeed, the Applicant did point out, that “[the Administration] might have made a mistake.” Thus, the Applicant was admittedly aware that he was being overpaid, but failed to take reasonable steps to have the obvious “mistake,” as he perceived it, corrected.

VII. The Tribunal is satisfied that, had the Applicant given it a modicum of thought, the basis of the miscalculation would have occurred to him. In these circumstances, the Tribunal is satisfied that it is not open to the Applicant to invoke the doctrine of equitable limitation of recovery, which would limit recovery to overpayments made in the final two years.

The Tribunal is satisfied that the true intent or justification for the doctrine of equitable limitation on recovery is to strike a fair balance between the interest in minimizing any hardship to an innocent recipient of overpayments and the interest in preventing the misuse of public funds.

VIII. The Applicant has argued that in lieu of requiring him to reimburse the totality of the overpayments, that staff rule 112.3 be invoked. That rule provides as follows:

"Financial responsibility

> Any staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of the staff member's negligence or of his or her having violated any regulation, rule or administrative instruction."

The Tribunal fully endorses the recommendation of the JAB that the negligence of those responsible for these overpayments should be investigated and punished. The Tribunal finds that the degree of negligence by the Administration manifest in this case is truly appalling and outrageous. However, it believes that requiring the negligent party to reimburse the loss should not be considered as an alternative remedy to enforcing reimbursement of the UN's loss against a staff member who could not, under any reasonable standard, be deemed an "innocent" recipient of overpayments. To do so, would misconstrue the purpose of staff rule 112.3. Its invocation is a remedy open to the Organization and should not be viewed as relieving the Applicant of his obligation to reimburse what he certainly must have known were overpayments. The Respondent had already determined to recoup only four years of overpayments rather than to seek repayment for the entire six year period because the Applicant had pointed out that there might have been a "mistake". The Tribunal considers that, in the circumstances of this case, it was an appropriate and reasonable exercise of the Secretary-General's discretion and that the decision should stand. Perhaps it might be appropriate to invoke staff rule 112.3, insofar as the Respondent has agreed to forego two years of overpayments, to seek the balance against those responsible for the negligent overpayments, if such persons can be identified.

IX. The Tribunal has been informed by the parties that the Applicant has already reimbursed the Administration for the four years' worth of overpayments demanded by the Respondent. The Tribunal considers that this should conclude the matter and that no further administrative action be taken against the Applicant in relation to the overpayments made in this case.

X. For the foregoing reasons:

1. The Tribunal considers that the Secretary-General's decision to recover only four years of overpayment constitutes a reasonable and proper exercise of his discretion and should stand.

2. The Tribunal rejects the application.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Member

Kevin HAUGH
Member

Geneva, 4 August 1998

R. Maria VICIEN MILBURN
Executive Secretary