

ADMINISTRATIVE TRIBUNAL

Judgement No. 426

Case No. 443: VAN BRANTEGHEM

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Arnold Kean, Vice-President, presiding;
Mr. Francisco A. Forteza; Mr. Ioan Voicu;

Whereas, on 5 October 1987, Ronny Paul Van Branteghem, a former staff member of the United Nations Development Programme, hereinafter referred to as UNDP, filed an application, the pleas of which read as follows:

"II Pleas

1. In its report No. 528 dated 15 November 1985 concerning the case No. 84-31, which was consequently endorsed by the Secretary-General, the Joint Appeals Board [JAB] found that the Appellant had been denied the effective application of the relevant provisions of the Performance Review and Staff Development Report to which he was entitled. The Panel recommended that the Appellant's contested performance review report be afforded the appropriate investigation and that such investigation be conducted in strict conformity with the criteria set forth by the United Nations Administrative Tribunal. The Applicant requests the Tribunal to find that UNDP has failed to comply, within a reasonable period, with the foregoing recommendations;
2. The Applicant further requests the Tribunal to find that the continued delays, from UNDP, in complying with the JAB's recommendation constitute an obstruction which has rendered the proper reconstruction of relevant facts impossible;
3. The Applicant requests the Tribunal to consider that the reassignment, to which the Applicant was subjected following the issuance of the rebutted statement, was of disciplinary nature and improper as the decision was taken without any proper investigation of the facts;

4. The Applicant finally requests the Tribunal to consider that the failure to undertake the appropriate investigation in accordance with the JAB's recommendation, has prevented the Applicant from redressing the substance of a serious accusation brought against him, which causes prejudice to the Applicant;
5. In view of the above, the Applicant requests the Tribunal to adjudge one year of salary for the injuries sustained."

Whereas the Respondent filed his answer on 19 January 1988;
Whereas, on 17 February 1988, the Applicant filed written observations;

Whereas, on 15 March and 17 March 1988, the Applicant submitted additional documents and on 31 March 1988, the Respondent commented thereon;

Whereas, on 19 April 1988, the Applicant submitted further comments on the Respondent's reply and an additional document;

Whereas, on 27 May 1988, the Executive Secretary of the Tribunal informed the Applicant that the Tribunal had decided to adjourn its consideration of the case until its autumn session to begin in New York on 10 October 1988;

Whereas the facts in the case are as follows:

Ronny Van Branteghem, a national of Belgium, entered the service of UNDP on 28 February 1981 as a Junior Professional Officer (JPO) sponsored by the Government of Belgium. He was offered a one-year fixed-term appointment at the L-1, step III Level, and was assigned to the UNDP office in Seoul, Republic of Korea. His appointment was initially extended for three successive terms of one-year, with the agreement of the Belgian Government. The Applicant had requested a transfer to a different duty station to serve on his third renewal, but his request could not be met in view of the staffing needs at the UNDP office in Korea.

In early 1983, the Chief, Recruitment Section, Division of Personnel (DOP) at Headquarters asked the Resident Representative in

Seoul to prepare the Applicant's Performance Review Report. In a report dated 31 January 1983, the Resident Representative evaluated the Applicant's performance during the period February 1982 to January 1983. The report contained a statement by Mr. Fabrizio Ossella, the Deputy Resident Representative, who was the Applicant's immediate supervisor and first reporting officer, that:

"...[the Applicant] appears to be quite close to his Government forgetting at times that he is a UNDP staff member and therefore accountable to UNDP, not to the Belgian Government."

The Resident Representative signed the report and commented "Noted".

On 1 February 1983, a Recruitment Officer wrote to the Chief, Recruitment Section, DOP, to inform him that officials at the Regional Bureau for Asia and the Pacific (RBAP) desired that the Applicant be reassigned from Korea to another duty station, notwithstanding the Belgian Government's knowledge that the Applicant would be serving his third year as a JPO in Korea.

On 10 February 1983, the Applicant submitted a rebuttal of his performance report to the Director, DOP, at Headquarters. He noted that he had not been given the opportunity to review the report or to have his comments reflected in it, and requested that Mr. Ossella "reconsider the above statement" and that he (the Applicant) be provided with "a detailed explanation" about why this allegation had been made.

In a cable dated 22 February 1983, the Applicant requested the Director, DOP, to acknowledge receipt of his rebuttal.

On 6 April 1983, the Belgian Government agreed to the Applicant's reassignment to Thailand. The Applicant reported for duty in Bangkok on 12 June 1983.

On 15 July 1983, the Applicant wrote a second reminder to the Director, DOP, inquiring about the action taken in connexion with his rebuttal.

On 9 August 1983, the Director, DOP, requested the Assistant

Administrator and Regional Director, RBAP, to investigate the Applicant's rebuttal in accordance with paragraph 24 of the Instructions and Guidelines for the Performance Review and Staff Development Report (UNDP/ADM/HQTRS/372/Rev.1 and UNDP/ADM/FIELD/575/Rev.1) dated 13 February 1979.

On 10 August 1983, the Director, DOP, so informed the Applicant and promised to send him the panel's appraisal on the matter "in due course".

In a memorandum dated 23 January 1984, the members of the investigative panel which had been constituted to consider the Applicant's rebuttal informed the Assistant Administrator and Regional Director, RBAP, that they had communicated with the Deputy Resident Representative in Seoul, as well as with the Resident Representative in Seoul, and they had both "individually cabled indicating they "wish[ed] to submit a new Performance Report to replace that to which the [Applicant] presented his rebuttal". The investigative panel agreed with their proposal and recommended that he inform the Division of Personnel Administration officially of their recommendation that a new report be prepared. On the same date, the Regional Director transmitted this recommendation to the Director, DOP. In a cable dated 10 February 1984, the Resident Representative and the Deputy Resident Representative were asked to complete a new Performance Review Report and to send it to the Applicant, for his signature, in Bangkok.

On 16 February 1984, the Resident Representative in Seoul forwarded to the Resident Representative in Bangkok two copies of a revised performance review report covering the Applicant's period of service from February 1982 to January 1983. The Applicant received the substitute report on 22 February 1984 and declined to sign it. In a letter dated 1 March 1984 to the UNDP Ombudsman (a copy of which he transmitted to the Secretary-General) the Applicant asserted that in accordance with UNDP/ADM/HQTRS/372/Rev.1, paragraph 24, the Division of Personnel should initiate an impartial investigation, to be conducted with maximum dispatch, consistent

with a fair review of the respective viewpoints of the staff member and of reporting officers. The staff member should be provided with a written appraisal of the matter. He noted that his viewpoints had not been sought, that he had not received a written appraisal and that "through [his] persistence for more than one year ... the more serious allegation [had] been proven unjustified".

On 2 March 1984, the Applicant wrote to the Secretary-General indicating that as a result of the unwarranted delay in resolving his rebuttal to the contested Performance Review Report, his "good reputation has been and is still being severely damaged ..." and that he would therefore introduce a claim against UNDP for libel and non-observance of the terms of his appointment. In a reply dated 20 March 1984, the Chief, Administrative Review Unit, Office of Personnel Services at Headquarters, informed the Applicant that it appeared that the rebuttal procedure envisaged by paragraph 24 of the relevant UNDP Instructions and Guidelines had not been completed, as he had not been provided with a written appraisal of the contested report. When provided, and if satisfactory to the Applicant, the appraisal should resolve the appeal.

In a letter dated 30 March 1984, the Chief, Recruitment Section, DOP, explained to the Applicant that the investigative panel had considered that it was not necessary to obtain additional information from the Applicant, since the first and second reporting officers had agreed to prepare a new report. He confirmed that the initial Performance Review Report was "void" and not part of the Applicant's official records. The second report constituted "the official Performance Review Report for the relevant panel in Korea".

On 18 April 1984, the Applicant requested administrative review of the decision on the ground that the essential procedural requirements of paragraph 24 of the Performance Review and Staff Development Report (UNDP/ADM/HQTRS/372/Rev.1 and UNDP/ADM/FIELD/575/Rev.1) had not been met. Having received no reply from the Secretary-General, on 10 July 1984, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

The Applicant was separated from the service of UNDP on 27 February 1984. He was then employed by the World Food Programme until 31 August 1985. On 1 October 1985, he re-entered the service of UNDP at the P-3 level and served at Khartoum, Sudan, as Assistant Resident Representative until 30 November 1986, when he resigned from UNDP.

The Board adopted its report on 15 November 1985. Its conclusion and recommendation read as follows:

"Conclusion and recommendation

40. The Panel concludes that the appellant has been denied the effective application of the relevant provisions of the Performance Review and Staff Development Report (UNDP/ADM/HQTRS/372/Rev.1 and UNDP/ADM/FIELD/575/Rev.1), to which he was entitled.
41. The Panel recommends that the appellant's contested PRR [Performance Review Report] be afforded the appropriate investigation and appraisal required by the said Performance Review and Staff Development Report and that such investigation be conducted in strict conformity with the criteria set forth by the United Nations Administrative Tribunal."

On 22 May 1986, the Secretary-General informed the Applicant that he had taken note of the Board's report and, in light of the Board's report, had decided to accept the Panel's recommendation.

In a letter dated 27 June 1986, the Officer-in-Charge, DOP, sought the Applicant's views on a possible settlement of the dispute and asked him whether he would consider withdrawing his request for an appraisal of his rebuttal to the report. While UNDP was prepared to take the necessary steps to re-open the matter, it would "involve considerable effort in view of the passage of time and re-assignments of various interested parties" from Seoul. In a reply dated 24 August 1986, the Applicant stated that "... it is my feeling that doubts regarding my integrity are bound to remain, unless there exists a statement of acceptable credibility on the substance of the matter. I appreciate, nevertheless, that the continuation of the recourse procedure will result in a

time-consuming and expensive exercise and I propose, therefore, that, as a way of compromise, the Director of the Division of Personnel confirms to me, in writing, that the contested allegation has not been substantiated ...".

It appears that this letter was misfiled by UNDP and never acted upon.

On 30 November 1986, the Applicant separated from the service of UNDP.

On 5 October 1987, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Respondent's continued delays and obstruction of legal procedures have prevented the Applicant from properly refuting the substance of a serious accusation against him and have caused him irreparable injury.

2. The Respondent's awareness that the accusation against the Applicant was groundless and his unwillingness to conduct a proper investigation which would demonstrate the Applicant's innocence are unfair and have caused the Applicant injury.

Whereas the Respondent's principal contention is:

Entitlement to damages requires a showing of loss flowing directly from an act of the Administration. As no such loss occurred in this case, the Applicant is not entitled to damages.

The Tribunal, having deliberated on 27 May 1988 in Geneva and from 12 to 27 October 1988 in New York, now pronounces the following judgement:

- I. The case involves a statement in the Applicant's Performance Review Report to the effect that he appeared to be:

"... quite close to his Government, forgetting at times that he is a UNDP staff member and therefore accountable to UNDP, not to

the Belgian government."

II. The Applicant, on 10 February 1983, submitted a rebuttal of this part of his Performance Review Report. At his insistence, an investigative panel was eventually set up in accordance with the applicable procedures, though after considerable delay.

III. In the course of its investigation, the panel was informed that the authors of the contested report - the first and second reporting officers - had withdrawn it and the panel recommended that a new one be drawn up. This recommendation was treated by the Administration as a "report" of the panel envisaged under the applicable rules.

IV. On 22 February 1984, the Applicant refused to sign the new performance review report although the contested passage had been removed, essentially because of the absence of "a written appraisal of the matter" called for by the procedures applicable to the investigation of his rebuttal.

V. The Applicant's continued request for such appraisal following a review having been rejected, he appealed to the JAB which found, on 15 November 1985, that the Applicant had been denied the effective application of the relevant provision governing performance review report rebuttal procedures and recommended that this be remedied by being undertaken now.

VI. Although the Secretary-General accepted the JAB's recommendation, it was never implemented by UNDP in view of the costs and difficulties involved in reassembling the competent officials. The Administration suggested instead that it should "close this chapter". The Administration was also now willing to accept the Applicant's earlier proposal of 24 August 1986, to issue, in lieu of such investigation and appraisal, a written confirmation

that the contested allegation was not substantiated. The Tribunal notes that the Applicant's proposal was never acted upon because it was misfiled due to apparent administrative confusion by UNDP officials.

VII. In requesting an extension of the time-limit to file a formal answer to the application to the Tribunal, the Respondent made an offer on 27 October 1987, as follows:

"... should Applicant insist on continuing with his Application to the Tribunal (in such event UNDP will implement the JAB recommendation to re-investigate the Applicant's rebuttal to his performance appraisal)."

VIII. Whatever the meaning of this offer, the Applicant, on 16 November 1987, indicated that he would not accept the offer at this late stage of an investigation, but that he wanted damages for which he had applied to the Tribunal.

IX. The issue which the Tribunal has to resolve is whether the failure by the Administration to follow the procedures laid down in UNDP/ADM/HQTRS/372/Rev.1 and UNDP/ADM/FIELD/575/Rev.1 for the rebuttal of a Performance Review Report entitles the staff member affected to monetary compensation. The Respondent's answer to the claim for damages is succinct: although the Applicant has a right to an investigation, which he no longer wants, he has no right to damages in substitution for such an investigation.

