ADMINISTRATIVE TRIBUNAL

Judgement No. 407

Case No. 372: NOBLE Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, Vice-President, presiding; Mr. Luis de Posadas Montero; Mr. Jerome Ackerman;

Whereas on 25 May 1987, the Administrative Tribunal rendered Judgement No. 382 in favour of the Applicant, Miss Miriam Noble;

Whereas in paragraph XX of that Judgement, the Tribunal held that:

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

(b) ...

(c) In conformity with the principles set forth above in paras. VII through XIV, the Administration should recal- culate the amount, if any, owing to it with respect to non-compensable time after July 31, 1981, for which the Applicant was paid, and after taking into account the amounts previously paid to the Applicant, promptly pay her the amounts, if any, for each pay period that should have been paid to her, plus interest at the rate of nine per cent per annum from the respective dates when she should have received payment;

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

..."

Whereas on 21 August 1987, the Applicant informed the Executive Secretary of the Tribunal that there had been no agreement between the Applicant and the Respondent concerning "the recalculation of the Applicant's entitlements", as had been ordered by the Tribunal;

Whereas on 23 September 1987, the Respondent informed the Executive Secretary of the Tribunal that in order to comply with the Tribunal's order, the Respondent had "recalculated the Applicant's absences and lateness in accordance with the Judgement guidelines, after a day-by-day review of her attendance records (attendance sheets and leave reports) for the period between 1 August 1981 and 31 May 1987" and submitted a series of documents with these calculations. Since the Applicant disagreed with them, the Respondent stated that "unless Applicant refutes the calculations set out in ..., the Tribunal should enter judgement based on those calculations, which are a fair and accurate reflection of her actual attendance";

Whereas on 16 October 1987, the Tribunal requested the Applicant and the Respondent to provide the Tribunal with any further observations they might have on the matter, not later than 27 October 1987. The Tribunal then contemplated the possibility of conducting a hearing to resolve the remaining issues in dispute, if any, but subsequently decided against doing so and requested observations from the parties;

Whereas on 27 October 1987, the Applicant filed additional documents;

Whereas on 27 October 1987, the Respondent filed additional documents;

Whereas on 2 November 1987, the Tribunal put questions to the Respondent, to which he replied on the same date;

Whereas on 4 November 1987, the Applicant commented on the Respondent's submissions of 27 October and 2 November 1987;

Whereas on 10 November 1987, the Tribunal put questions to

the Applicant and to the Respondent and they provided answers on 11 November 1987.

Whereas the facts of the case have been set forth in Judgement No. 382 rendered by the Tribunal on 25 May 1987;

The Tribunal, having deliberated from 16 October 1987 to 13 November 1987, now pronounces the following judgement:

I. In paragraph XX(d) of Judgement No. 382, dated May 25, 1987, the Tribunal decided that, if the parties were unable within 90 days of the date of the Judgement to concur on the quantum, the Tribunal would resolve remaining disputed issues as to the quantum upon the request of either party. The parties have not been able to agree within that period, and the Tribunal will now resolve the remaining disputed issues. In doing so, the Tribunal will apply the principles set forth in paragraphs VII through XIV of its Judgement No. 382 in accordance with paragraph XX(c) thereof.

II. With respect to the disputed issue concerning a credit of 297 days claimed by the Applicant on account of allegedly staying late at supervisors' requests, the Tribunal made clear in paragraphs VIII, IX, and XIV of Judgement No. 382 that this claim had no validity except for instances in which there was sufficient evidence of a specified number of longer hours worked with the knowledge and consent or at the direction of those for whom the Applicant worked. The Administration was able to substantiate a credit of 18.5 days to which the Applicant is entitled based on the foregoing. The Tribunal finds, as it did previously, that the Applicant's position on this issue is without merit. It is essentially an effort to relitigate the matter rather than abide by Judgement No. 382. Accordingly, the 18.5 day credit proposed by the Administration constitutes the Applicant's entitlement and the remainder of her claim on this issue is rejected.

III. The Applicant also apparently seeks to relitigate paragraph XI of Judgement No. 382, when she argues that "half day charges should be made only when lateness is four hours, etc., ...". That is plainly not what paragraphs XI and XIV provide. They make it clear that when the Applicant was more than 2 hours late, i.e. her arrival was after 12:30 p.m., a 1/2 day charge was proper. Before the Applicant's starting time was changed to 9 a.m., those paragraphs appear to have been generally adhered to by the Respondent. The only exceptions noted by the Tribunal are August 4, 1986, and as set forth in paragraph VII below. Indeed, if anything, the Administration appears to have been more generous than was required by Judgement No. 382 because the Administration could have, but did not treat fractions of a 1/4 hour of lateness as a 1/4 hour, as was permitted by the last sentence of paragraph XIV.

IV. The Applicant has requested clarification of Judgement No. 382 as it applies to lateness after her starting time was changed to 9 a.m. The question is whether when the Applicant during that period arrived at 1:30 p.m., she should be charged for a 1/2 day or for a 1/2 day plus 30 minutes. Under ST/AI/221 and paragraph XIV of Judgement No. 382, the Applicant should be charged only for a 1/2 day. Since ST/AI/221 expressly excludes the lunch hour from the formula it prescribes, the Applicant would not be late by more than 4 hours unless she arrived after 2:30 p.m.

V. Where the time the Applicant arrived for work is disputed, apart from her refusal (dealt with below), to sign a register during October/November 1986, the dispute is to be resolved on the basis of the Administration's attendance records if they show lateness. If the Administration failed to maintain or to obtain from the Applicant adequate records with respect to any particular day, it may not claim that the Applicant was late on that particular day. See Judgement No. 382, para. VII. However, where, as in October/November 1986, the Applicant refused to sign a daily

register with respect to her attendance, or if she otherwise obstructed efforts to keep adequate records, she is bound by whatever the records kept by the Administration show for those days, unless she proved otherwise, and she did not. Given the Applicant's history, and the circumstances of this case, it was not unreasonable for the Administration to require her to sign a daily register. This was as much for her protection as to ensure accuracy on the part of the Administration. The Applicant's conduct in this regard was, in the Tribunal's opinion, unjustified.

VI. The Administration has taken the position that it is obliged to pay interest to the Applicant only if the calculation for the entire period in question shows a net balance in favour of the Applicant with respect to time for which she had not been compensated. This is an erroneous interpretation of paragraph XX(c) of Judgement No. 382. The Administration's interpretation would, in effect, sanction advance withholding of compensation for unauthorized lateness or absence which occurred at a later point in time, and that plainly was not the intended effect of the judgement. Paragraph XX(c) instead requires a week by week examination of the amount, if any, which the Applicant was paid, but should not have been paid, because of lateness or absence in that, or in a prior pay period, or the amount the Applicant should have been paid, but was not, because of excessive withholding. The interest provided for in paragraph XX(c) should be paid to the Applicant from the date she should have received any given payment until the amount was or is paid to her.

VII. The Applicant has pointed out apparent inconsistencies and discrepancies in the Administration's records with respect to lateness recorded for May 16-20, 1983. The underlying attendance sheet does not support the 12:30 arrival time shown for the Applicant on those days, and the 10 hours charged to her for them should be credited back to her. Similarly the Applicant has

challenged a 1/2 day charge for March 14, 1983, on the ground that no arrival time was shown for that day on the daily attendance sheet but the tabulation of lateness charges showed her arriving at 12:45 on that day. In view of the absence of support for the 12:45 lateness time shown on the tabulation, the Applicant should be credited with that 1/2 day. The Applicant has also alleged that she arrived at noon on March 3, and March 15-18, 1983, but there is no evidence submitted in support of this allegation, and the daily attendance sheet supports the 1/2 day charges for the latter four days. The Tribunal will, therefore, not modify them.

VIII. The Administration has taken the position that under staff rule 105.2 (c), it is entitled to "uncredit" the Applicant for annual leave, previously allowed in its calculations, because of "excess absences." In determining such "excess absences," the Administration calculated a net cumulative balance of absences taking into account accrued annual leave balances over a multi-year period. The Tribunal finds that this calculation is not in conformity with staff rule 105.2 (c). That rule provides:

> "Staff members shall not accrue service credits towards sick, annual and home leave, salary increment, seniority, termination indemnity and repatriation grant during periods of special leave with partial pay or without pay. Periods of less than one calendar month of such leave shall not affect the ordinary rates of accrual; nor shall continuity of service be considered broken by periods of special leave."

