



Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 351

Case No. 330: HERRERA

AGAINST: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL,

Composed of Mr. Arnold Kean, Vice-President, presiding; Mr. Herbert
Reis; Mr. Roger Pinto;

Whereas on 10 May 1984, Jorge Alejandro Herrera, a former staff
member of the United Nations, filed an application, the pleas of which
read as follows:

"(a) Preliminary or complementary measures:

- i. Official communication in Spanish to the 'Director Nacional del Instituto Nacional de Estadística (INE), Avenida Presidente Bulnes 418, Santiago, Chile'. To confirm the prices given in Annex No
- ii. Official communication in Spanish to the 'Presidente del Colegio Médico de Chile A.G., Esmeralda 678, Santiago, Chile'. To confirm professional fees of a Specialist Physician for an individual consultation, in 1976.
- iii. Official communication in Spanish to the 'Director Nacional del Servicio de Impuestos Internos (Internal Revenue Service), Teatinos 120, Santiago, Chile'. Asking the reasons why this Service must change the system of sales receipts (Boletas de Venta), giving instead now the copy to the buyer and demanding the original to be kept by the retailer or professional for the control of an Officer of the Chilean Internal Revenue Service.

(b) Contesting Secretary-General's decision to dismiss the applicant on the 17th April 1978.

(c) The whole process of the Ad-hoc Committee must be declared invalid and void.

(d) Full termination indemnity. Granting in addition a sum equivalent to at least six month whole salary at the rate prevailing at the present date, considering the injuries suffered by the applicant, being dismissed without clear and true evidence.";

Whereas the Respondent filed his answer on 15 March 1983;

Whereas on 18 October 1985 the Tribunal requested the Respondent to submit additional information;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 9 August 1962 on a three-month, short-term appointment, as a messenger at the Division of Administration, General Services Section of the Economic Commission for Latin America, hereinafter referred to as ECLA, in Santiago, Chile. He served on a series of successive short-term appointments until 1 February 1963, when he was offered a probationary appointment which was converted to a regular appointment at the G-2, step II level on 1 July 1964. On 1 June 1967 the Applicant was promoted to the G-3 level. On 1 March 1974 his appointment was converted to a permanent appointment.

In a memorandum dated 31 March 1977 the Applicant was informed by the Acting Chief, Personnel Section, ECLA that an investigation had been initiated in accordance with the provisions of Personnel Directive PD/1/76 concerning "Disciplinary Procedure for Staff Serving at Offices away from Headquarters and Geneva". J. Van Breda Medical Insurance Company, hereinafter referred to as "Van Breda", had made allegations to the effect that the Applicant had submitted false medical claims to the insurance company for reimbursement. In addition, the Applicant was informed that Van Breda would continue to examine all documents submitted by the Applicant for reimbursement of medical expenses and would advise ECLA of the outcome. The Applicant was also informed that Headquarters, New York had been notified of the case. The Applicant was asked to provide his written version of the facts; suggest other persons whom the Office of Personnel Services might interview, and name witnesses in his favour. He was advised that he could resort to a staff member of his choice at the duty station, to assist him in his defense.

On the same date, the Applicant was further informed by the Acting Chief, Personnel Section, ECLA that in accordance with Staff Rule 110.4, the Assistant Secretary-General for Personnel Services had authorized the suspension of his services without pay effective 1 April 1977 "during the investigation of the charges made against [him]" and "without prejudice to [his] rights as a staff member".

On 1 April 1977 the Applicant was interviewed by a panel of Personnel and Administrative Officers who informed him of the specific charges "of alleged misconduct and of fraud" made against him by Van Breda. The Panel confronted him with the evidence - namely discrepancies between pharmaceutical receipts that he had submitted for reimbursement and copies of prescriptions and receipts held by the pharmacies where the purchases had taken place - and asked for explanations. The Applicant suggested at that meeting, that either his wife could have made the purchases and altered the receipts, in which case he would assume liability, or that the pharmacy could have altered prices of medicines to evade tax laws. However, the Applicant acknowledged that it was him and not his wife who had been reimbursed by Van Breda. The Applicant was again informed that he could submit evidence in his defense, but while he undertook to do so within fifteen days, he did not submit any such evidence.

In a memorandum dated 18 April 1977 the Acting Chief, Personnel Services Section, ECLA informed the Applicant of two additional charges made against him by Van Breda and asked for the Applicant's comments on the memorandum of 31 March 1977, which remained unanswered. A second meeting was held on 20 April 1977 between the Applicant and two Personnel Officers. At this meeting, one of the Personnel Officers requested the Applicant to provide a written explanation of the charges made against him on 1 April 1977. In addition, he presented new evidence submitted by Van Breda to corroborate the two further charges against him.

In a letter dated 2 May 1977 addressed to the Acting Chief, Personnel Section, ECLA the Applicant admitted that the bills and receipts that had been submitted to Van Breda for reimbursement had been altered by his wife in order to alleviate the family's financial needs. The Applicant stated that there was no intent on his part to deceive Van Breda and that he was ready to return the sums that had been paid to him.

In a letter dated 10 May 1977 addressed to the Acting Chief, Personnel Section, ECLA the Applicant requested reconsideration of the decision to suspend him without pay. On the ECLA Staff Counsellor's recommendation, and with the approval of the Chief, Staff Services, OPS [Office of Personnel Services] at Headquarters, the Applicant's request was granted and on 19 May 1977 he was retroactively suspended at half pay pending investigation, effective 1 April 1977.

In the meantime, the Executive Secretary, ECLA had informally established, in consultation with the ECLA Staff Council, a joint "Ad-Hoc Working Group" to participate in the investigation of suspected irregularities in the submission of medical and dental claims connected with other cases of suspected fraud against Van Breda.

On 14 June 1977 the Acting Chief, Personnel Services Section, ECLA transmitted to the Applicant a report dated 13 June 1977, related to the investigation that was being conducted in his case. The memorandum read in part as follows:

- "1. I attach a copy of the report of 13 June 1977 which will be sent to the Assistant Secretary-General for Personnel Services at Headquarters, concerning the investigation of your alleged misconduct.
2. As you know, according to the provisions of Personnel Directive PD/1/76, you have a reasonable period in which to give any additional explanation of these charges or to submit any other information which you wish to be taken into consideration by the Secretary-General before he takes a final decision. In this connection, I wish to draw your attention to paragraph 11 of the attached report which, in addition to the earlier charges contained in my memorandum of 18 April 1977, mentions three further charges of altering pharmaceutical receipts....
3. I should be grateful if you would send us your explanation by 17 June 1977 at the latest...."

On 17 June 1977, at the request of the Executive Secretary, ECLA, the Secretary-General sent a mission from Headquarters to Santiago to assist the Executive Secretary, ECLA and advise him on what course of action to take concerning the investigation of suspected irregularities in the submission of medical and dental claims to Van Breda. The mission was constituted of the Senior Administrative Officer in charge of Review of

Appeals and Disciplinary cases, Staff Services, OPS and the Chief of the Insurance Unit, Salaries and Allowances and Insurance, Division for Policy Coordination. According to their report, on arrival at Santiago, their first concern "was to remedy the serious situation resulting from the existence of the Ad Hoc Committee and its broad terms of reference which conflicted with the established procedure [set forth in the Staff Regulations and Rules]". After a formal meeting with all the members of the Ad Hoc Committee, an agreement was reached between the members of the mission from Headquarters and the members of the Ad Hoc Committee as to what should be the role and guidelines for this Committee. Subsequently, on 20 June 1977 the Executive Secretary, ECLA drafted a circular CGI/447, REF: PER 521 and informed the staff at ECLA, ILPES [Latin American Institute for Economic and Social Planning] and CELADE [Latin American Demographic Centre] that pending the approval by the Secretary-General of the establishment in Santiago of a Joint Disciplinary Committee in accordance with Chapter X of the Staff Rules, and without prejudice to the provisions of PD/1/76, he had decided to establish an Ad Hoc Committee that would assist him to "arrive at my findings regarding the facts and to make recommendations to the Secretary-General concerning any disciplinary measures which may be required."

It appears that in addition to the previous charges, Van Breda questioned dental claims filed by the Applicant on behalf of his daughters. On 5 July 1977, 11 July 1977 and 21 July 1977, the Acting Chief, Personnel Services Section, ECLA informed the Applicant that Van Breda had requested that his daughters Blanca Rosa, María Cristina and Jacqueline take a medical examination, in connection with claims for reimbursement made on three different dates. The examinations were scheduled to take place, first on 2 July 1977 and then on 26 July 1977. The Applicant did not appear and did not acknowledge receipt of the notices.

On 11 August 1977 the Applicant was retroactively suspended from duty at full pay pending investigation, effective 1 July 1977.

On 3 October 1977 the Chief, Division of Administration, ECLA transmitted to the Assistant Secretary-General for Personnel Services a report on the investigation conducted on the Applicant's case, in accordance with the requirements of PD/1/76. The report consisted of a description and analysis of the facts and concluded as follows:

"15. With regard to PD/1/76 in what refers to conclusions of fact, and a statement of such charges as appear to be supported after investigation, the following is noted:

(a) While the staff member stated that it was his wife who, in fact, altered the receipts, the staff member presented no substantiation of his assertion. He stated, however, that he accepted responsibility for the alterations.

(b) Despite repeated requests, the dental reimbursements totalling US\$ 948.05 could not be verified as the staff member's dependents did not present themselves for the dental examination.

(c) Mr. Herrera's fraudulent claims date back as early as May 1975 through October 1976.

16. In view of the above, it is concluded that Mr. Herrera committed serious misconduct by knowingly submitting, on many occasions, fraudulent claims, including dental claims, thereby receiving reimbursement amounts to which he was not entitled."

On 4 October 1977, the Chief, Division of Administration, ECLA addressed a memorandum to the Executive Secretary, ECLA which read in part as follows:

"I enclose herewith the investigation report and enclosures on [the Applicant] for any recommendation you may wish to make to be included in the final report to be submitted to Headquarters in accordance with PD/1/76".

He also noted that, in accordance with paragraph (d) of PD/1/76, "a copy of the final report be communicated to the staff member concerned so that he may make any answer to the charges or any further submission he may wish to be considered by the Secretary-General prior to a decision on the case".

On 21 October 1977 the Applicant was informed by the Chief, Division of Administration, ECLA that he would be reinstated effective 1 November 1977, but that this did not mean that he had been exonerated from the charges against him.

In November 1977, the Ad Hoc Committee submitted an unsigned General Report in which it made recommendations on all the cases of alleged fraud against Van Breda that it had investigated. With respect to the Applicant's case - No. 44 - the Committee's findings and recommendations read in part as follows:

"3. Proof of offence

The Ad-Hoc Disciplinary Committee considers the evidence presented sufficient to show the occurrence of the unlawful alteration of receipts and the undue collection of more than US\$200.- from the Van Breda Insurance Company.

Since the staff member did not present his three daughters for verification of the dental services in question, despite several notices sent him in this connexion, the Committee is unable to express an opinion regarding those services. The Committee has in any case noted the indisposition of the accused to cooperate in clearing up the doubt concerning the dental services mentioned.

4. Findings

The Ad-Hoc Disciplinary Committee considers that the behaviour of the accused constitutes a serious offence.

The Committee bases its conclusion on the facts that:

- (a) it has not been demonstrated that it was the wife of the accused who altered the receipts;
- (b) if the unlawful alterations had been made by his wife, the accused must have noticed them when filling out the reimbursement-claim form in view of the repetitive nature and notoriety of such falsifications;
- (c) he did not present his daughters for the dental examination.

5. Extenuating circumstances

Not applicable.

6. Recommended disciplinary action

The opinion of the Committee is that the accused has committed a serious offence. The Committee recommends the adoption of disciplinary action proportionate to the offence incurred."

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

"In accordance with PD/1/76, an investigation of the charges was initiated, the Personnel Office presented charges in writing and each individual concerned had the opportunity to present his written defense with the assistance of another staff member if so desired. In each case, the Division of Administration then prepared an investigation report and the complete charges being brought against the staff member.

Given the large number of cases involved and the fact that no joint disciplinary committee exists at ECLA, I decided, in consultation with Messrs. Badr [Senior Administrative Officer in charge of Review of Appeals and Disciplinary Cases, Staff Services, OPS] and Garcia [Chief, Insurance Unit, Salaries and Allowances and Insurance, Division for Policy Coordination] of Headquarters, the Division of Administration, and the Staff Council to establish an ad-hoc disciplinary committee. Based on the guidelines set by Headquarters I requested this committee to examine the problem in general and to analyse each case in depth with a view to assisting me in reaching conclusions of fact and in making recommendations to the Secretary-General as to disciplinary measures to be adopted, if any.

After careful study and analysis of the conclusions of the ad-hoc disciplinary committee in each case I have accepted them and hereby send them on to you as my own recommendation."

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

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

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

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

"HERRERA, J. -- Sixteen receipts attached by Mr. Herrera to eleven claims submitted by him between May 1975 and October 1976 were found to have been altered to reflect an excess payment equivalent to more than US \$200. The staff member contended that it was his wife who altered the receipts but adduced no evidence in support of his contention. In addition, claims for reimbursement of dental

expenses in respect of Mr. Herrera's dependants were investigated. Despite several warnings the staff member failed to have his dependants submit to the dental examination. This failure to avail himself of an opportunity to prove his innocence is no doubt indicative of the fraudulent nature of his dental claims totalling US \$948.05. Mr. Herrera's wrongdoing covers a longer period than any other staff member involved in the investigation. The Executive Secretary of ECLA recommended that the sanction be in accordance with the gravity of the offense."

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

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

- "1. You have submitted a number of claims for the reimbursement of medical expenses to which you attached receipts which were found to have been altered to reflect an excess amount equivalent to more than US \$200.
2. In addition you have submitted a number of claims for the reimbursement of dental expenses. The investigation established that the dental work has not been carried out as claimed.
3. These were serious acts of misconduct on your part. Taking into consideration the pattern of your repeated offences and the amounts involved, the Secretary-General has decided that you be dismissed for misconduct under the provisions of Staff Regulation 10.2 and Staff Rule 110.3(b).
4. The Administration of ECLA has been instructed to establish the effective date of your dismissal for misconduct and to implement the Secretary-General's above-mentioned decision. The Administration of ECLA will also take the necessary action for the recovery from your final payment of the amounts fraudulently obtained."

The memorandum was communicated to the Applicant with a letter dated 11 April 1978 from the Acting Chief, Personnel Section, ECLA, which stated that the Applicant's dismissal would become effective 17 April 1978 and his last day of work, 14 April 1978 and that

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

On 10 May 1978 the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 31 May 1983.

Its conclusions and recommendations read as follows:

"Conclusions and recommendations

100. Having considered that the findings of fact described in the report of the Ad Hoc Committee were accurate and correct and substantiated by the evidence, the Board concludes that the recommendation made by the Ad Hoc Committee in that report should have constituted the basis for the Secretary-General's decision in this case. On the basis of that recommendation, and since no new facts or circumstances had been submitted during the appeal procedure, the Board, while anxious and concerned about the serious consequences of a dismissal in the future of the appellant, could not find convincing grounds to conclude that the appellant's conduct merited a different sanction than the one imposed by the Secretary-General.

101. Having observed that the Administration in its decision-making process had made inaccurate and unsubstantiated statements of fact, the Board recommends that the record be corrected and any statement departing from the findings as evidenced by the disciplinary file be the object of a reasoned explanation and substantiation. It further recommends that the appellant be granted a sum equivalent to three-months' net base salary at the rates prevailing today, to compensate him for the procedural faults observed in the disciplinary proceedings.

102. In addition, and noting that the appellant's expectations had been maintained during almost five years due to the extraordinary delay in considering his case by the Joint Appeals Board, the Board recommends that the Secretary-General considers granting the appellant a sum equivalent to three-months' net base salary at the rate prevailing today to compensate him for the injuries caused by this delay."

On 22 December 1983 the Applicant informed the Secretary-General that he was presenting new evidence in his favour; "that the whole process of the Ad Hoc Committee must be declared invalidated and the dismissal measure annulled."

On 27 January 1984 the Officer-in-charge of the Office of Personnel Services informed the Applicant that

"The Secretary-General, having re-examined your case in the light of the Board's report, has decided:

- (a) to maintain the contested decision,
- (b) to accept, in an attempt to settle the case, the Board's recommendation that you be paid a sum equivalent to three month's net base salary at the rate prevailing today for a staff member at the level and step which you had at the time of your separation from service, and
- (c) to reject the Board's recommendation for payment of compensation for procedural delay which does not appear justified in the circumstances."

On 3 February 1984 the Director, Division of Personnel Administration informed the Applicant that no further consideration of his case would be undertaken unless he filed an appeal with the Administrative Tribunal.

On 10 May 1984, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The proceedings before the Ad Hoc Committee were irregular because they constituted a parallel investigation in contravention of PD/1/76.
2. The Ad Hoc Committee established by the Executive Secretary of ECLA acted negligently, analyzing the evidence in a superficial and irresponsible manner.
3. The Applicant's rights to a proper defense were violated when he was not given the opportunity to see the investigation report submitted by the Ad Hoc Committee to the Executive Secretary.
4. The Joint Appeals Board did not properly analyze the evidence against the Applicant submitted by the Respondent.

Whereas the Respondent's principal contentions are:

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

(a) The Applicant's arguments are untenable on the facts found by the Secretary-General;

(b) The Applicant's arguments are insufficient to contradict any of the findings of the Secretary-General;

(c) Neither the Joint Appeals Board nor the Applicant have established any mistakes concerning salient facts.

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

3. The Secretary-General's decision was reached by means of a procedure which guaranteed due process and safeguarded the Applicant's rights:

(a) The Applicant was granted a complete, fair and reasonable procedure which did not violate any of his rights;

(b) The Applicant did not have any rights or duties in respect of the Ad Hoc Committee because this body acted as an advisory group to the Executive Secretary only and was not part of the disciplinary machinery pursuant to PD/1/76;

(c) The disciplinary measure imposed by the Secretary-General was not vitiated by improper considerations.

4. The Applicant has no right to any compensation for procedural flaws or delays.

5. The Applicant has no right to any termination indemnity.

The Tribunal, having deliberated from 18 to 29 October 1985, now pronounces the following judgement:

I. The issues raised in the application require the Tribunal to analyse a number of matters. These concern the disciplinary investigation held under Personnel Directive 1/76 entitled "Disciplinary Procedure for Staff Serving at Offices away from Headquarters and Geneva"; questions relating to the Ad Hoc Committee that advised the Executive Secretary of the Economic Commission for Latin America on PD/1/76 conclusions; the significance of administrative errors in reaching the decision to dismiss the Applicant; recommendations of the Joint Appeals Board; the assertion of what the application terms

"extenuating circumstances" and the "disproportionate" measure of dismissal; the claim of wrongful denial of a termination indemnity; and possible damages for delay caused by the five-year period consumed by the Joint Appeals Board procedure.

II. The record shows that the investigation of the health insurance fraud, conducted in accordance with PD/1/76, was carried out with a scrupulous attention to the procedural rights of the Applicant. The Applicant was accorded a full opportunity to defend himself. He was interviewed in person, and clearly and repeatedly informed of the allegations of misconduct that were to be the focus of the investigation. He was invited to give his version of the matter and to suggest individuals of whom inquiry should be made, rights of which he availed himself. Likewise, he was invited to call witnesses on his behalf. The importance of obtaining counsel was explained to him, and the Administration assisted him in finding a staff member of his choice to assist in his defense and in the later presentation of his appeal to the Joint Appeals Board. The Tribunal thus finds that the PD/1/76 investigation accorded to the Applicant all of the rights to which he was entitled under that Directive, the terms of which appear to be fully protective of staff members who are the subject of disciplinary proceedings. In fact, the Applicant did not present a defense at the PD/1/76 stage; rather, while accepting responsibility, he implicated his wife as to the majority of the instances of fraudulent health claims with which he had been charged, and he later accused physicians and pharmacists of fraud.

III. The Applicant asserts that he should be entitled to the same procedural rights he enjoyed in the PD/1/76 investigation when it comes to the subsequent work of the so-called Ad Hoc Committee convened by the ECLA Executive Secretary to advise the latter as to recommendations he was to make to the Secretary-General in these health insurance fraud cases. In essence, the Application raises a question of audi alteram partem, asserting that the Ad Hoc Committee heard only one side because it wrongly conducted its work in private and without daily records, and

erroneously failed to grant to accused staff members hearings or the other procedural rights accorded in the earlier PD/1/76 investigation. Indeed, as before the Joint Appeals Board, the Applicant seeks to treat the Ad Hoc Committee as the investigative body under PD/1/76, or as conducting a parallel investigation on its own; he thus regards it as bound by the protective provisions of that Directive.

IV. The establishment of the Ad Hoc Committee at ECLA was an exceptional measure, called for neither by the Staff Regulations and Rules nor by PD/1/76. The record suggests that the ECLA Executive Secretary decided on his own initiative to set up the Committee as an advisory mechanism to assist him in reaching reasoned conclusions as to disciplinary recommendations he was obliged to submit to the Secretary-General; he appears to have been motivated by such factors as the wishes of a wide segment of the ECLA staff and the large number of staff members involved. His good faith as regards the staff is shown by the manner in which he composed the three-member Committee; he appointed one member and invited the Staff Union to appoint the other two. No basis has been found for suggesting that the Ad Hoc Committee was impaired by partiality against the staff. Moreover, following initial confusion over the mandate of the Ad Hoc Committee and the receipt of advice from Headquarters, the Executive Secretary took care to ensure that the Committee should not interfere with the PD/1/76 investigations, nor did the Committee do so.

V. Against this background and bearing in mind the facts of this case, the Tribunal concludes that the failure of the Ad Hoc Committee to incorporate in its work the procedural protections of the PD/1/76 investigation did not lead to denying due process to the Applicant. The Tribunal notes that the Applicant seems to have been timely given a copy of the PD/1/76 investigation report as it concerned his case, notwithstanding his later assertion, before the Joint Appeals Board, that no record can be found in the ECLA files of his having received this report. The Applicant did not exercise his PD/1/76 rights to submit to the Secretary-General any observations on the PD/1/76 report nor on the recommendation of the ECLA Executive Secretary for disciplinary action

proportionate to the offense. It was only in the next year, in appealing his dismissal, decided upon by the Under-Secretary-General for Administration and Management acting on behalf of the Secretary-General, that the Applicant raised the contention that, while accepting responsibility for the various instances of fraudulent claims, dismissal was disproportionate to the misconduct. The Tribunal notes that the advice given by the Ad Hoc Committee to the Executive Secretary on the health insurance fraud in general and on this case was consistent with, and did not go beyond, the PD/1/76 investigation and conclusions. In these circumstances, the reliance of the Executive Secretary on the advice of the Committee, does not vitiate the PD/1/76 investigation or otherwise result in the denial of due process. The Tribunal is unable to find that the ability of the accused staff member to defend himself, or to present his side of the case to the PD/1/76 investigators and the Secretary-General, was impaired by the work of the Ad Hoc Committee.

VI. We turn to the findings of the Joint Appeals Board concerning errors of the Administration in the handling of this case prior to the decision for dismissal. The Joint Appeals Board found four instances of such errors:

(a) the most serious, in its view, was the presentation to the Under-Secretary-General for Administration and Management of this case in a grouping along with eight others as involving the "worst offenders" of 53 cases investigated under PD/1/76. The Tribunal considers that a careful reading of the documents shows that this presentation did not contain an assertion that the Applicant had assumed a "leadership role" but addressed the nine cases considered most serious by reason of "the pattern of recurrence [by all of them] and the leadership role assumed by some of them";

(b) the Joint Appeals Board could not find any evidence that the recommendation of the Executive Secretary to the Secretary-General had been communicated to the Applicant. The Tribunal, too, is troubled by the number of gaps in the files maintained by ECLA. While deploring the absence from those files of a note indicating that the Executive Secretary's recommendations had been furnished to the Applicant, the fact

is that the Applicant was aware of the PD/1/76 investigation and its adverse conclusions in his case; he was also aware of his right to appeal to the Secretary-General, but he did not do so. In these circumstances, and taking note of the long silence of the Applicant, the unexplained gap in the ECLA files cannot be given so heavy a weight as to comprise a critical flaw in the Applicant's due process rights. Neither before the Joint Appeals Board nor the Tribunal did the Applicant allege that he was ignorant of the Executive Secretary's recommendations; he states, rather, that there was no proof in ECLA's files that a copy of the Ad Hoc Committee's report had been given to him.))

✓ (c) a memorandum from the Assistant Secretary-General for Personnel Services to the Under-Secretary-General for Administration and Management asserted that one instance of fraud on the part of the Applicant involved dental work and that the Applicant's failure to present evidence to the PD/1/76 investigators that the work had actually been performed "is no doubt indicative of the fraudulent nature of his dental claims". This assessment does not appear to have played a significant role in the dismissal decision;

✓ (d) similarly, a letter to the Applicant from the Assistant Secretary-General for Personnel Services stated that the PD/1/76 investigation "established that the dental work had not been carried out as claimed", which, as the Joint Appeals Board correctly observes, was an overstatement. This statement cannot be supported, but, as above, it did not have a substantial effect on the dismissal decision or the rights of the staff member.))

VII. The Applicant contends that there were extenuating circumstances that should have been considered, and which, if considered, would have resulted in a decision to impose a penalty less severe than dismissal. As before the Joint Appeals Board, he cites the involvement of his wife and the possible underreporting of charges for tax reasons as principal causes of his filing allegedly fraudulent claims. The Tribunal recalls that the discretion of the Secretary-General in cases of misconduct by members of the Secretariat is and must remain necessarily extensive. As recently as 1982, the Tribunal observed in the Sheye Case (Judgement No. 300, para. IX):))

"The Tribunal notes further that it has in its jurisprudence consistently recognized the Secretary-General's authority to take decisions in disciplinary matters, and established its own competence to review such decisions only in certain exceptional conditions, e.g. in cases of failure to accord due process to the affected staff member before reaching a decision (Judgment No. 210, Reid, III)."

The Tribunal has reviewed the lengthy record in the current case and has not found material that provides a basis for questioning the legitimacy of the decision by the Secretary-General to dismiss the Applicant.

VIII. The Applicant also raises a question with regard to another area where the discretion of the Secretary-General is broad, namely in deciding to withhold or grant a termination indemnity in case of dismissal for misconduct. Annex III to the Staff Regulations, entitled "Termination Indemnity", provides the regulatory context for these decisions by stating simply that, in the exceptional case, "A staff member whose appointment is terminated ... for misconduct other than by summary dismissal may be paid, at the discretion of the Secretary-General, an indemnity ...". The rule is stated in such a way as neither to presuppose nor preclude a limited indemnity in such cases. The Tribunal is unable to find evidence in the current case of any abuse of discretion by the Administration. As in the context of the decision to dismiss, the acknowledged involvement of the Applicant in a serious and widespread health insurance fraud, and the absence of violation of due process rights, do not support a challenge to the decision taken by the Secretary-General against granting a termination indemnity.

IX. There is, finally, a question regarding the long period involved in the proceedings of the Joint Appeals Board. It was the Board itself which raised this matter; having observed that the time from the filing of the Applicant's appeal with the Board until the rendering of its report was five years, the Board recommended compensation "for the injuries caused by this delay". The Tribunal can find no legal basis for the Board's recommendation in this regard. The appeal was filed in May 1978; the Respondent replied promptly, some two months later. There then followed a long period of almost four years during which Applicant

and Respondent argued with one another over the insistence of Applicant's counsel that Respondent produce the confidential conclusions of the Ad Hoc Committee not only as to the Applicant but for all the cases of staff members involved in the health insurance fraud investigations.

Apparently this expansive request gave rise to questions of principle involving the confidentiality affecting other staff members. These questions were not resolved until November 1982 when the Joint Appeals Board called for, and eventually obtained from the Respondent, the general sections of the Ad Hoc Committee's report and its recommendations with respect to the Applicant. Absent a showing that the Administration sought to use confidentiality questions in order to delay the proceedings before the Board, the delay cannot be attributed to the fault of the Respondent. Accordingly, an entitlement to damages for injury caused by excessive delay has not been made out.

X. In this connection, the Tribunal observes that, since its decision in the Ridler Case (Judgement No. 327, 1984), there has been a tendency, whether on the part of Applicants or the Joint Appeals Boards, to call for compensation for delay when a Board proceeding has lasted as long as five years. The Tribunal considers it appropriate to point out that the Ridler Judgement was based on the particular facts of that case and does not purport to enunciate the principle that a particular period of delay is to be regarded as giving rise to a right of compensation. In Ridler an important aspect evidencing culpability on the part of the Administration was the delay of more than a year caused by the inexcusable inaction of an agent of the Respondent who asserted that she had not begun to prepare Respondent's rebuttal because she had thought she should do so only when the Joint Appeals Board announced it was ready to begin hearings. In the case now before the Tribunal, the delay was not caused by acts or omissions of agents of the Respondent but by the extensive documentary requests made by the Applicant. It may also be observed that the Ridler Case involved a claim of legal expectation of renewal of a fixed-term contract, while the current case concerns a staff member subjected to disciplinary proceedings the record of which shows admissions of guilt for misconduct, thus giving rise to the

consideration ex turpi causa non oritur actio, that is, that an action does not arise from an illegal base. In any event, the Tribunal stresses that a claim for compensation for unjustifiable delay may succeed only when firmly based on proof of fault on the part of the Organization, fault that was instrumental in causing delay, and from which the Applicant suffered injury. At the same time, the Tribunal reiterates its concern over undue delays in appeals procedures, and welcomes the request of the General Assembly in Resolution 39/245 paragraph 6(e) that the Secretary-General should "... strengthen the various appeals machineries, with a view to eliminating the backlog of cases...".

XI. At the outset of his application, the Applicant presented pleas for the production of certain documents. These had to do with fees charged in Santiago for health services and with possible falsification of receipts and income tax returns. The Tribunal considers that the documents would not provide information relevant to the legal issues raised in this case and accordingly denies these pleas.

XII. For these reasons, the Tribunal rejects all of the pleas advanced by the Applicant.

(Signatures)

Arnold KEAN
Vice-President, presiding

Herbert REIS
Member

Roger PINTO
Member

New York, 29 October 1985

R. Maria VICIEN-MILBURN
Executive Secretary