

ADMINISTRATIVE TRIBUNAL

Judgement No. 395

Cases Nos. 418: OUMMIH	Against: The Secretary-General
419: GORDON	of the United Nations
420: GRUBER	

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Arnold Kean, First Vice-President, presiding;
Mr. Luis de Posadas Montero, Second Vice-President; Mr. Jerome
Ackerman; Mr. Ahmed Osman, alternate member;

The presence and participation of an alternate member ensured that the panel would always have three members, and could avail itself of the alternate's special knowledge of the large number of details which characterize these cases.

These three cases raise essentially the same issues, even though the pleas in the case filed by the Applicant Oummih have been formulated differently. In the circumstances the Tribunal considered that all these cases should be dealt with by the same panel and that one judgement should cover all the cases, care being taken to deal with any specific differences between them. The oral hearings were also held jointly for all the cases.

A. Case No. 418: Oummih

Whereas at the request of Mohamed Oummih, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit in which to file an application until 31 January 1987;

Whereas on 30 January 1987, the Applicant filed an application, the pleas of which read as follows:

"II. PLEAS

With regard to its competence and to procedure, the Applicant respectfully requests the Tribunal:

- (a) To find that it is competent to hear and pass judgement upon the present application under article 2 of its Statute;
- (b) To consider the present application receivable under article 7 of its Statute;

On the merits, the Applicant requests the Tribunal:

- (a) To find that in accordance with the rules governing cost-of-living adjustments he was entitled to a cost-of-living increment, effective 1 February 1986, and that the decision of the Secretary-General to deny that increment to him had no legal foundation;
- (b) To adjudge and declare that the Applicant's right to a cost-of-living increment in accordance with the applicable rules as of 1 February 1986, cannot be abrogated by the Respondent unilaterally and without his agreement;
- (c) To order the Respondent to rescind his decision to withhold the cost-of-living increment, in line with article 9 of the Tribunal's Statute, and further, to pay to the Applicant appropriate compensation."

Whereas the Respondent filed his answer on 29 May 1987;

Whereas the Applicant filed written observations on 31 July 1987;

B. Cases No. 419: Gordon and No. 420: Gruber

Whereas at the request of Denah Jill Gordon, a former staff member of the United Nations, and Silvia Elizabeth Gruber, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application until 31 December 1986 and 31 January 1987;

Whereas on 30 January 1987, the Applicants filed two individual applications, the pleas of which read as follows:

"MAY IT PLEASE the presiding member to agree to the holding of oral proceedings in this case.

AND MAY IT PLEASE the Tribunal:

1. To declare itself competent in this case;
2. To declare and judge the present application receivable;
3. To order the rescission of the individual decision of the Secretary-General of the United Nations (UN), in implementation of his statutory decision to defer the implementation of cost-of-living adjustments in the salaries of staff in the General Service and related categories at the eight main duty stations, communicated by his circular ST/SGB/217 of 20 March 1986, to withhold payment to the Applicants as from 1 February 1986 of a salary increment, due as from the same date in application of the interim adjustment methodology, amounting, for Vienna, to 3.43 per cent of the said salary;
4. Accordingly, to order the payment to the Applicant, as from 1 February 1986, of the increment in the said salary, calculated as described in paragraph 3 above;
5. To fix the amount of compensation provided for in article 7, paragraph 3 (d), of the Rules of the Tribunal, at a sum equal to the salary increment referred to in paragraph 4 above for the entire period from 1 February 1986 until the date of the restoration of the situation in accordance with law;
6. To award the Applicant, as costs, a sum payable by the Respondent, assessed at the time of the filing of this application at seventy thousand (70,000) French francs, subject to adjustment upon completion of the proceedings."
(Original French)

Whereas the Respondent filed his answer on 29 May 1987;

Whereas the Applicants filed written observations on
21 September 1987;

C. Consideration of all joined cases

Whereas the Tribunal held oral hearings at a public session on 16 October 1987;

Whereas on 29 October 1987, the Applicants Gordon and Gruber

submitted an additional document;

Whereas the facts in all the cases are as follows:

The Applicant Oummih works at the United Nations Headquarters in New York at the Department of Conference Services as a Conference Typist. He is the holder of a permanent appointment at the G-5 level. The Applicant Gordon worked as a Clerk/Typist at the United Nations Fund for Drug Abuse Control (UNFDAC) at the United Nations Office in Vienna. At the time she filed the application, she was the holder of a fixed-term appointment at the G-5 level. She separated from the service of the United Nations on 31 May 1987. The Applicant Gruber is an Administrative Clerk at the Centre for Social Development and Humanitarian Affairs at the United Nations Office in Vienna. She is the holder of a permanent appointment at the G-5 level.

