



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/075/
JAB/2009/032
UNDT/NY/2009/089
Judgment No.: UNDT/2010/156
Date: 31 August 2010
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

SHKURTAJ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
George Irving

Counsel for respondent:
Peri Johnson, UNDP
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The applicant, a former staff member of the United Nations Development Programme (UNDP), filed two separate appeals contesting (i) the refusal of the respondent to enforce the ethics policy, as set out in ST/SGB/2005/21, with respect to the applicant's request for protection from retaliation (case UNDT/NY/2009/089—hereinafter referred to as the “Ethics Policy Case”) and (ii) the respondent's failure to implement the recommendation of the Ethics Office to pay fourteen months' net base salary as compensation for the violation of his due process rights by an *ad hoc* investigative panel set up to investigate his allegations (case UNDT/NY/2009/075/JAB/2009/032—hereinafter referred to as the “Compensation Case”).

2. The Compensation Case was transferred to the United Nations Dispute Tribunal from the Joint Appeals Board (JAB) on 1 July 2009. The Ethics Policy Case is an application filed with the Dispute Tribunal. As both applications are based on the same factual history, concern the same parties, claims and related administrative decisions, I decided with the consent of the parties to examine both matters jointly and deal with them in one judgment.

3. On 13 May 2010, the Staff Council of UNDP, United Nations Population Fund and United Nations Office for Project Services submitted an application under art. 24 of the Rules of Procedure, requesting the Tribunal to grant leave to file a friend-of-the-court brief. Having considered the application, and with the consent of the parties, I granted the Staff Council leave to file the brief. The brief was submitted on 20 May 2010 and I have given it due consideration.

The facts

Employment history

4. On 30 January 2005, the applicant joined the UNDP country office in the Democratic People's Republic of Korea (DPRK) on a Special Services Agreement ("SSA" or the "consultancy contract") to finalise a 2005 monitoring and evaluation plan. Subsequently, from 6 March 2005 to 5 July 2005, the applicant was engaged under an SSA contract as Operations Manager. This SSA was extended four times until the end of May 2006. On 1 June 2006, the applicant was given a six-month appointment of limited duration as Operations Manager with the UNDP office in DPRK.

5. On 27 September 2006, two months before the expiration of his appointment of limited duration, the applicant was relocated to New York to work with the Centre for Business Solutions, Bureau of Management at UNDP headquarters. It appears that the applicant was placed on an SSA, although the parties are in disagreement whether the change in his status was with the knowledge and consent of the applicant. On 26 March 2007, the applicant's contract lapsed and was not renewed.

Allegations of retaliation

6. In 2005 and 2006, during his employment with UNDP in DPRK, the applicant raised concerns and allegations with respect to some financial and administrative aspects of UNDP's operations in DPRK.

7. In the January 2007 session of the UNDP Executive Board, the Board imposed a number of conditions on the DPRK Programme, which were not accepted by the host Government. As a result, UNDP suspended its operations in DPRK in March 2007.

8. On 5 June 2007, after the expiration of his last consultancy contract, the applicant sent an email to the Ethics Office, requesting protection from retaliation as

a result of the concerns he raised regarding UNDP's operations in DPRK. The email stated:

. . . I am a former United Nations Staff Member who while still employed by the UN reported misconduct through my chain of command. When no action was taken to cease such misconduct, using the protections of ST/SGB/2005/21 [Protection against retaliation for reporting misconduct and for cooperating with duly authorised audits or investigations], I reported such misconduct to an entity outside of the established internal mechanisms. The "entity outside of the established internal mechanisms" was the United States Mission to the United Nations. Subsequent to my reporting such misconduct to the outside entity, my employment was terminated. I believe such action was retaliatory in nature. Such reporting was necessary to avoid substantive damage to the Organization's operations. The use of internal mechanisms was not possible because at the time my report was made, I had grounds to believe that I would be subjected to retaliation by the person(s) I should report pursuant to the established internal mechanisms.

Furthermore, I had in fact previously reported the same information through the established internal mechanisms, and the Organization failed to inform me in writing of the status of the matter within six months of such report. . . .

The misconduct I reported was the violation of multiple rules and regulations as well as criminal conduct by the United Nations Development Program with respect to UNDP's operations in . . . [DPRK]. In July 2005, I informed UNDP in writing that its practices include receipt and non-disclosure of counterfeit currencies, the payment to the Government of DPRK in hard currency, as well as the management of UNDP programs by Government officials of the DPRK, and other related violations.

On 19 January 2007, UNDP senior officials were quoted in the media that the agency had been operating in violation of its own rules. On this same day, UNDP announced it would change its practices to be in line with its rules and regulations. On this same day, the Secretary-General ordered a wide-ranging independent external inquiry which will examine, *inter alia*, UNDP's operations in DPRK.

Section 1 of ST/SGB/2005/21 states that it is the duty of staff members to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action, and that an individual who makes such a report in good faith has the right to be protected against retaliation. . . .

...

On 19 January 2007—the same day as the Secretary-General ordered an inquiry into allegations of wrongdoing by UNDP in North Korea, UNDP Associate Administrator . . . informed a colleague that he suspected that I may have shared information with the United States Mission to the United Nations. He ordered that my access to ATLAS be terminated, and that my contract be allowed to expire as of the end of March 2007. These actions are retaliatory in nature. I hereby charge that [the UNDP Associate Administrator] has engaged in both retaliation and threatened retaliation, and that such acts are themselves misconduct.

I expect that the Ethics Office will undertake its responsibilities per ST/SGB/2005/21 with objectivity and alacrity, and that within 45 days of receiving this complaint of retaliation, the Ethics Office will complete its review of my complaint.

I expect that when the Ethics Office confirms the facts presented in this letter, the Ethics Office will recommend a reversal of the retaliatory actions undertaken against me by [the UNDP Associate Administrator] or his designate, and will recommend a further investigation into the retaliatory actions by [the UNDP Associate Administrator].

I expect that the United Nations will honor the requirements of ST/SGB/2005/21 and will ensure that no further retaliation is taken against me for my exercising my obligation to report misconduct to entities outside of the established mechanisms, including to the United States Mission to the United Nations.

I expect that I be reinstated . . . and allowed to continue employment with the United Nations.

9. The Director of the Ethics Office responded by letter dated 17 August 2007, stating that the Ethics Office did not have jurisdiction to address the applicant's request for protection from retaliation. The letter stated:

I have indicated from the outset, that there was an issue regarding the application of ST/SGB/2005/21 to UNDP. In fact, from a purely legal perspective, the Ethics Office does not have jurisdiction to address a request for protection from retaliation arising from UNDP. However, as Director of the Ethics Office, I undertook to review your case, based on the following:

(i) I received what I considered to be sincere and deeply concerned representations from the President of UNDP's Staff

Council, who are clearly interested in ensuring this matter be dealt with in the best interests of UNDP;

- (ii) an absence of an applicable protection from retaliation policy within UNDP;
- (iii) the direct and public intervention of one of the Executive Board members of the UNDP; and
- (iv) accountability in this matter is ultimately to the General Assembly.

As is evident from the attached memorandum, UNDP has decided that it does not wish to pursue this matter within the parameters of ST/SGB/2005/21; however, having undertaken to conduct a review of your case, had the jurisdiction of the protection from retaliation bulletin applied, in my view, a prima facie case of retaliation would have been established.

While it is unfortunate that this matter will not be considered independently and within the parameters of ST/SGB/2005/21, the Ethics Office hopes that UNDP will reconsider this matter, in the best interests of the United Nations.

10. On 17 August 2007, the Director of the Ethics Office also sent a letter to the Administrator of UNDP, stating that had the Ethics Office had jurisdiction over the matter, the information received by it would have supported a determination that a prima facie case of retaliation had been established in this case, and stating that it would be in the interests of the Organisation if UNDP considered the case pursuant to ST/SGB/2005/21:

In the present case, we discussed the possibility of UNDP, without ceding jurisdiction in future cases, allowing this case to proceed within the parameters of ST/SGB/2005/21. However, you have indicated that after discussing this matter further, and in light of ongoing inquiry being undertaken by the Board of Auditors, UNDP wishes to conduct its own external review.

When I undertook my review of this case, it was done so within the parameters of ST/SGB/2005/21. Indeed, the Ethics Office received independent and corroborative information in relation to whether a prima facie case of retaliation has been established.

While it is now understood that the case will not proceed any further within the parameters of ST/SGB/2005/21, I must advise that had the jurisdiction of the protection from retaliation bulletin applied, the

information received by the Ethics Office would have supported a determination that a prima facie case had been established in this case.

Should UNDP wish to reconsider pursuing this matter within ST/SGB/2005/21, I believe it would be in the best interests of the United Nations and UNDP to do so.

11. At the time the applicant addressed his claim to the Ethics Office and at the time of the Ethics Office's Director's letters of 17 August 2007, UNDP still had not promulgated its own policy on protection against retaliation, nor established an independent office to receive and review such claims.

12. On 23 August 2007, the applicant filed two requests for administrative review:

a. A request for review of UNDP's decisions to (i) place him on SSA contract, (ii) refuse to renew his appointment, (iii) refuse to afford him whistleblower protection from retaliation, and (iv) refuse to apply the provisions of ST/SGB/2005/21 to his situation.

b. A request for review of (i) Secretary-General's decision not to uphold the findings of the Ethics Office that a prima facie case of retaliation has been established, (ii) Secretary-General's refusal to mandate UNDP to abide by the Ethics Office request that the applicant's case be pursued according to ST/SGB/2005/21.

13. By separate letters dated 19 September 2007, the applicant was informed by the Under-Secretary-General for Management and the Assistant Administrator and Director of UNDP's Bureau of Management that the applicant's requests for review were not receivable. The letter from UNDP further stated:

This being said, since your two requests for administrative review aim at having your allegations of retaliation reviewed, I wish to refer [them] to the independent external review to be carried out . . . which will examine matters relating to DPRK, including, *inter alia*, your allegations.

14. On 11 September 2007, UNDP announced the establishment of an *ad hoc* investigative body, the External Independent Investigative Review Panel (EIIRP), to review, *inter alia*, “[the applicant’s] allegations related to these operations and the alleged retaliation, [and] make every effort to establish the facts, including about the specific events in DPRK and regarding application of relevant protection policies”.

15. The Terms of Reference of the EIIRP further provided:

5) A complaint has been lodged that UNDP retaliated against an individual for “blowing the whistle” on irregularities in its operations in DPRK. In this respect, [the EIIRP shall] review the complainant’s allegations related to these operations and the alleged retaliation, make every effort to establish the facts, including about the specific events in DPRK and regarding application of relevant protection policies. After completing the review, the Independent Review Team shall share its findings on this aspect of the Independent Investigative Review with the Director, UN Ethics Office. The Director, UN Ethics Office, could then provide an opinion and formulate recommendations, as may be appropriate, on the retaliation allegations in light of these findings. If the UN Ethics Office requires further investigation of this specific issue, after having reviewed the findings of the investigative review, it can arrange for such follow-up before providing its recommendations, with the full cooperation of UNDP.

6) The Independent Investigative Review may make any recommendations as it sees fit based on the conclusions drawn from this Independent Investigative Review, including regarding UNDP’s protection policies and any lessons learned.

...

D) The Independent Investigative Review will not seek or accept supervision or guidance from the Administrator, the Associate Administrator or any other officials or staff of UNDP or of the UN in the conduct of the Independent Investigative Review, or from members of the UNDP Executive Board or from any other Government, and will at all times avoid any conflict of interest or appearance of conflict with UNDP or its officials or personnel. Nothing in this paragraph shall preclude any person from providing relevant information in any form to the Independent Review Team.

16. Neither the Terms of Reference nor the report itself prescribed the exact procedures to be followed by the EIIRP during its investigation. On 20 September

2007—at the time the EIIRP was created—the UNDP adopted a document entitled “UNDP Legal Framework for Addressing Non-Compliance with UN Standards of Conduct”, which defined the mechanisms for reporting allegations of wrongdoing and explained the procedures applicable during and after fact-finding investigations. However, there is nothing before the Tribunal to suggest that EIIRP relied on investigation procedures of the UNDP Legal Framework when carrying out its investigation. The Terms of Reference of the EIIRP did not contain any references to it and, although the EIIRP briefly considered the Legal Framework in its report, this consideration was limited to whether its provisions on retaliation applied to the applicant’s substantive claims. The EIIRP found that the Legal Framework did not apply to them as it had no retroactive effect.

17. The EIIRP issued its final report on 31 May 2008, finding that although the applicant was entitled to protection from retaliation, UNDP was able to demonstrate that its actions with regard to the applicant were not retaliatory in nature and were not connected to his complaints. The EIIRP concluded that “UNDP did not retaliate against [the applicant] for his role in raising concerns about UNDP’s operations in DPRK”. The EIIRP also noted that it had “serious reservations about the [applicant’s] credibility and the trustworthiness of claims that he [had] made to the Panel and to others”. The EIIRP noted that it met with the applicant on three occasions and that he “promised to back up his allegations with documentary evidence. Despite the Panel’s repeated requests for and genuine interest in [the applicant’s] purported proof, [the applicant] never provided it”. The EIIRP accused the applicant of making submissions “believed [by the EIIRP] to be false or, at least, highly misleading”.

18. Following the issuance of the report, it was shared with the Ethics Office to enable the Director “to provide an opinion and formulate recommendations, as may be appropriate, on the retaliation allegations in light of these findings”.

19. The Director of the Ethics Office completed his review on 27 June 2008. Prior to the completion of this review, the report was publicly released by UNDP; in fact, a copy of the investigation report is still available on UNDP's website as at the date of this Judgment. In his review, the Director of the Ethics Office agreed with EIIRP's finding that, although the applicant had engaged in protected activity, UNDP's actions with respect to the applicant were not retaliatory. The Director found, however, that EIIRP failed to inform the applicant of the adverse finding about his credibility and to provide him with an opportunity to submit his comments. The Director found that this procedural failure did not impact upon the EIIRP's findings that, although the applicant was entitled to protection from retaliation, no retaliation had in fact taken place. Notwithstanding, as a result of the due process failure, the UN Ethics Director recommended payment of fourteen months' salary to the applicant as compensation for the breach of his due process rights. In his report on the matter, the Ethics Director stated:

Ethics Office Opinion

13. The mandate of the EIIRP, as it specifically relates to the Ethics Office, provides:

“The Director, UN Ethics Office, could then provide an opinion and formulate recommendations, as may be appropriate, on the retaliation allegations in light of these findings”.

14. In providing that opinion, a review of the Panel's findings must obviously be undertaken; however, in the conduct of such a review one must be careful not [to] substitute his or her views of the evidence for those of the EIIRP's and ensure that some degree of deference is given to the findings of credibility made by the EIIRP.

...

24. Accordingly, even though [the applicant] has been officially identified by the EIIRP as an individual entitled to protection from retaliation, the record shows that each of the actions occurred independent of the protected activity and therefore were not retaliatory.

Observations

25. As indicated above, the EIIRP found that [the applicant] was an individual “entitled to protection from retaliation” and, the evidence

supports the fact that UNDP had discharged the burden of proof that it (UNDP) would have taken the action(s) absent the protected activity.

26. However, the EIIRP in its report on this matter, also made specific reference(s) to [the applicant's] credibility as it related to a number of issues, including his Personal History Forms (P.11).

...

30. Unfortunately, it does not appear from the record that [the applicant] was offered an opportunity to provide a reasonable explanation in relation to the relevant facts upon which the EIIRP based its adverse findings.

31. The EIIRP's failure to provide [the applicant] with an opportunity to provide a reasonable explanation is, in my opinion, a due process failure. However, based upon the record, this due process failure did not impact upon the EIIRP's finding that [the applicant] was an individual entitled to protection from retaliation and UNDP discharging its obligation (burden of proof) to establish by clear and convincing evidence that it would have taken the action(s) absent the protected activity.

Recommendation

32. Since the Report has been released publicly and the EIIRP, as an entity, is now *functus officio*, there is no means by which to address this matter other than by means of restitution. Accordingly, it is recommended that UNDP pay [the applicant] fourteen (14) months net base salary as compensation (at the rate in effect at the time of his separation from service) for the due process failure.

20. To date, i.e. in over two years, UNDP has not made a decision on the Ethics Office's recommendation to compensate the applicant as stated in its report dated 27 June 2008.

JAB appeals

21. On 26 November 2007, the applicant submitted two statements of appeal with the JAB—against UNDP and the Secretary-General—in relation to the administrative decisions contested in his 23 August 2007 requests for review.

22. On 5 December 2008, the JAB, having consolidated both appeals, rejected the applicant's claims, finding that they were not receivable because the applicant was

not a staff member at the relevant time, but was instead engaged as a consultant under an SSA. The JAB also found that the change to applicant's status as an SSA contractor had been effected with his full consent and knowledge.

23. By letter dated 14 January 2009, signed by the Deputy Secretary-General, the applicant was informed that the Secretary-General had decided to accept the findings and recommendations of the JAB, including the finding that the applicant's claims with respect to the application of the ethics policy were not receivable. Shortly thereafter, by letter dated 29 January 2009, the Director of the Legal Support Office of UNDP informed the applicant that no further action would be taken in his case and that he could pursue the matter further by filing an appeal with the UN Administrative Tribunal.

24. On 20 February 2009, the applicant submitted a further request for administrative review, referring to UNDP's letter of 29 January 2009, and challenging the decision to "reject the findings and conclusions of the UN Ethics Office dated 27 June 2008 that [he] be awarded compensation for violations of [his] due process rights".

25. On 18 March 2009, the Assistant Administrator and Director, Bureau of Management, UNDP, rejected the applicant's request dated 20 February 2009, stating:

You have requested administrative review of the decision "rejecting the findings and conclusion of the UN Ethics Office dated 27 June 2008 that [you] be awarded compensation for violations of [your] due process rights".

In this connection, it should be recalled that in your previous appeal to the Joint Appeals Board (JAB) following receipt of my letter of 19 September 2007, you already raised this issue before the JAB. . . . The JAB unanimously concluded that you were not a UNDP staff member at the relevant time and that therefore your appeal was irreceivable. On 14 January 2009, the Deputy Secretary-General conveyed to you the Secretary-General's decision accepting the findings of the JAB and deciding to take no further action on the case.

Since the Secretary-General decided to take no further action on this case, the Administrator of UNDP has no jurisdiction to further review the decision of the Secretary-General.

Therefore, as already conveyed to you by the Deputy Secretary-General on 14 January 2009, and Ms. Peri Johnson, Director, Legal Support Office, Bureau of Management in her letter of 29 January 2009, any further appeal of the decision . . . must be made by appeal to the UN Administrative Tribunal within the prescribed time limits.

26. On 10 April 2009 the applicant filed an appeal with the JAB contesting the Secretary-General's decision, expressed in the Deputy Secretary-General's letter dated 14 January 2009, to accept the JAB recommendations and requesting to be paid compensation in the amount of fourteen months' net base salary as recommended by the Director of the Ethics Office. The matter—the Compensation Case—was subsequently transferred to the Dispute Tribunal.

27. On 22 July 2009, the applicant filed another application—the Ethics Policy Case—this time directly with the Dispute Tribunal, contesting the decision not to apply the Organisation's policy on retaliation as set forth in ST/SGB/2005/21.

Scope of appeals

28. Pursuant to my Order for clarification, counsel for the applicant filed a submission identifying the contested decisions in each of the two cases as follows:

a. *The Ethics Policy Case*: refusal of the respondent to enforce the ethics policy (per letter dated 17 August 2007 from the Director of the Ethics Office), articulated in ST/SGB/2005/21, with respect to the applicant's request for protection from retaliation. The final decision was expressed in the 14 January 2009 letter from the Deputy Secretary-General to take no further action on the applicant's appeals. The applicant filed two requests for administrative review (to the UNDP Administrator and to the Secretary-General), both dated 23 August 2007. The replies to both requests were provided by letters dated 19 September 2007.

b. *The Compensation Case*: failure to implement the recommendations of the Director of the Ethics Office dated 27 June 2008 for fourteen months' net base salary as compensation for violations of due process. This decision was contained in the letter dated 29 January 2009 from the Director, Legal Support Office, Bureau of Management, stating that UNDP would take no further action on this case. The request for administrative review was filed with UNDP on 20 February 2009, and the reply was received on 18 March 2009.

29. This judgment therefore will be limited to the review of these decisions. These appeals are not against the findings or decisions of the Ethics Office; in fact, the applicant relies on the findings of the Ethics Office in making his claims. The following summaries of the parties' submissions in this case are limited to their submissions with respect to the contested decisions identified above.

Applicant's submissions

Receivability of both appeals

30. The applicant submits that the contested decisions are receivable as they relate to the applicant's recognised status as a whistleblower entitled to protection from retaliation under the applicable ethics policy. The applicant was a staff member for at least part of the period during which he engaged in whistleblowing activities, which was recognised by the Ethics Office and the EIIRP.

The Ethics Policy Case

31. The applicant avers that he was entitled to protection from retaliation in accordance with ST/SGB/2005/21. The policy on protection against retaliation was envisaged by the General Assembly as a system-wide policy and the Secretary-General should have established and made available machinery for addressing the non-observance of a staff member's terms of appointment. UNDP's initial refusal to accept the jurisdiction of the UN Secretariat's Ethics Office represents a denial of

justice. At the time the applicant addressed his complaint to the UN Secretariat's Ethics Office, UNDP had no mechanism for implementing the ethics policy, which may account for the Administrator's decision to appoint an *ad hoc* investigatory body.

The Compensation Case

32. The applicant submits that the Administration failed to comply with its obligation to treat its staff in accordance with the requirements of good faith and fair dealing, this causing damage to his future career prospects and professional reputation, as well as emotional distress and anxiety, for all of which he should be properly compensated. The Ethics Office was delegated the responsibility for making final recommendations on the EIIRP's report and, therefore, its recommendations were binding and should have been implemented. The applicant avers that, had he been afforded an opportunity to respond to the factual inaccuracies and flawed conclusions in the EIIRP report, he would have pointed out that the respondent never rebutted the *prima facie* case of retaliation. The EIIRP shifted the burden of proof to the applicant yet never afforded him a full hearing on the issues.

Relief sought

33. The applicant seeks the Tribunal to order the following relief:
- a. Rescission of Secretary-General's decision to take no action on the applicant's appeals.
 - b. Compensation in the amount of fourteen months' salary, based on salary rates in effect in March 2007 and with appropriate interest, for the failure of due process on the part of the EIIRP.
 - c. Reinstatement or, in the alternative, compensation in lieu of specific performance at three years' net base pay in view of the special circumstances of the case.

- d. Compensation in the amount of five years' net base pay for the violation of his rights.
- e. Costs (legal fees and other expenses) in the amount of USD20,500.

Respondent's submissions

Receivability of both appeals

34. The respondent denies that the contested decisions relate to any matter that arose during the applicant's employment as a staff member. The non-renewal of his consultancy contract and related matters that were the focus of the applicant's request for protection arose when he was a contractor. The applicant's submission to the Director of the Ethics Office confirms that the applicant's retaliation claim was limited to the time when the applicant was on SSA in New York. Therefore, under arts. 3.1 and 8.1(b) of the Statute, the applicant's claim is not receivable and the Dispute Tribunal does not have jurisdiction over this case. Further, the ethics regime is separate from the regular appeal mechanism; therefore, the consideration of the applicant's claims by the Ethics Office and UNDP does not give him standing before the Tribunal.

35. Specifically with respect to the Compensation Case, the respondent avers that the applicant' is out of time since he failed to request administrative review by the Secretary-General of the decision dated 29 January 2009 from the Director, Legal Support Office, Bureau of Management, which stated that UNDP would take no further action on this case. With respect to the Ethics Policy Case, the respondent also submits the applicant failed to identify a decision in respect of his claim relating to protection from retaliation (i.e., alleged refusal by the respondent to provide him whistleblower protection under ST/SGB/2005/21).

The Ethics Policy Case

36. The respondent submits that at the relevant time ST/SGB/2005/21 and ST/SGB/2005/22 (Ethics Office—establishment and terms of reference) did not apply to UNDP. Paragraph 3.4 of ST/SGB/1997/1 (Procedures for promulgation of administrative issuances) provides that Secretary-General's bulletins shall not, unless otherwise stated, be applicable to separately administered organs and programmes of the UN. Further, under Section 2.1 of the ST/SGB/2005/21, this bulletin applies only to staff members, interns, or volunteers. ST/SGB/2007/11, extending the application of ST/SGB/2005/21 to UNDP, was only promulgated on 30 November 2007, and therefore did not apply to the applicant's case.

37. According to the respondent, the Ethics Office did not have jurisdiction over the matter and thus did not review the applicant's allegations under ST/SGB/2005/21. The respondent, however, thoroughly reviewed the applicant's claims of retaliation through the EIIRP, which applied the principles of ST/SGB/2005/21 and confirmed that the respondent had not retaliated against the applicant. In his findings and recommendation of 27 June 2008, the UN Ethics Director concurred with the EIIRP's finding that the respondent did not retaliate against the applicant.

The Compensation Case

38. The respondent submits that the EIIRP was carried out independently and with full opportunity for the applicant to present his version of the facts. On several occasions the EIIRP attempted to meet with the applicant to receive the evidence that he promised to provide. Despite numerous requests and opportunities to do so the applicant failed to follow through and provide the alleged evidence. The respondent further submits that the applicant was not the subject of the investigation in connection with his complaint of retaliation and therefore the EIIRP was not required to share the report with him.

Consideration

Applicant's standing in both appeals

39. The scope of the appeals, as discussed above, is limited to (i) the respondent's refusal to subject the applicant's request for protection from retaliation to review under ST/SGB/2005/21 in August 2007 (the Ethics Policy Case) and (ii) the decision of the Secretary-General not to implement the recommendation of the Ethics Office to pay fourteen months' net base salary as compensation for violations of due process (the Compensation Case). It was not submitted by the respondent that these decisions were not administrative decisions within the meaning of art. 2.1 of the Statute. However, the respondent submitted that the applicant's appeals were not receivable because, having worked as a staff member only between June and September 2006, the applicant was not a staff member when he raised his allegations, but was instead engaged under an SSA and therefore has no recourse through the Tribunal. The parties are in disagreement about whether the applicant was placed on an SSA in September 2006 with his consent and knowledge—the applicant maintains that he did not become aware of the change in his status until shortly before he was separated from service.

40. I find that the applicant has standing to bring both applications before the Tribunal. In their joint submission on agreed facts, both parties confirm that “[i]n 2005 and 2006, during his employment with UNDP DPRK, the Applicant raised concerns regarding financial and administrative aspects of UNDP's operations in DPRK”. Indeed, the applicant first raised concerns with alleged improprieties in the DPRK office of UNDP in early July 2005, and, between June and September 2006, he was a staff member on appointment of limited duration. In effect, the applicant claims that before, during, and after the period of his appointment of limited duration, he continued to raise his concerns and allegations and was subjected to retaliatory treatment. The relevant timing is also confirmed in the EIIRP investigation report which states that “[s]ince as early as [16] May 2006 [i.e., less than a month prior to

June 2006], [the applicant] claimed that UNDP retaliated against him in various ways for reporting concerns about UNDP's operations in the DPRK". It cannot be the case that the applicant was a potential subject of retaliation during the periods of July 2005 to June 2006 and September 2006 to March 2007, when he was allegedly on an SSA, but somehow ceased to be such between June and September 2006, when he was a staff member on appointment of limited duration. I find that the applicant has demonstrated a sufficient nexus between the time period he worked as a staff member, the allegations he raised with respect to the operations of the UNDP office in DPRK, and his allegations of retaliation to find his appeal receivable. By extension, because his appeal in the Compensation Case concerned the Organisation's investigation of the applicant's allegations of retaliation and the alleged procedural violations committed during the investigation, the applicant also has standing to bring this case before the Tribunal.

Time-bar issue

41. I find that in the Compensation Case the requests for administrative review and the statements of appeal with the JAB were filed properly and timeously. I do not accept the respondent's submission that the applicant should have filed his request for administrative review of UNDP's decision dated 29 January 2009 with the Secretary-General (meaning, the UN Secretariat). The request for administrative review was filed with the Legal Support Office of UNDP, constituting substantial compliance and sufficiency for proper filing of the request (*Planas* UNDT/2009/070). In any case, it does not behove the Administration to raise this argument because UNDP replied to the applicant's request for review on 18 March 2009, rejecting his request for administrative review. Subsequently, the applicant filed an appeal with the JAB, keeping the matter alive and showing diligence in pursuing this claim. Therefore, this case is receivable by the Tribunal as a matter pending before the JAB as of 1 July 2009, when all outstanding JAB matters were transferred to the Dispute Tribunal.

42. With respect to the Ethics Policy Case, the applicant provided evidence that he received extensions of time from the UN Administrative Tribunal and the Dispute Tribunal covering the relevant time periods. The appeal was submitted to the Dispute Tribunal on 22 July 2009, within the time limits given to the applicant, and the issue of receivability therefore does not arise.

The Ethics Policy Case

43. Pursuant to para. 3.4 of ST/SGB/1997/1, Secretary-General's bulletins are not applicable to separately administered organs and programmes of the United Nations unless otherwise stated therein. Secretary-General's bulletin ST/SGB/2005/21 did not contain a provision extending its application to UNDP and was thus not part of the applicant's contract with the Organisation. However, the Organisation was still required to act fairly towards the applicant, which meant that UNDP had to examine the concerns and allegations raised by the applicant, albeit not necessarily through the Ethics Office. The question, therefore, is whether the applicant's allegation that he had been retaliated against was adequately and objectively reviewed.

44. Although the Ethics Office did not have jurisdiction to examine this case under ST/SGB/2005/21, the Director of the Ethics Office reviewed the matter in August 2007 and found that there was a prima facie case of retaliation, which I accept to mean that, based on the information available to him, that there was an arguable case (as distinct from proven) that the applicant was retaliated against and thus there were grounds to investigate the matter further. In light of this finding, UNDP set up the EIIRP to examine the allegations concerning the operations of the UNDP office in DPRK, including the application's allegations of retaliation against him. With respect to the issue of retaliation, the EIIRP undertook a full substantive review of the applicant's claims and established that there was no retaliation. Pursuant to the EIIRP's terms of reference, the investigation report was subsequently provided to the Ethics Office for review and recommendations. The Director of the Ethics Office concurred with the EIIRP's findings and conclusions and did not recommend any

additional investigation. However, the Ethics Office found that the applicant was not given a chance to reply to the adverse findings concerning his credibility and trustworthiness and recommended compensation.

45. The EIIRP report, constituting of some 353 pages, and the interviews with the applicant are all a matter of record. I see no reason warranting a conclusion that the report of the EIIRP and the subsequent review by the Ethics Office were anything but thorough and objective. The Director of the Ethics Office carried out a careful review of the investigation report, this review constituting an independent analysis with the purpose of examining whether the report reflected a fair and balanced investigation. The Director found, in effect, that no further investigation was required, and agreed with the EIIRP that, although the applicant had engaged in protected activity, no retaliation had occurred. Accordingly, the applicant effectively received the same or substantially similar safeguards that he would have been entitled to had he been employed by the UN Secretariat and covered by ST/SGB/2005/21 at the time, which safeguards appear to be reasonable.

The Compensation Case

46. The respondent submitted that the procedural safeguards normally afforded to the subjects of UNDP investigations did not apply to the applicant because he was a complainant, not a subject. The respondent further submitted that there was no procedural violation in this case because the applicant had ample opportunity to meet with the EIIRP and provide relevant information and evidence and that he was interviewed several times and provided with recordings of his interviews.

47. The Dispute Tribunal is satisfied that the issue of retaliation was addressed with the applicant at length. However, the opportunity to be interviewed and to provide information and evidence to assist investigators is wholly distinct from being made aware of significant adverse findings against the whistleblower himself and him being given an opportunity to reply to them. The applicant was a staff member and

the requirements of good faith and fair dealing applied to him—he was entitled to be treated fairly, honestly and in accordance with the obligations of due process, particularly in light of the nature of the allegations raised by him and considering that no further proceedings were anticipated or undertaken by UNDP after the report was issued. Even if the EIIRP did not identify the applicant as the subject of its investigation, its report contained significant adverse findings about his credibility, trustworthiness and integrity. The Tribunal finds that not only was the applicant not given an opportunity to respond to these adverse findings, he was not even *made aware* of the EIIRP’s concerns regarding his credibility at any point prior to the issuance of the report. The Tribunal is persuaded by the applicant’s argument that the report of the EIIRP contained adverse findings against him and that, in the particular circumstances of this case, he should have been made aware of them prior to the issuance of the report and provided with the opportunity to comment on them and provide his explanations. Therefore, the Ethics Office’s finding that there was a violation of the applicant’s procedural right to be made aware of—and to have the opportunity to respond to—the adverse findings concerning his credibility and trustworthiness was reasonable and justified. This is particularly so considering the report was made public, following which there was no further process made available to the applicant to contest these findings. This failure resulted in a violation of the applicant’s due process rights, damaged his career prospects and professional reputation, and caused him emotional distress, for all of which he should be compensated. I find that the recommendation of the Director of the Ethics Office that the applicant be paid fourteen months’ salary was reasonable in light of all the circumstances of this case (see, e.g., UN Administrative Tribunal Judgments No. 1404, *Coggon* (2008), No. 1095, *Plasa* (2002), awarding in both cases one year’s salary for breach of due process and damage to reputation). I find that the calculation of this sum shall be based on the applicant’s salary as at 1 June 2006, when he was appointed on a six-month appointment of limited duration.

48. It was submitted to me by counsel for the respondent that the Administration has not been in a position to take a decision on whether to pay the fourteen months' compensation recommended by the Ethics Office because of the ongoing appeal procedures. The referral of the report to the Ethics Office for recommendations was part of UNDP's effort to carry out a fair and objective fact-finding exercise and this referral was meant to be meaningful, particularly considering the history of this case. The undertaking by UNDP was to share EIIRP's findings with the Director of the Ethics Office, who "could then provide an opinion and formulate recommendations, as may be appropriate, on the retaliation allegations in light of these findings". This meant that, having submitted to the process, UNDP was required to give serious and timeous consideration to the Ethics Office's comments and recommendations, make a decision on them and provide this decision, along with the reasons, to the applicant. There is no evidence before me that UNDP afforded such timeous and serious consideration to the Ethics Office's recommendation. This failure and the resultant procedural delay shall be recompensed. In light of the circumstances of this case, I find that the lump sum amount of USD5,000 is appropriate to compensate the applicant.

49. I find that neither party abused the proceedings before the Tribunal and, therefore, no costs will be awarded.

Conclusion

50. The Organisation did not violate the applicant's rights when it decided that the provisions of ST/SGB/2005/21 were not directly applicable to him, and, accordingly, his application in the Ethics Policy Case (UNDT/NY/2009/089) is dismissed.

51. In the Compensation Case (UNDT/NY/2009/075/JAB/2009/032), I find that the Ethics Office correctly determined that the applicant was not provided with the opportunity to comment on the adverse findings made by the EIIRP, an *ad hoc* investigation body set up by UNDP, concerning his credibility, trustworthiness and

integrity. The respondent is ordered to pay fourteen months' net base salary, based on the applicant's salary as at the starting date of his appointment of limited duration, as compensation for this procedural violation and the resulting harm. In addition to this sum, the respondent shall pay the applicant USD5,000 as compensation for the delay in considering the Ethics Office's recommendation.

52. The amounts ordered in paragraph 51 of this Judgment are to be paid within 45 days from the date of this Judgment, failing which interest is to accrue to the date of payment at the US Prime Rate applicable as at the date of expiry of this period, together with an additional five per cent.

53. All other pleas are rejected.



Judge Ebrahim-Carstens

Dated this 31st day of August 2010

Entered in the Register on this 31st day of August 2010



for

Hafida Lahiouel, Registrar, UNDT, New York