ADMINISTRATIVE TRIBUNAL

Judgement No. 394

Case No. 402: ARMIJO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Arnold Kean, Vice-President, presiding; Mr. Ahmed Osman; Mr. Jerome Ackerman;

Whereas on 29 October 1985 Rogelio Armijo Moya, a former staff member of the Economic Commission for Latin America, hereinafter referred to as ECLA, filed an application that did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas on 19 March 1986 and 6 June 1986, the Applicant again filed two successive applications that did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas on 28 August 1986 the Applicant, after making the necessary corrections, filed an application, the pleas of which read as follows:

> "I request the Tribunal: to revoke my dismissal by reinstating me retroactively in the service of ECLA, ruling, at most and if it sees fit, that some of the same disciplinary sanctions should be applied to me as have been applied by ECLA in equivalent cases; and to pay me retroactive salary in the amount of $US 77,300 (because at this point my salary comes to $Ch [Chilean Escudos] 140,000 monthly, or $US 700 monthly), deducting the amounts received and any other amount it may decide, taking into account that during these past years I have received no more than $Ch [Chilean Escudos] 700,000 in payment for occasional work."

Whereas the Respondent filed his answer on 18 May 1987;

Whereas the Applicant filed written observations on 19 October 1987;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 15 November 1962 on a short-term appointment at the Grade 1, step I level, as a cleaner/nightwatchman. He then served on a series of successive fixed-term appointments until 1 July 1966 when he was offered a probationary appointment. On 1 March 1974 his appointment became permanent. During the course of his employment with ECLA, he was promoted to the G-2 level on 1 December 1966 and to the G-3 level on 1 April 1974.

In early 1977, J. Van Breda and Co. International, hereinafter referred to as "Van Breda", the administrator of the group medical, hospital and dental insurance scheme that provides coverage to ECLA staff, conducted a large-scale investigation into possible fraudulent insurance claims by ECLA staff.

In a memorandum dated 5 April 1977, the Acting Chief, Personnel Section, ECLA, notified the Applicant that, in accordance with the provisions of personnel directive PD/1/76 concerning "Disciplinary Procedure for Staff Serving at Offices away from Headquarters and Geneva", he was being subjected to a disciplinary investigation, because Van Breda had grounds to suspect that he had submitted fraudulent claims to the insurance company for reimbursement. The specific charge against him was that on 16 July 1976 he had forwarded to Van Breda a receipt from the Clinic Oftalmólogos Asociados for 180 Ch Escudos, when the real value of the receipt was 80 Ch Escudos. The Applicant was asked to provide his written version of the facts; to suggest other persons whom the Office of Personnel Services might interview, and to name witnesses in his favour. He was advised that he could resort to a staff member of his choice at the duty station to assist him in his defense.

On 6 April 1977, the A pplicant was interviewed by a panel of

Personnel and Administrative Officers. According to the minutes of the meeting, the panel confronted him with the evidence against him - namely a discrepancy between the receipt No. 4323 for 180 Ch Escudos from Oftalmólogos Asociados that he had submitted for reimbursement and a photocopy of the same receipt provided by the Clinic for 80 Ch Escudos. When asked for an explanation, the Applicant admitted at that meeting that he had altered the figures in the receipt. On 7 April 1977, the Director, Division of Administration, ECLA, notified the Applicant in writing, that, in accordance with staff rule 110.4, the Assistant Secretary-General for Personnel Services had authorized the suspension of his services without pay, effective 1 April 1977, pending the investigation of the charges made against him. In a memorandum dated 22 April 1977, the Applicant admitted in writing that he had altered the receipt. He explained that it had not been a premeditated action and set forth extenuating circumstances to justify his actions, namely family pressures and bad health.

On 19 May 1977, the Acting Chief, Personnel Services Section, ECLA, notified the Applicant in writing of an additional charge against him by Van Breda, namely that he had submitted for reimbursement a receipt No. 043496 from the pharmacy Bitrán Ltdo. for the amount of 155 Ch Escudos, when the real value of the receipt was 55 Ch Escudos. In a reply dated 24 May 1977 the Applicant admitted that he had altered that receipt as well. He reiterated the contents of his memorandum of 22 April 1977, and stated that there had been no intent on his part to deceive Van Breda. He had committed the act on "thoughtless and irresponsible impulse".

On 13 June 1977, the Acting Chief, Personnel Section, notified the Applicant that Van Breda wanted to establish whether or not dental work for which the Applicant had filed a claim on 10 June 1976 and for which he had been reimbursed $US 384.96, had been performed on his daughter Ingrid or not. He informed the Applicant that according to a report from an independent specialist, "after completing an examination of the dental work allegedly performed on

[his] daughter, Ingrid, such work was not, in whole or in part, performed as claimed by [the Applicant]."

In a reply dated 24 June 1977 the Applicant stated that it was his wife who had accompanied his daughter for dental treatment. At the end of the treatment, he had received the bill and had requested reimbursement from Van Breda on the assumption that the treatment had been performed. For that reason, when on 3 June, the Acting Chief, Personnel Services, had asked that his daughter be examined by a dentist, he had immediately agreed, convinced that the treatment had been completed. He asserted that perhaps the dental work might not have been detected, as it was parodoncy performed over a year earlier, and he understood from other professionals that after prolonged periods it was difficult to detect parodoncy work. He indicated that he would not object to having his daughter examined again by another dentist in order to have a second opinion on the matter.

In an undated letter addressed to the Chief, Medical Service, ECLA, Dr. Cesar Ferrada, the dental surgeon who had allegedly treated the Applicant's daughter stated:

> "With reference to your inquiry about the estimate issued in the name of Ingrid Armijo, it is my duty to report that:
>
> (1) It relates to an estimate prepared at our public district clinic situated in Maturana Street, which, as recorded in our books, the patient Ingrid Armijo visited solely for a consultation.
>
> (2) The stamp 'Paid' is false, since the treatment was never carried out and consequently was not paid for; only a consultancy fee is recorded as having been received.
>
> (3) The proposed treatment plan refers to an adult suffering from a gum infection."

On 11 July 1977, the Chief, Division of Administration, ECLA, transmitted to the Executive Secretary, ECLA, "the investigation report and enclosures on [the Applicant] for any recommendation [he] may wish to make to be included in the report in accordance with

PD/1/76". On the same day, the Chief, Division of Administration, ECLA, transmitted to the Assistant Secretary-General for Personnel Services an investigation report concerning the Applicant's case, in accordance with the requirements of PD/1/76. The report consisted of a description and analysis of the facts and concluded as follows:

> "11. With regard to PD/1/76, paragraph 2(c) in what refers to conclusions of fact, and a statement of such charges as appear to be supported after investigation, the staff member admitted falsifying the doctor's bill (Oftalmólogos Asociados) and the pharmacy receipt (Farmacia Bitrán) in his written statements. As mentioned above, the difference between the real amounts and the altered amounts was $US 14.38.
>
> As concerns Mr. Armijo's dental claim for his daughter Ingrid of 10 June 1977, the Van Breda Company reimbursed the staff member $US 384.96. In view of the independent dentist's findings as reported in paragraph ... above, and in view of the written statement of Dr. C. Ferrada, the following is concluded with regard to the staff member's dental claim to Van Breda:
>
> 1) The patient was not Mr. Armijo's daughter Ingrid as the staff member claimed;
>
> 2) There was no dental treatment given or any dental expense incurred by Mr. Armijo as he claimed;
>
> 3) The dental document provided by Dr. Ferrada attached to Mr. Armijo's claim was an unpaid estimate and not a paid bill, as was claimed;
>
> 4) A 'paid' stamp was affixed to the estimate by an unknown person;
>
> 5) The estimate for the dental treatment prescribed had been done on an adult who suffered from gum infection, which person was not Mr. Armijo's daughter by virtue of her age and her dental condition as verified by the dental specialist and Mr. Armijo's dentist.
>
> In view of the above it is considered that Mr. Armijo committed a serious misconduct in submitting a false claim to Van Breda and thereby receiving $US 384.96 to which he was not entitled."

In a memorandum dated 27 July 1977, addressed to the Director, Division of Administration, ECLA, the Applicant requested reconsideration of the decision to suspend him without pay. On the ECLA Staff Counsellor's recommendation, and with the approval of the Chief, Staff Services, Office pf Personnel Services (OPS) at Headquarters, the Applicant's request was granted and he was retroactively suspended at half pay pending investigation from 8 April 1977 through 30 June 1977, and at full pay from 1 July 1977.

In the meantime, the Executive Secretary, ECLA, had informally established, in consultation with the ECLA Staff Council, a joint "Ad-Hoc Working Group" to participate in the investigation of suspected fraudulent medical and dental claims.

On 27 June 1977, at the request of the Executive Secretary, ECLA, the Secretary-General sent a mission from Headquarters to Santiago de Chile to assist the Executive Secretary, ECLA, and advise him on what course of action to take concerning the Van Breda investigation of suspected fraudulent claims. The mission was constituted by the Senior Administrative Officer in charge of Review of Appeals and Disciplinary cases, Staff Services, OPS, and the Chief of the Insurance Unit, Salaries and Allowances and Insurance, Division for Policy Coordination, Office of Financial Services (OFS). According to their report, on arrival at Santiago, their first concern was to remedy "the serious situation resulting from the existence of the Ad-Hoc Committee and its broad terms of reference which conflicted with the established procedure [set forth in the Staff Regulations and Rules]". After a formal meeting with all the members of the Ad-Hoc Committee, an agreement was reached between the members of the mission from Headquarters and the members of the Ad-Hoc Committee, as to what should be the role and guidelines for this Committee. Subsequently, on 20 June 1977 the Executive Secretary, ECLA, drafted a circular CGI/447, REF: PER 521 and informed the staff at ECLA, ILPES (Latin American Institute for Economic and Social Planning) and CELADE (Latin American Demographic Centre) that, pending the approval by the Secretary-General of the

establishment in Santiago of a Joint Disciplinary Committee in accordance with Chapter X of the Staff Rules, and without prejudice to the provisions of PD/1/76, he had decided to establish an Ad-Hoc Committee that would assist him to "arrive at my findings regarding the facts and to make recommendations to the Secretary-General concerning any disciplinary measures which may be required."

On 1 November 1977, the Applicant returned to duty.

In November 1977, the Ad-Hoc Committee submitted to the Executive Secretary, ECLA, an unsigned document entitled "Van Breda General Report" in which it made recommendations on all the cases of alleged fraud against Van Breda that it had investigated. With respect to the Applicant's case - No. 6 - the Committee's findings and recommendations read in part as follows:

> "3. Proof of offence
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> The Ad-Hoc Disciplinary Committee considers that the evidence submitted is sufficient to show that two receipts were unlawfully altered, with an improper charge of $US 14.38 and a fraudulent charge of $US 384.96 for work covered by a dental estimate which had never been actually performed. Therefore, the total amount fraudulently obtained is $US 399.34.
>
> 4. Findings
>
> The Ad-Hoc Disciplinary Committee considers that the behaviour of the accused constitutes a serious recurrent offence involving different kinds of fraudulent procedures.The accused had made himself liable to disciplinary action consistent with the seriousness of the offence.
>
> 5. Extenuating circumstances
>
> The Ad-Hoc Disciplinary Committee considers that the difficult financial situation adduced by the accused as extenuating circumstances deserves some attention.
>
> 6. Recommended disciplinary action
>
> In view of the seriousness of the charges resulting from the investigation, the Ad-Hoc Disciplinary Committee recommends a disciplinary measure consistent with the offence."

On 14 November 1977, the Executive Secretary, ECLA, transmitted the case files of 51 staff members who had been accused by Van Breda of submitting "fraudulent or misleading claims for reimbursement" to the Under-Secretary-General for Administration and Management. The letter of transmission reads in part as follows:

> "In accordance with PD/1/76, an investigation of the charges was initiated, the Personnel Office presented charges in writing and each individual concerned had the opportunity to present his written defense with the assistance of another staff member if so desired. In each case, the Division of Administration then prepared an investigation report and the complete charges being brought against the staff member.
>
> Given the large number of cases involved and the fact that no joint disciplinary committee exists at ECLA, I decided, in consultation with Messrs. Badr [Senior Adminis- trative Officer in charge of Review of Appeals and Disci- plinary Cases, Staff Services, OPS] and García [Chief, Insurance Unit, Salaries and Allowances and Insurance, Division for Policy Coordination, OFS] of Headquarters, the Division of Administration, and the Staff Council to estab- lish an ad-hoc disciplinary committee. Based on the guide- lines set by Headquarters I requested this committee to examine the problem in general and to analyse each case in depth with a view to assisting me in reaching conclusions of fact and in making recommendations to the Secretary- General as to disciplinary measures to be adopted, if any.
>
> After careful study and analysis of the conclusions of the ad-hoc disciplinary committee in each case I have accepted them and hereby send them on to you as my own recommendation."

The summary of the Applicant's case as described by the Ad-Hoc Committee in its unsigned report was attached to the letter.

On 15 November 1977, the Acting Chief, Personnel Section, ECLA, transmitted to the Applicant a copy of the investigation report and the Executive Secretary's recommendation. In a letter dated 25 November 1977 addressed to the Senior Administrative Officer-in-Charge of Disciplinary cases the Applicant acknowledged receipt of these documents. He stated in this regard:

> "With respect to the memorandum sent to Mr. Gherab [Assistant Secretary-General for Personnel Services] by Mr. El Haj [Chief, Division of Administration, ECLA] and the Ad-Hoc Committee recommendation concerning the disciplinary measures, I wish to express my greatest respect and abide by the verdict rendered, as I stated in my memorandum of 24 May 1977 addressed to Mr. Cure [Acting Chief, Personnel Services Section, ECLA]. Nevertheless, I wish once more to stress the very important fact that it was not my intention to act in bad faith with respect to the Van Breda Medical Plan, nor did I act intending to defraud, nor with premeditation.
>
> Appealing to the magnanimity of the Disciplinary Committee that will render the final verdict, I hope that it will take into account my years of service, my complete dedication to the United Nations ... and the absolute assurance that in the future I will not commit a similar offence." (Original Spanish: Tribunal's translation)

In an undated memorandum, the Assistant Secretary-General for Personnel Services, informed the Secretary-General of nine cases of ECLA staff members who had submitted fraudulent insurance claims and noted that:

> "From the point of view of the amounts involved, the patternof recurrence and the leadership role assumed by some of them, the nine staff members in question may be considered the worst offenders among the 79 staff members covered by the investigation. Since the degree of their culpability is basically the same, their cases are presented here together and the same disciplinary measure will be recommended for all nine. The details of the investigation of each case are to be found in the respective individual files."

The Applicant's case was included among the nine cases and was summarized as follows:

> "ARMIJO, R. -- One pharmacy and one physician's receipt attached by Mr. Armijo to his claim dated 16 July 1976 were found to have been altered to reflect an excess payment equivalent to $US 14.38. The staff member admitted having altered the two receipts. In addition, a claim submitted by him for reimbursement of dental expenses in respect of his daughter was investigated. The dental examination revealed that the work claimed for in June 1976 had never been done. In view of the staff member's insistence that the work had been done, a statement was obtained from his dentist to the effect that

> the treatment had not been given and that the fees had not been paid. It should be recalled that Mr. Armijo submitted an estimate marked 'paid' in support of his claim. He thus received undue reimbursement of $US 384.96. It is therefore obvious that the staff member has engaged in various types of fraudulent acts aiming at obtaining undue amounts from the insurance company. The Executive Secretary of ECLA recommended that the sanction 'be in accordance with the gravity of the misconduct'."

On 23 February 1978 the Under-Secretary-General for Administration and Management approved the dismissal of the nine staff members on behalf of the Secretary-General.

In a memorandum dated 28 March 1978 the Applicant was informed by the Assistant Secretary-General for Personnel Services that he would be dismissed for misconduct. The memorandum reads as follows:

"1. You have submitted a number of claims for the reim- bursement of medical expenses to which you attached receiptswhich were found to have been altered to reflect an excess amount equivalent to more than $US 14.38.

2. In addition you have submitted a number of claims for the reimbursement of dental expenses. The investigation established that the dental work has not been carried out as claimed.

3. These were serious acts of misconduct on your part. Taking into consideration the pattern of your repeated offences and the amounts involved, the Secretary-General has decided that you be dismissed for misconduct under the provisions of staff regulation 10.2 and staff rule 110.3(b).

4. The Administration of ECLA has been instructed to establish the effective date of your dismissal for mis- conduct and to implement the Secretary-General's above- mentioned decision. The Administration of ECLA will also take the necessary action for the recovery from your final payment of the amounts fraudulently obtained."

The memorandum was communicated to the Applicant with a letter dated 12 April 1978 from the Acting Chief, Personnel Section, ECLA, which stated that the Applicant's dismissal would become effective 17 April 1978, that his last day of work would be 14 April 1978 and

that:

> "In consultation with Headquarters, it [had] been decided that in accordance with staff rule 109.3 (a) and (c), [he would] be paid compensation calculated on the basis of the salary and allowances which [he] would have received had [his] appointment [been] terminated at the end of the notice period, i.e., three months pay in lieu of notice."

On 12 May 1978 the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 28 September 1984.

Its conclusions and recommendations read as follows:

"CONCLUSIONS AND RECOMMENDATIONS

142. The Panel finds that the reasons given for the decision to dismiss the appellant for misconduct were not based on an accurate description of the facts of the case as supported by the file.

143. The Panel further finds that the inclusion of the appellant's case among the worst offenders in a single presentation in the memorandum to the Secretary-General by the Assistant Secretary-General, Personnel Services, and his recommendation that they all be given the same sanction because they had the same degree of culpability had seriously prejudiced the appellant's case.

144. The Panel concludes that those were serious breaches of due process having a substantial negative effect on the rights of the defence.

145. Having reviewed the facts of the case as supported by the file on the basis of the objective criteria jointly adopted and applied in the administration of all the ECLA insurance claims disciplinary cases, the Panel concludes that the appellant's case fell within the category of those to which less severe sanctions than dismissal had been applied.

146. Noting that at the appeal stage the appellant had presented a new argument in support of his defence, and noting also that had this new argument been brought during the disciplinary proceedings, the Ad-Hoc Committee, in accordance with the criteria followed for its consideration of the cases, would have requested the appellant to provide written confirmation thereof, the Panel decided to afford the appellant the same opportunity given to other staff members by the ad-hoc

disciplinary committee and requested him to provide, if possible, documentary evidence of his new defence.

147. Having considered the procedural and substantive objections to the admission of the appellant's new argu- ment, raised by the respondent, the Panel finds that such admission was justified as it was reasonably possible that the appellant might have ignored during the disciplinary proceedings as well as when he filed his appeal that the dental treatment had not been performed.

148. The Panel further finds that the documentary evidence provided by the appellant was sufficient to exonerate him from having submitted a fraudulent dental claim knowingly and intentionally.

149. The Panel therefore concludes that the charge of fraud in connection with the dental claim should be changed to serious negligence.

150. The Panel further concludes that on the basis of eitheror both of the conclusions in paragraph 145 and 149 above, the disciplinary measure should be changed from the most severe to one of the least severe.

151. Accordingly the Panel unanimously recommends to the Secretary-General:

(a) To rescind the decision whereby the appellant was dismissed from the services for misconduct on 17 April 1978;

(b) To reinstate the appellant in the service of ECLA retroactively to the date of his dismissal;

(c) To review the appellant's case on the basis of the Panel's conclusions with a view to imposing an appropriate disciplinary measure consistent with the criteria applied to other ECLA insurance claims cases; and

(d) To pay the appellant back salaries from the date of his dismissal, less (i) any indemnity in lieu of notice paid to the appellant; (ii) any monetary sanction which might be imposed as an alternate disciplinary measure; (iii) any deductions due from the appellant; and (iv) any occupational income received by him since his dismissal from non-United Nations sources."

During the course of the JAB proceedings, the Applicant

produced as part of his evidence, an affidavit signed by his wife in which she acknowledged that in May 1976 she had informed her husband, Rogelio Armijo, from whom she was separated since 1970, that their daughter required dental treatment. In June she had given him a bill for 6,400 Ch Escudos in consideration for dental treatment, in order that he obtain reimbursement from the Insurance Company. Shortly thereafter, Mr. Armijo gave her that amount.

In connection with the above, she declared that:

> "1. My daughter did not receive such dental treatment;
>
> 2. I altered the bill so that the sum of 6,400 Ch Escudos would appear as paid to the dentist, when in fact he had not received that sum;
>
> 3. These facts were not known to my ex-husband;
>
> 4. I acted by impulse for reasons of force majeure, without imagining the harm that my conduct could cause my ex-husband; my only intention was to postpone temporarily the dental treatment." (Original Spanish: Tribunal's translation)

On 2 August 1985, the Officer-in-charge of the Office of Personnel Services informed the Applicant that:

> "The Secretary-General, having re-examined your case in the light of the Board's report, has decided not to accept the Board's recommendations and, therefore, to maintain the contested decision and take no further action on your case.
>
> The Secretary-General's decision is based on his conclusions that the decision to dismiss you taken in 1978 was fully justified on the basis of the facts established in the disciplinary investigation and that the affidavit submitted by you in 1984 does not suffice to establish that you were not responsible for the false dental claim you submitted.
>
> ..."

On 28 August 1986, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Applicant was unaware that the dental bills which he forwarded to Van Breda were fraudulent because they were given to him by his former wife with whom he had not been living since 1970. Since she subsequently admitted that she had altered them herself, the charges concerning the dental claims cannot validly be brought against the Applicant.

2. Although the Applicant admits that he altered two receipts, the amounts he obtained were so small that he merits a punishment commensurate with the magnitude of his offence.

3. The Applicant did not act with premeditated intent to defraud, but on impulse without weighing the seriousness of his actions.

Whereas the Respondent's principal contentions are:

1. The Secretary-General's decision to dismiss the Applicant was justified by the evidence against him.

2. The Secretary-General's decision was reached after a disciplinary procedure which guaranteed due process and safeguarded the Applicant's rights.

3. The Secretary-General's decision was a valid exercise of his discretion to impose disciplinary measures.

The Tribunal, having deliberated from 15 October 1987 to 2 November 1987, now pronounces the following judgement:

I. The Applicant was accused of two charges related to claims submitted to the Van Breda Company, the medical insurance company.

The first charge concerns a fraudulent medical claim dated 16 July 1977, which consists of two receipts, one from a pharmacy and the other from a physician, which were altered to reflect over-payments totalling the equivalent of $US 14.38.

The Tribunal finds, that since in his letters of 22 April 1977 and 24 May 1977, the Applicant admitted altering the figures on both receipts, for which he was reimbursed excess payments from the

medical insurance company, his guilt regarding this first charge is established.

II. The second charge, refers to a claim dated 10 June 1976, in respect of dental work supposedly performed on the Applicant's daughter, for which the Applicant had been reimbursed the equivalent of $US 384.96 (dental claim).

With regard to this second charge, the Tribunal finds that there are conflicting views between the Applicant and the Respondent on two main points:

1. Whether a fraud had been committed in the first place?

2. If so, is the Applicant innocent, as he claimed, or on the contrary is he implicated and therefore responsible for that fraud?

III. With regard to the first point, the Applicant, initially insisted that his daughter's dental treatment had actually been done, and that no fraud could have been involved. The Respondent asserted all along that the evidence available showed that the dental treatment had not been carried out, and that therefore fraud was committed.

After reviewing the arguments presented by both parties, the Tribunal observes the following:

1. Upon the request of the Respondent, the Applicant's daughter was submitted to an independent dental examination. The report of this examination, made on 3 June 1977, indicated that the dental work for which the reimbursement claim had been submitted had not been performed.

2. Faced with the statement of the Applicant on 24 June 1977, that he claimed reimbursement in full understanding that the treatment had been carried out, the Respondent contacted the dentist whose name appeared in the estimate. The latter certified that the treatment was never carried out, and that he was not paid.

3. The Tribunal notes also the statement of the Joint

Appeals Board at the end of paragraph 101 of its report where it stated:

> "... the [Applicant's] unsubstantiated contention in his defence that the dental treatment had been carried out, was not sufficient to contradict the evidence against it."

In view of the foregoing, the finding of the Tribunal with regard to the first point of contention is that the treatment had not been carried out, and therefore the presentation of the dental claim to the Insurance Company and the submission of an estimate marked "cancelado" in support of this claim, resulting in the undue reimbursement of $US 384.96, was in itself an act of fraud. The JAB's notion that the word "cancelado" is ambiguous and therefore that the Applicant's culpability is somehow lessened is not shared by the Tribunal. The fact is that the estimate was submitted as a basis for payment of the dental claim and can only be understood as signifying by the word "cancelado" that it had been paid.

The Tribunal notes also, in this regard, that under the heading "General criteria employed for the recommendations" the Ad-Hoc Committee gave the following explanation:

> "5. The collection of reimbursements for medical or dental services not carried out, or of which the unfulfilled part has represented an appreciable proportion of the total recovery, has been qualified as a serious offence."

Since in this case, there was reimbursement for dental services not carried out, the fraud committed is considered a serious offence. The Tribunal will turn now to whether the Applicant was implicated in this fraud.

IV. As to this, the Tribunal is also faced with different versions:

1. For the Respondent, the matter is clear. The Applicant, a staff member, had submitted to the Insurance Company a claim for dental expenses in respect of his daughter. Evidence had shown,

after thorough investigation, that the alleged dental work had never been carried out. Therefore, the Applicant had committed an offence of claiming and receiving reimbursement of the cost of dental work which had not been performed.

2. For the Applicant, his defence rests on his alleged unawareness that the dental bill forwarded to the Insurance Company was fraudulent because it was given to him by his former wife with whom he had not been living since 1970. Since she asserted in her affidavit of 11 July 1984, that she was solely and wholly responsible for the fraudulent claim, the charge concerning the fraudulent dental claim cannot be validly imputed to him.

V. In order to assess objectively and correctly the Applicant's possible implication and responsibility with regard to this second charge, the Tribunal must take into account all the circumstances of the case and look carefully into the various attitudes taken by the Applicant with regard to his responsibility in this matter, as expressed in his own statements and declarations made during the various stages of the proceedings.

The Tribunal notes that at first, with regard to this second charge, the Applicant did not adopt a consistent attitude. Instead of insisting vigorously and categorically on his innocence, his attitude varied between claiming innocence and admitting guilt, rendering the search for the truth rather difficult.

Since an untruthful confession of guilt is not usually made by an accused person, the Tribunal will consider first the instances where the Applicant admitted his guilt and then whether his various claims of innocence are sufficiently credible, both factually and legally, to invalidate his confession, or on the contrary, whether they tend more to incriminate him.

The Tribunal noted in this regard that the Applicant had admitted on 25 November 1977, in a letter to Mr. Gamal Badr, Senior Administrative Officer in charge of disciplinary cases, after the Executive Secretary of ECLA had endorsed the findings, conclusions

and recommendations of the Ad-Hoc Committee, that he had examined the relevant documents, including Mr. El Haj's memorandum and the Ad-Hoc Committee's report. He indicated in this letter: "that he wished to express his greatest respect and abide by the verdict rendered."

In the same letter he denied that he had acted in bad faith or with fraudulent intent or premeditation and requested leniency on the basis of his record and the absolute assurance that in the future he would not commit a similar offence.

The Tribunal considers that this written statement, voluntarily submitted by the Applicant, if taken as a whole, and being made without any reservation, is an admission of guilt of the two charges levelled against him. This is more so, since this admission of guilt came after a claim of innocence of the dental fraud, previously made by the Applicant on 24 June 1977, and which contradicted squarely the statement of both Mr. El Haj and the Ad-Hoc Committee that "a fraudulent charge of $US 384.96 for work covered by a dental estimate which had never been actually performed" had been submitted by the Applicant.

The only plausible explanation for this reversal in attitude by the Applicant, is that, faced with the overwhelming evidence that the dental treatment had not been performed, he opted to speak the truth, hoping for leniency.

A recent submission by new counsel for the Applicant contends, for the first time, that the Applicant, due to negligence on the part of his former counsel and his own negligence, did not read the underlying materials and therefore did not know what he was confessing to. The Tribunal cannot entertain a post-hoc explanation of this sort. Nor will it entertain assurances from counsel as to the Applicant's alleged trusting nature or honesty.

The Tribunal, therefore, gives credence to his admission of guilt of the two charges made in his statement of 25 November 1977, because moreover, this admission of guilt occurred at a time not long after the commission of the offences.

VI. Notwithstanding his admission of guilt referred to above, the Tribunal notes, that later on, during the JAB proceedings and in his application before this Tribunal, the Applicant was compelled to abandon his defence based on the assumption that the dental treatment had been carried out, because of the strong evidence against it. Instead, he rested his claim of innocence on the following new bases:

1. That he was unable to ascertain whether the treatment had actually taken place, because his daughter had not lived with him since 1970, and she was in the care of her mother from whom the Applicant had been divorced since that date. The Applicant went as far as enclosing the annulment act to prove his point;

2. That he merely received the receipt from his ex-spouse and requested reimbursement from the Medical Service.

It appears that the Applicant in his new defence aimed at proving two things:

Firstly, that he had no access to his daughter and therefore, he was not in a position to check accurately the details of her dental problem or of eventual treatment as a father would have done in normal circumstances;

Secondly, because of this family situation, he merely acted as a post-office between his ex-spouse and the Medical Insurance Company.

This new line of defence contains serious flaws which prevent the Tribunal from accepting it as justifying his claimed ignorance of the dental fraud.

In his new defence, the Applicant, relying on his family situation, claimed that he could not have access to his daughter, and that practically he acted only as a post-office between his ex-wife and the Insurance Company.In his first statement of 24 June 1977, the Applicant portrayed himself differently. He gave a picture of an attentive father, whose lines of communication with his ex-wife were not cut off. The proof is that on her part, she

informed him of the dental work needed for his daughter, and on his part, he gave his consent. He even kept himself informed of the treatment, because he volunteered to inform the investigator that his wife accompanied his daughter to the dentist on the necessary occasions.

It is strange that in 1977, we have the picture of a father, whose family situation did not impede him from getting involved in the details of his daughter's treatment, while in 1984, we have a father whose attitude towards his daughter's treatment is characterized by aloofness and disengagement, while the family situation at the initiation of the alleged treatment was exactly the same. This contradiction tends further to incriminate the Applicant. In his statement of 24 June 1977, that is, at the early stage of the investigation, the Applicant sought to give the impression of a father well-informed about his daughter's treatment and therefore in a position to vouch that the treatment had actually been carried out. He hoped thus to refute the fraud he was charged with. When he was unsuccessful in this, it is not surprising that he wanted to create the impression of a father who was not in a position to know exactly what happened with respect to his daughter's treatment.

It does not appear to the Tribunal, that the Applicant could sincerely and in good faith have believed at first that the treatment had been carried out. Were this the case, he should have confronted his wife with the evidence presented by the Respondent, or sought the truth from his daughter. The fact that for seven years, he had shown a lack of diligence in this respect, indicated that there was no point in pursuing the matter, simply because he knew from the beginning that the dental treatment had not been carried out.

VII. The Tribunal notes in this respect, paragraph 126* of the JAB report.There, the JAB sought to base the credibility of the Applicant's claim of unawareness that the dental treatment had been

carried out, on the fact that the Applicant, had immediately claimed responsibility for the alteration of the pharmacy and medical invoices, but had strongly objected to the charge against him in respect of the dental claim. This the JAB attributed to his ignorance of the true situation.

The truth of the matter, as the record shows, is that the Applicant did not immediately confess to altering the two receipts concerning the medical claim.

* "126. In addition, the Panel observed that, contrary to the Respondent's view in that respect, the appellant's new defence was not inconsistent with the arguments advanced by him during the disciplinary proceedings but rather it appeared to support them. Thus, while the appellant had immediately claimed responsibility for the alteration of the pharmacy and medical invoices, he had strongly objected to the irregularity of the dental claim. An objection which could be attributed to his ignorance of the true situation."

What happened is that Mr. Daniel Cure, Acting Chief, Personnel Section, notified the Applicant on 5 April 1977, of the alteration of the receipt issued by Oftalmólogos Asociados, requesting the Applicant to provide him with a written version of the facts, suggest other persons whom he might interrogate, and name witnesses in his favour; and that he could resort to a fellow staff member of his choice to assist him in his defence.

This letter also contained a paragraph stating that the Van Breda medical insurance company had informed Mr. Cure that they would continue to examine all the documents submitted by the Applicant to them and that they would advise Mr. Cure of the final results.

In his reply dated 22 April 1977 to Mr. Cure's letter, the Applicant admitted altering the receipt issued by Oftalmólogos Asociados which he had enclosed with the claim for reimbursement sent to the Insurance Company on 16 July 1976.

What is important to stress here is that the Applicant had tried to excuse himself by saying that what he did was not with premeditated intention to defraud, to profit by or to obtain material benefit; he went on to say that this was a thoughtless and irresponsible impulse, without considering the gravity of the consequences nor its adverse effect on the responsibilities which he assumed as a staff member of the U.N. Finally, he formally declared that this experience had been a true lesson to him and that he would take care in the future not to incur any action which may be incompatible with the conduct of a staff member of the of the U.N. The Tribunal observes that if the Applicant was really honest and trustworthy in all or even some of his above-mentioned remarks, he would have immediately admitted in the same letter the altering of the other receipt annexed to the same claim of reimbursement of 16 July 1976. He did not do so. Instead, the Applicant waited until he received another memorandum dated 19 May 1977 from Mr. Cure, notifying him of the alteration of the other receipt concerning the "Bitrán Ltda." pharmacy. In a letter dated 24 May

1977 to Mr. Cure, almost a month after his first admission, he confessed also to altering this receipt.

The Tribunal considers that there is a flagrant contradiction on the one hand between the very strong words of repentance and his assurance of no future action incompatible with the conduct required of a staff member, and on the other hand his concealment of the truth about the second altered receipt annexed to the same claim.

In the face of this, and in the light of the Applicant's conduct since the early stages of the investigation in not being forthcoming with the truth, he bears an exceptionally heavy burden when he seeks to overturn the Secretary-General's decision on the basis of the contentions he now asserts for the first time.

VIII. The Tribunal will now evaluate his ex-wife's affidavit of 11 July 1984.

Taken at its face value, the document purports to assert two things:

1. That the ex-wife acted alone in this fraud from beginning to end;

2. That the Applicant did not know anything about the wrongdoing of his ex-wife, and therefore was not implicated in any way.

The Tribunal considers that this document, coming seven years after the incident, is not sufficient to exonerate the Applicant for the following reasons:

Firstly, the non-implication of her ex-husband inferred from that document is contradicted by his admission of guilt and the reasoning substantiating it already mentioned earlier in this judgement.

Secondly, this being so, his ex-wife's affidavit is not believable, and this is not affected by the assertion that severe penalties might be imposed on her for false statements in this affidavit. As a practical matter, there is no way of ever testing the truth of the affidavit because he and his ex-wife, the principal

persons with actual knowledge of the fact, have a compelling interest in denying the falsehood of this affidavit.

Thirdly, in confessing to the fraud, it appears from representations by the Respondent before the JAB, that the ex-wife knew that she was no longer exposed to prosecution for it, because of the five-year time-bar in Chilean law.

The Tribunal believes that the Applicant co-operated with his ex-wife in this falsification. Here, the daughter did not live with her father, but was in the care of her mother, from the time when the Applicant had been divorced in 1970. In this particular situation, the parents needed each other to bring the dental fraud to a successful end. Collusion between them is, in the opinion of the Tribunal, the most likely explanation of what occurred. The daughter living with her mother, the husband needed the connivance of the mother to cover up the dental fraud.

On the other hand, the mother, who acknowledged taking the initiative in the fraud, could not venture to engage in it, unless she had a prior understanding that the husband would submit this claim, and not make inquiries of the doctor regarding it.

There is an additional point corroborating the Tribunal's conclusion. The Tribunal notes, that each of the factors invoked by the Applicant as extenuating circumstances:

1) The pressures of his family;

2) The fact that he had to support a daughter;

3) The fact that he had to undergo medical attention;

4) The social and economic conditions existing in Chile at that time, is equally consistent with a motivation for the perpetration of fraud in collusion with his ex-wife.

For all these reasons, the Tribunal rejects the affidavit of 11 July 1984, as acceptable evidence in favor of the Applicant.

IX. The JAB noted in its report a number of unsatisfactory procedural aspects of the work of the "Ad-Hoc Committee". The Tribunal, in examining the mandate and role of the same Ad-Hoc

Committee in connection with a previous case, concluded that "the failure of the Ad-Hoc Committee to incorporate in its work the procedural protections of the PD/1/76 investigation did not lead to denying due process to the Applicant". (Judgement No. 351, Herrera, paras. III, IV and V). In any event, the Tribunal notes in this respect that the procedures set forth in PD/1/76 were strictly adhered to by the Respondent in conducting its investigation.

X. The JAB also stated that "the inclusion of the Applicant's case among the worst offenders in a single presentation in the memorandum to the Secretary-General by the Assistant Secretary-General for Personnel Services and his recommendation that they all be given the same sanction because they had the same degree of culpability had seriously prejudiced the Applicant's case." The Tribunal recalls that in the earlier case in which a similar allegation had been made, the Tribunal rejected it (Judgement No. 351, Herrera, para. VI (a))

XI. In view of the foregoing, the Tribunal concludes that the Respondent's decision was based on the facts of the case, and was arrived at after due investigation and proper procedure safeguarding the rights of the Applicant. As a matter of fact, the Applicant was allowed seven years to present his case before coming to the Tribunal.

XII. The Tribunal wishes to emphasize the wide discretion vested in the Secretary-General for dealing forcefully with cases of fraud against the Organization, to make it clear to all concerned that they act at their peril when they engage in such reprehensible conduct.

The Tribunal recalls also that it has in its jurisprudence consistently recognized the Secretary-General's authority to take decisions in disciplinary matters, and established its own competence to review such decisions only in certain exceptional

conditions, e.g. in cases of failure to accord due process to the affected staff member before reaching a decision. Since the Tribunal has found that such conditions are not present in this case, the Tribunal cannot entertain the Applicant's claim concerning the severity of the penalty imposed upon him. (Judgement No. 300, Sheye, para. IX).

XIII. The Tribunal concludes that the decision of the Respondent to dismiss the Applicant for misconduct, as a disciplinary measure, was a valid exercise of his discretion in accordance with staff regulation 10.2 and staff rule 110.3(b).

XIV. For all the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Arnold KEAN
Vice-President, presiding

Ahmed OSMAN
Member

Jerome ACKERMAN
Member

New York, 2 November 1987

R. Maria VICIEN-MILBURN
Executive Secretary