

ADMINISTRATIVE TRIBUNAL

Judgement No. 486

Case No. 510: PICCI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Ahmed Osman, Vice-President, presiding;
Mr. Samar Sen; Mr. Arnold Kean;

Whereas, at the request of Raffaello Picci, a former staff member of the United Nations Development Programme, hereinafter referred to as UNDP, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 January and 31 May 1989, the time-limit for the filing of an application to the Tribunal;

Whereas, on 26 April 1989, the Applicant filed an application, containing the following pleas:

"II - PLEAS

1. I respectfully request the Tribunal:

(a) To declare that staff rule 109.7, as supplemented by sections 30201.1-3 and 31000.1.2 of the Personnel Manual had been infringed by the Respondent in taking the decision of limiting the renewal of my contract to 31 December 1985.

(b) To consider the totality of circumstances surrounding my separation from service and conclude, contrary to the findings of the Joint Appeals Board, that my expectation to receive a further extension of my contract was justified.

(c) Regardless of the extent of my legal expectancy and the discretionary power of the Respondent concerning renewals of contracts, to decide that the decision not to extend my

contract beyond 30 June 1986, had been illegally taken, because based prevailingly, if not solely, on a Performance Review and Staff Development Report which the Respondent has accepted to remove from my personnel file, as recommended by the Joint Appeals Board, being 'an incomplete document not having been subject to an appropriate and thorough review'.

(d) To recognize the specific responsibility of the Respondent for the unfair and partial assessment of my performance, including the libellous statements contained in my Performance Review and Staff Development Report, also in view of the testimonies received and submitted hereby, whether or not this negative assessment had been the only reason for not renewing my contract.

(e) To order the Secretary-General to pay an adequate compensation to me for illegal actions taken, anguish, injury and defamation.

(f) To order the Secretary-General that my Performance Review and Staff Development Report in question be retained in my personnel file, along with all pertinent documents including the Report of the Joint Appeals Board accepted by the Secretary-General and all testimonies received on my case, to be read as a single document."

Whereas the Respondent filed his answer on 11 July 1989;

Whereas the Applicant filed written observations on
2 September 1989;

Whereas, on 31 May 1990, the Executive Secretary of the Tribunal informed the parties that the Tribunal had decided to adjourn its consideration of the case until its next session, to be held in New York in October 1990;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP on 21 October 1975. He was initially offered a two-year fixed-term appointment as a Programme Officer at the P-4, step I level. He served thereafter on a succession of fixed-term appointments, initially at Headquarters and then in the field, from 1981 until October 1983, as Deputy Resident Representative in Djibouti, and subsequently, until the expiration of his last fixed-term appointment, as Deputy Resident Representative in Guyana. During his period of service with UNDP, the Applicant was on leave of absence from his post in the Italian Ministry of the Treasury.

During his employment with UNDP, the Applicant's performance

was evaluated in different Performance Review and Staff Development reports (performance reports). In a first performance report, covering his period of service from October 1975 to January 1977, he was rated "among the majority [of staff] who perform well and produce performance results expected of a well qualified, competent staff member". In a second performance report, covering his period of service from February 1977 through December 1978, he was rated as "a competent and well qualified staff member whose performance meets expected standards". In a third performance report, covering his period of service from 1 January 1979 to 29 June 1979, the Applicant was rated as "an excellent staff member whose performance exceeds expected standards". In a fourth performance report, covering his period of service from June 1979 through October 1980, he was rated as a "competent and well qualified staff member whose performance meets expected standards". In a fifth performance report, covering his period of service from January 1981 through April 1983, he was rated by one supervisor as "a competent and well qualified staff member whose performance meets expected standards" and by another as "an excellent staff member whose performance exceeds expected standards".

The Applicant was transferred to Guyana in January 1984 and was offered a two-year fixed-term appointment at the P-4, step IX level, with an expiration date of 20 October 1985.

In a performance report, covering his period of service from January 1984 to August 1985, the then Resident Representative in Guyana rated the Applicant as "a staff member whose performance does not meet expected standards in all respects". In a section containing general comments on performance, the Resident Representative noted that the Applicant had "not fulfilled expectations in several ... important respects and there [was] consequently some doubt as to whether he would be able to perform at more than a routine level should there be a prolonged absence of the R.R. [Resident Representative]". According to the Applicant, the performance report was presented to him "without any previous discussion, nor any previous direct or indirect warning" indicating that the Resident Representative was not satisfied with his performance.

On 6 September 1985, the Applicant wrote to the Chief, Staff

Development and Placement Section, Division of Personnel (DOP) at Headquarters, questioning the assessment by the Resident Representative in Guyana, and asking that "no action be taken until the matters raised have been fully reviewed and clarified". In a cable dated 25 October 1985, the Chief, Administrative Section, DOP, sought the Resident Representative's and the Applicant's concurrence to a further extension of the Applicant's appointment, which had expired on 20 October 1985, through 31 December 1985, pending the completion and consideration of his performance report. In a reply dated 1 November 1985, the Applicant argued essentially that the recommendation submitted after expiration of his appointment was in contravention of staff rule 109.7, and pertinent Sections of the UNDP Personnel Manual; that statements in his most recent performance report were not supported by evidence and that the report conflicted with assessments in his prior performance reports. The Applicant asked for authorization to come to Headquarters to discuss the matter.

On 5 December 1985, the Applicant wrote to the Director, DOP, to inform him that, in accordance with the applicable rules of the UNDP Personnel Manual, he was instituting a rebuttal procedure against the performance report, evaluating his performance in Guyana by the Resident Representative. On 26 December 1985, the Applicant submitted a complaint to the UNDP Ombudsman Panel and on 16 January 1986, he transmitted to the Director, DOP, his statement of rebuttal dated 5 October 1985, the submission of which he had deferred pending possible further review of his case.

On 21 January 1986, the Director, DOP, asked the Assistant Administrator and Regional Director, Regional Bureau for Latin America and the Caribbean, to conduct an impartial investigation of the matter and provide an appraisal of the rebuttal. An Investigative Panel was subsequently constituted to that effect.

In a cable dated 26 February 1986, the Deputy Director, DOP, informed the Applicant that his appointment had been extended through 31 March 1986, and that the Administration did not envisage any further offer of renewal of appointment. At the Applicant's request for further clarification of his contractual situation, the Deputy Director, DOP, confirmed on 1 March 1986, that his appointment had been extended through 31 March 1986, and that if he

should be unable to report to his post with the Italian Government before 1 June 1986, he would be placed on special leave with full pay until 31 May 1986. The Applicant was in fact placed on special leave with full pay from 28 March 1986, the date of his departure from Guyana, through 30 June 1986.

In a letter dated 22 March 1986, the Applicant asked the Secretary-General to review the administrative decision not to extend his appointment beyond 31 March 1986. Having received no reply from the Secretary-General, on 26 June 1986, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against this decision. On 30 June 1986, the Applicant was separated from the service of UNDP.

On 1 August 1986, the Assistant Administrator and Regional Director, Regional Bureau for Latin America and the Caribbean, transmitted to the Director, DOP, in accordance with UNDP/ADM/HQTRS/372/Rev.1, the report of the Investigative Panel which had been established to investigate the Applicant's rebuttal.

The report concluded that the overall rating contained in the Applicant's performance report was accurate.

On 8 September 1986, the Applicant requested the Secretary-General to review the Panel's report. In a letter dated 14 November 1986, the Assistant Secretary-General for Personnel Services informed the Applicant that fixed-term appointments carry no expectancy of renewal and that there were no grounds to reverse the Panel's decision.

On 19 November 1986, the Applicant lodged a second appeal to the JAB, in which he contested the administrative decision not to extend his appointment and requested compensation for the allegations contained in his last performance report. In addition, he appealed against the conclusions of the Investigative Panel, accepted by the Administration of UNDP. The Board adopted its report on 26 September 1988. Its considerations, conclusions and recommendation read as follows:

"Considerations and conclusions

31. The Panel concluded that the appellant had no legal expectancy of renewal. As a rule, fixed-term appointments do not carry a right of renewal. Staff rule 104.12(b) is very clear and the letters of appointment signed by the appellant

confirm the position. The Panel recognized the fact that the jurisprudence of the United Nations [Administrative] Tribunal had indicated that it had to consider 'the totality of circumstances surrounding a staff member's separation', and the Panel could not agree in this case that there was a clear and specific legal expectancy.

32. The Panel concluded also that the appraisal of the appellant's rebuttal of his PRR [Performance Review Report] was superficial, and could not be accepted as having satisfied the requirement for a fair, equitable and serious consideration of the rebuttal. The Panel composed for rebuttal consideration confined its review to telephone calls to the three Reporting Officers. Therefore, the PRR must be regarded as an incomplete document which should not be retained as part of the official status file of the appellant.
33. The Panel agreed that the UNDP administration had not respected its rules and procedures, not only with respect to reconsideration of the rebuttal, but also in not having given the appellant due written notice of his shortcomings and thus an opportunity to improve. The Panel also concluded that not to advise the appellant until after the expiry of his contract that he would not get another two-year renewal was insensitive.
34. The Panel noted, however, that the UNDP administration gave the appellant two contracts, each of three months, to enable the rebuttal and review process to be completed. He was also granted a further three months leave with pay to enable him to effect the transition back to the employ of his government.
35. The Panel concluded that these measures adequately compensated the appellant for the somewhat irregular circumstances surrounding his separation from service. Accordingly, no further compensation for any anguish or injury was deemed fit. As for the appellant's request for compensation for the alleged 'slander' contained in the PRR, the Panel found that the appellant had not sustained the burden of proof required to support a contention that the PRR was tainted by prejudice or other extraneous factors, let alone constitute [a] slander of his person.

Recommendation

36. The Panel recommends unanimously that the PRR covering the period of the appellant's service in Guyana be removed from the appellant's personnel file, since it is an incomplete document, not having been subject to an appropriate and thorough review.
37. The Panel makes no other recommendation in support of the appeal."

On 29 September 1988, the Officer-in-Charge of the Department of Administration and Management transmitted to the Applicant a copy of the Board's report and informed him that:

"The Secretary-General, having re-examined your cases in the light of the Board's report, has decided to maintain the contested decision of non-renewal of your fixed-term appointment. The Secretary-General has also decided to accept the Board's unanimous recommendation to remove your incomplete performance review and staff development report covering the period of your service in Guyana from January 1984 to August 1985 from your official status file and to take no further action on the matter."

On 10 November 1988, the Board adopted the following supplementary comments and transmitted them to the Under-Secretary General for Administration and Management:

- "1. We refer to the report ... to you concerning the case of Mr. Raffaello Picci and to the subsequent memorandum (copied to you) of 4 October 1988 to appellant and counsel. You will recall that counsel had been given an extended deadline to submit observations on the Respondent's reply but the report was concluded inadvertently before that extended deadline.
2. On 20 October 1988, the observations of counsel on the reply were received. The members of the Panel have examined carefully this submission and they have agreed to the following considerations.
3. The Panel accepts much of the analysis of facts and issues presented by counsel, especially as they relate to the questions of efficiency and other aspects of the appellant's performance. The observations of counsel and the attached material confirm the Panel's view that the rebuttal of the final PRR for the appellant was not properly or appropriately reviewed and the PRR was moreover inexplicably at odds with his previous performance history. Accordingly, the Panel can only maintain its earlier recommendation that this document be removed from the appellant's official status file.
4. The appellant was on a fixed-term contract. The appellant himself favoured a continuation of these appointments so that he could retain his position in the Italian Civil Service. The Panel found that there was no clear and specific legal expectancy of renewal.
5. The only residual matter is that of compensation. Counsel has argued that removal of unfounded allegations is insufficient compensation. The Panel had already considered the possibility of monetary compensation. It maintains its opinion that, since the appellant's service was extended for six months to allow resolution of the review process and that

he was given a further three months leave with pay, he had already received adequate compensation for the irregularities surrounding the non-renewal of his contract.

6. Accordingly, the Panel proposes that its earlier recommendations in paragraphs 36 and 37 of Report ... be maintained."

On 29 November 1988, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the Board's supplementary comments and informed him that:

"The Secretary-General has re-examined your cases in the light of the Board's additional comments in its memorandum of 10 November 1988 and taken note of its unanimous proposal that its earlier recommendations ... be maintained. Following full acceptance and implementation of the Board's earlier recommendations, as indicated in the letter to you, dated 29 September 1988 (...), the Secretary-General has therefore decided to take no further action on the matter."

On 26 April 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had a legal expectancy of renewal of his fixed-term appointment.
2. The Applicant's separation from service was motivated by an invalid performance report.
3. The evaluation of the Applicant's performance by the Resident Representative in Guyana was tainted by prejudice and extraneous factors.
4. The removal of the Applicant's last performance report from his personnel file did not represent a suitable solution nor adequate compensation.

Whereas the Respondent's principal contentions are:

1. The decision to limit the renewal of the Applicant's appointment did not infringe his rights.
2. The decision not to renew the Applicant's final appointment beyond 30 June 1986, did not infringe his rights.
3. The Applicant's fixed-term appointment expired automatically and carried no expectation of renewal; the Applicant

was accorded due process throughout the period during which he challenged the non-renewal decision.

4. The Applicant is not entitled to compensation for evaluations contained in his final performance report. The Tribunal is not competent to examine whether the contents of the final performance report accurately reflect his performance.

5. There is no merit in the Applicant's allegation that the final performance report contains slander.

The Tribunal, having deliberated on 9 May 1990 in Geneva and from 15 to 24 October 1990 in New York, now pronounces the following judgement:

I. The Tribunal has examined all aspects of the Applicant's claim to a legal expectancy of a further contract after the expiration of his fixed-term contract on 31 March 1986. In particular, it has taken into consideration the Applicant's ten years of good service on a series of fixed-term contracts from 1975 to 1986.

II. In Judgement No. 305, Jabbour (1983), para. I, the Tribunal stated that it:

"...has considered that after a staff member has been retained in service by a series of short-term contracts for many years and has rendered satisfactory services to the United Nations he can reasonably expect a measure of accommodation either in the form of extension or renewal of short-term contracts or by the Respondent trying in good faith and earnestly to find him some alternative employment". (Emphasis added)

In that case, however, "many years" meant about 15 years.

In Judgement No. 422, Sawhney (1988), paragraph X, the Tribunal stated that it considered:

"... that a series of successive fixed-term appointments by itself is not enough to detract from the effect of staff rule 104.12(b), which stipulates that fixed-term appointments carry no right of renewal or conversion to any other type of appointment. ... According to staff rule 109.7(a), such appointments expire automatically and without prior notice." (Emphasis added)

III. The Tribunal concludes that, in each case where the Applicant claims a legal expectancy of renewal or extension of service after the expiry of his fixed-term appointments, it is necessary to examine all the circumstances to justify the expectation of the Applicant that he would continue to be employed. (Cf. Judgement No. 142, Bhattacharyya (1971); Judgement No. 205, El Nagggar (1975)).

In the present case, the Tribunal finds that no such expectation was justified.

IV. The Applicant relies on a further argument, summarized in paragraph 1(c) of his pleas; he contends that the decision not to extend his contract beyond 30 June 1986, was illegally taken, because it was "based prevailingly" on a Performance Review and Staff Development Report (performance report) which, on the recommendation of the Joint Appeals Board (JAB), the Respondent has removed from the Applicant's personnel file as being "an incomplete document, not having been subject to an appropriate and thorough review".

V. The Tribunal has examined the performance report de novo. The Tribunal is neither competent nor required to substitute its own opinion for that of the reporting officers, but it has considered whether the contested decision was vitiated by lack of due process, or by prejudice, arbitrariness or failure to comply with the prescribed procedure.

VI. The Tribunal shares the view of the JAB that there is no evidence that the performance report and its rebuttal were tainted by prejudice or other extraneous factors. The rebuttal to his performance report was submitted to an Investigative Panel, which did not find prejudice or other extraneous factors.

VII. The Applicant, therefore, prima facie enjoyed a measure of due process. Nevertheless, the whole procedure leading to his separation from UNDP did, in the view of the Tribunal, fall short of the full requirement of due process of law, for several reasons.

VIII. In the first place, the Tribunal must dismiss as unrealistic the Respondent's contention that the performance report, and subsequent events in connection with it, did not influence his decision not to renew or extend the Applicant's employment: two such closely-allied matters cannot be easily isolated for separate consideration. The Tribunal is satisfied that the performance report must, to some extent, have influenced the decision and contributed to the Applicant's separation, and that reliance cannot be placed on the assertion, made to the Applicant by the Office of the Administrator, that the outcome of the rebuttal process would have "no bearing" on the "decision [as to] separation, which [was] based inter alia on prior performance records". Furthermore, the supposedly adverse prior performance records on which the decision was said to be based have never in fact been produced. On the contrary, the Applicant's personnel file contains a series of very commendable evaluations by different supervisors.

IX. Secondly, the rebuttal process, though at first sight adequate, was in fact superficially conducted, and has been criticised by the JAB because it consisted of nothing more than telephone calls to the three reporting officers.

X. Thirdly, the Applicant was entitled to the benefit of the relevant rules, regulations and guidelines of the Organization. In particular, the Resident Representative made the unfavourable performance report without prior warning to the Applicant. This was, moreover, the Applicant's first negative assessment in ten years of service. In the Tribunal's view, the Resident Representative also failed to comply with Section 4 of Appendix 5.0 to the UNDP Personnel Manual, "Guidelines for Completing Performance Review and Staff Development Report", reading as follows:

"The joint review should be part of a continuing dialogue between staff member and supervisor ... The staff member should be shown the comments and ratings in Sections 2 and 3, and any clarifications required should be given before this section (sic) is completed."

The failure to comply with these guidelines without proper cause amounts, in the Tribunal's view, to maladministration. When

asked by the two investigating officers why she had not discussed the performance report with the Applicant before it was signed, the Resident Representative replied only that it was "not her style", and that the staff member already knew enough to require no help from a dialogue. This, in the Tribunal's view, is unacceptable and cannot remotely be justified, resulting, in the Applicant being ambushed, as it were, by an unfavourable performance report of which he had no prior warning.

XI. The Tribunal considers that this high-handed manner of dealing with the Applicant's performance report, entitles him to compensation for maladministration which necessarily influenced his separation from the Organization.

XII. The Tribunal does not share the view of the JAB that, "since the [Applicant's] service was extended for six months ... and ... he was given a further three months leave with pay, he had already received adequate compensation ...". Accordingly, the Tribunal orders the Respondent to pay to the Applicant one year's net base salary, minus the three months of pay on special leave already received, as compensation for the consequences of the maladministration by the Respondent.

XIII. The Applicant also claims damages for slander, on the basis of his unsatisfactory performance report. It is unnecessary to go into the technicalities of the law of defamation, inasmuch as whatever compensation might have been awarded on that account is subsumed in the compensation awarded to the Applicant for the maladministration from which he suffered.

XIV. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant the amount of one year's net base salary, at the rate in effect at the time of the Applicant's separation from service, minus the three months of pay on special leave already received by the Applicant.

XV. The Applicant has asked that:

"[his] Performance Review and Staff Development Report in question be retained in [his] personnel file, along with all pertinent documents including the Report of the Joint Appeals Board accepted by the Secretary-General and all testimonies received on [his] case, to be read as a single document"

and the Tribunal orders the Respondent to grant the Applicant's request.

XVI. All other pleas of the Applicant are rejected.

(Signatures)

Ahmed OSMAN
Vice-President, presiding

Samar SEN
Member

Arnold KEAN
Member

New York, 24 October 1990

R. Maria Vicien-Milburn
Executive Secretary