ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUES

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ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 7 March 2006

JUDGMENT IN CASE No. 61

Mr. W.

v/ Secretary-General

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JUDGMENT IN CASE No. 61 OF THE ADMINISTRATIVE TRIBUNAL

Sitting on Friday 17 February 2006
at 9:30 a.m. in Annex Monaco of the OECD,
2 rue du Conseiller Collignon, Paris

The Administrative Tribunal consisted of:

Mr. Jean MASSOT, Chairman,
Professor James R. CRAWFORD
and Professor Arghyrios A. FATOUROS,

with Mr. Colin McINTOSH and Mrs. Christiane GIROUX providing Registry services.

By decision of the Secretary-General of 15 July 2004, Mr. W., administrator in the Environment Directorate, was suspended with pay pending completion of a disciplinary procedure. This decision was based on an adverse finding of an Enquiry, the main element of which was an allegation of harassment by Mr. W. against another member of the Environment Directorate, Ms. C. The officials who conducted the Enquiry were Mrs. W., Social Advisor, and Mr. M., an expert on mission.

On 8 September 2004, Mr. W. cited Ms. C., Mrs. W. and Mr. M. before the *Tribunal de Grande Instance de Paris* (*XVIIe Chambre Correctionelle*) alleging in each case calumnious denunciation, defamation and non-public injury contrary to the Penal Code.

On 15 September 2004, Mr. W. filed an application (No. 58) requesting the Tribunal to annul the Secretary-General's decision of 15 July 2004 and to award him damages under various heads, as well as legal costs.

On 20 September 2004, the Secretary-General commenced further disciplinary proceedings against Mr. W. based on additional allegations of misconduct occurring since 13 July 2004.

On 1 October 2004, the Director of Human Resources Management (HRM) sought to avoid convening the Joint Advisory Board (JAB) on the allegations contained in the Enquiry Report. The meeting of the JAB was held on 8 and 23 November 2004. Its Report of 25 January 2005 in fact dealt with both the complaints of 15 July and 20 September 2004, contrary to the Secretary-General's submissions in that regard.

By letter of 24 February 2005 the Secretary-General notified Mr. W. of his decision to terminate his appointment, based on the disciplinary proceedings commenced on 20 September 2004. The Secretary-General stated that, despite Mr. W.'s persistent failure to present evidence in his defence in relation to the allegations in the Enquiry Report, "I would not wish to now draw formal conclusions unnecessarily on such sensitive charges of misconduct as harassment and abuse of power. Therefore, I have decided not to do so unless you so request." Mr. W. did not so request, and thus the dismissal was based only on the charges contained in the Secretary-General's letter of 20 September 2004.

On 5 April 2005, Mr. W. wrote to the Secretary-General asking him to revoke this decision, a request which was refused by the Secretary-General on 18 April 2005.

On 7 April 2005 the Tribunal in Case No. 58 decided that the Secretary-General's decision of 15 July 2004 to place the Claimant on leave with pay was unlawful as contrary to paragraph 17 of the Secretary-General's Policy to Prevent and Combat Harassment, in particular because the Organisation had reached a conclusion in relation to an allegation covered by the Harassment Policy without giving Mr. W. any opportunity of being heard.[1] The Tribunal reserved for later decision all questions concerning damages and costs.

On 20 May 2005, Mr. W. filed an application (No. 60) concerning the Secretary-General's decision not to waive immunity in the pending proceedings before the *Tribunal de Grande Instance de Paris*.

On 23 May 2005, Mr. W. filed a further application (No. 61) requesting the Tribunal to declare the Secretary-General's decision to revoke him illegal and to award him damages for physical, material and moral harm in an amount provisionally estimated at €1,251,000.

On 27 September 2005, the Secretary-General submitted his comments to the Tribunal in respect of Case No. 61, asking the Tribunal to uphold the legality of his decision to dismiss the applicant and to rule that the claims for damages should be rejected.

On 27 October 2005, the Staff Association submitted written comments on the case, stating, *inter alia*, that the sanction of dismissal seemed out of proportion to the offence.

On 31 October 2005, the applicant submitted a reply.

On 5 December 2005, the Secretary-General submitted his comments in rejoinder.

The Tribunal heard:

Maître Daniel Laprès, Barrister, Counsel for the applicant;

Mr. Nicola Bonucci, Head of the Directorate of Legal Affairs, on behalf of the Secretary-General;

and Mrs. Marie-Christine Delcamp, on behalf of the Staff Association.

It handed down the following decision:

The grounds relied on for dismissal and their relation to the Enquiry Report

1. The background to the present application was recorded in the Tribunal's judgment in Case No. 58 (see especially paras. 1-4, 18-23). In its judgment of 7 April 2005, the Tribunal was concerned exclusively with the validity of the suspension decision of 15 July 2004, which was based on the Enquiry Report of 1 July 2004 and the Organisation's adoption of that Report. The Tribunal emphasised that nothing in its decision reflected any conclusion as to the substance of the claims and charges made either by the Organisation or by the applicant.

2. Yet it is a feature of the present proceedings that nothing has changed in this regard. Altogether the disciplinary charges against Mr. W. involved three grounds for action: (1) the matters set out in the Enquiry Report, and specifically the harassment allegation; (2) Mr. W.'s action on or

[1] The second sentence of paragraph 17 reads: "Specifically, the alleged harasser will be given the opportunity to answer the allegations and to produce evidence to the contrary."

about 14 July 2004 in erasing his computer hard disc, and (3) the French legal proceedings instituted by Mr. W.. In the event the Tribunal now has before it only the second and third of these. In his letter of 24 February 2005 the Secretary-General declined to rely on the harassment complaint as a basis for dismissal. Mr. W. for his part did not take up the offer in that letter to include that complaint as a further ground for action. The Secretary-General also sought to ensure that the JAB did not deal separately with the first ground for action, although in the event the JAB's Report of 25 January 2005 did so. But the JAB did not hear any witnesses, neither were any called before the Tribunal. Subject to one point (see paragraph 3 below), it remains the case that the Tribunal is not in a position to make any findings on the allegations in the Enquiry Report. Given the procedural deficiencies of the Enquiry and the Organisation's failure to comply with para. 17 of the Harassment Policy, it was not open to the Secretary-General to dismiss Mr. W. on the basis of the Enquiry Report without giving him a full opportunity to confront and rebut the allegations made against him. The Organisation's conduct in seeking to avoid a meeting of the JAB convened to deal with these allegations, and to act on the basis of subsequent conduct on the part of Mr. W. (conduct which, unjustified as it may have been, was to an extent provoked by the Organisation's own failings) was rightly criticised by the Staff Association in its oral submission to the Tribunal.

3. Furthermore Mr. W. produced to the Tribunal various documents tending to show a consensual relationship between himself and the complainant. This evidence, which he had no opportunity to produce to the Enquiry, tended to contradict at least some aspects of the Enquiry's conclusions. This demonstrates the wisdom of the procedural safeguard embodied in paragraph 17 of the Harassment Policy, and the signal failure of the Organisation to comply with its own procedures.

4. To summarise, the Tribunal is not in a position to judge whether, if these procedures had been complied with, Mr. W.'s dismissal could have been justified on the first ground. But it is clear that in acting as it did the Organisation denied to Mr. W., an official in apparent good standing who had been employed for more than 15 years, an important procedural safeguard.

5. Counsel for Mr. W. argued before the Tribunal that, faced with this failure, the Organisation was effectively precluded from relying on any subsequent conduct on the part of Mr. W. as a basis for dismissal. But the principle of the *exceptio inadempleti contractus* does not go so far. Mr. W. was not released by the events of 13 July 2004 from his obligation to act in accordance with the Staff Regulations, nor with his general obligations as an official of the Organisation. His subsequent conduct must be seen in the context of the events as they occurred, but he could still have acted in such a way that the Organisation, without committing a *détournement de pouvoir*, was justified in dismissing him. Thus it is necessary to turn to the second and third grounds for action on the basis of which Mr. W.'s dismissal was justified.

The second ground for action: erasure of computer files

6. The Secretary-General produced evidence tending to show, and the Claimant made no attempt to deny, that on or about 14 July 2004 the Claimant came to his office and erased his e-mail account and all his files. In fact the Organisation's IT department was able within a relatively short time to recover the lost data, and (apart from the time involved) no damage was actually suffered by the Organisation. Nor was it shown that this action was carried out with a view to the suppression of evidence of the allegations made against the Claimant; at least no such evidence was produced from the recovered files. It is a legitimate inference that this act was carried out in a fit of pique in the aftermath of the decision to suspend the Claimant.

7. As the Secretary-General argued, an official has an obligation not to destroy official files of the Organisation in his or her custody, and this applies equally to computer files as to any other data. In erasing the hard disc of his computer, Mr. W. committed a clear disciplinary fault. On the other hand it cannot be overlooked that this unjustified action took place immediately following the

interview of 13 July 2004 in which Mr. W. was confronted with serious allegations, allegations which he strongly contested, without his having any prior notice or opportunity to reply. The Tribunal agrees with the JAB, and the Staff Association, that the dismissal of Mr. W. on the basis of this ground alone would have been disproportionate and unjust in the circumstances.[2]

The third ground for action: the French criminal proceedings

8. The position is, however, quite different as concerns the French criminal proceedings. So far as Mrs. W. and Mr. M. were concerned these were plainly directed at persons acting in an official capacity on behalf of the Organisation. They were evidently immune from the jurisdiction of the French courts under Article 14 of Supplementary Protocol No. 1 on the legal capacity, privileges and immunities of the organisation.[3] The *Tribunal de Grande Instance* so held in its decision of 14 April 2005, imposing on the Claimant a sanction for abuse of process (*détournement de la procédure pénale*).

9. It might have been less clear at the time that the proceedings against Ms. C. fell within the scope of the Organisation's immunity from suit. But the statements complained of were made as part of the conduct of an inquiry under the Harassment Policy and were part of a process intended to ensure proper working relations within the Organisation: moreover the allegations covered at least in part conduct in the workplace. The allegations were made in the context of an inquiry internal to the Organisation and were also entitled to immunity, as the *Tribunal de Grande Instance* held.

10. The Secretary-General argued that for one official of the Organisation to seek to impose national criminal sanctions on colleagues performing their functions, in circumstances clearly covered by the Organisation's immunity, was subversive of disciplinary processes and amounted to a form of blackmail aimed at intimidating those officials and at suppressing investigations.

11. In response, the Applicant argued that he had reasonably relied on a series of statements made by the French Protocol Office to the effect that the officials concerned had not been notified pursuant to Protocol No. 1 and were therefore not known to possess any immunities. But the immunities of officials of the Organisation under Article 14(a) are not dependent upon notification. As concerns official functions they are an incident of the Organisation's own immunity under the Protocol: without individual immunity the immunity of the Organisation itself could be subverted.

12. Alternatively the Applicant argued that he had the "right to a court" under Article 6 of the European Convention of Human Rights, and that this justified him in seeking redress before the French courts. But as the European Court of Human Rights has held, Article 6 is not infringed by the immunity of international organisations, where those organisations maintain "alternative means of legal process available to the applicants".[4] The Tribunal's jurisdiction under Article 1 of its Statute extends to all questions concerning the suspension or loss of employment of an official. The conduct of the members of the Enquiry, no less than that of the Director of HRM, was carried out in the exercise of their functions on behalf of the Organisation. So too was the conduct of Ms. C. in making statements of alleged work-place harassment to a duly constituted inquiry. Furthermore, in asserting immunity in relation to these acts the Secretary-General accepted responsibility for them as official

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[2] On the jurisdiction to assess the proportionality of dismissal as a sanction see e.g. *In re Kalla*, ILOAT Judgment No. 1828, 28 January 1999, para. 12; *In re van Walstijn*, ILOAT Judgment No. 1984, 12 July 2000, para. 7.

[3] Paris, 16 April 1948, as applied to the OECD by Supplementary Protocol No. 2, Paris, 14 December 1960.

[4] See *Beer & Regan v Germany*, ECHR, decision of 18 February 1999, paras 58-63; *Waite & Kennedy v Germany*, ECHR, decision of 18 February 1999, paras 68-73.

acts which could be challenged before the Administrative Tribunal.[5] There was accordingly no denial of the Applicant's right to a court under Article 6.

13. Finally the Applicant argued that whatever the position with civil responsibility, he had the right to have conduct stigmatised as criminal in accordance with French penal law and procedure. But the immunity of the Organisation and its officials under Supplementary Protocol No. 1 extends to every form of legal process, civil or criminal. There is no indication that in asserting immunity the Secretary-General was seeking to shield officials of the Organisation from criminal responsibility. Any serious allegation of harassment is likely to imply possible criminal responsibility – yet the Organisation is entitled to investigate such allegations through its internal processes without the concurrent threat of a French criminal trial at the instance of the alleged harasser.

14. For these reasons the Tribunal concludes that the commencement, while disciplinary proceedings were pending, of criminal proceedings against persons evidently acting in an official capacity was a serious fault justifying dismissal. Although the Secretary-General erred in seeking to avoid a JAB hearing on the Enquiry Report, Mr. W. had it at all times within his power to have the Organisation's charges against him dealt with in accordance with due process. The concurrent pursuit of officials before the French criminal courts was, obviously, subversive of that process and entitled the Secretary-General to put an end to the employment relationship. Moreover it did so independently of the problem that had arisen in terms of non-compliance with paragraph 17 of the Harassment Policy. Nor is there evidence before the Tribunal that in acting as he did, the Secretary-General was in reality seeking to dismiss Mr. W. on the basis of the as-yet-unproven harassment charges, thereby committing a *détournement de pouvoir*. Thus the challenged decision is lawful and cannot give any right to compensation.

Assessment of damages flowing from Judgment No. 58

15. In its Judgment No. 58, taking into account the fact that there were other pending proceedings including proceedings before the French courts, the Tribunal reserved all questions concerning compensation and costs. Although an appeal is still pending from the decision of the *Tribunal de Grande Instance*, there is, for the reasons given, no prospect that it will bring about any change in the situation vis-à-vis the Organisation. Likewise Mr. W.'s administrative law claim against the French Minister for Foreign Affairs in relation to the issue of immunity will not affect Mr. W.'s status in relation to the Organisation. The Tribunal is thus in a position to complete the task of quantification deferred in Judgment No. 58.

16. As to damages, the Secretary-General notes that the initial suspension was with pay, and that any future employment rights were terminated by the decision of 24 February 2005, a decision the legality of which the Tribunal has upheld. Thus in the Secretary-General's view the duration of any damage was short. But the fact is that a chain of events was triggered by the Enquiry Report and its adoption by the Organisation on 13 July 2004 in violation of due process. While Mr. W.'s subsequent conduct involved serious fault on his part he was not the only party at fault in the affair. As noted in paragraph 4 above, the Tribunal cannot exclude the possibility that if the proceedings had been properly conducted, a different outcome might have been achieved – or at least one with less damage to the reputation of all concerned than has ensued. The Tribunal also takes note of the fact that Mr. W. has rather rapidly found a job with another organisation in Vienna, though at a considerably lower salary, and has thus sought to reconstruct his personal and professional life. Taking all these factors into account the Tribunal awards Mr. W. the amount of €60,000 for violation of his right to due process in relation to the Enquiry and its aftermath.

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[5] Cf. *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Reports 1999 p. 62 at 89 (para. 66).

17. As to legal costs, the Claimant sought an amount of €7,000 for costs in relation to Application No. 58. The Tribunal regards €5,000 as reasonable in the circumstances.

DECISION

For these reasons:

The Tribunal:

(1) holds that the decision of 24 February 2005 to dismiss the Claimant was not rendered unlawful by the Organisation's earlier breach of paragraph 17 of the Decision of the Secretary-General concerning the Policy to Prevent and Combat Harassment;

(2) holds that the decision of 24 February 2005, in so far as it was based on the criminal proceedings commenced by the Claimant against officials of the Organisation acting in their official capacity, was valid and proportionate;

(3) makes no order as to the costs of the present Application;

(4) as to the matter of damages and costs deferred in Judgment No 58, awards the Claimant €60,000 by way of damages for his unlawful suspension, and €5000 for the costs of those proceedings.