



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

Case No. 2010-116

Case No. 2010-117

Bertucci
(Respondent/Applicant)
v.
Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Translated from French

Before: Judge Jean Courtial, Presiding
Judge Sophia Adinyira
Judge Kamaljit Singh Garewal
Judge Mark P. Painter
Judge Inés Weinberg de Roca
Judge Luis María Simón

Judgment No.: 2011-UNAT-121

Date: 11 March 2011

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: François Lorient

Counsel for Appellant/Respondent: Phyllis Hwang

JUDGE JEAN COURTIAL, Presiding.

Synopsis

1. In this case, in which Mr. Guido Bertucci is contesting the decision not to select him for the post of Assistant Secretary-General (ASG), the Appeals Tribunal decided two questions of law.

2. The first question of law involves the right to confidentiality. The Appeals Tribunal recalled that the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) had the right to order the production of any document if it was relevant for the purposes of the fair and expeditious disposal of the proceedings. It considered that in this case, the judge had sufficient grounds to order the production of documents withheld by the Administration concerning the process that had led to the contested administrative decision. The requirements of transparency and respect for law set out in General Assembly resolution 63/253 prevail over claims of confidentiality that may not be sufficiently specific and justified. In principle, when the Administration relies on the right to confidentiality in order to oppose disclosure of information, it may request the Tribunal to verify the confidentiality of the document whose production may be relevant for the settlement of the case. The document may not be transmitted to the other party before such verification has been completed. If the Tribunal considers that the claim of confidentiality is justified, it must remove the document, or the confidential part of the document, from the case file. In any event, the Tribunal may not use a document against a party unless the said party has first had an opportunity to examine it. In the case under consideration, the grounds on which the Secretary-General refused to execute the orders of the Dispute Tribunal were neither specific nor justified.

3. The second question of law consists of determining what action the judge can take if the Administration refuses to disclose documents. The Dispute Tribunal judge sanctioned the Administration by excluding its counsel from participating in the proceedings and rendered a default judgment. The Appeals Tribunal found that the Dispute Tribunal had violated the Secretary-General's right to a hearing. However, before setting aside judgments on those grounds, it pointed out that, in such a situation, the Tribunal has the right to draw appropriate conclusions from the refusal

in its final judgment. Based on those conclusions, it could, depending on the circumstances, go so far as to find that, by virtue of its refusal, the Administration, whatever the scope of its discretionary power, must be regarded as having accepted the allegations made by the other party concerning the facts. The judgment of the case is remanded to the Dispute Tribunal.

Facts and Procedure

4. Mr. Bertucci, who entered the service of the United Nations in 1974, held the post of Director (D-2) of the Division of Public Administration and Development Management in the Department of Economic and Social Affairs from 1993 until he retired on 31 July 2008. In June 2007, he applied for the post of ASG in that same Department. In September 2007, he was interviewed by a high-level selection panel. On 8 February 2008, Mr. Bertucci was informed that he had not been selected for the post. The Secretary-General appointed a candidate who had not been interviewed in September 2007 and who had not previously been a staff member of the United Nations.

5. Mr. Bertucci contested the Secretary-General's decision not to appoint him ASG of the Department of Economic and Social Affairs (DESA). He contended that he had not been given in-depth and impartial consideration as a candidate owing to the adverse publicity that had come out of an investigation conducted in 2006 and 2007 into irregularities committed in the administration of his Division, although none of those irregularities was ultimately imputed to Mr. Bertucci. The applicant's recourse to the Joint Appeals Board (JAB) was transferred to the Dispute Tribunal when the new system of internal justice became effective on 1 July 2009.

6. In this case, the Dispute Tribunal handed down six orders (Nos. 40, 42, 43, 44, 46 and 59 UNDT/NY) and two judgments on the merits, Judgment No. UNDT/2010/080 of 3 May 2010, to which an addendum of 18 May 2010 was attached, and No. UNDT/2010/117 of 30 June 2010. Those judgments ruled in favour of the applicant, and the judge ordered that compensation be awarded to him on various grounds. The Secretary-General appealed both judgments. Mr Bertucci produced a joint answer to the two appeals.

7. In Judgment No. UNDT/2010/080, the Dispute Tribunal noted that the Secretary-General had told the JAB that Mr. Bertucci had been among the candidates short-listed by the selection panel whose candidacy had been submitted for his consideration. During the proceedings before the Dispute Tribunal, counsel appointed by the Secretary-General argued that Mr. Bertucci had not been short-listed. As no evidence was adduced to support that allegation or to explain the change in the Administration's position, the Dispute Tribunal judge found that, on the basis of the evidence before him, Mr. Bertucci had been on the list of recommended candidates. He noted that it had not been proved that the person appointed ASG/DESA had had an interview.

