



Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1480

Case No. 1530

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Dayendra Sena Wijewardane, President; Mr. Goh Joon Seng, Second Vice-President; Ms. Jacqueline R. Scott;

Whereas on 15 April 2007, a former staff member of the United Nations, filed an Application in which she requested the Tribunal, inter alia:

“II. PLEAS

7. ... [To] find:

...

(b) that the present [Application] is receivable under Article 7 of its Statute.

8. ... [T]o find that:

(a) the Applicant's case was properly submitted and both receivable *ratione materiae* and *ratione temporis* before the Joint Appeals Board [JAB] in accordance with the Staff Rules. Hence, the JAB erred in finding that the appeal was time barred;

(b) the JAB Secretariat and the Presiding Officer erred in law by failing to follow the Rules of Procedure and Guidelines of the JAB in effectively supervising the appeal process and taking timely procedural decisions concerning Applicant's appeal prior to the constitution of the JAB Panel which considered the appeal. The onus falls on the JAB Secretariat and the Presiding Officer to ensure that all the technical aspects of the appeal were satisfied prior to presenting a case to the constituted Panel;

(c) the JAB Panel erred in law and misdirected itself by incorrectly, interpreting Rules F and G of the JAB Rules of Procedure with regard to the receivability of the appeal before the JAB and applied subjective reasoning and value judgments of Applicant's motive without taking into account the exceptional circumstances that would justify a waiver, even if the said Rules were applicable to this case.

9. ... [To further] find that:

(a) the Respondent has arbitrarily and unlawfully denied the Applicant's earned accumulative home leave;

(b) the Respondent has unlawfully withheld the Applicant's earned annual leave;

(c) the Respondent has illegally and arbitrarily withheld payment from the Applicant in breach of the terms of the agreement for separation from service;

(d) the Respondent erred in law to hold the Applicant responsible for the debt owed by her husband to the Organization;

10. ...[To] order that:

(a) the recommendation of the JAB be set aside;

(b) the withheld portion of all monies outstanding under the agreed terms of the separation agreement be paid to the Applicant with interest of 12% thereon from the date of the administrative decision to withhold the funds;

(c) the Applicant receive the full amount of her earned entitlements including outstanding earned, accumulated home leave;

(d) the Administration pay the Applicant adequate compensation in the amount that the Tribunal may deem appropriate for (i) the consequences of the cumulative errors of the JAB Secretariat, the JAB Presiding Officer and the JAB Panel (ii) the Respondent's failure to provide the Applicant in a timely manner with official notice of the reason(s) for the administrative decision to withhold the Applicant's entitlement (iii) the continued violation and disregard of the Applicant's basic contractual rights thereby causing the Applicant undue stress, anxiety throughout this process and needless financial and emotional distress."

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 22 October 2007, and once thereafter until 21 November;

Whereas the Respondent filed his Answer on 15 November 2007;

Whereas the Applicant filed Written Observations on 10 January 2008;

Whereas, on 31 July 2009, the Tribunal declared the Application receivable and decided to postpone consideration of the merits of this case until its next session;

Whereas on 26 August 2009, the Applicant filed a communication;

Whereas on 28 August 2009, the Respondent filed his Answer on the merits;

Whereas on 29 September 2009, the Applicant filed Comments on the Respondent's Answer on the merits;

Whereas on 5 November 2009, the Tribunal decided not to hold oral proceedings in the case;

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] joined the Organization on 27 August 1973 on a one-month short-term appointment as Clerk, G-2, with the Yearbook Unit, Press and Publications Division, the then Office of Public Information. Her initial appointment was subsequently extended, then converted to a fixed-term appointment, and later to a probationary appointment. On 1 August 1975 the [Applicant] was granted a permanent appointment.

... Effective 12 December 1974, the [Applicant] was transferred to the Center for Natural Resources, Department of Economic and Social Affairs.

... From 28 September 1980 to 9 January 1983, the [Applicant] was on assignment to the [United Nations Peacekeeping Force in Cyprus (UNFICYP)].

... On 1 December 1984, the [Applicant] was promoted to the Professional category and awarded P-2 level. Same month she was reassigned to the Department of Political Affairs, Trusteeship and Decolonization. Effective 1 October 1987, the [Applicant] was promoted to the P-3 level.