In the opinion of the Tribunal, the plain meaning of the rule is that only <u>during</u> periods of special leave without pay (i.e. excessive leave) of more than one calendar month is there to be no accrual of service credits. Nothing in the language of this rule authorizes a multi-year cumulative net balance calculation as the basis for concluding that a period of, for example, 15 days of special leave without pay exceeded one calendar month. Hence, the original 30 day "uncrediting" later reduced to 25 days was improper and must be rescinded.

IX. The Applicant claims that, in determining the amount to be charged to her for lateness, the Administration did not properly credit her for alleged certified sick leave from 1979 through 1984, thus allegedly causing her to have approximately 100 fewer annual leave days available for absorption of lateness charges. The Applicant also alleges that there were other inaccuracies in her annual leave records with the same effect. Upon reviewing these matters, the Administration revised an earlier calculation made by it with respect to the Applicant's annual leave balance as at 1 August 1981 and credited her with 27.5 days. Apart from this and in respect of the alleged certified sick leave errors, the Administration has refused to accept the Applicant's contentions and has explained satisfactorily its reasons therefor. In addition, concerning certain days during the first six months of 1983, on which daily attendance sheets showed the Applicant to be absent, and she disputes this, the Administration continues to rely on the attendance records; and this also appears to be reasonable. However, the Administration conceded the validity of the Applicant's disagreement with a charge of 14 days during December 1984.

X. In the context of this case, although the Administration indicates that the Applicant previously raised, but did not pursue at least one of the matters referred to in paragraph IX and mentioned it before the Joint Appeals Board, the recommendations of the JAB do not show that it considered the merits of any of these specific disputed points, as distinct from the points of alleged justification for the Applicant's lateness. In addition, there is also no indication in the JAB's report that it gave any consideration to whether any or all of these specific points regarding sick leave and annual leave would be time-barred, and the Tribunal expresses no opinion as to this. However, the Tribunal is unable, in any event, to find in the record before it that the Applicant has furnished sufficient evidence to justify overturning

the Administration's determinations. Accordingly, the Tribunal accepts the Administration's determination without prejudicing in any other proceeding, any rights the Applicant may have regarding sick leave or annual leave with respect to any period of time.

XI. To summarize: from the total excess absence of 295 days shown in the Administration's 15 June 1987 calculations:

(a) One 1/2 hour should be deducted for the August 4, 1986 error;

(b) 6-1/4 hours should be deducted as they represent the erroneous charges included in the calculation of the 295 days in excess of one 1/2 day for the days following the change to 9 a.m. of the Applicant's starting time on which she arrived after 11 a.m. and before 2:31 p.m.;

(c) 10 hours should be deducted with respect to the erroneous charges for May 16-20, 1983;

(d) One 1/2 day should be deducted for the erroneous charge for March 14, 1983;

(e) 30 days should be deducted for the erroneous "uncrediting";

(f) 27.5 days should be deducted because of the erroneous new leave balance as of August 1, 1981;

(g) 14 days should be deducted for the erroneous December, 1984 charge.

The total number of days to be deducted is 74.

XII. The Tribunal assumes the accuracy of the amounts shown in item 10 of the 15 June 1987 calculation by the Administration, and therefore the balance should not be 72 work days due to the UN, but 2 work days due to the Applicant.

XIII. For the foregoing reasons, the Tribunal:

- Orders the payment of salary to the Applicant for 2 work days in accordance with the foregoing;

- Orders the payment of interest as provided in paragraph VI above; and
- Rejects in all other respects the pleas of the Applicant arising out of Judgement No. 382.

(Signatures)

Roger PINTO
Vice-President, presiding

Luis de POSADAS MONTERO
Member

Jerome ACKERMAN
Member

New York, 13 November 1987

R. Maria VICIEN-MILBURN
Executive Secretary