

ADMINISTRATIVE TRIBUNAL

Judgement No. 494

Case No. 522: REZENE

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

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

Whereas, at the request of Haile Rezene, 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, extended to 30 September 1989, the  
time-limit for the filing of an application;

Whereas, on 29 September 1989, the Applicant filed an  
application, containing the following pleas:

"II. PLEAS

The Applicant seeks (1) rescission of his dismissal,  
(2) compensation for the violation of his right to fair treatment in  
his employment, the investigation of his conduct, the  
execution of disciplinary proceedings and the review  
thereof, including (3) compensation for the adminis- trative  
delays inherent in keeping him on administrative leave from  
July 1987 through July 1988."

Whereas the Respondent filed his answer on 17 April 1990;

Whereas the Applicant filed written observations on 10 July  
1990;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on  
30 September 1974. He was initially offered a three month

fixed-term appointment at the G-2 level, as a Clerk at the Communications and Records Section, Division of General Services, UNDP. On 30 December 1974, the Applicant was granted a probationary appointment and on 1 June 1975, he was reassigned to the Services Section, Division of Management and Information Services, within UNDP, his level being reclassified to G-3. On 1 September 1976, he was granted a permanent appointment and on 1 January 1979, he was promoted to the G-4 level as an Operations Clerk. On 1 January 1981, he was promoted to the P-1 level as a Trainee. On 7 March 1981, he was detailed to the Yemen Arab Republic through 25 April 1981, when he returned to Headquarters. On 26 May 1981, he was reassigned from the UNDP Office in New York to Ankara, Turkey, as an Administrative Officer and was promoted to the P-2 level on 1 January 1983. On 30 September 1985, the Applicant was reassigned from the UNDP Office in Ankara to the UNDP Office in Lusaka, Zambia.

In February 1987, the Chief of Travel Services Section, Division for Administrative and Management Services, asked the Resident Representative in Turkey to conduct an investigation of documentation concerning the shipment of the Applicant's personal effects upon his reassignment from Turkey to Zambia. The request was prompted by the discovery by the U.N. Traffic Unit, that the airway bill issued by KLM in connection with the shipment had never been utilized and was void.

According to the Applicant's personnel files, when the Applicant was finalizing the administrative arrangements concerning his transfer to Zambia, he inquired from the Division of Personnel (DOP) at Headquarters whether he was entitled to reimbursement of the costs of shipping his private automobile. An exchange of cables ensued between the Applicant and the Administration concerning this matter. On 5 September 1985, the Applicant asked Headquarters for confirmation that, according to the General Administration Manual, Zambia was included among the countries to which UNDP partially reimbursed the cost of transport of a private vehicle. In a reply dated 9 September 1985, the Personnel Officer advised the Applicant that his information was incorrect, whereupon the Applicant asked Headquarters to provide him with the correct list of countries to which staff were entitled to ship private vehicles at the Organization's expense. This document was transmitted to him on

10 September 1985.

In a cable dated 16 September 1985, the Applicant informed the Personnel Officer that, on the basis of a telephone conversation held with her on 9 September, in which she had allegedly assured partial reimbursement of the transportation costs of his private vehicle, he had delivered his car and made commitments to the shipping agent, upon the assumption that UNDP would reimburse him US\$1,200. He asserted that he had received the document containing the rules in force, on 10 September 1985, when all arrangements with the shipper had been confirmed. He therefore asked her for reconsideration of the matter.

On 16 September 1985, the Deputy Director, DOP, informed the Applicant that the question whether UNDP would meet partial costs of the shipment of his car was "being examined". He also expressed his surprise at the Applicant's failure to depart from Turkey. In a reply dated 17 September 1990, the Applicant explained that the Resident Representative had asked him to finalize a building lease in Istanbul and that although he had made arrangements to depart on 15 September 1985, he had been compelled to postpone them, pending a reply from Personnel concerning the shipment of his vehicle. He further stated that he would proceed to ship his vehicle, as stated in his cable of 16 September 1985.

In a note dated 17 September 1985, the Deputy Director, DOP, expressed his concern to the Chief, Administrative Division, DOP, at the Applicant's reference to the shipment of his car, since the language in the Applicant's cable seemed to imply that he had approved the shipment, when in fact he had not. He added that UNDP might be "obliged to approve [the shipment] in view of the misinformation" given.

In a cable dated 18 September 1985, the Deputy Director, DOP, confirmed to the Applicant, that he had not approved partial reimbursement of expenses concerning the shipment of his car, but had simply stated that the matter was under review. The Applicant was further informed that the matter would be considered when he submitted his claim.

The Applicant proceeded to Zambia on 22 September 1985. When the investigation concerning the Applicant's shipment was initiated in 1987, the President of "Ozgür", the shipping company

who had arranged the shipment of the Applicant's personal effects, explained that the Applicant, who had been unable to sell his car in Turkey, had requested "that 851 kilos of his goods be shipped by air and the rest of the goods and the car should be transported by surface and sea". UNDP had previously paid the shipper Turkish Lira (TL) 8.684.900, for which the shipper had submitted a KLM airway bill. When he received the Applicant's instructions to split the shipment he had prepared a new invoice for TL 9.321.000. According to the shipper, the Applicant "insisted that this new invoice should not be prepared and the total amount he has to pay should not be over the original invoice of TL 8.868.000...". The KLM airway bill was cancelled.

The Applicant's personal effects were thus transported to Zambia in two separate shipments, an air shipment of 851 kilos and two surface shipments of 900 kilos and 950 kilos each, the latter corresponding to the Applicant's private car. Funds from the payment made by UNDP to Ozgür for the cancelled KLM airway bill were applied by Ozgür to cover the costs of the surface and air shipments.

On 27 March 1987, the Applicant was asked by the Director, Division for Audit and Management Review (DAMR) to provide his explanation of the events under investigation.

In a reply dated 2 April 1987, the Applicant denied any knowledge about the cancellation of the KLM airway bill or of any changes in the shipping arrangements prior to his departure. He asserted that when he informed Ozgür that he could not afford to pay for the cost of transportation for his car, the shipper, who had already made all the arrangements, "insisted that he [was] even willing to ship the car at his own expense". The Applicant admitted that he had never received a bill from Ozgür.

On 26 May 1987, the Deputy Director, DOP, transmitted to the Applicant a copy of an audit report prepared by DAMR concerning the shipment of his personal effects to Zambia. He also attached a list of questions to which the Applicant was asked to reply. The conclusions of the report read as follows:

"... in our opinion, the unauthorized transport of Mr. Rezene's private vehicle with UNDP funds, the submission of voided documentation to support official disbursement of funds and

the collusion with the shipping company to circumvent official procedures, constitutes fraud. On this basis, there is sufficient evidence to consider disciplinary action for Mr. H. Rezene, and to demand restitution for the unauthorized payments which benefitted him."

On 8 June 1987, the Applicant transmitted to the Deputy Director, DOP, his comments on the DAMR report and his replies to the attached list of questions.

In a letter dated 16 June 1987, the Director, DOP, formally charged the Applicant with "serious misconduct for fraudulent actions" in connection with the shipment of his personal effects, stating UNDP's conclusion that he had acted in collusion with the shipper and had, as a UNDP Certifying Officer, knowingly certified a false disbursement voucher, thereby violating his fiduciary duties by improperly certifying false documents and concealing that his personal car was shipped together with his personal effects. He informed him that the matter would be referred to the UNDP/UNFPA Disciplinary Committee (the Disciplinary Committee).

On 6 April 1988, the Disciplinary Committee transmitted its report to the UNDP Administrator. It found that it was its:

"... considered opinion that there had been wrongdoings which were the more unacceptable as they were attributable to a staff member whose functions make him a guardian of the Rules and Regulations of the Organization; the latter reason alone would normally have prompted a straightforward recommendation for a summary dismissal."

and that

"... the documentation as well as the additional verbal information submitted to its attention did not bring out with sufficient conviction that the staff member did devise special arrangements by his own initiative with a clear intention of defrauding the Organization; instead, he appeared just to have taken unfortunately advantage of what seems to be established (and regrettable) practices prevailing at his then duty station between the UNDP office and a local business partner".

It recommended:

"a) Suspension without pay for a period of 3 to 6 months (the exact duration being left at the Administrator's discretion).

- b) Written warning to the effect that any further breach of the standards of conduct of the international civil service within a period of 12 months starting from the date of the suspension will be sanctioned by a summary dismissal.
- c) Reimbursement to the Organization of the cost of over-entitlement regarding the shipment of personal effects.
- d) Finally, the Administrator may wish to consider that the staff member be employed in another capacity than that of an Administrative/Finance Officer, after the period of suspension."

In a memorandum dated 27 June 1988, the Administrator informed the Deputy Assistant Administrator, that he had concluded that the Applicant was guilty of misconduct, that he could not fully accept the recommendations of the Disciplinary Committee, and that he considered it appropriate to dismiss the Applicant from service with immediate effect.

On 15 July 1988, the Deputy Director, DOP, wrote to the Applicant enclosing the recommendation of the Disciplinary Committee, and notifying the Applicant of the Administrator's decision to dismiss him for misconduct under staff rule 110.3(b), effective on receipt of his letter.

On 12 August 1988, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 9 March 1989. Its conclusions and recommendation read as follows:

"Conclusions and Recommendation

51. The Panel unanimously

Finds that procedure against the appellant and the decision to dismiss him for misconduct was not tainted by prejudice, lack of due process or any other extraneous factor;

Finds in particular that the guidelines concerning the establishment of the Disciplinary Committee, and the relevant procedure were appropriately adhered to;

Finds that no convincing evidence was produced to substantiate the allegation that the principle of equal treatment had been violated;

Finds that the Administrator had acted in accordance with the jurisprudence of the Administrative Tribunal which

had consistently ruled that the Secretary-General had wide discretion and authority in taking disciplinary action;

Finds that the punishment may have been too harsh as it does not seem to be commensurate with the offence.

52. The majority of the Panel recommends that the Administrator be requested to reconsider his decision in accordance with the recommendations of the UNDP/UNFPA [United Nations Fund for Population Activities] Disciplinary Committee.

53. The Panel makes no further recommendation in support of the appeal."

On 23 March 1989, the Under-Secretary-General for Administration and Management, informed the Applicant that the Secretary-General, having re-examined his case in the light of the Board's report, had decided to maintain the original decision of 15 July 1988, to dismiss him for misconduct.

On 29 September 1989, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was denied the right to cross-examine his accuser and the Disciplinary Committee thus relied on evidence of dubious credibility.

2. The Applicant had no intention to defraud the Organization.

3. The Organization did not suffer financial loss on account of the Applicant's actions.

4. The sanction applied to the Applicant was not commensurate with the offence.

5. The decision by the Respondent to dismiss the Applicant was vindictive, exceeds the bounds of his legitimate discretion and should be reversed.

Whereas the Respondent's principal contentions are:

1. The U.N. system for reimbursement of the costs of transporting automobiles privately owned by staff members requires honest disclosure of all facts.

2. The U.N. Charter and the Staff Regulations oblige the

Secretary- General to select and retain staff of the highest standards of integrity and, therefore, he has the responsibility of determining definitively whether a staff member meets that standard.

3. The dismissal of the Applicant was preceded by ample opportunity for the Applicant to state his case.

4. The decision was neither arbitrary nor improperly motivated as alleged by the Applicant but rather was taken after proceedings complying with the rules of due process.

5. The Respondent respected the principle of equal treatment.

The Tribunal, having deliberated from 17 October to 5 November 1990, now pronounces the following judgement:

I. In his first plea, the Applicant seeks rescission of the Respondent's decision to dismiss him for misconduct under staff regulation 10.2 and staff rule 110.3(b) then in force. The misconduct arises from alleged fraudulent action of the Applicant in connection with shipment of his personal effects and automobile from Turkey to Zambia.

II. The UNDP/UNFPA Disciplinary Committee (the Disciplinary Committee) and the Joint Appeals Board (JAB) were seized of this case. The JAB noted the following conclusions of the Disciplinary Committee that:

"... the basic facts, as established through inquiries, were not being denied by the staff member, although he had been giving them different interpretations".

and that the Disciplinary Committee

"had formed the considered opinion that there had been wrongdoings which were the more unacceptable as they were attributable to a staff member whose functions make him a guardian of the rules and regulations of the Organization".

The JAB, after carefully reviewing the proceedings before the Disciplinary Committee, "felt that the Committee's conclusion had been properly arrived at and the alleged fraud had been established after appropriate fact-finding procedure".



III. With regard to the sanction imposed, the Disciplinary Committee was not convinced that the Applicant had devised a special arrangement by his own initiative with a clear intention to defraud the Organization. Therefore, the Disciplinary Committee recommended lesser sanctions than the dismissal imposed by the Secretary-General. The JAB, on its part, while recognizing that the Secretary-General is not bound by advice given to him by disciplinary bodies, felt that the punishment might have been too harsh and not commensurate with the offence.

IV. It is pertinent to recall here the consistent jurisprudence of the Tribunal that:

1. The Secretary-General has broad discretion with regard to disciplinary matters, and this includes determination of what constitutes serious misconduct as well as the appropriate discipline.

2. The reports of a Disciplinary Committee and a JAB are only advisory. The Respondent is entitled to reach a different conclusion from theirs after consideration of all the facts and circumstances of the case. However, the Tribunal is competent to review the Respondent's decision if such a decision is based on a mistake of fact or of law, or is arbitrary or motivated by prejudice or by other extraneous considerations.

V. The Applicant claims that the decision to dismiss him for misconduct is arbitrary, motivated by prejudice or other extraneous motives, and is therefore reviewable by the Tribunal. To substantiate his case in this regard, the Applicant advances several arguments.

VI. The Applicant denies categorically the facts as reported by the President of Ozgür Transport Co. (Ozgür) upon which the Respondent partially relied. Moreover, the Applicant claims that the evidence of Ozgür is of dubious credibility because that company derives its income by providing services to the Organization and, therefore, had a strong economic motive to exculpate itself at the Applicant's expense. In other words, the Applicant contends that

the Respondent based his decision to dismiss him on a mistake of fact, which if established might vitiate the decision.

VII. The Tribunal notes first that the version of the facts reported by Ozgür and contested by the Applicant, contains the following points:

(a) The Applicant had at first arranged to have his car transported by air but later changed his request so that part of his personal effects would be transported by air and the rest by surface shipment.

(b) The Applicant wanted the original KLM airway bill and invoice for Turkish Lira (TL) 8.684.900 submitted to UNDP by Ozgür for reimbursement even though KLM had cancelled the airway bill;

(c) Ozgür agreed to do this since the Applicant was one of the "top officials" in UNDP Ankara. Ozgür therefore did not submit a new higher invoice for TL 9.321.000 which would have been justified by the cost of transporting the Applicant's car.

VIII. The Applicant, on his part, says that he did not instruct Ozgür to make any change in the original shipping arrangement by air, and that the change was initiated without his knowledge after his departure, according to a fraudulent scheme by Ozgür to enhance his profit. The Applicant also claims to have made private arrangements with Ozgür for shipment of his car. He, however, admits to not having paid those shipping costs because, he says, Ozgür wished to absorb those costs and the related invoice was never presented.

IX. The Respondent on his part did not accept either Ozgür's version that he was simply acting on instructions from the Applicant, or the Applicant's version that the entire episode involving the change in the original shipping arrangement, with its irregular ramifications, was without the Applicant's knowledge. The Respondent concluded that, on the contrary, there was collusion between the Applicant and Ozgür to make it possible for the Applicant's private car to be shipped at UNDP cost, with the shipment to remain unnoticed by the Organization.

X. The Tribunal is, therefore, faced with three versions of the truth. After reviewing all the facts and circumstances of the case, the Tribunal finds that it was not unreasonable for the Respondent to disbelieve the Applicant's version. The Respondent could reasonably decide that there was collusion between the Applicant and the shipping agent because it was more in keeping with the facts of the case.

The Tribunal notes that the crucial period in which the determinative events occurred with regard to the shipping of the Applicant's household effects was the first half of September 1985, when the Applicant was in the process of leaving Ankara for his new post in Lusaka. Indeed, two of the key events during this period were:

(a) The cancellation of the original KLM airway bill for 1,500 kilos, during the first half of September 1985, as shown by KLM's letter dated 8 December 1986, to the Chief, Traffic Unit, Transportation Section at the U.N. This seemingly strange and sudden cancellation of the airway bill signaled the intention to change the original regularly processed arrangement for shipping 1,500 kilos of the Applicant's household effects by air;

(b) The splitting of the shipment so that it went partly by air and partly by surface.

It is important to determine who was actually involved in these events.

XI. According to the Applicant, they were solely of Ozgür's doing. The Tribunal finds that the Respondent was justified in not adopting the Applicant's view in this regard. It appears to the Tribunal, as it did to the Respondent, that Ozgür must have acted in concert with the Applicant in respect of both actions. With regard to the cancellation of the airway bill, it makes no sense for a shipping agent regularly doing business with UNDP to disregard instructions and unilaterally cancel an airway bill issued for the benefit of a staff member, without the knowledge and approval of UNDP, or the staff member, for eventually the staff member is bound to learn of the change, and is likely, either to complain about it, or in some fashion to bring it to the attention of UNDP, to the detriment of the shipping agent's relationship with the

Organization. This supports the Respondent's view that there was a prior understanding on an alternative arrangement between Ozgür and the Applicant.

XII. Likewise, there is no plausible reason why a shipping agent, under normal circumstances, in charge of a straightforward transaction for transporting 1,500 kilos of air freight directly from Ankara to Lusaka, would assume the sole responsibility, the risk of exposure and criticism and the trouble involved in changing this simple operation into one which is more cumbersome, more complex and above all, more costly.

XIII. The Respondent's conclusions are also corroborated by the attitude of the Applicant towards the shipping of his car. From a reading of the cables exchanged between the Applicant and the Administration during the month of September 1985, the Tribunal observes that the Applicant was under heavy pressure to do something about the shipping of his car.

1. His concern for shipping the car was uppermost in his mind. Indeed, it played a part in delaying his departure to his new post and this prompted an expression of shock by his superior and exerted considerable pressure on him to implement his assignment to Lusaka originally scheduled for 12 August 1985.

2. On 9 and 10 September 1985, it was confirmed to the Applicant that, as he had previously been informed in August, Zambia was not on the list of countries to which UNDP accepted partial responsibility for car transportation costs, and there was obvious reticence on the part of UNDP to accede to the Applicant's pleas for partial reimbursement for the cost of shipping his car.

XIV. Under these circumstances, it is not surprising that the Respondent believed that the Applicant was searching for a way to overcome this problem and avoid selling his car, especially since the Applicant admitted he had made arrangements for leaving on 15 September 1985. Moreover, the Respondent's conclusions could reasonably have been influenced by the fact that the Applicant never paid the cost of shipping his car, and never called to the attention of UNDP the fact that a significant change had been made in the

proposed original shipment on which the invoice certified by him had been based.

XV. After reviewing all the facts and circumstances of the case, the Tribunal finds that there was no mistake of fact in the Respondent's determination that there was collusion between the Applicant and the shipping agent, whereby the Applicant allowed the change in shipping arrangements and inclusion of his private vehicle to remain unnoticed by the Organization. This collusion was intended to accomplish the unauthorized transport of the Applicant's private vehicle at UNDP cost. The collusion involved submission of a voided document, and certification by the Applicant of a false disbursement voucher, thus violating his fiduciary duties. Accordingly, the Tribunal finds that it was reasonable for the Respondent to determine that the Applicant was guilty of intentional fraud, warranting dismissal.

XVI. The Applicant asserts that he was denied due process by not being afforded the opportunity to cross-examine Özgür. The Tribunal rejects this assertion. The Applicant was fully informed with respect to the misconduct alleged, including the report of Özgür, and was given an opportunity to respond. In this situation, he was not required to be given an opportunity to cross examine.

XVII. The Applicant further claims that the contested decision is flawed by arbitrariness and single-minded vindictiveness because the Respondent applied its most severe sanction, ignoring the unanimous recommendations of both the Disciplinary Committee and the JAB, that the Administrator's sanction did not seem to be commensurate with the offence. In paragraph IV, the Tribunal has already recalled its jurisprudence stating that the reports of a Disciplinary Committee and of the JAB are advisory and that the Respondent is entitled to reach a different conclusion from that of these bodies on a consideration of all the facts and circumstances of the case.

XVIII. The Applicant advances another argument that the Respondent's decision was arbitrary. He alleges that the Organization in his case did not suffer any financial damage and

therefore he did not deserve the ultimate sanction. This argument is factually inaccurate. Whatever the amount paid by UNDP in this case, it included costs of shipping the Applicant's private vehicle. Thus, UNDP improperly paid such costs.

XIX. With respect to the Applicant's other contentions that the Respondent's decision was vitiated by lack of due process, prejudice or other extraneous factors, the Tribunal has reviewed the procedures followed in this case leading to the contested decision.

The Tribunal agrees with the conclusion of the JAB that the decision was neither vitiated by lack of due process nor any extraneous or improper factors.

XX. The Applicant further claims that by imposing the sanction of dismissal, he was unfairly treated because he alleges that his sanction was not consistent with those imposed by the Secretary-General in cases similar to his case. Although consistency in applying sanctions in similar offences may be desirable, the Tribunal considers that the Secretary-General is entitled to consider each case on its own facts. He is not required to impose identical discipline in cases involving a similar offence, provided that the sanction has not been influenced by prejudice or other extraneous or improper factors.

XXI. In his second plea, the Applicant seeks compensation for the violation of his right to fair treatment in the investigation of his conduct, the execution of disciplinary proceedings and the review thereof. The Tribunal has already concluded that the requirements of due process have been respected during the proceedings leading to the Applicant's dismissal. Therefore, this plea is without merit.

XXII. In his third plea, the Applicant seeks compensation for the administrative delays inherent in keeping him on administrative leave from August 1987 through July 1988. The Tribunal notes that the Applicant was on full salary for the duration of the proceedings, which, considering the circumstances of the case, cannot be regarded as having been unduly delayed. Therefore, his plea in this respect must fail.

XXIII. For the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Roger PINTO  
President

Jerome ACKERMAN  
First Vice-President

Ahmed OSMAN  
Second Vice-President

New York, 5 November 1990

R. Maria VICIEN-MILBURN  
Executive Secretary