



Judgme

JUDGE ROSALYN CHAPMAN , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal of Judgment No. UNDT/2014/051, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 14 May 2014, in the case of *Nartey v. Secretary-General of the United Nations*. On 15 July 2014, the Secretary-General filed his appeal and on 13 September 2014, Mr. Felix Tei Nartey filed his answer and a cross-appeal. The Secretary-General filed his answer to the cross-appeal on 11 November 2014.

Facts and Procedure

2. Mr. Nartey began employment with the Organization on 1 September 1998. Effective 27 March 2006, he joined the United Nations at Nairobi (UNON) as a Procurement Officer, P-3 level. On 6 December 2011, his appointment was converted to a permanent appointment in the Secretariat, with retroactive effect from 30 June 2009.

3. On 2 September 2009, in Case No. UNDT/NBI/2009/67, Mr. Nartey testified before the Dispute Tribunal on behalf of a co-worker (Mr. Mohammed Rizwan Kasmani), who challenged UNON's decision not to renew his appointment.

4. On 16 February 2010, in Case No.

Services (DAS), advising him, inter alia, of Mr. Nartey's selection for reassignment on promotion to UNAMID as Procurement Officer at the P-4 level, subject to UNON's confirmation that it would release the staff

[...] Since you hold a permanent appointment, you have a right of placement for a suitable P3 position within the UN should this become necessary. It is my hope though that you will aspire for upward career progression and aim for moves from P4 to P5 and so on.

18. On 14 May 2012, Mr. Nartey accepted the offer from UNAMID.

19. On 12 July 2012, Mr. Nartey submitted a request for management evaluation of “UNON’s decision not to grant [him] a lien on [his] post while on mission to UNAMID”. He claimed that the decision: (i) contravened his rights under ST/AI/404 and ST/AI/2010/3; (ii) was a “violation of the right not to be retaliated against”; and (iii) was taken in violation of Order No. 25 issued by the UNDT in the *Kasmani* case.

20. On 1 August 2012, UNON released Mr. Nartey for transfer to UNAMID. However, due to a long delay in obtaining a visa from Sudan, the request from UNAMID was later withdrawn.

21. On 3 August 2012, Mr. Nartey filed a complaint with the Ethics Office alleging, inter alia, retaliation, harassment, and abuse of authority against him by UNON following his testimony in 2009 as a witness in the *Kasmani* case. On 12 November 2012, the Ethics Office advised Mr. Nartey that it could not receive his complaint because “testimony before the UNDT does not constitute a protected activity under ST/SGB/2005/21 [Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations]”.⁴ The Ethics Office also advised Mr. Nartey that complaints of harassment, discrimination, and abuse of authority come within ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) and, accordingly, should be submitted to the UNON Director-General.

22. On 28 August 2012, the Under-Secretary-General for Management adopted the findings and recommendations of the Management Evaluation Unit (MEU) to uphold the decision to deny Mr. Nartey’s request for a lien on his post. The Under-Secretary-General found that UNON “validly exercised its discretion in declining to release [him] on mission assignment which would have resulted in maintaining a lien on [his] post and the hiring of temporary staff members in [his] absence”. The Under-Secretary-General also found that his claims of retaliation, abuse of authority and harassment regarding events occurring during

⁴ Footnote omitted.

the period of 2010 to 2012 were time-barred and not receivable and, in any event, the MEU did not have authority to determine whether the impugned decision was motivated by retaliation.

23. On 6 September 2012, Mr. Nartey submitted a complaint to the UNON Director-General alleging that the Director of DAS (D/DAS) had retaliated and discriminated against him, harassed him, and abused his authority. The UNON Director-General did not respond to this complaint prior to Mr. Nartey filing his application before the Dispute Tribunal.

24. On 26 November 2012, Mr. Nartey, represented by counsel, filed an application before the UNDT challenging “UNON’s decision not to grant him a lien on his post while on mission to UNAMID”. In the application, Mr. Nartey also contested a series of “other related actions or decisions taken by UNON” between 14 October 2009 and February 2012, asserting that “[t]he impugned decision should be read in conjunction with all the retaliatory actions taken against [him] since his testimony before the [Dispute] Tribunal”. Mr. Nartey requested rescission of the decision, measures to ensure UNON refrained from actions threatening his career, compensation for material and mora

27. On 15 July 2014, the Secretary-General filed his appeal, and on 13 September 2014, Mr. Nartey, represented by counsel, filed his answer and a cross-appeal. The Secretary-General filed his answer to the cross-appeal on 11 November 2014.

Submissions

The Secretary-General's Appeal

28. The UNDT exceeded its competence and erred in law by receiving numerous claims in addition to Mr. Nartey's challenge of the decision not to grant him a lien against his post. These claims related to events between 2009 and February 2012, which were not the subject of requests for management evaluation within 60 days of their occurrence. Listing some of these claims in Mr. Nartey's request for management evaluation of the impugned decision was solely to show UNON's bad motive for the impugned decision. The UNDT had no authority to waive the requirement of management evaluation.

29. The UNDT also exceeded its competence and erred in law when it concluded that it could consider the Ethics Office's decision not to accept Mr. Nartey's complaint of retaliation, which was not an administrative decision subject to judicial review. Assuming whi03ion t(r)]TJeemeteriaef 1.

Mr. Nartey's request for a lien. Second, UNON's general practice does not violate ST/AI/404, which expressly allows the Secretary-General to exercise reasonable discretion in light of the historic difficulties faced by certain duty stations in recruiting qualified candidates. The General Assembly has recognized this difficulty, which is exacerbated when staff members are permitted to maintain liens on their posts, thus requiring their posts to be filled through temporary assignments, which are less stable and less attractive to candidates.

32. The UNDT exceeded its competence and er

the nature of the prejudice he suffered during the three-year period from 2009 to 2012, as well as the stagnation of his career. TheUNDT should have awarded him 24 months' net

against; and (iii) violated Order No. 25 issued by the UNDT in the *Kasmani* case. The UNDT agreed with Mr. Nartey on all three grounds. On appeal, we consider each ground separately.

48.

52. To determine whether the UNDT made an error of law in finding the impugned decision was unlawful, we must consider the language of the controlling Administrative Instruction ST/AI/404. The Administrative Instruction addresses two distinct types of mission service: (i) the Administration's assignment of staff members to missions; and (ii) the staff members' voluntary service on missions. There is no dispute that Mr. Nartey comes within the latter category of voluntary mission service.

53. The Administrative Instruction has broad language encouraging and promoting mission service. Regarding voluntary service on missions, however, the Administrative Instruction does not contain mandatory language requiring a department or office to release its professional staff members on mission or, if they are released, to grant liens to those staff members to retain their posts. Paragraph 6 of the Administrative Instruction specifically and clearly provides that selection for voluntary mission service is "not an entitlement in any sense or form". The UNDT correctly recognized that the policy or intent behind ST/AI/404 is to encourage departments and offices to release their staff members on voluntary mission service. However, it made an error of law when it found that UNON's decision to deny Mr. Nartey's request to grant him a lien on his post was an "abuse of [its] authority" and "contrary to the spirit and intent" of the Administrative Instruction. The Administrative Instruction sets forth a broad policy promoting mission service, but it does *not* require UNON to either release Mr. Nartey on voluntary mission service or to grant him a lien on his post, if released. Paragraph 6 of the Administrative Instruction provides otherwise.¹³

Was UNON's decision in retaliation against Mr. Nartey?

54. Mr. Nartey claimed that UNON's decision to deny his request for a lien was retaliatory and a violation of Order No. 25. In his application, he listed several acts or omissions (from 2008 through February 2012) which he claimed showed a pattern of retaliation. Addressing the retaliation claim, the UNDT found that UNON's illegal refusal to grant Mr. Nartey a lien on his post "in the circumstances served to reveal a state of mind bent on exacting retaliation and forcing [Mr. Nartey] out of UNON".¹⁴

¹³ *Scott v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-225, para. 28.

¹⁴ Impugned Judgment, para. 183. Although the UNDT did not make a specific finding of retaliation in violation of Order No. 25, it is reasonable to draw such an inference from the foregoing findings.

55. On appeal, the Secretary-General argues that the UNDT made an error of law in

60. The UNDT considered *sua sponte* whether the Ethics Office's decision not to receive Mr. Nartey's report of retaliation in violation of Order No. 25 was correct. In this regard, it found that "testifying before the [Dispute] Tribunal amounts to an 'activity protected by the present policy' within the scope of Section 1.4 of ST/SGB/2005/21"¹⁶ and, accordingly, "the Ethics Office willfully disobeyed the Tribunal's Order" when it did not receive Mr. Nartey's report of retaliation.¹⁷

61. On appeal, the Secretary-General argues that the UNDT exceeded its competence by considering *sua sponte* the Ethics Office's decision since it is not an administrative decision subject to judicial review or, alternatively, Mr. Nartey had not sought management evaluation of the decision. Additionally, the Secretary-General contends that the UNDT erred in concluding that the Ethics Office disobeyed Order No. 25.

62. There is no doubt that the Dispute Tribunal has the inherent power to issue orders to protect witnesses who testify before it from retaliation by a party. Like the contempt power, the power to protect witnesses stems from "[t]he ability to promote and protect the court, and to regulate proceedings before it[; it] is an inherent judicial power. ... [and] it is essential to [...] a tribunal's case management and ability to conduct hearings."¹⁸

63. When the *Kasmani* case was on appeal before us, we held that the UNDT could properly issue an order to protect witnesses who testify before it – as we repeat here – and that the "Ethics Office would only act [on Order No. 25] upon the basis of a report".¹⁹ We did not determine that the UNDT was competent to order the Ethics Office to "be seized" of Order No. 25 to "monitor the situation for further action should there arise allegations of violations" of Order No. 25.

T

he presented no evidence of stress⁸ and, more importantly, the UNDT exceeded its competence in receiving a harassment claim regarding conduct by the D/DAS.

Mr. Nartey's cross-appeal

72. On cross-appeal, Mr. Nartey contends that the UNDT erred in failing to find “exceptional” grounds within the meaning of Article 10(5)(b) of the UNDT Statute to award him 24 months’ net base salary, instead

Judgment

75. The appeal is granted and JudgmentNo. UNDT/2014/051 is vacated.

The referrals of the Director of the Ethics Office and the Director of DAS of UNON to the Secretary-General for accountability are vacated.

The cross-appeal is denied.

Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Thomas-Felix

Entered in the Register on this 20th day of August 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar