ADMINISTRATIVE TRIBUNAL

Judgement No. 420

Case No. 444: BAUER

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, Vice-President, presiding; Mr. Ahmed Osman; Mr. Jerome Ackerman;

Whereas, on 13 October 1987, Alois Bauer, a staff member of the United Nations Conference on Trade and Development (hereinafter referred to as UNCTAD), filed an application, the pleas of which read as follows:

"II. PLEAS

The Applicant respectfully requests the Tribunal:

(a) To rescind the decision by the UNITED NATIONS to deduct a government grant for a dependent child from salary;

(b) To order the UNITED NATIONS to restitute all such deductions made from salary."

Whereas the Respondent filed his answer on 20 January 1988;

Whereas the Applicant filed written observations on 8 March 1988;

Whereas, on 10 May 1988, the Tribunal put questions to the Respondent;

Whereas, on 12 May 1988 and 21 May 1988, the Respondent provided answers to the questions put to him by the Tribunal;

Whereas the facts in the case are as follows:

Alois Bauer, a national of the Federal Republic of Germany, entered the service of the United Nations on 2 February 1970. He has since served at the Commodities Division of UNCTAD, at the United Nations Office in Geneva (UNOG) and is the holder of a permanent appointment.

The Applicant has three children, Alice, Julia and Stephanie. Accordingly, pursuant to staff regulation 3.4(a)(i) which, up to 31 December 1976, provided for payment of separate dependency allowances for a dependent spouse as well as for each dependent child, he received a dependency allowance for each of his three children. The Applicant did not claim a dependency allowance for his wife who, in view of her own occupational earnings, was not considered a dependent.

Being a national of the Federal Republic of Germany, the Applicant, in addition to the UN dependency allowance for each child, also received monthly dependency benefits for each child in the form of grants from the Government of the Federal Republic of Germany. Accordingly, the UN dependency allowance was duly reduced pursuant to staff regulation 3.4(c).

The General Assembly, in its resolution 31/141/B of 17 December 1976, pursuant to recommendations of the International Civil Service Commission (ICSC), amended staff regulation 3.4(a)(i) so that the previously separate dependency allowance payable for a dependent spouse was thenceforth incorporated into the revised base salary at the higher "dependency rate". In the event of there being no dependent spouse, the "dependency rate" of the base salary was to be applied vis-à-vis the first eligible dependent child. In such a case, the staff member would not receive a separate UN dependency allowance for that child, as the allowance was paid instead as part and parcel of the staff member's higher base salary.

In implementing the above amendment as of 1 January 1977

vis-à-vis the Applicant, and as the Applicant's spouse was not considered his "dependent", the Respondent paid the dependency allowance for the Applicant's first eligible dependent - Alice - as part and parcel of his base salary at the higher "dependency rate" rather than as a separate payment. The Applicant continued to receive the governmental grant as a supplementary dependency benefit for the same child, and it was thus deducted by the Respondent from the Applicant's salary pursuant to staff regulation 3.4(c). In so doing, the amount of his salary representing the UN dependency benefit from which the governmental grant was deducted, was computed to be the difference between the Applicant's salary and post adjustment at the dependency rate, and those at the lower single rate. The Applicant received separate "dependency allowances" for his daughter Julia and Stephanie.

On 6 February 1983, the Applicant's first child Alice reached the age of 21. She therefore ceased to be considered a "dependent child" (pursuant to staff rule 103.24(b)), and the procedure described above for deduction of the governmental grant was applied as of 6 February 1983 with respect to the Applicant's second child, Julia, who thereupon was considered as his first eligible dependent. The Applicant received his salary at the dependency rate, but no dependency allowance for his daughter Julia. He received a dependency allowance for his third daughter Stephanie.

In an exchange of correspondence between April 1983 and August 1984 the Applicant objected to the deduction from his salary of the governmental grant received for his second daughter Julia. He asserted that as she had now become his first eligible dependent, he received no UN dependency allowance for her, and hence no recovery of a governmental grant should be effected. (This claim had previously been made with respect to his first child Alice in an earlier exchange of correspondence between May and December 1981, but was not pursued as an appeal).

