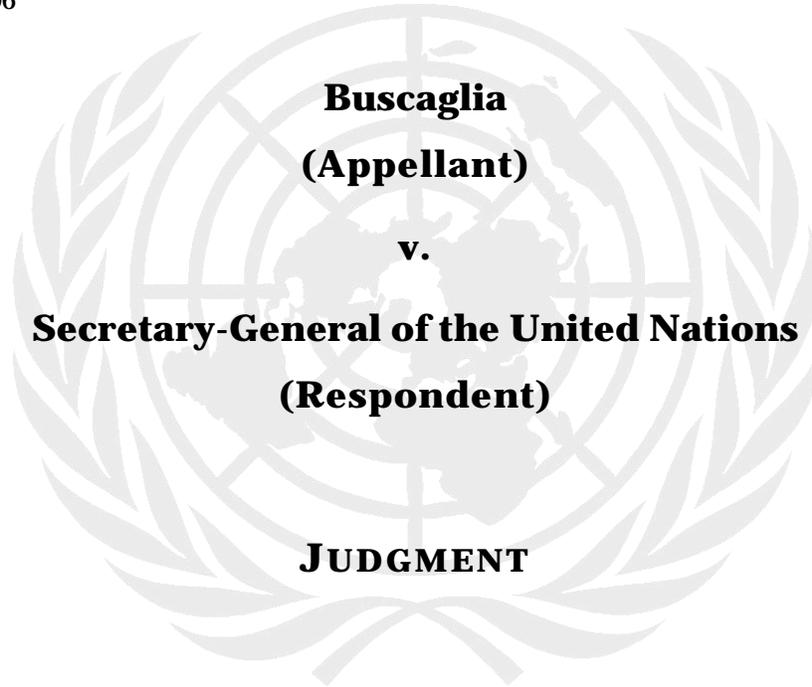




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-206



**Buscaglia
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Kamaljit Singh Garewal, Presiding Judge Sophia Adinyira Judge Mary Faherty
Judgment No.:	2012-UNAT-202
Date:	16 March 2012
Registrar:	Weicheng Lin

Counsel for Appellant: Winston Sims

Counsel for Respondent: John Stompor

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

Synopsis

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal by Mr. Edgardo Buscaglia against Judgment No. UNDT/2010/112 issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 24 June 2010 in the case of *Buscaglia v. Secretary-General of the United Nations*.

2. Mr. Buscaglia served with the United Nations Office on Drugs and Crime (UNODC) from 6 May 2001 until 16 November 2003 when he announced that he would not be willing to continue working for UNODC upon the expiry of his contract on 30 November 2003. During his service with UNODC, Mr. Buscaglia informed the Office of Internal Oversight Services (OIOS) of two instances of wrongdoing in UNODC. OIOS conducted a thorough investigation and did not identify any misconduct. Upon releasing the OIOS report on 26 November 2003, the Executive Director of UNODC (Executive Director) issued a press release in which he stated that the two staff members, Mr. Buscaglia and another, “who [had] raised these unfounded allegations cannot have a future in the Organization”.

3. We hold that Mr. Buscaglia’s contract was scheduled to end on 30 November 2003 due to a lack of funding and not as a result of retaliation for his submission of a complaint to OIOS. We affirm the decision of the UNDT that the impugned press release was not an administrative decision but merely a publicly stated opinion without any legal consequences on the terms of employment of Mr. Buscaglia who, in addition to already knowing that his contract was not going to be renewed, had previously announced that he would not remain with UNODC following the expiry of his contract.

4. Mr. Buscaglia’s appeal is dismissed.

Facts and Procedure

5. Mr. Buscaglia joined the Anti-Organized Crime Unit/Human Security Branch, UNODC on 6 May 2001 at the L-4 level on a one-year appointment under the 200 series of the former Staff Rules. His contract was subsequently extended until 30 November 2003.

6. On 24 September 2003, Mr. Buscaglia identified himself as a witness in an ongoing investigation conducted by OIOS into acts of alleged corruption and mismanagement by UNODC staff members.

7. Mr. Buscaglia was informed on 29 October 2003 that his contract would not be renewed beyond 30 November 2003. The next day Mr. Buscaglia requested administrative review of the decision not to renew his contract and on 3 November 2003, he also submitted a request for suspension of action of that decision to the Joint Appeals Board (JAB). The JAB denied Mr. Buscaglia's request on 13 November 2003.

8. A few days later, on 16 November 2003, Mr. Buscaglia advised the Executive Director that following the expiration of his contract he would not continue working for UNODC. On 20 November 2003, Mr. Buscaglia was informed of the Secretary-General's decision to follow the JAB's recommendation. Nevertheless, on 22 November 2003, Mr. Buscaglia reiterated that he was still requesting administrative review of the decision not to renew his contract beyond 30 November 2003.

9. On 26 November 2003, following the release of OIOS' Investigation Report, a press release was issued which stated that as a result of OIOS' "findings, which clear the UNODC of corruption, the Executive Director has decided that the two employees who raised these unfounded allegations cannot have a future in the Organization". On that same day the Executive Director also informed Mr. Buscaglia that as a result of funding constraints, as well as Mr. Buscaglia's 16 November 2003 notice regarding his intention not to continue working at UNODC, his contract would expire on 30 November 2003.

10. On 28 November 2003, Mr. Buscaglia requested administrative review of the Executive Director's 26 November 2003 statement which he characterized as equating to a disciplinary sanction. Mr. Buscaglia also submitted to the JAB a request for suspension of action concerning the Executive Director's statement. On 13 January 2004, the Under-Secretary-General, Department of Management, informed Mr. Buscaglia that the Secretary-General had decided to follow the JAB's recommendation and had rejected his request for suspension of action. On 9 April 2004, Mr. Buscaglia filed an appeal in front of the JAB against the aforementioned statement. On 17 September 2007, the JAB found his appeal irreceivable and, on 30 November 2007, the Secretary-General informed Mr. Buscaglia that he would follow the JAB's recommendations and reject his appeal.

11. Mr. Buscaglia filed an application on 3 March 2008 before the former Administrative Tribunal which, following the implementation of the new system of justice, was subsequently transferred to the UNDT. On 24 June 2010, the UNDT rendered its Judgment in which it found that seeing that Mr. Buscaglia had already been informed on 29 October 2003 of the decision not to renew his appointment, the ensuing 26 November 2003 statement by the Executive Director in the UNODC press release could not be considered to be either a decision not to renew Mr. Buscaglia's appointment, or a disciplinary measure.

Submissions

Mr. Buscaglia's Appeal

12. Mr. Buscaglia submits that the UNDT erred in not addressing allegations of cover-up by the Executive Director. Mr. Buscaglia further contends that UNODC, OIOS and the JAB did not follow their own internal procedures, failed to exercise its jurisdiction and withheld access to requested documents, including his Official Status File (OSF), when investigating the reported misconduct.

13. Mr. Buscaglia submits that the UNDT erred in determining that the Executive Director's statement did not breach any Regulations or Rules. Mr. Buscaglia contends that his non-renewal, the ensuing statement by the Executive Director and, more importantly, the Secretary-General's actions towards his counsel, including attempting to bar him from representing Mr. Buscaglia and denying him access to his OSF file, were a result of retaliation for having filed appeals and were therefore in breach of Staff Rules 101.2(j) which reads: "Nor shall any staff member threaten, retaliate or attempt to retaliate against such individuals or against staff members exercising their right to appeal against administrative decisions".

14. Mr. Buscaglia submits that the UNDT erred in law and failed to exercise its jurisdiction by departing from the jurisprudence of the former Administrative Tribunal and adopting a narrow interpretation of the precedent set by *Andronov*.¹

15. Mr. Buscaglia submits that, while the UNDT noted the inappropriateness of the Executive Director's statement, it erred in determining that it was just a "publicly stated

¹ Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

opinion". Mr. Buscaglia also submits that the UNDT erred by not offering an "explanation, justification or substantiation for its summary conclusions". Mr. Buscaglia contends that the statement was contrary to Staff Rule 101.2(f) and constituted a disciplinary measure that had consequences on his terms of appointment.

16. Mr. Buscaglia requests that the Appeals Tribunal hold an oral hearing because of the complex nature of the case. Mr. Buscaglia also requests that the Appeals Tribunal remand the case to the UNDT and order the Organization to pay damages in the amount of USD 100. Mr. Buscaglia further requests that the Secretary-General issue him an apology or, in lieu of an apology, compensation in the amount of three years' net base salary.

Secretary-General's Answer

17. The Secretary-General submits that Mr. Buscaglia's assertions regarding the OIOS investigation, the activities of the JAB, his lack of access to his OSF, as well as the allegations of corruption and mismanagement at UNODC were not part of his request for administrative review. Rather, the only matter before the Dispute Tribunal was whether the statement made by the Executive Director on 26 November 2003 constituted an administrative decision that affected Mr. Buscaglia's terms of appointment. Consequently, Mr. Buscaglia's submissions on these topics "fail to provide any basis for reversal of the [UNDT] Judgment".

18. The Secretary-General submits that the Dispute Tribunal correctly concluded that the Executive Director's statement was not an administrative decision that fell within its competence. The statement did not have any legal consequences on Mr. Buscaglia's appointment or terms of employment as it was not a "unilateral decision taken by the administration in a precise individual case (individual administrative act)".² The Secretary-General further submits that the Executive Director's statement could not constitute a decision not to renew Mr. Buscaglia's appointment seeing that Mr. Buscaglia had been informed of the decision not to renew his appointment one month prior to the issuance of OIOS' report and the ensuing UNODC press release.

19. The Secretary-General submits that while Mr. Buscaglia makes several assertions regarding the UNDT Judgment, including the fact that the UNDT did not indicate whether it

² Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

considered Mr. Buscaglia's arguments, none of them establish an error that would warrant the reversal of the UNDT Judgment. Furthermore, the Secretary-General submits that Mr. Buscaglia not only incorrectly interprets the jurisprudence of the former Administrative Tribunal, but also the recommendation of the JAB and the decision of the Dispute Tribunal which found that "such a statement did not affect [Mr. Buscaglia's] rights".

20. The Secretary-General requests that the Appeals Tribunal reject Mr. Buscaglia's appeal in its entirety and affirm Judgment UNDT/2010/112.

Considerations

21. A brief review of Mr. Buscaglia's career with UNODC will help narrow down the controversy involved in this appeal as well as provide an understanding as to why Mr. Buscaglia acted in the way he did when his term was coming to an end.

22. Mr. Buscaglia was a staff member at the L-4 level in the Anti-Organized Crime Unit/Human Security Branch, UNODC where he held an intermediate-term appointment under the 200 Series of the Staff Rules. Mr. Buscaglia's appointment was first extended to 31 December 2002 and then periodically until 30 November 2003 at which time he was separated from service.

23. In early 2003, an anonymous source informed the Investigations Division of OIOS that questions had been raised within UNODC concerning the travel arrangements of a senior expert as well as the hiring of the spouse of the Chief of the Operations Branch as an editor. Mr. Buscaglia claimed that he and another UNODC staff member were the whistleblowers who had conveyed that information to OIOS. Consequently, as the time for their separation from service neared, they began claiming that they were being retaliated against as a result of their role as whistleblowers. As a matter of fact, the renewal of Mr. Buscaglia's contract, and that of the other staff member, were unrelated to their involvement as complainants or witnesses in OIOS' investigation as they would have been separated from service anyway.

24. On 24 October 2003, Mr. Buscaglia voluntarily brought to the Executive Director's attention his 24 September 2003 letter to the Director, Division for Operations, UNODC in which he disclosed the "pattern of apparent wrongdoing". Mr. Buscaglia further expressed the fact that "as a result of anonymous reports made by other concerned staff to OIOS, in

February of 2003 a team of internal investigators requested [Mr. Buscaglia's] informal testimony (after OIOS was tipped by an anonymous whistleblower)". Finally, Mr. Buscaglia stated that the two events "represent an unconscionable state of affairs that hampers your capacity to improve UNODC's institutional performance and fund raising abilities..." and "[o]nly the explicit, strong, and recognized attempt to eradicate these types of practices...will avoid a possible deterioration of the image of our institution."

25. Nevertheless, Mr. Buscaglia and the other staff member did not wait for the results of the OIOS report prior to tendering their resignations. Mr. Buscaglia announced on 16 November 2003 that he would not remain with UNODC beyond the expiry of his current term while the other staff member, whose term did not end until 31 December 2003, resigned on 29 October 2003. Under these circumstances, the question of retaliation does not arise as the staff members had voluntarily resigned prior to the 26 November 2003 release of the OIOS report and the ensuing statement by the Executive Director.

26. Although Mr. Buscaglia's term may have been extended if fresh funding of USD 11 million for a new project had been confirmed, the question of whether or not he would be extended is unrelated to his status as a complainant/whistleblower in the OIOS investigation. Following his voluntary resignation of 16 November 2003, Mr. Buscaglia was separated from service on 30 November 2003.

27. The OIOS report was released on 26 November 2003. The report found that there was no abuse of travel entitlements. With regard to the award of the editing contract to the wife of the Chief of Operations, the OIOS report noted that this was done without the Chief of Operation's participation or supervision, and cleared him of the allegation of wrongdoing. However, the report did note that there was a conflict of interest and recommended that appropriate action be taken against the Chief of Operations. More importantly, the OIOS report found that "there [was] no evidence of retaliation against [Mr. Buscaglia]" and that the funding for a project that could have resulted in the terms of their employment being extended "ha[d] not been confirmed. Indeed, there is little documentation for this project".

28. On 26 November 2003, the UNODC press release was published and stated that "[h]aving carefully examined the OIOS' findings, which clear UNODC of corruption, the Executive Director has decided that the two employees who raised these unfounded allegations cannot have a future in the Organization".

29. We have gone through the record of the case, examined the grounds of appeal, the Respondent's Answer, and hold that the UNDT was correct in finding that the above statement dated 26 November 2003 was neither a decision to terminate Mr. Buscaglia's appointment nor a disciplinary measure. Instead, this statement was merely a publicly stated opinion which had no legal consequences on Mr. Buscaglia who, in addition to having already been informed on 29 October 2003 that his contract would not be renewed beyond 30 November 2003, had also declared "that he would not be able or willing to continue working for UNODC after his contract expired".

Judgment

30. The appeal is dismissed. The UNDT Judgment is affirmed.

Original and Authoritative Version: English

Dated this 16th day of March 2012 in New York, United States.

(Signed)

Judge Garewal, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Faherty

Entered in the Register on this 7th day of May 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar