



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Case No. 2010-116

Case No. 2010-117

Bertucci

(Respondent/Applicant)

v.

Secretary-General of the United Nations

(Appellant/Respondent)

JUDGMENT

Translated from French

Before: Judge Jean Courtial, Presiding
Judge Sophia Adinyira
Judge Kamaljit Singh Garewal
Judge Mark P. Painter
Judge Inés Weinberg de Roca
Judge Luis María Simón

Judgment No.: 2011-UNAT-121

Date: 11 March 2011

Registrar: Weicheng Lin

Counsel for Respondent/Applicant:

JUDGE JEAN COURTIAL , Presiding.

Synopsis

1. In this case, in which Mr. Guido Bertucci is contesting the decision not to select him for the post of Assistant Secretary-General (ASG), the Appeals Tribunal decided two questions of law.

2. The first question of law involves the right to confidentiality. The Appeals Tribunal recalled that the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) had the right to order the production of any document if it was relevant for the purposes of the fair and expeditious disposal of the proceedings. It considered that in this case, the judge had sufficient grounds to order the production of documents withheld by the Administration concerning the process that had led to the contested administrative decision. The requirements of transparency and respect for law set out in General Assembly resolution 63/253 prevail over claims of confidentiality that may not be sufficiently specific and justified. In principle, when the Administration relies on the right to confidentiality in order to oppose disclosure

7. In Judgment No. UNDT/2010/080, the Dispute Tribunal noted that the Secretary-General had told the JAB that Mr. Bertucci had been among the candidates short-listed by the selection panel whose candidacy had been submitted for his consideration. During the proceedings before the Dispute Tribunal, counsel appointed by the Secretary-General argued that Mr. Bertucci had not been short-listed. As no evidence was adduced to support that allegation or to explain the change in the Administration's position, the Dispute Tribunal judge found that, on the basis of the evidence before him, Mr. Bertucci had been on the list of recommended candidates. He noted that it had not been proved that the person appointed ASG/DESA had had an interview.

8. The Dispute Tribunal held that the Secretary-General was duty-bound to respect the requirements of good faith and fair dealing, and that the fact that he had vast discretionary power to appoint high-level officials did not negate Mr. Bertucci's rights.

9. The Dispute Tribunal inferred from the reference to an administrative instruction on the staff selection system (ST/AI/2006/3) in the vacancy announcement for ASG/DESA, that the Secretary-General had intended to apply the main elements of the new procedure laid down in that instruction, in particular with respect to interviewing all candidates and giving priority to internal over external candidates.

10. The Dispute Tribunal held that it was incumbent on the Secretary-General to demonstrate that he had considered Mr. Bertucci's candidacy seriously and in good faith and that he failed to make that showing. It believed that the only conclusion that could be drawn from the Administration's refusal to produce the documents relating to the appointment process whose production it had ordered was that those documents would have supported Mr. Bertucci's arguments. It deduced from this that the decision not to appoint Mr. Bertucci was vitiated and was made in breach of the applicant's contractual entitlements.

11. Judgment No. UNDT/2010/080 was a default judgment against the Secretary-General. The Dispute Tribunal judge thus sanctioned the Administration's refusal to produce the pertinent evidence requested of it. The judge found that this sanction did not affect the rights of the Secretary-General, as the facts were not really contested.

12. The Dispute Tribunal found that Mr. Bertucci was entitled to claim compensation for the loss of a chance to be appointed ASG/DESA, compensation to redress the damage

asking itself whether the fact that the articles on the investigation of Mr. Bertucci appeared in the press could be legitimately taken into account in the consideration of the candidates.

21. The Secretary-General maintains that the Dispute Tribunal erred on a question of fact in considering that it had been misled by the Administration's counsel during the proceedings with regard to the date on which the Secretary-General appealed the orders and the binding nature of those orders, and exceeded its competence in ordering the appearance

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Article 18, paragraph 2, of the Rules of procedure of the same Tribunal provides: "The Dispute Tribunal may order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings." According to Article 19 of the Rules of procedure, "[t]he Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties".

39. As this Tribunal already stated in Judgment Calvani No. 2010-UNAT-032, it follows from these provisions that the UNDT has discretionary authority in conducting the proceedings and the production of evidence in the interest of justice. This power is conferred on the Tribunal so that there may be a fair and expeditious disposal of the case. The Tribunal is entitled to order the production of any document relevant to that end.

40. In this case, as the contested judgment shows, the judge had sufficient reason to consider it pertinent to order the production of documents withheld by the Administration for the fair and expeditious disposal of the case.

41. First, the question of whether the Secretary-General had intended to apply the appointment process set out in administrative instruction ST/AI/2006/3, in force at the time -- or at least certain parts of it -- did not have an obvious answer. On the one hand, section 3 entitled "Scope", paragraph 3.2, of the instruction did not explicitly exclude the appointment of ASGs -- though it should be noted that it did exclude appointments of staff selected to serve in the Executive Office of the Secretary-General or as special envoys of the Secretary-General -- and the job vacancy notice on the Galaxy site referred to the instruction as a whole. On the other hand, parts of the selection system as defined by the instruction seemed inappropriate for the appointment of an ASG, for example, proposing the filling of a vacancy by a central review body. While resolution 51/226 undoubtedly authorizes the Secretary-General to bypass the established procedures for appointing ASGs, there was no evidence that the Secretary-General had informed the candidates in advance, in the job vacancy notice or elsewhere, that he intended to exercise his discretionary power outside the established procedures and, if so, what procedure he had established in its stead.

42. Secondly, Mr. Bertucci's argument was based on the idea that the use of unfavourable publicity to adversely affect his candidacy was unfair, since ultimately no impropriety was imputed to him. This Tribunal does not object to the possibility that the Secretary-General may take into consideration the effect of articles in the press and concerns that representatives of Member States may have about them. Regarding the appointment of an ASG, such concerns are not irrelevant to the good-faith assessment of integrity, provided that the insinuations reflect the results of the investigation at the same time and that the adverse publicity does not result from a kind of conspiracy aimed at discrediting the candidate. In this case, it was relevant for the Tribunal to attempt to clarify this point.

43. Thirdly, the Dispute Tribunal judge noted in the contested judgment that it was not established that the external candidate who was appointed ASG/DESA, had been interviewed by the high-level selection committee. Seeking clarification of the process whereby the candidate who was ultimately appointed prevailed over Mr. Bertucci cannot be considered pointless.

44. Fourthly, and last but not least, the judge noted that the Administration had argued before the JAB that Mr. Bertucci had been one of the candidates short-listed for submission by the selection committee to the Secretary-General, but that subsequently it claimed before the Dispute Tribunal, without producing evidence, that Mr. Bertucci had not been short-

event, the Tribunal may not use a document against a party unless the said party has fsy

Judgment

55. The Judgments Nos. UNDT/2010/080 and UNDT/2010/117 are set aside. The adjudication of the case is remanded to the President of the Dispute Tribunal or the judge that the President shall designate.

56. Mr. Bertucci's claim for compensation in respect of costs for abuse of process is hereby rejected.

Original and Authoritative Version: French

Dated this 11th day of March 2011 in New York, United States.

(Signed)

Judge Courtial, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Garewal

(Signed)

Judge Painter

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Simón

Entered in the Register on this 19th day of April 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar