



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

Case No. 2010-121



Appellant
v.
Secretary-General of the United Nations
(Respondent)
JUDGMENT

Before: Judge Kamaljit Singh Garewal, Presiding
Judge Sophia Adinyira
Judge Mark P. Painter

Judgment No.: 2011-UNAT-124

Date: 11 March 2011

Registrar: Weicheng Lin

Counsel for Appellant: George G. Irving

Counsel for Respondent: Amy Wood

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

Synopsis

1. The Appellant (name withheld on request) was serving as Portfolio Manager with the United Nations Office for Project Services (UNOPS). He reported certain wrongdoings on the part of a Project Management Specialist.

2. The Appellant claimed that he faced retaliation, was relocated from New York to Copenhagen, was unsuccessful in 11 selection processes and finally was separated from service on 30 November 2008.

3. We follow our decision in *Koumoin*¹ and hold that the Appellant has not been able to establish that he was a genuine whistle-blower.

4. We affirm the UNDT Judgment that there was no connection between the so-called report of wrongdoing and the administrative decisions in respect of the Appellant. The appeal is dismissed.

Facts and Procedure

5. The narrative of this case begins when the Appellant was serving as a Portfolio Manager for Argentina (P-4) with UNOPS in New York. In autumn 2005, the Appellant reported certain wrongdoings by the Project Management Specialist to his Regional Director. The Specialist was told that his contract would not be renewed on expiration at the end of 2005, but when the new Interim Executive Director took over, this decision was reversed. The Appellant later reported the misconduct of the Project Management Specialist to the Office of Audit and Performance Review of the United Nations Development Programme (OAPR) in March 2006.

6. This was to become the starting point of retaliation allegations made by the Appellant. The Appellant faced certain unpleasant decisions. On 5 April 2006, he was advised that he would have to hand over his portfolio and, the next day, he was informed that he would be re-located to Copenhagen as an L-4 Procurement Officer with the new UNOPS

¹ *Koumoin v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-119.

Headquarters. The Appellant was further informed that, if he did not accept the position by 7 April, he would be separated from service on 30 June at the end of his contract.

7. On 15 May 2006, the Appellant submitted a retaliation complaint to the Interim Ethics Officer for review. However, the Interim Ethics Officer, in her preliminary report, found no credible link between the disclosure of wrongdoing and the alleged retaliation. The Appellant was not satisfied with this finding. He complained to the Office of Internal Oversight Services (OIOS) on 7 July and to OAPR shortly thereafter.

8. Upon arrival in Copenhagen on 5 September 2006, the Appellant was surprised to find that there was no post of Procurement Officer for him. He was assigned as Business Specialist in the Organizational Effectiveness Centre, with reduced responsibilities.

9. The Appellant applied for as many as 11 posts, from January 2007 through October 2008, ranging from Regional Director (D-1), Senior Procurement Officer (P-5) to Senior Partnership Manager (P-5), but was unsuccessful in getting selected for any of these posts. The Appellant's appointment with UNOPS ended on 30 November 2008, when he was separated from service on account of non-renewal.

10. On 30 October 2009, the Appellant filed an application before the United Nations Dispute Tribunal (UNDT or Dispute Tribunal), contesting the decision to separate him from service. He claimed that he had been subjected to a long pattern of harassment from 2006 to 2008. He complained that the Respondent had failed to protect him from retaliation.

11. In its Judgment No. UNDT/2010/115, the Dispute Tribunal held that the evidence amounted to "clear and convincing proof that retaliation played no part in the decision" of non-renewal of the Appellant's appointment. The non-renewal was not a breach of contractual obligations. The application, in which a series of issues related to the removal of his portfolio and duties, the relocation agreement and his non-selection for the posts for which he had applied were raised, was accordingly dismissed. In the view of Judge Adams, the preponderance of evidence failed to establish that the impugned decisions were affected by any intention to retaliate against the Appellant for his reporting of what he believed to be misconduct.

Issues

12. (i) Did the UNDT correctly determine that the non-renewal decision was not retaliatory?

(ii) Was the UNDT correct in determining that only the non-renewal decision was receivable because only this decision had been submitted for administrative review, and the other decisions could only be considered in the context of determining whether the non-renewal decision was part of a pattern of retaliation?

(iii) Did the UNDT err in rejecting the notion of “institutional prejudice”?

(iv) Is reversal of the Judgment warranted in view of the Appellant’s claims of errors of law and errors of procedure?

