
ADMINISTRATIVE TRIBUNAL

Judgement No. 439

Case No. 483: VAN BRANTEGHEM

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Arnold Kean, President; Mr. Ahmed Osman;

Mr. Ioan Voicu;

Whereas, on 9 November 1988, Ronny Paul Van Branteghem, a former staff member of the United Nations Development Programme, hereinafter called UNDP, filed an application the pleas of which read as follows:

"1. The subject of the appeal brought before the Joint Appeals Board concerned the decision of the United Nations Development Programme (UNDP) requiring the Applicant to refund the costs of the home leave travel of himself and his family. The Panel recommended that this decision be rescinded and this recommendation was accepted by the Secretary-General;

2. Without being solicited hereto by UNDP, the Joint Appeals Board has formulated, on its own initiative and without any discussion hereof between all parties involved, a recommendation on the recovery, by UNDP, of the Applicant's repatriation travel costs of himself and his family. The Applicant requests the Tribunal to find that this recommendation is not pertinent to the case and that the Board has exceeded its competence by considering an issue which is not related to UNDP's demand;

3. In accordance with the contents of the above paragraph 2, the Applicant requests the Tribunal to find that

the decision of the Secretary-General should not have been sought on the unrelated matter of repatriation travel costs and that, therefore, this part of the final decision should be disregarded;

4. Besides the fundamental error of procedure, described in the foregoing paragraphs, the Applicant requests the Tribunal to find that the demand for refund of repatriation travel costs - which has never been directed or brought by UNDP to the Applicant - is, moreover, made untimely and, therefore, without effect to the Applicant.

5. The Applicant requests the Tribunal to find that the explicit mutual agreement between UNDP and the Applicant, concluded at the time of the repatriation travel and whereby the latter costs would be borne by UNDP, was a valid agreement.

6. The Applicant requests the Tribunal to demand UNDP to release the Applicant's final payments, including salary and commutation of accrued annual leave, withheld since November 1986 on grounds now rescinded by the Secretary-General."

Whereas the Respondent filed his answer on 12 December 1988;

Whereas the Applicant filed written observations on 16 January 1989;

Whereas the facts in the case are as follows:

On 14 August 1985 the Applicant, a Belgian national having his residence in Spain, was offered a fixed-term appointment for one year as Programme Adviser in the UNDP office in Khartoum, Sudan; the appointment would be at the L-3 level, governed by the 200 Series Staff Rules. He accepted this offer of appointment on 24 August 1985 and entered on duty on 1 October 1985. By a cable dated 24 October 1985, UNDP advised him that, upon recommendation of the Appointment and Promotion Board, the Associate Administrator of UNDP had approved the Applicant's appointment at the P-3 level under the 100 Series Staff Rules, the other details of the initial offer remaining the same. The Applicant cabled his acceptance on 28 October 1985. On 20 November 1985 the UNDP Division of Personnel

sent him, in duplicate, "your Letter of Fixed-Term Appointment ... for a period of Two Years" as Assistant Resident Representative (Programme). The Applicant was requested to sign and return the copy but he did not do so. Also on 20 November 1985 a Personnel Action form was issued, with a copy to the Applicant, recording his appointment for a fixed term of two years as Assistant Resident Representative (Programme).

On 9 April 1986 the Applicant requested that his spouse and his two daughters be authorized to travel under accelerated home leave to Spain in early May 1986. The Division of Personnel granted this request on the same day on the understanding that the Applicant would also travel on home leave during 1986 and would spend at least 15 days in Belgium. The Applicant's dependants took their home leave in Spain in May/July 1986 and the Applicant took his in Belgium and Spain from 3 to 24 July 1986.

On 21 September 1986 the Applicant tendered his resignation, which was accepted by UNDP effective 30 November 1986. The Applicant returned to Spain, where he had been recruited, his repatriation travel and that of his dependants being paid by UNDP.

On 19 March 1987 the Division of Personnel informed the Applicant that the criteria for the home leave he had taken from 3 to 24 July 1986 had not been met due to his resignation; his home leave entitlement had become due in October 1986 at which time he had accumulated 24 points; his contract being for two years through 30 September 1987, his home leave had been authorized on the understanding that he was contractually covered for six months beyond the date that he accrued 24 points; the Division of Personnel was therefore unable to process payment of his final entitlements until he made a cheque payable to UNDP in the amount of \$5,563.97 which he had incorrectly received in respect of his home leave. On 1 April 1987 the Applicant asked the Division of Personnel to reconsider its position, arguing inter alia that his contract had

not been for two years since he had deliberately omitted to sign the revised letter of appointment. In a reply dated 15 April 1987 the Division of Personnel reiterated its demand and on 25 May 1987 the Applicant requested the Secretary-General to review the administrative decision of UNDP to recover the expenditure related to his dependants and his own home leave.

On 20 July 1987 the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 13 October 1988. The Board's considerations, conclusions and recommendations read in part as follows:

"Considerations

35. The Panel noted that the Respondent, invoking staff rule 105.3(b) (ii), contends that UNDP had to recoup the cost of the appellant's home leave travel from him because the expectation that he would serve for at least six months beyond his return from home leave was not fulfilled due to his resignation. The Panel could not agree with this contention. The staff rule referred to does indeed enumerate amongst the conditions for eligibility for home leave that the staff member's service must be expected by the Secretary-General to continue for at least six months beyond the date of his or her return from the proposed home leave. However, neither that rule nor any other staff rule states that the staff member must refund the costs of his home leave travel if this expectation is not fulfilled, even if this is due to his resignation.

36. On the other hand, there is a staff rule which deals with exactly that situation. This is staff rule 107.4(a) which provides that a staff member who resigns within six months following the date of his or her return from travel on home leave shall not be entitled to payment by the Organization of return travel expenses for himself or herself and family members unless in the opinion of the Secretary-General, there are compelling reasons for authorizing such payment. The Panel concluded that upon the appellant's resignation UNDP should have applied this rule rather than paying for his return travel and that of his family and thereafter demanding that he reimburse the costs of their home leave travel.

37. Regarding the conflicting contentions of the parties concerning the employment status of the appellant after 30 September 1986, the Panel considered that it need not resolve this conflict since there is no doubt that the appellant was employed by UNDP from 1 October 1985 until 30 November 1986 and that his employment ended as a result of his resignation. These circumstances, in the view of the Panel, bring the case under staff rule 107.4(a).

...

Conclusions

40. The Panel concluded that there was no basis in the Staff Rules for the Respondent's claim that the appellant should

refund the costs of the travel on home leave of himself and his family in May-July 1986.

41. The Panel concluded that upon the appellant's separation, UNDP should have applied staff rule 107.4(a). Since UNDP had not done so, the Panel concluded that the appellant had received the benefits of repatriation travel at the cost of UNDP contrary to the Staff Rules and UNDP was therefore entitled to recoup those costs from the appellant.

Recommendations

42. The Panel recommends that the decision requiring the appellant to refund to UNDP the costs of the travel on home leave of himself and his family should be rescinded.

43. The Panel recommends that the Secretary-General consider exercising his discretion under staff rule 107.4(a) to waive, in this case, the requirement that the staff member work six months after return from home leave or forego the right to repatriation travel.

44. Failing this, the Panel recommends that the appellant be required to refund to the UNDP the cost of repatriation travel for himself and his family."

On 19 October 1988 the Under-Secretary-General for Administration and Management advised the Applicant that the Secretary-General, having re-examined the case in the light of the Board's report, had decided

"to accept the Board's unanimous recommendations:

(a) to rescind the decision requiring you to refund to UNDP the costs of the travel on home leave of yourself and your family members,

(b) to require you to refund to UNDP the cost of repatriation travel for yourself and your family members in accordance with staff rule 107.4(a) based on your resignation within six months following the date of your return from travel on home leave and in this connection to make any necessary financial adjustments, and

(c) to take no further action on your case."

On 9 November 1988 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The only issue raised by the Respondent related to the home leave travel costs of the Applicant and his dependants. By adding to it another unrelated issue - that of repatriation travel costs - the Joint Appeals Board acted ultra vires because its recommendation on this matter had not been solicited either by the Applicant or by the Respondent.

2. The issue of repatriation travel costs is not pertinent to the Respondent's demand and was never subject, before and during the recourse procedure, of any discussion between the Respondent and the Applicant.

3. By analogy with staff rule 103.15, it appears logical and fair that the Organization, if it wanted to demand the refund of the repatriation travel costs, should have claimed such refund within one year after the repatriation travel.

4. In the absence of a formal contract from 1 October 1986 through 30 November 1986, the Applicant was, by explicit and written mutual consent between UNDP and himself, given the benefits of repatriation travel costs.

5. The Applicant has not been offered the opportunity to comment on the composition of the Panel.

Whereas the Respondent's principal contentions are:

1. The Applicant was subject to the Staff Rules at the time his repatriation travel and that of his family was paid by UNDP.

2. There was no time-limit barring the Secretary-General from seeking recovery of the repatriation travel costs erroneously paid to the Applicant.

3. The Joint Appeals Board acted within its competence in

making its recommendation to the Secretary-General in the instant case.

4. Even if the Applicant had not had an effective opportunity to comment on the composition of the Joint Appeals Board Panel, he was not prejudiced thereby.

The Tribunal, having deliberated from 9 to 17 May 1989, now pronounces the following judgement:

I. The Respondent relies on staff rule 107.4 (a) as having deprived the Applicant of his entitlement to payment of return travel expenses for himself and members of his family. The paragraph in question reads as follows:

"(a) A staff member who resigns before completing one year of service or within six months following the date of his or her return from travel on home leave or family visit shall not be entitled to payment of return travel expenses for himself or herself and family members unless, in the opinion of the Secretary-General, there are compelling reasons for authorizing such payment."

The concluding words of the paragraph clearly give the Secretary-General discretion to authorize such payment.

II. Upon the resignation of the Applicant, the Respondent decided to authorize the payment and it was in fact paid but, subsequently inspired by a recommendation of the Joint Appeals Board, the Respondent has now withheld sums otherwise due to the Applicant, so that the Respondent may recover the amount of the return travel expenses previously paid.

III. In the view of the Tribunal, it is not open to the Respondent, once he has exercised his discretion by authorizing payment of these expenses, to reverse his decision and to require

repayment by the Applicant, in the absence of some fundamental mistake of fact or some element of fraud not present in this case. To hold otherwise would be to expose staff members to decisions of the Administration which were reversible at will.

IV. In consequence, the Respondent's reversal of his decision was without effect, and it is unnecessary for the Tribunal to decide whether it was void for other reasons advanced by the Applicant, including the making of a recommendation by the Joint Appeals Board on an issue not brought before it by the parties.

V. The Tribunal accordingly orders that the Respondent shall bear the return travel expenses of the Applicant and his family members and shall cease to withhold the equivalent amount from sums otherwise due to the Applicant.

VI. All other pleas are rejected.

(Signatures)

Arnold KEAN
President

Ahmed OSMAN
Member

Ioan VOICU
Member

Geneva, 17 May 1989

Jean HARDY
Acting Executive Secretary