*Translated from French*

| UNITED NATIONS DISPUTE TRIBUNAL | Case No.: | UNDT/GVA/2009/32 |
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| | Judgment No.: | UNDT/2009/085 |
| | Date: | 30 November 2009 |
| | | English |
| | Original: | French |

**Before:** Judge Jean-François Cousin

**Registry:** Geneva

**Registrar:** Víctor Rodríguez

BOUTRUCHE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

# JUDGMENT

**Counsel for Applicant:**
None

**Counsel for Respondent:**
Ivan Koulov, HRMS/UNOG

**Application**

1. In his appeal to the Geneva Joint Appeals Board (JAB), registered on 29 April 2009 and transferred to the United Nations Dispute Tribunal on 1 July 2009, the Applicant contested the decision of 30 December 2008 by which the Office of the High Commissioner for Human Rights (OHCHR) refused to recruit him on a P-3 post for which he had been selected and requested JAB to recommend that:

(a) He should be reinstated to a position within OHCHR or be allowed to apply for positions within the United Nations Secretariat;

(b) He should receive compensation in the amount of salaries that he would have received had he been recruited for the post in question and for the damage caused to his career;

(c) He should receive compensation for the moral damage caused to him and his wife as a result of the contested decision.

**Facts**

2. The Applicant started working for OHCHR on 1 May 2007 on a three-month short-term contract as a P-2 level Associate Human Rights Officer in the Rule of Law and Democracy Unit. In his P-11 form dated 23 April 2007, which he submitted to the Human Resources Management Service (HRMS), United Nations Office at Geneva (UNOG), at the time of his initial appointment, the Applicant clearly indicated that his brother worked for the Office of the United Nations High Commissioner for Refugees (UNHCR).

3. After having left the Organization on 31 July 2007, the Applicant was offered a new short-term contract in the Universal Periodic Review Section, OHCHR, on 29 October 2007. In his Personal History Profile (PHP) of November 2007, the Applicant again indicated that his brother worked for UNHCR.

4. The Applicant was offered several short-term contracts until 1 July 2008 when he was offered a three-month fixed-term contract, still at the P-2 level. This fixed-term contract was subsequently extended until 31 December 2008.

5. On 31 October 2008, internal vacancy announcement VA 08/OHCHR/116/Geneva was published for a P-3 post of Human Rights Officer in the Special Procedures Division, OHCHR, to temporarily replace three staff members taking maternity leave.

6. In November 2008 the Applicant participated in a competitive selection process for the aforementioned posts and in December 2008 he was recommended and selected for one of the posts. As before, the Applicant indicated in his PHP that his brother worked for UNHCR. On 16 December 2008, a human resources officer at OHCHR forwarded to HRMS/UNOG the request of the Director, Special Procedures Division, OHCHR, that the Applicant be recruited on one of the aforementioned P-3 posts on a short-term contract until March 2009.

7. On 30 December 2008, a human resources officer at UNOG asked the Applicant whether his brother still worked for UNHCR. The Applicant confirmed that he did.

8. In an e-mail dated 30 December 2008, HRMS/UNOG responded to the request of OHCHR that the Applicant be recruited on one of the P-3 posts. In its reply, HRMS stated that it had been discovered that the Applicant had been inadvertently employed by OHCHR since May 2007. In accordance with staff rule 104.10 (a), the Applicant should not have been appointed in the first place. He should therefore cease to work for OHCHR as of 31 December 2008, when his current contract ended. HRMS then proposed that the Unit identify another candidate for the P-3 post in question.

9. On 31 December 2008, at the request of the Human Resources Section, OHCHR, the Applicant's contract was exceptionally extended for a further three months on the condition that he cease to work for OHCHR as of 1 April 2009 and that OHCHR recruit another candidate for the post in question. The Applicant's contract was extended until 31 March 2009 under the same terms and conditions (P-2 level) as his previous contract.

10. By a letter dated 11 February 2009, the Applicant informed the Universal Periodic Review Section, OHCHR, that he had been offered a job outside the United Nations effective 18 February 2009. His request to be released was approved and he was separated from the Organization effective 17 February 2009.

11. The very same day, the Applicant wrote to the Secretary-General to request an administrative review of the decision not to appoint him to the P-3 post for which he had been selected. The Acting Chief of the Administrative Law Unit (ALU) of the Office of Human Resources Management (OHRM) of the Secretariat acknowledged receipt of the Applicant's request and informed him of the deadlines that applied to the submission of an appeal.

12. By a letter dated 26 March 2009, which was received on 30 March 2009, the Acting Chief, ALU/OHRM, responded to the Applicant's request for administrative review by concluding that his rights had not been violated and by rejecting his demands.

13. On 29 April 2009, the Applicant submitted his statement of appeal to the Geneva JAB. On 1 July 2009, pursuant to General Assembly resolution 63/253, the appeal was transferred to the United Nations Dispute Tribunal. The Respondent's reply was registered on 20 July 2009 and various memorandums were exchanged until 24 September 2009.

14. By way of a memorandum of 30 July 2009, the Director, Division of Human Resources Management, UNHCR, informed UNHCR staff that the United Nations Secretariat and the funds and programmes had decided that new staff rule 4.7 (a) concerning family relationships should be interpreted as applying only within the same United Nations entity. From then on, therefore, a person having a family relationship as defined in staff rule 4.7 (a) with a staff member of UNHCR could be appointed to a position within another United Nations entity.

**Applicant's submissions**

15. First of all, the Applicant recalls the jurisprudence of the United Nations Administrative Tribunal (UNAT), according to which administrative decisions affecting a staff member must not run counter to certain concepts fundamental to the Organization. They must not be improperly motivated, they must not violate due process, they must not be arbitrary, taken in bad faith or be discriminatory (UNAT judgment No. 981, *Masri*, (2000)).

16. The Applicant maintains that he never hid the fact that his brother worked for UNHCR and that he consistently indicated that fact in his P-11 form and in his

PHPs. The Applicant considers that the Organization recruited him in May and November 2007 and extended his contract several times for a year and a half in the full knowledge and despite the fact that his brother worked for UNHCR. According to the Applicant, the arguments put forward by the Respondent to explain how the Administration could have overlooked the fact that his brother worked for UNHCR are not admissible.

17. The Applicant notes that, where the Administration's knowledge of personal information is concerned, UNAT does not make a distinction between different types of contract or between new and renewed contracts.

18. The Applicant considers that the Respondent's claim that it is the Administration's duty to correct an error as soon as it becomes aware of it disregards the fact that the Administration should have checked his personal information when he was first recruited. The Applicant points out that, by employing him since 2007, despite the fact that his brother worked for UNHCR, the Administration created a factual situation whereby he was legitimately employed as a United Nations staff member for almost a year and a half, which situation generated rights.

19. The Applicant notes that, in a similar case, UNAT found that suddenly denying the Applicant his legitimacy as a staff member, after having considered him as an employee and periodically renewing his employment for four years, was indeed bad faith (UNAT judgment No. 981, *Masri*, (2000)).

20. The Applicant also notes that the principle of *venire contra factum proprium*, according to which no one may set himself in contradiction to his own conduct, is a well-established principle that also applies to administrative decisions, such as the decision currently being contested.

21. In view of the foregoing, the Applicant considers that the decision not to appoint him to the P-3 post in the Special Procedures Division and not to renew his contract as an Associate Human Rights Officer at the P-2 level in the Universal Periodic Review Section on the grounds of his family relationship in application of former staff rule 104.10 (a) was arbitrary and unfair.

22. On a subsidiary ground, the Applicant notes that, given that UNHCR was granted special status for the appointment of its staff by the General Assembly

and therefore applies recruitment rules and procedures different from those of the United Nations Secretariat, a strict application of former staff rule 104.10 (a) is not justified in the case of UNHCR. The Applicant stresses that the purpose of this rule is to prevent favouritism and nepotism, or even the appearance thereof, and that there is no such risk in the case of a family member working for UNHCR. In that connection, the Applicant maintains that the Administration's interpretation of new staff rule 4.7 (a), according to which more flexibility was introduced vis-à-vis family relationships, only strengthens his position.

23. The Applicant also maintains that the fact that a decision effective 31 December 2008 was not communicated to him until 30 December 2008 violates his right to due process and transparency. The Applicant points out that the Administration never told him why the exception to former staff rule 104.10 (a) did not apply in his case.

**Respondent's observations**

24. At the outset, the Respondent recalls that the Applicant had only been working for OHCHR for 17 months when the Administration became aware of the fact that his brother worked for UNHCR. At the time this fact was discovered, the Applicant had already been selected for but had not yet been appointed to the P-3 post of Human Rights Officer on a three-month short-term contract.

25. The Respondent stresses that the decision to select the Applicant had to be withdrawn because his appointment would have violated former staff rule 104.10 (a) concerning family relationships. The Respondent notes that it has been a long-standing policy of the Administration to strictly apply former staff rule 104.10 (a) when the family relationship is with a staff member of the Secretariat or one of the subsidiary organs, funds and programmes, such as UNHCR. The Respondent points out that the conditions of former staff rule 104.10 (a), which do not leave any room for interpretation, have been met as the Applicant's brother works for UNHCR.

26. The Respondent notes that the exception provided in former staff rule 104.10 (a) did not apply because another candidate, who had also been shortlisted, was appointed instead of the Applicant. That the Applicant's statement that his brother worked for UNHCR was not taken into consideration by the

Administration at the time of his first contract or subsequently was the result of an oversight. It was only in December 2008, when the Applicant participated in a new selection process, that the error was discovered.

27. The Respondent points out that, in the interests of good administration, the Administration has the possibility to rectify an administrative error and, consequently, it also has the possibility to withdraw an illegal administrative decision that was taken in favour of a staff member. According to the Respondent, this assessment is reflected in administrative instruction ST/AI/2000/11 entitled "Recovery of overpayments made to staff members". Furthermore, it is the Administration's duty to correct an error as soon as it becomes aware of it in order to ensure equal treatment of its staff and to prevent illegal situations from persisting. That being so, the Administration is aware that, should it have to withdraw an illegal administrative decision, it must take account of the interests of the staff member, who in good faith relied on the continued existence of the situation.

28. The Respondent considers that, in the present case, the decision not to appoint the Applicant to the P-3 post was not improperly motivated and was not taken in bad faith. The Administration took account of the Applicant's interests by offering him one final three-month contract.

29. As for UNAT jurisprudence in the *Masri* case, the Respondent points out that, in that case, the appellant had been employed by the Organization for four years. In that situation, the interest of the staff member not to be refused employment owing to the fact that his brother worked for the Organization prevailed over the interest of the Organization to correct an illegal situation.

30. The Respondent recalls that, by virtue of former staff rules 104.12 (b) (ii) and 304.4 (a), neither short-term appointments nor fixed-term appointments create a right to renewal and that the Secretary-General's discretion in that regard is broad. In the present case, the Applicant cannot claim to have had a legitimate expectation that his contract would be renewed.

31. The Respondent maintains that the more flexible interpretation of new staff rule 4.7 (a) confirms its argument that until 30 June 2009 former staff rule 104.10 (a) was strictly applied when the family relationship was with a staff

member of the Secretariat or one of the subsidiary organs, funds and programmes. The Respondent stresses, however, that since 1 July 2009 the Applicant has been allowed to apply for and be appointed to posts within the United Nations Secretariat.

**Judgment**

32. The Applicant contests the decision of 30 December 2008 by which OHCHR refused to recruit him on a P-3 post for which he had been selected. The Applicant maintains that, since he had repeatedly informed the Administration that his brother worked for UNHCR and since he had still been recruited despite that fact, OHCHR could not invoke staff rule 104.10 (a), which was in force at the time and which states the following: "Except where another person equally well qualified cannot be recruited, appointment shall not be granted to a person who bears any of the following relationships to a staff member: father, mother, son, daughter, brother or sister."

33. First, the Tribunal must consider whether the Administration had good reason to invoke the prohibition provided in staff rule 104.10 (a). Under the heading "Scope and purpose", the Staff Regulations state the following: "For the purposes of these Regulations, the expressions 'United Nations Secretariat', 'staff members' or 'staff' shall refer to all the staff members of the Secretariat, within the meaning of Article 97 of the Charter of the United Nations, whose employment and contractual relationship are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1, of the Charter." It follows from the two aforementioned texts that the aforementioned prohibition is applicable to persons who are applying for a post in one organization that is part of the Secretariat and who bear a family relationship to a staff member of another organization that is part of the Secretariat.

34. It is clear from ST/SGB/1997/5 of 12 September 1997, as amended on 27 September 2002 and 22 August 2005 that both OHCHR and UNHCR are part of the Secretariat. Accordingly, since the Applicant was applying for a post in one organization that is part of the Secretariat while his brother was a staff member of another organization that is part of the Secretariat, the Administration was bound

to apply staff rule 104.10 (a), which was in force at the time, and to reject his application, as indeed it did.

35. Since the Applicant does not establish or even allege that he was the only shortlisted candidate qualified for the disputed post, he cannot maintain that the Administration should have applied the exception that former staff rule 104.10 (a) provides in the event that another person equally well qualified cannot be recruited.

36. If it is true that, since 1 July 2009, new staff rule 4.7 (a), which contains the same provisions as former staff rule 104.10 (a), has been interpreted by the Administration as applying only to family members working for or applying for posts in the same organization, this new administrative doctrine is illegal, since the provisions contained in new staff rule 4.7 (a), like those contained in former staff rule 104.10 (a), which apply to the present appeal, are clear and can be interpreted only in the manner set out above. For it to apply its new doctrine legally, the Administration must therefore make the necessary changes to the wording of staff rule 4.7 (a). Accordingly, the Applicant is not justified in citing an illegal change in doctrine by the Administration which, in any case, post-dates the contested decision.

37. Contrary to that maintained by the Applicant, the Administration, bound as it is to apply existing rules, has a right and even an obligation to put an end to illegal situations as soon as it becomes aware of them, while preserving any rights acquired by staff members in good faith. Accordingly, the error that the Administration unwittingly made by recruiting the Applicant even though his brother worked for UNHCR and the good faith of the Applicant do not prevent the Administration from putting a swift end to this illegal situation, provided the rights acquired previously by the staff member are respected.

38. It follows from the facts described above that the contested decision did not affect the rights acquired by the Applicant as a result of his contract, since the contested decision constitutes a decision not to appoint him to a new post on a new contract, not a decision to terminate or not to renew an existing contract. Accordingly, the Applicant is not justified in maintaining that his benefiting from

several previous contracts gave him the right to apply for another post at a higher level.

39. It follows from that said above that the Applicant has not established the illegality of the decision that he contests and that his demands should therefore be rejected in their entirety.

40. For these reasons, the Tribunal DECIDES:

The application is rejected.

(*signed*)
Judge Jean-François Cousin

Dated this 30th day of November 2009

Entered in the Register on this 30th day of November 2009

(*signed*)
Víctor Rodríguez, Registrar, UNDT, Geneva