



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/054
/UNAT/1680
Judgment No.: UNDT/2011/063
Date: 6 April 2011
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

HUNT-MATTHES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Simon Cuthbert, Russell Jones & Walker

Counsel for Respondent:

Shelly Pitterman, UNHCR

Introduction

1. The Applicant was employed as a Senior Investigation Officer at the P-4 level with the United Nations High Commissioner for Refugees (“UNHCR”). She is contesting the finding of the Ethics Office that while she had engaged in a protected activity by reporting misconduct, there was no prima facie case of retaliation as there was no connection between her reporting of misconduct and the decision not to renew her contract.

Facts

2. The Applicant joined the United Nations in 1994 as a Human Rights Field Officer with the Office of the High Commissioner for Human Rights (“OHCHR”) in Rwanda. From February 1995 to January 1996, she served as a Crime Prevention and Criminal Justice Officer at the P-3 level for the United Nations Office in Vienna. Between 1996 and 1998, she worked for UNHCR on short-term appointments in the following capacities: Fund Raising Officer, Liaison Officer and Public Affairs Officer.

3. As from July 1998 until December 2000, the Applicant was employed by the United Nations World Food Programme (“WFP”) in Rome, Italy as an inspector on an indefinite contract at the P-4 level. From December 2000 until December 2001, the Applicant worked as an Advisor to the Director, Policy Strategy and Research for the United Nations Programme on HIV/AIDS in Geneva on the basis of an inter- Food Programme r

which included the mid-term assessment dated 12 April 2004. Her performance was rated as “unsatisfactory”.

10. By a memorandum dated 27 August 2004, the Personnel Administration Section informed the Applicant that while her fixed-term appointment was due to expire effective 1 September 2004, her appointment was being extended as an administrative measure for the duration of her certified sick leave¹.

11. On 6 September 2004, the Applicant informed the Head of the Investigation Unit of her disagreement with the appraisals in her PAR and of her intention to possibly institute rebuttal proceedings.

12. From 1 October 2004 until 30 August 2005 the Applicant was on 50 per cent sick leave. On 4 October 2004, the Applicant reported to work but was assigned to the Evaluation & Policy Analysis Unit (“EPAU”), UNHCR, as a Senior Evaluation Officer at the P-4 level where she served on several consecutive short-term appointments until she was separated from service on 31 May 2006.

13. On 1 January 2005, the Applicant submitted a rebuttal statement contesting her PAR for the period 1 September 2003 to 30 August 2004. On 27 May 2005, the Rebuttal Panel issued a report in which it concluded that the case was outside its purview due to the allegations of misconduct involving senior staff of the IGO of the Executive Office. Instead, it recommended that the matter be referred to the Office of Internal Oversight Services (“OIOS”) for action. This recommendation was not acted on.

14. On 29 August 2005, the Applicant’s PAR for the period 4 October 2004 to 1 September 2005 while she worked at EPAU was issued and her supervisors rated her performance as being “fully effective”.

¹ The Applicant had been placed on certified sick leave until 30 September 2004.

15. On 3 December 2005, the Applicant filed a formal complaint with OIOS alleging harassment and abuse of authority against her former supervisors at the IGO. OIOS did not investigate the matter.

16. On 22 March 2006, the Applicant wrote to OIOS seeking protection against

(ii) the Ethics Office did not abuse its discretionary power in deciding that the Applicant's case did not constitute a *prima facie* case of retaliation. Consequently, the JAB recommended that the Secretary-General reject the appeal. The Secretary-General accepted the recommendation of the JAB and therefore took no further action.

20. The Applicant appealed the decision of the Ethics Office to the Former United Nations Administrative Tribunal ("the former UN Administrative Tribunal"). On 1 January 2010 the case was transferred to the United Nations Dispute Tribunal ("the Tribunal") in accordance with ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice).

UNDT Proceedings

21. Upon its review of the parties' submissions to the former UN Administrative Tribunal, the Tribunal noted that the Respondent had, in his reply dated 24 January 2008, submitted, *inter alia*, that the determination of the Ethics Office in respect of the Applicant's complaint of retaliation is not subject to appeal and therefore not properly before that Administrative Tribunal as the mandate of the Ethics Office entails functions of an advisory nature, which cannot be deemed to be administrative decisions.

22. In light of the fact that the former UN Administrative Tribunal was unable to make a determination on the issue of receivability raised by the Respondent, the Tribunal provided the parties with the opportunity to submit supplementary documents and/or comments on the issue of receivability. The parties did not submit any supplementary documents and/or comments.

Respondent's submissions

23. It is the Respondent's case, in his reply to the former UN Administrative Tribunal, that the determination of the Ethics office in respect of the Applicant's

complaint of retaliation is not subject to appeal and therefore not receivable. Further that the Tribunal is not competent to hear this appeal since the functions of the Ethics Office are advisory in nature and do not encompass the ability of its Director to make administrative decisions on behalf of the Secretary-General within the meaning of former staff regulation 11.1. In this respect, the Respondent submits that the responsibilities of the Ethics Office include the provision of advice to the Secretary-General with a view to ensuring ethical conduct and more extensive financial disclosure by United Nations Officials and protection of those who reveal wrongdoing within the Organization. The Respondent submits that ST/SGB/2005/21 articulates that the Ethics Office has an intermediary role, and not the role of a decision-maker.

24. The Respondent avers that the role played by the Ethics Office is similar to the role played by the Office of the Ombudsman in that they are both independent of the hierarchical structure of the Organization and that they both play intermediary roles. He submits that pursuant to the jurisprudence of the former UN Administrative Tribunal, the Ombudsman is not a decision maker as s/he does not have the ability to impose a binding solution in a conflict between the Organization and a staff member. Thus, in the absence of any decision-making power the Ombudsman is unable to take an administrative decision. In light of the jurisprudence of the former UN Administrative Tribunal on the legal nature of the Ombudsman's decisions, the Respondent submits that the determination made by the Director of the Ethics Office in the Applicant's case, which is akin to a decision made by the Ombudsman, cannot be considered to be an administrative decision within the meaning of former staff regulation 11.1.

Applicant's submissions

25. The Applicant contends that the Tribunal is competent to hear the application because decision-making functions have been conferred on the Ethics Office so as to

make it an essential part of the mechanism that has been put in place to effectively combat retaliation. The Applicant submits that the decisions of the Ethics Office are final when, as in her case, they conclude that there is no prima facie case of retaliation. In this respect, she notes that such a decision is directly determinative of the rights of an individual as it brings the complaint to an end and prevents any further redress. Consequently, the Ethics Office, unlike the Office of the Ombudsman, has the requisite authority to make binding determinations affecting the rights of a party and should therefore not be allowed to operate in a legal vacuum.

26. The Applicant further asserts that the decision of the Ethics Office was an administrative decision because it was unilateral, it was taken in a precise individual case and it had direct legal consequences for the individual concerned. Lastly, she submits that the arguments in the Respondent's reply of 17 September 2009 are the same as those raised by the Ethics Office and rejected by the JAB. She notes that the Respondent subsequently accepted the JAB report and should therefore not be permitted to radically change the nature and scope of his arguments without a compelling reason. Consequently, she submits that it is not appropriate for the Tribunal to entertain detailed arguments from the Respondent on this issue for the first time on appeal.

Issue

27. The only issue for determination is whether the decision of the Ethics Office amounts to an administrative decision.

Applicable legal principles

28. Article 2.1(a) of the Statute of the Dispute Tribunal provides that:

“The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual [...] against the Secretary-General as the Chief Administrative Officer of th

Consequently, the application was rejected as irreceivable and the Applicant appealed to the United Nations Appeals Tribunal (“the Appeals Tribunal”).

33. The Appeals Tribunal subsequently observed in *Nwuke* 2010-UNAT-099 that whether or not the Dispute Tribunal may review a decision depends on whether it falls into its jurisdiction pursuant to Article 2(1) of its Statute. In determining whether a contested decision amounts to an administrative decision that can be reviewed by the Dispute Tribunal, the Appeals Tribuna

applicable law. Consequently, the Appeals Tribunal held that the Applicant had, in fact, challenged an administrative decision and that Dispute Tribunal erred in finding his application not receivable.

Does the contested decision affect the staff member's rights directly?

36. Pursuant to section 1.1 of ST/SGB/2005/21, staff members have a duty to report any breach of the Organization's regulations and rules. When such reports are made in good faith, staff members are entitled to protection against retaliation. Section 1.3 provides, *inter alia*, that retaliation against individuals who have reported misconduct violates the fundamental obligation of all staff members to uphold the highest standards of efficiency, competence and integrity.

37. Pursuant to section 5.2 (c), upon receipt of a complaint from a staff member who believes that retaliatory action has been taken against him or her for reporting misconduct, the Ethics Office conducts "a preliminary review of the complaint to determine if (i) the complainant engaged in a protected activity; and (ii) there is a prima facie case that the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation."

39. In the present case, the Ethics Office found that while the Applicant had engaged in a protected activity, there was no *prima facie* case of retaliation because there was no nexus between her reporting of misconduct and the decision not to renew her contract. No further action was taken by the Ethics Office subsequent to this finding. Under these circumstances, the Tribunal

42. Lastly, the Tribunal notes that from the commencement of this case by the Applicant with the request for administrative review to her appeal to the JAB, the Respondent accepted and defended the 18 December 2006 decision of the Ethics Office as an administrative decision within the meaning of former staff regulation 11.1. The Chief of the Administrative Law Unit (“ALU”) of the Office of Human Resources Management (“OHRM”) noted in her response, dated 8 March 2007, to the Applicant’s request for administrative review that “[t]his letter accordingly constitutes the review of the administrative decision.” The Chief of ALU did not assert that the matter was not receivable. The Respondent’s reply to the JAB, dated 25 July 2007, also did not assert that the matter was not receivable but rather addressed the JAB on the merits of her claim. In this respect, the Respondent requested that the JAB find that the Ethics Office properly reviewed and assessed the Appellant’s complaint and rightfully decided that there was no prima facie case of retaliation. He also requested that the JAB find that the contested decision of the Ethics Office did not constitute a violation of the Applicant’s rights.

43. The JAB found that the contested decision was an administrative decision and was therefore receivable. Subsequently, the Secretary-General, in his decision dated 11 August 2008, agreed with the conclusion of the JAB that the “Ethics Office did not abuse its discretionary power in deciding that [the Applicant’s] case did not constitute a prima facie case of retaliation.” In light of the foregoing, the Secretary-General decided to reject the Applicant’s appeal and take no further action.

44. It is quite apparent from the foregoing that as a matter of fact, the Respondent considered and accepted the decision of the Ethics Office as an administrative decision from the inception of the Applicant’s case. The Tribunal finds it remarkable that the Respondent suddenly decided to reverse himself when the Applicant contested the same decision before the former UN Administrative Tribunal and asserted that the decision of the Ethics Office is not an administrative decision and therefore not receivable. The Tribunal finds it even more remarkable that the

Respondent did not provide any reason(s), logical or otherwise, for this unexpected turnabout and yet expects the Tribunal to accept his argument unequivocally.

Does the decision of the Ethics Office fall under the jurisdiction of the Dispute Tribunal?

45. In the current case, the Tribunal notes that the contested decision falls within the purview of ST/SGB/2005/21, which is a bulletin issued by the Secretary-General. In light of the fact that article 2(1)(a) of the Statute of the Dispute Tribunal covers the pertinent regulations, rules, bulletins and administrative instructions issued by the Secretary-General, ST/SGB/2005/21 is covered by article 2(1)(a). Additionally, ST/SGB/2005/21 grants a staff member the right to compel the Ethics Office to conduct an investigation and as such, is covered by his or her terms of appointment and entitles him or her to pursue his or her claim before the Dispute Tribunal. Thus, the Tribunal concludes that the determination of the Ethics Office falls under its jurisdiction and as such, is competent to examine the administrative activity followed by the Administration after the Applicant's complaint of retaliation, and to decide if the action was taken in accordance with the applicable law.

Status of the Ethics Office versus that of the Office of the Ombudsman

46. The Tribunal has taken note of the Respondent's assertion that the determination made by the Director of the Ethics Office in the current case is akin to a decision made by the Ombudsman and cannot therefore be considered to be an administrative decision within the meaning of former staff regulation 11.1. The Tribunal is of the considered view however that the functions of the Ethics Office are not analogous to the functions of the Office of the Ombudsman. The two offices carry out dissimilar functions that cannot plausibly be lumped together.

47. Pursuant to ST/SGB/2002/12 (Office of the Ombudsman - appointment and terms of reference of the Ombudsman), the Ombudsman is a neutral party who

addresses the employment-related problems of staff members. Section 3.8 of this bulletin categorically states that the ombudsman shall not have decision-making powers but shall advise and make recommendations on actions needed to settle conflicts between the Organization and a staff member.

48. The Tribunal agrees with the view of the former UN Administrative Tribunal that the Ombudsman is an intermediary in that s/he does not advocate for any party but rather advises staff of the various options available to them for conflict resolution. Considering that the parties eventually make the decision as to which option to use to resolve their conflict, they in actuality take on the role of the decision-makers while the Ombudsman remains an advisor to the process. The Tribunal does not, however, agree with the Respondent's contention that the role played by the Ethics Office in relation to its tasks under section 5.2 of ST/SGB/2005/21 is on par with that played by the Ombudsman i.e. advisory.

49. Unlike the Ombudsman, the Ethics Office is not a passive observer once a report of misconduct has been submitted to it. The Ethics Office is tasked with conducting a preliminary review of the complaint and based on this review, it determines if the complainant engaged in a protected activity and whether the protected activity was a contributing factor in causing the alleged retaliation or threat of retaliation. As was noted in paragraph 39 above, determinations from the Ethics Office have direct consequences for the rights of staff members. If the decision of the Ethics Office is that there is a prima facie case of retaliation, the staff member is accorded protection under ST/SGB/2005/21. If the decision is that there is no prima facie case of retaliation, the staff member is left without protection even if he or she was found to have engaged in a protected activity. The Tribunal considers that this unique role played by the Ethics Office cannot be deemed as merely an advisory one that is not subject to judicial scrutiny.

50. Further, it is noteworthy that ST/SGB/2002/12 specifically stipulates that the Ombudsman shall not have decision-making powers. Such a provision is resoundingly absent from ST/SGB/2005/22. The Tribunal can only surmise that if the Secretary-General intended that the Ethics Office not have any decision-making powers, he