

Translated from French

ADMINISTRATIVE TRIBUNAL

Judgement No. 802

Case No. 896: BACCOUCHE

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS

Composed of Mr. Hubert Thierry, Vice-President, presiding;
Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 19 May 1995, Habib Baccouche, former staff member of the United Nations, filed an application which did not fulfil the formal requirements established by article 7 of the Rules of the Tribunal;

Whereas, on 17 November 1995, the applicant, having made the necessary corrections, filed a new application in which he, inter alia, requested the Tribunal:

"- To annul and render null and void the decision [to terminate his appointment] rendered by the [Under-Secretary-General for Administration and Management] on 23 March 1995 ...

"...

"- To order that he be reinstated as a staff member;

"- To pay him equitable compensation corresponding to his base salary from the date of [his] termination ...

"...

"- To hear additional witnesses, including [the Director of the Conference Services Division, UNOG,] and [the Assistant Secretary-General for Human Rights, UNOG].

"..."

Whereas the Respondent filed his answer on 28 March 1996;

Whereas the Applicant filed written observations on 8 May 1996;

Whereas the Applicant submitted additional information on 13, 24 and 25 October 1996;

Whereas, on 30 October 1996, the President of the Tribunal decided that there would be no oral proceedings in the case;

Whereas the facts of the case are as follows:

The Applicant entered the service of the United Nations Office at Geneva

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(UNOG) on 16 May 1967 at the G-1 level, on a temporary contract. He obtained a permanent contract on 1 January 1971 as a clerk at the G-2 level, step 3. He was promoted to the G-3 level on 1 July 1973.

From 20 October 1976 to 31 December 1978, the Applicant obtained special leave without pay in order to enable him to fill the position of external contributor for the International Institute of Social Studies. On 1 May 1981, he was granted a second period of leave without pay for one year to enable him to pursue law studies, a period which was extended for another year, this time in order to work for the Arab Labour Organization.

On 26 April 1983, the Applicant requested the Chief, Personnel Service, to grant him a further extension of the special leave without pay. In a letter dated 9 June 1983, the assistant to the Chief, Personnel Services, denied his request on the grounds that:

"The rules in force do not permit the granting to staff members of a period of leave without pay of more than two years. Yet [he] was granted leave without pay from 1 May 1981, which represents two consecutive years of leave without pay, even though he had already been granted a period of leave without pay from October 1976 to December 1978."

Nevertheless, the Applicant obtained an extension of three months, "the Chief of Personnel [being] ready to extend the period by three months, from 1 May 1983 to 31 July 1983".

On 5 August 1983, the Chief, Personnel Service, informed the Applicant in writing that, if he did not resume his post by 8 August 1983, a decision to terminate his appointment for abandonment of post would be taken against him. Since he had not rejoined his service by 15 August 1983, the Applicant was informed in a letter dated 18 August 1983 that his appointment had been terminated for abandonment of post, with effect from that same date.

On 17 November 1983, the Applicant appealed against that decision before the Joint Appeals Board. In its report of 14 February 1985 to the Secretary-General - on the basis of a medical certificate produced by the appellant - the Board recommended to the Secretary-General that the appellant should be reinstated and given a last chance to resume his service with the United Nations. In a letter dated 28 June 1985 sent to the appellant, the Secretary-General accepted the recommendation and rescinded the decision to terminate his appointment. Consequently, the Applicant's special leave without pay was extended retroactively for a period of two years and 19 days, and he resumed his position on 2 September 1985 as an assistant bookbinder in the Library.

The Applicant again enjoyed special leave without pay from 13 February 1989 to 12 February 1990, in order to enter service with the Regional Organization for the Protection of the Marine Environment (ROPME).

With effect from 13 February 1990, the Applicant worked part time.

In a memorandum dated 13 December 1990 addressed to the Applicant concerning his participation in the Second World Climate Conference, the Chief, Personnel Services, UNOG, informed him that the World Meteorological Organization (WMO), which was responsible for registration at that Conference, had contacted UNOG concerning the Applicant's participation in that Conference. The Chief, Personnel Services, UNOG, pointed out that such participation constituted an outside activity for which the prior approval of the Secretary-General was

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required and that there was no trace of such approval in his file. Furthermore, since the Applicant's superior, the Chief Librarian, had at no time received any request for approval from the Applicant, the Chief, Personnel Services, UNOG, requested the Applicant to provide a written explanation in that regard.

On 19 December 1990, the Applicant replied to the Chief, Personnel Service, UNOG, and, referring to the question of prior approval, invoked paragraph 10 of administrative instruction ST/AI/190/Rev.1, which, in his view, permitted him to participate in the meeting in question. Moreover, he pointed out that he had only participated in the work of the ministerial session of the Conference, held on 6 and 7 November 1990, on the basis of invitations a copy of which, he claimed, had been sent to the Administration. He added that that activity was in no way incompatible with his status, especially since it had been outside working hours.

In a memorandum of 11 January 1991, the Chief, Personnel Services, UNOG, acknowledged receipt of the Applicant's observations and reiterated that his file contained no request for approval from him concerning an outside activity since his return to work in February 1990. He also pointed out to the Applicant that any outside activity had to be submitted for the prior approval of the Secretary-General, and concluded by saying that his participation in the said Conference had not been in keeping with the Staff Rules.

In a memorandum dated 4 February 1991, the Applicant declared: "The Regional Organization for the Protection of the Marine Environment has requested my participation in the work of this meeting [inter-agency consultation concerning the ecological damage caused by the oil slick in the Gulf].* I request you to permit me to participate in the meeting. It goes without saying that the discussions in this meeting are of vital importance to me, my studies and my future relations with ROPME." In a memorandum dated 7 February 1991, the Personnel Administration Section replied to the Applicant that "[his] request [had] therefore [been] approved under the conditions laid down in administrative instruction ST/AI/190/Rev.1", and informed him that "these three days [from 5 to 7 February inclusive] will be considered special leave without pay."

The Applicant resumed full-time work on 13 February 1991.

On 22 April 1991, the Senior Legal Officer, UNOG, addressed a memorandum to the Applicant noting that the latter had signed correspondence as "Representative to the United Nations and international organizations" on paper with the ROPME letter heading, and pointed out to him that the host State had never issued an authorization for the opening of an office of ROPME at Geneva. She added that the use of that title and that position were not in keeping with the Staff Rules, and that her office had received a complaint from the host State concerning the unauthorized representation of an intergovernmental organization by a staff member of UNOG. The Senior Legal Officer, UNOG, requested him to provide an explanation, but the Applicant did not respond to that communication.

The Applicant had, moreover, enjoyed special leave without pay from 18 March 1991 to 23 February 1992, as evidenced by a memorandum dated 25 March 1992 from the Personnel Service. Those periods of leave had been aimed at enabling him to participate in certain intergovernmental meetings on behalf of ROPME. With effect from 1 June 1992, he was placed on unauthorized leave until 20 June 1992.

* Translator's note: title of this meeting not yet traced.

The Chief Librarian, in a memorandum dated 3 July 1992, requested the Chief, Personnel Service, to provide a clarification concerning the Applicant's official status. The Applicant had been placed on unauthorized leave since 1 June 1992, having been absent from the office since that date. The Applicant, in a memorandum of 27 May 1992 addressed to the Chief, Personnel Service, had submitted a request for special leave from 1 to 30 June 1992 in order to enable him to participate, on behalf of ROPME, in the work of the United Nations Conference on Environment and Development, held at Rio de Janeiro. As noted by the Officer-in-Charge, Personnel Service, in a memorandum dated 18 August 1992 addressed to the Applicant, not only had the latter granted himself the leave in question, but there was also no trace in his file of the prior approval of the Secretary-General permitting him to undertake such an outside activity, such approval being required by administrative instruction ST/AI/190/Rev.1.

On 21 August 1992, the Applicant was accompanying a colleague of UNOG to the Pregny guard post, where an incident involving a security officer occurred.

That incident followed an earlier disturbance on the same day between that security officer and the Applicant's colleague; the Applicant and his colleague had apparently insulted the security officer and had behaved in an aggressive manner. On 16 December 1992, the Chief, Security and Safety Section, addressed a memorandum to the Applicant warning him that if such an incident recurred, the Administration would be so informed. The Applicant replied in a memorandum dated 11 January 1993, in which he accused the Chief, Security and Safety Section, of "harassment of a staff member" and of not respecting the procedures in force within UNOG.

On 20 April 1993, the Senior Legal Officer, UNOG, having received a copy of a letter from WMO concerning the participation of the Applicant, as a representative in Geneva of ROPME, in the "Intergovernmental Meeting on the World Climate Programme", held at Geneva from 14 to 16 April 1993, asked the Chief Librarian whether he had authorized the Applicant to participate in that conference. In a memorandum of 19 May 1993, the Chief Librarian replied that he had at no time been informed of the Applicant's desire to participate in such a conference and that no leave for the period in question had been requested.

In the meantime, on 5 May 1993, an incident occurred involving an altercation between the Applicant and a security officer who addressed him in order to verify his identity, which apparently angered the Applicant, who, it was reported, had attempted to force his way through.

On 25 May 1993, the Chief, Personnel Administration Section, had sent a memorandum to the Applicant requesting him to provide an explanation of that incident. The Applicant replied in a memorandum dated 7 June 1993, denying that he had insulted the security officer in question or acted discourteously.

As a follow-up to the memorandum from the Chief Librarian, on 25 May 1993 the Chief, Personnel Administration Section, addressed a memorandum to the Applicant in which he noted that "following an examination of [his] file, it must be noted that there is no trace of any prior request relating to [his] desire to participate in that conference having been submitted to the Personnel Service or of a request for leave covering that period". He also requested the Applicant to submit his comments on that subject by 3 June 1993.

The Applicant submitted his comments on 7 June 1993, in which he denied having participated in the conference and declared that he had been physically present in the Library from 14 to 16 April 1993. Copies of loan-request forms made out in his presence from 14 to 16 April were attached.

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In a memorandum dated 22 July 1993, the Division of Administration alerted the Applicant to its decision to submit his case to the Joint Disciplinary Committee (JDC) for the following reasons:

- "(a) [He had allegedly] engaged in an activity external to the United Nations by representing the Regional Organization for the Protection of the Marine Environment, as an observer, from 14 to 16 April 1993, at the Intergovernmental Meeting on the World Climate Programme held at Geneva, in violation [of staff regulation 1.2] and of staff rule 101.6 (a), despite two memoranda dated 11 January and 26 April 1991 from the former Chief of Personnel concerning his conduct;
- "(b) [He had allegedly] participated without prior authorization in the above-mentioned meeting, in violation of staff rule 105.1 (b) (ii); and
- "(c) [He had allegedly] made very discourteous remarks to the security officers on two separate occasions, on 21 August 1992 and 5 May 1993, constituting conduct totally incompatible with that expected of international civil servants."

In a memorandum dated 22 November 1993, the Personnel Service informed the Division of Administration of its decision to submit the Applicant's case to JDC for the opinion of the Secretary-General concerning the above-mentioned facts.

JDC adopted its report unanimously on 16 February 1995. Its observations and conclusions are, in part, as follows:

"...

- "97. During the period from 14 to 16 April 1993, [the Applicant] did not in fact request leave. [The Applicant] completely denied having been at that conference on those days, and produced as proof the forms filled out by readers who came during that period to consult the microfiches in the Library (one form was dated 14 April, two forms 15 April and one form 16 April).
- "98. The Panel finds that the proof adduced by [the Applicant] was not convincing. First of all, some of the forms were so vague that they were barely credible (for example, the form which mentioned the title of a periodical without giving the date requested, or the one which mentioned a very vague subject for research). In addition, as stated by Ms. [X], who is employed in the Reading Room, these forms should normally be sent via the Reading Room to the Loan Service; however, Ms. [X] did not see them.
- "99. The Panel notes, moreover, that if [the Applicant] merely wished to collect the documents and send them to [ROPME] (as he claimed), he could have had them sent to him by the Secretariat of WMO, without physically going to register.
- "100. Lastly, during the hearing, in order to exonerate himself, [the Applicant] claimed that the conference had begun on Easter Monday, whereas Easter Monday in 1993 had fallen on 12 April and not 14 April. That explanation

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betrayed the fact that [the Applicant] had not told the entire truth to the Panel. [The Applicant] mentioned in his written comments that he had gone to register on Monday, 14 April at 8.15 a.m. However, the registration form indicated the date of 13 April.

"101. The Panel also notes that a similar situation occurred in June 1992 when [the Applicant] left for Rio in order to participate in the Conference on Environment and Development without having made a prior request for leave.

"(c) Incidents involving the security officers

"102. Concerning the incident on 21 August 1992, the Panel considers that there is apparently no formal proof indicating the presence [of the Applicant] during the incident, given the contradictory statements made by witnesses.

"103. With regard to the incident on 5 May 1993, the Panel is convinced that [the Applicant] made discourteous remarks and jostled [a security officer]. The Panel has noted the following: at the time, [the security officer] had just been appointed and consequently had to comply with the rules, especially those concerning courtesy, otherwise his contract would not be renewed. Other individuals are often requested to give their identity (including members of the Panel), and that happens normally without incident. It has not been brought to the attention of the Panel that the security officers use familiar language to address persons passing through the gate, and jostle them in response to polite remarks made by the latter.

"104. In addition, the past conduct of [the Applicant] (cf. the incident at the airport in November 1986, ..., and the incident with Mr. [Y], as testified by the latter during the hearing) suggests that [the Applicant] is capable of aggressive conduct."

"(C) Other serious misconduct

"105. During its investigations, and upon examining the file [of the Applicant] in its entirety, the Panel considers that it has the duty to call the attention of the Secretary-General to other allegations constituting circumstances which aggravate the charge against [the Applicant].

"(a) Unlawful activity: [ROPME] is not recognized by the Swiss authorities.

"106. As indicated in the letters of protest from the Swiss Mission and communications from [the Senior Legal Officer, ROPME] has no office in Geneva recognized by the Swiss authorities.

"(b) Unsatisfactory service

"107. The Panel notes that, since 1976, the year in which his permanent contract was granted, [the Applicant] has had more than eight years of officially authorized leave without pay. That represents nearly half of the period from 1976 to 1994.

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- "108. In addition, he has had a remarkably high number of periods of sick leave as well as 'unauthorized leave'. (...) From a brief calculation of all the leave taken by [the Applicant] (special leave without pay, sick leave, uncertified sick leave, unauthorized leave and annual leave) it is clear that the staff member was present at work only a quarter of the time required.
- "109. Concerning the periods of sick leave [of the Applicant], the Panel notes that his periods of leave were often supported by medical certificates filled out in a location other than his duty station and sent one or two months late (there are numerous examples in the staff member's personnel file).
- "110. As to the 'unauthorized periods of leave', the Panel notes also that [the Applicant] often took leave without requesting prior authorization, and this leave was subsequently converted into sick leave or unauthorized unpaid leave (for example, the leave from 1 February 1989 to 13 February 1989, 19 April 1991 to 18 August 1991, June 1992, etc.).
- "111. In addition to these excessive absences, [the Applicant] evinced a complete lack of interest in his work, as evidence by his supervisors during the hearings and as indicated by the series of memoranda on that subject from successive chiefs of service. It should also be noted that [the Applicant] has remained at the G-3 level since July 1973.
- "112. It must be noted that the [Applicant's] repeated absences and his serious neglect of his work are prejudicial to the Organization and create serious problems in his service.
- "...
- "114. The Panel considers that this is a case of serious misconduct, that [the Applicant] has acted in a manner not in keeping with his general obligations as an international civil servant as laid down in article I of the Staff Regulations, has infringed the standards of conduct expected from international civil servants and, by his conduct, has caused prejudice to the United Nations and has tarnished its image.
- "115. Consequently, the Panel unanimously recommends to the Secretary-General the measure which it considers appropriate in the light of the gravity and accumulation of the facts: namely, summary dismissal."

The report of JDC was approved by the Secretary-General, who notified the Applicant thereof by a letter dated 23 March 1995, which reads:

"On the basis of his analysis of the case, the Secretary-General indicates his agreement with the conclusions of the Panel to the effect that you have carried on activities external to the Organization by participating on several occasions in conferences as a representative of ROPME and have done so without prior approval; that your conduct vis-à-vis a security officer

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on 5 May 1993 was unacceptable and that your repeated absences and your negligent attitude towards your work are prejudicial to the Organization.

"In the light of the foregoing and after a careful scrutiny of the facts and the documents submitted as evidence, the Secretary-General has concluded that you have been negligent in the discharge of your duties, that you have failed to respect the obligations and duties of your position as stipulated in article I of the Staff Regulations, and that you are guilty of serious misconduct by failing to respect the standards of conduct and integrity befitting an international civil servant.

"Before the determination of a disciplinary measure is made, careful note has been taken of the numerous warnings already given to you in the past, to which, however, you have turned a deaf ear. Your repeated misconduct is all the more striking, given that you have already benefited from a measure of clemency on our part, which on 18 June 1985 was termed a last chance by the Joint [Appeals?] Board in Geneva, when we rescinded our decision to terminate you on 15 August 1983 for abandonment of post. On 7 April 1987, your misconduct merited censure coupled with a warning, following the report of the [Joint?] Disciplinary Committee [in January 1987?] It is therefore appropriate to state that you have not improved your conduct or the quality of your services, as the Organization was entitled to expect from you, and your continued employment in the Organization no longer serves any useful purpose. Consequently, in exercising his discretionary power, the Secretary-General has decided on your separation from service by virtue of staff rule 110.3 (vii), with compensation of one month's net salary in lieu of notice. Your separation will take effect on the date of notification of this letter. Any appeal must be addressed to the Administrative Tribunal of the United Nations."

On 17 November 1995, the Applicant filed the aforementioned appeal with the Tribunal.

Whereas the Applicant's principal contentions are the following:

1. The Applicant's right to a hearing before JDC was infringed because he was unable to have the assistance of counsel.

2. The representative of the Secretary-General requested JDC to examine the grounds other than those justifying referral of the case to JDC, such as his allegedly unsatisfactory service and the validity of his periods of sick leave, with the result that the recommendation made against him by JDC was disproportionate or was based on irrelevant legal arguments.

3. The Applicant did not request leave to participate in the Meeting on the World Climate Programme from 14 to 16 April 1993, because he did not participate in it, but merely filled out registration forms and ordered two sets of documents. Consequently, the decision taken against him should be annulled.

4. The Applicant did not commit physical violence against the security officer, as claimed in the JDC report.

Whereas the principal contentions of the Respondent are the following:

1. Since the Applicant was informed of his right to be represented before

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JDC, the rules of procedure concerning the right of defence were respected.

2. In exercising his discretionary power, the Secretary-General has concluded that the unacceptable conduct of the Applicant towards a security officer and his participation without prior approval in the Meeting on the World Climate Programme, as a representative of ROPME, constitute serious misconduct justifying termination of the Applicant's appointment.

The Tribunal, having deliberated from 30 October to 21 November 1996, now pronounces the following judgement:

I. The Applicant was appointed to serve with the United Nations at Geneva in 1967 at the G-1 level. He was promoted to the G-3 level in 1973 after obtaining a permanent contract.

II. Following several cases of dereliction of which he was accused, the Joint Disciplinary Committee (JDC) recommended to the Secretary-General his summary dismissal, but the Secretary-General decided on his separation from service with one month's salary in lieu of notice.

III. The Applicant challenges this decision before the Tribunal. He requests its rescission. He also requests his reinstatement as well as compensatory damages equivalent to his net base salary to be paid from the date on which he was terminated. He also claims that he did not have the assistance of counsel before JDC.

