

## Judgement No. 162

(Original: English)

Case No. 158:  
Mullan

Against: The Secretary-General  
of the United Nations

*Request by a staff member for reimbursement of her husband's travel expenses incurred in connexion with her home leave.*

*Request for the rescinding of the decision refusing, on the basis of Staff Rule 107.5 (a), to reimburse the Applicant for her husband's travel expenses.—The Respondent's preliminary objection to the competence of the Tribunal on the ground that the appeal aims at invalidating this rule.—This objection is based not on the pleas of the Applicant but on the arguments she submits in support of them on the basis of Article 8 of the Charter.—The Applicant's pleas concern a dispute relating to her own contract of employment.—Article 2.1 of the Statute of the Tribunal does not exclude the possible application of the Charter or the fundamental principles of law.—In view of the content of the aforesaid pleas, the Tribunal is competent to consider the substance of the application.*

*The Applicant claims that, under Article 8 of the Charter, she is entitled to receive the same benefits as her male colleagues, notwithstanding Staff Rule 107.5 (a).—Absence of a text providing for cases where there is a conflict between the Charter and the Staff Regulations and Rules and absence of a general principle of law concerning the effects of hierarchy of legal provisions.—Scope of Article 8 of the Charter.—Its implementation by the General Assembly which is competent to make rules applicable to the staff.—Staff Regulation 7.1.—Principle of reimbursement of dependants' travel expenses.—Broad authority accorded to Secretary-General to implement the principle.—Staff Regulation 3.4.—Staff Rule 103.24 defining dependency for the purpose of payment of dependency allowances.—Applicability of the same rules to all staff members irrespective of sex.—Staff Rule 107.5 (a) defining dependants for the purpose of official travel.—Interpretation prevailing in practice.—Distinction between staff members by reason of sex, a "wife" always being referred to as dependent.—Responsibility of the Secretary-General to implement the principle of equal conditions of employment enunciated in Article 8 of the Charter.—Staff Rule 107.5 (a) is consistent with Staff Regulation 7.1 in that it authorizes payment of travel expenses only for a dependent husband.—Conclusion that the application cannot be sustained.*

*Application rejected.*

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Madame Paul Bastid, Vice-President; Sir Roger Stevens;

Whereas, on 19 April 1972, Mrs. Silvia Mullan, a staff member of the United Nations, filed an application, the pleas of which she amended on 20 July 1972;

Whereas the pleas of the application, as amended, read as follows:

*"The contested decision*

*"The contested decision is the denial of a request by the Applicant of authorization to claim payment of her husband's travel expenses in connexion with her home-leave. . . .*

*"Specific pleas*

"The Applicant requests the Tribunal

"(a) to order the rescinding of the contested decision; and

"(b) to order the reimbursement of her husband's travel expenses incurred in connection with her home-leave.

*"Obligation invoked*

"The Applicant contends that, as long as the Secretary-General accords to some staff members the benefit of having their non-dependent spouses travel on home-leave at the Organization's expense, the Secretary-General must, in accordance with Article 8 of the United Nations Charter, extend the same benefit to all staff members without discrimination with regard to the sex of the staff member concerned.

*"Amount of compensation claimed: \$550.00 (New York-Buenos Aires-New York air fare.)"*

Whereas, on 12 June 1972, the Respondent filed his answer requesting the Tribunal to make a preliminary decision that the application was not within its competence or, should it hold itself competent on the substance, to reject the application on the merits as there had not been any non-observance of the Applicant's contract of employment or terms of appointment;

Whereas the Applicant filed written observations on 20 July 1972;

Whereas, on 11 August 1972, the Respondent submitted additional information at the request of the President of the Tribunal;

Whereas, on 26 September 1972, the Chairman of the Staff Committee filed a brief on behalf of the United Nations Staff Union under article 23, paragraph 2 of the Rules;

Whereas the facts in the case are as follows:

On 19 January 1971 the Applicant, a Translator in the Spanish Translation Section of the United Nations, claimed payment of travel expenses for her husband in connexion with her forthcoming home leave to Argentina. On 26 January 1971 she was informed by the Office of Personnel that under Staff Rule 107.5 (a) her husband was not entitled to accompany her on home leave at the expense of the United Nations. On 19 February 1971 she requested from the Secretary-General, under Staff Rule 111.3 (a), a review of that decision in a memorandum reading in part:

"... My husband is not a dependant within the meaning of Staff Rule 103.24, and under Staff Rule 107.5, a female staff member is entitled to payment of her spouse's travel expenses only if he is a 'dependent husband'.

"However, I should like to point out that under such rule, a non-dependent wife of a staff member is entitled to accompany her husband at the expense of the Organization, whereas a non-dependent husband does not benefit in the same way.

"This situation seems to be in contradiction of the fundamental principle of equality of rights as laid down in the Charter, specifically in Article 8, and in other international instruments. It also runs counter to the principle of equal remuneration and equal conditions of employment, in so far as the rule denies female staff members a benefit which can be claimed automatically by male staff members even when they are exactly in the same position as I am now, and regardless of the earning capacity of their wives.

"That is why I respectfully request you, Sir, to review and rescind the decision quoted above, as it is based on a rule which is inconsistent with those basic principles and with the policy of non-discrimination pursued and advocated by the United Nations in all fields."

On 16 March 1971 the Applicant received from the Director of Personnel the following reply:

"..."

"Your request concerns the denial of travel expenses in respect of your husband for your journey on home leave. It is your contention that the denial of such expenses in respect of a husband who is not dependent within the meaning of Staff Rule 103.24 is inconsistent with the basic principle of equality of rights for men and women laid down in the Charter, since such expenses are automatically authorized to a wife of a staff member irrespective of her dependency status. You have accordingly requested that the decision be rescinded.

"Staff Rule 111.3 (a) which you have invoked for the submission of your request to the Secretary-General sets out the procedures to be applied in making an appeal under the terms of Staff Regulation 11.1. The regulation specifies that the basis for such an appeal is the allegation of non-observance of a staff member's terms of appointment, including all pertinent Regulations and Rules. You did not make any allegation of this kind. Instead, you contend that Staff Rule 107.5 (a), under which the contested administrative decision was taken, is inconsistent with the Charter. Your appeal thus represents a challenge to the policy underlying the Rule, rather than to the manner in which the Rule was applied in your case. As such, your appeal is not receivable either by the Joint Appeals Board or by the Administrative Tribunal.

"The policy underlying Staff Rule 107.5 (a) was established by the General Assembly following a comprehensive review of the conditions of service of the United Nations by the 1956 Salary Review Committee. This policy may well be the subject of review by the Special Committee established under resolution 2743 (XXV), but until and unless it has been modified the existing Rules governing entitlement to travel must necessarily be applied in all cases. I regret therefore to inform you that the Secretary-General is unable to rescind the decision referred to in your memorandum."

On 16 April 1971 the Applicant lodged an appeal with the Joint Appeals Board, which submitted its report on 19 November 1971. The Board's conclusions and recommendations read as follows:

*"Conclusions and recommendations"*

"12. The Board finds that the present appeal, which in substance challenges not an administrative decision but a Staff Rule as being contrary to applicable provisions considered higher and prevalent, is beyond the powers of the Board as determined by Regulation 11.1 and implemented by Staff Rules 111.1 to 111.4.

"13. Accordingly, the Board makes no recommendation on this appeal."

The Secretary-General having decided to maintain his earlier decision, the Applicant filed on 19 April 1972 the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The contested decision fails to observe Article 8 of the Charter of the United Nations.
2. Article 8 of the Charter is a part of the Applicant's terms of appointment. Indeed, the Charter is in respect of the Tribunal a primary legislative text intended to prevail over the Staff Regulations and Rules. If under Article 103 of the Charter the obligations derived from agreements concluded between sovereign States cannot prevail over the Charter, how can the Staff Rules?
3. When a decision fails to observe terms of appointment of higher rank, there is "non-observance of the terms of appointment" under article 2 (1) of the Statute of the Tribunal, even though such a decision may conform to contrary terms of lower rank.
4. The principle of non-discrimination with regard to sex, contained in Article 8 of the Charter, is of higher rank than the discriminatory dependency requirement contained in Staff Rule 107.5 (a) and, therefore, conformity with the latter cannot excuse the non-observance of the former.
5. As a result, the contested decision should be rescinded for non-observance of the Applicant's terms of appointment and the Applicant should be granted what she has been denied by such a decision.
6. The above contentions are the basis of the appeal both as to the merits of the case and as to the question of receivability. They amount to an allegation of non-observance of the Applicant's terms of appointment and therefore the appeal is clearly receivable under article 2 (1) of the Statute of the Tribunal.
7. Since he has detailed information about the dependency status of staff members' spouses, the Secretary-General cannot make a presumption which deprives women staff members of a benefit that is granted to men staff members.
8. The Applicant's right derives, not from the Staff Rule found to be invalid, but from Article 8 of the Charter and the fact that the benefit she claims was actually granted to men staff members at the time she claimed it. The wording of Staff Regulation 7.1 does not preclude the result sought by the Applicant since the word "dependants" can include all spouses regardless of their dependency status for other purposes.

Whereas the Respondent's principal contentions are:

1. While the Tribunal is competent to apply the Charter in *interpreting* contracts of employment or in *supplementing* them where they are silent, it does not have jurisdiction as a constitutional court to invalidate a staff rule as being in violation of the Charter. There is a procedure for the review of Staff Rules by the General Assembly, which is the authority required by the Charter to make the Staff Regulations, and the Assembly cannot have intended to create an alternative mode of review under which the Tribunal would be competent to examine the validity under the Charter not only of Rules made by the Secretary-General and already reviewed by the Assembly, but even of Regulations adopted by the Assembly itself.
2. If the Tribunal considers that it is competent to decide the case on the merits, it should reject the application because the Applicant's terms of appointment have been fully complied with. Staff Regulation 7.1 shows the intention that travel expenses should be paid only in the case of dependants of staff members. Staff Rule 107.5 (a) is subject to two interpretations, but the one which has so far been followed presumes that wives are dependants for travel purposes, while it requires that the dependency status of husbands should be established. This does not amount to discrimination, since it would normally

be understood that wives are dependants of their husbands for purposes of travel, while the same would not be true in the case of husbands. The consequence of the Applicant's arguments would be, not to pay her husband's travel, but rather to interpret the Rule so as to require establishment of dependency for wives as well as husbands; but such an interpretation would work serious hardship on families where the husband is a staff member and the wife works outside the United Nations.

3. Even if Staff Rule 107.5 (a) were invalid or rescinded, there would still be no basis for payment of the travel costs of the Applicant's husband, since Staff Regulation 7.1 would remain in effect.

The Tribunal, having deliberated from 2 to 10 October 1972, now pronounces the following judgement:

I. The Applicant contests the decision taken by the Respondent on 16 March 1971 confirming the refusal of payment by the United Nations of her husband's travel costs from New York to the Argentine Republic on her home leave. She requests the rescinding of this decision and a ruling that she is entitled to receive reimbursement of these travel expenses, amounting to \$550.

The Respondent's denial of the claim is based on the terms of Staff Rule 107.5 (a), which reads:

“(a) Dependants, for the purposes of official travel, shall be deemed to comprise a wife, dependent husband or children in respect of whom a dependency allowance is payable under Rule 103.23, or in respect of whom such an allowance would be payable if, under the Staff Rules, the staff member concerned was not specifically excluded from entitlement. A son or daughter of more than 21 years of age may also be considered a dependant for travel purposes if totally disabled.”

The Respondent points out that the application aims not at ensuring the fulfilment of obligations deriving from the Staff Regulations and Rules, but at invalidating the rule quoted above. He consequently maintains that the Applicant's appeal was not receivable by the Joint Appeals Board, and does not come within the competence of the Tribunal. He accordingly requests the Tribunal to give a preliminary ruling on its competence under the terms of article 2.3 of its Statute.

II. The Tribunal notes that the request of the Respondent is based not on the pleas of the Applicant but on the arguments she submits in support of them, which in essence assert a right, which she derives from Article 8 of the Charter, to claim reimbursement of her husband's travel expenses for home leave in the same way that her colleagues currently receive reimbursement of the travel expenses of their wives.

The Tribunal observes that the Applicant's pleas concern a dispute relating to her own contract of employment, and that any decision on those pleas would affect only her individual situation. Article 2.1 of the Statute of the Tribunal refers, in defining the competence of the Tribunal, to applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of their terms of appointment. The words “contracts” and “terms of appointment” are stated to include all pertinent regulations and rules in force at the time, but this phraseology cannot be assumed to exclude the possible application of any other sources of law, particularly the Charter, which is indeed the constitution of the United Nations and contains certain

provisions relating to staff members; nor does it exclude the fundamental principles of law, especially of the law of contracts.

It is unquestionable that the Applicant may, in support of her application, advance such legal arguments as seem to her appropriate and relevant. The Tribunal is certainly entitled to consider their substance and to draw from them the conclusions which it deems appropriate in the exercise of its powers under article 9 of its Statute.

Consequently, the Tribunal decides that, in view of the content of the pleas submitted by the Applicant, it is competent to consider the substance of the application.

III. According to the Applicant, all wives of staff members of the Secretariat are regarded as dependants for purposes of payment of travel expenses in connexion with home leave and the same rule should apply to her husband since she is entitled to invoke Article 8 of the Charter, which reads:

“The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.”

The Applicant points out that the expression “to participate . . . under conditions of equality” is very broad in scope and covers *inter alia* the benefits relating to home leave. The Charter of the United Nations would therefore entitle the Applicant to receive the same benefits as her male colleagues so long as the latter enjoy them. She maintains that this legal position must be recognized by the Tribunal notwithstanding Staff Rule 107.5 (a) which has been cited by the Respondent in support of his action.

IV. The Respondent does not dispute that the provisions of the Charter may affect the legal status of staff members, but contends that the latter cannot rely on the Charter in order to avoid the application of a staff rule. The Applicant, on the other hand, argues that in the event of a conflict between the Charter and the Staff Rules, the Charter should prevail.

V. The Tribunal notes that there is no text comparable to Article 103 of the Charter applicable to the Staff Regulations and Rules. In the view of the Tribunal, it would be difficult to assert that a general principle of law concerning the effects of the hierarchy of legal provisions has definitely emerged from the practice of States. In considering a specific case, the Tribunal believes that the most appropriate course is to identify the source and ascertain the scope of the texts which have been relied on in this case.

Article 8 of the Charter is a provision of great historic scope. It marks an orientation towards equality of the sexes which has since been followed in other instruments adopted under United Nations auspices. It contains a rule which is legally binding on United Nations organs. However, responsibility for its implementation falls upon those who are competent to make rules applicable to the staff. Under the Charter this responsibility devolves primarily on the General Assembly, which is responsible under Article 101, paragraph 1 for establishing Staff Regulations. On the subject under discussion, the Staff Regulations contain two basic texts.

Regulation 7.1, relating to travel expenses, states:

“Subject to conditions and definitions prescribed by the Secretary-General, the United Nations shall in appropriate cases pay the travel expenses of staff members and their dependants.”

The General Assembly has therefore laid down in principle an obligation on the part of the United Nations to pay the travel expenses of persons other than the staff member, namely his dependants. However, this text leaves the Secretary-General broad authority to implement the principle. He must prescribe "conditions and definitions" for this purpose, and the payment is to take place only "in appropriate cases".

The question of reimbursement of travel expenses arises in various contexts, and elaborate rules have had to be drawn up to take into account the various factors involved. These rules deal *inter alia* with the definition of dependency for the purpose of travel. It is the content of the rule on this question which the Applicant disputes.

VI. However, the Staff Regulations also use the concept of dependency for another purpose in the chapter on salaries and related allowances. Regulation 3.4 provides for dependency allowances and sets their levels for "a dependent wife or dependent husband" and "for each dependent child". It also states:

"(e) Claims for dependency allowances shall be submitted in writing and supported by evidence satisfactory to the Secretary-General. A separate claim for dependency allowances shall be made each year."

Staff Rule 103.24 defines dependency for the purpose of payment of dependency allowances. Where a dependent spouse is concerned, the criterion is based on occupational earnings, if any, which must not exceed an amount established by the Secretary-General for the purpose. The same Rule authorizes the Secretary General to fix this amount, which "shall normally be the approximate equivalent of the lowest entry level of the United Nations salary scales for the duty station in the country of the spouse's place of work". For New York the amount for 1972 is \$6,500 and any spouse of a staff member with occupational earnings exceeding \$6,500 is not regarded as a dependant for purposes of dependency allowances.

The Tribunal notes that with regard to dependency allowances the same rules apply to all staff members irrespective of sex and that the "conditions of equality" enunciated in Article 8 of the Charter are thereby realized.

VII. For the purpose of official travel, the definition of dependants is dealt with in another rule, namely Staff Rule 107.5 (a). Entitlement to a dependency allowance and entitlement to official travel expenses for dependants do not necessarily coincide. However, the relationship between the two systems is not clearly indicated in Staff Rule 107.5 (a), which both parties have recognized to be open to a number of interpretations.

If the phrase "in respect of whom a dependency allowance is payable" is taken to apply not only to "children" but also to "a wife" and "dependent husband", the same rule would apply to the wife and the husband, and the principle of conditions of equality for staff members would be respected, in accordance with the Charter. However, it is to be noted that the reference to a dependency allowance is supplemented by mention of cases in which payment is excluded under the Staff Rules, a situation which can exist in respect of children, but not of a wife or husband meeting the necessary conditions with regard to occupational earnings. Moreover, the use of the word "dependent" applied to the husband would under this interpretation be redundant and difficult to explain.

However that may be, this interpretation has not prevailed in practice and the Respondent does not deny that in applying the text he distinguishes between

a woman staff member who can claim payment of her husband's travel expenses on home leave only when the husband is dependent and a male staff member who can claim such payment for his wife whatever her total occupational earnings.

VIII. The Tribunal recognizes that the General Assembly has given the Secretary-General authority to establish the conditions and definitions for the payment of travel expenses for dependants of staff members. In referring to "a wife", Staff Rule 107.5 (a) appears to assume that the latter is always dependent, apparently applying a traditional sociological and economic yardstick, but departing from the legal criterion used for the "dependent" husband, which is established in another rule.

However, this assumption is not necessarily correct, and there is every reason to think that social and economic changes have, since the text was drafted, led to an increase in the number of wives who are not dependent according to the definition of dependency in Staff Rule 103.24 (a).

In any event, by making a distinction between wife and husband for the payment of travel expenses in connexion with home leave, the Staff Rules establish a distinction by reason of sex between staff members, and this distinction would appear contrary to the principle of equal conditions of employment enunciated in Article 8 of the Charter. While it is the responsibility of the Secretary-General to implement that principle with regard to payment of a spouse's travel under Staff Regulation 7.1 and while he possesses a wide discretion in this respect, his discretion must be exercised in accordance with Article 8 of the Charter.

IX. In the present case, however, the Tribunal observes that the part of Staff Rule 107.5 (a) which entitles a woman staff member to payment of her husband's travel expenses only if he is a "dependent husband" is consistent with Staff Regulation 7.1 adopted by the General Assembly under the authority granted to it by Article 101 of the Charter and is not affected by the fact that another part of the same Staff Rule enables payment of travel expenses for a staff member's wife, whether dependent or not. The Applicant can derive no right to reimbursement from the fact that home leave travel was paid for staff members' wives regardless of their dependency status.

X. In view of the finding that the Staff Rule authorizing payment of travel expenses only for a dependent husband is consistent with the Staff Regulations established by the General Assembly and of the fact that under the Applicant's contract of employment her appointment is governed by the Staff Regulations and Rules, the Tribunal holds that the Applicant's claim cannot be sustained.

XI. The Tribunal accordingly:

- (1) Declares itself competent to consider the application;
- (2) Rejects the application.

(Signatures)

R. VENKATARAMAN  
*President*

Suzanne BASTID  
*Vice-President*

Roger STEVENS  
*Member*  
Jean HARDY  
*Executive Secretary*

*New York, 10 October 1972*

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