8. The Dispute Tribunal held that the Secretary-General was duty-bound to respect the requirements of good faith and fair dealing, and that the fact that he had vast discretionary power to appoint high-level officials did not negate Mr. Bertucci's rights.

9. The Dispute Tribunal inferred from the reference to an administrative instruction on the staff selection system (ST/AI/2006/3) in the vacancy announcement for ASG/DESA, that the Secretary-General had intended to apply the main elements of the new procedure laid down in that instruction, in particular with respect to interviewing all candidates and giving priority to internal over external candidates.

10. The Dispute Tribunal held that it was incumbent on the Secretary-General to demonstrate that he had considered Mr. Bertucci's candidacy seriously and in good faith and that he failed to make that showing. It believed that the only conclusion that could be drawn from the Administration's refusal to produce the documents relating to the appointment process whose production it had ordered was that those documents would have supported Mr. Bertucci's arguments. It deduced from this that the decision not to appoint Mr. Bertucci was vitiated and was made in breach of the applicant's contractual entitlements.

11. Judgment No. UNDT/2010/080 was a default judgment against the Secretary-General. The Dispute Tribunal judge thus sanctioned the Administration's refusal to produce the pertinent evidence requested of it. The judge found that this sanction did not affect the rights of the Secretary-General, as the facts were not really contested.

12. The Dispute Tribunal found that Mr. Bertucci was entitled to claim compensation for the loss of a chance to be appointed ASG/DESA, compensation to redress the damage

corresponding to the loss of professional benefit resulting from the recognition of a qualification which appointment as ASG/DESA would have signified, compensation for the Administration's refusal to carry out the Tribunal's orders, and compensation for the cost of the proceedings.

13. In Judgment No. UNDT/2010/117, the Dispute Tribunal fixed the final amount of compensation to be awarded to Mr. Bertucci for various instances of damage and loss of pension entitlement. The total amount of compensation was fixed at US \$655,000.

Submissions

The Secretary-General's appeal

With regard to Judgment No. UNDT/2010/080

14. In his appeal against Judgment No. UNDT/2010/080, the Secretary-General maintains, first of all, that the UNDT erred on questions of law and of fact concerning the propriety of the selection process for the post of ASG/DESA. The Appellant reproaches the Dispute Tribunal for refusing to recognize that, by virtue of General Assembly resolution 51/226, the Secretary-General has vast discretionary power to make appointments to very high-level posts and that he had the right, in exercising that power, to take various factors into consideration, in particular, articles appearing in the press on the investigation of the applicant and the concerns expressed by Member States in this respect.

15. The Secretary-General further reproaches the UNDT for having deduced from the reference to administrative instruction ST/AI/2006/3, in the vacancy announcement placed on *Galaxy*, that the Secretary-General had intended that the staff selection process described in that instruction would be applied, wholly or in part, and that, consequently, candidates were legitimately entitled to expect that that procedure would largely be followed.

16. The Secretary-General further claims that the UNDT erred on a question of law with regard to the burden of proof in contesting the propriety of a selection process. Contrary to the determination by the UNDT, it is incumbent on the staff member bringing a case before it to adduce evidence that would seriously call into question the propriety of the process. Only if such evidence is provided would the Administration be obligated to prove that the procedure was properly followed. He adds that the two pieces of evidence referred to by the

judge of the Dispute Tribunal, namely, the negative effect of articles in the press and concerns expressed by Member States, as well as respect for the procedure set out in instruction ST/AI/2006/3, do not constitute a basis for calling into question the propriety of the selection process.

17. According to the Secretary-General, the Dispute Tribunal erred on a question of law and exceeded its competence in ordering the production of documents concerning the selection process when Mr. Bertucci had not adduced evidence that would seriously call into question the propriety of that process. The Dispute Tribunal, it alleges, erred on a question of law when, in disregard of the jurisprudence of the former United Nations Administrative Tribunal and that of the International Labour Organization Administrative Tribunal (ILOAT), it ordered the production of documents without first having assured that those documents concerning the deliberations of selection bodies were not confidential, in which case their disclosure would have been barred.

18. It claims that the Dispute Tribunal also erred on a question of law in considering that the Secretary-General's decision to appeal the orders to produce the documents and not to execute them constituted "disobedience".

19. The Secretary-General maintains that the Dispute Tribunal vitiated its judgment by erring on questions of law and procedure and by exceeding its competence in considering that it had the power to impose a sanction for contempt in respect of disobedience, to prohibit the Secretary-General, who was the respondent in the case, from appearing before him for the purposes of submitting evidence, and ultimately, to render a default judgment. In this ruling, the Tribunal judge violated the principle of equality of arms and the impartiality of the Tribunal. The Secretary-General argues that the exercise of judicial power in that manner, without legal basis, was ultra vires and constituted a violation of the fundamental rights of the parties.

20. The Secretary-General contends that the Dispute Tribunal erred on questions of law and of fact and exceeded its competence in inferring from the refusal to produce documents that Mr. Bertucci was a such an outstanding candidate that he probably would have been appointed. Assuming that there was even anything for the Tribunal to infer from the non-production of documents, it could not have done so without taking into account the Secretary-General's vast discretionary power with regard to the candidacies or without

asking itself whether the fact that the articles on the investigation of Mr. Bertucci appeared in the press could be legitimately taken into account in the consideration of the candidates.

21. The Secretary-General maintains that the Dispute Tribunal erred on a question of fact in considering that it had been misled by the Administration's counsel during the proceedings with regard to the date on which the Secretary-General appealed the orders and the binding nature of those orders, and exceeded its competence in ordering the appearance of the individuals who had issued instructions for the preparation of his answer dated 10 March 2010.

With regard to Judgment No. UNDT/2010/117

22. The Secretary-General maintains that the Dispute Tribunal erred in law and exceeded its competence in ordering that compensation be awarded to Mr. Bertucci for the loss of the presumably likely chance of being appointed ASG.

23. The Secretary-General maintains that the Tribunal erred in law and fact and exceeded its competence in ordering that compensation be awarded to Mr. Bertucci, without justification of how genuine the damage was, for the loss of the professional benefit that would have come of being appointed ASG.

24. The Dispute Tribunal, he alleges, erred in law and fact and exceeded its competence in ordering the Organization to pay Mr. Bertucci compensation for the loss of pension entitlement.

25. The Secretary-General claims that the UNDT erred in law and exceeded its competence in ordering the payment of US \$10,000 for the alleged breach of Mr. Bertucci's contractual entitlement in not having carried out the orders to produce documents.

26. The Secretary-General adds that the UNDT erred in law by awarding Mr. Bertucci compensation in excess of the cap of two years' net base salary without providing valid reasons.

27. Lastly, the Secretary-General argues that the UNDT erred in law and exceeded its competence in ruling that he was liable for expenses on the basis of article 10, paragraph 6, of its Statute.

28. The Secretary-General requests that the two contested judgments be set aside.

Mr. Bertucci's answer

29. In a joint answer to the Secretary-General's two appeals, Mr. Bertucci notes first that the appeal against Judgment No. UNDT/2010/080 appears to have been filed after the time limit had expired. It would therefore not be receivable unless it was established that the President of the Appeals Tribunal had granted the Secretary-General's request for an extension of the time limit.

30. Mr. Bertucci argues that the contested judgments are well-founded in law and in fact and that they should therefore be upheld.

31. Mr. Bertucci contends that the Secretary-General is wrong in claiming that he did not seriously challenge the selection process when he argued before the Dispute Tribunal, which the Judge accepted, that he had been acknowledged as a suitable candidate for the position of ASG, that he had been short-listed and interviewed by the high-level selection committee, unlike the external candidate who was eventually appointed to the position, and that the selection process set out in administrative instruction ST/AI/2006/3, to which the vacancy announcement placed on *Galaxy* referred, was not followed, without it being established by the Secretary-General, who was bound by the process he had himself instituted, that that process was not applicable. In that regard, General Assembly resolution 51/226 does not supersede either the Charter or the provisions of regulation 4.4 of the Staff Regulations of the United Nations.

32. Mr. Bertucci contends that the argument that the documents the Dispute Tribunal judge ordered to be produced would be covered on the grounds of confidentiality was not based on any verifiable justification that the Tribunal ought to have taken into consideration.

33. Mr. Bertucci argues that in this case the Administration has persistently called into question the UNDT's independence and prerogatives particularly concerning the production of documents, but that those prerogatives have been upheld by the jurisprudence of the Appeals Tribunal.

34. Mr. Bertucci states that the Dispute Tribunal judge's reasoning regarding his compensation for the loss of pension entitlements was correct, such a loss being a damage

distinct from the damage to his career and the loss of opportunity for enhanced earning capacity. He also argues that the US\$ 10,000 that he was awarded in compensation does not constitute a sanction but rather compensation for genuine damages resulting from a disregard for his contractual entitlements. The calculation of the total compensation was laid out in detail in the judgment of the UNDT. Moreover, the first judge discussed the exceptional circumstances that he took into account.

35. Mr. Bertucci asks that the contested judgments be upheld and that the Organization be required to pay him compensation of US\$ 50,000 for abuse of process.

Considerations

36. Mr. Bertucci states that he believes the appeal against Judgment No. UNDT/2010/080 was submitted late and is therefore not receivable. In fact, that judgment on the merits is not a final judgment. The Dispute Tribunal judge made substantive findings, but deferred judgment on the question of compensation. Only in Judgment No. UNDT/2010/117, against which the Secretary-General filed a second appeal within the time limit, did the UNDT Judge make a final ruling on compensation. The two appeals are in fact to be taken together as one. They are receivable (cf. *Kasyanov*, Judgment No. 2010-UNAT-076).

37. The former Administrative Tribunal, other tribunals competent to rule in cases involving international civil servants and this Tribunal itself in *Asaad*, Judgment No. 2010-UNAT-21, have consistently maintained that, whatever the scope of the discretionary power invested in the Secretary-General of the United Nations concerning the appointment of staff members, including staff members at the highest level, who will be closely involved in implementing the policies of the Organization, his discretionary power is not unfettered. The Secretary-General must act in good faith and comply with the applicable law. His decisions must not be taken on erroneous, inconsistent or fallacious grounds. If a decision is contested, it is for the Tribunal exercising its control to reconcile the judicial authority vested in it in the interests of justice of the the United Nations with the discretionary power vested in the Secretary-General.

38. Article 9, paragraph 1, of the Statute of the UNDT reads as follows: “The Dispute Tribunal may order production of documents or such other evidence as it deems necessary.”

Article 18, paragraph 2, of the Rules of procedure of the same Tribunal provides: “The Dispute Tribunal may order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings.” According to Article 19 of the Rules of procedure, “[t]he Dispute 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”.

39. As this Tribunal already stated in Judgment *Calvani* No. 2010-UNAT-032, it follows from these provisions that the UNDT has discretionary authority in conducting the proceedings and the production of evidence in the interest of justice. This power is conferred on the Tribunal so that there may be a fair and expeditious disposal of the case. The Tribunal is entitled to order the production of any document relevant to that end.

40. In this case, as the contested judgment shows, the judge had sufficient reason to consider it pertinent to order the production of documents withheld by the Administration for the fair and expeditious disposal of the case.

41. First, the question of whether the Secretary-General had intended to apply the appointment process set out in administrative instruction ST/AI/2006/3, in force at the time -- or at least certain parts of it -- did not have an obvious answer. On the one hand, section 3 entitled “Scope”, paragraph 3.2, of the instruction did not explicitly exclude the appointment of ASGs -- though it should be noted that it did exclude appointments of staff selected to serve in the Executive Office of the Secretary-General or as special envoys of the Secretary-General -- and the job vacancy notice on the *Galaxy* site referred to the instruction as a whole. On the other hand, parts of the selection system as defined by the instruction seemed inappropriate for the appointment of an ASG, for example, proposing the filling of a vacancy by a central review body. While resolution 51/226 undoubtedly authorizes the Secretary-General to bypass the established procedures for appointing ASGs, there was no evidence that the Secretary-General had informed the candidates in advance, in the job vacancy notice or elsewhere, that he intended to exercise his discretionary power outside the established procedures and, if so, what procedure he had established in its stead.

42. Secondly, Mr. Bertucci's argument was based on the idea that the use of unfavourable publicity to adversely affect his candidacy was unfair, since ultimately no impropriety was imputed to him. This Tribunal does not object to the possibility that the Secretary-General may take into consideration the effect of articles in the press and concerns that representatives of Member States may have about them. Regarding the appointment of an ASG, such concerns are not irrelevant to the good-faith assessment of integrity, provided that the insinuations reflect the results of the investigation at the same time and that the adverse publicity does not result from a kind of conspiracy aimed at discrediting the candidate. In this case, it was relevant for the Tribunal to attempt to clarify this point.

43. Thirdly, the Dispute Tribunal judge noted in the contested judgment that it was not established that the external candidate who was appointed ASG/DESA, had been interviewed by the high-level selection committee. Seeking clarification of the process whereby the candidate who was ultimately appointed prevailed over Mr. Bertucci cannot be considered pointless.

44. Fourthly, and last but not least, the judge noted that the Administration had argued before the JAB that Mr. Bertucci had been one of the candidates short-listed for submission by the selection committee to the Secretary-General, but that subsequently it claimed before the Dispute Tribunal, without producing evidence, that Mr. Bertucci had not been short-listed. These contradictory statements on the part of the Administration, with no explanation as to how the initial alleged error had been made or evidence to support the new allegations, are astonishing.

45. It follows from the foregoing that it is not essential that the Appeals Tribunal rule on the applicability to the case of administrative instruction ST/AI/2006/3. The Appeals Tribunal merely points out that Mr. Bertucci had raised sufficiently serious questions before the United Nations Dispute Tribunal, regarding the propriety of the process leading to the decision not to select him, to give the judge real grounds for ordering the production of documents withheld by the Administration with a view to ensuring a fair and expeditious disposal of the case, in so far as such documents were necessary to that end.

46. With regard to the right to confidentiality, this Tribunal agrees with the International Labour Organization Administrative Tribunal (ILOAT) that "it is for the party making [the] claim [of confidentiality] to establish the grounds upon which the claim is based"

(Judgment No. 2315 (2004), para. 28) and that “the staff member must, as a general rule, have access to all evidence on which the authority bases (or intends to base) its decision against him. Under normal circumstances, such evidence cannot be withheld on the grounds of confidentiality” (Judgment No. 2229 (2003), para. 3 (b)).

47. The documents relating to the process that led to the contested administrative decision are part of the case file. They must therefore, in principle, come under the Tribunal's control, unless they are covered by a right to confidentiality by virtue of the internal law of the United Nations.

48. The exceptions to this principle, if they exist, must be interpreted strictly. In its resolution 63/253, the General Assembly chose to establish a new administration of justice system that was “transparent” and “consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike”. This is an overriding objective that prevails over claims of confidentiality that are not sufficiently specific and justified.

49. That said, this Tribunal acknowledges that, in the case of a selection process to fill a vacancy, the Administration may express its concern not to reveal to one candidate information relating to the other candidates. However, as the ILOAT stated in its Judgment No. 1815 (1999), paragraph 2:

Yet if there is a dispute a candidate has a rightful interest in proving material facts. So the case law prescribes disclosure of any privileged item of evidence that goes to the nub. Precautions may be taken to keep from the complainant's ken immaterial information on a third party such as another candidate.

To this end, the Administration may, for example, anonymize references to third parties before transmitting a document.

50. In principle, when the Administration relies on the right to confidentiality in order to oppose the disclosure of information, it may request the Tribunal to verify the confidentiality of the document whose production may be relevant for the settlement of the case. The document may not be transmitted to the other party before this verification has been completed. If the Tribunal considers that the claim of confidentiality is justified, it must remove the document, or the confidential part of the document, from the case file. In any

event, the Tribunal may not use a document against a party unless the said party has first had an opportunity to examine it.

51. In this case, the objections raised by the Secretary-General in declining to execute the orders of the UNDT were neither specific nor justified. However, the Statute of the UNDT does not provide for any sanction comprising the exclusion of one party from the proceedings in the event of a refusal to execute an order requiring the disclosure of evidence. Neither the principle of respect for the right to a defence nor the right to an effective remedy before a judge, recognized by Article 8 of the Universal Declaration of Human Rights, imply any recognition that the Tribunal has the power to impose such a sanction in the case of “disobedience”. The Tribunal is, however, entitled to draw appropriate conclusions from the refusal in its final judgment. Based on these conclusions, it could, depending on the circumstances, go so far as to find that, by virtue of its refusal, the Administration, whatever the scope of its discretionary power, must be regarded as having accepted the allegations made by the other party regarding the facts.

52. However, the judge of the UNDT was not entitled to sanction the Secretary-General by preventing his counsel from taking part in the proceedings and to deliver a default judgment. In delivering such a judgment, the Dispute Tribunal violated the right of the Secretary-General to be heard and exceeded its competence.

53. The two Judgments Nos. UNDT/2010/080 and UNDT/2010/117 are both vitiated by the same irregularity. It is therefore not necessary to proceed and rule on the other issues raised by the parties. The two Judgments must be set aside.

54. The procedure has been vitiated by the above-mentioned irregularity. It must therefore be corrected before the Dispute Tribunal such that the two parties are genuinely able to present their case in the light of the foregoing. To this end, the Appeals Tribunal remands the adjudication of the case to the President of the Dispute Tribunal, for assignment to a judge.

Judgment

55. The Judgments Nos. UNDT/2010/080 and UNDT/2010/117 are set aside. The adjudication of the case is remanded to the President of the Dispute Tribunal or the judge that the President shall designate.

56. Mr. Bertucci's claim for compensation in respect of costs for abuse of process is hereby rejected.

Original and Authoritative Version: French

Dated this 11th day of March 2011 in New York, United States.

(Signed)

Judge Courtial, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Garewal

(Signed)

Judge Painter

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Simón

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

(Signed)

Weicheng Lin, Registrar