IV. The Respondent requests that this claim be rejected on the grounds that the Applicant was correctly treated with regard to the exercise of his right of defence and that the contested decision was taken by the Secretary-General in accordance with his discretionary power. The Respondent adds that the Applicant has not provided proof that the contested decision had been influenced by irrelevant considerations.

V. As to the Applicant's right to be assisted or represented by counsel before JDC, the Tribunal notes that the Applicant was duly informed of such a right in a memorandum dated 22 July 1993, which, furthermore, contained the charges against him. The file reveals, moreover, that the Secretary of JDC had transmitted to the Applicant a list of counsels and that, on several occasions, the Applicant had been reminded of his right to be assisted by counsel.

The Tribunal considers in this case that the obligation incumbent upon the Administration to inform the staff member of his right to be represented or assisted by counsel was fulfilled, but that it is for the staff member himself to exercise such a right (Judgement No. 515, Khan (1991), para. XX).

The Tribunal therefore considers that the Applicant enjoyed the right of defence before JDC.

VI. The Tribunal has doubts regarding the compatibility of being able to represent an intergovernmental organization with the Staff Regulations of the United Nations. The Tribunal is astonished at the conduct of the Respondent in authorizing the Applicant, on at least two occasions, to participate on behalf of that intergovernmental organization (Regional Organization for the Protection of the Marine Environment (ROPME)) in international conferences.

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VII. As to the substance of the case, the Tribunal notes first of all that the Secretary-General took the contested decision following the report of JDC, which did not correctly take into account all the elements of the case. In fact, in its assessment of the charge against him concerning the exercise of an outside activity as a representative of ROPME at the Meeting on the World Climate Programme held at Geneva from 14 to 16 April 1993, JDC did not take account of the fact that, at least on two occasions, the Applicant had submitted a written request and had obtained authorization from the Administration to be absent without pay in order to participate in international conferences.

VIII. Furthermore, JDC did not take into consideration the fact that the Administration had been perfectly aware of the Applicant's outside activities as a representative of ROPME, as evidenced by the file, without the Administration having taken any measure against him. The Tribunal regrets such laxity, which is precisely what encouraged the Applicant to pursue his activities on behalf of ROPME and for the exercise of which he had not formally obtained the approval of the Secretary-General as required by the Staff Rules.

IX. The file also reveals that no formal proof had been submitted concerning the Applicant's participation in the conference held at Geneva from 14 to 16 April 1993, for which he had been reproached for having participated in it without approval. Nevertheless, JDC arrived at a contrary conclusion instead of at least expressing doubt, which should have benefited the Applicant.

X. The Tribunal lastly notes that JDC made an overall evaluation of the two incidents involving acts of violence which occurred on 21 August 1992 and 5 May 1993 respectively involving officers of the Security Service. JDC drew conclusions which were unfavourable to the Applicant, whereas, on the one hand, the representative of the Respondent in JDC formally declared before that body that he had renounced any disciplinary measure concerning the incident of 21 August 1992 and, on the other hand, with regard to the incident of 5 May 1993, JDC wrongly considered that it had involved acts of violence. During the hearing of the parties before JDC, the security officer declared that he had received a blow to the arm "but not a blow which caused [him] pain that required going to the Medical Service". In the note dated 6 May 1993 by the guard post commander,* mention was also made of a blow to the arm. To that, the Applicant replied: "I did not shove him and I did not hit him." In support of his testimony, he referred to the note dated 5 May 1993 by the security officer, which made no mention of any physical violence against his person.

XI. Taking account of the foregoing and of the injury which the contested decision has inflicted on the Applicant, the Tribunal decides that the latter should receive equitable compensation.

XII. For the foregoing reasons, the Tribunal decides to grant the Applicant, as compensation, the equivalent of six months' net base salary in effect at the

* Translator's note: title being checked (French title is not necessarily correct).

date of his separation from service.

All other conclusions are rejected.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

New York, 21 November 1996

(Signed) R. María VICIEN-MILBURN
Secretary