General service salaries are fixed by the Secretary-General "normally on the basis of the best prevailing conditions of employment in the locality of the United Nations Office concerned".

Staff regulation 3.1 and paragraph 7 of Annex I to the Staff Regulations confer on the Secretary-General the authority to do so.

To this end, periodic salary surveys have always been conducted at various duty stations to determine what are the conditions of service at those duty stations. Comparisons are made with conditions offered by private employers and by local public service.

The methodology to determine General Service salary scales and to adjust the salaries to changes in cost of living, has varied from time to time.

Following the establishment of the International Civil Service Commission (ICSC), hereinafter referred to as the Commission, in 1972, the Commission was empowered by article 12 of its Statute to "... establish the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories."

From 1977 to 1980 the Commission conducted salary surveys and

proposed new salary scales for the duty stations where those surveys had been conducted. In 1981, in its report to the General Assembly (A/36/30) the Commission recommended new salary scales for staff in the General Service and related categories working in Vienna, pursuant to the results of a survey of best prevailing conditions of service in Vienna. It also recommended an interim adjustment methodology for adjusting those salaries between surveys. The Secretary-General accepted the ICSC recommendations and announced them to the staff on 23 October 1981 in information circular UNIDO/ADM/PS/INF.802 which reads, in part, as follows:

"1. The Secretary-General has approved the recommendations of the International Civil Service Commission ... in regard to the General Service and Manual Worker salary schedules for Vienna ...

10. ICSC recommended that adjustments ... be effective the first day of the month following the month in which the index had moved 5 per cent or more or after 12 months, whichever occurred first. The base month for calculating the next adjustment is June 1981. ..."

At its eleventh session held in 1980, the Commission adopted a report, ICSC/R.213 dated 21 March 1980, on the "Salary scales of staff in the General Service, Manual Workers and Security Service categories in New York", which contained recommendations on the methodology for the adjustment of the New York salaries. These recommendations were accepted by the Secretary-General and announced to the staff in information circular ST/IC/80/22 of 23 April 1980 which reads, in part, as follows:

"... The net salaries of staff in the General Service and related categories would be adjusted by 90 per cent of the CPI [Consumer Price Index] movement in New York whenever the CPI has increased by 5 per cent or more over the level reached at the time of the previous adjustment, or every 12 months, whichever comes first." (para. 3)

In 1982, in its annual report to the General Assembly (A/37/30), the Commission described a general methodology for

surveys to determine the best prevailing conditions of service of the General Service and other locally recruited categories at headquarters duty stations, and "endorsed the principle of automatic adjustments between salary surveys in headquarters duty stations" (para. 157). In order to apply the principle at headquarters duty stations, it approved a general Interim Adjustment Methodology (IAM) to which the methodologies in the individual duty stations had to conform. The General Assembly, in its resolution 37/126, section III, of 17 December 1982 "[took] note of the general methodology for surveys of best prevailing conditions of service of the staff in the General Service and related categories approved by the International Civil Service Commission for application to headquarters duty stations."

Since the methodology recommended by the Commission for Vienna in 1981, and approved by the Secretary-General, was accepted as being consistent with the IAM adopted by the Commission in 1982, adjustments to General Service salary scales at Vienna between 1982 and 1985 were announced in Information Circulars that stated the increases were "in accordance with the arrangements covering interim adjustments" (UNIDO/ADM/PS/INF.824) or "in accordance with the recommendation of the International Civil Service Commission on the adjustment of the local salary scales for Vienna ..."
(UNIDO/ADM/FS/INF.203).

In 1984 the Commission, at its twentieth session, approved a report ICSC/20/R.7 dated 2 July 1984 in which it recommended that there be no change in the interim adjustment procedure used until then, and which conformed to the methodology approved by the General Assembly. The Secretary-General accepted the Commission's recommendations and so informed the New York staff in ST/IC/84/60 of 27 August 1984:

- "5. On the basis of the recommendation of ICSC the current procedure for effecting interim adjustments of the salary scales between surveys, which was described in detail in paragraph 3 of ST/IC/80/22, will be continued, taking February 1984, the effective date of the revised scales, as the base date."

In the same circular the Controller announced to the Staff that:

"2. ... the Secretary-General has decided to accept the revised salary scales for staff in the General Service and related categories at Headquarters proposed by ICSC. He has further decided these scales should be implemented with effect from 1 February 1984, since the salary data collected by the Commission relate to that month."

Accordingly, on 27 August 1984, new salary scales for the General Service, Trades and Crafts, Security, and Public Information Assistants categories were promulgated with retroactive effect from 1 February 1984.

On 26 February 1985, the Controller announced to the New York staff in ST/IC/85/13 that a cost-of-living adjustment became due on 1 February 1985 "... on the basis of the 3.7 per cent movement of the New York CPI over the period January 1984 to January 1985." (para. 2)

On 16 April 1985, the UNIDO Administration informed the staff in UNIDO/ADM/FS/INF.223 that "in accordance with established [ICSC] procedures: (a) effective 1 February 1985 the next salaries of the General Service category have been increased by 3.5 per cent ..." (para. 1)

Since 1985 the United Nations has faced a serious financial crisis. Indeed, on 3 October 1985, in his report to the Fifth Committee on the financial situation of the United Nations (A/C.5/40/16), the Secretary-General pointed out that the regular budget deficit had been estimated to be of \$US 116.3 million. He further stated that "... the shortfall in payments for the regular budget - whether due to withholdings or delays in the payment of assessments [by Member States] - results in an immediate cash shortage in respect of the day-to-day cash needs of the Organization - i.e., essentially, payroll and payments to vendors." He concluded that "the primary means of resolving the Organization's financial

difficulties, and the one which would result in the lowest cost to Member States, would be the prompt payment by every Member State, early in the year, of its assessed contributions for the year in accordance with financial regulation 5.4." In its resolution 40/241 of 18 December 1985, the General Assembly urged "all Member States to meet their financial obligations." (para. 2)

On 17 January 1986, the Secretary-General issued ST/SGB/215 in which he explained to the staff the seriousness of the financial situation of the Organization. He referred to his statement to the General Assembly on 18 December 1985, when he had informed the Assembly of "certain recently enacted legislation and to unilateral withholdings of assessed contributions by Member States as measures that were contrary to obligations flowing from the Charter, endangering the financial viability of the Organization." The Secretary-General noted that instead of improving, "recent developments have added to the seriousness of the cash shortage confronting the Organization" and announced a number of economy measures aimed at alleviating the immediate cash flow problem.

On 21 February 1986, the Secretary-General wrote to all Heads of Departments to apprise them of his assessment of the grave financial situation of the Organization in respect of the regular budget and of the steps he was taking and contemplating in order to keep the Organization functioning. He also asked all Heads of Departments to bring the information contained in that memorandum to the attention of the staff.

On 28 February 1986, the Staff Committee of the United Nations Staff Union in New York published a Bulletin SCB/849, in which the President of the Staff Committee informed the staff at large in New York that the cost-of-living increase of 4.3 per cent that was due as of 1 February 1986 would only be reflected in the end of March pay checks and not earlier, on account of payroll deadlines.

On 13 March 1986, the Under-Secretary-General for Administration and Management informed the staff in ST/IC/86/17 on

"The financial crisis of the United Nations", that the deficit projected in January had not diminished and that the short term outlook continued to be "exceedingly bleak" and gave "cause for great concern". Accordingly, further cost saving measures were being discussed at that time in the respective staff-management consultative bodies in all eight of the main duty stations. The measures ranged "from a freeze in recruitment ... to a deferral of regular salary increases which [would] affect the well-being of all those involved."

On 20 March 1986, the Secretary-General announced to the staff in ST/SGB/217 the measures - to be implemented immediately - that he had taken to meet the cash shortfall of \$US 100 million required in 1986 to meet the operating expenses of the Organization.

Among the measures was the "deferment of the implementation of cost-of-living adjustments in the salaries of staff in the General Service and related categories at the eight main duty stations ...".

