Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

LESAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Christopher Ronald, OSLA

Counsel for Respondent:
Josiane Muc, ALU/OHRM, UN Secretariat

The issues

1. In an application filed on 30 November 2009 before the United Nations Dispute Tribunal (UNDT), the Applicant contests Judgement No. 1465, rendered by the United Nations Administrative Tribunal (UNAT) on 31 July 2009, and transmitted to the Applicant's counsel before UNAT by letter dated 30 September 2009.

Facts

2. The Applicant entered service of the United Nations on 31 August 2000 on a five-month Appointment of Limited Duration (ALD) as Principal Officer, Post and Telecommunications, at the D-1 level, with the United Nations Interim Administration Mission in Kosovo (UNMIK). His contract was subsequently extended several times, as Director (D-1), Department of Communications, Directorate of Infrastructure Affairs/Communication (DIA/C), until September 2002.

3. The Applicant's duties included assisting with the modernization of the Posts and Telecommunications Enterprise (PTK), Kosovo. As part of his functions, he was involved in the negotiation of a number of contracts of PTK with consultancy companies.

4. On 22 May 2002, the Deputy Special Representative of the Secretary-General (Civil Administration), UNMIK, tasked UNMIK Management Review and Internal Oversight Unit to submit a fact-finding report into allegations of improprieties in the award of contracts relating to PTK to Austrian companies. The resulting report, issued on 16 June 2002, recommended that a "formal, comprehensive, and complete investigation should be undertaken covering, *inter alia*, the entire process of entering into these contracts, the transaction of funds under the contracts, the nature and extent of delivery of services, etc." A copy of this report was transmitted to the Applicant, who provided comments rebutting its contents and conclusions on 21 July 2002.

5. The above-mentioned report was transmitted to the Office of Internal Oversight Services (OIOS) on 17 June 2002. Upon receipt of the report, the

Investigations Division, Office of Internal Oversight Services (ID/OIOS) launched an investigation.

6. On 30 September 2002, upon the expiration of his last ALD, the Applicant was separated from service.

7. On 9 October 2002, ID/OIOS contacted the Chief Public Prosecutor of Graz, Austria, concerning the allegations that the Applicant, Austrian citizen and then former staff member of UNMIK, might have been "involved in criminal conduct relating to the sole source procurement of contracts with two Austrian companies." ID/OIOS memorandum of 9 October 2002 contained a summary of the facts and allegations against the Applicant and requested the Chief Public Prosecutor's "views on the facts presented … in regard to a criminal investigation that may be conducted by the pertinent Austrian authorities". It also suggested to convene a meeting "to explain how [OIOS] may be able to assist the progression of the criminal investigation".

8. By memorandum dated 6 November 2002, ID/OIOS transmitted to the Office of the Public Prosecutor, Graz, a series of documents "reflect[ing] the current status of evidence yet adduced in the ongoing investigation into allegations of breach of trust and corruption against [the Applicant]", provided "following to previous discussion between [the Public Prosecutor's office] and ID/OIOS". It was further specified that the Office of Legal Affairs of the United Nations Secretariat had authorized the release of those documents, which were, nevertheless, "given on a voluntary basis and without prejudice to the privileges and immunities of the United Nations".

9. On 20 November 2003, the Office of the Public Prosecutor, Graz, informed the Applicant that the criminal proceedings for charges of breach of trust brought against him on 27 November 2002 were closed.

10. By letter dated 20 December 2003, the Applicant brought to the Secretary-General's attention that "OIOS seemingly ha[d] violated procedures in conducting the investigation against [him]", and requested remedial action to be taken. The Applicant also contacted the Ombudsman for the United Nations on the matter, by letter dated 11 February 2004.

11. On 8 April 2004, the Applicant filed an appeal with the New York Joint Appeals Board (JAB) challenging the decision by OIOS to invite the Austrian Public Prosecutor to open a criminal investigation against him. The JAB issued its report on the case on 27 February 2006; the JAB Panel made no recommendation regarding that appeal, as it "unanimously agreed that, in view of the fact that [the OIOS relevant investigation was] still open, it was unable to reach a conclusion in this case". It found "disturbing" that the investigation remained open for such a long time and recommended that OIOS be instructed to finalize its investigation as soon as possible, after which any necessary review of the Respondent's course of action could be conducted.

12. On 3 April 2006, the Under-Secretary-General, Department of Management (USG/DM), notified the Applicant of his final decision on the appeal. He stated that "the Secretary-General ha[d] been advised by OIOS that, at this stage, the investigation into [the Applicant's] case can no longer continue as the preliminary fact-finding process ha[d] been largely compromised by the actions of others in precluding further action by OIOS and in disclosing confidential witness information". The Secretary-General's final decision was that no further action would be taken in the Applicant's case.

13. On 26 December 2006, the Applicant filed an application with UNAT, registered under case No. 1513. He requested UNAT to find on the merits, *inter alia*, that his due process and administrative law rights were violated by the Respondent's failure to disclose the facts of the case against him, or to provide the opportunity to refute the allegations against him or to confront his accusers, before a decision was made which adversely affected his interests and reputation; that the investigation into the Applicant by OIOS took an inexplicable long time and was tainted by improper motives; that "the OIOS violated the Applicant's rights by providing the Public Prosecutor of Graz, Austria, with a detailed dossier on the internal OIOS investigation [in question] … and without interviewing the appellant to give him the opportunity to defend himself and refute the accusation"; that the OIOS approached the Austrian prosecution service and shared purported evidence against the Applicant without having secured a waiver of his functional immunity.

14. By Judgement No. 1465 (2009), rendered on 31 July 2009, UNAT rejected the Applicant's pleas in their entirety. The judgement was transmitted to the Applicant's counsel by letter dated 30 September 2009.

15. According to the Applicant, on 6 November 2009, his counsel consulted his Official Status File (OSF) and discovered that it contained a memorandum dated 8 June 2006 signed by the then USG/DM, UN Secretariat. In this memorandum, the Applicant affirms, the former USG/DM stated, among other things, that he was "concerned about the decision of the Austrian Prosecutor not to pursue its criminal investigation into [the Applicant] with respect to allegations against him of breach of trust and corruption".

16. On 30 November 2009, the Applicant filed an application with UNDT contesting UNAT Judgment No. 1465. On 18 December 2009, the Respondent submitted to the Tribunal a motion to dismiss the case. The Applicant's counsel transmitted final comments on 5 January 2010, in which he requested that an oral hearing be held.

Parties' Contentions

17. The Applicant's main contentions are as follows:

a. When reviewing the Applicant's OSF on 6 November 2009 (i.e. after the issuance of UNAT Judgement No. 1465), his counsel discovered a memorandum dated 8 June 2006 and signed by the former USG/DM. The latter stated that he was "concerned about the decision of the Austrian Prosecutor not to pursue its criminal investigation into [the Applicant] with respect to allegations against him of breach of trust and corruption". Such a statement damages the Applicant's reputation, prevents him from being offered another job with the United Nations and prejudiced the consideration of his case before UNAT. Furthermore, the inclusion of this memorandum in the Applicant's OSF is in breach of ST/AI/292, *Filing of Adverse Material in Personnel Records*, of 15 July 1984, inasmuch as he was never informed, nor given an opportunity to comment on these statements;

b. Considering that the Applicant had never been charged with wrongdoing, interviewed by OIOS, nor given the chance to defend himself in front of a UN judge or disciplinary panel, that two national judicial authorities have dropped their cases against him for lack of evidence and, finally, that the other UNMIK officials investigated in relation to the same facts have been exonerated, the Applicant submits that a consideration of the relevant facts, "untainted by unsubstantiated accusations, could not have produced the Judgment 1465";

c. The above-referred memorandum indicates that OIOS violated the Applicant's due process rights and also its own procedures, in particular Section III – *Principles*, of its *Uniform Guidelines for Investigations*, which foresees that "Investigative findings should be based on substantiated facts and related analysis, not suppositions and assumptions" and that "[w]here investigative findings are either insufficient to substantiate or discredit the complaint, those findings should be reported and the affected subject cleared";

d. The fact that the Applicant still has not been cleared prolongs his mental anguish and the damage to this personal and professional reputation;

e. Under the UNAT Statute, one of the UNAT members entrusted with his case was not allowed, due to conflict of interest, to act as a Judge in this case. The Applicant would have requested his recusal had he had knowledge of the identities of the Judges hearing his case. The Applicant only came to know about the composition of the Tribunal regarding his case upon receipt of the judgement.

f. The contested judgement contains a significant number of errors of fact or facts not stated;

g. Based on the above, the Applicant requests the Tribunal to order that:

(i) The Office of the Secretary-General investigate the accountability and culpability of the Administration's staff members, who through their actions or negligence, violated the Applicant's rights to administrative justice and due process;

(ii) The Office of the Secretary-General issue a written apology to help restore the Applicant's personal and professional reputation;

(iii) The UN Administration give the Applicant active and equal consideration for any UN job for which he is qualified;

(iv) The Organization pay three years' net base salary to compensate for the costs incurred by the Applicant and the damage to his personal and professional reputation throughout the period of and subsequent to the investigation, which severely affected his prospects for employment and caused intense emotional stress and harm; and

(v) The Respondent search and remove from its files all detrimental documents that it may have filed and/or kept and return all favorable items that may have been removed from the files.

18. The Respondent's main contentions are the following:

a. The Tribunal does not have the competence to hear appeals of judgements of UNAT. In this connection, article 11, paragraph 2, of the UNAT Statute provides that "judgements of the Tribunal shall be final and without appeal";

b. The Tribunal does not have the competence to review UNAT judgements as part of its authority during the transitional period, in accordance with paragraphs 43 and 45 of General Assembly resolution 63/253, article 2.7 of the UNDT statute and section 4.2 of ST/SGB/2009/11, *Transitional measures related to the introduction of the new system of administrative of justice*. The

Applicant's case is not one that was pending before UNAT or not decided by same at the time UNAT was abolished. On the contrary, UNAT has completed its review of the case and issued a final judgement. The Applicant has filled a new application with UNDT appealing the UNAT judgement;

c. The contested decision is not an administrative decision within the meaning of article 2, paragraph 1 (a), of the UNDT statute. According to article 2.1 of the UNDT statute, "the Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual … [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment … " . In light of the definition in Judgment UNDT/2009/86, *Planas* (in line with longstanding UNAT and ILOAT jurisprudence), an administrative decision can only be considered as such if, *inter alia*, it has been "taken by the Administration". In the present case, the Applicant contests a decision by UNAT;

d. For the reasons set out above, the Respondent submits that the application at hand is not receivable and should be dismissed.

Considerations

19. According to article 9 of the UNDT rules of procedure (RoP), which are based on article 7, paragraph 2, of the UNDT statute, the Tribunal may determine, on its own initiative, that it is appropriate to decide on a case by summary judgment. This may be the case when there is no dispute as to the material facts and judgment is restricted to a matter of law. It may be particularly adequate for issues related to the receivability of an application. The crucial question in the present case – i.e. whether it falls within the Tribunal's mandate to hear cases already decided upon by the former UNAT- is such a matter of law.

20. The Applicant's request for an oral hearing will be addressed as a preliminary issue.

21. Usually, in cases deemed suitable to be decided by summary judgment, no oral hearing will be necessary. According to the Tribunal's procedural law there is no obligation to hold an oral hearing. Article 7, paragraph 3 (e), of the UNDT statute merely prescribes that the Tribunal's own rules of procedure shall include provisions concerning oral hearings. Article 16, paragraph 1, of the UNDT RoP provides that the Tribunal "may" hold oral hearings; article 16, paragraph 2, of the RoP sets out that a hearing "shall normally be held following an appeal against an administrative decision imposing a disciplinary measure". It follows from this distinction that in non-disciplinary cases (like the present one) it is a matter of judicial discretion to hold an oral hearing or to abstain from it. Article 16, paragraph 6, of the UNDT RoP (requiring that the oral proceedings shall be held in public) does not supersede article 16, paragraph 1, of the RoP. Hence, it remains within the Tribunal's discretion whether to hold an oral hearing or not. Open justice, as a fundamental element of the exercise of the Tribunal's jurisdiction (see UNDT/2010/004, *Dumornay*), may not be equated with oral hearings. The efficient and fair functioning of the Tribunal has to be demonstrated in its judgments and orders.

22. In the case at hand, an oral hearing is neither necessary nor even helpful. According to the application and Applicant's final comments, he would like to have an oral hearing in order convince the Tribunal to revise the facts of the case which was already decided upon by the former UNAT. However, any discussion on the merits has as indispensable precondition that the Tribunal be competent to enter into examining them. This issue is a pure question of law, on which the parties have already commented in a sufficient manner.

23. Turning to the main issue at stake, it must be concluded, after analysis of the relevant rules and provisions, that the Tribunal lacks competence to hear the present application, inasmuch as it does not contest an administrative decision, but is aimed against a final judgement rendered by the former UNAT.

24. Article 2 of the UNDT statute, which defines the Tribunal's jurisdiction *ratione materiae*, stipulates in paragraph 1 that the UNDT shall be competent to consider applications filed "[t]o appeal an administrative decision" allegedly contrary to the terms of appointment or the contract of employment of the

concerned staff member. The Tribunal's competence is thus circumscribed to administrative decisions, excluding any other kind of acts or behaviour.

25. The notion of "administrative decision" may be disputable. On the one hand, the Tribunal has upheld a well-established definition (see Judgments UNDT/2009/077, *Hocking, Jarvis, McIntyre*, paragraph 44, and UNDT/2009/086 *Planas*, paragraph 10, referring to Judgement No. 1157, *Andronov* (2004)). On the other hand, it has been said that there may be no precise and limited definition of this concept (see UNDT/2010/018, *d'Hellencourt*, paragraph 40). Some find unnecessary to understand it in any special or technical sense (see Order No. 19 (NY/2010), *Wasserstrom*, paragraph 28). But at least it is beyond question that administrative decisions must necessarily be taken by the Administration.

26. In the case at hand, however, the challenged decision is UNAT Judgement No. 1465, i.e. a decision issued by a jurisdictional body. Such judgement most obviously constitutes a judicial decision, as opposed to an administrative one, and, as such, it does not fall within the scope of UNDT competence.

27. As a transitional measure for the passage to the new internal justice system implemented as of 1 July 2009, UNDT was also conferred competence to review cases inherited from the now defunct UNAT. Having said that, the Tribunal's competence in this regard covers exclusively cases not yet decided upon by UNAT at the time of its abolishment.

28. Indeed, the General Assembly decided, as per paragraph 45 of its resolution 63/253, that "all cases from the United Nations and separately administered funds and programmes pending before the United Nations Administrative Tribunal [should] be transferred to the United Nations Dispute Tribunal, as from the abolishment of the United Nations Administrative Tribunal".

29. Consistent with this decision, article 2, paragraph 7, of the UNDT statute provides that "[a]s a transitional measure, the Dispute Tribunal shall be competent to hear and pass judgement on … a case transferred to it from the United Nations Administrative Tribunal".

30. In implementation of General Assembly resolution 63/253, section 4.2 of ST/SGB/2009/11, *Transitional measures related to the introduction of the new*

system of administration of justice, establishes that "… [c]ases not decided by the United Nations Administrative Tribunal by 31 December 2009 will be transferred to the United Nations Dispute Tribunal as of 1 January 2010".

31. It clearly flows from the above-quoted provisions that UNDT is only competent to hear cases still pending before UNAT at the time of its disappearance on 31 December 2009, and not those on which judgement had been passed by that date.

32. In the present case, UNAT had already pronounced itself on the Applicant's claims and put an end to the relevant procedure by issuing Judgement No. 1465. By no means could the case be deemed to remain pending. Consequently, UNDT is not competent to examine the application at hand as one of the cases transferred to the UNDT from old UNAT by virtue of the aforementioned transitional measures.

33. In addition, it should be recalled that UNAT constituted the very last instance in the former justice system of the United Nations. In this connection, article 11 of the UNAT Statute unambiguously provided that "the judgements of the Tribunal shall be final and without appeal".

34. As a matter of fact, the Applicant's case was introduced, considered and disposed of entirely under the former justice system. UNAT Judgement No. 1465 was, accordingly, meant to be the final judicial determination of the case. Hence, the issues raised by the Applicant before the former UNAT are now *res iudicata*, and the fact that a new system entered into functioning shortly after the Applicant's case was closed has no bearing in this respect.

35. The Applicant submits that certain elements which allegedly could have had an impact on the outcome of his case came to his knowledge only after the questioned judgement had been issued. Be it as it may, the foregoing could in no manner alter the findings made above regarding the limits of UNDT competence. This is without prejudice to the Applicant's right to institute new proceedings, subject to the applicable time limits and conditions, should he consider that an administrative decision, which has not been the object of a decision by UNAT, arises from the said elements and runs contrary to his terms of appointment.

36. In view of the foregoing, the application under review must be deemed irreceivable, as it falls outside the Tribunal's competence.

Conclusion

37. For the reasons stated above, the Tribunal DECIDES that:

The application be rejected in its entirety.

(*Signed*)

Judge Thomas Laker

Dated this 5th day of February 2010

Entered in the Register on this 5th day of February 2010

(*Signed*)

Víctor Rodríguez, Registrar, UNDT, Geneva