



Case No.: UNDT/GVA/2009/97

Judgment No.: UNDT/2010/023

Date: 05 February 2010

The issues

1. In an application filed on 30 November 2009 before the United Nations Dispute Tribunal (UNDT), the Applicant contests Judgement No. 1465, rendered by the United Nations Administrative Tribunal (UNAT) on 31 July 2009, and transmitted to the Applicant's counsel before UNAT by letter dated 30 September 2009.

Facts

2. The Applicant entered service of the United Nations on 31 August 2000 on a five-month Appointment of Limited Duration (ALD) as Principal Officer, Post and Telecommunications, at the D-1 level, with the United Nations Interim Administration Mission in Kosovo (UNMIK). His contract was subsequently extended several times, as Director (D-1), Department of Communications, Directorate of Infrastructure Affairs/Communication (DIA/C), until September 2002.

3. The Applicant's duties included assisting with the modernization of the Posts and Telecommunications Enterprise (PTK), Kosovo. As part of his functions, he was involved in the negotiation of a number of contracts of PTK with consultancy companies.

4. On 22 May 2002, the Deputy Special Representative of the Secretary-General (Civil Administration), UNMIK, tasked UNMIK Management Review and Internal Oversight Unit to submit a fact-finding report into allegations of improprieties in the award of contracts relating to PTK to Austrian companies. The resulting report, issued on 16 June 2002, recommended that a "formal, comprehensive, and complete investigation should be undertaken covering, inter alia, the entire process of entering into these contracts, the transaction of funds under the contracts, the nature and extent of delivery of services, etc." A copy of this report was transmitted to the Applicant, who provided comments rebutting its contents and conclusions on 21 July 2002.

5.

11. On 8 April 2004, the Applicant filed an appeal with the New York Joint Appeals Board (JAB) challenging the decision by OIOS to invite the Austrian Public Prosecutor to open a criminal investigation against him. The JAB issued its report on the case on 27 February 2006; the JAB Panel made no recommendation regarding that appeal, as it “unanimously agreed that, in view of the fact that [the

14. By Judgment No. 1465 (2009), rendered on 31 July 2009, UNAT rejected the Applicant's pleas in their entirety. The judgement was transmitted to the Applicant's counsel by letter dated 30 September 2009.

15. According to the Applicant, on 6 November 2009, his counsel consulted his Official Status File (OSF) and discovered that it contained a memorandum dated 8 June 2006 signed by the then USG/DM, UN Secretariat. In this memorandum, the Applicant affirms, the former USG/DM stated, among other things, that he was "concerned about the decision of the Austrian Prosecutor not to pursue its criminal investigation into [the Applicant] with respect to allegations against him of breach of trust and corruption".

16. On 30 November 2009, the Applicant filed an application with UNDT contesting UNAT Judgment No. 1465. On 18 December 2009, the Respondent submitted to the Tribunal a motion to dismiss the case. The Applicant's counsel transmitted final comments on 5 January 2010, in which he requested that an oral hearing be held.

Parties' Contentions

17.

b.

Applicant's case is not one that was pending before UNAT or not decided by same at the time UNAT was abolished. On the contrary, UNAT has completed its review of the case and issued a final judgement. The Applicant has filled a new application with UNDT appealing the UNAT judgement;

- c. The contested decision is not an administrative decision within the meaning of article 2, paragraph 1 (a), of the UNDT statute. According to article 2.1 of the UNDT statute, "the Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual ... [t]o appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment ... ". In light of the definition in Judgment UNDT/2009/86, Planas (in line with longstanding UNAT and ILOAT jurisprudence), an administrative decision can only be considered as such if, inter alia, it has been "taken by the Administration". In the present case, the Applicant contests a decision by UNAT;
- d. For the reasons set out above, the Respondent submits that the application at hand is not receivable and should be dismissed.

Considerations

19. According to article 9 of the UNDT rules of procedure (RoP), which are based on article 7, paragraph 2, of the UNDT statute, the Tribunal may determine, on its own initiative, that it is appropriate to decide on a case by summary judgment. This may be the case when there is no dis

21. Usually, in cases deemed suitable to be decided by summary judgment, no oral hearing will be necessary. According to the Tribunal's procedural law there is no obligation to hold an oral hearing. Article 7, paragraph 3 (e), of the UNDT statute merely prescribes that the Tribunal's own rules of procedure shall include provisions concerning oral hearings. Article 16, paragraph 1, of the UNDT RoP provides that the Tribunal "may" hold oral hearings; article 16, paragraph 2, of the RoP sets out that a hearing "shall normally be held following an appeal against an administrative decision imposing a disciplinary measure". It follows from this distinction that in non-disciplinary cases (like the present one) it is a matter of judicial discretion to hold an oral hearing or to abstain from it. Article 16, paragraph 6, of the UNDT RoP (requiring that the oral proceedings shall be held in public) does not supersede article 16, paragraph 1, of the RoP. Hence, it remains within the Tribunal's discretion whether to hold an oral hearing or not. Open justice, as a fundamental element of the exercise of the Tribunal's jurisdiction (see UNDT/2010/004, Dumornay), may not be equated with oral hearings. The efficient and fair functioning of the Tribunal has to be demonstrated in its judgments and orders.

22. In the case at hand, an oral hearing is neither necessary nor even helpful. According to the application and Applicant's final comments, he would like to have an oral hearing in order convince the Tribunal to revise the facts of the case which was already decided upon by the former UNAT. However, any discussion on the merits has as indispensable precondition that the Tribunal be competent to enter into examining them. This issue is a pure question of law, on which the

concerned staff member. The Tribunal's competence is thus circumscribed to administrative decisions, excluding any other kind of acts or behaviour.

25. The notion of "administrative decision" may be disputable. On the one hand, the Tribunal has upheld a well-established definition (see Judgments UNDT/2009/077, Hocking, Jarvis, McIntyre, paragraph 44, and UNDT/2009/086 Planas, paragraph 10, referring to Judgement No. 1157, Andronov (2004)). On the other hand, it has been said that there may be no precise and limited definition of this concept (see UNDT/2010/018, d'Hellencourt, paragraph 40). Some find

system of administration of justice, establishes that "... [c]ases not decided by the United Nations Administrative Tribunal by 31 December 2009 will be transferred to the United Nations Dispute Tribunal as of 1 January 2010".

31. It clearly flows from the above-quoted provisions that UNDT is only competent to hear cases still pending before UNAT at the time of its disappearance on 31 December 2009, and not those on which judgement had been passed by that date.

32. In the present case, UNAT had already pronounced itself on the Applicant's claims and put an end to the relevant procedure by issuing Judgement No. 1465. By no means could the case be deemed to remain pending. Consequently, UNDT is not competent to examine the application at hand as one of the cases transferred to the UNDT from old UNAT by virtue of the aforementioned transitional measures.

33. In addition, it should be recalled that UNAT constituted the very last instance in the former justice system of the United Nations. In this connection, article 11 of the UNAT Statute unambiguously provided that "the judgements of the Tribunal shall be final and without appeal".

34. As a matter of fact, the Applicant's case was introduced, considered and disposed of entirely under the former justice system.

36. In view of the foregoing, the application under review must be deemed irreceivable, as it falls outside the Tribunal's competence.

Conclusion

37. For the reasons stated above, the Tribunal DECIDES that:

The application be rejected in its entirety.

(Signed)