X. As there is no dispute between the parties regarding the relevant facts, there is no need for the Tribunal to enter into a detailed examination thereof.

XI. Instead, the Tribunal must consider the following question of law: is the right to invoke the rebuttal procedures unconditional or does it become academic if the purpose for which it exists, i.e., to effect a change in, or the removal of, the whole or part of the

contents of the Performance Review Report, is achieved by other means?

XII. If the latter is true, the Tribunal must examine if there was at any time an offer made by the Administration to remove the passages in the Performance Review Report to which the Applicant objected, which was rejected by the Applicant.

XIII. In the Tribunal's view, in the area of administrative law of which the Staff Regulations and Rules form a part, rights involved are of a substantial nature and the procedures provided for their protection confer no additional rights.

XIV. It is clear, therefore, in regard to rebuttal procedures of a Performance Review Report, that the right of the staff member to be protected is the right to a report which is accurate, fair and not vitiated by bias or other improper motives.

XV. If, as a result of the initiation of the rebuttal procedures, i.e., after the challenge by the staff member to any part of the report, the Secretary-General withdraws that part, by deleting it, or by substituting for it a text acceptable to the staff member, the staff member's rights have been vindicated and there is no need for further action under the rebuttal procedures.

XVI. In the present circumstances, a determined staff member, who felt aggrieved by the accusations levelled against him by his supervisors, rebuffed in his efforts to bring to the attention of the Organization flagrant violations of a public trust which he believed were being committed by some of his colleagues, became totally frustrated when the Administration failed to set up the machinery for rebuttal of the accusation levelled against him, even after the JAB had held that it should be done and the Secretary-General had agreed to do so.

XVII. The haphazard and dilatory manner in which the Respondent dealt with the Applicant's insistence that justice be done only reinforced the latter's determination that the proper rebuttal procedures be followed, particularly when even his expressed readiness for a compromise was either deliberately or negligently overlooked.

XVIII. There can be no doubt that the Applicant did not receive the treatment to which he was entitled under the rebuttal procedure and that its denial constituted a lack of due process.

XIX. Equally however, there can be no doubt that when in February 1984, the Respondent offered, without resort to such procedures, to satisfy the objective by withdrawing the challenged parts of the performance review report, the injury done to the Applicant by the denial of due process could have been repaired had the Applicant agreed thereto.

XX. His insistence thereafter on compliance with procedures which could not have resulted in any more favourable outcome to him, but which, at best, might have added material explaining the reasons for the withdrawal of the challenged portions, was no longer reasonable.

XXI. Though understandable, in the circumstances, his claim does not create an entitlement to damages. Even if the Applicant was exposed to serious accusations, such as unaccountability to UNDP, the Tribunal notes that those charges were subsequently withdrawn and that the Applicant continued working for UNDP.

XXII. On the other hand, the delay and the negligent manner evinced by the Respondent in dealing with his rebuttal request, between its submission on 10 February 1983 and the offer of 22 February 1984, to accede to its substance, entitle him to damages.

XXIII. The various claims by the Applicant for alleged losses suffered through the mode of his transfer, the alleged defamation of his character and his alleged punitive assignments are not before the Tribunal, as they have not been submitted to the JAB as required by article 7.1 of the Tribunal's Statute.

XXIV. The Tribunal, taking all the circumstances of this case into account, decides to award US\$3,000 to the Applicant as damages for the delay in establishing the appropriate machinery for the consideration of his request for rebuttal under staff rule 112.6 or in offering an appropriate alternate remedy.

XXV. The Tribunal orders that the Performance Review Report which was the object of the rebuttal request, shall be removed from the Applicant's file. Instead, a Performance Review Report as offered in substitution therefor in February 1984, shall be incorporated in the Applicant's file, whether or not he signs it.

XXVI. The Tribunal orders that a copy of this judgement shall also be inserted in the Applicant's personnel file.

XXVII. For the above reasons, the Tribunal orders the Respondent to pay the Applicant the sum of \$3,000.

XXVIII. All other pleas are rejected.

(Signatures)

Arnold KEAN
Vice-President, presiding

Francisco A. FORTEZA
Member

Ioan VOICU
Member

New York, 27 October 1988

R. Maria VICIEN-MILBURN
Executive Secretary