United Nations **AT**

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1074

Case No. 1154: HERNANDEZ-SANCHEZ

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Mr. Kevin Haugh, Vice-President; Ms. Marsha Echols;

Whereas at the request of Homero L. Hernández Sánchez, a member of the Joint Inspection Unit (JIU), the President of the Tribunal, with the agreement of the Respondent, extended to 31 August 2000 the time limit for the filing of an application with the Tribunal;

Whereas, on 30 August 2000, the Applicant filed an Application containing pleas which read as follows:

"***II. Pleas***

1. The Applicant respectfully requests the Tribunal:

(a) to declare itself competent to hear the Applicant's case and to consider it on its merits;

(b) to reverse the administrative decision to recover the monies paid the Applicant as education grant in respect of his son…for the academic year 1996/1997 …; and

> (c) to order the Respondent to pay the Applicant the equivalent of one month's net base salary as compensation for damages and losses resulting from the failure by the [Joint Appeals Board (JAB)] … to exercise its competence to consider the appeal on its merits and from the decision of the Respondent to accept the Board's recommendation."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 January 2001 and periodically thereafter until 30 April 2001;

Whereas the Respondent filed his Answer on 23 April 2001;

Whereas the Applicant filed Written Observations on 26 July 2001;

Whereas the facts in the case are as follows:

The Applicant was appointed by the General Assembly as an Inspector with the JIU for a five-year term, with effect from 1 January 1993. The General Assembly renewed the Applicant's appointment for an additional five-year term, effective 1 January 1998.

On 16 February 1994, the Applicant requested home leave travel in respect of his then 20 year old son. He was informed on 21 February that his request could be approved; however, on 29 March, he was advised as follows:

> "after another careful examination of this matter and based on the Certificate of Attendance issued by Miami-Dade Community College [where the Applicant's son was enrolled] … we find that for the academic years 1992/1993 and 1993/1994, your son was enrolled on a half-time basis only. Since, according to staff rule 103.24 (b), children above the age of 18 can only be considered as dependents – for the purposes of receiving the relevant allowances from the Organization – provided they are in *full-time* attendance at an academic institution, [the Applicant's son] should not have been considered [the Applicant's] dependent from the beginning of [the Applicant's] appointment".

The Applicant was informed that all monies paid to him in respect of his son for the academic years 1992/1993 and 1993/1994 would have to be recovered.

On 28 June 1994, the Applicant submitted a request for an education grant for his son, who was to commence full-time studies in October 1994 at the European University in Geneva. The Applicant's son attended University full-time during the academic years 1994/1995,

1995/1996, 1996/1997 and 1997/1998. The Applicant received education grant and related allowances and benefits in respect of his son for the first three of these school years.

In response to the Applicant's request for an education grant for his son for the school year 1997/1998, on 1 August 1997 he was informed that it had been denied as, in accordance with the applicable Administrative Instruction, education grant is payable only "up to and including the day on which the child … completes four years of post-secondary studies". The Applicant was informed that as the Rules and Personnel Manual Section (RPMS) had previously ruled that "all periods of attendance at post-secondary institutions count towards the four years", and since his son had completed four years of post-secondary education at the end of the 1995/1996 academic year, the education grant paid in respect of the academic year 1996/1997 would be recovered. On 20 August 1997, the Applicant replied that the year 1993 had been incorrectly counted as one during which his son was enrolled on a full-time basis when, in fact, he was enrolled on a part-time basis. Therefore, the Applicant felt that there "should be no impediment to the payment of the education grant [for the 1996/1997 school year]".

In a ruling on the matter dated 19 September 1997, the Rules and Regulations Unit, Office of Human Resources Management (OHRM), stated, inter alia, that "the post-secondary education grant would be payable only for the four years counted from the time the son commenced his post-secondary studies in 1992, and even then only if all conditions, such as the requirement that attendance be full-time …, are met" and that the spreading of one academic year into two had no bearing on the running of the four-year period. This ruling was forwarded to the Applicant on 30 September and, on 13 November, he was informed that the 1996/1997 education grant would be recovered from his salary. On 9 January 1998, the Applicant requested administrative review of this decision, which request was acknowledged by the Chief, Administrative Law Unit, OHRM.

On 15 May 1998, the Applicant lodged an appeal with the JAB.

On 29 July 1998, the Acting Secretary of the JAB wrote to the Director, General Legal Division, Office of Legal Affairs (OLA), requesting his advice as to whether JIU inspectors were entitled to file appeals before the JAB. In its opinion dated 2 September 1998, OLA determined that, since the Tribunal had previously established its jurisdiction regarding members of the JIU associating them to staff members as regards their relevant conditions of service, "consequently, the requirements for the receivability of appeals by these members are the same as for staff

members; they are subject to the provisions of … the Statute of the Tribunal which requires that disputes be first submitted to the joint appeals body".

The JAB adopted its report on 11 October 1999. Its considerations, conclusions and recommendation read, in part, as follows:

"**Considerations**

Receivability

…

36. Considering receivability *ratione personae*, although none of the parties raised this issue, the Panel examined as a preliminary question whether the Joint Appeals Board was the appropriate forum before which an Inspector could appeal an administrative decision.

37. The Panel noted indeed that, under the Statute of the Joint Inspection Unit, the Inspectors "shall not be considered to be staff members" … in accordance with Staff Regulation 11.1, joint appeals boards have been established to advise the Secretary-General "in case of any appeal by *staff members*".

38. Moreover, … [as] the Inspectors are elected for appointment by the General Assembly … to submit the Inspectors to the authority of the Secretary-General for the settlement of disputes arising from their terms of appointments would be in direct contradiction with their independent status.

39. Nevertheless, the Panel was concerned that no persons in the employ of the Organization should be left without any avenue for judicial review of claims arising out of their employment. …

…

Conclusions and Recommendation

43. … [T]he Panel **concludes** that it is not competent to consider an appeal filed by an Inspector of the Joint Inspection Unit …

44. The Panel further **concludes** that the Tribunal could be the appropriate forum …

45. Accordingly, the Panel does not examine the merits and **recommends** to the Secretary-General that the present appeal be submitted to the UNAT for determination of the merits.

…"

On 17 January 2000, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the JAB's conclusions and had decided to take no further action on his appeal.

On 30 August 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB erred when it declared it was not competent to hear the Applicant's case on the merits.

2. The Respondent erred in accepting the JAB's conclusions and recommendation.

3. The Applicant suffered undue delay as a result of the decisions taken by the JAB and the Respondent.

4. The Respondent contradicted himself in determining that part-time studies did not qualify for education grant while, at the same time, did count towards determining the maximum period of four years in respect of which such grant may be received.

5. The academic year 1996/1997 corresponds to the Applicant's son's fourth year of post-secondary education, for which the Applicant is entitled to education grant.

Whereas the Respondent's principal contentions are:

1. The Respondent's decision to recover the education grant paid to the Applicant in respect of his son's 1996/1997 school year was based upon a well-founded interpretation of the Staff Regulations and Rules and the relevant administrative issuances, and was not vitiated by mistake of fact, by lack of due process or by any other extraneous factors or improper motivation.

2. The JAB was within its authority to determine that it lacked competence to consider the Applicant's appeal on the merits, and the Applicant was on notice that the JAB could make such a determination.

The Tribunal, having deliberated from 28 June to 26 July 2002, now pronounces the following Judgement:

I. The Applicant requests the Tribunal to reverse an administrative decision and order payment of monies due to him based on an entitlement to an education grant for his son. The Applicant claims that the Respondent erred in accepting the Rules and Regulations Unit's interpretation of the rule regarding the four-year post-secondary studies education grant, and its recommendation that the Organization not pay him the education grant claimed by him. The Applicant also claims that the JAB erred when it determined that it lacked competence to consider his appeal on the merits.

II. The case concerns the issue of whether the Applicant's rights were violated in two instances: (i) when the Organization decided that he had no right to receive an education grant for his son's 1996/1997 school year; and, (ii) when the JAB decided that it lacked competence to consider the Applicant's case.

