



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1333

Case No. 1410

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Spyridon Flogaitis, President; Ms. Jacqueline R. Scott, First Vice-President; Mr. Dayendra Sena Wijewardane, Second Vice-President;

Whereas at the request of a former staff member of the United Nations, the President of the Tribunal extended to 28 February 2005 the time limit for the filing of an application with the Tribunal;

Whereas, on 7 February 2005, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 5 April 2005, the Applicant, after making the necessary corrections, again filed an Application containing pleas which read as follows:

**“II. PLEAS**

Measures and decisions which the Applicant requests the Tribunal to take:

(a) ...

(b) The Applicant contests the decision of the Secretary-General ... which rejected the unanimous opinion of the ... Joint Appeals Board [(JAB)] ... recommending that the Applicant ‘be allowed to re-enter the [United Nations] dental insurance scheme’ (...) and requests the rescission of the ... decision ...

(c) The Applicant considers the he was - and remains - entitled to re-enter the ‘new’ [United Nations] dental insurance scheme which made it possible for him to benefit from it once it was adopted and open to staff and retired staff members.

(d) As a result of being prevented from re-entering the [United Nations] dental insurance scheme, the Applicant and his dependent spouse incurred dental expenses amounting to [US\$ 8,495] for the period preceding his initial appeal (August 2000) and approximately [US\$ 12,000] since that time to date, for which he seeks compensation ...

(e) Additionally, since ... August 2000, and in the absence of the minimum assistance provided by dental insurance, [they] had to forego important and costly dental work estimated at [US\$ 11,000] which they could not afford. Thus, the Applicant and his dependent spouse have not only undergone physical discomfort and pain, but considerable anguish ... for which he seeks compensation ...”

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent’s answer until 30 September 2005 and twice thereafter until 15 November;

Whereas the Respondent filed his Answer on 15 November 2005;

Whereas the Applicant filed Written Observations on 28 December 2005;

Whereas, on 27 October 2006, the Tribunal posed a question to the Respondent and, on 2 November, the Respondent provided an answer thereto;

Whereas, on 21 November 2006, the Tribunal decided to postpone consideration of this case until its next session;

Whereas the statement of facts, including the employment record, contained in the report of the JAB reads, in part, as follows:

#### **“Employment History**

... The [Applicant] served successively with the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the United Nations from 1959 to 1986, when he retired from service at the D-1/VII level.

#### **Summary of the facts**

... Upon his retirement, the [Applicant] left Geneva where he had been stationed and went back to his home country, the United States. The [Applicant] took up residence in Silver Spring, Maryland. On 1 January 1987, the [Applicant] enrolled in the United Nations After-Service Health Insurance (ASHI) plan, thus, joined the medical and dental insurance plans of New York, for the United Nations staff members and retirees. Under the ASHI plan, dental insurance was provided by Group Health Dental Insurance dental (GHI) plan.

... It then appeared to the [Applicant] that the GHI dental insurance plan had no participating practitioners in Washington, D.C., or in the neighboring states. The [Applicant] and his family thus were not able to benefit from the GHI dental plan, as they could not find a GHI dental practitioner in [the] Washington, D.C., area. Upon the suggestion of ... [the] Chief, Compensation and Classification Service, Office of Human Resources Management [(OHRM)], the [Applicant] approached the Pan American Health Office (PAHO) (the World Health Organization’s regional office for the Americas), invoking the reciprocity agreement between the United Nations and the World Health Organization (WHO), with a view to enlisting ... in ... PAHO’s health insurance plan ... The [Applicant] was informed that he could not be included in the dental plan in view of the deficit experienced by the health plan and also his capacity as an

individual retiree ... [The Chief, Compensation and Classification Service,] promised the [Applicant] to raise the matter with the relevant authorities.

... In 1988, after the [Applicant]'s fruitless efforts, on the advice of [the Chief, Compensation and Classification Service], the [Applicant] ended his participation in the GHI dental insurance plan but remained with the [United Nations] medical plan. ...

