



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

Case Nos. 2010-146 & 147

Shkurtaj
(Appellant/Respondent/Appellant on Cross-Appeal)
v.
Secretary-General of the United Nations
(Respondent/Appellant/Respondent on Cross-Appeal)

JUDGMENT

Before: Judge Mark P. Painter, Presiding
Judge Sophia Adinyira
Judge Luis María Simón

Judgment No.: 2011-UNAT-148

Date: 8 July 2011

Registrar: Weicheng Lin

Counsel for Shkurtaj: George Irving

Counsel for Secretary-General: Amy Wood

JUDGE MARK P. PAINTER, Presiding.

Synopsis

1. A former staff member has standing to contest an administrative decision concerning him or her if the facts giving rise to his or her complaint arose, partly arose, or flowed from his or her employment. There must be a sufficient nexus between the former employment and the impugned action. We view the trial court's determination of this issue as a factual finding, which we affirm.
2. Damages awarded for violations of due process rights are not exemplary or punitive, but must be awarded with care and be of a reasonable amount. In this case, we affirm that an award is proper, but reduce the amount.
3. This being an appellate court, findings of fact made by the trial court are generally not appealable if supported by the evidence. The alleged error of law in the United Nations Dispute Tribunal's (UNDT or Dispute Tribunal) finding that no retaliation occurred was one of fact, and is affirmed.

Facts and Procedure

4. Artjon Shkurtaj (Shkurtaj) was employed by the United Nations Development Programme (UNDP) in the Democratic People's Republic of Korea (DPRK) first on a Special Services Agreement (SSA) from January 2005 to May 2006 and then on an Appointment of Limited Duration (ALD) from June to September 2006. During this time Shkurtaj raised concerns about certain financial and administrative aspects of UNDP's operations in the DPRK.
5. Following his service with UNDP in the DPRK, Shkurtaj served with UNDP's Bureau of Management, Centre for Business Solutions (CBS), at UNDP headquarters in New York under two SSA agreements, the last of which ended on 26 March 2007. On 5 June 2007, Shkurtaj contacted the United Nations Ethics Office (Ethics Office) to request protection from retaliation. Shkurtaj indicated in his email to the Ethics Office that he believed that his reporting of alleged misconduct by UNDP in 2005 and 2006 improperly influenced the decision by UNDP to allow his contract with CBS to expire in March 2007.

6. According to UNDP's "General Conditions of Contracts for the Special Services Agreement", an "individual contractor shall have the legal status of an independent contractor vis-à-vis the United Nations Development Programme (UNDP), and shall not be regarded, for any purposes, as being [...] a 'staff member' of the UNDP". Thus, on 17 August 2007, the Director of the Ethics Office informed Shkurtaaj that his office did not have jurisdiction over Shkurtaaj's request for protection as it arose from UNDP. On the same day, he informed the Administrator of UNDP that if the Ethics Office had jurisdiction over the matter, it would have supported a determination that a *prima facie* case of retaliation had been established on the basis of the information received. He urged the UNDP Administrator to consider Shkurtaaj's case pursuant to the Secretary-General's Bulletin on retaliation (ST/SGB/2005/21).

7. On 23 August 2007, Shkurtaaj submitted two requests for administrative review of the decisions by the UNDP Administration to inter alia "refuse to afford him whistle blower protection" and "refuse to apply the provisions of ST/SGB/2005/21 to his situation". On 19 September 2007, the Under-Secretary-General for Management and the Assistant Administrator and Director of UNDP's Bureau of Management informed Shkurtaaj that his requests for administrative review were not receivable, but that his claims of retaliation would be referred to an "independent external review . . . which will examine matters relating to DPRK, including, *inter alia*, [Shkurtaaj's] allegations".

8. In September 2007, UNDP announced the creation of the "External Independent Investigative Review Panel" (External Panel), an ad hoc investigative body established to review various matters relating to UNDP's operations in the DPRK, including Shkurtaaj's allegations of retaliation. The External Panel's terms of reference required it to "make every effort to establish the facts" and to share its findings with the Director of the Ethics Office, after completing its review, so that the Director could then provide an opinion and formulate recommendations.

9. On 26 November 2007, Shkurtaaj submitted two statements of appeal to the Joint Appeals Board (JAB) against both UNDP and the Secretary-General contesting among other things UNDP's decisions not to apply the provisions of the Secretary-General's Bulletin on retaliation to his claim of retaliation.

10. The final report of the External Panel of 31 May 2008 determined that UNDP had demonstrated that its actions with respect to Shkurtaj were neither retaliatory, nor were they connected to his allegations of misconduct. The External Panel also noted in its report that it had “serious reservations about [Shkurtaj’s] credibility and the trustworthiness of claims that he [had] made to the [External] Panel and others”, and that moreover, Shkurtaj had made submissions to the External Panel that the External Panel believed to be “false or, at least, highly misleading”. The External Panel’s report was shared with the Director of the Ethics Office. But prior to the completion of the review by the Director of the Ethics Office, the report of the External Panel was made public by UNDP.

11. On 27 June 2008, the Director of the Ethics Office affirmed the External Panel’s determination that Shkurtaj had not been retaliated against. But the Director determined that the External Panel had not only failed to inform Shkurtaj of the adverse findings about his credibility but also failed to provide him with an opportunity to respond to the adverse findings before the report went public. The Director concluded that these failures constituted a violation of Shkurtaj’s due process rights and recommended payment to Shkurtaj of fourteen months’ net base salary as compensation. To date, the compensation recommended by the Ethics Office has not been paid to Shkurtaj.

12. On 5 December 2008, the JAB dismissed Shkurtaj’s claims as non-receivable since Shkurtaj was not a staff member at the relevant time. On 14 January 2009, the Deputy Secretary-General informed Shkurtaj in writing that the Secretary-General had accepted the JAB’s finding.

13. In April 2009, Shkurtaj filed an appeal with the JAB requesting that he be paid the fourteen months’ net base salary as recommended by the Director of the Ethics Office (Compensation Case). This appeal was subsequently transferred to the Dispute Tribunal upon the abolition of the JAB in June 2009. In July 2009, Shkurtaj filed a separate application directly with the UNDT challenging the refusal by the Administration to apply the Secretary-General’s Bulletin on retaliation (Ethics Policy Case).

14. On 31 August 2010, the UNDT issued Judgment No. UNDT/2010/156 with respect to both of Shkurtaj’s applications. The UNDT held that Shkurtaj had standing in

both cases. It decided that Shkurtaaj had standing to file the Ethics Policy Case because during the time that he was a staff member with UNDP, he had raised concerns about possible misconduct at UNDP in the DPRK, and it was this act that led to his request for protection from possible retaliation. The UNDT considered that there was “a sufficient nexus between the time period [Shkurtaaj] worked as a staff member, the allegations he raised with respect to the operations of the UNDP office in DPRK, and his allegations of retaliation to find his appeal receivable”. The UNDT found that this “nexus” could also be extended to give Shkurtaaj standing with respect to the Compensation Case.

15. Regarding the merits of the Ethics Policy Case, the UNDT concluded that the Secretary-General’s Bulletin on retaliation was not applicable to UNDP, and that in any event, UNDP fulfilled its obligations to Shkurtaaj by “adequately and objectively” reviewing the allegations of retaliation raised by Shkurtaaj before determining that there was no basis for his claim.

16. Regarding the Compensation Case, the UNDT held that Shkurtaaj was not afforded an opportunity to respond to adverse conclusions regarding his credibility found in the External Panel’s report, and found the amount of fourteen months’ net base salary in compensation for violation of his due process rights to be “reasonable in light of all the circumstances of this case”. In addition, USD 5,000 was awarded for the Administration’s failure to timely consider, act on, or even communicate the Ethics Office’s findings and recommendations to Shkurtaaj.

17. Both parties appeal everything. The Secretary-General appeals the UNDT Judgment insofar as it relates to the Compensation Case. Shkurtaaj appeals the UNDT Judgment as to the Ethics Policy Case. Shkurtaaj also cross-appeals the Secretary-General’s appeal.

Submissions

Ethics Policy Case

Shkurtaj's Appeal

18. Shkurtaj submits that the legal conclusion that no retaliation had occurred is based on a flawed investigatory process and is an error of law. Shkurtaj requests that the United Nations Appeals Tribunal (Appeals Tribunal) reverse the finding of the UNDT in the Ethics Policy Case and to grant him appropriate relief, including his retroactive reinstatement in service, or compensation equivalent to the salary he would have received between the date of his separation and the date of the Judgment. Shkurtaj also requests an unspecified amount of compensation for moral injury based on the denial of due process and UNDP's public dissemination over the Internet of the findings of the External Panel. Shkurtaj further seeks payment of interest from the date of his separation from service and legal costs in the amount of USD 25,000 due to the Secretary-General's refusal to implement the recommendation of the Ethics Office forcing Shkurtaj to resort to unnecessary and protracted litigation.

Secretary-General's Answer

19. The Secretary-General submits that the Dispute Tribunal correctly determined that the Secretary-General's Bulletin on retaliation did not apply to UNDP, and that Shkurtaj's allegations of retaliation were adequately and objectively reviewed.

20. The Secretary-General submits that Shkurtaj has failed to establish any errors of law or fact that would warrant a reversal of the UNDT Judgment insofar as it relates to the Ethics Policy Case.

Compensation Case

Secretary-General's Appeal

21. The Secretary-General submits that the Dispute Tribunal erred on a question of law and exceeded its competence in finding that Shkurtaj had standing *ratione personae* with respect to the Compensation Case.

22. The Secretary-General submits that the Dispute Tribunal erred in law and exceeded its jurisdiction by awarding compensation to Shkurtaaj with respect to the Compensation Case.

23. The Secretary-General requests that the Appeals Tribunal overturn Judgment No. UNDT/2010/156 with respect to its findings relating to the Compensation Case.

Shkurtaaj's Answer

24. Shkurtaaj submits that he was a staff member on ALD during the period of time that the whistle blowing activity took place. Moreover, the UNDT did not invent the term the "extended nexus" test; it is the Secretary-General's term.

25. Shkurtaaj submits that damages awarded for violations of due process are neither exemplary nor punitive. Shkurtaaj submits that the Secretary-General should honor his commitments regarding the compensation recommended by the Ethics Office.

26. Shkurtaaj requests the Appeals Tribunal to reject the Secretary-General's appeal in respect of the Compensation Case and to grant the relief requested in his cross-appeal. Shkurtaaj requests the Appeals Tribunal to consider the awarding of costs in the amount of USD 20,000 for the Secretary-General's unwarranted and ill-motivated litigiousness.

Shkurtaaj's Cross-Appeal

27. Shkurtaaj submits that, with respect to the award of fourteen months' net base salary, he should have been remunerated based on a higher salary rate; that the Secretary-General should be liable for interest on this amount; that the award by the UNDT of USD 5,000 as compensation for the delay is insufficient—Shkurtaaj suggests an award of USD 50,000; and that Shkurtaaj should be awarded an additional three years' net base salary for "moral damages", and USD 25,000 in legal costs.

Secretary-General's Answer to the Cross-Appeal

28. The Secretary-General submits that Shkurtaj has not identified any errors by the Dispute Tribunal that would warrant an increase in the amount of compensation awarded by the Dispute Tribunal. Moreover, the circumstances of the present case are not exceptional.

Considerations

29. We hold that a former staff member has standing to contest an administrative decision concerning him or her if the facts giving rise to his or her complaint arose, partly arose, or flowed from his or her employment. There must be a sufficient nexus between the former employment and the impugned action.

30. Damages awarded for violations of due process rights are not exemplary or punitive, but must be awarded with great care and be of a reasonable amount. The basis of the UNDT's award, the damage to Shkurtaj's professional reputation and prospects by the disparaging comments in the publicly released report—without notice or ability to comment—justify the award.

31. The amount of fourteen months' net base salary, recommended by the Ethics Office and ordered by the UNDT, seems excessive, especially in view of the finding against Shkurtaj on the underlying merits. We have examined other cases, but find none substantially similar. We reduce the award to six months. We affirm the award of USD 5,000 for the Administration's substantial delay. The trial court properly ordered interest on these amounts, and we affirm that holding.

32. Shkurtaj alleges an error of law in the Dispute Tribunal's conclusion that no retaliation had occurred. We see this finding to be one of fact, and it is supported by the evidence, so we defer to the UNDT's conclusion and affirm that finding.

Judgment

33. In view of the foregoing, we dismiss Shkurtaj's appeal, grant the Secretary-General's appeal in part, and dismiss Shkurtaj's cross-appeal. The UNDT Judgment is affirmed, except insofar as the fourteen months' compensation is reduced to six months.

Original and Authoritative Version: English

Dated this 8th day of July 2011 in Geneva, Switzerland.

(Signed)

Judge Painter, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Simón

Entered in the Register on this 29th day of August 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar