



United Nations Dispute Tribunal

Case No.: UNDT/GVA/2009/6
and 13
Judgment No.: UNDT/2009/021
Date: 17 September 2009
English
Original: French

Before: Judge Jean-François Cousin
Registry: Geneva
Registrar: Víctor Rodríguez

CAMPOS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

None

Counsel for respondent:

Ivan Koulov, HRMS/UNOG

Notice: The format of this judgment has been modified for publication purposes in accordance with article 26 of the rules of procedure of the United Nations Dispute Tribunal.

Decision

The two applications filed by the applicant with the Geneva Joint Appeals Board, registered as JAB Case No. 609 and JAB Case No. 627 respectively and subsequently as UNDT/GVA/2009/6 and UNDT/GVA/2009/13 following their transfer to the Tribunal, are rejected.

I. First application (UNDT/GVA/2009/6)

The application

I.1. In his appeal to the Geneva Joint Appeals Board (JAB) registered on 17 July 2008, the applicant requested that the action dated 8 April 2008 by which the Secretary-General of the United Nations published the appointment of JC as a member of the Internal Justice Council should be rescinded and, consequently, that all decisions taken by that Council should be rescinded.

Applicant's submissions

I.2. The applicant, who at the time was Executive Secretary of the UNOG Coordinating Council, maintains that the contested decisions are appealable administrative decisions because he was a candidate for the post of staff representative to which JC was appointed. This decision is related to his contract within the meaning of staff regulation 11.1 and article 1 of the rules of procedure of the Geneva JAB. The Geneva JAB has already agreed that it has jurisdiction and the Administration is trying to create a sort of administrative act that, although it affects his rights as a staff member, would not be appealable. He maintains that his rights as Executive Secretary of the Staff Coordinating Council and as a staff member have been breached. The decision by the Staff-Management Coordination Committee (SMCC) to set up a contact group to choose the management and staff representatives to the Internal Justice Council was taken in July 2007 at the latest, yet the General Assembly resolution creating the Council was adopted only on 22 December 2007.

I.3. The Secretary-General had no authority to organize the staff representative's election or to interfere in its procedure. Moreover, his decision runs counter to the wishes of the majority of the United Nations staff, who had decided to elect the applicant as their representative. The role of SMCC is defined by its rules of procedure and there is nothing to suggest that the SMCC staff associations wished to delegate their right to elect their representatives. The future justice system will affect bodies that are not SMCC members and the Secretary-General had no authority to speak on their behalf.

Respondent's observations

I.4. It is argued that the application is inadmissible because the contested decision does not affect the applicant's terms of appointment or his rights as a staff member and therefore falls outside the jurisdiction of the Joint Appeals Board. Under staff regulation 11.1, the Joint Appeals Board is competent to advise the Secretary-General in case of any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules. The rules of procedure of the Geneva JAB define what

constitutes an appealable administrative decision. The Internal Justice Council is not a staff representative body pursuant to staff regulation 8.1 and staff rule 108.1.

I.5. The application before the Geneva JAB must concern the same decisions as the request for a management review. The respondent therefore limits his response to the legality of the decision not to appoint the applicant to the Internal Justice Council, since this alone was the subject of the request for a management review.

I.6. It is only proper that SMCC should have been entrusted with designating the members of the Internal Justice Council, as this conforms to chapter VIII of the Staff Regulations and Rules. At the twenty-eighth session of SMCC, it was decided to set up a staff-management contact group on the implementation of the new justice system, whose tasks would include choosing their respective representatives to the Council. All the staff representatives on SMCC were invited to nominate their candidates. The management did not interfere in or veto the nomination process, of which the Deputy Secretary-General was informed by e-mail dated 21 February 2008. Thus the applicant, with whom the burden of proof rests, does not demonstrate any irregularity.

II. Second application

The application

II.1. In his appeal registered on 11 November 2008, the applicant requests that the appointment of the members of the Internal Justice Council for a period of four years, as announced by information circular of 23 June 2008, should be rescinded.

Applicant's submissions

II.2. The applicant reiterates the submissions made in the first application and maintains that the General Assembly did not authorize the Secretary-General to appoint the members of the Internal Justice Council for a period of four years. The administration's interference has made the Internal Justice Council unrepresentative. At least four of the Council's five members are common law lawyers or have served as United Nations lawyers. The four-year appointment creates a *fait accompli* and is contrary to freedom of representation.

Respondent's observations

II.3. The respondent reiterates some of the observations made on the first application and adds the following: the rules of procedure of the Geneva JAB define what constitutes an appealable administrative decision; the application is time-barred, because the applicant was informed of the contested decision on 8 April 2008.

III. The procedure

III.1. In its resolution 63/253, the General Assembly decided that all cases pending before the Geneva JAB as at 1 July 2009 would be transferred to the United Nations Dispute Tribunal (UNDT).

III.2. The applicant's two applications concern the appointment of members of the Internal Justice Council and contain common arguments. It is therefore appropriate that they be joined and the subject of a single judgment.

III.3. By letters dated 27 and 28 July 2008, the members of the Internal Justice Council informed the Tribunal that they did not wish to intervene in the case.

III.4. The parties were summoned by letter and memorandum dated 25 August 2009 to a hearing scheduled for 16 September 2009.

III.5. By letter registered on 3 September 2009, the applicant informed the Tribunal that, as he was away from Geneva, he would be unable to attend the 16 September 2009 hearing to which he had been summoned and that he intended to appeal against the judgments rejecting his request that the Tribunal recuse itself. He confirms that he maintains his request for recusal.

III.6. Ms. Stéphanie Cochard, representing the Secretary-General, was heard at the 16 September 2009 hearing.

IV. The facts

IV.1. At its twenty-eighth session, SMCC decided to set up a contact group on the administration of justice composed of three staff representatives and three management representatives. SMCC entrusted the group with, inter alia, ensuring that management and staff took action to select the staff representative and the management representative to the future Internal Justice Council and to nominate the two external jurists.

IV.2. By its resolution 62/228 of 22 December 2008, the General Assembly decided to establish by 1 March 2008 a five-member Internal Justice Council consisting of a staff representative, a management representative and two distinguished external jurists, one nominated by staff and one by management, and chaired by a distinguished jurist chosen by consensus by the four other members.

IV.3. In his 23 August 2007 report to the General Assembly on the administration of justice (A/62/294), the Secretary-General mentioned the agreement reached by SMCC at its twenty-eighth session to appoint the staff representative and the management representative separately and to entrust that task to an SMCC contact group. By decision dated 6 February 2008, the Deputy Secretary-General of the United Nations asked PA, a contact group member, staff representative and Vice-President of SMCC, to organize the appointment of the staff representative and recalled that it was important that the Internal Justice Council should include women members.

IV.4. On 11 February 2008, PA e-mailed the representatives of all the staff associations members of SMCC, namely, the Geneva Staff Coordinating Council, the United Nations Staff Union in Nairobi, the United Nations Staff Council in Vienna, the United Nations Staff Union in New York, the Staff Council of the Economic and Social Council for West Asia, the Staff Association of the Economic Commission for Latin America and the Caribbean, the Staff Union Committee of the Economic Commission for Africa, the Staff Council of the Economic and Social Commission for Asia and the Pacific, the Field Service Staff Union and the staff associations of the United Nations University, the United Nations Development

Programme/United Nations Office for Project Services/United Nations Population Fund, the Office of the United Nations High Commissioner for Refugees, UNICEF, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia, asking them to nominate their candidates for staff representative and external jurist. Most of the bodies did so.

IV.5. On 21 February 2008, PA informed the Deputy Secretary-General that the staff had nominated JC as staff representative by 10 votes to three for the applicant and had nominated CR as external jurist.

On 27 March 2008, the Deputy Secretary-General announced to JC and three other members of the Internal Justice Council that JC had been appointed as staff representative.

IV.6. By information circular dated 23 June 2008 (ST/IC/2008/32), the Under-Secretary-General for Management announced that the members of the Internal Justice Council had been appointed for a period of four years.

V. Concerning the request for recusal

V.1. By letters dated 21 and 23 July 2009, the applicant requested that the judges of the United Nations Dispute Tribunal (UNDT) recuse themselves from judging the two applications. By judgments of 12 and 20 August 2009, the UNDT President rejected the requests for recusal. There are thus no longer any grounds for ruling on those requests.

VI. Concerning the first application

VI.1. The applicant requests rescission of the Secretary-General's decision, announced on 8 April 2008, to appoint JC as staff representative to the Internal Justice Council and of the 6 February 2008 decision whereby the Deputy Secretary-General asked PA, a contact group member and Vice-President of SMCC, to give her the names of the staff member and the external jurist nominated by the staff and to tell her how they had been nominated. The facts related above show that the appointment of JC as a member of the Internal Justice Council is not the result of a decision by the Secretary-General but solely of the election organized by SMCC staff representatives. The Secretary-General, as he was required to do since he had no power of appointment in the case, limited himself to noting the outcome of the election and publishing it. As a result, the application, despite the terms used, must be deemed to be directed not against the publication of the name of the person who was elected, an act for which the respondent cannot be criticized, but against the election of JC by SMCC members.

VI.2. The respondent argues that the application is inadmissible because it does not fall within the jurisdiction of the Geneva JAB. Pursuant to General Assembly resolution 63/253, cases pending before the Geneva JAB as at 1 July 2009 were transferred to UNDT. It is not disputed that the application was pending before JAB on 1 July 2009 and it is therefore for this Tribunal to now decide whether it has jurisdiction under the rules contained in its statute adopted by General Assembly resolution 63/253.

VI.3. Article 2 of the Tribunal's statute states that UNDT "shall be competent to hear and pass judgement on an application filed ... to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms 'contract' and 'terms of appointment' include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance." Moreover, staff rule 108.1 (e) provides that "In accordance with the principle of freedom of association, staff members may form and join associations, unions or other groupings."

It is thus clear from the United Nations Staff Rules that any United Nations staff member has the right to be a candidate to represent the staff. As Executive Secretary of the UNOG Coordinating Council, the applicant was put forward by a number of SMCC staff representatives as their candidate for election to the Internal Justice Council. It is also true that the applicant's candidacy was not for election as a representative of a staff association but as a staff representative to a council created by a General Assembly resolution. The applicant's candidacy is therefore directly linked to his status as a United Nations staff member and the dispute arising from his non-election is thus related to the rules governing his contract within the meaning of the above-mentioned provisions of the Tribunal's statute. There are grounds therefore for the Tribunal to declare itself competent to judge the application, which must be declared admissible in this connection.

VI.4. The applicant maintains that it was not up to the Secretary-General to choose the staff representative to the Internal Justice Council. However, it is clear from the foregoing that the respondent did not choose JC but simply noted her election by SMCC.

VI.5. The applicant claims that, since the General Assembly had not, in its resolution 62/228 of 22 December 2007, specified the procedure for electing the staff representative, it was not up to the respondent to do so. However, Article 97 of the Charter of the United Nations states that the Secretary-General is the chief administrative officer of the Organization. The Secretary-General is thus, by the very nature of his functions, responsible for implementing the resolutions of the General Assembly and for determining the procedure for such implementation in cases where a resolution does not do so. It cannot be argued, therefore, that the respondent exceeded his authority by organizing the election of the staff representative to the Internal Justice Council.

VI.6. The applicant argues that the respondent could not legally entrust SMCC with appointing the staff representative to the Internal Justice Council since SMCC is composed of representatives of both management and staff. Paragraph 1.1 of the Secretary-General's bulletin containing the SMCC terms of reference states: "In accordance with staff rule 108.2, the Staff-Management Coordination Committee (SMCC) is the joint staff-management machinery at the Secretariat level and thus the Secretariat-wide mechanism for negotiation in good faith between staff representatives and the administration". However, while the applicant contests the choice of SMCC, he does not say which United Nations body would have been competent to organize the election, whereas SMCC, even if it is a joint body, is the only body in which all the Secretariat staff organs are represented.

VI.7. Examination of the case file shows that by her letter dated 6 February 2008, the Deputy Secretary-General asked PA to organize the appointment of the staff representative and of the external jurist nominated by the staff. Thus, while the

organization of the appointment of the staff representative and the jurist was entrusted to PA, the Vice-President of a joint body, PA is herself a staff member and neither the facts set forth above nor any documents in the file indicate that management representatives interfered in the elections that resulted in the nomination of JC. Consequently, the applicant does not establish that the Secretary-General's choice resulted in any management interference contrary to the principle that staff members are free to appoint their representatives.

VI.8. On 11 February 2008, PA e-mailed the representatives of all SMCC member organs, including those that did not participate in its sessions, namely, the Geneva Staff Coordinating Council, the United Nations Staff Union in Nairobi, the United Nations Staff Council in Vienna, the United Staff Union in New York, the Staff Council of the Economic and Social Commission for West Asia (ESCWA), the Staff Association of the Economic Commission for Latin America and the Caribbean (ECLAC), the Staff Union Committee of the Economic Commission for Africa (ECA), the Staff Council of the Economic and Social Commission for Asia and the Pacific (ESCAP), the Field Service Staff Union, the staff associations of the United Nations University and the United Nations Development Programme (UNDP)/United Nations Office for Project Services (OPS)/United Nations Population Fund (UNFPA), the Staff Council of the Office of the United Nations High Commissioner for Refugees (UNHCR) and the staff associations of UNICEF, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia. She asked them to provide her, by 14 February 2008 at the latest, with the names of their candidates for membership of the Internal Justice Council. On 19 February 2008, PA announced the election results to participants. JC obtained the votes of 10 SMCC members: the United Nations Staff Council in Vienna, the United Nations Staff Union in Nairobi, the ECA Staff Union Committee, the ECLAC Staff Association, the ESCAP Staff Council, the ESCWA Staff Council and the staff associations of the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, UNICEF and the United Nations University. The applicant obtained three votes: the Geneva Staff Coordinating Council, the UNHCR Staff Council and the Field Service Staff Union. While the applicant claims that the associations that voted for him are more representative than those that voted for JC, the provisions of paragraph 1.2 of the SMCC terms of reference show that all interventions made by SMCC members carry equal importance. He has thus no grounds for complaining that SMCC members were given only one vote each, regardless of how representative they are. Moreover, while he maintains that the United Nations Staff Union in New York and the UNDP/OPS/UNFPA staff association voted for him, he provides no documentary evidence to that effect for the file. It is thus established that the appointment of JC is the result of a procedure that culminated in her election by SMCC members.

VI.9. Consequently, it is clear from the foregoing that the applicant does not establish the illegality of the election of JC and his application for the election to be declared null and void must be rejected.

VI.10. With regard to the applicant's request that all decisions taken by the Internal Justice Council be rescinded, it is clear from General Assembly resolution 62/228 of 22 December 2008 that the General Assembly created a body that is purely advisory and does not take any administrative decisions that could be referred to this Tribunal. Thus the applicant's request must also be rejected.

VII. Concerning the second application

VII.1. The applicant filed with the Geneva JAB an appeal for rescission of the respondent's decision to appoint the five members of the Internal Justice Council for a period of four years.

VII.2. The respondent raises the inadmissibility *ratione temporis* of the appeal filed on 11 November 2008 with the Geneva JAB, arguing that the applicant was informed on 8 April 2008 of the decision appointing the members of the Internal Justice Council and failed to appeal against that decision within the two-month deadline. However, it is clear from the appeal addressed to the Secretary-General on 19 August 2008 that the applicant is contesting the decision published on 23 June 2008, which announced that the appointment of the members of the Internal Justice Council was limited to a period of four years. On 11 November 2008, the applicant contested before JAB the reply dated 29 September 2008 rejecting his appeal. However, since the administration does not establish the date on which the applicant received notice of the rejection of his appeal, it cannot maintain that the appeal to JAB was not lodged within the one-month deadline stipulated by staff rule 111.2 (a) (ii). Therefore, his application is not time-barred.

VII.3. It was judged above that the applicant's candidacy for the post of staff representative on the Internal Justice Council is directly linked to his status as a United Nations staff member and therefore that the dispute arising from his non-election is related to the rules governing his contract within the meaning of the abovementioned provisions of the Tribunal's statute. However, since it was also decided above that JC was elected in due form and that the applicant was quite rightly not declared elected, there is no point in the applicant, as the defeated candidate, requesting rescission of the respondent's decision limiting the appointment of members of the Internal Justice Council to a period of four years; only the members themselves might have reason to contest such a decision.

VII.4. Therefore, the applicant's second application must also be rejected.

For these reasons, the Tribunal DECIDES:

The two applications submitted by the applicant are rejected.

Judge Jean-François Cousin

Dated this 17th day of September 2009

Entered in the Register this 17th day of September 2009

Víctor Rodríguez, Registrar, UNDT, Geneva