

ADMINISTRATIVE TRIBUNAL

Judgement No. 391

Case No. 401: PICCI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Luis de Posadas Montero, Vice-President,
presiding; Mr. Roger Pinto; Mr. Ahmed Osman;

Whereas on 23 September 1986, Raffaello Picci, a former staff member of the United Nations Development Programme, hereinafter referred to as UNDP, filed an application in which he requested the Tribunal:

- "(a) That based on the description of facts and the observations contained in this application and in the annexes (which are to be considered as an integral part of this application), the Tribunal review the decision requiring me to pay Dollars 13,972.29 as the result of the application of rental deductions for the period July 1981 to October 1983 in accordance with circular UNDP/ADM/PER/ 189/Rev.1 dated 20 June 1980. This decision has been confirmed by the Secretary-General, who has not accepted the recommendation of the Joint Appeals Board that the rental deductions in question be reduced by one-half.
- (b) That in this context, the Tribunal judge on the legal validity of circular UNDP/ADM/PER/189/Rev.1, taking into account that the application of the rental deduction scheme envisaged by this circular may result in substantial injustice and disparity of treatment among staff members incompatible with the declared objectives of the circular, with the spirit of the Staff Rules and the conditions of service, as well as with the principle set forth in article 23.2 of the Universal Declaration of Human Rights.
- (c) Should the Tribunal decide that circular UNDP/ADM/PER/189/Rev.1 has a valid legal basis, that the Tribunal ensure that the rules contained in the circular be correctly applied with a view to achieving the objectives of equity

declared in the circular; and that the Tribunal consider favourably the merit of the observations and conclusions of the Joint Appeals Board leading to the Board's recommendation that the rental deductions in question be reduced by one-half, also deciding in this context on the legal validity of the limitation set in article 6 and 10.c of the circular concerning the non-applicability of the category 'sub-standard' to dwellings in capital or other major cities.

- (d) That accordingly, the Tribunal decide either that the rental deductions claimed by the Respondent are not due, or that the amount of such rental deductions be reduced by half as recommended by the Joint Appeals Board."

Whereas on 29 December 1986, the Respondent filed his answer;
Whereas on 27 April 1987, the Applicant filed written observations;

Whereas on 5 May 1987, the presiding member of the Panel ruled that no oral proceedings would be held in the case;

Whereas on 7 May 1987 and 14 May 1987, the Tribunal put questions to the Respondent who replied on 8 May 1987 and 20 May 1987;

Whereas at the request of the Tribunal, on 27 May 1987, the Respondent filed an additional document;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Development Programme on 21 October 1975. He was initially offered a two-year fixed-term appointment at the P-4 level and continued to serve on a succession of further fixed-term appointments until 30 June 1986 when he separated from the service of the Organization.

On 20 June 1980, UNDP issued administrative circular UNDP/ADM/PER/ 189/Rev.1. In this circular, the Officer-in-charge, Division of Personnel (DOP), announced to the staff serving at all UNDP Field Offices, that the International Civil Service Commission had approved a revised rental subsidy scheme that would be implemented on 1 July 1980. On 19 December 1980, the Chief, Rates and Allowances Unit, DOP, informed the UNDP Resident Representative

in Djibouti that, pursuant to the provisions of the circular, monthly rental deductions would be applied in local currency to the Resident Representative and to two other staff members serving at the duty station.

In December 1980, the Applicant was assigned to Djibouti to serve as Deputy Resident Representative. He initially rented accommodations in a local hotel.

In a letter dated 2 February 1981, addressed to the Chief, Rates and Allowances Unit, DOP, the Resident Representative sought reconsideration of the decision to apply rental deductions to UNDP personnel in Djibouti in view of the unfavourable prevailing housing market as well as the sub-standard nature of the accommodation provided by the Government. He requested that rental deductions be waived or reduced pursuant to paragraph 6 of circular UNDP/ADM/PER/189/Rev.1, by the Chairman of the International Civil Service Commission, who could, in exceptional circumstances, authorize such a waiver. Djibouti should, in the Resident Representative's view, be considered an "exceptional" case.

In July 1981, the Applicant who had been, until then, residing in a hotel, rented accommodations provided by the Government.

On 25 October 1981, the Resident Representative submitted Rental Subsidy/Deduction Calculation Forms to the Chief, Rates and Allowances, DOP, in respect of several staff members, including the Applicant. On 27 January 1982, the Chief, Rates and Allowances Unit, DOP, wrote to the Resident Representative and indicated the amount of rental deduction charges to be applied to those staff members. He also asked whether accommodations for the Applicant had been provided "by the Organization, the Government or a related institution". He added:

"We regret that the deductions for those in Government-provided accommodation cannot be waived nor can these be reduced. The sub-standard category mentioned in circular UNDP/ADM/PER/189/Rev.1 of 20 June 1980 does not apply to accommodation in capital or other major cities."

An exchange of correspondence ensued on the subject. In letters dated 2 February 1982, 13 March 1982, and 20 April 1982 addressed to the Chief, Rates and Allowances Unit, DOP, UNDP, the Resident Representative reiterated the reasons why he did not believe, and was not prepared to accept, that rental deductions be applied to the staff in Djibouti in accordance with circular UNDP/ADM/PER/189/Rev.1.

In a memorandum dated 4 May 1982, addressed to the Resident Representative, the Chief, Rates and Allowances Unit, DOP, set forth the amounts of monthly rental deductions to be applied pursuant to the circular, effective 1 February 1982. He also stated that the contents of all prior correspondence on the subject had been noted, but "the decision to apply rental deductions on accommodations provided by the Government, the Organization or a related institution [had] been mandated by the ICSC", and therefore UNDP could not exercise any flexibility on the matter.

The Applicant requested the UNDP Ombudsman Panel's intervention. The record of the case shows that an exchange of correspondence ensued between the Applicant, the Chairman of the Staff Council and the UNDP Ombudsman. The Applicant elaborated on his objections to the application of rental deductions to personnel stationed in Djibouti.

On 12 January 1984, the Applicant was assigned to the UNDP Office in Georgetown, Guyana, as Deputy Resident Representative.

In a memorandum dated 7 February 1984, the Chief, Rates and Allowances Unit, DOP, informed the Applicant that he owed UNDP the amount of US\$ 12,891.34. This sum represented rental deductions due from him in respect of government-provided housing in Djibouti. He also noted that despite representations made to the UNDP Ombudsman Panel concerning the application of rental deductions to UNDP personnel in Djibouti, there had been "no change in the status" and rental deductions continued to be applicable.

On 1 March 1984, the Applicant requested the Secretary-

General to review the administrative decision to charge him for rental deductions for the period July 1981 to October 1983 when he was stationed in Djibouti. Not having received a reply from the Secretary-General, on 30 May 1984, the Applicant lodged an appeal with the Joint Appeals Board and requested, in accordance with staff rule 111.2(f), suspension of action on the decision to settle payment of the monies he owed until the dispute was definitively solved. The Joint Appeals Board adopted a report on the request for a recommendation to suspend action under staff rule 111.2(f) on 19 November 1984. Its recommendation reads as follows:

"Recommendation

17. The Panel recommends that action on the decision that the appellant should pay \$12,891.34 on account of rental deductions in respect of housing provided by the Government of Djibouti during July 1981-October 1983 be suspended until the Panel submits its conclusions and recommendations on the present appeal."

On 26 December 1984, the Assistant-Secretary-General for Personnel Services informed the Applicant that the Secretary-General had taken note of the Board's report and had "decided that action on the contested decision be suspended until the Board submits its report on the appeal".

On 4 January 1985, the Chief, Rates and Allowances Unit, DOP, informed the Applicant that the total amount due from him for rental deductions was US\$ 13,973.29 and not US\$ 12,891.34.

The Joint Appeals Board adopted its report on 27 March 1986. Its conclusions and recommendations read as follows:

"Conclusions and recommendations

62. The Panel concluded

- (i) That the application of the rental deduction scheme during the relevant period had a valid legal basis in the conditions of service of UNDP in respect of staff members in the field as specified in circular UNDP/ADM/PER/189/Rev.1;

- (ii) That the rental deductions imposed on the appellant had

been established in accordance with the then prevailing provisions of the rental deduction scheme but that UNDP should have sought a modification of those provisions or an exception to their application as they affected rental deductions in respect of substandard housing in Djibouti;

(iii) That the recently introduced provision for reducing by one-half rental deductions in respect of rents paid for substandard housing located in capital cities should be applied in the appellant's case.

63. The Panel accordingly recommends that the rental deductions imposed on the appellant be reduced by one-half."

The Applicant separated from the service of UNDP on 30 June 1986.

On 10 July 1986, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General had re-examined his case in the light of the Board's report, had decided to reject the recommendation to reduce by half the rental deduction for the period July 1981 through October 1983 and to maintain the contested decision. He noted:

"The Secretary-General's decision not to accept the Board's above-mentioned recommendation is based on his conclusion that the contested decision was validly taken in accordance with the provisions in effect during the period July 1981 through October 1983. The effective date of the provision which authorized full or partial waiver of the rental deductions was 1 July 1985 and therefore this provision cannot properly be applied retroactively to the rental deductions which are the subject of your appeal."

On 23 September 1986, the Applicant filed with the Tribunal the application referred to above.

On 20 October 1986, the UNDP Administration deducted the amount of US\$ 13,973.29 from the entitlements due to the Applicant on his separation from service.

Whereas the Applicant's principal contentions are:

1. The circular UNDP/ADM/PER/189/Rev.1 exceeds the scope of

staff rule 103.18(b), does not have a legal basis, and is incorrectly applied by the Respondent.

2. The Applicant was obliged to rent accommodations which were deficient in many respects and which obliged him to incur additional expenditures. These accommodations were not up to the general standards of subsidized housing and should not be judged solely on that basis under the circular.

3. There was no subsidy element in the rent payable by the Applicant to the Government of Djibouti since rents in the private sector were of the same level.

4. The distinction between renting from the Government or from a commercial landlord is an essential feature of the scheme mandated by the ICSC. This distinction is arbitrary since rentals from the Government are sometimes more expensive than rentals from private landlords. Government owned houses and apartments in Djibouti are rented at commercial prices. Accordingly, the application of rental deductions under these circumstances creates an unjustifiable and unacceptable disparity of treatment between staff members living in Government owned and in commercial houses. The Applicant had no option to rent from a commercial landlord.

Whereas the Respondent's principal contentions are:

1. The provisions of the UNDP circular implementing a revised rental subsidy/deduction scheme (UNDP/ADM/PER/189/Rev.1) are part of UNDP's conditions of service and bind the Applicant. The decision to apply rental deductions to the Applicant was validly taken and properly applied.

2. The Respondent is not required to apply retroactively to the Applicant changes in the rental subsidy/deduction scheme introduced subsequent to his relevant period of service.

The Tribunal, having deliberated from 6 May 1987 to 5 June 1987, now pronounces the following judgement:

I. The Applicant requests that the Tribunal "ensure that the rules contained in the circular [UNDP/ADM/PER/189/Rev.1] be correctly applied with a view to achieving the objectives of equity declared in the circular...;". The Tribunal will examine if the rules of this circular have been correctly applied in the case of the Applicant.

II. The Respondent, on his part, contends in this respect that the UNDP properly applied the rental deduction scheme and that no evidence has been adduced to show that the UNDP calculations were incorrect.

III. The Tribunal observes here that the pertinent rules concerning rental deduction can be divided into two categories:

(a) The rules enunciating the conditions required for determining the eventual applicability of the rental deduction to a staff member, and

(b) The rules referring to the method of calculation of the deduction once its applicability to a staff member has been duly established.

This being said, the Tribunal considers that to ensure a correct application of the rules of rental deduction as envisaged in circular UNDP/ADM/PER/189/Rev.1, the Tribunal must address itself to the issue of applicability in order to dispose of it first.

IV. The Tribunal notes that the crux of the disagreement between the parties centres on the way the conditions required in paragraph 5 of the circular, for the determination of the applicability of the rental deduction, should be implemented. Paragraph 5 states the following:

"Rental Deductions

5. Staff members whose housing is provided by the organization, by the government or by a related institution, either free of charge or at rents substantially lower than the average rents

used in calculating the post adjustment index for the duty station shall be subject to deductions from their salaries so as to maintain equity in the application of the post adjustment system among staff members at that duty station. Any calculated deduction of less than \$10 dollars per month shall be disregarded."

According to this paragraph, the applicability of the rental deduction is tied to two conditions:

(a) The staff member must be residing in housing provided by the organization, by the government or by a related institution;

(b) The rent must be either free, or substantially lower than the average rents used in calculating the post adjustment index for the duty station.

V. The Tribunal will examine now if in the case of the Applicant, these two conditions have been fulfilled:

(a) With regard to the first condition, there is no doubt that the Applicant occupied a one bedroom apartment provided by the Government of Djibouti;

(b) With regard to the second condition, the Tribunal observes:

- (i) That the housing of the Applicant is not free,
- (ii) That the Applicant had stated that the amount of rent paid by him was 100.000 DF [Djibouti Francs] per month, both in 1981 and 1982 and 120.000 DF starting 1 January 1983. These amounts have not been contested by the Respondent.

VI. The Respondent claims that the rents paid by the Applicant are substantially lower than the average rent used in calculating the post adjustment index for Djibouti. Accordingly, he considers that rental deductions are applicable to the Applicant.

VII. The Applicant on his part asserts that "across the board" applications of the rule in Djibouti cannot be sustained because the

Government-owned houses are not of uniform standard, nor are they necessarily substantially lower in price than comparable privately-owned accommodations. He cites, in this respect, the case of another international staff member stationed in Djibouti, working for UNHCR, who occupied a comparable one bedroom apartment in privately-owned housing and also paid 100.000 DF per month as rent.

VIII. The issue before the Tribunal is therefore to decide if the Applicant's rent fulfills the requirement stated in paragraph 5 of the circular, that it should be "substantially lower than the average rents used in calculating the post adjustment index" of Djibouti.

In order to decide on the matter, the Tribunal requested the Respondent to provide it with "the amount ... in Djibouti Francs of the average rent used in calculating the post adjustment index for Djibouti."

The Respondent, by his cable dated 26 May 1987, transmitted to the Tribunal a memorandum dated 26 May 1987 from the ICSC Secretariat entitled "1981-1983 Average rents used for post adjustment - Djibouti" in which is stated that "average rents by bedroom count used to calculate rent indices for Djibouti submitted by the international officials stationed there in 1981, 1982 and 1983 ..." are for one bedroom apartments the following:

128.148 DF in 1981
140.007 DF in 1982
200.000 DF in 1983

IX. Comparing the rents paid by the Applicant for the period 1981-1983 to the average rents reported above, the Tribunal finds that the Applicant's rent is indeed lower

by 28.148 in 1981 - i.e. 21.86 per cent
by 40.007 in 1982 - i.e. 28.57 per cent, and
by 80.000 in 1983 - i.e. 40 per cent

The Tribunal notes that the Applicant's rent never went below

50 per cent of the average rent for any of the years in question.

X. Although the expression "substantially lower" is not very precise, and opinions may differ as to what constitutes "substantially lower" rent, the Tribunal considers that in this particular case, a rent which has never been at all times below 50 per cent of the average rent, cannot possibly be considered in all fairness as a "substantially lower" rent.

XI. In view of the foregoing, the Tribunal considers that the rental deductions envisaged in circular UNDP/ADM/PER/189/Rev.1 are not applicable in the case of the Applicant, because one of the conditions required for its application has not been fulfilled.

Therefore, the Tribunal finds that:

(1) Circular UNDP/ADM/PER/189/Rev.1 has not been properly applied;

(2) The Applicant is entitled to claim that the rental deduction envisaged in that circular was not applicable to him.

XII. In view of these findings, the Tribunal considers that it is not necessary to entertain the other pleas of the Applicant.

XIII. For these reasons, the Tribunal orders:

(a) The rescission of the administrative decision on the basis of which the Applicant paid to the United Nations Development Programme the sum of \$13.973,79 for rental deductions, wrongly applied to him from July 1981 to October 1983;

(b) The Respondent to reimburse the Applicant the amount mentioned in the preceding paragraph;

(c) All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO

Second Vice-President, presiding

Roger PINTO
Member

Ahmed OSMAN
Member

Geneva, 5 June 1987

R. Maria VICIEN-MILBURN
Executive Secretary