Submissions

Appellant’s Appeal

13. The Appellant contends that he was a victim of a long pattern of harassment and abuse of authority culminating in his separation from service. The UNDT Judgment has rejected the notion of “institutional prejudice” by misrepresenting the Appellant’s arguments. A series of administrative decisions adversely affected the Appellant’s career. They were influenced by a negative assessment by the senior management that he was not a team player. According to the Appellant, retaliation took the form of a systematic application of constructive discharge measures. The Judgment failed to notice that a series of administrative actions placed the Appellant in an inappropriate and prejudicial situation where he was marginalized and set up to fail.

14. It was further submitted that the Appellant’s whistle-blowing called for a heightened scrutiny of decisions which adversely affected his career. Reference was made to former Administrative Tribunal Judgment No. 1258 (2005), to argue that the determination of whether “full and fair consideration” was accorded may sometimes have to be gleaned from the surrounding circumstances, and the whole picture should be seen. According to the Appellant, the UNDT did not exercise full authority to establish the facts before drawing conclusions. The UNDT placed an undue burden on the Appellant to prove his case by

having to disprove everything that the Respondent had said. The analysis in the Judgment deals with a few contested decisions and concludes that they may have been prejudicial but were not retaliatory.

15. The Judgment does not address the Appellant's other arguments that acts amounting to abuse of authority, procedural irregularity, and denial of due process were equally unlawful and indicative of discriminatory treatment. Even in the absence of clearly delineated motivation of retaliation, the impugned decisions leading to his separation were in themselves an abuse of authority to the extent that they individually and cumulatively prejudiced the Appellant's legitimate career expectations. There was also the misreading of the oral testimony of two witnesses. The Judgment wrongly considered allegations of retaliation as peripheral issues and misinterpreted the notion of institutional prejudice.

16. The Appellant went on to plead further detailed grounds that there had been errors of facts, the decision to remove his portfolio was not correctly appreciated, the Appellant's reassignment was not seen in the proper light, the restructuring and separation were not properly examined, the job fair exercise was conducted improperly and the Appellant did not receive full and fair consideration in all the selection processes.

Secretary-General's Answer

17. According to the Secretary-General, the Dispute Tribunal correctly determined that it only had jurisdiction over the administrative decision of non-renewal because the other decisions related to the Appellant's non-selection to various posts had not been referred for administrative review. In this respect, reference was made to former Staff Rule 111.2(a).

18. On the question of the Dispute Tribunal placing an undue burden on the Appellant to prove his case, the Secretary-General refers to a long line of judgments of the former Administrative Tribunal and the Dispute Tribunal to argue that where a party alleges prejudice the burden of proof rests on that party to present substantiated evidence to prove the existence of prejudice.

19. The Dispute Tribunal correctly determined that the decision of non-renewal was a proper one, unaffected by any intention to retaliate against the Appellant. The Dispute Tribunal correctly found that retaliation had played no part in UNOPS's decision on the Appellant's non-renewal. The evidence had been carefully considered and it was found that

there was no basis to support the claim of retaliation against the Appellant. The Appellant's assertion that the Dispute Tribunal failed to consider certain facts did not establish any errors of facts leading to a manifestly unreasonable decision, warranting a reversal of the judgment.

Considerations

20. In the *Koumoin* Judgment rendered during its 2011 Spring Session, this Court discussed the issue of retaliation and found that there was nothing on the record to establish that the Appellant in that case was a genuine whistle-blower who was subject to retaliation following his report of possible misconduct by his superior. We rely on the exposition of legal framework regarding retaliation in the Judgment to dispose of the present case.

21. In all fairness to the UNDT, it would be appropriate to briefly summarize the Judgment before commencing the task of determining whether the Appellant has established any of the five grounds for challenging the Judgment. These are well-known grounds given in Article 2(1)(a) to (e) of the Statute of the Appeals Tribunal.

22. The UNDT Judgment commences with setting out the real issue in the case and then lists the multiple recruitment processes regarding positions which the Appellant applied for. It was in autumn 2005 that the Appellant reported the wrongdoing of his colleague. After referring to two communications, the Judgment describes the testimony of the newly appointed Interim Executive Director of UNOPS that following a trip to Argentina, it was decided to remove the Appellant from his post. Then follows a detailed narration of facts. On 3 March 2006, the Project Management Specialist was informed that his contract would not be extended beyond 31 March. On 8 March, the Appellant reported the alleged wrongdoing of the Project Management Specialist to the Deputy Executive Director, and the decision not to extend the Project Management Specialist's contract was endorsed, but on 17 March, this decision was reversed by the new Regional Director.