... On 10 April 1990, ... [the] Chief, Insurance Section, in his reply to the [Applicant]'s [letters dated 5 February and 4 April] ..., among other things, concurred with the [Applicant] that the GHI plan was not 'particularly good for staff and retirees who do not go to GHI affiliated practitioners'. [He] also stated that he had no positive information with regard to the [Applicant]'s dental coverage.

... On 27 January 1999, further to the [Applicant]'s enquiry about a dental survey conducted in 1998 by [ASHI] participants ... the Insurance Claims and Compensation Section replied that the [Applicant] had not been involved in the dental survey because he was not enrolled in the dental plan. [Apparently,] only 'those that were enrolled in the old dental plan were eligible to be automatically switched to the new dental plan when the [United Nations] switched dental insurance carriers on 1 July 1998'.

... On 10 February 1999, further to the [Applicant]'s request for information, [he was informed] that he was not eligible to enroll in the dental plan for the following reasons:

'First of all you would have had to be enrolled in the dental plan at the time of your retirement in order to be eligible to be covered under the ... ASHI dental programme. Secondly, if you were enrolled in the dental plan as an ASHI participant but terminated your coverage, you cannot reinstate it any time afterwards.'

... On 15 July 1999, on the [Applicant]'s request to be re-enrolled in the [United Nations] dental insurance plan, [the Chief, Insurance Section,] replied that there was no valid basis for him to make an exception in the [Applicant]'s case by authorizing his reinstatement in the dental insurance programme, [eleven] years after he terminated his coverage.

... On 13 January 2000, the [Applicant] wrote to ... [the] Under-Secretary-General for Management, for review of the decision to reject his request for re-admission to the [United Nations] dental insurance plan. In his reply dated 10 March ..., [the Under-Secretary-General] confirmed ... [the] decision [of the Chief, Insurance Section].

... On 26 May 2000, the [Applicant] submitted a request for review ...

... On 22 June 2000 [and on 12 August, the Applicant] submitted his ... appeal to ... the JAB in New York. ..."

The JAB adopted its report on 17 September 2003. Its considerations, conclusions and recommendations read, in part, as follows:

***“Considerations***

19. The Panel had to determine whether or not the Appellant should be allowed to re-enter the ASHI dental plan after having terminated his coverage.

20. In its consideration of the case, the Panel examined the Appellant's contentions. The Panel rejected the Appellant's contention that he dropped the dental insurance plan in 1987 on the basis of advice from ... [the] Chief, Compensation and Classification Service. The Panel was of

the view that the Appellant could not blame [the Chief, Compensation and Classification Service,] for having given his personal opinion, which the Appellant had used as a basis for his personal decision.

21. The Appellant asserted that the retroactive application of the new administrative instruction ST/AI/394 of 19 May 1994, governing ASHI, was 'arbitrary and illegal' because at the time he retired, the rules governing ASHI were ST/AI/172/Amend.3 of 5 April 1984. The Panel acknowledged that on 1 January 1987, the Appellant qualified for ASHI coverage under the then prevailing administrative instruction which was ST/AI/172 ... The Panel further observed that the same [administrative instruction] was still in effect when the Appellant decided to end his ASHI dental coverage then provided by GHI. The Panel, after reviewing both administrative instructions found that unlike the new ST/AI/394 ..., the old [administrative instruction] did not have a provision stating that coverage once cancelled could not be reinstated. The Panel, therefore, was of the view that the Appellant, when making the decision to withdraw from [the] GHI dental plan, did not know that he would not be able to reinstate his coverage at a later date ...

22. The Panel acknowledged that, in accordance with the new administrative instruction issued on 19 May 1994, a restriction was made with regard to re-entry in the ASHI scheme as it stipulates in paragraph 12, *in fine*, '[i]t should be noted that coverage, once cancelled, cannot later be reinstated'. In the view of the Panel, the application of such a restriction to retirees who had qualified for the ASHI but had opted out of the plan before 1994 deprived such retirees of their acquired rights. While understanding concerns for the financial position of the insurance scheme, the Panel felt that allowing retirees in the same category as the Appellant to re-enroll in the ASHI plan would not be excessively costly to the Organization, given that number of such retirees was limited.

23. Moreover, the Panel noted that the Appellant, while having dropped his dental coverage still remained in the ... medical insurance scheme, which shows a continuation in the United Nations contributory health insurance scheme, which the Appellant had been part of since September 1959. The Panel further noted that the Appellant made every effort to keep his coverage in the ... dental insurance plan by first attempting to join the PAHO's health insurance plan in Washington, D.C., then suggesting ... arrangements with other insurance companies such as Blue Cross-Blue Shield or Aetna, on the same basis as the regular plan. ...

24. The Panel then considered the Appellant's argument that exceptions had been granted to allow the return of some staff members to the [United Nations] medical/dental insurance scheme. The Panel noted that his attempts to obtain from the Chief of the Insurance Section some clarification of the policy with respect to the granting of exceptions to the re-enrolment, had been met with an equivocal answer, which led the Panel to infer that there was a lack of transparency in that respect. The Panel was therefore of the view that exceptions may well have been granted but remained undisclosed. The Panel was further of the view that the Insurance Section should be more pro-active and more sympathetic in its dealing with retirees in recognition of their long service with the United Nations but most of all because a basic right was at stake, namely the right to medical and dental insurance.

25. In view of the foregoing, the Panel felt that the Appellant should be allowed to re-enter the ASHI dental plan as he had terminated his coverage before the issuance of ST/AI/394 ... Alternatively, the Panel felt that in the interest of equity and fairness, and the United Nations being an exemplary Organization, the Secretary-General ought to make use of his discretionary power to make an exception by allowing the Appellant to be re-instated in the [United Nations] dental plan. The Panel was of the view that in so doing, the Administration would at least express its recognition to the Appellant for his long service with the Organization but also show its concern for a category of people living on fixed incomes who needed insurance coverage given the prevailing economic conditions.

26. With regard to the Appellant's request for monetary compensation, the Panel felt that there were no legal grounds for granting such a request.

#### **Conclusion and Recommendation**

27. In light of the foregoing, the Panel unanimously agrees that there is merit to the Appellant's claim.

28. The Panel thus unanimously recommends that the Appellant be allowed to re-enter the [United Nations] dental insurance scheme."

On 21 November 2003, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary-General considers that neither the doctrine of acquired rights nor the general principle of non-retroactivity is applicable in this case. In that regard, the Secretary-General points out that administrative instruction ST/AI/172, which was in force at the time you enrolled into, and withdrew from, the ASHI dental plan, never conferred upon the ASHI participants any right to reinstatement following withdrawal from the plan. In the absence of a right, the issue of an acquired right cannot arise. As regards the 1994 administrative instruction ST/AI/394, it did not abrogate any right to reinstatement, as such a right never existed. As a matter of fact, administrative instruction ST/AI/172 stressed continuity of coverage for purposes of remaining eligible for such coverage. Therefore, even though the subsequent administrative instruction ST/AI/394 ... specifically barred re-enrollment into the plan following cancellation by a participant, this rule was neither new nor introduced a new policy to your detriment. Such a restriction was the underlying assumption in the earlier administrative instruction as well, as evidenced by the emphasis on the need for continuity of coverage.

In light of the above considerations, the Secretary-General regrets not being able to accept the Board's conclusions and recommendation and has decided to take no further action on your case. ..."

On 5 April 2005, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. He would never have withdrawn from the GHI dental insurance scheme if he had not been advised to do so by "authoritative sources" in charge of staff and retirees' health insurance.
2. Both the doctrine of acquired rights and the general principle of non-retroactivity are applicable in his case.

Whereas the Respondent's principal contentions are:

1. The Applicant is not entitled to reinstatement under the plan.
2. The Applicant does not have an acquired right to reinstatement.
3. The principle of non-retroactivity is not applicable to the Applicant's case.

The Tribunal, having deliberated from 24 October to 21 November 2006, in New York, and from 26 June to 27 July 2007, in Geneva, now pronounces the following Judgement:

I. The case comes before the Tribunal as the result of a decision of the Secretary-General denying the Applicant's longstanding and repeated requests to be allowed to re-enroll in the dental plan portion of his health insurance.

II. The Applicant retired from the service of the Organization on 31 July 1986. Following his retirement, the Applicant relocated to Silver Spring, Maryland, a suburb of Washington, D.C., and elected to transfer his medical insurance coverage to the ASHI plan, effective 1 January 1987. Under the ASHI plan, the Applicant was a participant both in a medical plan with Aetna and in the GHI dental plan. Unfortunately for the Applicant, apparently there were no dentists in the Washington, D.C., area who participated in the dental plan, and the Applicant was unable to avail himself of the dental benefits for which he was continuing to pay premiums. As a result, he wrote to the Chief, Compensation and Classification Service, on 19 May 1989, who, the Applicant asserts, advised him to withdraw from the dental portion of ASHI and, instead, to seek coverage under the WHO plan, pursuant to a reciprocity agreement between the United Nations and WHO. As it was ultimately impossible to join the WHO plan, the Applicant sought additional advice from the Chief, Compensation and Classification Service, regarding alternative dental coverage. There was no alternative coverage available, however, and, as the Applicant asserts, the Chief, Compensation and Classification Service, advised the Applicant to simply withdraw from GHI, which the Applicant did, in 1988.

III. At the time of the Applicant's withdrawal from the dental portion of the plan, the rules pertaining to after-service health care were set out in administrative instruction ST/AI/172/Amend.3. ST/AI/172/Amend.3 was silent as to the ability of a staff member to participate in only one portion of an after-service health care plan - i.e., to participate only in the medical portion of the plan and not the dental portion. In addition, the administrative instruction was silent as to whether a former staff member who, having withdrawn from a portion of health coverage, could be reinstated into the plan from which he or she withdrew or into another, substitute portion of that plan. As a result, the Applicant alleges, when he withdrew from GHI, he believed he could be reinstated into the plan if, and when, the circumstances changed so that he could take advantage of the benefits, and it appears that he relied on his ability to seek reinstatement in deciding to withdraw.

IV. On 5 February and 4 April 1990, the Applicant directed a letter to the Chief, Insurance Section, raising, inter alia, the issue of obtaining dental coverage in Washington, D.C. In response, by letter of 10 April, the Chief, Insurance Section, confirmed to the Applicant that indeed there were no participating practitioners in the Washington, D.C., area, and that, at the time of the letter, the Organization was not in a position to change the plans. However, the Chief noted that it was possible that the plan might change later in 1990 or early in 1991, and the problem might then be addressed in the future.

V. Subsequently, in May 1994, a new administrative instruction, ST/AI/394, regarding after-service health care, was issued, and it superseded the provisions of ST/AI/172, including its addendums and amendments thereto. Unlike the silence of ST/AI/172/Amend.3, paragraph 12 of ST/AI/394 expressly addressed the consequences of withdrawing or cancelling participation in a plan. Specifically, paragraph 12 provides that “coverage, once cancelled, cannot later be reinstated”. The Administration never advised the Applicant of this change in rules relating to after-service care, nor did the Applicant ever learn of it otherwise.

VI. In January 1999, the Applicant received a letter relating to his participation in ASHI, which letter referred to a previously conducted survey regarding dental plans. The Applicant had not received the dental survey and contacted the Administration to inquire as to why he had not been included in the survey. In response, the Administration informed him, by letter of 27 January, that he was not included in the dental survey because the survey was sent only to those retirees who were enrolled in the GHI dental plan. As he was not enrolled in the plan, he did not receive the survey. In this letter from the Administration, the Applicant also learned, for the first time, that the dental plan had been changed; however, thereafter, the Administration informed him that “only those who were enrolled in the old dental plan were eligible to be automatically switched to the new dental plan when the [United Nations] switched dental insurance carriers on 1 July 1998”.

VII. Subsequently, in response to the Applicant’s request to be reinstated into the dental plan, now that there was a new plan, he was advised, by letter of 10 February 1999, that he was not eligible to enroll in the dental plan. In support of its position to deny him re-enrollment, the Administration relied on the language of paragraph 12 of ST/AI/394, advising him that “if you were enrolled in the dental plan as an ASHI participant but terminated your coverage, you cannot reinstate it any time afterwards”.

VIII. Thereafter, the Applicant engaged in correspondence with the Chief, Insurance Section, regarding the matter of his reinstatement into the dental plan. On 15 July 1999, the Chief responded. In his response, he referenced correspondence between the Applicant and himself, dating back to early spring of 1990, and indicated to the Applicant that

“had you sought reinstatement of dental coverage at that time [presumably, in 1990], such request could have been considered. However, I regret to say that I see no valid basis for making an exception in your case by authorizing reinstatement in the dental insurance programme at this stage, more than eleven years after you terminated coverage.”

IX. Despite his repeated attempts to re-enroll in the dental plan, the Applicant has been prohibited from doing so. In subsequent denials by the Administration, the Organization has repeatedly relied on the language of ST/AI/394 in support of its position that the Applicant is not entitled to re-enroll, having once cancelled the plan. The Applicant now asks the Tribunal to find that he was entitled to be allowed to re-enter the insurance scheme in 1998, when the Organization switched to a dental plan in which Washington,

D.C., area dentists participated, to order his reinstatement in the plan and to award him compensation for various dental expenses.

X. The Tribunal turns first to the issue of whether the Applicant was entitled to rejoin the after-service dental insurance scheme. The Tribunal notes that under ST/AI/172/Amend.3, which was the administrative instruction in force at the time the Applicant opted to cancel his dental insurance, the Applicant was not expressly prohibited from re-entering the dental insurance scheme.

The Administration argues, *ex post facto*, however, that even though ST/AI/172/Amend.3 was silent on the re-entry right, the policy underlying that administrative instruction was always based on the understanding that re-entry was not allowed. The Tribunal is not convinced. In reaching its conclusion that this was not the underlying policy of ST/AI/172/Amend.3, the Tribunal notes the letter from the Chief, Insurance Section, dated 15 July 1999, which makes clear that under some circumstances - for example, apparently, if the Applicant had sought re-entry sooner - it might have been possible for the Applicant to re-enter the scheme:

“Had you sought reinstatement of dental coverage [in 1990], such request could have been considered. However, I regret to say that I see no valid basis for making an exception in your case by authorizing your reinstatement in the dental insurance programme at this stage, more than eleven years after you terminated coverage.”

Thus, if re-entry would have been possible at some earlier date, it is clear that a policy prohibiting such re-entry did not in fact exist prior to the enactment of ST/AI/394.

Moreover, even if, in fact, such a policy had been implicit in the language of ST/AI/172/Amend.3, as the Administration asserts, the Tribunal would not have looked favorably upon a policy that denied to staff members a social right as important as the one to maintain health/dental insurance without providing expressly the circumstances under which such a right would be given up or compromised.

XI. The Tribunal further notes that the Administration must have shared its view in this regard to at least some degree, because when it enacted ST/AI/394, which was intended to modify and supersede ST/AI/172/Amend.3, it made clear that staff members who cancelled their insurance would not be allowed to re-join. Had the policy underlying ST/AI/172/Amend.3 been as clear as the Administration argues, there either would have been no need to add an express prohibition to the later administrative instruction or the amended language of the administrative instruction would have made clear that it was a codification of a previous implied policy.

At the time the Applicant withdrew from the GHI dental scheme, he believed, as he asserts, and relied to his detriment on, the fact that he would be able to re-enter the scheme when circumstances changed, such that, for example, either the plan changed, participating dentists joined the existing plan, or he relocated. His belief and reliance thereon were further encouraged, or at least not discouraged, by the letter he received from the Administration, evidencing not only a recognition that the dental coverage



scheme was inadequate and inequitable but also that a remedial change in the plans was possible in the future. Again, nothing in the language of ST/AI/172/Amend.3 led the Applicant to believe otherwise.

When the dental scheme changed in 1998, and the Applicant sought re-enrollment, he should have been allowed to re-enroll. In addition, the Administration's repeated attempts to impose the prohibition of ST/AI/394 upon the Applicant, even though the administrative instruction did not exist at the time the Applicant decided to withdraw from dental coverage, also violates the long-standing principle of law regarding non-retroactivity. In Judgement No. 1197, *Merón* (2004), citing Judgement No. 82, *Puvrez* (1961), the Tribunal held that "[n]o amendment of the regulations may affect the benefits and advantages accruing to the staff member for services rendered before the entry into force of the amendment. Hence, no amendment may have an adverse retroactive effect in relation to a staff member." Therefore, the Tribunal finds that the Applicant is entitled to re-enroll in the current dental scheme.

XII. The Tribunal now turns to the Applicant's claims for reimbursement of dental expenses he incurred as a result of being denied participation in the dental scheme and to his claim for foregone dental treatments he would have had, had he been a participant in the dental insurance scheme. In addressing this question, the Tribunal notes that the Applicant has failed to provide any necessary documentation in support of his claim for reimbursement of dental expenses. Second, the Tribunal recognizes that, had the Applicant participated in the dental scheme, he might have made different choices about dental care. Third, the Tribunal is aware that, had the Applicant been allowed to enroll in the dental scheme starting in 1998, he would have been responsible for paying premiums and deductibles to maintain the insurance. In view of these factors, the Tribunal finds that it would be virtually impossible to determine with accuracy the position he would have been in had his re-enrollment not been denied. In reaching its conclusion, however, the Tribunal notes that, but for the Administration's wrongful denial of re-enrollment, the Applicant would not now be seeking relief. Therefore, under the circumstances, the Tribunal decides to compensate the Applicant only for the failure of the Administration to allow his re-enrollment or participation in the dental plan for a period of more than nine years. In doing so, the Tribunal is mindful of the very unusual and particular facts of this case and the unlikelihood of additional, similar cases arising in the future.

XIII. In view of the foregoing, the Tribunal:

1. Orders the Respondent to allow the Applicant to enroll in the current dental scheme with effect from the date of the Judgement, or, in the alternative, should the Secretary-General decide, within thirty days of the notification of this Judgement, in the interest of the United Nations, not to take any action, that the Applicant be paid the amount of US\$ 25,000, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected;

2. Orders the Respondent to pay the Applicant, for his failure to permit the Applicant to re-enroll in the ASHI dental insurance scheme, the sum of US\$ 15,000, with interest payable at eight per cent per annum as from 90 days from the date of distribution of this Judgement until payment is effected; and,
3. Rejects all other pleas.

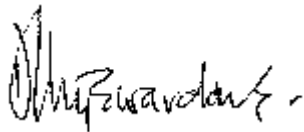
*(Signatures)*



**Spyridon Flogaitis**  
President

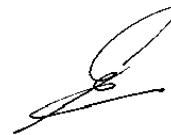


**Jacqueline R. Scott**  
First Vice-President



**Dayendra Sena Wijewardane**  
Second Vice-President

Geneva, 27 July 2007



**Maritza Struyvenberg**  
Executive Secretary