



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/031
(UNAT 1628)
Judgment No.: UNDT/2011/005
Date: 10 January 2011
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

COMERFORD-VERZUU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

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governing the payment of compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the United Nations.

7. On 27 July 2001, the Applicant submitted a complaint to OIOS against UNDP and the Office of the United Nations Security Coordinator, which she accused of not having taken the necessary security measures prior to sending her husband on mission.

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accused of “violation of the UN’s International Civil Servant Standards of Conduct and other misconduct” against her between March 2004 and March 2005.

15. By email of 2 August 2005, the Investigations Division, OIOS, informed the Applicant, in reply, that since the substance of her second complaint was the same as the one she had made in 2001 (see paragraphs 7 and 9 above), which had already been examined in various United Nations fora, the matter was closed.

16. The Applicant replied on 9 August 2005 the Investigations Division, pointing out, among other things, that her 2005 complaint was distinct from that of 2001.

17. On 19 August 2005, the Applicant filed an application (“the first application”) to the former United Nations Administrative Tribunal against the decision of the Secretary-General on her first appeal.

18. On 5 September 2005, the Applicant again sent her email of 9 August 2005 to the Investigations Division, OIOS, copying, among others, the Under-Secretary-General, OIOS.

19. By email of 6 September 2005, the Investigations Division replied to the Applicant, repeating the contents of email of 2 August 2005, namely that since her second complaint was substantially the same as the one she had made in 2001, the matter was closed.

20. By email dated 16 September 2005 to the Under-Secretary-General, OIOS, the Applicant complained about the replies from the Investigations Division concerning her second complaint and her request for an investigation. She pointed out that if the Under-Secretary-General did not react differently to her complaint, she would pursue the case in other fora.

21. By letter of 23 September 2005, the Applicant again sent her email of 16 September 2005, together with her complaint of 25 June 2005, to the Under-Secretary-General, OIOS.

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44. Also by letter of 30 November 2010 Counsel for the Applicant once again made a series of objections to the Tribunal. He complained, *inter alia*, that the Registrar had still not replied to his submissions of 27 October, 25 November and 29 November 2010, a matter he regarded as not only discourteous but also as a substantive and procedural irregularity. He added, among other things, that he was still awaiting a reply concerning the level of English of the Judge assigned to the case and whether it was possible to respond to the Respondent's comments of 27 October, filed, according to him, without leave of the Judge.

45. By email of 1 December 2010, the Applicant complained to the Registrar that the failure to reply to her Counsel's letters was a breach of her rights, and stated that she would be filing a formal complaint with the Head of Human Resources of her organization.

46. By emails of 2 December 2010, the Applicant and her Counsel finally provided the Tribunal with telephone numbers where they could be contacted for the purposes of the hearing.

47. On 2 December 2010, the hearing took place. The Applicant and her Counsel participated via a telephone conference link and Counsel for the Respondent by videoconference. At the end of the hearing, the Judge ordered Counsel for the Applicant to submit within 15 days—not later than 17 December 2010—his reply to the Respondent's comments dated 27 October 2010. Those instructions were confirmed the same day by Order No. 89 (GVA/2010).

48. By email of 17 December 2010, Counsel for the Applicant sent the Tribunal his reply to the Respondent's comments dated 27 October 2010, stating that he would forward a signed version later.

49. By email of 20 December 2010, Counsel for the Applicant sent the Tribunal what he presented as the "final

Parties' contentions

50. On admissibility, the Applicant's contentions are:

a. The Tribunal exceeded its jurisdiction in raising the issue of admissibility of the application as the JAB has given a "decision" in the Applicant's favour on that issue and the Respondent has neither contested the JAB "decision" nor appealed it. The present application was made not to the Dispute Tribunal but the Administrative Tribunal, and was transferred to the former only when the latter was abolished; the only issues in the matter before the Tribunal, therefore, those raised in the written pleadings filed with the former Administrative Tribunal;

b. The OIOS decision is an appealable administrative decision, as the JAB found. The Secretary-General has not disputed that point, either in his letter of 28 August 2007, or in his answer to the application. Consequently, the issue of admissibility *ratione materiae* has been resolved, and the Tribunal should not have raised it. Moreover, the Respondent—who maintains that an administrative decision is of necessity a decision taken by the Administration—offers no definition either of "Administration" or "administrative decision". In the present case, the fact that OIOS enjoys autonomy in the exercise of its functions does not support the conclusion that OIOS is not part of the Administration. The Respondent confuses operational independence—which the OIOS has—and constitutional independence. OIOS is an integral part of the United Nations and acts under the authority of the Secretary-General, as is clear from the applicable instruments. Its decisions are therefore appealable;

c. The time limits have been complied with, as the JAB explained in its report, and the Respondent has not contested the JAB decision on that point. Prior to that, ALU itself did not dispute the fact that the Applicant had submitted her request for review to the Secretary-General within the time limit allowed. Consequently, the question of admissibility *temporis* has been resolved and the Tribunal should not have raised it.

Furthermore, in her request for review to the Secretary-General dated 16 February 2006 the Applicant was not contesting the OIOS decision of 2 August 2005 but the refusal of OIOS to reply to her letter of 11 January 2006; clearly, in so doing, the Applicant was also contesting the decision of 2 August 2005. OIOS has not treated the Applicant in a courteous and professional manner.

51. The Respondent's contentions are:

- a. The OIOS decision not to open an investigation is not an appealable administrative decision. OIOS is in fact an independent office

Applicant contests the choice by the Judge assigned to the case to conduct the hearing in French, it should be remembered that French is on an equal footing with English as one of the two working languages of the United Nations pursuant to General Assembly resolution 2(I) of February 1946, and that the services of interpreters were available throughout the hearing.

53. On the admissibility of the application, the Applicant maintains that at the time the Tribunal raised that issue on its own motion, it no longer had the power to do so, because the question had been decided by the JAB in the Applicant's favour, and the Respondent had not raised it subsequently.

54. The Tribunal must therefore set out the legal reasoning underlying its decision to raise, on its own motion, the question of admissibility of the application. First, however, the Tribunal must make it clear that on the one hand, it is not in any way bound by the conclusions of the JAB, which is merely an advisory and not a judicial body, and on the other, the fact that the Respondent has not, of his own initiative, raised the question of admissibility of the application does not prevent the Tribunal from raising it on its own motion if its Statute so requires.

55. The Tribunal recalls that the present application was referred to it pursuant to General Assembly resolution 63/253, in which it decided that all cases pending on 1 January 2010 before the former UN Administrative Tribunal would be transferred with effect from that date to this Tribunal.

56. It is beyond dispute that the only powers of any tribunal are those conferred by its Statute, which in this case means the General Assembly resolutions establishing the former UN Administrative Tribunal and the present Dispute Tribunal. This means that, before it rules on the lawfulness of a decision, the Tribunal is bound in all cases, including those where the issue is not raised by the parties, to verify whether its Statute, or the Statute of the former UN Administrative Tribunal for transferred cases, grants it jurisdiction to do so.

57. The Statute of the former UN Administrative Tribunal, as laid down in General Assembly resolution 55/159, provided that it was "competent to hear and

pass judgment upon applications ~~gile~~ non-observance of contracts of employment of staff members of the ~~Secretariat~~ of the United Nations or of the terms of employment of such staff members (article 2.1). That Tribunal made it clear through its case law that, in order to be receivable, an application must invoke an administrative decision whereby the applicant was harmed. It defined, notably in Judgment No. 1157 Andronov (2004), what was meant by an administrative decision and stated, Judgment No. 1213 (2004): “The Tribunal must first make a determination on the issue of receivability. A finding that the case is not receivable would negate the need to enter into its merits. The essential element of an appeal is that there is a contested ‘administrative decision’.”

58. Article 8 of the Statut applicat Ster8(t)5edia6.7(s)-99nal 9nal .3(o157,)]nh” upon ribTyl l

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nature, to the extent that the rights of the claimant were directly affected. The Appeals Tribunal thus held, ~~Mwuke~~

28. So, whether or not the UNDT may review a decision not to undertake an investigation, or to do so in a way that a staff member considers breaches the applicable Regulations and Rules will depend on the following question: Does the contested administrative decision affect the staff member's rights directly and does it fall under the jurisdiction of the UNDT?

29. In the majority of cases, not undertaking a requested

Tribunal must, however, examine the legal arguments that might defeat such jurisdiction.

66. It must, first of all, reject one of the Respondent's arguments, to the effect that the OIOS decision is not an administrative decision appealable to the Tribunal. The Respondent maintains that, given the independence of OIOS, the Secretary-General cannot be held responsible for the unlawfulness of decisions

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73. The Tribunal must now rule on the admissibility of the application, a question the Tribunal also regards as one it has a duty to raise on its own motion.

74. Staff rule 111.2 in force at the time of the events provided:

(a) A staff member wishing to appeal an administrative decision ... shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing.

79. In this connection, the Tribunal recalls the principles laid down in ~~Ryan~~
UNDT/2010/174:

53. When a staff member has submitted requests to the Administration on several occasions, only the first decision of refusal is appealable, and this appeal must be lodged within the time limits which run from the moment of the first decision of refusal. Subsequent decisions of refusal by the Administration are merely confirmative decisions that cannot be appealed. It is only when the staff member's new request is accompanied by new circumstances that the Administration must review it and the ensuing decision cannot be considered as a confirmative decision

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Entered in the Register on this ~~10~~th day of January 2011

_____ signed _____

Víctor Rodríguez, Registrar, UNDT, Geneva