



UNITED NATIONS DISPUTE TRIBUNAL

Order No.: 12 (ALU/2010)
Date: 3 February 2010
Original: English

Before: Judge Adams
Registry: New York
Registrar: Hafida Lahiouel

WASSERSTROM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDERS ON RECEIVABILITY AND
PRODUCTION OF DOCUMENTS**

Counsel for applicant:
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Counsel for respondent:
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Introduction

1. The applicant made a complaint of retaliation to the Ethic Office under ST/SGB/2005/21. A credible case of retaliation was found and the matter was referred to the Office of Internal Oversight Services (OIOS) for investigation. The investigation concluded there was no retaliation. The Director of the Ethics Office (Director) adopted this conclusion. The applicant contends that the report was significantly flawed and the Director's decision that there was no retaliation was wrong as it was based upon insufficient grounds. There is a preliminary issue as to whether the decision is an "administrative decision" within the meaning of art 2.1(a) of the Statute of the Tribunal.

Background

2. The applicant, who was a senior United Nations official in the United Nations Interim Administration Mission in Kosovo (UNMIK), alleged that certain actions, supported by other senior UN officials, concerning the management of public enterprises in Kosovo were unlawful. He cooperated with an ensuing investigation undertaken by OIOS and provided other information of what he alleged to be impropriety, which later came to his attention.

3. In March 2007 the applicant had been approached by the management of certain companies to discuss the possibility of employment, should he leave UNMIK. As the applicant had no plans to leave UNMIK at the time these were inconclusive but the applicant was informed on 8 May 2007, shortly after the investigation commenced, that his secondment to UNMIK would expire on the 30 June 2007 for budgetary reasons and, on 24 May 2007, he entered into an employment contract with the companies, to commence on 1 July 2007 after termination of his UNMIK assignment.

4. On 25 May 2007 the Special Representative of the Secretary-General of UNMIK (SRSG), on becoming aware of the applicant's external employment contract, sought legal advice about its propriety and was informed that the applicant had violated UN staff regulations. On 31 May 2007, several officials met with the applicant and he was informed of the investigation concerning the contract and asked to provide a copy of the contract and to prepare a defence in writing. On the same day, the applicant's personal assistant filed a request for the applicant to travel to Greece. The relevant UN official confirmed that there were no objections from Mission management and approved his travel. On 1 June 2007 the applicant was informed that he had been placed on special leave and that a formal investigation for possible conflict of interest had been initiated.

5. It is a very live question whether there was a proper basis for commencing such an investigation and it also appears that the requirements for so doing were not followed and the rights of the applicant were ignored. If this were so, it obviously raises the question why the requirements were departed from and thus whether it was retaliatory. The applicant then took his belongings from his office, having earlier informed management that he was vacating, made an image of the hard drive of his office computer (which, in the circumstances was a perfectly reasonable precaution), placed them in his vehicle and left Pristina for the Kosovar/Greek border. There then followed a number of apparently high-handed, perhaps unlawful, certainly extraordinary, actions to detain the applicant and search his vehicle and his home. A poster containing his photograph was placed at the entrances of UNMIK headquarters to ensure that he would not be allowed to enter and "Do not cross" tape was placed on his office for some considerable time, long after investigations had concluded that there was no wrongdoing on the applicant's part. Not surprisingly, all these actions had a predictable and, it might have been, intended devastating effect upon the applicant's reputation, magnified by widespread publicity. Other seriously adverse administrative actions were taken against him.

6. On 3 June 2007 the applicant filed a formal complaint of retaliation under ST/SGB/2005/21 with the Ethics Office. This was a detailed document, which set out clearly the commencement and course of his differences about corporate governance with senior officials, commencing in September 2006 with his supervisor, the Political Deputy of the SRSG and later involving the Legal Advisor which, it would be reasonable to infer, also involved the SRSG and very likely other senior officials. The Ethics Office concluded that he had engaged in a “protected activity” (pursuant to ST/SGB/2005/21, discussed below) and that a *prima facie* case of retaliation against him had been made out. On 29 July 2007 the Ethics Office referred the case to OIOS for investigation, which reported on 8 April 2008 that there had been no retaliation because the decision to close the applicant’s office and the non-extension of his contract preceded his cooperation with OIOS, and because the initiation of the preliminary investigation into the applicant’s possible conflict of interest was duly authorized and warranted, the investigative steps were lawful and not influenced by the persons against whom the applicant had complained. Some mild criticisms were made of certain “shortcomings”.

7. In a letter of 21 April 2008, the Director gave the applicant a summary of the findings of the investigation and concluded as follows –

As a consequence of OIOS’ detailed and thorough investigation of this matter, which entailed interviews with UNMIK staff, review of telephone and e-mail records during the relevant time periods, OIOS’s conclusion is that the alleged retaliatory acts, although having been found to be disproportionate in relation to the conflict of interest issue, are in no way linked to the protected activities. There, therefore, cannot be a finding of retaliation in this case.

Instruments

8. Article 2.1 of the Statute of the United Nations Dispute Tribunal defines the jurisdiction of the Tribunal:

The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual, as provided for in article 3,

3.5 The Ombudsman shall not be compelled by any United Nations official to testify about concernsan sh5

an activity protected by the present policy. When established, retaliation is by itself misconduct.

...

Section 5

Reporting retaliation to the Ethics Office

5.1 Individuals who believe that retaliatory action has been taken against them because they have reported misconduct or cooperated with a duly authorized audit or investigation should forward all information and documentation available to them to support their complaint to the Ethics Office as soon as possible ...

5.2 The functions of the Ethics Office with respect to protection against retaliation for reporting misconduct or cooperating with a duly authorized audit or investigation are as follows:

(a) To receive complaints of retaliation or threats of retaliation;

(b) To keep a confidential record of all complaints received;

(c) To conduct a preliminary review of the complaint to determine if (i) the complainant engaged in a protected activity; and (ii) there is a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation.

...

5.5 If the Ethics Office finds that there is a credible case of retaliation or threat of retaliation, it will refer the matter in writing to OIOS for investigation and will immediately notify in writing the complainant that the matter has been so referred. OIOS will seek to complete its investigation and submit its report to the Ethics Office within 120 days.

...

5.7 Once the Ethics Office has received the investigation report, it will inform in writing the complainant of the outcome of the investigation and make its recommendations on the case to the head of department or office concerned and the Under-Secretary-General for Management. Those recommendations may include disciplinary actions to be taken against the retaliator.

5.8 If the Ethics Office finds that there is no credible case of retaliation or threat of retaliation but finds that there is an interpersonal problem within a particular office, it will advise the complainant of the

existence of the Office of the Ombudsman and the other informal mechanisms of conflict resolution in the Organization.

...

Section 6

Protection of the person who suffered retaliation

6.1 If retaliation against an individual is established, the Ethics Office may, after taking into account any recommendations made by OIOS or other concerned office(s) and after consultation with the individual who has suffered retaliation, recommend to the head of department or office concerned appropriate measures aimed at correcting negative consequences suffered as a result of the retaliatory action. Such measures may include, but are not limited to, the rescission of the retaliatory decision, including reinstatement, or, if requested by the individual, transfer to another office or function for which the individual is qualified, independently of the person who engaged in retaliation.

...

11. The Ethics Office is established and its terms of reference created in ST/SGB/2005/22:

Section 1

Establishment of the Ethics Office

1.1 The Ethics Office is established as a new office within the United Nations Secretariat reporting directly to the Secretary-General.

1.2 The objective of the Ethics Office is to assist the Secretary-General in ensuring that all staff members observe and perform their functions consistent with the highest standards of integrity required by the Charter of the United Nations through fostering a culture of ethics, transparency and accountability.

Section 2

Appointment of the head of the Ethics Office

The head of the Ethics Office shall be appointed by the Secretary-General and will be accountable to the Secretary-General in the performance of his or her functions.

Section 3

Terms of reference of the Ethics Office

3.1 The main responsibilities of the Ethics Office are as follows:

(a) Administering the Organization's financial disclosure programme;

(b) Undertaking the responsibilities assigned to it under the Organization's policy for the protection of staff against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations;

(c) Providing confidential advice and guidance to staff on ethical issues (e.g., conflict of interest), including administering an ethics helpline;

(d) Developing standards, training and education on ethics issues, in coordination with the Office of Human Resources Management and other offices as appropriate, including ensuring annual ethics training for all staff;

(e) Such other functions as the Secretary-General considers appropriate for the Office.

3.2 The Ethics Office will not replace any existing mechanisms available to staff for the reporting of misconduct or the resolution of grievances, with the exception of certain functions assigned to the Ethics Office under section 3.1 (b) above.

3.3 The Ethics Office shall maintain confidential records of advice

Case No. UNDT/NY/2009/044/JAB/2008/087

Order No.19 (NY/2010)

The respondent's submissions to the Tribunal

17. An “administrative decision” within the meaning of the Statute must be made on behalf of the Secretary-General within former Staff Regulation 11.1 (ST/SGB/2001/8). The Ethics Office has “independent status” (par 161(d) A/RES/60/1) reporting directly to the Secretary-General in relation to the discharge of its mandated responsibilities which are advisory in nature and therefore do not entail the ability of its Director to make administrative decisions on behalf of the Secretary-General. The functions conferred on the Office by ST/SGB/2005/21 in relation to retaliation do not involve the making of administrative decisions. The Director’s communication to the applicant, based on the OIOS report, that there had been no retaliation is not an administrative decision within the meaning of former Staff Regulation 11.1. Since there is no decision-making power, it follows that no administrative decision can be taken.

18. The Ethics Office is relevantly identical to that of the Ombudsman which is not part of the hierarchical structure of the Administration and is an intermediary rather than a decision-maker, its lack of

adverse publicity and the non-renewal of his contract. The decision of the Director that there was no retaliation on the basis of the investigation report, which must have been seriously flawed, deprived him of these

for example, in sec 3.1 of ST/SGB/2005/22, let alone its meaning in ST/SGB/2005/21. Not only must management attempt to identify who actually is (or are) accountable for the functions committed to it but, more to the point, so must the Tribunal. Undertaking intellectual acrobatics is fun for solving cryptic crosswords but resolving the questions of legal rights and obligations should not require them. It involves fudging boundaries, filling gaps, re-constructing language and deriving conclusions that far too much depend upon the accidental mind-set of a particular judge of the Tribunal. This is one of a number of unfortunate examples of bad drafting. It does not need a degree in management to understand that significant responsibilities must be conferred in such a way as to make it completely clear who is charged with undertaking them.

22. The Ethics Office “reports directly to the Secretary-General” and the head of the office is appointed by and is accountable to the Secretary-General in the performance of his or her functions: secs 1.1 and 2 of ST/SGB/2005/22. The head of the Office, no doubt, is responsible for its proper functioning, yet he or she is not the Office and does not embody or stand for the Office, in marked contrast with the Ombudsman who, it could fairly be said, holds the office of Ombudsman, using the term “office” in its narrow and more precise sense. This is of more than mere theoretical significance as one comes to consider the responsibilities that are entrusted to the Office as such, in particular, the responsibility to decide whether retaliation occurred and the ensuing recommendations.

23. As to the respondent’s reliance on A/RES/60/1, although the recommendations of the General Assembly must be given serious consideration, the request that the Secretary-General “submit details on an ethics office with independent status” does not usefully inform the question here in issue or assist in interpreting and applying the provisions of ST/SGB/2005/21, which must, of course, be regarded as accepted by the General Assembly as fulfilling its request, else it would not have approved it.

24. On the other hand, although the Ethics Office does have certain advisory functions, in relation to retaliation its functions cannot be accurately so described. It is the obligation of the Ethics Office not only to refer allegations of retaliation, where a credible case is demonstrated, to OIOS but also in due course to decide whether retaliation did or did not occur for the purposes of exercising the functions conferred on it by sec 6 of ST/SGB/2005/21. The process by which the Ethics Office determines that retaliation occurred is not mentioned except for the requirement that it involve consideration of the OIOS report. Nevertheless, by whatever name, it is a decision. Furthermore, the decision as to whether retaliation occurred or not must be made by the Ethics Office (or the Director) and it cannot be delegated to OIOS. It follows from this that the investigation report must be carefully examined and an independent decision made as to the occurrence of retaliation or otherwise. Where the report contains inferences of fact, the Ethics Office must consider whether the primary material justifies the inferences. Where the report states conclusions of law, the basis for those conclusions must be examined to ensure that the investigator or the source of the conclusion is properly qualified to give it.

25. Retaliation against a staff member for the performance of his or her duty by another staff member is a violation of the retaliator's fundamental obligations

Case No.

Organization's operations in so far as they impinge upon the staff member's position

of the UN. By virtue of the interaction between the rules relating to review of administrative decisions and management evaluation on the one hand and, on the other, the ability to apply to the Tribunal for a decision, the decision must also be one that is capable of being corrected by the Secretary-General pursuant to his or her powers under art 97 of the Charter as “chief administrative officer” of the Organization. As will be seen, however, this does not necessarily mean that the impugned decision must be one that can be made by the Secretary-General.

29. Whether a decision is capable of being litigated in the internal justice system, including, of course, the Tribunal, is governed, as I have already mentioned, by the Statute and depends upon whether it is asserted to be in breach of the staff member’s contract of employment, which includes the legal instruments governing the operations of the Organization. Those instruments provide, amongst other things, for particular processes to be followed in order to make certain decisions. Those processes might be explicit or implied as a condition of the contract. The requirement of fair dealing is an example of the latter. It is necessarily implied in the instruments governing management of the UN that a decision maker must, when making a decision, take into account only relevant matters, ignore irrelevant mat ms5 Td[(requi9s(T Tdr

the UN and a staff member fall within the jurisdiction of the Tribunal under article 2.1(a) of its Statute if this decision is capable of being affected or changed by the Secretary-General. This is so, not by virtue of any administrative law considerations but by a straightforward interpretation of the instruments forming part of the contract.

30. Of course, whether an *act* alleged to constitute a breach of the contract of employment is administrative in character and is a decision are jurisdictional facts which the Tribunal is empowered to determine and its findings in those respects are valid and *intra vires*, even if it ultimately holds that there was no decision or that, if there were one, it was not administrative. The distinction between an “act” and a “decision” is clear enough; an act will usually be preceded by a decision to perform it. But not every decision is administrative in character. Thus, the decision by a manager to sexually harass a staff member will not be an administrative decision, although it may attract disciplinary measures. On the other hand, a decision made in relation to the staff member’s employment, say, in relation to work allocation, transfer, promotion etc, in furtherance of sexual harassment is necessarily administrative in character and thus within the Tribunal’s jurisdiction to consider. This is not dissimilar to the approach of the International Labour Organization Administrative Tribunal in Judgment 1203, *Horsman, Koper, McNeill and Petitfils*, cited with approval by Laker J in *Planas* UNDT/2009/086 at [11]ff.

31. It will often be the case that following the administrative law path, as it were, will lead to the same conclusion as the contractual law path. The former path (if I may take the metaphor somewhat further) is, however, often winding and badly marked, whilst the latter is relatively straightforward and well marked. If the *Andronov* formula indeed correctly stated the administrative law, then its liability to confuse with unnecessary complexity is obvious. Thus, it really does not matter whether a decision is unilateral or joint, nor does it matter how many individuals are affected: if the decision is in breach of an explicit or implicit term of the staff member’s contract, these considerations are irrelevant; and the only “direct legal

(though I observe that the letter of 21 April 2008 to the applicant was coy as to who had actually evaluated the investigator's report and decided that there was no retaliation). Accepting the parties' assumption as correct for the present, the Director was bound, by exercising his own judgment, to make a decision as to whether there had been retaliation against the applicant, since without doing so, he could not have determined whether to exercise the powers conferred by sec 6 of ST/SGB/2005/21. Furthermore, if there were a decision that retaliation was established those powers must have been exercised reasonably and properly having regard to the purpose for which they were conferred. Accordingly, the decision as to what recommendations were made would be an administrative decision, though it could not directly be made by the Secretary-General. Here, it would have been inevitable that the (Director of the) Ethics Office would have recommended that steps be taken "correcting [the] negative consequences suffered" by the applicant. The applicant had a right to the advantage that such a recommendation would have given. Moreover, the recommendation would have required due and proper consideration by the "head of department or office concerned" and carried the concomitant likelihood that it would have been accepted to a greater or lesser extent. The decision as to implementation of the recommendations would also be an administrative decision which, of course, would be entirely under the ultimate control of the Secretary-General. This process was mandated by ST/SGB/2005/21, incorporated into the applicant's contract with the UN, and the failure, if any, to comply with it was a breach of that contract.

35. It was the bounden duty of the Director, therefore, to carefully assess the adequacy of the investigation report, draw reasonable conclusions from the facts disclosed in it and consider all significant matters that reasonably impinged upon the question whether retaliation had occurred. The letter of 21 April 2008, at least arguably, appears to disclose that there was no independent consideration of the conclusions rightly to be drawn from the investigation. It may be, as well, that the applicant had a right to be heard on an adverse investigation report before a decision was made, but I will leave this question for later determination. On the face of it, at least, a rational decision-maker would seek a response from someone in the

applicant's position before making a final decision that no retaliation occurred, having regard to the vital importance of a correct decision, not only in the interests of the staff member, but also the manifest interests of the Organization. Even a latent error in the investigation report, for example, one exposed by the applicant's response, may, if it were significant, vitiate the decision which would (on this hypothesis) be based upon a significant error of fact. This is not to apply administrative law rules (though they might be identically expressed) but to state what follows from the importation into the applicant's contract the terms of the applicable bulletins; the right to a decision that is properly founded is a contractual right of the staff member.[(Or)6(der)001 Tc (ound)001bulle.01

(Signed)

Judge Adams

Dated this 3rd day of February 2010