



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/097

Order No.: 308 (NY/2010)

Date: 19 November 2010

Original: English

Before: Judge Marilyn J. Kaman

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

DUDLEY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON

SUSPENSION OF ACTION

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Christine Graham, ALS/OHRM, UN Secretariat

Michael Dudley, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant has filed with the United Nations Dispute Tribunal (“UNDT”) an application for a suspension of action which contests “the decision of the Ethics Office to proceed with an investigation into [his] conduct”. At the hearing it became clear to the Tribunal that in fact, the ultimate decision could be more aptly expressed as the decision of the Respondent to agree to an alternative investigating mechanism as recommended by the Ethics Office. This is discussed in more detail below. The Tribunal considers this to be the most efficient and fair approach to considering the matter.

Procedural history

2. On 12 November 2010, the Applicant filed his request for a suspension of action with the UNDT. At the time of the filing his application, the Applicant had not requested a management evaluation of the decision.

3. On 16 November 2010, the Respondent filed his Reply.

4. On 18 November 2010, the Applicant filed, without leave of the Tribunal, a document titled “Applicant’s Additions Comments on Respondent’s Submission”. In that document, the Applicant indicated for the first time that he had made a request for management evaluation at 14:03 hours on 16 November 2010.

5. On 18 November 2010, the Tribunal conducted a hearing on the merits of the Applicant’s request for a suspension of action. At the hearing, the Respondent stated that while the Applicant had failed to request a management evaluation before the application for a suspension of action had been filed with the UNDT, the Respondent nevertheless would not object to the Applicant’s application on that basis.

complainants and the Applicant were members of OIOS, the Ethics Office Director indicated that an “irreconcilable conflict of interest” existed that warranted establishment of an alternative investigating mechanism under ST/SGB/2005/21, sec. 5.10.

12. On 1 October 2010, the Chef de Cabinet concurred that proceeding under ST/SGB/2005/21, sec. 5.10 for an alternative investigating mechanism would be a reasonable course of action in the circumstances.

13. On 15 October 2010, the Applicant was asked to attend a meeting with the Ethics Office Director and another Ethics Officer. According to the Applicant, during the meeting, the Ethics Office Director informed the Applicant that she was investigating him for alleged retaliation regarding the electronic performance appraisals of two staff members in the Investigations Division.

14. By a 29 October 2010 memorandum from the Ethics Office Director to the Director, Office of Programme Planning, Budget and Accounts, it is again explained that OIOS is normally the body designated to investigate complaints of retaliation. In this case, however, since both complainants and the subject of the investigation (the Applicant) are OIOS staff members, the Ethics Office decided it would be inappropriate for OIOS to conduct the investigation in this case. After consultation with the Under-Secretary-General, Department of Management (“USG/DM”); the Under-Secretary-General, OIOS; and Assistant Secretary-General and Deputy to the Under-Secretary-General, Office of Legal Affairs, it was decided that the complaints involving the Applicant would be referred to an alternative investigating mechanism under ST/SGB/2005/21.

15. On 8 November 2010, the Ethics Office Director informed the Applicant in writing a) that the Ethics Office had determined that a *prima facie* case of retaliation existed; b) that an alternative investigating panel was being constituted, pursuant to ST/SGB/2005/21 (“Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations”), sec. 5.10; c) of the

composition of the Panel; d) of the timetable for its investigation; and e) of the fact that the Applicant would be provided a copy of the Panel's Terms of Reference prior to him being interviewed by the Panel.

Contentions of the parties

16. The Applicant:

a. questions whether the whistleblower has acted in good faith as required by SGB/2005/21, without which no *prima facie* case of retaliation can be made;

b. states that it is, therefore, "premature" to commence an investigation into the Applicant's conduct;

c. states that "the very basis for her unlawful decision is seriously compromised";

d. argues that the Ethics Office Director has a conflict of interest in overseeing the investigation and that the Ethics Office Director is pursuing a "stated agenda ([General Assembly document A/65/343 entitled *Activities of the Ethics Office, Report of the Secretary-General*]) to obtain the authority to investigate" which has resulted in a hasty, if not reckless, conclusion that a *prima facie* case of retaliation by the Applicant exists;

e. challenges the authority of the Ethics Office Director to conduct such an investigation and requests that the USG/DM receive the investigation report;

f. asserts that the Ethics Office Director has gone beyond her mandate, as SGB/2005/21, para. 5.10 only gives the Ethics Office Director authority to recommend alternative means to investigate, but does not grant authority to execute an investigation;

Considerations

18. Under the Statute, art. 2.2 (implemented by art. 13.1 of the Rules of Procedure),

[t]he Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage.

19. In order for the Tribunal to act upon the Applicant's request for a suspension of action, at issue must be a *bona fide* "administrative decision", that decision must have been made the subject of an ongoing management evaluation, and the three criteria of *prima facie* unlawfulness, particular urgency and irreparable harm must *all* exist.

What decision is being contested, and by whom was it made?

20. The Applicant identifies the contested administrative decision as "the decision of the Ethics Office to proceed with an investigation into my conduct."

21. With respect, and recognising that the Applicant is self-represented, the Applicant's submissions actually address three different decisions. The Applicant, as well, incorrectly names the decision-maker for one of those decisions.

22. SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) governs, *inter alia*, the procedures to be implemented when a staff member reports a case of retaliation (as defined). Under sec. 5.1, individuals who believe that retaliatory action has been taken against them should forward all information to the Ethics Office. Under sec. 5.2(c), it is the obligation of the Ethics Office thereafter to receive complaints, to keep a confidential record of complaints received, and

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.

23. The Ethics Office Director made her decision on 28 September 2010 that a *prima facie* case of retaliation for each complaint existed under ST/SGB/2005/21, sec. 5.2(c) (“*prima facie* case”).

24. The first decision that the Applicant challenges is the decision of the Ethics Office Director that a “*prima facie* case” of retaliation existed. This is clear from the Applicant’s submissions which articulate that the good faith of the whistleblower needs to be examined, without which a *prima facie* case does not exist, and in the Applicant’s statement in his 18 November 2010 submission, para. 2.5 that “the very

alternative investigating mechanism was a decision not made by the Ethics Office Director, but rather was one made by the Secretary-General.

Do the decisions at issue constitute administrative decisions?

28. As stated in former UN Administrative Tribunal Judgment No. 1157 *Andronov* (2004) at para. V:

...an “administrative decision” is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which is usually referred to as rules or regulations), as well as from those not having direct legal consequences.

29. Subsequent jurisprudence has amplified this definition. *Wasserstrom* Order No. 19 (NY/2010), as quoted in *Kamanou* UNDT/2010/93 provides:

[28] The question whether the correctness or propriety of a decision is within the jurisdiction of the Tribunal to determine is essentially a simple one: does the decision of the Administration breach a contractual right of the staff member.

30. Further, as noted in *Planas*

existence of a *prima facie* case. At most, her determination on this point is preliminary to what the Tribunal has identified as the second decision under challenge: the decision of the Ethics Office Director to recommend to the Secretary-

35. The concept that a recommendation is preliminary to an administrative decision being made was also discussed in *Elasoud* UNDT/2010/111:

While staff members are entitled to request the quashing of decisions not to appoint them to a post for which they have applied and, at that time, to criticise the future supervisor's recommendation, that recommendation is only a preliminary to the administrative decision not to appoint them and therefore has no direct legal consequence for their terms of appointment. The Secretary-General was therefore justified in considering that the contested recommendations were not appealable administrative decisions and, accordingly, in rejecting the appeal [emphasis added].

36. The Tribunal is of the opinion that the Applicant is seeking to take preemptive action, but that the key decision has not yet been taken relating to the matter being investigated (i.e., whether or not the Applicant engaged in retaliatory conduct).

37. It is noted that the only receivability issue raised by the Respondent is with

decision, as articulated under the UNDT Statute, art. 2.2 (“*prima facie* unlawfulness”).

40.

43. The Applicant's request for a suspension of action fails to meet the showing of *prima facie* unlawfulness.

Irreparable harm

44. The Tribunal specifically asked the Applicant what irreparable harm he would suffer as a result of the contested decision if it were implemented. In response, the Applicant replied that it was "difficult to assess." As correctly noted by the Respondent, the Applicant himself cannot identify the nature of irreparable harm.

45. The Applicant nevertheless posited that 1) there may be questions from media reporters, 2) the investigation would "make his job more difficult", and 3) gossip within the Organization would occur. In response, the Respondent noted that while the Applicant may be concerned about the prospect of media attention, such media focus has not yet occurred, and the Respondent's concerns are, at best, hypothetical.

46. In his written submissions, the Applicant cites as factors constituting irreparable harm the fact that his reputation may be "unduly impeached without any respect for fairness or the process to which [the Applicant] is due." Yet, as noted above and as conceded by the Applicant at the hearing, a possible outcome of the investigation is that the Applicant may be exonerated of the complaints lodged against him.

47. The Applicant also contends that the decision may affect negatively his candidature for internal positions. A vacancy announcement apparently has been circulated for the position that the Applicant now holds and for which position the Applicant "might" apply (the Applicant at the hearing also stated he has a live prospect for employment outside the Organization). The Applicant may in fact be incorrect in his concerns about the possible effect an Ethics Office investigation has on any candidacy of his for a position within, or outside of, the Organization.

48. Since the facts regarding supposed impact of the investigation on the Applicant's job prospects have not yet developed, the Tribunal cannot, as a basis for

finding irreparable harm, be in a position of speculating about what might, or might not, happen in the future. This is, of course, without prejudice to the Applicant bringing a case before the Dispute Tribunal if necessary, in the future.

49. The Tribunal did enquire of the Applicant as to how the contested administrative decision was in non-compliance with the terms and conditions of the Applicant's employment as Deputy Director, Investigations Division, OIOS. The Applicant's answer is revealing, for it also demonstrates that irreparable harm is lacking in this case. The Applicant stated the following:

- a. there will be an extensive amount of media attention, if this matter proceeds and he has already

resources and by what the Applicant sees as an improper aggrandisement of power by the Ethics Office Director.

52. The Tribunal considers that the Applicant's contentions regarding particular urgency fall short of the showing required for this criterion.

53. The Applicant's request for a suspension of action fails to meet the showing of particular urgency as to the Applicant's terms and conditions of employment.

Decision

54. The Applicant's request for suspension of action is rejected in its entirety.

(Signed)

Judge Marilyn J. Kaman

Dated this 19th day of November 2010