



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.

6. At the hearing, the Applicant indicated that he currently was self-represented and that he had no objection to the Tribunal proceeding to consider his application for a suspension of action, without the Applicant being assisted by counsel.

Facts

7. The Applicant currently holds a fixed-term appointment as Deputy Director of the Investigations Division, Office of Internal Oversight Services (“OIOS”).

8. At a point in time that has not been identified, the Ethics Office received complaints of retaliation regarding the Applicant submitted by the Government Accountability Project (a non-profit, public interest organization dedicated to whistleblower protection and advocacy) on behalf of two staff members.

9. The Director of the Ethics Office conducted a preliminary review of the complaints pursuant to ST/SGB/2005/21, sec. 5.2 to determine a) if the complainants were engaged in a protected activity and b) whether a *prima facie* case existed that the protected activity was a contributing factor in causing the alleged retaliation.

10. On 28 September 2010, the Ethics Office determined that a *prima facie* case of retaliation for each complaint existed. In connection with this preliminary review under ST/SGB/2005/21, sec. 5.2, the Ethics Office Director, *inter alia*, stated:

Both complainants allege that their supervisor who is the Officer-in-Charge (OiC) of the Investigations Division, acted with retaliatory animus after they had reported concerns about this individual’s behaviour to the former Under-Secretary-General for Internal Oversight Services. I have concluded that there exists a *prima facie* case of retaliation in connection with both sets of allegations.

11. As a result of this finding, on 29 September 2010, the Ethics Office Director wrote to the Chef de Cabinet for the Secretary-General and requested to implement the provisions of ST/SGB/2005/21, sec. 5.10 for an alternative investigating mechanism regarding the complaints received. While OIOS is normally the body designated to investigate *prima facie* cases of retaliation, in this instance where both

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;

g. claims that the Ethics Office Director “has refuse [sic] to comply” with the express provisions of her mandate ... and will proceed, unless stopped, with an investigation without proper authority and great expense and with considerable impact on me and the Investigations Division”;

h. notes that the Applicant’s candidacy for the Director position currently held by the Applicant would be adversely impacted by an Ethics Office investigation;

i. claims that this would be an “illegal investigation based on a malicious complaint by and [sic] individual who has previously applied for the position of Deputy but lost out to [the Applicant] in that selection process”;

j. questions further whether the Ethics Office Director has acted “in good faith herself”, and contends that she is acting in “haste.”

17. The Respondent:

a. notes that the contested decision was not taken by the Ethics Office, but by the Secretary-General, as provided for in ST/SGB/2005/21, sec. 5.10, and thus, the decision is not *prima facie* unlawful;

b. observes that the Applicant has failed to demonstrate that the implementation of the decision to investigate would cause him irreparable harm; and

c. at the hearing revised his position regarding particular urgency, and stated that the matter was, indeed, particularly urgent, as the alternative investigating mechanism Panel was ready to begin its work; thus, time is of the essence.

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 basis for her unlawful decision is seriously compromised”.

25. Upon making her determination that a *prima facie* case of retaliation existed under ST/SGB/2005/21, sec. 5.2(c), the Ethics Office Director made the additional determination that a conflict of interest existed in having OIOS conduct the investigation, as would ordinarily be the case under ST/SGB/2005/21, sec. 5.5. Thus, the Ethics Office Director turned to ST/SGB/2005/21, sec. 5.10, which states:

5.10 Where, in the opinion of the Ethics Office, there may be a conflict of interest in OIOS conducting the investigation as referred to in section 5.5 above, the Ethics Office may recommend to the Secretary-General that the complaint be referred to an alternative investigating mechanism.

26. The second decision that the Applicant challenges is the decision of the Ethics Office Director to recommend to the Secretary-General that the complaint of retaliation be referred to an alternative investigating mechanism.

27. The third decision that the Applicant, in effect, challenges is the decision—made by the Secretary-General as communicated by the Chef de Cabinet—to proceed with the alternative investigating mechanism Panel under ST/SGB/2005/21, sec. 5.10. As the Respondent correctly notes, however, the decision to proceed with an

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* UNDT/2009/086, a decision is any act by the defendant organization that has an effect on an official’s rights and obligations (citing ILOAT Judgment 1203, *Horsman, Koper, McNeill and Petitfils* (1992)). The Tribunal in *Planas* concluded,

14. In light of the foregoing, the Tribunal deems that an administrative decision can only be considered such if – *inter alia* – it has direct legal consequences (effects) on an individual’s rights and obligations.

31. Regarding what the Tribunal has identified as the first decision, namely the decision of the Ethics Office Director that a *prima facie* case of retaliation for each complaint existed under ST/SGB/2005/21, sec. 5.2(c), the Tribunal does not consider that to be a decision properly before the Tribunal. As such, the Tribunal will not examine the determination that the Ethics Office Director has made regarding the

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-General that the complaints of retaliation be referred to an alternative investigating mechanism.

32. As to the so-called second decision under challenge—the recommendation of the Ethics Office Director for an alternative investigating mechanism—the Tribunal emphasises that this was a recommendation only, and that the ultimate decision was made by the Secretary-General, as communicated by his Chef de Cabinet.

33. Even if the recommendation of the Ethics Office Director for an alternative investigating mechanism is considered by the Tribunal to be a decision, while the Applicant focuses on the alleged illegality of actions taken by the Ethics Office Director in making this recommendation, the Applicant failed to present convincing evidence that the Ethics Office Director failed to follow the correct procedure. In fact, the evidence, on the face of it, indicates that the Ethics Office Director followed the procedure as set out in ST/SGB/2005/21. This is discussed further below. The Applicant also failed to identify any manner in which these allegedly improper actions affect his terms and conditions of employment.

34. The Tribunal considers that the Applicant's case here is similar to the situation described in *Planas* UNDT/2009/086: the decision under appeal—to recommend an alternative investigating mechanism—may be considered as part of a decision-making process, involving a series of steps that ultimately leads to a final administrative decision. The decision to recommend an alternative investigating mechanism is a preliminary decision only, one that may lead to a final decision on alleged wrongdoing being made at some point in the future. It is against such a future, final decision that the Applicant may appeal but until the final decision is made, the issue is prematurely before the Tribunal.

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 regard to the Applicant's failure to submit the impugned decision to a management evaluation and that this has since been done.

38. The decision of the Secretary-General to proceed with the alternative mechanism (or the third decision as outlined in the discussion above) appears to be the ultimate decision under appeal and the Tribunal considers that this decision is receivable.

If this decision is considered to be receivable, has the Applicant met all three criteria of prima facie unlawfulness, irreparable harm and particular urgency?

Prima facie unlawfulness

39. At this juncture, it is necessary to address terminology used confusingly and interchangeably in the submissions and during the hearing. The Tribunal, above, has already discussed the term "*prima facie* case" as a term that is defined under ST/SGB/2005/21, sec. 5.2 (a "*prima facie* case that the protected activity was a contributing factor in causing the alleged retaliation"). "*Prima facie* case" is distinct from the concept of *prima facie* unlawfulness of the contested administrative

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

40. The two inquiries are not the same and must not be confused as such, although, perhaps understandably, the Applicant conflates the distinct legal analyses. The Applicant first makes as his focus what the Applicant considers to be defects in the “*prima facie* case” under ST/SGB/2005/21, sec. 5.2 as determined by the Ethics Office Director. As stated above, the Tribunal does not consider that the evaluation of this determination is properly before the Tribunal.

41. Rather, what is before the Tribunal is whether a showing has been made that a “*prima facie* unlawful [administrative] decision” exists in the application for a suspension of action. In proceedings for suspension of action, the onus is on an Applicant requesting the suspension to make a *prima facie* showing that the contested administrative decision is unlawful as to the Applicant.

42. In order for the Tribunal to find that the criterion of *prima facie* unlawfulness has been made, the Tribunal would need to have “serious and reasonable doubts about the lawfulness of the contested decision” (*Hepworth* UNDT/2009/003), to cite one of many cases which define this issue. Under ST/SGB/2005/21, sec. 5.10, it is clear that the Ethics Office may recommend to the Secretary-General that a complaint be referred to an alternative investigating mechanism, which was done in this case. The manner in which the Ethics Office Director has proceeded and upon which the decision to establish the alternative investigating mechanism was made, quite contrary to the Applicant’s contentions, appear as *prima facie* lawful. Furthermore, the Applicant has presented no credible evidence that would impugn the substance of the decision the Ethics Office Director’s has made (for example, a showing of discrimination or prejudice). The Applicant did raise concerns with regard to the Terms of Reference of the panel, but the revised Terms of Reference as presented to the Tribunal appear to have addressed his concerns. Thus, the Applicant’s contentions regarding *prima facie* unlawfulness do not have merit.

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 received questions from reporters;
- c. voluminous and critical documentation against the Applicant exists and there is no way of defending himself against it;
- d. if the Organization, by making the decision, contributes to an action which is flawed and which relates to an individual who has already demonstrated an interest in representing facts to discredit the Applicant (one of the claimants of retaliation) and proceeds with this flawed investigation, these procedural flaws may affect the validity of any resulting decisions which stem from the process;
- e. the way the investigation has been put together does not comply with the Organization's procedural rules;
- f. the Terms of Reference for the alternative investigating mechanism panel are flawed; and
- g. the Applicant has been discriminated against, vis-à-vis process.

50. Upon consideration of all of the above, the Tribunal concludes that the Applicant's request for a suspension of action fails to meet the showing of irreparable harm.

Particular urgency

51. The Applicant presses his case of urgency by contending that the Organization will be harmed (in the Applicant's view) by wasteful expenditure of

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