III. On 14 September 1992, the United Nations General Assembly elected the Applicant as a member of the Joint Inspection Unit (JIU) for a period of five years and re-elected him on 21 May 1997 for an additional term, ending on 31 December 2002. By memorandum dated 29 March 1994, the Chief, Personnel Administration Section (PAS), United Nations Office at Geneva (UNOG), informed the Applicant that

> "for the academic years 1992/1993 and 1993/1994, [his] son was enrolled on a half-time basis only. … [A]ccording to staff rule 103.24 (b), children above the age of 18 can only be considered as dependents - for the purposes of receiving the relevant allowances from the Organization - provided they are in *full-time* attendance at an academic institution."

Additionally, the memorandum stated that the Applicant's son should not have been considered a dependent from the beginning of the Applicant's appointment. Accordingly, the Chief, PAS, instructed the Chief, Financial Resources Management Service, UNOG, to recover all the monies paid to the Applicant in respect of his son for the academic years 1992/1993 and 1993/1994.

Subsequently, the Applicant's son enrolled in an academic institution in Geneva on a full-time basis. The education grant and other benefits in respect of his son were paid to the Applicant for the scholastic years 1994/1995, 1995/1996 and 1996/1997. On 24 July 1997, the

Applicant submitted a request for an education grant for his son for the academic year 1997/1998. In response to this request, on 1 August 1997, the Applicant received a memorandum from the PAS indicating, that in accordance with administrative instruction ST/AI/181 Rev. 9, the education grant is payable "up to and including the day on which the child completes four years of post secondary studies" and explaining that

> "the four year period begins when the child starts attendance at any educational institution after completion of secondary studies … All periods of attendance at post-secondary institutions count towards the four years even if the grant is not payable for some or all of the time because the school is free or because the child received a scholarship."

The memorandum also stated that the records showed that the Applicant's son was engaged in full-time post secondary education from January to December 1992 and again from January to December 1993 at Miami-Dade Community College. Moreover, the Applicant was informed that his son completed four years of post-secondary studies at the end of the academic year 1995/1996 and that the Financial Resources Management Service would be instructed to recover the advance received by the Applicant for the scholastic year 1996/1997.

In a memorandum dated 20 August 1997, addressed to the PAS, the Applicant stated that during 1992/1993 and 1993/1994 his son was enrolled on a half-time basis. Therefore, the period from January 1993 to December 1993, which had been mistakenly counted as full-time, should be adjusted to reflect his son's part-time enrollment. The Applicant attached a copy of the above-mentioned memorandum of 29 March 1994 and further stated that it was "on that basis [that] education grant, home leave and other entitlements were denied in respect of [his] son … Now that it is clear that [his] son … was … a half-time student during the period between January 1993 to December 1993, there should be no impediment to the payment of the education grant".

After further correspondence with the PAS, the Applicant wrote to the Secretary-General requesting administrative review of the decision not to pay him the education grant for the academic year 1996/1997.

On 19 February 1998, the Chief, Administrative Law Unit, OHRM, informed the Applicant that her office was in receipt of his letter addressed to the Secretary-General and that should he not receive a letter within two months, he could file an appeal directly with the JAB in

Geneva. She further stated in her letter that "the Secretary-General always reserves the right to raise the issues of receivability and competence, as deemed appropriate". The Applicant did not receive a reply from the Secretary-General and, on 15 May 1998, he submitted his appeal to the JAB.

The Acting Secretary of the JAB requested an advisory opinion from OLA concerning access to the JAB by JIU Inspectors and their status as staff members. In its opinion dated 2 September 1998, OLA indicated that the dispute should first go to the JAB. In its report dated 11 October 1999, the JAB stated that it was not competent to consider an appeal filed by an Inspector of the JIU and that the appeal should be submitted directly to the Tribunal. The Secretary-General agreed with the conclusion of the JAB and informed the Applicant accordingly. This Application followed.

IV. The Tribunal will first examine whether the Organization erred when it decided that the Applicant had no right to receive an education grant for his son's 1996/1997 academic year. The Applicant claims that PAS erred when it alleged that the academic year 1993/1994, during which the Applicant's son was enrolled on a part-time basis only, should be counted as one year of post-secondary education for the purposes of computing the four-year maximum entitlement to education grant. The Respondent claims that its decision to recover the education grant advance paid to the Applicant in respect of his son's 1996/1997 academic year was based upon a well-founded interpretation of the Staff Regulations and Rules and the relevant administrative issuances. The Respondent further contends that the decision was not vitiated by mistake of fact, by lack of due process or by any other extraneous factors or improper motivation.

The Applicant states that the following accurately reflects his son's enrollment status: he completed his first year of post-secondary education in 1992/1993, prior to the Applicant's appointment. During 1993/1994 he attended college on a part-time basis and subsequently he enrolled on a full-time basis at a university in Geneva, where he completed the 1994/1995, 1995/1996 and 1996/1997 academic years.

The Applicant accepts that since his son was enrolled only on a part-time basis during the academic year 1993/1994, he was not entitled to receive education grant for that year. However, it is the Applicant's claim that the same year (of part-time studies) cannot be counted in the computation of the four-year maximum entitlement to education grant. Consequently, the three

years of full-time studies should be counted as years two, three and four, for which the Applicant is entitled to receive the education grant for his son. There should have been no obstacle to the payment of the education grant for 1996/1997 since he received the education grant only for two of the three years to which he was entitled.

The Applicant further claims that, in determining eligibility for the education grant, the Respondent interprets "years of post-secondary studies" as having to be "in full-time attendance", while for the purpose of computing the maximum entitlement of four years, the Respondent's interpretation of the same phrase is to include either "in full-time attendance" or "in part-time attendance". The Applicant claims that nothing in the applicable provisions on education grant warrants such an interchangeable interpretation.

The Respondent claims that, based on staff regulation 3.2 and staff rule 103.20 (e) (i), the period of eligibility for the education grant is premised on a temporal four-year period following commencement of post-secondary studies, irrespective of the academic status of the student, such as full-time versus part-time enrollment. Staff regulation 3.2 (a) and staff rule 103.20 (e) (i) state that the post-secondary education grant shall be payable in respect of a dependent child in full-time studies up to the end of the fourth year of post-secondary studies or the award of the first recognized degree, whichever is earlier. Consequently, the Respondent contends that the Applicant is not entitled to the education grant for the academic year 1993/1994, during which his son was enrolled in part-time studies, and that 1995/1996 was the fourth and last academic year for which the Applicant was entitled to receive education grant for his son.

V. The Tribunal finds that the Respondent's decision to recover the education grant for the 1996/1997 academic year was consistent with the Staff Regulations and Rules and therefore, whilst it may seem harsh, must be upheld. The Applicant's son completed a first year of studies before the Applicant took up his appointment in 1993 and that period should be counted as one year of post-secondary studies towards the total four. The Applicant has not disputed this fact. The studies undertaken by the Applicant's son during 1993/1994 were on a part-time basis, precluding the Applicant from receiving the education grant for that year. The Tribunal finds that the Respondent correctly interpreted the Staff Regulations and Rules, and the Administrative Instructions, when interpreting and calculating "years of studies". The Tribunal has previously established that "the expression used in [rule 103.20 (e) (i)] 'up to the end of the school year in

which the child completes four years of post-secondary studies' correctly renders the true meaning of the provision of the Regulation [3.2]". (See Judgement No. 301, *Sanchez* (1983).) The Tribunal is of the opinion that the four-year period of entitlement to post-secondary education grant runs *continuously* from the commencement of the post-secondary studies. Therefore, 1996/1997 was the Applicant's son's fifth year of post-secondary studies, for which the Applicant was not entitled to receive an education grant. Consequently, the Applicant's claim for an education grant for his son for that year is rejected.

VI. The second issue is whether the JAB lacked competence to consider the Applicant's case. The Respondent claims that it was within the JAB's authority to determine that it lacked competence to consider the Applicant's appeal on the merits, and that the Applicant, by way of the memorandum dated 19 February 1998 from the Chief, Administrative Law Unit, was on notice that the JAB could make such a determination. The Applicant claims that the JAB did have competence to consider the case and that no objection was made regarding the JAB's competence to hear the appeal based on the Applicant's status as an official, not a staff member, of the Organization.

The Applicant further claims that the Respondent contradicted himself by claiming that the JAB lacked the competence to hear the case on the merits whilst, on the other hand, using the facts as established by the JAB. The Applicant claims that the JAB report is indivisible: the Respondent cannot pick and choose which parts of the case the JAB was competent to hear.

The Tribunal notes that, in the advisory opinion issued by OLA on 2 September 1998 concerning access to the JAB by JIU Inspectors (based on the Tribunal's precedent in Judgement No. 656, *Kremer and Gourdon* (1994), in which it established its jurisdiction regarding members of the JIU, "associating them regarding their relevant conditions of service to staff members") OLA stated that the requirements for receivability of appeals by JIU members are the same as for staff members. The Tribunal would wish to emphasize that *Kremer and Gourdon* never considered the question of its jurisdiction in relation to claims by JIU members at all as the issue had not arisen and, since the case of the staff member concerned had come directly to the Tribunal with the consent of the Secretary-General, no issue was taken or arose in relation to receivability. In these circumstances, the Tribunal's Judgement in *Kremer and Gourdon c*an

hardly be described as a precedent relevant to the issue of admissibility or receivability of an appeal by a JIU inspector to the JAB.

VII. The Tribunal is satisfied that the JAB was correct in determining that it did not have competence to hear the case. In its report, the JAB stated

> "under the Statute of the Joint Inspection Unit, the Inspectors 'shall not be considered to be staff members'… Furthermore, in accordance with staff regulation 11.1, joint appeals boards have been established to advise the Secretary-General 'in case of any appeal by the *staff members*'".

Since the JIU inspectors are not "staff members", the JAB was precluded from considering the Applicant's case. However the constraints on the jurisdiction of the JAB are not to be found in similarly restrictive terms in the Statute and Rules of the Tribunal. The Tribunal is not confined to receiving cases from staff members as it is additionally empowered under article 2.2 (b) of the Statute to hear and pass judgement on applications from "any other person who can show that he or she is entitled to rights under any contract or terms of appointment" and the Applicant clearly comes within this provision.

In the view of the Tribunal, the Respondent ought properly to have assented to a direct referral of this case to the Tribunal, rather than to have advised the Applicant to apply to the JAB if he received no reply to his request for administrative review within two months; whilst, at the same time, reserving the entitlement to raise issues as to receivability or competence, particularly since there were no factual issues as between the parties and the only issues arising were issues of construction of the Staff Regulations and Rules and issues of law. This is, after all, what was done by the Respondent in *Kremer and Gourdon* and the Tribunal can identify no good reason why it was not done here.

The Respondent's advice that the Applicant should lodge his appeal with the JAB has caused the Applicant to suffer substantial and unnecessary delay in the finalization of his proceedings. At least 18 months elapsed between the time when the Applicant submitted his appeal to the JAB and the time when he learned of the Respondent's decision, arising from the JAB's report. The Tribunal considers that a sum of one month's net base salary is appropriate compensation for this delay.

Notwithstanding that this case has not come to the Tribunal by way of a direct referral, the Tribunal is satisfied that it is competent to hear and pass judgement on this Application as firstly, it has jurisdiction by virtue of the afore-mentioned article 2.2 (b) of the Statute and secondly, the Application satisfies the requirements of article 7 of the said Statute as it transpires that the dispute has been submitted to the JAB (albeit unnecessarily) and the said JAB has communicated its opinion thereon to the Respondent, albeit that its opinion was that it was not competent to embark upon a consideration of the merits of the case.

VIII. For the foregoing reasons, the Tribunal orders that the Applicant be paid one month net base salary for the unnecessary and avoidable delay in the resolution of his case.

IX. All other pleas are rejected.

(Signatures)

Mayer GABAY
President

Kevin HAUGH
Vice-President

Marsha ECHOLS
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary