United Nations AT/DEC/1157

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1157

Case No. 1247: ANDRONOV Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Mayer Gabay, Vice-President; Mr. Spyridon Flogaitis, Member;

Whereas at the request of Evgueni Andronov, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 28 February 2002 the time limit for the filing of an application with the Tribunal;

Whereas, on 11 February 2002, the Applicant filed an Application containing pleas which read, in part, as follows:

"II: PLEAS

… **the Applicant respectfully requests the Tribunal to**:

1. Rescind the decision of the Secretary-General to accept the recommendation of the Joint Appeals Board [(JAB)].

…

3. Recommend [to] the Secretary-General to undertake an administrative investigation with a view to establishing responsibilities of the [United Nations Office at Geneva (UNOG)] Administration officials who, by abusing power and authority … have involved the Organization in the Applicant's private and family affairs … and who defamed and harassed the Applicant for more than five years.

The Applicant respectfully further requests the Tribunal to order the Secretary-General:

4. To award the Applicant the sum of … (USD $100,000) as compensation for the actual and consequential damages he has suffered as a result of the Administration's illegal interference into his private family affairs …

5. To award the Applicant the sum of … (USD $500,000) as compensation for the actual, consequential and moral damages … he has suffered as a result of his continued and systematic harassing treatment by the Administration …

6. To award the Applicant the sum of … (USD $500,000) for the moral injury and damages to his reputation as a result of the defamation and illegal placing of adverse material by the Administration into his Official Status File; and for the consequential damage to his career development;

7. To add interest (at the rate of six percent per annum) to any and all of the above amounts … from … (18 May 2000) through the date any amounts awarded hereunder are finally and fully paid to the Applicant;

8. To award the Applicant the sum of … (USD $30,000) in respect of expert and legal fees, and other costs …

9. To award such other relief as the Tribunal deems just, fair and equitable …

10. The Applicant … also respectfully requests the Tribunal to invoke Financial Rule 114.1 and Staff Rule 112.3 so that … officials be held accountable for their actions and decisions which they knew were contrary to [United Nations] policies and established practices, and so that the amount of the compensation paid to the Applicant may eventually be recovered from those officials."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 July 2002;

Whereas the Respondent filed his Answer on 31 July 2002;

Whereas the Applicant filed Written Observations on 31 January 2003;

Whereas the facts in the case are as follows:

The Applicant joined the Organization on a one-month short-term appointment as a Translator with the United Nations Office at Geneva (UNOG), on 30 August 1968, and was subsequently granted a five-year fixed-term appointment. Following a lengthy break in service, on 9 January 1983, the Applicant was re-appointed on a fixed-term secondment basis for a period of two years as a Senior Research Officer at the P-5 level, with the Joint Inspection Unit. This appointment was renewed several times

until 1 December 1991, when the Applicant was granted a permanent appointment. The Applicant separated from service upon retirement on 30 April 2001.

On 20 October 1994, the Applicant filed for divorce in the Nikoulinsky Tribunal, Russian Federation. On 6 December, he informed the Legal Adviser, UNOG, of same and of the fact that his spouse had filed for divorce before the "Tribunal de Première Instance" in Geneva. On 15 February 1995, the Nikoulinsky Tribunal pronounced the Applicant's divorce and, on 7 March, the Applicant transmitted to the UNOG Administration a copy of the court's decision, adding that since no appeal had been filed, the decision became final and binding on 27 February. On 14 March, a Personnel Action form was issued, changing the Applicant's status to "divorced" and ending his entitlement to salary and post adjustment at dependency rate.

The same day, 14 March 1995, the Acting Chief, Personnel Service, UNOG, forwarded to the Applicant a copy of a letter sent by his former spouse whereby she claimed that she had received no financial support from him since October 1994. The Acting Chief stated that, while the Organization does not normally intervene in private family matters, failure to honour legally binding family support obligations violated the standard of conduct required of international civil servants. Additionally, the Applicant was requested to provide evidence that the sum paid to him at the dependency rate was being used for its declared purpose. Subsequently, the Applicant responded, confirming, inter alia, that he had been transferring the dependency allowance paid to him by the Organization to his former spouse's bank account.

On 30 March 1995, the Moscow City Tribunal rejected an appeal from the Applicant's ex-wife against the divorce decision and, on 14 April, the divorce became final and binding.

On 18 April 1995, in response to a request by the Senior Legal Adviser, UNOG, the Applicant transmitted a copy and an unofficial translation of the Certificate of Dissolution of Marriage and, on 2 June, the Applicant requested that his former spouse's "carte de légitimation" be cancelled. The Applicant reiterated this request on 19 June.

On 26 July 1995, the Applicant submitted a copy of an official translation of the Certificate of Dissolution of Marriage and, on 31 July, he brought to the attention of the Personnel Service, UNOG, the relevant article of the Russian law, which states that "the marriage is considered terminated at the time that the divorce is recorded in the Register of the Acts of Civil Status". The conditions having been met, the

Applicant again requested the Administration to "bring this matter to a close without further delay".

On 26 September, the Senior Legal Adviser, advised the Chief, Strategic Planning for Human Resources Management, UNOG, that:

> "The documentation provided by [the Applicant] clearly indicates that he has been legally divorced by a competent Russian Court ... as far as the legal consequences for alimony and matrimonial property are concerned, I advised [the Applicant's former spouse] that she might wish to obtain a decision from a Swiss Court, since the Moscow Court decision remains silent on these questions … I would recommend that the Administration draws the attention of the [Applicant], in writing, to his legal and financial obligations towards his former wife, as contained in Administrative Instruction ST/AI/399 of 14 December 1994."

On 24 November 1995, the Acting Chief, Personnel Service, UNOG, informed the Applicant that the "cancellation list concerning the 'carte de légitimation' of [his] ex-spouse was sent … to the Swiss Permanent Mission in Geneva."

On 29 March 1996, the Applicant submitted a decision rendered by the *Tribunal de Grande Instance* de Thonon-les-Bains (France) dated 25 January 1996, confirming the validity of the divorce pronounced by the Nikoulinsky Court. The Applicant again urged the Administration to collect the "carte de légitimation" of his former spouse.

On 17 May 1996, the Senior Legal Adviser, informed the Applicant that legal action was initiated by his former spouse before a Swiss Court.

On 10 March 1997, the Senior Legal Officer advised Human Resources Management that as the divorce sentence issued by a Moscow court in March 1995 did not address the question of alimony, it was reasonable to expect that the Applicant might have to pay to his ex-wife a portion of his earnings.

On 23 October 1997, the *Tribunal de Première Instance* of Geneva rendered its decision in favour of the Applicant's former spouse.

On 20 January 1998, in response to a letter from the Applicant's former spouse, the Assistant-Secretary-General for Human Resources Management stated that

> "while private family matters are not in themselves the business of the Organization, staff members are expected to comply with their legal obligations towards former spouses and dependants. Whenever such obligations are not met, the United Nations will request the staff members to comply with the relevant court order issued in such cases".

On 13 November 1998, the Geneva appeals court overturned the 23 October 1997 decision of the *Tribunal de Première Instance* of Geneva, thereby rejecting the claims of the Applicant's former spouse.

On 6 July the Applicant responded to a request from the Senior Legal Adviser, to provide evidence of the financial support to his former spouse, concluding that the statements made by the Senior Legal Adviser amounted to harassment. The same day, the Chief, Personnel Service, wrote to the Applicant informing him that, having considered the documents submitted by him in relation to his divorce, the Administration considered the case closed. Subsequently, on 8 July, she informed the Senior Legal Adviser that further involvement of the Administration in this case would be inappropriate.

On 13 July 1999, the Applicant was again assured that the case was closed.

On 6 and 21 March 2000, the Applicant requested copies of several documents contained in his Official Status file. He received the requested documents on 24 March.

On 18 May 2000, the Applicant requested the Secretary-General's agreement to bring his appeal directly to the United Nations Administrative Tribunal and, on 5 July he was informed that his request was denied.

On 25 July 2000, the Applicant lodged an appeal with the JAB. The JAB adopted its report on 20 July 2001. Its considerations, conclusion and recommendation read, in part, as follows:

> "**Considerations**
>
> *Receivability*
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> …
>
> 65. … the Panel recalled that although there is no 'official definition' of the term 'administrative decision', it can be defined within the meaning of Staff Regulation 11.1 as 'a decision by the Administration concerning a staff member's terms of appointment, including all pertinent regulations and rules'.
>
> 66. Hence, in the absence of jurisprudence, the Panel first called to mind that the doctrine defined the 'administrative decision' as a juridical act adopted unilaterally by the Administration and affecting staff members' terms of appointment.
>
> 67. … the Panel found no administrative decision as defined above. It noticed that the alleged administrative decisions against which the Appellant complained consist of a series of communications sent by the Administration either to inform the Appellant or other concerned staff members, or to ask the Appellant for comments or clarifications. …

> 68. Moreover, the Panel found no violation of the Appellant's terms of appointment in the documents and memoranda provided with the Statement of Appeal. The matters brought to the fore by the Appellant are mainly related to private concerns and as such did not have any influence whatsoever on the Appellant's career.
>
> …
>
> **Conclusion and Recommendation**
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> 70. … the Panel concludes that the appeal is **not admissible** for the reason that the constitutive element for an appeal to be receivable is lacking: there is no administrative decision that the Appellant could have contested.
>
> 71. … the Panel finds that there is no valid basis for entering further into the merits of the case.
>
> 72. Consequently, the Panel unanimously **recommends** to the Secretary-General to reject the present appeal."

On 9 November 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General agreed with the JAB's conclusions and had decided to take no further action on his appeal.

On 11 February 2002, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The JAB erred in determining that there was no administrative decision contested. In fact, there was a series of consequential decisions taken by the UNOG Administration, which violated the Applicant's rights.

2. The Applicant suffered from the Administration's abuse of power and authority; interference in his private affairs, including judicial proceedings before national courts; continued and systematic harassment; defamation; and, placing of adverse material in his Official Status file, thereby damaging his reputation and career development.

3. The Administration violated the Applicant's terms of appointment provided for under the Staff Regulations and Rules and various administrative issuances.

4. The Administration delayed cancellation of the Applicant's former spouse's "*carte de légitimation*".

Whereas the Respondent's principal contentions are:

1. There is no administrative decision in contest. The Administration's actions were reasonable in the circumstances, and did not constitute harassment.

2. Even if the subject matter of the present Application came within the competence of the Tribunal, it would not be timely filed.

3. The actions complained of were not prompted by bias, improper motivations, or other extraneous factors on the part of the Administration.

The Tribunal, having deliberated from 23 October to 20 November 2003, now pronounces the following Judgement:

I. In October 1994, the Applicant, a Russian national who was at the time married to another Russian national, filed for divorce in the competent court in the Russian Federation. It appears that, during these proceedings, the Applicant's wife was represented by an attorney. In February 1995, the divorce was pronounced and a few days later the Applicant transmitted the decision to the Administration. Accordingly, effective 27 February, the Respondent amended the Applicant's marital status to "divorced" and discontinued the Applicant's entitlement to salary and post adjustment at the dependency rate. The Applicant's wife appealed against the divorce decision, which appeal was considered and rejected by the Moscow City Tribunal on 30 March. The divorce became final and binding, in accordance with the relevant Russian law, upon its registration in the "Register of the Acts of Civil Status", on 14 April.

II. According to the Applicant, a series of problems with the Administration ensued. First, he was required by the Administration to provide evidence to rebut his ex-wife's accusations that he had not been supporting her since the legal proceedings began, despite having received payments from the Organization at the dependency rate; then the Applicant had to repeatedly request that his ex-spouse's "carte de legitimation" be cancelled; in July 1995, the Chief, Strategic Planning for Human Resources Management, started investigating, with the assistance of the Senior Legal Adviser, the validity of the Russian judgement and its consequences, particularly as they concerned the Applicant's financial responsibilities towards his ex-wife; subsequently, on the advise of the Administration, the Applicant's ex-wife brought before the Geneva courts her case for alimony, and when she won in the Court of the First Instance, the Assistant-Secretary-General for Human Resources Management rushed to remind the Applicant of his obligations to his ex-wife, notwithstanding that,

on appeal, this judgement was reversed, with the final result being that the Russian decision was final and binding; additionally, the Applicant was not informed of adverse material which was placed in his official status file; and, finally, informal legal advise was repeatedly given to his ex-wife by the Administration.

The Applicant maintains that, in all of the above mentioned instances, the Administration failed to comply with its own policies.

Having felt that he had been subjected, since 1995, to mistreatment, as briefly described above, on 18 May 2000, the Applicant requested the Secretary-General's agreement to bring his case by way of direct submission to the Tribunal. The Applicant thought that this was the appropriate procedure, as his appeal would raise legal issues related to the basic rights and obligations of staff. The Applicant further stated his belief that his case did not fall within the competence of the JAB, since there was no administrative decision *per se* to appeal against, but at the same time, it was within the competence of the Tribunal, since the issues raised dealt with non-observance of a staff member's terms of appointment.

On 5 July 2000, the Applicant was informed that his request had been denied by the Respondent, and that, "only appeals that raise solely issues of law should be submitted directly to the Tribunal".

Following the denial of his request, the Applicant lodged an appeal with the JAB, contesting a series of failures and non-observance of his terms of appointment by the UNOG Administration. The JAB determined that the appeal was not admissible *ratione materiae* as, according to the JAB, there was no administrative decision that the Applicant could have challenged in the proceedings before it. The JAB therefore recommended that the Secretary-General reject the appeal and the Secretary-General decided to accept the JAB's recommendation. This is the decision contested in the present Application before the Tribunal.

III. Article 2.1 of the Statute of the Administrative Tribunal of the United Nations, states that:

> "The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words "contracts" and "terms of appointment" include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations."

Article 7.1 of the Statute states that:

> "An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal."

Finally, under staff rule 111.2(a)

> "A staff member wishing to appeal an administrative decision pursuant to staff regulation 11.1 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".

In view of the above and taking into account the facts of the case, the Tribunal has to address the issue of receivability of the present Application.

IV. The Respondent contends that the Tribunal has no jurisdiction over this case, since, without his consent, a case cannot be submitted directly to the Tribunal, and such consent was not given in the present case; at the same time, the case could not be brought to the Tribunal via the JAB proceedings, because no matter what alleged injury the Administration caused the Applicant, there is no specific administrative decision to challenge. The Respondent fails, however, to answer the question, how an employee's legal rights against the Administration would be protected under these stipulations. The Respondent seems to indicate that there is a *lacuna* in the legal system of the United Nations, but fails to suggest how this *lacuna* would be filled.

The Tribunal believes that the legal and judicial system of the United Nations must be interpreted as a comprehensive system, without *lacunae* and failures, so that the final objective, which is the protection of staff members against alleged non-observance of their contracts of employment, is guaranteed. The Tribunal furthermore finds that the Administration has to act fairly vis-à-vis its employees, their procedural rights and legal protection, and to do everything in its power to make sure that every employee gets full legal and judicial protection.

Consequently, the Tribunal determines that, in cases where the Administration believes that there is no specific administrative decision to be challenged in proceedings before the JAB, the rules should be interpreted by the Administration so as to ensure that legal and judicial protection are provided.

V. Having stated the above, the Tribunal does not find it necessary to pursue this course as, in the present case, there were administrative decisions challenged by the Applicant, even if he initially thought that there were no administrative decisions *per se*.

There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that an "administrative decision" is 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. 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. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as *implied* administrative decisions. The Tribunal notes in this context its Judgement No. 916, *Douaji* (1999), where the Applicant contested the "non-extension [to her] of priority for re-employment and/or reinstatement ...". In that case the Tribunal determined that "[t]he 'administrative decision' that [the Applicant] sought to challenge, … was the Secretary-General's failure to take appropriate measures …"

In the present case, the file contains many such implied administrative decisions in the failures and non-observance of terms of employment, as cited by the Applicant. For example, the decision not to cancel, for an unreasonably long period of time, the ex-wife's "carte de legitimation", or the decision to provide the Applicant's ex-wife with legal advise on how to utilize the judicial system to her benefit, in her marital dispute with the Applicant. Moreover, the Tribunal accepts the Applicant's contention that documents placed in his official status file contained language which reflected adversely on his character, reputation and conduct and as such constitute "adverse material" as referred to in administrative instruction ST/AI/292 of 15 July 1982. In accordance with this Administrative Instruction, such material "may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon". Placing such documents in the Applicant's file without

showing it to him and obtaining his comments, constitutes another challengeable administrative decision. However, as the Respondent also concedes, for the Tribunal to obtain jurisdiction over a case, it is sufficient for an Applicant to contest a single administrative decision.

VI. The Respondent contends that even if the Tribunal accepts that there was an appealable administrative decision, the Applicant failed to challenge this decision in a timely manner. The Tribunal rejects this contention. As stated in previous jurisprudence, the countdown for the deadlines of appeals begins only when the contested decisions and their relevant details are known to the Applicant. Staff rule 111.2(a) indicates, procedurally, the point in time from which the counting towards the deadline begins for initiating an appeal process. However, if a decision is not made in writing and is unknown to the staff member concerned, the point of time for starting the process is from the time the staff member knew or should have known of the said decision. This is particularly so in cases of implied administrative decisions, as otherwise the right to legal and judicial protection could easily be jeopardized. In Judgement No. 1046, *Diaz de Wessely* (2002), the Tribunal, stated:

> "… another possible and … more realistic starting point would be the point at which the Applicant became aware that her situation was unsatisfactory … The Tribunal recalls in this regard its jurisprudence in Judgements No. 549, *Renninger* (1992), para. VI, and No. 596, *Douville* (1993), para. IX, in which 'the Tribunal notes that ordinarily, when timely efforts to vindicate a claim are of importance because of potential prejudice resulting from delay, logic suggests that the starting point for measurement of the delay is the point at which one knows, or should have known, of the existence of the claim' (see also Judgement No. 527, *Han* (1991))."

The Applicant became aware of the adverse material in his file only upon reviewing it in March 2000, following which and having received copies of these documents, in May 2000, he requested the Secretary-General to review his case and to agree to direct submission to the Tribunal. The Applicant initiated the appeal process within the prescribed time-limits. The Tribunal also notes that upon reviewing his Official Status file in the context of the current proceedings before the Tribunal, the Applicant discovered additional documents which the Administration failed to bring to his attention, though it should have done so.

VII. The Tribunal, however, wishes to take this opportunity to point out that, in its jurisprudence, the Tribunal has practically dissociated its decisions on the issue of damages from its position concerning the challenged administrative decision. The

Tribunal may thus find, for example, that a contested decision is legally sound, or that it is not tainted by arbitrariness, yet at the same time decide to award damages for reasons which are completely independent from the legality of the administrative decision in question, for example as compensation for undue delays. (See Judgment No. 1104, *Tang* (2003).)

VIII. Finally, the Tribunal does not find it necessary to remand this case to the JAB, as the file contains sufficient written documentation to support and substantiate the Applicant's claims. Specifically, there is ample written proof that the Administration interfered in the Applicant's personal affairs and in so doing violated its obligation not to get involved in the private maters of its employees. Examples of this interference can be found in the 26 September 1995 memorandum from the Senior Legal Officer to the Chief, Strategic Planning for Human Resources Management, whereby he states, inter alia, "as far as the legal consequences for alimony and matrimonial property are concerned, I advised [the Applicant's ex-wife] that she might wish to obtain a decision from a Swiss Court …"; in the 10 March 1997 memorandum from the Senior Legal Officer to the Chief, Strategic Planning for Human Resources Management, whereby he states, inter alia, "the divorce sentence issued by a Moscow court in March 1995 does not address the question of the distribution of matrimonial property nor the question of alimony … By all standards, it is reasonable to expect that [the Applicant] will in the end have to pay to his ex-wife a portion of his earnings …" - he additionally states in that memorandum that he believes that it might be warranted to obtain from the Applicant information on "the kind of subsistence he is currently giving to his former wife or, in the absence of such, to invite him to ensure that he supports his ex-wife financially with a minimum amount pending the determination … by the competent courts"; as well as in additional correspondence on this subject. This is in stark contradiction to the prevailing policy, according to which, in cases such as this, only a court order should get the Administration involved in securing alimony and/or other financial entitlements for an ex-spouse.

IX. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be awarded compensation in the amount equivalent to three months net base salary at the rate in effect on the date of this Judgement; and

2. Rejects all other pleas.

(Signatures)

Julio **Barboza**
President

Mayer **Gabay**
Vice-President

Spyridon **Flogaitis**
Member

New York, 20 November 2003

Maritza **Struyvenberg**
Executive Secretary