UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/068/ JAB/2009/018
Judgment No.: UNDT/2010/062
Date: 13 April 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

ROSCA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Duke Danquah, OSLA

Counsel for respondent:
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. The applicant, who had previously held appointments with the International Criminal Tribunal for the former Yugoslavia, began service with the Organization on a fixed-term appointment with the International Criminal Tribunal for Rwanda in January 2004. Effective 1 September 2007 he was given a one-year fixed-term contract with the United Nations Assistance to the Khmer Rouge Trials (UNAKRT) programme in Cambodia as Audio/Visual (AV) Technician. He undertook some supervisory responsibilities and was usually referred to as 'Supervisor, AV Unit'. On 27 August 2008 the applicant was reassigned to another section. Effective 1 September 2008 his appointment was extended to 30 November 2008, then to 12 December 2008 and ultimately to 17 December 2008, when he was separated.

2. Following an extensive review in early 2008, a new post of Supervisor, AV Unit was created which absorbed the functions of the applicant's post and, according to the respondent, added new responsibilities. In effect, the applicant's post was abolished. The new job description was approved in July 2008 and the position re-advertised. The applicant did not apply for it.

3. On 24 October 2008 the applicant complained about his reassignment and reappointment for three months, claiming, in effect, that it was an abuse of authority. In due course, a request for administrative review was made, which was unsuccessful. Following a suspension of action application, the appointment was extended to enable the consideration of the issues raised by the applicant and ended, as mentioned above, on 17 December 2008.

4. On 5 November 2009 I ruled that that the staff member's application was receivable.

5. Essentially, the applicant's case is that the decisions to reassign him and not to renew his appointment were motivated by irrelevant considerations, including a desire by the decision-maker to replace the applicant with a personal friend.

Background

6. The Extraordinary Chambers in the Courts of Cambodia (ECCC) is a domestic criminal tribunal of special jurisdiction established under the law of Cambodia for the prosecution of crimes committed by the Khmer Rouge regime. The UN provides support to the court through UNAKRT, of which an integral part is the Court's Office of Administration which provides, together with the national component of that Office, legal, judicial, technical, administrative and security support services including, in particular, the provision of AV services. The court commenced operations in 2006 with the arrival of the initial UNAKRT administration officials and the appointment of the Court's judges.

7. For a considerable time following the commencement of its operations, the ECCC experienced a significant difficulty in setting up sufficient services, procedures and systems for its work. It was the task of the Court Management Section to coordinate, amongst other things, the provision of legal services, the conduct of trials, judicial investigations, records keeping, witness support and protection and AV services. A number of consultations took place throughout 2007 and their reports pointed to significant structural and organizational shortcomings. One of the consultants who reported on the set up for the impending trials was later recruited as Senior Court Management Officer (SCMO), thereby becoming the applicant's first reporting officer. Overcoming the parlous state of judicial support services had become more urgent since the Court was already seized of its first two cases.

8. A review undertaken by the UNAKRT Coordinator and the SCMO included the following issues facing the AV Unit –

(a) the courtroom was not ready to conduct trials and hearings were held in a small courtroom that scarcely accommodated 15 visitors;

(b) procurement of AV equipment, for which local procurement authority had been granted almost a year earlier, was still incomplete;

(c) the AV Unit was operating with an incomplete AV system and semi-portable equipment which was not of industrial standard;

(d) with the exception of two forms, the AV Unit had produced no written procedures or guidelines regulating its functions and services;

(e) AV services were provided *ad hoc*, primarily based on instructions and preferences of individual judicial officers;

(f) the lack of centralized written procedures and developed systems caused preparations for hearings to lack coordination with consequential failures to respond effectively to technical problems arising during hearings; and

(g) there was a lack of planning and coordination with other offices, projecting longer term AV needs of the court for such needs as video-conferencing remote testimony or witness protection during trials.

9. The Coordinator and the SCMO proposed that the Supervisor, AV Unit post should be revised to include a number of operational and managerial responsibilities, which had hitherto not been part of the role. These additional responsibilities were –

(a) direct managerial responsibility for the Unit, including planning, client activity coordination and the like, not then managed within the Unit;

(b) development and implementation of AV procedures, including standard operation procedures in a wide range of different operational contexts;

(c) provision of reports on the work of the Unit;

(d) provision of general AV support for court activities other than hearings; and

(e) management of production of AV materials for public distribution, in cooperation with the Public Affairs Section, in respect of which very significant demands were anticipated.

10. A revised job description, including these elements, was submitted by the SCMO to the Coordinator who approved it on 3 July 2008. This decision was immediately communicated to the applicant by the then Chief of Personnel. The

SCMO also met with the applicant to discuss the restructuring. Shortly after the decision was communicated to the applicant on 3 July 2008, he spoke to the Chief of Personnel about his situation. As mentioned above, the applicant did not, in the result apply for the new position, which was filled in due course.

11. On 10 July 2008 the SCMO recommended extension of the applicant's contract "up to completion of recruitment for new AV Head of Unit post (current post being discontinued)". On 6 August 2008 the Coordinator endorsed the relevant interoffice memorandum with the recommendation of "a further extension of three months, through 30 November 2008 … [by which date] the recruitment process should be finalized …"

Issues

12. The applicant refers to a number of incidents involving himself and the SCMO, which he claims demonstrate that the SCMO formed unfair and unreasonable opinions about his ability and willingness to perform the tasks of Supervisor, AV Unit and which comprised the true reasons for the restructuring of his job. He contends that the restructuring was merely a device to remove him from UNAKRT and that it was this understanding that led him to refrain from making what would have been a pointless application for the new position.

13. So far as the respondent is concerned, it is contended that the restructuring was a legitimate and indeed necessary undertaking in light of the demonstrated shortcomings of the structure which it replaced. The SCMO denied any feelings of personal animus towards the applicant and said that his invitation to the applicant to apply for the new position was genuine. He agreed that he had been critical of certain actions of the applicant but maintains that this played no part in the decision to recast his job. Indeed, he felt that the applicant would have been a genuine contender for the position if he had changed his attitude towards its requirements.

The evidence and findings

14. Before discussing the evidence adduced in the trial, I should deal with two issues which do not require any extensive discussion and should be dismissed at the

outset. The first of these is the suggestion by the applicant that the SCMO lacked the technical knowledge necessary to enable a fair evaluation of his work and the tasks of the Supervisor, AV Unit. It is obvious from the 2007 reports on the work of UNAKRT, to which the SCMO was a major contributor, that he was fully qualified to make the assessments that he did as well as the recommendations about the need to change the competencies required for the new position. It is not necessary for me to consider, let alone determine, the particular criticisms made by the applicant of certain technical proposals in the reports. The SCMO's perspective was that of a manager, not a technician, and he candidly disclaimed any such expertise. Nevertheless, though not a technician, the SCMO certainly had sufficient information, knowledge and experience to undertake the tasks here in question, with considerable and more than adequate knowledge about the technical requirements of the undertaking. The second issue concerns the allegation that the SCMO misused his position by attempting to remove the applicant in order to replace him with a friend or partner of a friend. I do not intend to set out the details either of the allegation or of the SCMO's response. It is sufficient to state that not only was there no evidence whatever that might justify this fanciful allegation, I am quite satisfied that the allegation is completely untrue and unjustified.

15. I now turn to the particular complaints made by the applicant.

16. There were significant delays in installation of the AV equipment which the SCMO attributed at least in part to the applicant. These delays were mainly due to matters out of the applicant's control concerning the late supply of equipment and lack of technical expertise of the national staff, who the applicant was training. The applicant said that the SCMO did not sufficiently understand the work of the AV Unit and the problems being experienced with substandard equipment and local employees who worked according to their own timetable and not that set by the applicant. I do not accept this evidence.

17. The SCMO had made several requests of the applicant for reports which were either late or inadequate but the first significant contretemps occurred on 21 May 2008 when, during a hearing, an interpretation channel stopped operating. The

complaint of the SCMO was not that the problem had occurred but that the applicant, in effect, had ignored his request to fix it and only when he had asked him to deal with it immediately did the applicant contact the AV technician in the courtroom and see to the problem. The applicant explained to the SCMO that the problem was caused by the interpreter speaking too low and not a failure of equipment. However, after some significant delay it was found that this was not the case, the problem was identified and fixed shortly after. As the SCMO so explained, it was not so much a problem of equipment failure, for which the applicant could not be blamed, but the failure to put into effect any plan for testing the equipment before the hearing and ensuring that there was a process for ensuring, if a problem arose, that it could be quickly fixed. A meeting between the applicant and the SCMO occurred on 30 May 2008 to discuss these problems, in which the latter made it clear that he was dissatisfied with the applicant's performance. The applicant testified that the SCMO simply would not accept the explanation that the problems were due to substandard equipment. On the other hand, the SCMO testified that he was aware of and accepted the difficulties caused by the equipment but was rather concerned with the failure of the applicant to put in place a procedure to deal with the problem. Having heard both witnesses on this point, I prefer the evidence of the SCMO largely because it is more consonant with the logic of events.

18. The next major issue occurred over a failure to have the AV equipment ready for a prescheduled court rehearsal on 17 June 2008. There had been a meeting on 10 June 2008 inside the courtroom, involving the applicant, the SCMO and other participants. The applicant told the meeting that the AV systems, which were crucial for the rehearsal, would be ready by 13 June 2008, in light of which it was scheduled to occur on 17 June 2008, and official invitations with an agenda were sent out to a wide range of interested parties. When the SCMO arrived in the courtroom as arranged, the AV systems were not ready, with wires hanging off the walls and mounting brackets not fully set up. Nor was the seating in place (though I have difficulty understanding why this was the applicant's responsibility). The SCMO complained about this state of affairs and, in particular, that he was given no notice of any problem.

19. The applicant said that the problem arose because the equipment had not arrived, and it was necessary to move what had been installed in the pre-trial court, which had been used only recently, into the trial court, where the rehearsal was to take place. The brackets for the cameras, which were to be provided by a local contractor, had not arrived and thus the cameras could not be installed. The applicant did not explain why he had not informed the SCMO of the problem and I gathered that he had simply been waiting for the brackets and had hoped that they would come in time. He said that they eventually arrived an hour after the time for the meeting and that two hours later, all was in place and working. The SCMO testified that he asked the applicant at the time to explain what had happened, but could not get a satisfactory answer. He said that the applicant was angry at being asked to explain and simply told him that the brackets had not arrived on time and that everything would be ready in a couple of hours. He did not give any explanation as to why he did not let the SCMO know about the problem. A subsequent exchange of emails was not satisfactory, though the applicant's complaints about lack of resources struck me as not unreasonable. The point was that he had indicated that the AV would be ready in time, had been given extra days for this to be done and, when it was still not completed at the last minute, still did not inform the SCMO of the problem. A subsequent rehearsal was arranged for 20 June 2008 but the equipment, though installed, was not functioning, and it could not take place. The SCMO was informed later that the problem was not the equipment itself, as had been claimed by the applicant, but that it had not been set up correctly, which would have been detected if it had been tested beforehand. Again, it seems to me that the SCMO's critical opinion about the applicant's performance in respect of this matter was not unreasonable, however unacceptable it was from the applicant's point of view.

20. I now move to the explanation for the change in the job requirements, in respect of which the applicant's case, essentially, is that there was no need for any change, those which were made to his job description were inconsequential and this was a scheme to replace him. The job descriptions contained in the original vacancy announcement for the applicant's post and the later announcement contained distinct and not insignificant differences which are fairly identified in the summary above.

However, this is very much a management question in an area in which the Tribunal has no particular expertise. Evidence was given on this point by the Coordinator and the SCMO. There was nothing about their testimony that provided a basis to doubt their credibility. Nor did they have any axe to grind. I do not accept that there were any feelings of personal ill-feeling towards the applicant or ulterior motives behind the change. Although the SCMO candidly conceded that he had criticised the applicant's performance, he said that, in his opinion, the applicant was able to improve and could perform the new tasks if he were minded to do so. He said, and I accept, that the change was part of an overall revision of the functioning of UNAKRT, and not triggered or influenced by his adverse opinion or the competence displayed by the applicant.

21. The Coordinator, who approved the revised job description on 3 July 2008, relied in substance on what he was told by the SCMO as to the changes required to the requirements of the supervisor's job in light of his knowledge of the independent consultancy reports, a developing understanding of the problems that had been exposed and the requirements for greater managerial control of all aspects of the court's administration. This issue had become immediately important because of the substantial and complex trials about to be undertaken. The SCMO, who was directly responsible to ensure that the necessary AV resources were in place for the Court's work, and had, I am satisfied, appropriate managerial experience of the actual problems and challenges that required to be overcome and faced, judged that there should be a significant extension of the functions of the Supervisor, AV Unit, in connection with his or her managerial responsibilities. The SCMO testified, in substance, that the applicant had, perforce, hands-on management tasks to perform, but this was done *ad hoc*, and it was necessary both to define and extend this role. This required formal changes to the job description and a recruitment exercise to be undertaken.

22. Both the Coordinator and the SCMO testified that changes to the job description in no way related to any dissatisfaction with the applicant's performance but were entirely controlled by their conclusion that significantly greater

responsibilities were now required of the Supervisor, AV Unit. I also accept their evidence that, when they discussed the impending recruitment process with the applicant, they extended genuine invitations to the applicant to apply, though I think it is also fair to comment that the applicant was not in a frame of mind that enabled him to receive this information as it was intended.

23. I do not accept the applicant's evidence that there was no significant difference between the new job description and that under which he was recruited or that the work that he was already doing adequately answered the actual and impending demands of the AV task. Although in some respects the old job description and the new were similar, I am satisfied that, in respect of these similar requirements, the managerial responsibilities were significantly increased: the use of generic language does not fairly express this change in degree.

24. Having regard to the changes in the job requirements, it was obviously reasonable that the applicant's contract, which was to expire at the end of August 2008, should not be renewed. The SCMO testified, in effect, that the extension or the applicant's contract was approved to place him in a position to apply for the new post and the recruitment process was completed in a timeframe that permitted him to do so.

25. As has been mentioned, the applicant spoke with the Chief of Personnel shortly after having been informed of the proposed changes. He testified, in effect, that she told him that there was no point applying for the position as his superiors did not want him. Whilst this evidence is uncontradicted, I do not accept that this was actually said to him. It may be that he gathered it from whatever was said, but the inherent unlikelihood of someone in the position of Chief of Personnel making such a completely uncalled for and indiscreet comment to someone in the applicant's position is so substantial that, without some corroboration, I would not be prepared to accept that it was said. My doubts have not been assuaged by other weaknesses in the reliability – though not, I think, the sincerity – of other evidence given by the applicant. At all events, whatever the opinion of the Chief of Personnel, I am satisfied that it did not represent the fact. I think it is fair to say that the SCMO (and

probably the Coordinator) would have preferred a more efficient and effective Supervisor, AV Unit, than they considered the applicant to be, but this is no doubt the desire of every manager anxious to achieve good results in respect of any subordinate who seems to be less than optimally effective: such an attitude may be unpleasant for the subordinate but it is by no means a breach of his or her contract of employment. Managers are not always right about such matters but mistakes in judgment are part of the human condition and do not necessarily have legal consequences.

26. The applicant submitted that the Coordinator told him that the SCMO wished to oust him from his position. The Coordinator, in effect, denied that the SCMO had told him this and denied that he had told the applicant that the SCMO had any such motive. Quite apart from this evidence, the claim of the applicant strikes me as fanciful and quite contrary to the logic of events. What could be the reason for the Coordinator to tell the applicant this?

27. On 27 August 2008 the applicant was reassigned to the Information and Communication Technology Section (ICTS) to assist with what was described as "some forthcoming special projects" and he commenced these duties upon his return from three weeks leave on 23 September 2008. The parties did not adduce evidence as to the actual content of these "special projects" but there is no reason to infer that they were inappropriate or in any way demeaning. There were delays in the delivery of AV equipment and problems with wiring in the courtroom that raised warranty issues and the Chief of ICTS had asked for staff. I reject the applicant's complaint that the reassignment was inappropriate and his contention that it was actuated by ill-feeling towards him.

28. The applicant also complains about not being permitted to enter the courtroom, after his reassignment, to assist (as he put it) his former workmates with AV work being done. Several witnesses called by the respondent, including the SCMO, said the problem about access did not relate to the applicant, as such, but to serious electrical faults in the courtroom which made it unsafe to work there until they were fixed. I accept that the applicant was motivated by the best of intentions,

but this does not mean that his exclusion was in any way a reflection on him. Nor was it any evidence of ill-will towards him.

29. Another issue raised by the applicant concerns criticism of him by the SCMO when he was absent from work. The details do not matter. The SCMO has acknowledged that his criticism was unwarranted and has apologised. Nothing significant arises from this. I am satisfied that, although from the applicant's point of view, the incident was embarrassing and perhaps hurtful, the SCMO was simply mistaken and not acting maliciously.

30. It remains to deal with the complaints of the applicant concerning his evaluation in the electronic performance appraisal system (e-PAS). It was submitted on his behalf that, although the SCMO had supervised the applicant for only four months, he nevertheless evaluated him as having failed in the goal to "design and maintain specific databases in connection with case tracking, court schedules". The applicant says that that this criticism was evidence of the SCMO's bad faith since "he actually participated in meetings and advised the AV Unit on how to implement the database". The short period of supervision gave the SCMO, it is also contended, insufficient interaction with the applicant to enable him to decide that the applicant only partially met the performance expected of him.

31. I have carefully read the SCMO's entries in the applicant's e-PAS appraisal. Detailed analysis is unnecessary and, at all events, was not attempted on the part of counsel for the applicant. The contention of the applicant that they prove the SCMO's bad faith is without merit. The explanation proffered by the applicant in respect of the criticism over the databases is self-evidently inadequate. To my mind the appraisal entries of the SCMO demonstrate a careful, moderate and balanced assessment, very far from what could and would have been said had the applicant's contentions the slightest basis in truth.

32. In his submissions on the applicant's behalf, counsel for the applicant indulged in a persistent and extravagant attack on the integrity of the Coordinator and, in particular, the SCMO, which not only did not, but could not, reflect any fair or reasonable, let alone accurate view of the evidence. I have moderated some of this

language for the purposes of this judgment. I do not doubt that the applicant sincerely feels that he has been wrongly done by, but counsel is not the mouthpiece of the client and cannot hide behind the notion that, if the client wants something said, counsel should say it. It is not, of course, the duty of counsel to be the judge and he or she has the responsibility to put the client's case fully and, if necessary, courageously even if it is a losing case. But personal attacks on witnesses or parties that cannot be justified by the evidence are contrary to the obligation of counsel to exercise their independent judgment; they are an abuse of the office of counsel and bring both counsel and the administration of justice into disrepute. I am very disappointed that it has been necessary for me to remind counsel of this fundamental ethical obligation.

33. In light of these attacks it remains for me to say that I have no doubt that both the Coordinator and the SCMO acted towards the applicant with complete propriety and told the truth in their evidence to the Tribunal. The criticisms of their conduct were not justified on the evidence and the extreme language used by counsel was completely inappropriate.

Conclusion

34. The application is dismissed.

(*Signed*)

Judge Michael Adams

Dated this 13th day of April 2010

Entered in the Register on this 13th day of April 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York