

JUDGE INÉS WEINBERG DE ROCA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by the Secretary-General of the United Nations against Judgment No. UNDT/2013/127, issued by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) in Geneva on 17 October 2013, in the case of *Gehr v. Secretary-General of the United Nations*. The Secretary-General filed his appeal on 16 December 2013. Mr. Walter Gehr did not file any answer.

Facts and Procedure

2. The Dispute Tribunal made the following findings of fact:¹

... The Applicant joined the UNODC in Vienna in 2002 and, in 2007, was appointed as a Crime Prevention and Criminal Justice Officer at the Terrorism Prevention Branch (“TPB”), Division of Treaty Affairs (“DTA”). His fixed-term appointment was extended several times until 31 December 2011, when he was separated from service of the Organization.

... In the fall of 2009, the Chief, TPB, and the Officer-In-Charge, DTA, announced to TPB staff that the Branch was to be reorganised. In early November 2009, the Chief, TPB, and the Officer-in-Charge, DTA, were the Applicant’s first and second reporting officers respectively; as such, they conducted with the Applicant his mid-point review for the performance cycle period of 1 April 2009 to 31 March 2010 (“2009-2010 performance appraisal”).

... On 8 December 2009, the Applicant was informed that his post would be abolished and that he would be reassigned to the position of Senior Legal Adviser which was to be created within the Office of the Chief, TPB.

... In a letter dated 31 January 2010 sent to the UNODC Executive Director, the Applicant explained that, in his view, the decision to abolish his post and reassign him to the position of Senior Legal Adviser was motivated by extraneous considerations. He further explained that the decision had been preceded by prohibited conduct, including harassment, on the part of his first and second reporting officers.

... The Applicant alleges that on 1 December 2010 he sought the assistance of the Ethics Office following the receipt of his 2009-2010 performance appraisal.

... On 14 December 2010, the Applicant submitted to the Ethics Office a request for protection from retaliation based on ST/SGB/2005/21 (Protection Against Retaliation for Reporting Misconduct and for Cooperating with Duly Authorized

¹ The following text is taken from Judgment No. UNDT/2013/127, paras. 2-11.

Audits or Investigations). He claimed in particular that his first and second reporting officers had made negative comments in his 2009-2010 performance appraisal, that he had been denied the right to rebut the appraisal and that he had been threatened by his second reporting officer with the non-renewal of his contract. This, he submitted, constituted retaliation against him for having reported prohibited conduct to several officials and institutions in 2009 and 2010.

... After the filing of his request, several communications ensued between the Applicant and the Ethics Office ...

... By letter dated 17 October 2011 which the Applicant received on the following day, he was notified that, following a preliminary review of his complaint of retaliation, the Ethics Office had determined that a credible *prima facie* case of retaliation had not been established.

... On 18 November 2011, the Applicant sought management evaluation of the determination by the Ethics Office conveyed by the letter of 17 October 2011 and the Management Evaluation Unit ("MEU") informed him by letter of 15 December 2011 that they did not have the authority to evaluate the decision of the Ethics Office, because the Secretary-General had taken the position that he could not be held liable for the acts or omissions of the Ethics Office.

... On 22 December 2011, the Applicant filed the present application with the Tribunal, challenging the determination made by the Ethics Office and the inordinate delay by the Ethics Office in reaching a decision.

3. In Judgment No. UNDT/2013/127, the Dispute Tribunal concluded that the Ethics Office's determination that no credible *prima facie* case of retaliation had been established constituted an administrative decision, and that Mr. Gehr's application was therefore receivable. Nevertheless, the UNDT concluded on the merits that the Ethics Office did not err in reaching that determination. The Dispute Tribunal, on the other hand, found that the Ethics Office had acted with undue delay of almost ten months in responding to Mr. Gehr's report of misconduct, and that the delay had caused Mr. Gehr anxiety and unnecessary frustration, for which he should be awarded compensation in the amount of USD 3,000.

Submissions

The Secretary-General's Appeal

4. Based on the applicable provisions of the UNDT Statute and the jurisprudence of the Appeals Tribunal, the UNDT exceeded its jurisdiction and erred in law in concluding that the Ethics Office's determination was an administrative decision.

5. Article 2(1) of the UNDT Statute provides that the UNDT is competent to review an application appealing an "administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment", and that the "terms 'contract' and 'terms of appointment' include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance".

6. The UNDT understood *Nwuke*² to mean that, whenever a staff member had a right to certain administrative processes, any determination that impacts on whether or how these administrative processes were undertaken constituted an administrative decision that fell within the UNDT's jurisdiction. It erred in applying *Nwuke* to the present case as it is clearly distinguishable. *Nwuke* concerned a different legal instrument, ST/SGB/2008/5, which expressly provides that the measures for ensuring protection from discrimination, harassment and abuse of authority are undertaken by the Administration. By contrast, in the present case, neither Mr. Gehr nor the Administration has any right or authority to compel an investigation by the Ethics Office under ST/SGB/2005/21.

7. The UNDT erred in its interpretation of a quote from *Servas*.³ The Appeals Tribunal never addressed the issue of whether a determination by the Ethics Office is or is not a contestable administrative decision. At most, the quote indicates that had the staff member filed a new application, the UNDT would have reviewed it. At that point, the UNDT would have been required to review other aspects of whether the application was receivable, including any arguments that a determination by the Ethics Office is not a contestable administrative decision.

² *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-099.

³ *Servas v. Secretary-General of the United Nations*, Judgment No. 2013-UNAT-349.

8. In view of the foregoing, the UNDT erred by failing to consider the independent status of the Ethics Office vis-à-vis the Secretary-General. Accordingly, actions or omissions of the Ethics Office cannot be attributed to the Secret

13. The Dispute Tribunal decided that the Ethics Office's determination that no credible *prima facie* case of retaliation had been established constitutes an administrative decision that comes within its statutory jurisdiction.

14. The Secretary-General contends that it is not an administrative decision subject to judicial review under Article 2 of the Statute of the UNDT.

15. We have held that the UNDT 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 the United Nations.⁵

16. The former Administrative Tribunal's definition of an administrative decision that is subject to judicial review has been adopted by the Appeals Tribunal:

A unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences.⁶

17. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.⁷

18. The key characteristic of an administrative decision subject to judicial review is that the decision must "produce[] direct legal consequences" affecting a staff member's terms or conditions of appointment. "What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision."⁸ We agree with the Secretary-General that the Ethics Office is limited to making recommendations to the Administration.⁹ The Ethics Office's

⁵ *Reid v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-419.

⁶ *Wasserstrom v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-457, para. 34 (internal citations omitted).

⁷ Former Administrative Tribunal Judgment No. 1157, *Andronov* (2003), para. V.

⁸ *Bauzá Mercére v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-404, para. 18, citing *Andati-Amwayi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-058.

⁹ *Wasserstrom*, *supra* note 6.

recommendation was accepted by the head of the department or office concerned. The decision was made by the Secretary-General and has been challenged by Mr. Gehr.

19. Mr. Gehr had legal remedies available to him regarding his claims of retaliation and wrongful termination. Under Section 6.3 of ST/SGB/2005/21 entitled "Protection against retaliation for reporting irregularities" and 7.2()-5.4(e) of ST/SGB/2005/21, the Secretary-General is authorized to conduct an audit of the situation.

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Dated this 17th day of October 2014 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Chapman

(Signed)

Judge Adinyira

Entered in the Register on this 22nd day of December 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar