ADMINISTRATIVE TRIBUNAL

Judgement No. 564

Cases No. 520: LAVALLE
No. 580: LAVALLE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Ioan Voicu; Mr. Hubert Thierry;

Case No. 520

Whereas, on 19 March 1991, Roberto Lavalle, a former staff member of the United Nations Environment Programme, hereinafter referred to as UNEP, filed an application which did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 12 August 1991, the Applicant, after making the necessary corrections, again filed an application, in which he requested, in accordance with article 12 of the Statute of the Tribunal, the correction of alleged errors in Judgement No. 501, rendered by the Tribunal on 9 November 1990;

Whereas the application contained pleas which read, in part, as follows:

"II. Pleas

2. Applicant respectfully requests the Tribunal to correct Judgement No. 501 ..., so as to correct the factual errors detailed below ...

3. The judgement ... contains a number of purely factual errors serious enough to warrant correction under the last sentence of article 12 of the Statute of the Tribunal.

4. The most serious of these errors are in para. X of the operative part of the judgement...

5. ... the word 'finds' [in paragraph X] should be changed to 'notes'. The 'performance report' that is the subject of the first sentence of para. X does not exist. And, contrary to what the sentence affirms, there has never been, nor has Applicant ever claimed that there has been, a 'gap' of any kind in any of the reports prepared on his performance. Unlike the performance report that is the subject of the first sentence of para. X, the one with which the second sentence of the paragraph deals does exist (but was not in Applicant's official status file at the time of the decision he contested in case No. 520). However, contrary to what the second sentence avers, there has never been any question whatsoever 'concerning the authority of the Officers signing' that or any other report on Applicant's performance. Actually the 'questions' to which the second sentence (wherein the word "reports" should have been in the singular) refers relate to the period mentioned in the first sentence, for which period, as Applicant has noted, no performance report was ever prepared. ... The 'gap and uncertainty' that are the subject of the third sentence of para. X concern only the period to which the first sentence refers. The 'gap' in question, however, is not one in a performance report, but a gap in Applicant's performance record for the whole of that period, the reason for this gap being the 'actions' referred to in the third sentence.

...

7. Para. XI of the judgement misquotes the Joint Appeals Board report ... In ... para. 33 ... the Board did not say that 'it was incumbent upon the Administration to make every effort in completing the Performance Evaluation Report' (emphasis added). What the Board said is that 'it was incumbent upon the Administration to make every effort in completing the performance evaluation record' (emphasis added). ...

8. ... On page 4 of the judgement it is stated that '[o]n 27 June 1986, the Applicant asked the Secretary-General to review the administrative decision to abolish his post' (emphasis added). Applicant did not ... make any such request. What Applicant asked the Secretary-General to review was the decision to terminate his appointment ..."

Whereas, on 21 August 1991, the Respondent filed his answer, in which he stated:

"Respondent notes that Applicant does not request revision of Judgement No. 501, but only correction of a few

clerical errors of no significance to the outcome of the case and submits that:

(a) Applicant is correct in stating that no PER [Performance Evaluation Report] exists for the period January 1983 to September 1984. He is also correct in stating that the reason for no PER existing is given in the third sentence of para. X of Judgement No. 5O1, namely, that no officials of UNEP familiar with Applicant's work were found in order to sign the required report (...).

(b) Applicant is not absolutely correct in asserting that the second sentence of para. X of Judgement 5O1 is mistaken 'as there has never been any question whatsoever concerning the authority of the Officers signing that or any other report on Applicant's performance' (...). Para. 34 of the JAB report states that: '... In fact the PER for the period 1980-1983 was only completed in May 1985, which casts doubt on its validity and objectivity as both the First and Second Reporting Officers may not have been able to recall fully the performance of the staff member during that period, and, moreover, may not have been able to evaluate the staff member without being influenced by his performance at the time of the completion of that PER ...'. (emphasis added, ...). ... and

(c) Applicant is correct in stating that para. 33 of the JAB report refers to his 'performance evaluation record' and not his 'Performance Evaluation Report' (see para. XI of Judgement No. 501). He is also correct that on 27 June 1986, he requested a review of the decision to 'terminate his appointment' (...) and not 'to abolish his post' (emphasis added, see Judgement No. 501, page 4)."

Whereas the Applicant filed written observations on 11 September 1991;

Whereas, at the request of the Tribunal, the Applicant submitted an additional statement on 7 January 1992;

Whereas the facts in the case are set out in Judgement No. 501;

Case No. 580

Whereas, on 14 February 1991, the Applicant filed an application containing the following pleas:

"II. Pleas

4. Applicant respectfully requests the Tribunal to order the rescission of the decision contested and fix the compensation due to him, whether or not Respondent decides that he is to be compensated without further action being taken, at three months net base salary."

Whereas the Respondent filed his answer on 7 March 1991;

Whereas the Applicant filed written observations on 22 March 1991;

Whereas, in addition to the facts recited in Judgement No. 501, the facts in the case are as follows:

In a memorandum dated 10 March 1986, the Applicant stated his intention to institute a rebuttal against his performance evaluation report covering the period from 1 July 1980 to 14 February 1983, in accordance with ST/AI/240/Rev.2.The Applicant submitted his statement of rebuttal on 31 March 1986. On 21 May 1986, the Applicant separated from the service of UNEP.

The Executive Director, in his appraisal, prepared in accordance with ST/AI/240/Rev.2, endorsed the findings of the panel constituted to consider the Applicant's rebuttal and recommended a number of changes to the report, while maintaining the ratings.

On 1 August 1989, the Applicant asked the Secretary-General to withdraw from his personnel file the performance evaluation report evaluating his services from 1 July 1980 to 14 February 1983, together with all documents concerning the rebuttal proceedings he had instituted. He also asked for payment of six months' net base salary as compensation for the "harm done to [his] professional reputation by the report". In a letter dated 17 October 1989, the Assistant Secretary-General for Human Resources Management (OHRM) rejected the Applicant's requests. On 1 November 1989, the Applicant asked the Secretary-General to review that administrative decision.

In a reply dated 13 December 1989, the Assistant Secretary-

General, OHRM, informed the Applicant that the Secretary-General had decided to maintain the decision. On 27 December 1989, the Applicant lodged an appeal with the Vienna Joint Appeals Board (JAB). The JAB adopted its report on 1 November 1990. Its conclusions read, in part, as follows:

"E. Conclusions of the Panel

...

2. Merits of the appeal

(a) Lack of seriousness and carelessness in its preparation

In the opinion of the Panel, the appellant fails to prove his charges. Spelling and syntax errors, while certainly not commendable, are no sufficient proof of carelessness concerning the content of the report.

(b) Staleness of the report

The Panel notes that, in fact, the PER [Performance Evaluation Report] for the period in question, 1 July 1980 - 14 February 1983, was prepared with considerable delay, having been signed by the appellant's supervisors on 25 May 1985. Furthermore, the Panel notes a delay of nearly ten months between this date and that on which the appellant signed the PER, namely, 7 march 1986. The Panel, however, while not justifying these delays, cannot but observe that the preparation of the report was initiated early in 1985 at the request of the appellant, who, having noticed its absence from his file, considered that this fact could have negative consequences for his career.

... It is not until 3 June 1986, in a fourth submission made by the appellant in relation to his rebuttal, that 'staleness' of the report is mentioned as a ground for its invalidation. Consequently, the Panel cannot avoid the impression that the argument of staleness was a reaction of the appellant to the contents of the report, and not to its lateness.

...

(c) Lack of impartiality of the Executive Director and of the UNEP officials making up the Panel

The appellant claims that his attempt to have the decision to

> abolish his post rescinded earned him the enmity of the above-mentioned persons. The Panel feels, however, that the appellant fails to provide any proof that the alleged hostility and a resultant loss of objectivity actually obtained. The constitution of the Panel that reviewed his rebuttal of the PER was accomplished in accordance with ST/AI/240/Rev.2. Thus, the appellant exercised his right to select a panel acceptable to him, and proceeded to submit his case to it. The appellant cannot, in the opinion of the Panel, question, years later, the objectivity of the members of the rebuttal Panel without providing sufficient proof.
>
> Furthermore, after careful examination of ST/AI/240/Rev.2 and of UNV/INF/173, the Panel finds no grounds on which a performance evaluation report that has gone through a rule-conform rebuttal could be eliminated from a staff member's official status file.
>
> Finally, the information available to the Panel of the appellant's employment record after termination of his appointment with UNEP does not support his contention that he has been harmed by the presence of the PER in question in his official status file.
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> ...
>
> Consequently, the Panel finds itself unable to recommend that either claim made by the appellant, i.e., that the PER in question be removed from his file and that he be paid six months' salary as compensation for the damage caused, be granted."

On 18 December 1990, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed him that the Secretary-General had decided to maintain the contested decision.

On 14 February 1991, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The performance evaluation report does not meet minimum formal standards of seriousness, which connotes extreme carelessness in its preparation.

2. Having been prepared over two years after its cut-off

date, the report is stale.

3. The meeting between the First Reporting Officer and the Applicant called for by paragraph 11 of ST/AI/240 was never held.

Whereas the Respondent's principal contention is:

Appraisal of a staff member's performance is a discretionary decision of the Secretary-General reviewable only if motivated by prejudice. The Applicant alleges only error of form and delay. However, the Applicant has already been awarded adequate compensation by the Tribunal for these defects and delay surrounding the finalization of his Performance Evaluation Report.

The Tribunal, having deliberated from 16 June to 2 July 1992, now pronounces the following judgement:

I. As the applications in cases No. 580 and No. 520 both follow Judgement No. 501 and are linked, the Tribunal orders their joinder.

II. The application in case No. 580 raises two distinct questions:

(1) Should the report evaluating the Applicant's services from 1 July 1980 to 14 February 1983, be removed from his personnel file?

(2) Should the Applicant be awarded compensation for the injury which the report has caused him?

III. Regarding the first, the Tribunal decided in its Judgement No. 501 that: "Also, there was doubt on the accuracy of the performance report evaluating the Applicant's services during the period running from 1 July 1980 to 14 February 1983, due to questions concerning the authority of the officers signing the reports".

Because of that doubt which, however, is not equivalent to a

finding that the report is erroneous and hence does not warrant ordering that the report be withdrawn from Applicant's personnel file, the Tribunal considers that it is proper that the present judgement be placed in that file, together with Judgement No. 501.

IV. Regarding the second question, the Tribunal notes that the Applicant has already been compensated by Judgement No. 501 for the alleged injury. Indeed, it is because of the irregularities in the evaluation of his services that the Applicant has been awarded compensation amounting to three months of his net salary. Allocation by the Tribunal of a new indemnity would therefore lack any legal basis.

V. The Tribunal orders that the present judgement be placed in the Applicant's personnel file, together with Judgement No. 501.

VI. The Tribunal rejects all other pleas.

VII. The application in case No. 520 seeks various corrections in the text of Judgement No. 501, dated 9 November 1990, rendered on a previous application concerning the termination of the Applicant's services. The new application is based on article 12 of the Statute of the Tribunal, which states in fine: "Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties".In the consideration of this case, the Tribunal deems it necessary to make certain comments on these provisions.

1. Unlike an application for the revision of a judgement, also under article 12 of the Statute, based on the discovery of a new fact, an application for the correction of a judgement may be made "at any time" and is thus not subject to time-limits.

2. Upon receiving an application for the correction of a judgement, the Tribunal may correct "clerical or arithmetical

mistakes ... or errors arising ... from any accidental slip or omission". The terms used in article 12 of the Statute must be interpreted strictly, because article 11 of the Statute gives the person in whose case a judgement has been rendered, the right to contest it, by applying to the Committee established by paragraph 4 of article 11, on the following grounds: that the Tribunal "has exceeded its jurisdiction or competence or ... has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice". Any confusion between the remedy provided in article 11 and an application under article 12 for the correction of a judgement must be scrupulously avoided. Hence, all requests for changes in wording which go beyond those authorized by the language used in article 12 for correcting a judgement must be rejected.

3. The right conferred on the parties by article 12 in fine is not intended to open the door to corrections irrespective of whether either party may have any interest in them. The principle expressed by the maxim "Pas d'intérêt, pas d'action" is as applicable to appeals made to the Administrative Tribunal of the United Nations as to any other court. Thus, in principle, only if a clerical or arithmetical mistake or an error arising from any accidental slip or omission affects the Applicant's rights under a judgement, would the Tribunal ordinarily be constrained to grant an application for correction.

VIII. In the present case, there may be some doubt about the Applicant's interest in the correction of the wording in several parts of Judgement No. 501, which awarded him compensation equivalent to three months' net salary because of irregularities in the assessment of his performance from 1980 to 1984. Nevertheless, in the interest of the proper functioning of administrative justice, the Tribunal will take account of the Applicant's requests, insofar

as the corrections he seeks are compatible with the terms of article 12 of the Statute.

IX. The Applicant points out that on page 4 of judgement No. 501 (i.e. in the recital of the facts), it is stated that the request made by him to the Secretary-General was in respect of the decision "to abolish his post", whereas it related to the decision to terminate his appointment. That is a clerical error which ought to be corrected.

X. The Applicant points out that the language of paragraph X of Judgement No. 501, which concerns the lacunae found in the assessment of his performance,is not totally accurate. No report having been prepared for the period 1983-1984, it would have been more accurate to refer in the first sentence of the paragraph to the Applicant's "performance record", rather than to his "performance report". The same applies to paragraph XI of the judgement, while the word "reports" in the second sentence of paragraph X ought to be in the singular, not in the plural. The Tribunal considers that these errors are accidental and ought to be corrected.

XI. The Applicant asks, finally, that the wording of paragraph X be substantially modified on the grounds that incorrect reasons were cited by the Tribunal for doubting the accuracy of the assessment of his performance. On this point, the Applicant's request, which is opposed by the Respondent, goes beyond the criteria for the correction of a judgement stated above. The Tribunal therefore denies this request.

XII. Accordingly, the Tribunal decides:

1. To replace the words "to abolish his post" in page 4 of Judgement No. 501 by the words "to terminate his appointment".

2. To replace the word "report" in the first sentence of paragraph X by the word "record" and to proceed likewise in paragraph XI where the word "reports" is replaced with the word "record" and the words "Performance Evaluation Report" by the words "performance evaluation record".

3. To delete the letter "s" from the word "reports" in the second sentence of paragraph X.

4. To reject all other requests.

(Signatures)

Jerome ACKERMAN
President

Ioan VOICU
Member

Hubert THIERRY
Member

Geneva, 2 July 1992

R. Maria VICIEN-MILBURN
Executive Secretary