... On 1 February 1990, the [Applicant] was detailed on a temporary assignment to the Secretariat of the [Advisory Committee on Administrative and Budgetary Questions (ACABQ)], Office of Programme Planning, Budget and Finance, Department of Management. Later the same year the temporary assignment was converted into an inter-departmental transfer under the Vacancy Management and Staff Redeployment Programme.

... Effective 1 February 1991, the [Applicant] was promoted to the P-4 level and effective 1 February 1994 – to the P-5 level. In addition, the [Applicant] was granted retroactively for the period 7 April 1993 to 31 January 1994 a special post allowance to the P-5 level in recognition of the fact that she had performed functions at that level for a considerable period of time and to the full satisfaction of her supervisors prior to her promotion. From 1 July 1994, the [Applicant]’s functional title was changed to Deputy Executive Secretary of the ACABQ Secretariat.

... On 1 September 1999, the [Applicant] was laterally reassigned to the newly created Oversight Services Unit in the Office of the Under-Secretary-General for Management and appointed as Chief of that Unit.

... Effective 31 August 2005, the [Applicant] was separated from the Organization on agreed termination.

Summary of the facts relevant to the receivability of the present appeal

... From the documents on file it appears that after the [Applicant] joined the ACABQ Secretariat in February 1990 and even when she was transferred as Chief, Oversight Support Unit, Department of Management in 1999, she was forced, because of the exigencies of service, to systematically defer her home leave entitlement for up to two years at a time or even longer. Until 2002 the Administration appeared to always demonstrate certain understanding of the [Applicant]’s situation and was consistently granting her the necessary authorizations to defer and carry forward her unused home leave entitlements to the succeeding years. In June 2002, the

Administration, however, refused to defer any further the [Applicant]'s 1998 home leave entitlement and informed her that it had lapsed.

... On 27 August 2002, the [Applicant] filed with the Secretary-General a request for administrative review of the Administration's decision on her 1998 home leave entitlement. While waiting for the decision on her request, the [Applicant] in the meantime must have applied for and was granted the authorization to exercise her 2002 home leave entitlement, which she successfully did in November-December 2003. Also, shortly before her departure on the 2002 home leave, the Administration agreed to restore her 1998 home leave entitlement. The [Applicant] exercised it in December 2004.

... On 16 March 2005, the [Applicant] requested an agreed termination of her service with the Organization. Reportedly on 5 May 2005 her request had been approved with the effective date of 31 August 2005.

... On 24 May 2005, the [Applicant] was informed by the Payroll Section of the Accounts Division, OPPBA, (hereafter 'the Payroll Section') that the 2001 and 2002 tax returns of the [Applicant]'s husband showed some outstanding amount in the receivable balance which was due to the UN over-advancing the taxes in 2001, i.e. the advances paid by the UN to the US Internal Revenue Service (IRS) and the State Authorities in 2001 on behalf of the [Applicant]'s husband were higher than the actual amounts claimed by the [Applicant]'s husband eventually for those years. The [Applicant]'s husband reportedly benefited from the Foreign Income Exclusion provisions, which reduced his tax liability. The [Applicant] was requested to contact her husband so that the latter provided to the UN a tax account transcript for the years 2001-2002.

... On 1 June 2005, the [Applicant] forwarded the Payroll Section's request to her husband who on 13 June 2005 replied that he was attending to his aged and sick mother and would look into the matter once he was back in New York. On 14 June 2005, the [Applicant] forwarded the reply of her husband to the Payroll Section without any comments.

... On 28 June 2005, the [Applicant]'s Executive Office advised the Office of Human Resources Management (OHRM) that the [Applicant] was to be separated from the Organization on agreed termination effective 31 August 2005.

... On 13 July 2005, the Payroll Section sent a reminder to the [Applicant] about the outstanding issue of her husband's tax returns for 2001 and 2002, emphasizing that the Payroll Section was expected to report very soon on all tax receivables which had not been collected so far. The Payroll Section re-iterated its belief that the [Applicant]'s husband should have received a large reimbursement from the IRS and NY State and that at least part of that reimbursed amount, if not all, should have been paid back to the UN. A transcript from the IRS would have confirmed the fact and the amount. The [Applicant] was suggested to also check 'the bank statements for the period 2002-2003 and look for any large refund from the IRS'.

... Same day the [Applicant] replied to the Payroll Section's reminder by contending that although she spoke to her husband over the phone on several occasions the previous day, she was not able to discuss with him the matter of tax returns. Rather she called her husband in connection with his mother's hospitalization. The [Applicant] assured the Payroll Section that she was not able to check the bank statements because she and her husband had separate bank accounts and 'as a G-4 visa person [she] ha[d] never had to deal with IRS and such things'. The [Applicant] stated further that her husband was expected to return to New York by 19 July 2005 but due to the sudden turn of events on 12 July 2005, i.e. the hospitalization of the husband's mother, it was no longer the case. The [Applicant] informed the Payroll Section that she did not know any more when her husband would return to New York and that she could not be of more help because she was 'trying to cope with [her] own health and stuff'.

... On 15 July 2005, the Payroll Section acknowledged the [Applicant]'s information about the hospitalization of her husband's mother and asked the [Applicant] to let them know 'as soon as [her] spouse [was] able to request a transcript from the IRS or to go through his bank statements upon his return to NY'.

... On 19 July 2005, the [Applicant] had her exit interview where it was inter alia noted that her departure date would be provided later and that she might apply for a change of visa status. The part to be completed by non-US staff members had not been completed for some reason.

... [On] 9 to 23 August 2005 – the [Applicant] had an exchange of e-mail communications with the UN Ombudswoman on the status of the [Applicant]'s final entitlements and payments. During this interval, i.e. on 12 August 2005, she also received a reminder from the Payroll Section about the outstanding tax returns issue, where it was re-iterated that it needed to be resolved as soon as possible.

... On 20 September 2005, the Payroll Section formally sought guidance of the Office of Human Resources Management (OHRM) on whether the [Applicant] was 'liable for the outstanding tax receivable against her husband, and whether ...it would be appropriate to release her separation payments without recovering the tax overpayment'. Inter alia the Payroll Section informed the OHRM that the [Applicant]'s husband, who separated on 31 October 2002 and who was a US citizen, had 'an outstanding receivable with the United Nations corresponding to a \$19,747 overpayment of tax advances [and that] it was very likely [that he had] received this amount as a refund from the US tax authorities but did not remit it to the United Nations as warranted by the rules and regulations governing the payment of US income tax on UN earnings'.

... On 26 September 2005, the Payroll Section informed the OHRM further that 'both documents [tax returns from 2001 and 2002] were signed by both spouses, including the 2001 return that carried an overpayment for an amount over 19,000 \$ and requested a reimbursement from the US Tax authorities'.

... On 28 September 2005, the OHRM sought advice on the issue from the Office of Legal Affairs (OLA). Inter alia the OHRM informed the OLA that while the 2001 and 2002 tax returns were signed jointly by the [Applicant] and her husband, 'the requests for settlement of income taxes (F.65) for the years in question, where staff members [were] required to provide a number of certifications and undertakings, were signed by the husband only'. The OHRM requested the OLA to advise on 'the propriety of recovery against the amounts otherwise payable to the [Applicant] on separation [and] whether it would be possible to withhold the amount of the apparent overpayment from the [Applicant]'s final payments until she or her husband provide[d] the information necessary to verify the existence and amount of the overpayment, or until the UN obtain[ed] that information from the tax authorities'.

... On 21 October 2005, the OLA replied to the OHRM and to the Payroll Section that insofar as the [Applicant] filed and signed joint tax returns with her husband for the years in question, she would be 'an equal beneficiary of the tax refund from the US tax authorities resulting from the UN's overpayment of the tax advances'. Consequently, such a tax refund, if received by the [Applicant], would 'create an indebtedness on [her] part ... to the UN [and the UN would] ... be entitled to deduct the indebtedness from her salary, wages and other emoluments pursuant to staff rule 103.18 (b) (ii)'. Accordingly, the OLA determined that it was 'appropriate for Payroll to withhold the final separation payments from [the Applicant], up to the amount of the outstanding receivable, until she provide[d] the information required by [the Payroll] office or until the UN obtain[ed] the relevant information from the tax authorities'. At the same time, the OLA declined to pronounce itself on the question of the [Applicant]'s liability for the outstanding receivable against her husband but took note of the facts that (i) the Respondent earlier already withheld the final pay cheque of the [Applicant]'s husband in the amount of \$2,173 and (ii) there were no other due payments available to be withheld against this outstanding receivable at the time of the husband's separation from the Organization in October 2002. The OLA recommended

that the Payroll Section informs the [Applicant] of its intention to withhold the separation payments and pursues the matter with her and the tax authorities on an urgent basis.

... [From] 12 to 23 October 2005 – an exchange of informal e-mail communications between the [Applicant] and the Director, Accounts Division, on the subject of the [Applicant]’s final payments, their withholding, and then partial release. Inter alia the [Applicant] complained about ‘willful harassment’ and its possible harmful impact on her reputation all over the UN. She also categorically objected to the Administration’s intention/decision to hold her legally responsible for her husband’s tax issues and re-iterated that the matter should be resolved directly with her husband once he was back in New York from Pakistan.

... [On] 21 December 2005 – the [Applicant] complained formally to the Director, Accounts Division, about the delay in the payment of her final dues. Inter alia she claimed that she received no formal explanation for the delay but heard informally that the delay might have been caused by ‘some old tax issues relating to [her] husband, ... who retired from the UN in early 2002’. The [Applicant] re-iterated her contentions that while her husband was a US citizen and US taxpayer, she was a G-4 visa holder and that it was ‘unfair and unjust’ to hold her responsible for his US tax issues. She also re-iterated that the matter should be discussed directly with her husband upon his return to the USA.

... On 3 February 2006, the [Applicant] reviewed her official status file and on 28 February 2006 requested the Secretary-General that ‘the matter [i.e. the Administration’s refusal to release all the payments and failure to provide any official notification or explanation to that effect] [be] investigated’. It appears that the [Applicant]’s request was received in the Office of the Secretary-General on 8 March 2006 and on 10 March 2006 forwarded for action to the Administration.

... On 25 April 2006, the [Applicant] submitted an incomplete statement of appeal to the New York JAB ‘in order to keep within the deadline established by the staff rule’.

... On 14 May 2006, the [Applicant] requested authorization to file a complete statement of appeal by mid June 2006, since she was away from New York and did not have access to her records/files. She was granted an extension to 16 June 2006.

... On 9 June 2006, the [Applicant] was reportedly informed by the Controller that her final entitlement payments could not be made until the outstanding issue related to the 2001 and 2002 tax returns and a substantial overpayment of tax advances had been resolved and that she was required to obtain and submit to the Organization the appropriate tax transcripts to that effect.

... On 12 June 2006, the [Applicant] filed a complete statement of appeal, which was received by the New York JAB on 15 June 2006.”

The JAB submitted its report on 28 November 2006. Its considerations, conclusions, and recommendation read, in part, as follows:

“Considerations

49. The Panel reviewed the receivability of the present appeal. The Panel agreed that the crux of the matter was the Appellant’s letter of 28 February 2006 to the Secretary-General and whether it constituted a proper request for administrative review under Chapter XI of the Staff Rules. All other issues, including, for example, the Appellant’s specific recourse against the alleged administrative decision on her 2004 home leave entitlement, were secondary, although somewhat useful in the determination of the nature of the Appellant’s letter of 28 February 2006 to the Secretary-General.

50. With regard to the letter, the Panel noted the diametrically opposite contentions of the parties, namely, that the Appellant contended that the said letter ‘cannot be regarded as anything other than a request for review under the relevant Staff Rules’, while the Respondent claimed that in her letter the Appellant asked not for a review of a specific administrative decision but for an investigation.

51. The Panel reviewed the contents of the Appellant’s letter of 28 February 2006 and found that in the letter the Appellant complained to the Secretary-General about ‘the appalling treatment’ to which she was allegedly subjected by the Administration who initially ‘arbitrary’ withheld all her separation payments and then after ‘numerous and frantic efforts by [the Appellant], [and] after more than a month and a half, [released] part of the payments ... to [her]’. The Appellant also claimed in the said letter that the Organization ‘failed to provide [her] with any [emphasis added] official notification or explanation for [its] actions [and that] all [her] efforts, including requests in writing, to seek clarification and secure [her] entitlements ha[d] been ignored’.

52. The Panel noted that in the letter in question the Appellant indeed asked for an ‘investigation’ of ‘the matter’ rather than for a review of any specific administrative decisions. The Panel agreed that the Appellant’s choice of words in the letter was not accidental, taking into account her extensive experience with and knowledge of the UN administrative matters, procedures and terminology as well as her personal experience, in 2002, with the UN appeal and administrative review procedure with regard to her 1998 home leave entitlement.

53. Furthermore, the Panel found that the Appellant’s description of the ‘matter’ was too general and vague in order to serve as a meaningful request for review of the related administrative decisions, if any. It is also of importance that the Appellant did not copy her letter of 28 February 2006 to the Secretary-General to the head of her respective department/office, as it should have been the case with a request for administrative review in accordance with the amendment to the Chapter XI of the Staff Rules, which became effective on 1 January 2006.

54. Furthermore, having reviewed the available exchange of the Appellant’s e-mail communications with the Chief of Payroll and later with the Director of Accounts, the Panel was satisfied that the Administration was in constant contact with the Appellant about the problem from as early as May 2005, i.e. even before her actual separation from service. Moreover, the Appellant, at least initially, demonstrated considerable understanding, cooperation and willingness to assist the Administration in resolving the problem. This fact also proves to the Panel that the Appellant was well informed about the ‘matter’ and the Administration’s reasoning to withhold part of her final payments. Accordingly, her contentions to the contrary are very much misleading and simply not true.

55. In the Panel’s opinion, insofar as the Appellant knew about the issue or the ‘decision’ and its rationale already in May 2005, her letter of 28 February 2006 to the Secretary-General, if to recognize it as a request for administrative review under Chapter XI, was filed well after the established time limits for such an action. The Appellant did not provide and the Panel did not find any exceptional circumstances, which would have prevented the Appellant from initiating her recourse earlier, for example, in October 2005 when she finally received part of her final payments and was again told why the rest of her final payments would continue to be withheld. It goes without saying that in the absence of such exceptional circumstances, the Panel could not waive the established time limits for requesting a review of an administrative decision. With regard to the Appellant’s continued efforts to obtain a more formal statement from the Administration on the matter, the Panel could not accept them as such exceptional circumstances. In this connection, the Panel recalled the UNAT judgment No. 1211 *Muigai* (2004) where the Tribunal pronounced that ‘once it is clear that a decision is made, the time for initiating the appeal process begins to run and, thus, further correspondence on the issue [as well as negotiations between the parties] would normally not stop it from running’. Also, ‘bringing up an issue on which a decision had previously been communicated to the staff member and which was not the subject of a request for administrative review does not normally start the process anew’ (para. III).

56. Based on the above mentioned findings and observations, the Panel agreed that the Appellant's letter of 28 February 2006 to the Secretary-General requesting an investigation of the matter was not and could not be recognized as the proper request for review of an administrative decision under Chapter XI of the Staff Rules. Consequently, the Appellant's appeal is not receivable because it lacked a 'constitutive element' (the UNAT judgment No. 1122 *Lopes-Braga* (2003)). According to the UNAT judgment No. 905 El-Far (1998), administrative review is 'a very important internal procedure [which] gives the Administration an opportunity to redress a grievance before it is taken any further...[and] it [was] of the utmost importance that the Administration be given this opportunity ... before [the] decision is litigated'. In this connection, the Panel also noted that it had no power to waive this constitutive element of the appeal process (UNAT judgment No. 878 *Orfali* (1998))

57. Accordingly, the Panel decided that there was no need for it to review the merits of the appeal and/or any of the Appellant's particular contentions related to her specific entitlements and final payments.

Conclusions

58. The Panel concluded that the appeal at hand was not receivable because the Appellant failed to seek an administrative review of the subject-matter prior to taking it to the JAB.

Recommendations

59. The Panel made no recommendation in favour of the appeal."

On 23 April 2007, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her as follows:

"The Secretary-General has examined your case in the light of the JAB's report and all the circumstances of the case. He accepts the JAB's findings and conclusion and has accordingly decided to take no further action on this appeal ...".

On 15 April 2007, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. Her case was receivable, *ratione materiae* and *ratione temporis*, before the JAB.
2. The JAB did not follow its own Rules of Procedure and Guidelines as it failed to properly supervise the appeals process and to take timely procedural decisions as to her prior appeal to the JAB panel considering her case. The technical aspects of the appeal were not effectively dealt with before the case presented to the JAB panel.
3. The JAB erred in law and incorrectly interpreted its own rules of procedure in misapplying Rules F and G as regards to the receivability of the appeal before it. The JAB was also too subjective in its consideration of whether exceptional circumstances warranted a waiver of the time limits in this case.

Whereas the Respondent's principal contention is:

1. The Applicant's appeal is not receivable because she failed to request an administrative review of the decision.

The Tribunal, having deliberated from 5 November to 25 November 2009, now pronounces the following Judgement:

I. The Applicant brings before the Tribunal three issues for consideration. First, the Applicant challenges the decision of the Administration not to pay her for home leave deferred from 2004 when she separated from service pursuant to an agreed termination on 31 August 2005. Second, the Applicant challenges the Administration's decision to pay her 31 days of annual leave instead of the 40 days of annual leave she alleges she was entitled to receive. Finally, the Applicant challenges the Organization's decision to withhold monies, in the amount of US\$19,747 from her final entitlement, which amount represents monies owed to the Organization by the Applicant's husband, a former staff member.

II. The Applicant was employed by the Organization from 27 August 1973 until 31 August 2005. Her husband separated from service on 31 October 2002.

III. During the course of her service, the Applicant was entitled to home leave in accordance with the Staff Regulations and Rules in effect. Apparently, based on the record, commencing sometime after 1990, when she was transferred to the ACABQ Secretariat, she was forced, based on exigencies of service, to systematically defer her home leave entitlement for two years or longer. This pattern of carryover apparently continued until 2002, when suddenly, the Administration changed course and informed the Applicant that her 1998 home leave would no longer be carried over. In response, the Applicant sought administrative review of that decision. While that review was pending, the Applicant applied for and took her 2002 home leave in 2003. Shortly before she took her 2002 home leave, the Administration reversed its position and restored her 1998 home leave, which she subsequently exercised in 2004.

IV. On 16 March 2005 the Applicant requested an agreed termination of her service, in part for "personal and family reasons". In her letter of request, she proposed the date of June 2005, as her separation date. However, the date of 31 August 2005 was later agreed upon, and this was the actual date of her separation from service. At the time of her agreed termination, she had not yet taken her 2004 home leave.

V. In conjunction with the agreed termination, on 6 May 2005, the Applicant signed a Memorandum of Understanding (MOU) accepting the terms of her termination. Paragraph (d) of the MOU specifically provided, in relevant part, that "the Organization has no further obligations, financial or otherwise, upon separation". In addition, paragraph (e) provided that the Applicant "agreed to withdraw any and all claims

and appeals [she] may have pending against the Organization and to refrain from filing any further claims or appeals against the Organization arising from [her] terms of appointment or separation, *including the 2004 home leave.*” (Emphasis added.)

VI. On 24 May 2005, the Applicant was notified by the Payroll Section that her husband, a U.S. tax-paying, former staff member, owed the Organization money resulting from a previous year’s tax advance. Specifically, the Payroll Section informed the Applicant that the Organization had advanced taxes to her husband for 2001 and 2002 and that those advances were higher than the amounts eventually paid to the U.S. taxing authorities by her husband. According to the Payroll Section’s records, the Applicant’s husband should have received a refund of such excess advance, and a portion, if not all, of those monies were owed to the Organization. The Organization requested the Applicant to contact her husband, who apparently was out of the country attending to a sick parent, and she did so, allegedly on 1 June 2005. On 13 June 2005, the Applicant’s husband responded that he was temporarily unavailable but would address the matter upon his return to the U.S. The Applicant forwarded his reply to the Organization.

VII. On 13 July 2005, the Organization again reminded the Applicant about the monies allegedly owed to it by her husband, which eventually were determined to equal US\$19,747, and suggested to the Applicant that she review “bank statements for the period 2002-2003 and look for any large refund from the IRS”. Again, the Applicant was reminded to contact her husband. In response, the Applicant noted that she was not able to check the bank statements as she and her husband maintained separate bank accounts and she had no access to his account records.

VIII. The Applicant, a G-4 visa holder, was not required to pay U.S. taxes. However, she and her husband filed a joint U.S. tax return for the period in question.

IX. When the Applicant separated from service, she was paid 31 days of accrued annual leave. She alleges that she was entitled to be paid 40 days of annual leave. In addition, upon her separation, the Respondent withheld the amount of her husband’s unpaid tax liability from her final termination payment, pending review. From the period of 20 September 2005 until 21 October 2005, while continuing to withhold the Applicant’s monies, the Organization sought to determine whether the Applicant could be held liable for the debt of her husband, and on 21 October 2005, it answered that question in the affirmative. Relying on the fact that the tax return was jointly filed and that the Applicant would have been “an equal beneficiary of the tax refund from the U.S. authorities resulting from the UN’s overpayment of the tax advances,” the Organization decided that “such a refund, if received by the Applicant, would ‘create an indebtedness on [her] part ... to the UN [and the Organization would]... be entitled to deduct the indebtedness from her salary, wages and other emoluments pursuant to staff rule 3.18(b)(ii)”. Accordingly, the Payroll Section was advised that the amount of the unreimbursed tax advance could

properly be withheld from the Applicant's final separation payments. The Payroll Section was further advised to notify the Applicant of its intention to so withhold and also to pursue the matter further with the Applicant and the relevant tax authorities.

X. The Tribunal will first consider the issue of the Applicant's home leave. It notes that, generally, home leave is available to staff members every two years, subject to certain limitations, and that if not used, it is forfeited. In the instant case, the Applicant carried forward her home leave from 1999 to 2004. The home leave attributable to 2004 was available to be taken in 2005, but the Applicant left the service of the Organization before taking her home leave. Had she wanted to take advantage of her home leave, she could have arranged her separation date to allow for that leave. She did not take the home leave while she was in the service of the United Nations and was not entitled to be compensated in lieu thereof. In addition, pursuant to the MOU signed by the Applicant in connection with her agreed termination, the Applicant specifically agreed to refrain from filing any claims with respect to the terms of her separation, *including the home leave*. As she waived her rights to challenge the 2004 home leave, she is further estopped from asserting her claim in this respect. The Applicant's claim for home leave is denied.

XI. The Tribunal next turns to the issue of the Applicant's annual leave. According to the record, there are in dispute only 9 days of annual leave. The Applicant asserts that she was entitled to be paid for 32 working days and 8 weekend days during one month. The Respondent asserts that annual leave only includes working days, not weekend days, and that the Applicant was indeed properly compensated for all annual leave to which she was entitled, that is, 31 days.

XII. Staff rule 105.1(a) states that "[s]taff members shall accrue annual leave while in full pay status at the rate of six weeks a year ..." The Organization's policy is that such leave accrues at a rate of 2.5 days a month. This rate is based on a five day work week over twelve months of service and does not provide any credit for weekend days. Thus, the Applicant is not entitled to any annual leave for weekend days.

XIII. With regard to matters of personnel and management, "[t]he Tribunal's jurisprudence recognizes the broad discretion enjoyed by the Secretary-General." (Judgement No. 1231 (2005).) The Tribunal has recognized that it is "[o]nly where the Respondent's discretion is tainted by extraneous factors, such as prejudice, arbitrariness, improper motive [or] discrimination, for example, [that] such discretion [is] subject to limitation." (Judgement No. 981, *Masri* (2000), para. VII.) Additionally, the Tribunal has recently specifically held that such discretion extends to matters of daily calculations of compensation. (Judgement No. 1419 (2008)). The Organization calculated that as of 31 August 2005, the Applicant was due 31 days of annual leave, and there is no evidence that the annual leave calculation made by the Organization was arbitrary, discriminatory, or motivated by extraneous factors. Thus, the Applicant was not entitled to be

paid for any annual leave beyond those 31 days for which she was already compensated, and her plea in this regard must be denied.

XIV. Finally, the Tribunal turns to the Applicant's claim that the Organization wrongfully withheld a portion of her final entitlement to cover the cost of unreimbursed tax advances made by the Organization to her husband. According to the Applicant, she has the right to receive her entire final entitlement, and she has no liability for her husband's obligations, as she does not pay U.S. taxes nor has she agreed to make any tax reimbursement to the Organization. The Respondent, on the other hand, argues that "since both the Applicant and her husband were United Nations staff members, they were required, as joint tax filers, to remit such refund to the Organization, as warranted by the rules and regulations governing the payment of U.S. income tax on UN earnings." In support of his position, the Respondent cites paragraphs 49-51 of Section H of ST/IC/2002/4, an Information Circular entitled "Payment of 2001 taxes" and Section 1 of the "Request for Settlement of 2001 Income Taxes".

XV. Generally, paragraphs 49 to 51 of Section H of ST/IC/2002/4 address the overpayment of tax advances by the Organization to or on behalf of a staff member. In particular, these provisions stipulate that such overpayments/advances shall be refunded to the Organization, normally by reducing the staff member's advances for a subsequent year. If, however, the staff member fails to reimburse the Organization in a timely fashion, such amounts are subject to recovery from salary or final separation payments.

XVI. The "Request for Settlement of 2001 Income Taxes (Form F. 65)" must be signed by the U.S. tax-paying staff member, whereby he or she makes certifications with respect to those taxes. In relevant part, the staff member certifies that "[he] will refund to the United Nations any overpayment of tax reimbursements or advances, together with any interest received as a result of any such overpayment made by the United Nations". It is signed by the staff member whose taxes are being paid by the Organization and no one else.

XVII. Upon review of the record, the Tribunal takes the view that the Applicant is not liable for her husband's debts, and her final entitlements should have been paid to her immediately upon her separation from service, in the normal course. The record reflects that for the tax years in question, 2001-2002, the Applicant's husband apparently signed Form F. 65, and therefore bound himself to reimburse the Organization for any and all refunds which he received as a result of any overpayment of taxes made by the Organization on his behalf to the IRS. The Applicant, however, never signed a Form F.65 in her own right, as she was a G-4 visa holder whose income was not subject to U.S. tax. Therefore, she did not have any obligations to the Organization with respect to tax advances. Moreover, she was not required to, nor did she, sign her husband's Form F.65, in her capacity as a spouse, and, therefore, she had no obligation as his

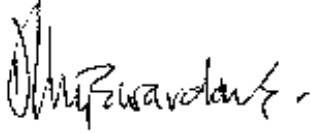
spouse, with respect to any such tax advances made on behalf of her husband by the Organization. Thus, the only person who was obligated to refund tax advances to the Organization, resulting from overpayments made by the Organization, was the Applicant's husband. The Organization should have directed its refund recovery attempts to the Applicant's husband, not the Applicant. The fact that the Organization failed to seek reimbursement from the Applicant's husband when he separated from service - the time when the Organization most likely might have been able to recover monies owed - was unfortunate, but such failure does not give rise to a right on the part of the Organization to take money rightfully belonging to the Applicant. Moreover, the Tribunal notes that if the Organization intended to create a contractual obligation between the Applicant, as the spouse of her U.S. tax-paying husband and itself, it could have implemented a form and a procedure to do so. However, since the Organization has failed to do so, it cannot now bootstrap the husband's obligation onto the Applicant.

XVIII. The Tribunal notes that the fact that the tax return was a joint one is not determinative of the matter at hand. While this creates certain rights and obligations vis à vis the U.S. Internal Revenue Service, such that, for example, the Applicant might be jointly and severally liable to the US Government for any underpayment of taxes attributable to her husband's income, it does not create any concomitant obligation on the part of the Applicant to the Organization. This is so even if, ostensibly, the Applicant could have had access to and enjoyed the refund issued to her and her husband jointly, because the Applicant was under no obligation to refund the monies. In the instant case, however, the Tribunal notes that it is unlikely that the Applicant did have access to any refund, as the record reflects that the Applicant and her husband maintained separate bank accounts and that the Applicant did not have access to her husband's bank account. It is certainly possible that the Applicant merely signed any refund over to her husband, as it was a refund arising solely from his income, her income not being subject to U. S. taxes.

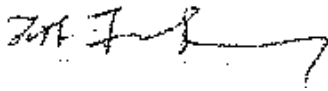
XIX. In light of the foregoing, the Tribunal:

1. Orders the Respondent to release the remaining funds, in the amount of US\$19,747, and pay them to the Applicant within 30 days of the date of this Judgement, with interest payable at eight per cent per annum as from 30 days from the date of distribution of this Judgement until payment is effected;
2. In addition, orders the Respondent to pay to the Applicant interest on the US\$19,747 at the rate of eight per cent per annum, calculated from 31 August 2005 to the date of payment, with interest payable at eight per cent per annum as from 30 days from the date of distribution of this Judgement until payment is effected; and
3. Rejects all other pleas.

(Signatures)



Dayendra Sena **Wijewardane**
President



Goh Joon Seng
Second Vice-President



Jacqueline R. **Scott**
Member

New York, 25 November 2009



Tamara **Shockley**
Executive Secretary