

Case No.: UNDT/GVA/2010/027
(UNAT 1624)

Judgment No.: UNDT/2011/006

Date: 10 January 2011

English

Introduction

1. In June 2008, the Applicant filed an application with the former UN Administrative Tribunal contesting the decision of the Office of Internal Oversight Services (“OIOS”) not to carry out an investigation into the disappearance of documents and personal effects she had placed in her office.

2. She requests the Tribunal:

a. To order her case to be treated as a category I matter under the classification system adopted by OIOS for the purpose of identifying complex and serious cases, and order that Office to carry out an investigation;

b. To award her the sum of USD25,000 as compensation for the loss of and/or damage to her personal effects and take into consideration, in determining the amount of compensation, the time spent by the Applicant to recover those personal effects and reconstitute her files;

c. To award her the sum of USD500,000 for the moral and material damage caused to her;

d. To order the Respondent to issue a report formally recording the facts as laid out by the Applicant;

e. To hold an oral hearing and order the Respondent to produce a number of documents.

Facts

3. The Applicant entered the service of the United Nations Office of the High Commissioner for Human Rights (“OHCHR”) in 1994 on a short-term appointment, which was converted into a fixed-term appointment the following year and subsequently extended several times. In 1998, she was appointed to the post of Secretary of the Commission on Human Rights Working Group on Enforced or Involuntary Disappearances, at level P-4.

4. Starting in January 2004, the Applicant was placed on medical leave. Her appointment was terminated and she was granted a disability benefit with effect from June 2005.

5. On 6 December 2005, the Applicant sent an email to the Officer-in-Charge of the Safety and Security Section, OHCHR in which she explained that, on 16 November 2005, she had visited the OHCHR premises to collect her belongings, where she found that certain confidential documents and personal effects were missing from the office she had previously occupied.

6. On 16 December 2005, the Officer-in-Charge of the Safety and Security Section, OHCHR informed the Applicant that he had forwarded her request to the Head of the Safety and Security Section of the United Nations Office at Geneva (“UNOG”).

7. In December 2005 and February 2006, the Applicant made inquiries of the Officer-in-Charge of the Safety and Security Section, OHCHR and then the Head of the Section at UNOG about progress on her request. The Head of the Safety and Security Section replied to her on 27 February 2006 that her request had been transmitted to the staff member in that Section responsible for the UNOG annexes.

8. By email of 16 March 2006 to the Under-Secretary-General for Internal Oversight Services, the Applicant asked OIOS to investigate the disappearance of her personal belongings and confidential documents, stating that UNOG had no intention of pursuing her request. The Under-Secretary-General replied, on the same day, that the request had been forwarded to the Investigations Division, OIOS.

9. In a confidential information note dated 23 March 2006 that was not sent

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20. At the hearing on 2 December 2010, the Judge asked Counsel for the Applicant to confirm that the Applicant had informed OIOS in writing that she consented to the disclosure of her identity to the Safety and Security Section. Counsel for the Applicant replied by email on 10 December 2010, and the Respondent filed comments on that reply with the Registry on 13 December 2010.

Parties' contentions

21. The Applicant's contentions are:

- a. The application is receivable. OIOS is an integral part of the administrative machinery of the Organization and, in spite of its operational independence, cannot be considered as an entity distinct from the Secretariat, which must be held responsible for the decision of OIOS

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offended her dignity. In addition, the fact that confidential documents of the Organization had been left in a corridor for all to see compromises her professional integrity.

22. The Respondent's contentions are:

a. The application is irreceivable as the OIOS decision does not constitute an "administrative decision" within the meaning of article 2 of the Statute of the Tribunal and cannot be imputed to the Secretary-General because that Office is independent. Moreover, the Applicant did not, as she should have done, make a claim for compensation for loss of, or damage to, her personal belongings pursuant to staff rule 106.5 in force at the time, or administrative instruction ST/AI/149/Rev.4;

b. The Tribunal may concern itself only with the disappearance of the Applicant's personal belongings since the rules protecting the confidentiality of United Nations documents are intended to protect the Organization's interests and not those of its staff members;

c. The Applicant has failed to show that there was any connection between the harassment she claims to have suffered and the OIOS decision not to investigate. The arguments and claims she makes in this regard must therefore be rejected;

d. Under its mandate, as laid down in bulletin ST/SGB/273, and under the case law of the former UN Administrative Tribunal, OIOS has discretionary power in deciding whether to carry out an investigation at the request of a staff member. In the present case, it exercised its discretionary power appropriately and showed due diligence. Since the Applicant gave no written authorisation for the disclosure of her identity, OIOS was under no obligation to refer the matter to the Safety and Security Section;

e. The review of the matter by the Safety and Security Section was conducted in a timely, fair and adequate manner;

f. The Applicant has adduced no evidence that documents and personal belongings had disappeared from her former office. Moreover, it was her own responsibility to make arrangements for such items. Besides that, even if the Applicant had made a claim for compensation for loss or damage to personal effects under staff rule 106.5 then in force and administrative instruction ST/AI/149/Rev.4, such a claim could not have succeeded on the merits;

g. The Applicant has failed to discharge the burden of proof with regard to the allegations of malice, bad faith, prejudice and harassment.

Judgment

23. The Tribunal considers, first, that the Applicant's request for the production by the Respondent of a number of documents is not justified in the present case, and that the pleadings and documents already on the file afford sufficient material on which to base its decision.

24. Moreover, while the Tribunal finds it regrettable that the Respondent raised the question of inadmissibility only at a very late stage, it is bound to address it before ruling on the lawfulness of the contested decision as this is a matter of the Tribunal's jurisdiction which it would, in any event, have been bound to raise on its own motion (Judgment UNDT/2011/005, *Comerford-Verzoo*).

25. In this connection, it should be remembered that the application in the present case was transferred to the Dispute Tribunal pursuant to General Assembly resolution 63/253, which decided that all cases pending on 1 January 2010 before the former UN Administrative Tribunal would be transferred with effect from that date to this Tribunal.

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terms of employment of such staff members” (article 2.1). That Tribunal made it clear through its case law that, in order to be receivable, an application must invoke an administrative decision whereby the applicant was harmed. It defined, notably in Judgment No. 1157, Andronov (2004), what was meant by an administrative decision and stated, in Judgment No. 1213 (2004): “The Tribunal must first make a determination on the issue of receivability. A finding that the case is not receivable would negate the need to enter into its merits. The essential element of an appeal is that there is a contested ‘administrative decision’.”

27. Article 8 of the Statute of the present Tribunal provides that “[a]n application shall be receivable if ... [t]he Dispute Tribunal is competent to hear and pass judgment on the application, pursuant to article 2 of the present statute”. Article 2 of the Statute states that the Tribunal shall be “competent to hear and pass judgment on an application filed ... against the Secretary-General as the Chief Administrative Officer of the United Nations

36. Resolution 48/218 B provides that the purpose of OIOS “is to assist the Secretary-General in fulfilling his internal oversight responsibilities in respect of the resources and staff of the Organization” (para. 5(c)), and bulletin ST/SGB/273 states that “[t]he purpose of this Office ... is to assist the Secretary-General in fulfilling his internal oversight responsibilities” (para. 1). What is more, the bulletin reaffirms, as does the resolution (para. 5(a)), that the Office “shall exercise operational independence under the authority of the Secretary-General” (para. 2).

37. The Tribunal considers that, while it is clear from the foregoing that the General Assembly intended to confer “operational independence” on OIOS—which prevents any staff member, even the Secretary-General, from giving it instructions in its investigative work—the General Assembly must, in stating that the Office acts under the authority of the Secretary-General, have intended to acknowledge that the Secretary-General was administratively responsible for any breaches or illegalities OIOS might commit. In fact, contrary to what the Respondent contends, in an organization like the United Nations it would be inconceivable for one of its offices to be able to act without potentially engaging the liability of the Organization and thus of the Secretary-General, in his capacity as Chief Administrative Officer.

38. Secondly, under both the former and the present internal justice systems, before filing an application with the Tribunal, the staff member must request the Secretary-General to review the contested decision or carry out a management evaluation. The purpose of that formal requirement, imposed by resolutions 55/159 and 63/253 respectively as a prior obligation on the staff member, is to allow the Secretary-General to overturn the contested decision if he considers it

with two principles, explained above, which are difficult to reconcile: on the one hand, the operational independence of OIOS and on the other, the binding nature of the request to the Secretary-General for review or management evaluation of the decision taken by OIOS in the exercise of its investigative function. When faced with apparently contradictory instruments of equal value, the Tribunal must necessarily give precedence to the staff member's right of access to justice. It must find, therefore, that the fact that the Secretary-General may not modify the

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complete confidence These procedures ... are designed to protect individual rights, the anonymity of staff and others, due process for all parties concerned and fairness during any investigation, as well as to protect against reprisals.

...

identities without their consent. Those procedures are set out in ST/AI/397 of 7 September 1994 ...

57. It is clear from the foregoing that OIOS is bound to protect the anonymity of staff members who contact it to report cases of presumed irregularity and that it may not disclose their identity to another unit unless it has obtained their prior consent to do so: if it does not, its staff members risk liability under paragraph