



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/040
(UNAT 1646)
Judgment No.: UNDT/2011/125
Date: 11 July 2011
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

MURATORE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Myriam Foucher, UNOG

Introduction

1. By application filed with the former United Nations Administrative Tribunal on 22 September 2008, the Applicant contests the decision of the Ethics Office that the events about which he had lodged a complaint did not constitute retaliation.

2. He requests:

a. Immediate reinstatement as a P-4 Human Rights Officer in the Office of the United Nations High Commissioner for Human Rights (“OHCHR”);

b. That his performance be assessed under the Performance Appraisal System (“PAS”) pursuant to rule 301.4 (a) of the former Staff Rules;

c. Compensation for moral and material damage suffered.

3. The case, which was pending before the former UN Administrative Tribunal, was transferred to the United Nations Dispute Tribunal on 1 January 2010 pursuant to the transitional measures set forth in General Assembly resolution 63/253.

Facts

4. The Applicant joined OHCHR on 19 July 2004 as a P-3 Human Rights Officer in the Africa Unit, Capacity Building and Field Operations Branch (“CBB”), on a three-month short-term appointment. His contract was extended several times until June 2006.

5. Relations between the Applicant and his supervisor, the Africa Team Coordinator, deteriorated in late 2004. The Applicant informed the Officer-in-Charge of CBB of these issues in December 2004. He subsequently made a number of complaints to management that he was being discriminated against and

harassed by his supervisor and requested that steps be taken to resolve the situation.

6. On 15 May 2005, the Applicant was transferred to the Europe, North America and Central Asia Unit (“ENACA”) on a short-term contract-appointment as desk officer for Russia, Belarus and Ukraine.

7. On 31 March 2006, the Applicant complained to the then recently appointed Chief of CBB about certain comments and actions by the Coordinator of ENACA, the Applicant’s supervisor at the time, in particular during the selection process. The Applicant believed that he was the victim of retaliation by the ENACA Coordinator.

8. The Applicant requested the intervention of other authorities, including the Deputy High Commissioner for Human Rights, the Office of the Ombudsman and OHCHR staff representatives.

9. On 23 May 2006, the Applicant submitted to the Chief of the Ethics Office a complaint with a full description of the events which, according to him, constituted retaliation.

10. On 30 June 2006, the Ethics Office replied that the event reported by the Applicant did not demonstrate any professional misconduct for the purposes of bulletin ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) and noted that the Applicant had not made use of the internal mechanisms as outlined in section 3 of that bulletin and that he could use the avenues of appeal available for complaints other than retaliation, such as the Joint Appeals Board (“JAB”) or the Office of the Ombudsman.

11. On the same day, the Applicant expressed his disagreement with that decision in writing and requested that the Ethics Office review its conclusions. He also asked the Office to provide him with a copy of document A/58/708, cited in its response.

12. On 13 July 2006, the Applicant was informed that another review of his case had been carried out with the involvement of the Special Adviser to the Secretary-General on the Establishment of the Ethics Office. However, the Ethics Office remained of the same view.

13. In an email dated 14 July 2006, the Applicant reiterated his disagreement and again requested a copy of document A/58/708, which was subsequently sent to him.

14. On 21 July 2006, the Applicant again requested revision of the Office's decision.

15. On 9 August 2006, the Special Adviser to the Secretary-General on the Establishment of the Ethics Office replied that although the Applicant might feel that his rights had been violated, his case did not lie within the purview of the Ethics Office but that that opinion was without prejudice to his right to appeal to another forum.

16. On 4 September 2006, the Applicant sent another request for review of the decision made by the Ethics Office; by letter dated 14 December 2006, the Administrative Law Unit upheld that decision.

17. The Applicant filed an appeal with the JAB on 2 January 2007, at the end of which the JAB, in its report of 13 February 2008, recommended that the Secretary-General should reject the appeal on the merits. By letter dated 11 April 2008 from the Deputy Secretary-General, it was decided not to pursue the Applicant's case on the grounds that it was inadmissible.

18. On 26 September 2006, the Applicant submitted his appeal to the former United Nations Administrative Tribunal. As that appeal was pending before the Tribunal when it was abolished on 31 December 2009, it was transferred to the United Nations Dispute Tribunal on 1 January 2010.

19. A hearing on the case was held on 1 June 2011.

20. By Order No. 99 (GVA/2011) of 10 June 2011, the Tribunal requested the parties to provide additional input on the receivability *ratione temporis* of the application under review, which the Applicant and the Respondent did on 16 and 23 June 2011, respectively. On 25 June, the Applicant requested permission to submit observations on the Respondent's comments of 23 June. By Order No. 109 (GVA/2011), the Tribunal authorized him to do so. The Applicant submitted his observations on 5 July 2011.

Parties' contentions

21. The Applicant's contentions are:

a. With regard to the receivability of the application, the Tribunal stated in *Hunt-Matthes* UNDT/2011/063 that a decision of the Ethics Office was an administrative decision for the purposes of article 2.1(a) of the UNDT Statute and that accordingly, the application contesting the Office's decision on a complaint by a staff member was receivable;

b. The Applicant's request for review is not time-barred since the contested decision was taken on 9 August 2006 and he submitted his request to the Administrative Law Unit on 4 September 2006, less than two months later. Only in his second reply did the Respondent maintain that the application was inadmissible because it was time-barred, whereas there was nothing to prevent him from doing so sooner;

c. The Ethics Office abused its discretionary authority. The Organization's discretionary authority is not unlimited and cannot be invoked to violate United Nations rules;

d. In issuing the contested decision, the Ethics Office committed numerous flaws that undermined the whole review procedure: it did not give the reasoning for its decision or identify the legal foundation thereof, and it relied on an Office of Internal Oversight Services report that had no legal standing. The consideration of his case by the Ethics Office lacked

professionalism; the document that constituted its legal foundation, bulletin ST/SGB/2005/21, was ignored. The Office's only goal was to cover up professional misconduct. This last point is confirmed by the fact that the Office refused to hear the witnesses put forward by the Applicant;

e. The behaviour of the Africa Team Coordinator constituted professional misconduct as defined in section 1.1 of Secretary-General's bulletin ST/SGB/2005/21, i.e., a breach of the Organization's rules. Secretary-General's bulletin ST/SGB/2003/5, staff regulation 1.2(a), administrative instruction ST/AI/371 (Revised disciplinary measures and procedures), Chapter X of the former Staff Rules and rule 110.1 thereof prohibited abuse of authority and harassment in the workplace. In addition, the behaviour of the Africa Team Coordinator was aggravated by her discriminatory and racist motives. Her harassment could in no way be mistaken for an interpersonal conflict;

f. Whereas international civil servants have a duty to report cases of professional misconduct of which they are aware and have the right to be protected from retaliation, the Applicant suffered various kinds of retaliation from the Africa Team Coordinator, the Chief of CBB and the ENACA Coordinator. Specifically, he was eliminated from the selection process for available posts at OHCHR.

22. The Respondent's contentions are:

a. The Ethics Office does not make final decisions, only recommendations and advice, in accordance with bulletin ST/SGB/2005/21 and as acknowledged by the Deputy Secretary-General in her letter of 11 April 2008. The role of the Office is to be an intermediary, not a decision-maker. Its lack of decision-making power stems from its inability to impose an obligatory solution to a conflict between the Organization and a staff member;

b. Therefore, since it does not have decision-making power, there is no doubt that the Ethics Office is unable to take an administrative decision, as defined in former United Nations Administrative Tribunal's *Andronov* case. Since it does not have legal effect, the Ethics Office's recommendation cannot be characterized as an administrative decision and it is therefore not subject to appeal;

c. According to section 1 of ST/SGB/2005/22 (Ethics Office— establishment and terms of reference), the Ethics Office, whilst part of the United Nations Secretariat, reports directly to the Secretary-General and cannot be considered part of the Administration hierarchy;

d. The application is inadmissible for reasons of time. The contested decision was communicated to the Applicant on 30 June 2006. However, instead of submitting a request for review, the Applicant twice requested the Ethics Office to reconsider its decision. Reiteration of a request on which a decision has already been taken does not stop the deadline for contesting a decision from running (see *Sethia* 2010-UNAT-079). Thus, the time period established in former staff rule 111.2(a) began on 30 June 2006 and it was only on 4 September 2006 that the Applicant requested administrative review. Accordingly, the two-month time period for doing so had expired and the application is inadmissible;

e. In addition, the Ethics Office considered the allegations of professional misconduct and retaliation submitted by the Applicant, thereby exercising its discretionary authority, and concluded that the actions of the Africa Team Coordinator, the ENACA Coordinator and the Chief of CBB did not constitute professional misconduct or retaliatory conduct.

Consideration

23. Rule 111.2 (a) of the former Staff Rules, which were in force at the time of the events, read:

A staff member wishing to appeal an administrative decision ... shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing ...

24. Furthermore, former staff rule 111.2(f) provided that “[a]n appeal shall not be receivable unless the time limits specified ... have been met ...”.

25. It is clear from these provisions that the present application would only be admissible if the Applicant had submitted a request for review within two months of notification of the contested decision.

26. The facts as stated above indicate that, on 23 May 2006, the Applicant submitted a complaint to the Chief of the Ethics Office concerning acts that, in his view, constituted retaliation and that on 30 June 2006, the Ethics Office replied that the acts that he had reported did not show any retaliatory action. On the same day, the Applicant requested that the Office reconsider its decision; this shows that he did not misunderstand the reply that he had received.

27. Thus, while the Office confirmed its initial decision on 13 July 2006 and 9 August 2006, the time period for requesting review, established in rule 111.2(a) of the former Staff Rules, had begun on 30 June 2006. Contrary to what the Applicant submits and in accordance with the jurisprudence of the Appeals Tribunal in *Sethia* 2010-UNAT-079 subsequent confirmative decisions do not have the effect of stopping the deadline for contesting a decision from running.

28. It has been shown that the Applicant submitted his request for review on 4 September 2006, after the two-month time period established in the aforementioned provisions. Thus, the application cannot be considered receivable.

Conclusion

29. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

Translated from French

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(UNAT 1646)

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(Signed)

Judge Jean-François Cousin

Dated this 11th day of July 2011

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

(Signed)

Víctor Rodríguez, Registrar, Geneva