



**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

---

Case No. 2010-109

**Bertucci  
(Respondent/Applicant)**

**v.**

**Secretary-General of the United Nations  
(Appellant/Respondent)**

**JUDGMENT**

---

**Before:** Judge Jean Courtial, Presiding  
Judge Inés Weinberg de Roca  
Judge Luis María Simón

**Judgment No.:** 2011-UNAT-114

**Date:** 11 March 2011

**Registrar:** Weicheng Lin

---

**Counsel for Appellant:** François Loriot

**Counsel for Respondent:** Christían Gimenez Corte

**JUDGE JEAN COURTIAL**, Presiding.

### **Synopsis**

1. The Administration withheld payment of amounts owed to Mr. Guido Bertucci upon his retirement based on an administrative instruction regarding the financial responsibility of staff members for gross negligence. Subsequently, the amount due was paid to Mr. Bertucci, as in the end, no negligence was imputed to him. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) found that the payment had been legally withheld and that Mr. Bertucci had suffered no prejudice. However, he was awarded compensation in the amount of USD 500. This tribunal reiterates that compensation in the absence of actual injury is without legal basis. It finds that the Dispute Tribunal erred in law. However, acceding in part to a cross-appeal by Mr. Bertucci, it finds that when the disciplinary procedure does not confirm the suspicions raised, during the preliminary investigation, with regard to a staff member, the monies whose payment could be legally withheld must be paid in full, along with the interest that has accrued. It is the opinion of this Tribunal that the award of USD 500 in compensation represents a fair assessment of the injury suffered by Mr. Bertucci due to the non-payment of interests. The Appeals Tribunal therefore affirms the judgment based on the substitution of grounds.

### **Facts and procedure**

2. Prior to Mr. Bertucci's retirement, which took place on 31 July 2008, the Office of Internal Oversight Services (OIOS) launched an investigation into allegations of irregularities that allegedly occurred within the Division for Public Administration and Development Management of the Department of Economic and Social Affairs. Mr. Bertucci was at that time the director of that Division.

3. In March 2008, OIOS offered Mr. Bertucci to provide written comments on the interim results of the investigation. On 7 March, Mr. Bertucci sought to obtain, an initial, access to the OIOS case file, including recordings of witness hearings. OIOS refused to grant him access to these documents.

4. On 30 July 2008, Mr. Bertucci was charged with negligence in the fulfilment of his managerial duties. On 16 December 2008, he was informed that the Administration would initiate recovery action against him under the administrative instruction on the financial

responsibility of staff members for gross negligence (ST/AI/2004/3). On 16 January 2009, Mr. Bertucci provided written comments on the charges brought against him.

5. The Administration decided to withhold payment of USD 13,829 of the amount due to him upon his retirement. On 9 September 2009, Mr. Bertucci filed an application with the UNDT to contest that decision on the grounds that the charges filed against him were baseless. In October 2009, the Administration paid him the remaining amount owed.

6. On 14 May 2010, the Dispute Tribunal delivered Judgment No. UNDT/2010/094. It found that the payment had been withheld in accordance with the provisions of administrative instruction ST/AI/2004/3. Although it found, on the other hand, that the refusal to provide Mr. Bertucci with documents concerning the investigation under way, while he was being requested to provide written comments on the interim results of that investigation, did not appear to be in accordance with the requirement of due process, the Dispute Tribunal noted that it was not established that the transmission of the documents would have been such that the measure of withholding payment would have been lifted, and that, therefore, Mr. Bertucci had suffered prejudice. The Dispute Tribunal nevertheless awarded Mr. Bertucci compensation in the amount of USD 500.

7. The Secretary-General filed an appeal against the judgment, insofar as it sentenced him to pay compensation to Mr. Bertucci. The latter submitted an answer and filed a cross-appeal against the judgment for the dismissal of his other claims for compensation.

### **Submissions of the parties**

#### **The Secretary-General's Appeal**

8. The Secretary-General contends that the Dispute Tribunal erred in law by finding that the respondent was entitled to access the documents relating to the ongoing investigation before any charge was brought against him. He avers that the investigation was conducted by OIOS in accordance with the applicable rules, including the administrative instruction dealing with disciplinary measures and procedures (ST/AI/371), the administrative instruction dealing with the financial responsibility of staff members for gross negligence (ST/AI/2004/3) and the Investigations Manual. No applicable provision requires that the party concerned have access to the investigation file at the initial stages of the investigation.

9. The appellant maintains that the Dispute Tribunal erred in law by awarding the respondent compensation, whereas, firstly, none of his rights were undermined and, secondly, it pointed out that even if Mr. Bertucci had had access to the documents he would not have been in a better position to defend himself, and that he had therefore suffered no actual harm. He was not legally entitled to any compensation.

**Bertucci's Answer and Cross-Appeal**

10. Mr. Bertucci contends that the OIOS Manual has no legal value and that the administrative instruction dealing with disciplinary measures and procedures (ST/AI/371) has been implicitly repealed, or at least rendered null and void. He affirms that he had been the victim of an investigation system that was not in conformity with the values and principles of the United Nations, in particular General Assembly resolution 48/218 B, which requires the Secretary-General to ensure that procedures are in place that protect the rights of defendants, that investigation procedures are fair, and that falsely accused staff members are fully cleared.

11. Pursuant to the jurisprudence arising from the *Sokoloff* judgment (No. 1246) of the former United Nations Administrative Tribunal, material in the investigation files must be communicated to a staff member in a timely manner once the Administration brings an action against him or her. Had the material in the investigation file been communicated to OIOS on 5 March 2008, it would have had to clear the staff member, as the Financial Controller ultimately did in October 2009.

12. Mr. Bertucci maintains that the USD 500 compensation he was awarded by the Dispute Tribunal barely covers the non-payment of interest on the amount of USD 13,829, the payment of which had been withheld until October 2009. He should be awarded a much greater compensation for the damages he suffered.

13. Mr. Bertucci requests that the Appeals Tribunal dismiss the Secretary-General's appeal and that it either remand the case to the Dispute Tribunal to reconsider the compensation amount, or grant him compensation corresponding to one year's net base salary for the damages suffered following the investigation, and USD 10,000 in costs.

**The Secretary-General's Answer to the Cross-Appeal**

14. The Secretary-General argues that the respondent was unable to establish that the Dispute Tribunal erred in finding that the non-disclosure of evidence from the investigation file at a time when charges had not yet been brought against him had not caused him any actual prejudice and in dismissing the remainder of his application for compensation. He holds that the respondent, in his cross-appeal, merely repeats an argument that did not convince the first judge.

15. The Secretary-General asserts that, contrary to the respondent's pleading, the Dispute Tribunal committed error in law by awarding him compensation even though he failed to establish the existence of actual damages.

**Considerations**

16. On one hand, concerning the Administration's right to withhold part of the payments owed to Mr. Bertucci upon his retirement pursuant to paragraph 3.5 of the administrative instruction on financial responsibility for gross negligence (ST/AI/2004/3), the Dispute Tribunal judge decided that the right had been exercised lawfully in that there were sufficient grounds at the time for suspecting that he might have been guilty of gross negligence resulting in financial loss to the Organization, even though, following the investigation, no charges were ultimately brought against him.

17. On the other hand, the Dispute Tribunal judge, having found that the refusal to give the staff member access to the investigation file at the preliminary investigation stage was unlawful, held that this unlawful refusal had not been shown to have caused any actual prejudice to Mr. Bertucci. He nevertheless awarded him compensation in the amount of USD 500.

18. This Tribunal reaffirms its disapproval for the awarding of compensation in the absence of actual prejudice. There are no legal grounds that can justify such a decision. Consequently, the Dispute Tribunal judge erred in awarding compensation when no actual prejudice had been found.

19. However, Mr. Bertucci is requesting that he be awarded a higher compensation in reparation for the actual damages he claims to have suffered.

20. It is not necessary to rule on the issue of the law applicable to the rights of a staff member who is subject to a preliminary investigation, since the judge agreed that, in this case, the Administration's refusal to give the staff member access to the investigation file was unlawful. As for Mr. Bertucci's allegations that OIOS would have been compelled to clear him of the charges had he been given access to the investigation file earlier, this Tribunal notes that there is no evidence to substantiate Mr. Bertucci's general assertions. Mr. Bertucci, who is not challenging the grounds of the judgment as to the application of the administrative instruction on financial responsibility for gross negligence (ST/AI/2004/3), has failed to show that the Dispute Tribunal committed an error in law or on a point of fact resulting in a manifestly unreasonable decision that caused compensable prejudice.

21. Mr. Bertucci also argues, however, that the compensation of USD 500 awarded by the judgment merely compensates for the failure to pay interest when, in October 2009, the amount owed to him was finally paid.

22. This Tribunal finds that when a disciplinary proceeding does not bear out allegations against a staff member that may have been considered during a preliminary investigation, entitlements that may have been lawfully withheld pursuant to administrative instruction ST/AI/2004/3 must be paid in full. In every legal system in the world, interest on arrears is part of the sum to be paid. Considering the US Prime Rate in effect between 31 July 2008 and October 2009, the amount withheld, and the period that elapsed from the time payment was withheld to the time it was made, this Tribunal finds that the prejudice suffered by Mr. Bertucci as a result of the non-payment of interest can be fairly compensated by an award of USD 500.

23. The Tribunal therefore substitutes the grounds set out in the preceding paragraph for the erroneous grounds set out in the contested judgment and maintains the award to Mr. Bertucci of compensation in the amount of USD 500.

**Judgment**

24. The Secretary-General's appeal and the remainder of the cross-appeal by Mr. Bertucci are denied. Judgement No. UNDT/2010/094 is upheld.

Original and Authoritative Version: French

Dated this 11<sup>th</sup> day of March 2011 in New York, United States.

*(Signed)*

Judge Courtial, Presiding

*(Signed)*

Judge Weinberg de Roca

*(Signed)*

Judge Simón

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

*(Signed)*

Weicheng Lin, Registrar