



Judgment No. 2015-UNAT-509



Counsel for Respondents/Applicants: Thad M. Guyer

Counsel for Appellant/Respondent: Rupa Mitra

Reissued for technical reasons on 12 November 2015

JUDGE SOPHIA ADINYIRA , PRESIDING .

6. Pursuant to the instruction of the USG/OIOS, Mr. Postica and Ms. Nguyen-Kropp's complaint was forwarded to the Professional Practice Section (PPS), OIOS, for investigation.

7. In the notes dated 25 March 2010, the PPS

13. The Dispute Tribunal issued a total of three judgments on Mr. Postica and Ms. Nguyen-Kropp's applications, two dealing with the receivability issue and one dealing with the merits. In the Judgments on Receivability, the Dispute Tribunal determined that the respective applications of Ms. Nguyen-Kropp and Mr. Postica in respect of the decision of 9 April 2010 by the USG/OIOS to conduct an investigation into their conduct were receivable. The UNDT found that the contested decision to initiate an investigation against Ms. Nguyen-Kropp and Mr. Postica was an appealable administrative decision as the launching of a disciplinary investigation concerned rights of the accused staff members. It also found that their requests for management evaluation of 4 October 2010 were not time-barred because Ms. Nguyen-Kropp and Mr. Postica had not received clear notification of the 9 April 2010 decision either prior to, or even after, 4 October 2010.

14. In its Judgment on the Merits, the Dispute Tribunal found that the decision that there was "reason to believe" that misconduct may have occurred on the part of Ms. Nguyen-Kropp and Mr. Postica was manifestly unreasonable and unlawful. The Dispute Tribunal also found that the manner in which, and the process whereby, the subsequent

wae-3.9(8(-3.9(8(e.3(ct m onre noocessdural)5-3.9(8(l)(a).w a

Submissions

In respect of the Judgments on Receivability

The Secretary-General's Appeal

17. The UNDT erred in accepting Ms. Nguyen-Kropp's and Mr. Postica's applications as receivable when they challenged a decision to undertake a preliminary investigation while the investigation process was still ongoing. That decision was but one in a series of steps in the investigative and disciplinary processes. If it were to consider each individual stage of an administrative process as giving rise to an administrative decision subject to appeal, the UNDT would essentially assume the role of the Administration undertaking the day-to-day management of administrative processes. The conclusion of the Dispute Tribunal is at odds with the consistent jurisprudence of the Appeals Tribunal and the Dispute Tribunal that preparatory decisions in an ongoing process cannot be challenged, particularly when it results in a decision that no disciplinary measure should be imposed.

18. The UNDT also erred in accepting Ms. Nguyen-Kropp's and Mr. Postica's applications as receivable when they challenged the decision to undertake a preliminary investigation, given that the decision did not have direct legal consequences for them. Ms. Nguyen-Kropp and Mr. Postica filed their UNDT applications before the report of the investigation of their actions was completed in March 2011 and the decision of the USG/OIOS that no misconduct had been established was communicated to them in November 2011. Therefore, when they applied to the Dispute Tribunal in January 2011, Ms. Nguyen-Kropp and Mr. Postica could not establish any legal consequences that resulted from the contested decision to investigate them since no final decision had been taken.

19. The Secretary-General requests that the Appeals Tribunal vacate the Judgments on Receivability, as well as the Judgment on the Merits on the basis that the applications were not receivable.

Ms. Nguyen-Kropp and Mr. Postica's Answer

20. No clearly stated statutory or judicial authority renders an application against the launching of an investigation non-receivable. Requiring staff to wait until they appeal the disciplinary sanction to challenge the decision to investigate would grant the Administration a

carte blanche to use the threat of investigation to intimidate staff from disclosing administrative wrongdoings, knowing that even a retaliatory investigation of staff is beyond judicial review as long as the Administration takes no further action after the investigation is closed. The current jurisprudence of the Appeals Tribunal does not support such an unseemly rule of law.

21. The duty of the Administration not to undertake a misconduct investigation absent an objective and “well-founded” “reason to believe” that a disciplinary offence had been committed creates a concomitant due-process right to be free of unfounded, unreasonable or retaliatory investigations. Such a right forms part of the “terms of appointment or contract of employment” subject to review by the Dispute Tribunal under Article 2(1) of its Statute.

22. If an investigation is closed without further action, and the staff member alleges that the investigation caused him reputational injury, then the Dispute Tribunal should have jurisdiction to review the lawfulness of the investigation as a free standing administrative decision.

23. Ms. Nguyen-Kropp and Mr. Postica request that this Tribunal affirm the Judgments on Receivability in all respects.

In respect of the Judgment on the Merits

24. In view of our decision below with respect to the Dispute Tribunal’s receivability findings, we do not find it necessary to summarize the parties’ contentions in respect of the Judgment on the Merits.

Considerations

Appeal in respect of the Judgments on Receivability

25. The UNDT held in the two Judgments on Receivability that the contested decision, which was the decision to initiate an investigation into the alleged misconduct on the part of Ms. Nguyen-Kropp and Mr. Postica, was an appealable administrative decision.

26. Article 2(1)(a) of the UNDT Statute reads:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual [...]

...

THE UNITED NATIONS

authority, a challenge of the Administration's decision not to investigate such a complaint is receivable, in light of the specific guarantees provided for in ST/SGB/2008/5.

29. The Appeals Tribunal notes that our jurisprudence requires that to be reviewable, the administrative decision must have direct legal consequences on an individual's terms of appointment. "Thus, the key characteristic of an

Original and Authoritative Version: English

Dated this 26th day of February 2015 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Chapman

(Signed)

Judge Simón

Entered in the Register on this 17th day of April 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar