



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

GEHR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Ingeborg Daamen-Mayerl, UNOV/UNODC

Introduction

1. By an application filed on 30 September 2011, registered under Case No. UNDT/GVA/2011/064, the Applicant challenges the decision of the Ethics Office not to respond to his complaint of retaliation.

2. By way of relief, he seeks compensation for the violation, by the Ethics Office, of its obligations under the Secretary-General's bulletin ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) and for the continuous retaliation he suffered. He also asks the Tribunal to order that the cases of those officials who engaged in retaliation against him be referred to the Secretary-General for possible action to enforce accountability.

Facts

3. The Applicant joined the United Nations Office on Drugs and Crime ("UNODC") in Vienna in 2002 and, in 2007, he was appointed in the Terrorism Prevention Branch ("TPB") within the Division of Treaty Affairs ("DTA"). His fixed-term appointment was extended several times until 31 December 2011, when he was separated.

4. In early November 2009, the Chief of TPB and the Officer-in-Charge of DTA, respectively the Applicant's first and second reporting officers, conducted with the Applicant his mid-point review for the performance cycle from 1 April 2009 to 31 March 2010 ("2009-2010 performance appraisal").

5. In the fall of 2009, they announced to TPB staff that the Branch was to be reorganized and, on 8 December 2009, they informed the Applicant that his post would be abolished and that he would be reassigned to the position of Senior Legal Adviser which was to be created within the Office of the Chief of TPB.

6. In a document dated 31 January 2010 sent to the UNODC Executive Director, the Applicant explained that, in his view, the decision to abolish his post and reassign him to the position of Senior Legal Adviser was motivated by

extraneous considerations. He further explained that the decision in question had been preceded by prohibited conduct, including harassment, on the part of his first and second reporting officers.

7. By a letter dated 1 December 2010 addressed to the UNODC Executive Director, the Applicant again reported what he considered as prohibited conduct on the part of his first and second reporting officers.

8. In a letter of 8 December 2010 to the UNODC Executive Director, the Applicant referred to his letter of 1 December and reiterated his report of prohibited conduct.

9. On 14 December 2010, the Applicant submitted a complaint of retaliation to the Ethics Office. Relying on ST/SGB/2005/21, he claimed in particular that his first and second reporting officers had made negative comments in his 2009-2010 performance appraisal, that he had been denied the right to rebut the appraisal and that he had been threatened by his second reporting officer with the non-renewal of his contract. This, he submitted, constituted retaliation against him for having reported prohibited conduct to several officials and institutions in 2009 and 2010.

10. On 7 February 2011, the Applicant wrote to the Ethics Office, stating that he maintained his complaint of 14 December 2010 and, on 14 February 2011, he submitted to the Office additional documents which, he claimed, constituted another report of prohibited conduct.

11. On 31 March and 4 April 2011, he enquired with the Ethics Office as to when he would be informed of the outcome of the Office's preliminary review. An official from the Ethics Office responded to him on 5 April 2011 that he did not think that he would be able to complete the preliminary review before leaving on mission on the following week.

12. Replying to an email from the Applicant advising that oral hearings were soon to be held in relation to applications he had filed with the Tribunal, the Ethics Office official wrote to him on 19 April 2011 that the Tribunal "would appear to be the best forum for resolving this ... issue".

13. On 28 July 2011, the Applicant again enquired with the Ethics Office as to when he would be informed of the outcome of its preliminary review. Having received no reply to his query, on 5 August 2011 he sought management evaluation of the Ethics Office's decision not to respond to his complaint of retaliation.

14. By a letter dated 25 August 2011, the Applicant was informed that his request for management evaluation had been deemed irreceivable.

15. By an email of 6 September 2011, the Ethics Office official apologized for the delay and assured the Applicant that he would be informed of the outcome of the review by the end of the week. On the following day, the official enquired with the Applicant about the status of his cases before the Tribunal and requested further information.

16. On 23 September 2011, the Ethics Office official informed the Applicant that he would be notified about the outcome of the review upon the return from mission of the Director of the Office, that is, within one week.

17. On 30 September 2011, the Applicant filed with the Tribunal the application which forms the subject of the present Judgment, explaining that, as at that date, he had not received any response from the Ethics Office.

18. By a letter dated 17 October 2011 which the Applicant received on the following day, he was notified that, following a preliminary review of his complaint of retaliation, the Ethics Office had determined that a credible *prima facie* case of retaliation had not been established.

19. On 18 November 2011, the Applicant sought management evaluation of the determination conveyed in the letter of 17 October.

20. He was informed by letter of 15 December 2011 that the Management Evaluation Unit considered that it had no authority to evaluate the Ethics Office's determination as the Secretary-General had taken the position that he could not be held liable for the Office's acts or omissions.

21. On 26 December 2011, the Applicant filed with the Tribunal another application in order to challenge the determination made by the Ethics Office that a credible *prima facie* case of retaliation had not been established. This new application was registered under Case No. UNDT/GVA/2011/090.

22. A directions hearing was held on 18 April 2012, which the Applicant and Counsel for the Respondent attended by videoconference. During the hearing, the Applicant asked that this case be joined with Case No. UNDT/GVA/2011/090.

Parties' submissions

23. The Applicant's principal contentions are:

a. As per the Tribunal's case law, not taking a decision is also a decision;

b. The Ethics Office found that there was a *prima facie* case of retaliation in only 2 out of 134 complaints it received. This confirms that the Ethics Office does not carry out its obligations in accordance with the Secretary-General's bulletin ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations);

c. The Ethics Office also acted in breach of ST/SGB/2005/21 as it failed to review the Applicant's complaint of retaliation.

24. The Respondent's principal contentions are:

a. The Secretary-General cannot be held liable for the Ethic Office's acts or omissions which do not constitute appealable administrative decisions within the meaning of article 2.1(a) of the Tribunal's Statute. The term "administrative decision" was incorporated into the Statute with full knowledge and understanding of how the former UN Administrative Tribunal had interpreted it. That Tribunal considered that determinations made by the Ombudsman did not constitute administrative decisions in view of his/her independence. Likewise, the Ethics Office has an

independent status and the manner in which it carries out its operational responsibilities lies outside the effective control of the Secretary-General. The application is therefore not receivable;

b. The application is moot since the decision of the Ethics Office was communicated to the Applicant on 18 October 2011.

Consideration

25. In *Gehr* UNDT/2011/211, the Tribunal considered :

In cases where the Administration rescinds the contested decision during the proceedings before the Tribunal, the applicant's allegations may become moot. This is normally the case if the alleged unlawfulness is eliminated and, unless the applicant can prove that he or she still sustains an injury for which the Tribunal can award relief, the case should be considered moot.

26. In this case, the Applicant challenges the decision of the Ethics Office not to respond to his complaint of retaliation. Yet, after he filed this application with the Tribunal, the Ethics Office notified him of the outcome of its preliminary review of his complaint, and the Applicant then filed another application to challenge that outcome and complain about the Office's delay in responding to his complaint (Case No. UNDT/GVA/2011/090). The Tribunal observes that, in that latter application, the Applicant "refer[red] to the summary of facts provided under Case Number UNDT/GVA/2011/064" and that the pleas put forward in that application include those made in the former application. The application which forms the subject of the present Judgment is thus moot because the issue raised by the Applicant in this case, i.e., the Ethics Office's failure to respond to his complaint, is no longer at stake. Whether the delay in this process has caused a significant injury to the Applicant, is an issue to be treated within the context of Case No. UNDT/GVA/2011/090.

27. At the hearing, the Applicant requested that Cases Nos. UNDT/GVA/2011/064 and UNDT/GVA/2011/090 be joined.

28. According to article 19 of its Rules of Procedure, the 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”.

29. Given that the application is irreceivable, the Tribunal does not consider that a joinder with Case No. UNDT/GVA/2011/090 is appropriate for the fair and expeditious disposal of this case. The Tribunal accordingly rejects the Applicant’s request.

Conclusion

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

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 10th day of May 2012

Entered in the Register on this 10th day of May 2012

(Signed)

René M. Vargas M., Registrar, Geneva