



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/025

Judgment No.: UNDT/2012/195

Date: 11 December 2012

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

SERVAS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Stéphanie Cochard, ITC

Introduction

1. The Applicant requests rescission of the decision dated 26 March 2012 by which the Ethics Office refused to consider that the settlement agreement she had concluded on 29 June 2011 with the International Trade Centre (ITC), following mediation, constituted a protected activity within the scope of the Secretary-General's bulletin ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations).

2. She also requests the Tribunal:

- a. To find that she was subjected to retaliation and order that her case be referred to the Office of Internal Oversight Services (OIOS) for investigation;
- b. To order that protection be extended to witnesses and Staff Council members who assisted her and who face threats of retaliation;
- c. To order that her name be removed from all Tribunal orders and judgments.

Facts

3. The Applicant was recruited by ITC in Geneva on 20 January 2009 on a short-term appointment that was renewed until 19 July 2009. Following the entry into force on 1 July 2009 of the new Staff Regulations and Rules, the Applicant was reappointed on 20 July 2009 to the same post on a temporary appointment. She served as a G-5 Programme Assistant until 31 May 2010.

4. On 26 October 2010, the Applicant submitted to the Secretary-General a request for a management evaluation of the ITC decision finding her ineligible for the P-2 post in respect of which she had been performing some duties.

5. Following the referral of the case to mediation through the Office of the United Nations Ombudsman and Mediation Services (UNOMS), a settlement agreement was signed on 29 June 2011.
6. On 18 July 2011, the Applicant separated from service with ITC.
7. In September 2011, numerous errors were made in the calculation of retroactive salary payment owing to her and, in October 2011, she was refused payment of the repatriation grant.
8. On 27 October 2011, the Applicant filed an application with this Tribunal to enforce the implementation of the agreement reached through mediation that had been signed on 29 June 2011.
9. On 18 January 2012, she filed an application against the decision refusing her payment of a repatriation grant.
10. On 16 February 2012, by Judgment No. UNDT/2012/027, the Tribunal partially granted the application that sought to enforce the implementation of the agreement reached through mediation that had been signed on 29 June 2011.
11. On 12 March 2012, the Applicant filed with the United Nations Ethics Office a request for protection against the retaliation to which she was subjected after she had concluded a settlement agreement with ITC on 29 June 2011.
12. On 26 March 2012, the Ethics Office refused to grant protection to the Applicant on the grounds that the settlement agreement concluded with ITC on 29 June 2011 did not constitute a protected activity within the scope of the Secretary-General's bulletin ST/SGB/2005/21.
13. The present application was filed with the Registry of the Tribunal on 2 April 2012.
14. The Respondent submitted a reply on 3 May 2012, raising, in particular, the non-receivability of the application on the grounds that the Applicant had not requested a management evaluation of the contested decision.

15. On 7 May 2012, the Applicant submitted a request to the Secretary-General for a management evaluation of the decision dated 26 March 2012 by which the Ethics Office refused her protection against the retaliation to which she was subjected after she had concluded a settlement agreement with ITC on 29 June 2011.

16. Also on 7 May 2012, the Applicant submitted to the Tribunal a request seeking that the deliberation of the present application be held in abeyance until the outcome of the management evaluation and maintaining that her application was receivable.

17. On 11 May 2012, the request for a management evaluation was rejected on the grounds that the decision of the Ethics Office is not an administrative decision that can be submitted to the Secretary-General for a management evaluation.

18. On 2 July 2012, by Judgment No. UNDT/2012/102, the Tribunal rejected the application contesting the decision refusing her payment of a repatriation grant.

19. On 6 December 2012, the Tribunal held a hearing which was attended by the Applicant, via teleconferencing, and by Counsel for the Respondent.

Parties' submissions

20. The Applicant's contentions are:

- a. She was subjected to retaliation from 1 July to 27 October 2011; days before her separation from service, Human Resources changed its policy such that temporary staff who reached the two-year limit of consecutive contracts would no longer be allowed to move onto consultancies with the Organization; on 21 July 2011, ITC informed her that, despite the settlement agreement concluded, the grade on her Performance Appraisal System (PAS) report would continue to appear as G-5 and not P-2; throughout September, various errors were made in the calculation of the salary owing to her; on 18 October, she was informed that she was considered ineligible for the repatriation grant; during the week of 24 October 2011, after she had

accepted an offer for a consultancy contract at ITC, the offer was blocked by Human Resources;

b. Decisions taken by the Ethics Office constitute administrative decisions that may be contested before the Tribunal, in accordance with the Tribunal's case law in *Hunt-Matthes* UNDT/2011/063;

c. The settlement agreement that she concluded with ITC through the Office of the United Nations Ombudsman and Mediation Services constitutes a protected activity within the scope of the Secretary-General's bulletin ST/SGB/2005/21; that is clear from the Tribunal's case law in *Kasmani* Order No. 25 (NBI/2010) and the objectives of the reform of the internal justice system;

d. The Ethics Office's decision to refuse her protection has led to injustice as the Tribunal had ruled in a previous judgment that, when an application was filed to enforce implementation of an agreement pursuant to article 2.1(c) of its Statute, it was not competent to rule on ensuing retaliation;

e. The retaliation to which she was subjected occurred when she was no longer in the Organization's service; the Ethics Office was the only available avenue through which to seek redress against retaliation;

f. Her application is receivable, even though she did not request a management evaluation of the contested decision, since in any case the Secretary-General has continuously maintained that the decision could not be subject to appeal before the Tribunal and he would have therefore certainly rejected the request for management evaluation;

g. In any event, she submitted a request for a management evaluation on 7 May 2012, within the statutory time limits;

h. Her name should be removed from the present judgment since her application is related to an agreement that must remain confidential.

21. The Respondent's contentions are:
- a. Recommendations made by the Ethics Office do not constitute administrative decisions for the purposes of article 2.1(a) of the Tribunal's Statute; such decisions cannot be attributed to the Organization as the Secretary-General does not have control over the Ethics Office;
 - b. The Ethics Office was established by the Secretary-General pursuant to the General Assembly's request for the establishment of an entity with independent status;
 - c. The Applicant did not request a management evaluation prior to filing her application, and that was not an issue in *Hunt-Matthes* UNDT/2011/063; however, several other decisions of the Tribunal have confirmed the requirement for a request for management evaluation;
 - d. The application must also be dismissed on the merits since the scope of application of the Secretary-General's bulletin ST/SGB/2005/21 is limited to individuals who either report misconduct or cooperate in good faith with a duly authorized investigation or audit, which is not so in the present case;
 - e. Mediation is a voluntary process that cannot be considered as a protected activity. Furthermore, the Applicant never brought any official complaint to OIOS and, in addition, the allegations of retaliation are not supported by the facts.

Consideration

22. The Applicant contests the decision taken on 26 March 2012 by which the Ethics Office refused her protection against the retaliation to which she was allegedly subjected after having concluded a settlement agreement with ITC, on 29 June 2011, through the Office of the United Nations Ombudsman and Mediation Services.

23. To raise the non-receivability of the application, the Respondent first maintains that the decision of the Ethics Office is not an administrative decision subject to appeal before this Tribunal.

24. Article 2 of the Statute of the Tribunal stipulates that:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

25. In *Nwuke* 2010-UNAT-099, the Appeals Tribunal ruled that the OIOS decision not to undertake an investigation was an administrative decision appealable to the Dispute Tribunal, stating:

“So, whether or not the UNDT may review a decision not to undertake an investigation, or to do so in a way that a staff member considers breaches the applicable Regulations and Rules will depend on the following question: Does the contested administrative decision affect the staff member’s rights directly and does it fall under the jurisdiction of the UNDT ?”

26. The Tribunal should therefore take the same approach with regard to the decision of the Ethics Office and, since it is not contested that the dispute is related to the Applicant’s status as a staff member, examine whether the contested decision could affect her rights directly.

27. The Secretary-General’s bulletin ST/SGB/2005/21 on protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations entitles staff members to make complaints of retaliation to the Ethics Office and directs that Office to conduct a preliminary review to determine if the staff member engaged in a protected activity.

28. In the present case, the decision of the Ethics Office that is being contested was to consider that the agreement concluded on 29 June 2011 with ITC through the mediation of the Office of the United Nations Ombudsman and Mediation Services did not constitute a protected activity within the scope of the Secretary-General's bulletin ST/SGB/2005/21. It is clear that by taking that decision, the Ethics Office effectively put an end as far as it was concerned to the action brought before it by the Applicant. The Tribunal therefore considers that the decision affected the Applicant's rights directly within the meaning of the *Nwuke* 2010-UNAT-099 case law.

29. In arguing that the decision is not an administrative decision subject to appeal, the Respondent also submits that, given the independence of OIOS, the Secretary-General cannot be held responsible for the unlawfulness of decisions over which he has no power. While it is beyond dispute that the General Assembly intended the Ethics Office to have a large degree of independence, the Secretary-General's bulletin ST/SGB/2005/22 of 30 December 2005 (Ethics Office — establishment and terms of reference) stipulates:

Section 1

Establishment of the Ethics Office

1.1 The Ethics Office is established as a new office within the United Nations Secretariat reporting directly to the Secretary-General.

30. The Tribunal considers that it is clear from the provisions cited above that the Ethics Office reports directly to the Secretary-General and, as such, the Secretary-General is administratively responsible for any breaches or illegalities the Ethics Office might commit. In fact, contrary to what the Respondent contends, in an organization like the United Nations it would be inconceivable for one of its offices to be able to act without potentially engaging the liability of the Organization and thus of the Secretary-General, in his capacity as Chief Administrative Officer.

31. It follows from the foregoing that the contested decision must be considered as an administrative decision appealable before this Tribunal.

32. The Respondent also raises the failure to submit a request for a management evaluation of the decision before the application was filed as further grounds for non-receivability of the application.

33. Rule 11.2 of the Staff Rules stipulates:

Management evaluation

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested.

34. The Applicant does not dispute that she filed her application with the Tribunal without having first submitted to the Secretary-General a request for management evaluation of the Ethics Office's decision that the settlement agreement she had concluded on 29 June 2011 with ITC through the Office of the United Nations Ombudsman and Mediation Services (UNOMS) did not constitute a protected activity within the scope of the Secretary-General's bulletin ST/SGB/2005/21. It is therefore established that the Applicant did not comply with the aforementioned provision.

35. To support her claim that she was not required to submit to the Secretary-General a request for a management evaluation, the Applicant alleges that she knew that, in any event, the Secretary-General would reject her request on the grounds that the Ethics Office's decision was not an administrative decision subject to appeal before him or the Tribunal. This argument can by no means be accepted by the Tribunal since the instrument laying down the requirement to request a management evaluation is clear and, consequently, must be applied; it

cannot be left to the Applicant to decide whether he or she deems it worthwhile to request such an evaluation based on his or her chances of obtaining satisfaction.

36. Following the Respondent's Reply of 3 May 2012 maintaining that the application was not receivable on the grounds that it had not undergone management evaluation, on 7 May 2012 the Applicant submitted a request for management evaluation of the contested decision; that request was rejected on 11 May 2012. The Applicant requests the Tribunal to consider that she regularized her application a posteriori.

37. The Tribunal notes that the contested decision of the Ethics Office was dated 26 March 2012 and that when the Applicant submitted her request for a management evaluation on 7 May 2012, she was within the 60-day time limit prescribed in rule 11.2 of the Staff Rules. However, as stated above, the request for a management evaluation was submitted subsequent to her filing of the application with the Registry.

38. The question for the Tribunal is whether the formal requirement to request a management evaluation can be met subsequent to the filing of the application since all other imposed deadlines were met. In this case, the instrument that provides for this requirement is clear and cannot be interpreted otherwise by the Tribunal. The aforementioned rule 11.2 of the Staff Rules is unambiguous: the request for a management evaluation must be submitted before an application is filed before the Tribunal, which was not done in the present case. Thus, the Tribunal must find the application to be non-receivable as it did not comply with the aforementioned requirement.

39. In any event, for the sake of completeness, the Tribunal considers that the application must also be dismissed on the merits.

40. The Secretary-General's bulletin ST/SGB/2005/21 provides that:

Section 1
General

1.1 It is the duty of staff members to report any breach of the Organization's regulations and rules ...

Paragraphs
39-44 struck out
by UNAT
Judgment N°
2013-UNAT-349.

1.2 It is also the duty of staff members to cooperate with duly authorized audits and investigations.

...

1.4 Retaliation means any direct or indirect detrimental action recommended, threatened or taken because an individual engaged in an activity protected by the present policy.

Section 2

Scope of application

2.1 Protection against retaliation applies to any staff member ... who:

(a) Reports the failure of one or more staff members to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other relevant administrative issuances ...

(b) Cooperates in good faith with a duly authorized investigation or audit.

Section 5

Reporting retaliation to the Ethics Office

5.2 The functions of the Ethics Office with respect to protection against retaliation for reporting misconduct or cooperating with a duly authorized audit or investigation are as follows:

...

(c) To conduct a preliminary review of the complaint to determine if (i) the complainant engaged in a protected activity[.]

41. The facts as stated above indicate that the Applicant submitted to the Ethics Office a complaint of retaliation following the conclusion of a settlement agreement concluded between herself and the ITC through the Office of the United Nations Ombudsman and Mediation Services. Upon receiving the complaint, the Ethics Office, in accordance with the aforementioned section 5.2(c) of the Secretary-General's bulletin ST/SGB/2005/21, conducted a preliminary review to determine if the complainant engaged in a protected activity.

42. It is not disputed that the retaliation alleged by the Applicant was said to have arisen from the settlement agreement that she had signed. As such, it is not a consequence of having reported misconduct or cooperated with a duly authorized

Paragraphs
39-44 struck out
by UNAT
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audit or investigation. Consequently, the Office in question, whose competence is strictly limited to the cases provided for in the Secretary-General's bulletin ST/SGB/2005/21, could legitimately consider that it was not a protected activity and reject the Applicant's complaint. While the Applicant claims that the Tribunal, in *Kasmani* Order No. 25 (NBI/2010) of 16 February 2010, broadened the mandate of the Ethics Office, that order concerned only the protection of staff members testifying before the Tribunal, which is not the case here.

43. Lastly, the Applicant requested that her name should be removed from the judgment, as published, claiming that the dispute is related to a settlement agreement the circumstances of which must remain confidential pursuant to article 15.7 of the Tribunal's rules of procedure. However, the present Judgment does not refer to any document or statement that formed part of the mediation process to which the Applicant had recourse and contains nothing to justify her request.

44. It follows from the foregoing that all of the Applicant's requests must be dismissed.

Conclusion

45. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Jean-François Cousin
Dated this 11th day of December 2012

Entered in the Register on this 11th day of December 2012

(Signed)

René M. Vargas M., Registrar, Geneva
