



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/015
(UNAT 1588)
Judgment No.: UNDT/2010/112
Date: 24 June 2010
English
Original: French

Before: Judge Jean-François Cousin
Registry: Geneva
Registrar: Víctor Rodríguez

BUSCAGLIA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Winston Sims

Counsel for respondent:
Linda Starodub, UNOV

Introduction

1. The applicant seeks the rescission of the decision of 30 November 2007 whereby the Secretary-General rejected his appeal against the statement made by the Executive Director of the United Nations Office on Drugs and Crime (UNODC) at a meeting on 26 November 2003 between the Administration and the Vienna staff and subsequently published in a UNODC press release that “Having carefully reviewed the ... findings [of the Office of Internal Oversight Services (hereinafter OIOS)], which clears 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”.

2. He requests, in the light of the public nature of the Executive Director’s statements, a public apology from the Secretary-General.

Facts

3. The applicant joined the UNODC Anti-Organized Crime/Human Security Branch 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 renewed until 30 November 2003, when he left UNODC.

4. Early in 2003, OIOS, having been anonymously informed of acts by UNODC staff potentially constituting professional misconduct, opened an investigation.

5. On 24 September 2003, the applicant identified himself as an OIOS witness in the investigation into corruption and mismanagement.

6. On 29 October 2003, he was informed that his contract would not be renewed beyond 30 November 2003.

7. On 30 October 2003, he submitted to the Secretary-General a request for administrative review of the decision not to renew his contract beyond 30 November 2003. On 3 November 2003, he submitted a request for suspension of action on that decision to the Joint Appeals Board (JAB).

8. On 13 November 2003, JAB rejected his request for suspension of action.

9. On 16 November 2003, the applicant advised the Executive Director, UNODC, by e-mail that he would not be able or willing to continue working for UNODC after his contract expired.

10. On 20 November 2003, the Under-Secretary-General, Department of for Management transmitted to the applicant a copy of the JAB report on his request for suspension of action and advised him of the Secretary-General's decision to reject his request. The Secretary-General also referred to the applicant's e-mail of 16 November 2003, which he considered rendered the request for suspension of action moot.

11. On 22 November 2003, the applicant responded to the Secretary-General's decision and reiterated that, despite his resignation, he requested administrative review of the decision not to renew his contract beyond 30 November 2003.

12. On 26 November 2003, OIOS published its report on the allegations of corruption and mismanagement at a meeting between the Vienna Administration and staff. The same day, the report was published on the UNODC website together with a press release containing the Executive Director's contested statement.

13. Also on 26 November 2003, the Executive Director, UNODC, informed the applicant that, in view of the funding situation and his intention not to continue working at UNODC, his contract would expire on 30 November 2003.

14. On 28 November 2003, the applicant requested administrative review of the Executive Director's statement in the press release of 26 November 2003, which he characterized as a disciplinary sanction.

15. On the same day, the applicant submitted to JAB a request for suspension of action concerning the Executive Director's statement.

16. On 13 January 2004, the Under-Secretary-General, Department of Management, transmitted to the applicant a copy of the JAB report on his request for suspension of action and advised him of the Secretary-General's decision to reject the request.

17. On 9 April 2004, the applicant filed an appeal against the Executive Director's statement with JAB. In its report of 17 September 2007, JAB found the appeal irreceivable.

18. On 30 November 2007, the Under-Secretary-General, Department of Management, transmitted the JAB report to the applicant and advised him of the Secretary-General's decision to reject his appeal.

19. On 3 March 2008, the applicant filed an application before the former United Nations Administrative Tribunal (UNAT).

20. Pursuant to General Assembly resolution 63/253, the application was transferred to the United Nations Dispute Tribunal (UNDT) on 1 January 2010.

Parties' contentions

21. The applicant's principal contentions are:

- a. The application is receivable because it relates to an administrative decision as defined by the former UNAT in *Andronov*. The decision was disciplinary, but the disciplinary procedure was not followed. There was therefore a violation of his due process rights;
- b. The Executive Director did not have authority to take the contested decision;
- c. He suffered retaliation because of his cooperation with OIOS;
- d. Neither he nor his counsel had access to his official status file;
- e. The OIOS report is inaccurate and incomplete. Furthermore, the Executive Director, UNODC, drew wrong conclusions from its recommendations against the applicant;

- f. There was a reprehensible delay of three years in submitting the JAB report to the Secretary-General and of almost three years between the last meeting of JAB and the adoption of that body's report. JAB held its last executive meeting on 10 November 2004 and the report was issued on 17 September 2007;
 - g. The procedure followed by JAB was improper;
 - h. He does not seek punishment of United Nations officials or monetary gain.
22. The respondent's principal contentions are:
- a. The application is irreceivable because the Executive Director's statement is not an administrative decision affecting the applicant's terms of appointment;
 - b. As the Executive Director, UNODC, does not have authority to take decisions regarding the appointment of staff throughout the United Nations system, his statement is not an administrative decision capable of affecting the applicant's terms of appointment;
 - c. The applicant cannot be identified from the contested statement, which cannot therefore have had legal consequences for his situation;
 - d. JAB took too long to submit its opinion, but that was attributable to staffing problems in Vienna. However, the delay caused no injury to the applicant, as he is not claiming compensation;
 - e. The procedure followed by JAB was not improper;
 - f. UNODC did not deny the applicant's counsel access to his official status file;
 - g. The OIOS report cleared UNODC of corruption charges.

Judgment

23. To support his claim that, contrary to the opinion of JAB and the Secretary-General, his application is receivable, the applicant, who seeks no compensation from the Tribunal, contends that the statement by the Executive Director, UNODC, that the two staff members who had made unfounded allegations had no future in the Organization is, since it is in fact a disciplinary decision, an appealable administrative decision.

24. Article 2 of the statute of the United Nations Dispute Tribunal provides that “The ... 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 noncompliance with the terms of appointment or the contract of employment...”.

25. In its judgement No. 1157, *Andronov* (2003), the former United Nations Administrative Tribunal held as follows on the question what constitutes an administrative decision:

“There is no dispute as to what an “administrative decision” is. It is acceptable by all administrative law systems, that an “administrative decision” is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as implied administrative decisions”.

26. The contested statement was neither a decision to terminate or not to renew an appointment nor a disciplinary measure, but merely a publicly

stated opinion which, even if the word ‘decision’ was used, had no direct legal consequence for the applicant because when, on 26 November 2003, the Executive Director, UNODC, made the contested statement, the applicant had already been informed, on 29 October 2003, that his contract would not be renewed. The contested decision cannot, therefore, be considered a decision not to renew his contract. Having no legal consequence for the applicant’s terms of appointment, it is unappealable. The application must therefore be rejected in so far as it seeks the statement’s withdrawal.

27. While the applicant requests the Tribunal to order the Secretary-General to make him an apology, the Tribunal has no authority under its Statute to issue such orders, although it does note the inappropriateness of the statement by the Executive Director, who publicly stigmatized two staff members without there having been disciplinary proceedings against them.

Decision

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

The application is rejected.

(signed)

Judge Jean-François Cousin

Dated this 24th day of June 2010

Entered in the Register on this 24th day of June 2010

(signed)

V́ctor Rodŕguez, Registrar, UNDT, Geneva