In a memorandum dated 20 August 1984, the Applicant informed the Chief, Personnel Service, UNOG that he would institute appeal proceedings.

On 12 October 1984, almost eight years after the amendment to staff regulation 3.4(a)(i) had been applied vis-à-vis the Applicant, he requested the Secretary-General to review the decision to deduct the governmental grant for his first dependent child Julia from his salary. Not having received a reply, on 18 February 1985, he lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 1 May 1987. Its considerations, conclusions and recommendations read as follows:

> "IV. CONSIDERATIONS, CONCLUSIONS AND RECOMMENDATIONS
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> 27. It is the judgement of the Board that the case under consideration involves a fundamental principle which should not be allowed to be obscured or compromised by any differences of interpretation concerning administrative terminology or concepts or methods of accounting. This principle, as rightly pointed out in the rebuttal of Respondent, is that of the equality of the staff and the avoidance of favourably discriminatory treatment. The issue in the case is simple. If the subsidies which Appellant receives from the Government of his country are not subjected to the reduction effected by the United Nations Administration, Appellant would end up earning an income which would be larger than a non-subsidized staff member in an otherwise identical situation. This kind of arrangement is incompatible with, inter-alia, rule 3.4(c) of the Staff Rules [sic] and cannot therefore, be sustained. Compared to his peers, i.e. his other colleagues in the UNCTAD Secretariat, Appellant, a staff member with a permanent contract, is not perceived to perform any additional work for the United Nations which would justify a net supplementary compensation or income. A fortiori, he is precluded by the Charter from rendering any services to his Government. The extra subsidy paid to him, which the Administration took corrective measures to equalize, is the arbitrary result of nationality. Considerations of equity and justice, and the paramount concern for the preservation of the integrity and unity of the International Civil Service, lead the Board to oppose any pattern of total remuneration which would condone privilege and pave the way to the establishment of two or more classes

> of international civil servants of exactly the same grade level and family situation who would enjoy relative pecuniary advantages or suffer disadvantages, depending on the provisions made or not made by institutions extraneous to the Organization.
>
> 28. As a concluding observation, the Board wishes to record that it is aware that schemes of the type which Appellant proposes to uphold are not unknown to the Administrations of the United Nations system. Their potentially deleterious effects should not be underestimated.
>
> 29. For the reasons outlined above, the appeal is denied."

On 23 July 1987, the Assistant Secretary-General for Personnel Services informed the Applicant that the Secretary-General, having re-examined the case in the light of the JAB report, had decided to maintain the contested decision on the ground that "... the policy of deducting a dependency benefit in the form of a governmental grant from the United Nations' dependency benefit for a first dependent child, which is granted in the form of a higher salary rate, is consistent with staff regulation 3.4(c)."

On 13 October 1987, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The level of payment of social benefits by individual Member States is at their discretion and there is no justification for the UN Administration to interfere on grounds of equal treatment among staff members.

2. The deduction of a governmental grant from a staff member's salary is not covered by the UN Staff Regulations and Rules. Had Member States wished to proceed as the Respondent argues, they would have added to staff regulation 3.4(a)(i) a provision similar to staff rule 103.23(b).

Whereas the Respondent's principal contentions are:

1. A substantial part of the present appeal is time-barred.

2. Staff regulation 3.4(a)(i) provides that if there is no dependent spouse, then instead of paying the normal dependency allowance for the first eligible dependent child, the staff member's salary is paid at the dependency rate.

3. The UN dependency allowance received by the Applicant for his first eligible dependent child, i.e. the payment of his salary at the dependency rather than the single rate, is, pursuant to staff regulation 3.4(c) subject to deduction of the equivalent of the governmental grant received for that child.

The Tribunal, having deliberated from 10 to 26 May 1988, now pronounces the following judgement:

I. Two issues are presented to the Tribunal for decision in this case. One is a procedural question raised by the Respondent as to whether part of the Applicant's claim is time-barred. The other has to do with the interpretation of staff regulation 3.4. If the Tribunal's judgement with respect to the interpretation issue is unfavorable to the Applicant, there will be no need to consider the procedural time bar argument advanced by the Respondent.Accordingly, the Tribunal deals first with the issue of interpretation.

II. Staff regulation 3.4 provides that:

> "(a) Staff members whose salary rates are set forth in paragraphs 1 and 3 of annex I ... shall be entitled to receive dependency allowances as follows:
>
> > (i) At $700 per year for each dependent child, except that the allowance shall not be paid in respect of the first dependent child if the staff member has no dependent spouse, in which case the staff member shall be entitled to the dependency rate of staff assessment ...

...

(c) With a view to avoiding duplication of benefits and in order to achieve equality between staff members who receive dependency benefits under applicable laws in the form of governmental grants and staff members who do not receive such dependency benefits, the Secretary-General shall prescribe conditions under which the dependency allowance for a child specified in (a)(i) above shall be payable only to the extent that the dependency benefits enjoyed by the staff member or his spouse under applicable laws amount to less than such a dependency allowance;

..."

III. Staff rule 103.23(b) was promulgated by the Secretary-General to implement the foregoing Staff Regulation. It provides:

"(b) Subject to the provisions of staff regulation 3.4(a), the full amount of the dependency allowance provided under that regulation and the Staff Rules in respect of a dependent child shall be payable, except where the staff member or his or her spouse receives a direct governmental grant in respect of the same child. Where such a governmental grant is made, the dependency allowance payable under this rule shall be the approximate amount by which the governmental grant is less than the dependency allowance set out under the Staff Regulations and Staff Rules. In no case shall the sum of the two payments be less than the rate set out under the Staff Regulations and Staff Rules."

IV. Because it is relevant to the question of interpretation presented in this case, it is appropriate to set out the text of staff regulation 3.4(a)(i)and (c) as it existed prior to its amendment by the General Assembly in 1977. Those provisions were:

"(a) Staff members whose salary rates are set forth in paragraphs 1 and 3 of annex I to these regulations shall be entitled to receive dependency allowances as follows:

(i) At $400 per year for a dependent wife or dependent husband and $450 per year for each dependent child; or

...

> (c) With a view to avoiding duplication of benefits and in order to achieve equality between staff members who receive dependency benefits under applicable laws in the form of governmental grants and staff members who do not receive such dependency benefits, the Secretary-General shall prescribe conditions under which the dependency allowance for a child specified in (a)(i) above shall be payable only to the extent that the dependency benefits enjoyed by the staff member or his spouse under applicable laws amount to less than such a dependency allowance."

V. The Applicant contends that the Administration is in error when it deducts from his compensation an amount with respect to a governmental grant he receives because his child Julia is a dependent. The deduction, a portion of his salary at the dependency rate not greater than the difference between the said salary and what he would receive if his salary was being paid at the single rate, is made by the Administration on the basis of its interpretation of staff regulation 3.4 as applied to the Applicant who has no dependent spouse. The Applicant says that the Administration is wrong because under staff regulation 3.4(a)(i) he does not receive a dependency allowance with respect to that child. Instead, pursuant to the language of staff regulation 3.4(a)(i), he receives a salary at the dependency rate, and therefore staff regulation 3.4(c) may not be applied to him. Reduced to its essentials, the Applicant's theory is that unless an amount received by him as part of his compensation is described in so many words as a dependency allowance, it cannot be deemed to be such and there can be no offset under staff regulation 3.4(c) because there is no dependency allowance against which to make the offset. The Applicant contends that the offset applied by the Administration in his case is tantamount to a requirement by the UN that his government subsidize a portion of his UN salary and that there is no warrant for this.

VI. Although the relevant language of staff regulation 3.4 and

staff rule 103.23(b) is not a model of clarity on the point in question, thus providing a colorable basis for the argument advanced by the Applicant, the Tribunal is nevertheless unable to agree with the Applicant's position. In essence the Applicant is urging that the words "dependency allowance" as used in staff regulation 3.4(c) can only be read as meaning the annual amount of dependency allowance provided for in staff regulation 3.4(a)(i) for dependent children other than the first dependent child if there is no dependent spouse. This the Applicant would have the Tribunal find to be the only "dependency allowance" described as such and therefore the only dependency allowance referred to in staff regulation 3.4(c). But the Applicant's reading of these provisions is not the only one that is permissible.

VII. To begin with, the introductory language of staff regulation 3.4(a) refers to "dependency allowances as follows". The Tribunal finds that in subsection (i), in reality, two forms of dependency allowances are described although not in so many words, and in subsection (ii) still another form of allowance is set forth. In staff regulation 3.4(a)(i) the first form of dependency allowance is the one identified by the Applicant as the only dependency allowance. However, that is only the form of dependency allowance which is payable when there is a dependent spouse. The other form of benefit due to a child's dependency relationship is that payable in the absence of a dependent spouse, the Applicant's situation, in which the staff member receives compensation at a dependency rate rather than a single rate.

VIII. Merely because the latter benefit which stems from the existence of a dependent child may not literally be phrased as a "dependency allowance", does not mean that that is not what it is. In the Tribunal's view, the language of staff regulation 3.4(a)(i)

stating that in the absence of a dependent spouse, a staff member would not receive the first form of dependency allowance for the first dependent child, does not mean that the General Assembly excluded altogether a dependency allowance for the child. It means only that a different form of dependency allowance was to be paid. For the Tribunal to agree with the Applicant's argument on the point would amount to an exaltation of form over substance.

IX. The plain fact is that the Applicant receives the difference between what his salary would be at the single rate and what it is at the dependency allowance for a child specified in (a)(i) above ...". Reasonably construed, this language must be read as referring to either form of dependency allowance provided for in staff regulation 3.4(a)(i). Otherwise the principle of equality and avoidance of duplicate benefits reflected in staff regulation 3.4(c) would be undermined.

X. The Tribunal's view is entirely consistent with the history of the amendment to staff regulation 3.4 in 1977. Prior to 1977, it was clear that dependency benefits with respect to children under staff regulation 3.4(a)(i) were to be offset under staff regulation 3.4(c) by governmental grants with respect to the children. When the ICSC recommended a structural change in the compensation system to provide the same gross salaries for single staff members and staff members with dependents with recognition of dependency relationships thereafter taking the form of different staff assessment rates, there was no suggestion of any intention to change substantive provisions relating to offsetting dependency benefits for children. Nor was there any indication of an intention to change the principle of avoiding duplication of benefits or of equality between staff members as set forth in staff regulation 3.4(c). Yet the Applicant's argument is necessarily premised on the

erroneous notion that there must have been an intention to exempt a first child from offset where there was no dependent spouse.

XI. The Joint Appeals Board, in its recommendation adverse to the Applicant, relied heavily on the principle of equality manifest in staff regulation 3.4(c) and, as the foregoing indicates, the Tribunal believes the views expressed by the JAB well founded. If this is thought by the General Assembly to be a misreading of what was intended by the 1977 amendment, it will be simple enough for the General Assembly to correct it.

XII. The Applicant's argument that the Administration's deduction from his compensation on account of the governmental grant relating to his child is tantamount to requiring his government indirectly to pay part of his salary is without merit. The Tribunal regards the present situation as involving potential duplication of benefits and inequality of treatment as between staff members which the General Assembly saw fit to deal with in staff regulation 3.4. The UN has obviously not created any requirement on the part of Member States with respect to the payment of dependency benefits to any of their nationals. But it is surely within the competence of the General Assembly to determine the extent, if any, to which it wishes to take into account the payment of such benefits by Member States in arriving at the amount of dependency benefits to be paid by the UN in order to avoid duplication. It has done no more than this. For government grants are only taken into account to the extent that they amount to less than or are equal to the UN dependency benefits.

In view of the foregoing, the application is rejected and there is no need for the Tribunal to reach the issue of the time-bar.

(Signatures)

Roger PINTO
Vice-President, presiding

Ahmed OSMAN
Member

Jerome ACKERMAN
Member

Geneva, 26 May 1988 R. Maria VICIEN-MILBURN
Executive Secretary