In this connection the Secretary-General noted:

"I realize, in particular, that the deferment of cost-of-living adjustments affects the lowest paid categories of staff, and I wish to state that it is my intention to lift this deferment as soon as practicable." (para. 5)

In a memorandum dated 25 March 1986, the Under-Secretary-General for Administration and Management informed all Heads of Departments and Offices how the measures announced in ST/SGB/217 would be implemented. With respect to the deferment of cost-of-living adjustments he stated:

"9. The payment of cost-of-living adjustments in the salaries of staff in the General Service and related categories which may fall due at the eight main duty stations (Addis Ababa, Baghdad, Bangkok, Geneva, Nairobi, New York, Santiago, and Vienna) will be deferred till further notice. The situation will be kept under constant review in the light of the financial situation of the Organization and account will be taken of the differing rates of increase in the cost of living at the various duty stations so as to ensure that this burden is shared on an equitable basis. It should be noted that cost-of-living adjustments under the post adjustment

scheme have been frozen for staff in the Professional and higher categories since 1984."

In his report dated 12 April 1986 on the "Current financial crisis of the United Nations" to the resumed fortieth session of the General Assembly (A/40/1102), the Secretary-General described the various savings measures he had implemented and proposed. In connection with the "deferment of the implementation of cost-of-living adjustments in the salaries of staff in the General Service and related categories at the eight main duty stations" he stated:

"30. As regards salaries and conditions of service, the Secretary-General would note that the actions which the General Assembly and he, himself, have already taken are substantial in terms of their contribution to redressing the short-term financial difficulties and their impact on the welfare of staff. To his regret, certain inequities have resulted in comparison with the staff of other organizations in the United Nations common system, particularly because of the deferral of cost-of-living adjustments of the salaries of staff of the General Service and related categories. It should further be noted that the salaries of staff in the Professional categories and above in New York have been frozen since August 1984, and no adjustments are envisaged during the current biennium. This has had a consequential effect on the level of salaries at other locations."

The Advisory Committee on Administrative and Budgetary Questions (ACABQ), in its report dated 22 April 1986 (A/40/1106) on the Secretary-General's report on the current financial crisis (A/40/1102), commented on the deferment of the implementation of the cost-of-living adjustments as follows:

"10. As has been noted in paragraph ... above, several of the measures referred to in paragraphs ... of the Secretary-General's report as having already been implemented are described as 'suspensions' or 'deferrals'. A distinction must be made, however, as to the eventual effect of such actions. In some cases these measures should lead to an absolute reduction in expenditure; in the opinion of the Advisory Committee, the suspensions and deferment referred to in paragraph 17 ... and (f)* should be lifted prospectively

only; i.e. when these payments are resumed, there should be no obligation to make them retroactive."

* "Deferment of the implementation of cost-of-living adjustments in the salaries of staff in the General Service and related categories at the eight main duty stations".

In its report to the resumed session of the fortieth session of the General Assembly, (A/40/1111) dated 1 May 1986, the Fifth Committee approved the Secretary-General's approach, but agreed with the ACABQ recommendation that "the cancellation of the measures relating to staff contained in paragraph 17, subparagraphs ... and (f) of the report of the Secretary-General should not be applied retroactively". The General Assembly, in its resolution 40/471 of 2 May 1986 took note of the Fifth Committee's report.

On 9 May 1986, the President of the General Assembly addressed the Assembly (A/40/PV.132) on the financial crisis of the Organization. He proposed that the Secretary-General proceed according to the proposals suggested in his report, taking into account the comments of the President of the Assembly and the report of the Fifth Committee. He noted that the Secretary-General, as Chief Administrative Officer, had "the responsibility to prudently administer the ongoing work of the Organization ...". The General Assembly decided on the same day in its resolution 40/472 "that the Secretary-General should proceed according to the proposals made in his report, taking into account the report of the Fifth Committee ...".

The Fifth Committee of the General Assembly at its fortieth session continued discussing the financial crisis and the economy measures proposed by the Secretary-General in his report. In its decision 41/466 dated 11 December 1986 the General Assembly "agreed that the Secretary-General might proceed along the lines of the proposals contained in his report taking into account the report of the Fifth Committee".

On 22 December 1986, the Secretary-General, in ST/SGB/222

informed the staff of the financial situation of the Organization and announced the emergency economy measures he intended to implement in 1987. With respect to the deferment of the implementation of the cost-of-living adjustments in the salaries of General Service staff, he stated:

"5. ... In this regard, I have decided that the cost-of-living adjustments that were deferred in 1986 will be implemented with effect from 1 January 1987. At the same time, in the light of the current financial situation, there is no alternative but to postpone implementation of cost-of-living adjustments that may become due in 1987 at the same eight duty stations. As in 1986, I remain fully committed to lifting this measure as soon as practicable."

On 13 May 1986, the Applicant Oummih requested the Secretary-General to review the administrative decision to defer the implementation of cost-of-living adjustments in the salaries of staff in the General Service and related categories at the eight main duty stations. On 3 June 1986, the Applicants Gordon and Gruber wrote similar letters. In a letter dated 24 July 1986 the Secretary-General consented to the submission of the three appeals directly to the Administrative Tribunal.

On 30 January 1987, the Applicants Oummih, Gordon and Gruber filed with the Tribunal the applications referred to above.

Whereas the Applicant's principal contentions are:

1. The rules governing adjustments in the salary of General Service staff related to cost-of-living changes are binding upon the Secretary-General until such time as they are validly changed.

2. Under the applicable rules in force, a cost-of-living adjustment by 4.3 per cent of net base salary became due for New York General Service staff as of 1 February 1986.

3. The decision of the Secretary-General not to pay the cost-of-living adjustment effective 1 February 1986 was retroactive and therefore legally invalid.

4. As of December 1986, the Applicants' entitlement to a

cost-of-living adjustment could be considered as an earned service benefit for services already rendered and hence an acquired right.

5. The decision, communicated by the Respondent in circular ST/SGB/217 of 20 March 1986, which consisted in withholding payment to the Applicants Gordon and Gruber as from 1 February 1986 of a salary increment, due as from the same date in application of the interim adjustment methodology, amounting for Vienna, to 3.43 per cent of the said salary, constitutes a violation of the Applicants' terms of appointment.

6. The Respondent was legally bound by the mechanism for interim adjustments between salary surveys specifically established for Vienna in 1981 by the ICSC, since he had approved that mechanism in circular UNIDO/ADM/PS/INF/802 of 23 October 1981. Moreover, the adjustments implemented subsequently do indeed confirm the Secretary-General's approval of that procedure.

7. A distinction between staff in the General Service and related categories according to their duty station constitutes a violation of the principle of equality and can therefore not be invoked in any way by the Respondent in order to provide a legal justification for the irregularity of the decision contested.

8. The decision not to implement the cost-of-living adjustment due on 1 February 1986 is unlawful, since it violated the principle of non-retro-activity.

Whereas the Respondent's principal contentions are:

1. The IAM was implemented by the Secretary-General on the recommendation of the ICSC. The IAM was, thus, a statutory regime subject to prospective change. A decision to defer the implementation of an increase resulting from that methodology because of the Organization's financial crisis requires only that there be consultation with staff pursuant to Chapter VIII of the Staff Regulations and Rules.

2. The Secretary-General has power under the Charter to deal with a financial crisis. In order to overcome this crisis, the

Secretary-General, as part of a comprehensive cost-cutting package, deferred implementation of General Service salary increases. This measure was a valid exercise of the Secretary-General's powers, as it was not arbitrary and was applied equally and was designed to avoid more drastic measures later. Furthermore, the Secretary-General's actions were specifically approved by the General Assembly.

3. The various communications to the staff from the Secretary-General regarding the financial crisis placed the staff on notice that any cost-of-living adjustment that might be due on 1 February 1986 was in jeopardy and the word "deferment" carried with it the connotation of non-retroactivity when the deferment was lifted.

4. Whatever retroactive effect may have been involved in the Secretary-General's action was justified by the unprecedented and extraordinary nature of the financial crisis facing the Organization.

The Tribunal, having deliberated from 14 October 1987 to 5 November 1987, now pronounces the following judgement:

I. Since the applications submitted in cases No. 418, 419 and 420 relate to the same measures and contain essentially the same pleas, the Tribunal orders the joinder of these cases.

II. The Tribunal decides that it is competent, under article 2 of its Statute, to hear and pass judgement upon these applications.

III. The Tribunal holds the applications receivable under article 7 of its Statute inasmuch as the Respondent and the Applicants have agreed to submit the applications directly to the Tribunal.

IV. The relevant facts are not in dispute. There is also no dispute that, apart from the intervention of the Respondent, the

Applicants were entitled to a cost-of-living adjustment, in accordance with the applicable rules, in respect of the period from 1 February 1986.

V. The salaries of members of the General Service and related categories had been fixed by the Secretary-General in accordance with staff rule 103.2 and with staff regulation 3.1 and paragraph 7 of Annex I to the Staff Regulations, which require those salaries to be fixed by him "normally on the basis of the best prevailing conditions of employment in the locality of the United Nations Office concerned".

VI. By article 12.1 of its Statute, the International Civil Service Commission (ICSC) is empowered to "establish the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories". It is the practice of the ICSC to conduct periodic surveys in order to establish the facts and make recommendations for giving effect to this provision.

VII. The ICSC in its report to the General Assembly dated 21 March 1980, made recommendations as to an Interim Adjustment Methodology (IAM) for adjusting General Service category salaries in New York between the conduct of surveys. These recommendations were accepted by the Respondent and announced to the Staff in information circular ST/IC/80/22 dated 23 April 1980.

VIII. As regards General Service category staff in Vienna, the ICSC recommended an IAM, which was accepted by the Respondent and announced to the staff on 23 October 1981 in information circular UNIDO/ADM/PS/INF.802.

IX. The General Assembly, in its resolution 37/126, section III, paragraph 1, dated 17 December 1982, took "note of the general

methodology for surveys of best prevailing conditions of service of the staff in the General Service and related categories approved by ICSC for application to headquarters duty stations".

X. There is no dispute that the methodology thus established has statutory force. As such it may be altered by the Secretary-General in exercise of his power under the Staff Regulations and Rules, subject to the requirements of good faith, intervention by the ICSC, and adequate consultation with the staff. The Applicant Oummih argues that the methodology also has contractual force and therefore cannot be modified unilaterally by the Respondent. The fact that his contract of employment incorporates by reference the Staff Regulations and Rules for the time being in force is of no consequence here since the action taken by the Secretary-General in March 1986, as interpreted below, did not, in the Tribunal's view, involve a change in the methodology. The March 1986 decision was to withhold payment of the amount produced by application of the methodology.

XI. The Tribunal is not aware of any basis for staff members to have or have had a legal expectancy that the methodology or the consequential adjustments would never be modified or suspended. No promise or assurance, expressed or implied, was ever given to that effect.

XII. There is no dispute that the action in question recognized that the General Service staff had become entitled as of 1 February 1986 to a cost-of-living adjustment, and took the form of a decision of the Secretary-General, to be implemented immediately, which was announced to the staff in ST/SGB/217 dated 20 March 1986 as being the

"... deferment of the implementation of cost-of-living adjustments in the salaries of staff in the General Service and related categories at the eight main duty stations". (Emphasis added)

The Secretary-General stated in this connection:

"I realize, in particular, that the deferment of cost-of-living adjustments affects the lowest paid categories of staff, and I wish to state that it is my intention to lift this deferment as soon as practicable". (Emphasis added)

Cost-of-living adjustments of salary due after 31 January 1986 had not in fact been made.

XIII. This decision was, in the opinion of the Tribunal, announced in ambiguous terms. It is not at all clear from the language used which of two very different courses was intended:

1. To withhold payment for the time being of the cost-of-living adjustment otherwise payable from 1 February 1986, but to make good the amount withheld as soon as the Organization's financial position would allow; or alternatively

2. To withhold payment of the adjustment otherwise due from 1 February 1986 without the intention of making it good in the future, but only with the intention of resuming adjustments in respect of the period following the date from which the Organization's financial position would sufficiently improve. If that was the intention, it amounted to permanently depriving the staff of adjustments in respect of the period from 1 February 1986 until adjustments could resume.

XIV. There is a very substantial difference between a temporary withholding (however prolonged) of a sum otherwise due and, in effect, the abolition of the entitlement to receive it. Given the ambiguity of the Secretary-General's decision, it is open to the Tribunal to interpret its legal effect and in doing so the guiding principle to be observed, in the circumstances of this case, is that the decision should be construed as having a lesser rather than a greater adverse effect on the rights of the staff under the Staff Regulations and Rules.

Furthermore, the Tribunal finds that inherent in the employment relationship is a right on the part of the staff to be informed with reasonable clarity of the abolition of an important aspect of staff compensation for a specified or indefinite future period. This right exists irrespective of the existence of an emergency situation. Once the staff is so notified, the Secretary-General is, of course, free to reduce or remove the adverse action if conditions permit. But it is inconsistent with the rights of the staff to be placed in a position, as here, where the staff could reasonably have understood that the cost-of-living adjustment would eventually be paid retroactively and then discover later that this may not be the case.

For the above-mentioned reasons, the legal effect of the Secretary-General's decision of 20 March 1986 must, in the Tribunal's view, be interpreted as only a decision to withhold payment temporarily, quite apart from other grounds on which it has been impugned by the Applicants.

XV. Thus interpreted, the 20 March 1986 decision was, in the Tribunal's opinion, within the authority of the Secretary-General under staff regulation 3.1, annex I, paragraph 7 and staff rule 103.2. Its consequence was that for work performed after 1 February 1986, the General Service staff acquired a right to payment at a later date of the cost-of-living adjustment that was to be effective 1 February 1986.

Furthermore, the Tribunal observes, that even if on 20 March 1986, the Secretary-General had made it clear that the decision would apply retroactively to the period beginning on 1 February 1986, to that extent the Tribunal would hold the decision to have no effect. The Applicants had an acquired right under staff regulation 12.1 to be paid for the work they performed before the announcement, including the cost-of-living adjustment due in respect of that period.

XVI. The other grounds referred to in paragraph XIV include allegedly inadequate consultation between the Respondent and representatives of the staff. Although it may be unnecessary for the Tribunal to consider the adequacy of the consultation, in view of the legal effect of the 20 March 1986 action, the Tribunal is mindful that staff rule 108.1 (f) requires consultation "unless emergency situations make this impracticable." The Tribunal notes that some efforts were made by the Administration to keep the staff informed and to discuss the situation with them, as the events leading to the 20 March 1986 decision were unfolding.

XVII. The Tribunal also notes, but need not dwell long on, the Applicants' arguments that the Secretary-General's decision of 20 March 1986, was invalid for lack of intervention of the ICSC. As to the ICSC, it is plain that the scope of any obligation that may exist to consult it would depend on the degree, if any, to which the matter was within the competence of the ICSC. Here the Tribunal finds that the 20 March 1986 decision, having the legal effect of a temporary withholding, did not require consultation with the ICSC.

XVIII. In view of its determination in paragraph XIV above, the Tribunal need not consider the Respondent's reliance on reserved powers under the United Nations Charter, in his capacity as Chief Administrative Officer of the Organization, to take whatever emergency measures were necessary in the interests of the Organization, or in the face of the alleged force majeure with which the Organization was confronted.

XIX. By its resolution 40/472 adopted on 9 May 1986, the General Assembly acting on the proposals of the Secretary-General and taking into account the report of the Fifth Committee (A/40/1111), decided:
"... that the Secretary-General should proceed according to proposals made in his report, taking into account the report of the Fifth Committee ...".

The Fifth Committee, in its report dated 1 May 1986, had accepted the ACABQ's opinion expressed in its report (A/40/1106) dated 22 April 1986, as follows:

"As has been noted in paragraph ... above, several of the measures referred to in paragraphs ... of the Secretary-General's report as having already been implemented are described as 'suspensions' or 'deferrals'. A distinction must be made, however, as to the eventual effect of such actions. In some cases these measures should lead to an absolute reduction in expenditure; in the opinion of the Advisory Committee, the suspensions and deferment referred to in paragraph 17 ... and (f) should be lifted prospectively only; i.e. when these payments are resumed, there should be no obligation to make them retroactive."

XX. The Tribunal is not empowered to question the sovereign authority of the General Assembly to take the decision referred to in paragraph XIX. Indeed, the International Court of Justice has made it clear in paragraph 76 of its advisory opinion of 20 July 1982 in the "Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal" (Mortished) that "the Tribunal has no powers of judicial review or appeal in respect of decisions taken by the General Assembly in conformity with the Charter of the United Nations" (I.C.J. Reports 1982, p. 325).

XXI. From 9 May 1986, the staff was clearly on notice that with respect to services performed by them after that date, the cost-of-living adjustment to which they would otherwise have been entitled was not merely being delayed but was being cancelled, subject, of course, to possible future action by the General Assembly. The 9 May 1986 decision also rendered academic any possible remaining questions as to the ICSC or further staff consultation.

XXII. The main issue remaining for the Tribunal is to determine the intent and significance of the General Assembly's decision of 9 May

1986.

XXIII. The record shows that the General Assembly's decision calls for the Secretary-General to take into account the Fifth Committee's report which, itself, made clear that when the deferment of the cost-of-living increase was lifted, this was not to be done retroactively. As counsel for the Respondent viewed it, the General Assembly resolution divested the Secretary-General of discretion to pay the General Service staff the cost-of-living adjustment withheld in respect of the full period beginning 1 February 1986. It appears that Counsel for the Respondent considered that the financial crisis facing the Organization would justify the abrogation of acquired rights notwithstanding staff regulation 12.1 and he was evidently prepared to assume that this is what the General Assembly wished to do. The Tribunal does not share this view. In its opinion, the General Assembly's admonition that the Secretary-General take "account" of the Fifth Committee's report should be regarded as meaning only that the abolition of staff entitlement to the cost-of-living adjustment, entailed in the General Assembly's resolution, was intended by the General Assembly to be effective in consonance with existing Staff Regulations, i.e. only with respect to the period after 9 May 1986. Had the General Assembly specifically decided to abrogate staff regulation 12.1, it would have made this clear, and an entirely different issue would have been presented. But nothing of this nature appears in the language of the General Assembly's resolution.

XXIV. It is an accepted principle of law that, unless no other interpretation is reasonably permissible, the actions of any party, including a sovereign authority, are presumed to be in accord with, and to honour prior legislation and commitments. The Tribunal must, therefore, consider the 9 May 1986 decision of the General Assembly - not as a deliberate abrogation of the acquired rights of the staff - but as a prospective measure without prejudice to acquired rights.

Hence, on 9 May 1986, the withholding of the cost-of-living adjustment for the General Service staff prospectively ceased being a temporary withholding and the staff's entitlement was effectively abolished until such time as the Secretary-General decided to lift the deferment. This conclusion is not altered by the ratification in December 1986 by the General Assembly in its resolution 41/466 of the Secretary-General's proposals. For nowhere in its resolution did the General Assembly purport to affect staff regulation 12.1, with respect to compensation earned prior to 9 May 1986.

XXV. The Applicant Oummih contends that he had an acquired right to the cost-of-living adjustment. The contention is correct only to the extent set forth above. In accordance with its jurisprudence, the Tribunal holds that the Applicant did not have an acquired right to salary, including cost-of-living adjustment, accruing after the General Assembly's 9 May 1986 resolution was adopted. See Judgements No. 82 (Puvrez), para. VII and No. 295 (Sue-Ting-Len), paragraph X.

XXVI. The Applicants assert that, inasmuch as the decision of the Secretary-General and the resolution of the General Assembly applied only to staff at the eight headquarters duty stations, constituting only some of the General Service category, they gave rise to inequality prohibited by Article 8 of the United Nations Charter. The Tribunal cannot improve upon the words of the ILO Administrative Tribunal in its Judgement No. 391 (In re de Los Cobos and Wenger), paragraph 9:

"The argument fails. The principle of equality means that those in like case should be treated alike, and that those who are not in like case should not be treated alike. It is not violated if officials in different circumstances are treated differently."

The Respondent and the General Assembly were entitled to take into consideration such differing circumstances as different levels

of remuneration or of inflation affecting the cost of living at different duty stations, and the numbers employed at those stations.

XXVII. For the foregoing reasons, the Tribunal determines that the Applicants, being members of the General Service category staff affected by the Secretary-General's decision of 20 March 1986, are entitled to receive the cost-of-living adjustment withheld in consequence of that decision, in respect of the period from 1 February 1986 to 9 May 1986, both dates inclusive.

The Tribunal accordingly orders the Secretary-General to pay to each of the Applicants the cost-of-living adjustment in respect of the period from 1 February 1986 to 9 May 1986. Should the Secretary-General decide, in the interest of the United Nations, to compensate the Applicants without further action, the Tribunal, pursuant to article 9, paragraph 1 of its Statute, fixes the amount of compensation to be paid as the additional amount which would have been due to each Applicant in consequence of the implementation of the cost-of-living adjustment from 1 February 1986 to 9 May 1986, both dates inclusive.

XXVIII. All other pleas of the Applicants, including the Applicants' request for costs are rejected.

(Signatures)

Arnold KEAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Jerome ACKERMAN
Member

New York, 5 November 1987

R. Maria VICIEN-MILBURN
Executive Secretary