23. The Judgment continues with the description of facts and the background which led to the Appellant's relocation to Copenhagen and notes that, on 15 May 2006, the Appellant submitted his claim of retaliation to the Ethics Officer. Reference has been made to a detailed preliminary report of the Ethics Officer dated 15 June 2006 that there was no link between the Appellant's removal as portfolio manager and his reporting of his colleague's

wrongdoing. The Judgment refers to a portion of the report which says that “the decision to move the Argentina portfolio pre-dated your complaint and was based on management’s perception that clients were unsatisfied with you. ... While your report of misconduct was a protected activity, I did not find that the fact that you reported it caused retaliation ... since the portfolio decisions had been suggested long before you submitted the allegations of misconduct ... I do not find a credible link between the disclosure of wrongdoing and alleged retaliation.”

24. Thereafter, the Judgment notes that on 7 July 2006, the Appellant complained to the OIOS, and the matter was referred by the Appellant to the OAPR in July-August 2006. Reference has been made to the OIOS report, dated 2 April 2007, which was transmitted to the Executive Director and concluded that no evidence was found that the Project Management Specialist was involved in selecting consultants or received any kick-backs. It was concluded that the Project Management Specialist was in breach of Staff Regulation 1.2(m) by actively associating with the management of a company that he and his wife owned. In the cover memorandum from the Under-Secretary-General of OIOS to the Executive Director these findings were summarized and it was stated that OIOS found no evidence of retaliation against the Appellant.

25. The Judgment proceeds to recount in detail the various events and also analyses what happened to the Appellant’s candidature for the 11 posts for which he had applied. When the Appellant’s contract with UNOPS expired on 30 November 2008, the Executive Director testified about the decision not to renew the contract. The Judgment notes these reasons. The submissions of the parties were summarized in detail and the evidence was also discussed in detail. The learned Judge categorically stated that “in every instance the logic of events favours the official’s evidence and not the applicant’s”.

26. The UNDT considered the scope and receivability of the case and held that no submission that depended on the truth of the allegations involving the Project Management Specialist could be accepted. The allegations of retaliation were also a peripheral issue. As regards the 11 selection decisions, the Dispute Tribunal held that those decisions were not subject to litigation, but evidence of the circumstances of those decisions was relevant to show a pattern of retaliation. The Dispute Tribunal could examine retaliation irrespective of the fact that the bulletin on retaliation had not come into force. On retaliation, the Dispute Tribunal referred to the Appellant’s reliance on “institutional prejudice” and not prejudice of

any individual to prove his case. The Dispute Tribunal noted that if the ultimate decision not to renew the contract was affected in a substantial way by prejudice against the Appellant, by his having been a whistle-blower, then the decision was improper leading to a breach of his contract. However, the concept of institutional prejudice was thoroughly discussed but it was not accepted because the decision makers involved were numerous and removed from the allegation that had allegedly motivated the retaliation.

27. The UNDT examined the decisions to remove the Appellant from his portfolio and duties, the offer of assignment to Peru, the relocation to Copenhagen, the full and fair consideration of the selection processes, the restructuring exercises, and finally the non-renewal of the Appellant's contract, but found against him on all counts.

28. We have examined the pleadings of the parties and have carefully gone through the UNDT judgment. We do not find any reason to disagree with the Judgment of UNDT. Whistle-blowing and concomitant retaliation may not be easy to prove, though tempting for a staff member to plead to challenge the non-renewal of his or her contract. The UNDT has gone through all aspects of the case, the testimonies of various witnesses, the documents and the Secretary-General's bulletins, but has found against the Appellant.

29. The Appellant has failed to show how the UNDT has exceeded its jurisdiction or competence, or failed to exercise jurisdiction vested in it. What error on a question of law was made, the Appellant has not identified. The Appellant has merely re-iterated his case that he had reported wrongdoing on the part of the Project Management Specialist and had become a subject of a series of retaliatory acts. These acts, according to the Appellant, amounted to "institutional prejudice". We do not find any reason to disagree with the UNDT that in this case no institutional prejudice, or retaliation, played a part in the non-renewal of the Appellant's contract. The decision to take the Appellant's portfolio away from him had been taken before he had made any report of wrongdoing. The Appellant's non-selection for the 11 posts involved a large number of individuals, and unless each of them acted out of retaliation, an unlikely scenario, the Appellant could not succeed in establishing the institutional prejudice. This is a case in which only one view is possible, that the non-renewal of the Appellant's contract was valid and was not a retaliatory measure against him on account of his reporting of certain wrongdoings by the Project Management Specialist.

Judgment

30. In light of the foregoing, we hold that the Judgment of the UNDT does not suffer from any illegality or infirmity requiring interference by us.

Original and Authoritative Version: English

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

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Painter

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

(Signed)

Weicheng Lin, Registrar