



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/092

Judgment No.: UNDT/2011/082

Date: 11 May 2011

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

NWOKEABIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Helen Morris, OSLA

Counsel for Respondent:
Bettina Gerber, UNOG

Introduction

1. The Applicant contests before the Tribunal the decision dated 11 February 2010 whereby the Officer-in-Charge of the Resource Management Service (“RMS”) of the United Nations Conference on Trade and Development (“UNCTAD”) confirmed to him that the memorandum from the Office of Internal Oversight Services (“OIOS”) dated 2 October 2009 constituted the final decision to close the investigation opened into the complaint he had filed after finding that a link had been set up without his authorisation between his official email address and the email address of another UNCTAD staff member.

2. The Applicant requests the Tribunal to:

a. Order his case to be remitted to the Management Evaluation Unit to be reconsidered on the merits;

b. Order the Respondent to compensate him for the damage sustained.

Facts

3. The Applicant entered the service of the United Nations in September 1984 as a staff member in the General Services category. Having passed the competitive examination for promotion to the Professional category, and occupied a number of posts, he was promoted on 6 September 2002 to the P-3 level and took up his duties in Geneva as Transnational Corporations Affairs Officer in the Division on Investment and Enterprise of UNCTAD.

4. On 2 February 2006, the Applicant noticed a malfunction in the email system about which he complained on 3 February 2006 to the UNCTAD IT Service, which found, after testing his email system, that an entry had been created in the Applicant’s personal address book linking his address to the email address of one of his colleagues. It was also found that on 20 December 2005, a modification had been made from his computer under his official email address as a result of which all email messages created from his mailbox or received at his email address had been, and continued to be, delivered to his colleague.

5. In March 2006, he asked the IT Service to investigate, and they forwarded his request to the Head of RMS, UNCTAD. On 6 March 2007, in the absence of a reply, he wrote to the Director of Administration asking what had been done regarding his request for an investigation, and the latter informed him on 16 March 2007 that the case had been transferred to OIOS for investigation.

6. By memorandum of 2 November 2009, the Officer-in-Charge, RMS forwarded to the Applicant a memorandum by OIOS of 2 October 2009 and informed him that, having conducted an investigation, OIOS had decided to close the case for lack of evidence.

7. On 30 December 2009, the Applicant filed an application with this Tribunal contesting the abovementioned decision of 2 November 2009. The case was registered by the Tribunal under number UNDT/GVA/2009/111 (“the first application”). On 29 January 2010, the Respondent filed his answer with the Tribunal, contending that the application was not receivable, as the Applicant had not requested a management evaluation of the contested decision.

8. Following a request by the Applicant for information, the Officer-in-Charge, RMS informed him by email on 11 February 2010 that the OIOS memorandum of 2 October 2009 that had been transmitted to him constituted the final decision to close the case and that no decision by UNCTAD was necessary.

9. By letter of 15 February 2010, the Applicant replied to the email of 11 February 2010 requesting clarification of the role of the Secretary-General in the investigation and the conclusions of OIOS. The Officer-in-Charge, RMS replied on the same day, advising him to contact the OIOS Investigations Division for further clarification.

10. The Applicant withdrew his first application to the Tribunal on 17 February 2010.

11. By Order No. 15 (GVA/2010) of 22 February 2010, the Tribunal took formal note of the withdrawal of the application filed on 30 December 2009.

12. On 31 March 2010, the Applicant requested a management evaluation of the decision of UNCTAD of 11 February 2010.

13. On 19 April 2010, the Management Evaluation Unit replied that the said decision of 11 February 2010 was not a new administrative decision but a confirmation of the decision by OIOS of 2 October 2009 of which he had been notified by memorandum of 2 November 2009, and that, as he had not requested a management evaluation following that memorandum, his request for management evaluation was inadmissible as it was time-barred.

14. On 17 June 2010, the Applicant filed his application with the Tribunal. On 21 July 2010, the Respondent filed his answer to the application, and on 9 August 2010 the Applicant submitted his observations.

15. By Order No. 53 (GVA/2011) of 18 April 2011, the Tribunal notified the parties of the decision of the Judge assigned to the case not to hold a hearing, and invited them to file their final written submissions. Neither party has filed any further submissions.

Parties' contentions

16. The Applicant's contentions are:

- a. The email of 11 February 2010 from the Officer-in-Charge, RMS, UNCTAD informing him that the Administration would be taking no action on his complaint is an administrative decision, while the decision of OIOS to close the investigation is not;
- b. According to the Secretary-General's bulletin ST/SGB/273, OIOS shall conduct investigations and transmit its conclusions to the Secretary-General together with its recommendation on the action to be taken;
- c. The Respondent's replies contradict those of the Administration;
- d. Four years elapsed between the Applicant's complaint and the contested decision, which has made the investigation impossible, as many

of the staff members involved have since left their posts. This is an inexcusable delay, which has prejudiced the Applicant. Though his original complaint was made on 1 March 2006, no action was taken until 6 March 2007, the date on which he asked what had been done regarding his complaint. This had enabled the staff member implicated to leave the Organization without being questioned;

e. His computer was removed on 7 March 2006 by the IT Service causing the loss of critical information concerning the tampering with his computer;

f. He was the subject of retaliation in the form of a threat in April 2007 on which, despite his request, no action was taken. He was the subject of allegations following the results of the investigation in November 2009.

17. The Applicant requests disclosure of the OIOS investigation report.

18. The Respondent's contentions are:

a. Paragraph 4 of circular ST/IC/1996/29 states that when OIOS has completed its investigation it must report the results to the Secretary-General, unless it determines that such action is unnecessary, and thus OIOS was competent to close the investigation;

b. UNCTAD did not take the final decision to close the case, the only decision taken was that of OIOS on 2 October 2009. By his current application, the Applicant is contesting the same decision he had contested previously, though he withdrew his first application;

c. The date of the final decision is 2 October 2009, and he was notified of that decision on 2 November 2009. The Applicant had 60 days in which to request a management evaluation pursuant to staff rule 11.2, but he only requested it on 31 March 2010. His application is therefore not receivable.

Consideration

19. The Applicant contests before the Tribunal the decision dated 11 February 2010 whereby the Officer-in-Charge, RMS, UNCTAD confirmed to him that the OIOS memorandum dated 2 October 2009 constituted the final decision to close the investigation into the complaint he had made on discovering that a link had been created without his authorisation between his official email address and that of another UNCTAD staff member.

20. In requesting the Tribunal to find the application not receivable, the Respondent contends that the Applicant has failed to comply with the 60-day time limit laid down in staff rule 11.2 in force at the time, which provides:

a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested.

21. The record shows that in March 2006, the Applicant requested an investigation into the technical problems he had noticed with his official email address, and that the Officer-in-Charge, RMS, UNCTAD informed him by memorandum of 2 November 2009 that the investigation conducted by OIOS had concluded and that that body considered the case to be closed, as shown by the attached OIOS document dated 2 October 2009.

22. It is thus perfectly clear that the content of the email of 11 February 2010 that was the subject of a management evaluation and also contested before this Tribunal is merely confirmation of the information given on 2 November 2009, namely that OIOS considered the case to be closed. It is common ground, however, that the Applicant did not request a management evaluation of the decision of 2 November 2009 within the prescribed time limit.

23. In arguing that the memorandum of 2 November 2009 is not an appealable administrative decision, the Applicant maintains that OIOS is a body whose competence is limited to making recommendations to the Secretary-General or the General Assembly, and that it therefore was not competent to decide to close the case as only the Secretary-General had such power.

24. Even assuming the Tribunal were to follow the Applicant's reasoning and take the view that, since the Applicant had made a complaint to the administration, the administration alone could give a response and, if necessary, close the case, it is nonetheless abundantly clear from the memorandum of 2 November 2009 that, rightly or wrongly, the Officer-in-Charge, RMS, on behalf of the Administration, took the view that the Administration was bound by the OIOS decision and therefore also decided to take no further action on the Applicant's complaint.

25. In addition, it is obvious from the fact that the Applicant contested the decision of 2 November 2009 in an earlier application dated 30 December 2009, which he withdrew on 17 February 2010, that he was not under any misapprehension about the final nature of that decision, nor was he misled by any mistake of law on the part of the Administration.

26. Where a staff member receives a decision from the Administration he considers to be unlawful because, as in this case, it was taken by a body he regards as incompetent, he must, if he intends to contest that decision, request a management evaluation of it within the time limit prescribed, on the very grounds that the author of the decision lacked competence, and not simply ask the Administration to correct its error by taking a new decision.

27. In accordance with the case-law of the United Nations Appeals Tribunal as laid down in its Judgment *Sethia* 2010-UNAT-079 of 29 October 2010, a staff member may not contest a reply by the Administration the sole purpose of which is to confirm a previous administrative decision. In the present case, only the decision of 2 November 2009 could be contested by the Applicant and, for his application to the Tribunal to be receivable, he would have had to request a

management evaluation of that decision within the 60-day time limit. The Applicant did not do so, having made no such request until 31 March 2010.

28. It follows, without the need arising to request the Respondent to produce other documents, that the application must be dismissed as not receivable.

Conclusion

29. For these reasons, the Tribunal DECIDES:

The application is dismissed.

(Signed)

Judge Jean-François Cousin

Dated this 11th day of May 2011

Entered in the Register on this 11th day of May 2011

(Signed)

Víctor Rodríguez, Registrar, Geneva