



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/66

Judgment No.: UNDT/2010/085

Date: 06 May 2010

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

ISHAK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

Counsel for respondent:
Shelley Pitterman, UNHCR

Introduction

1. By application registered with the United Nations Dispute Tribunal on 25 September 2009, the applicant contested a number of decisions that allegedly prevented his being promoted during the 2008 promotions session of the Office of the United Nations High Commissioner for Refugees (UNHCR).

2. The applicant requested the Tribunal to:

(a) Order that his UNHCR fact sheet be altered to reflect favourable comments contained in a letter from the High Commissioner acknowledging his contribution as Chairperson of the Staff Council;

(b) Award him compensation for moral injury;

(c) Report the behaviour of the Director of the Division of Human Resources Management (DHRM) to the Secretary-General for action to enforce accountability under article 10, paragraph 8, of the Statute on the ground of deliberate failure to take the required measures.

Facts

3. The applicant joined UNHCR at Islamabad, Pakistan, on 2 September 1984 at the L-2 level under a contract under the 200 series of the former Staff Rules. Following renewal of his contract on 2 March 1985, he was transferred to Lahore, Pakistan. In April 1988 he was assigned to UNHCR headquarters at Geneva. He was promoted to the L-3 level in July 1990.

4. In August 1991 he was elected Chairperson of the UNHCR Staff Council. From 1 February 1992 he was released from his duties to serve full-time in that office.

5. On 1 July 1994 his contract was converted into a fixed-term appointment (100 series) at the P-3 level.

6. Following the expiry in October 1998 of his term of office as Chairperson of the Staff Council, he was temporarily assigned to Geneva.

He was transferred to Abu Dhabi, United Arab Emirates, in May 1999 and promoted to P-4.

7. Following a number of missions and temporary assignments and two periods of leave without pay, he was assigned to the Inspector General's Office (IGO) on 1 January 2004.

8. After being re-elected Chairperson of the Staff Council, he was again released from his duties from 15 June 2007 to 30 June 2008. He rejoined IGO with effect from 1 July 2008.

9. In a letter dated 9 December 2008 the High Commissioner thanked the applicant for his participation in the Joint Advisory Committee during the period 2007-2008 and added that the applicant's efforts in that capacity should be reflected in his fact sheet.

10. The UNHCR annual promotions session for 2008 took place from 16 to 21 March 2009. The results were published in memorandum IOM/022/2009-FOM/022/2009 of 28 April 2009. The applicant was not among the persons promoted. The date for the start of the relevant recourse session was set as 22 June 2009.

11. On 16 June 2009 the applicant submitted to the Secretary-General a request for review of the following decisions:

(a) The convening of the recourse session on 22 June 2009;

(b) The implied refusal by the Director of DHRM to respond to the applicant's questions as to what, if any, decision had been taken regarding the criteria for assessing the performance of the Staff Council Chairperson for promotion purposes;

(c) The absence of action by the Director of DHRM to formulate policy guidance for use in considering the Chairperson of the Staff Council for promotion.

12. On the same day, the applicant submitted to the Geneva Joint Appeals Board (JAB) a request for suspension of the decision to convene the 2008 recourse session on 22 June 2009. In its report dated 22 June 2009, the JAB recommended that the Secretary-General reject the request on the ground of

inadmissibility *ratione materiae* as the decisions in question were not "administrative decisions". The Secretary-General accepted the JAB recommendation in a letter dated 24 June 2009.

13. The applicant's recourse was considered during the 2008 recourse session, which took place from 22 to 25 June 2009. At the outcome of the session, the results of which were published in IOM/035/2009-FOM/035/2009 of 28 July 2009, the applicant was promoted to P-5.

14. Pursuant to the transitional measures related to the introduction of the new system of administration of justice, the applicant's request of 16 June 2009 for administrative review was transmitted to the Deputy High Commissioner on 1 July 2009. On 31 July 2009 the Deputy High Commissioner informed the applicant that, following management evaluation, the request had been found inadmissible *ratione materiae* as the decisions challenged had not been administrative decisions. The Deputy High Commissioner further noted that in the interim the applicant had been promoted.

15. On 25 September 2009 the applicant, alluding to his state of health, requested the Tribunal to extend until 30 November 2009 the deadline for the submission of an application. He did not specify which decisions he wished to contest except to refer to the Deputy High Commissioner's response to him of 31 July 2009.

16. On 29 September 2009 the Tribunal gave the applicant until 30 November 2009 to submit his application.

17. On 30 November 2009 the applicant submitted a "provisional" application and simultaneously requested a further, two months' extension of the deadline to submit a complete application. He stated that the purpose of the application was to contest decisions and acts by the UNHCR Director of DHRM and Deputy High Commissioner intended to deny him the possibility of being recommended for promotion in the 2008 promotions session. He impugned in particular:

(a) Undue interference by the Deputy High Commissioner and the Director of DHRM in the elections to the 2008 UNHCR Staff Council in which he had been a candidate;

(b) The Director of DHRM's refusal to include in his fact sheet favourable information concerning the period from March 2007 to June 2008 when he had been Chairperson of the UNHCR Staff Council and collusion with other staff numbers to misrepresent the circumstances of his full-time release to serve in that capacity;

(c) The result, notified to him on 31 July 2009, of the management evaluation, which had been made, despite a conflict of interest, by the Deputy High Commissioner.

18. He further sought in his provisional application the disclosure of relevant parts of the minutes of the 2008 recourse session.

19. On 10 December 2009 the applicant renewed his requests for the extension of the deadline for submission of his application and for access to the minutes of the 2008 recourse session.

20. By an Order dated 11 December 2009 the Tribunal granted the applicant an extension until 11 February 2010 of the deadline for the submission of his application. In the Order, the Tribunal requested the applicant to include in his application comments on the issue of its receivability and stated that it would decide in due course on his request for the disclosure of documents.

21. On 30 December 2010 the applicant informed the Tribunal that a member of the Office of Staff Legal Assistance had been appointed to assist him as his counsel.

22. By e-mail dated 15 January 2010 the applicant submitted to the Geneva Registry a request for the recusal pursuant to article 28, paragraph 2, of the Tribunal's rules of procedure of the judge handling his case.

23. By letter dated 22 January 2010 the applicant informed the Tribunal that he had decided to dispense with the services of his counsel.

24. On 11 February 2010, the deadline for the submission of his complete application, the applicant submitted to the Tribunal (i) a request under article 6,

paragraph 2, of the rules of procedure that his application be heard in New York and (ii) a request for leave to file allegations of misconduct against the Geneva Registrar.

25. By Order dated 12 February 2010 the President of the Tribunal, having concluded that the applicant was actually seeking to appeal the judgments in his two previous cases before the Tribunal and that no conflict of interest was involved, rejected the applicant's request for recusal of the judge in charge of the present case.

26. On the same date, the Geneva Registry transmitted all of the applicant's submissions to the respondent for the latter's observations. The said observations were submitted on 15 March 2010.

27. By letter dated 16 March 2010 the Tribunal informed the parties that it did not consider an oral hearing necessary and invited them to take a position on that matter within two weeks.

28. The respondent conveyed his agreement on that matter the same day. On 23 March 2010 the applicant requested an oral hearing and indicated that he would wish to call witnesses during it.

29. By letter dated 24 March 2010 the Tribunal instructed the applicant to provide a list of the witnesses he wished to call and left open its option of holding an oral hearing.

30. On 31 March 2010 the applicant submitted his observations on the respondent's reply and a provisional list of witnesses. He also informed the Tribunal that, because of an investigation in progress, he had no access to his official computer.

31. On 15 April 2010 the applicant submitted a list of 12 witnesses and requested a one month's suspension of the proceedings.

32. By letter dated 16 April 2010, followed by a correction dated 21 April concerning the time of the event, the parties were convoked to an oral hearing to be held on 4 May 2010 to address solely the issues of the request for a change of venue and the receivability of the application.

33. On 3 May 2010 the applicant informed the Tribunal that he was unable to attend the hearing in person as he had recently been transferred to Nicosia, Cyprus. He asked for the hearing to be postponed until the week beginning 17 May 2010.

34. An oral hearing was held on 4 May 2010. The respondent's counsel appeared in person and the applicant participated by telephone.

Parties' contentions

35. The applicant's contentions are:

- a. The Director of DHRM and the Deputy High Commissioner deliberately tried to prevent the applicant being recommended during the 2008 promotions session. Their actions were part of a campaign of reprisal and harassment against him because of his staff representation and whistle-blowing activities;
- b. The Director of DHRM failed in his duty to update the criteria for the conduct of the promotions session and failed to provide guidance to the Appointment, Postings and Promotions Board;
- c. The interference by the Director of DHRM in his career amounted to breach of the duty of care, the duty to act in good faith and the duty to respect the dignity of staff members which are enshrined in the Staff Rules;
- d. The attempts at retaliation against him, including the repeated denial of his right to fair consideration for promotion to the P-5 level, must be deemed infringements of his terms of appointment;
- e. The impugned decisions have directly affected his rights in both the short and the long terms. They constituted a denial of his fundamental right to have the appraisal of his performance reflected in his fact sheet. The omission of favourable information was detrimental to the review of his case during the 2008 promotions session and resulted in severe moral injury. Although he was promoted during the recourse session for 2008, the impact

of the initial negative decision on his health has not been addressed and the Director of DHRM failed to take the appropriate administrative measures in that regard. His fact sheet still does not reflect the favourable assessment contained in the High Commissioner's letter acknowledging his contribution as Chairperson of the Staff Council.

36. The respondent's contentions are:
- a. There is a discrepancy between the issues raised in the request for administrative review and the decisions appealed before the Tribunal. In his request for administrative review, the applicant did not raise any issue regarding either the Staff Council elections, retaliation or harassment, or misrepresentation or collusion by DHRM. The Tribunal is competent only to review administrative decisions that have been subject to a request for administrative review or management evaluation;
 - b. Furthermore, the application is inadmissible *ratione materiae* since the contested decisions do not constitute administrative decisions as defined in United Nations Administrative Tribunal (UNAT) Judgement No. 1157, *Andronov* (2003), and recognized as such by the Dispute Tribunal in its Judgments UNDT/2009/077 and UNDT/2009/086. The alleged actions or inactions of the Deputy High Commissioner and the Director of DHRM are not unilateral decisions producing direct legal consequences for the legal order; nor do they have direct legal consequences for the applicant's terms of appointment or contract;
 - c. The issue of retaliation ought to have been pursued through appropriate mechanisms, which do not include an appeal to the Tribunal;
 - d. As to the merits of the case, it is, as the Tribunal stated in its Judgment UNDT/2009/083, *Bye*, the applicant who must prove his allegations of irregularities. However, the applicant provides no

evidence to support his allegations against the Deputy High Commissioner or the Director of DHRM;

- e. The applicant's fact sheet reflects his activities as head of the Staff Council in the same way as was done for his predecessors;
- f. By virtue of article 10, paragraph 6, of its Statute, the Tribunal is authorized to determine that a party has manifestly abused proceedings before it. UNAT held in its Judgement No. 1343 (2007) that the submission of multiple applications to obtain relief for the same issue constitutes an abuse of process. While the facts in the present case are different, the applicant made allegations of retaliation and harassment in two previous cases before the Tribunal. Furthermore, the subject matter of the present appeal is redundant as the applicant was promoted to the P-5 level in the recourse session. Whereas the applicant continues to seek redress for decisions that allegedly could have affected his chances during that session, the Organization demonstrated its good faith, impartiality and fairness by promoting him at that time.

37. In view of the foregoing, the respondent requests that the application be rejected as inadmissible and/or unfounded and that, pursuant to article 10, paragraph 6, of the Tribunal's Statute, costs be imposed against the applicant.

Judgment

38. The first requirement is for the Tribunal to rule on the applicant's request that his case be heard elsewhere than at Geneva. That request is based on allegations of bias and conduct detrimental to the applicant made against the Geneva Registrar.

39. The Tribunal cannot but reject the request in as much as it is no more than a flagrant attempt to block the possible rejection of the applicant's earlier request to the President of the Tribunal for the recusal of the Geneva judge handling the present case. Nor are there any grounds for accepting the allegation of bias on the part of the Registrar, since all of that officer's acts

in connection with proceedings are carried out under the control and sole responsibility of the judge. In this connection, the applicant is reminded that, while it is every staff member's right to submit applications, that right does not entail the right to include in submissions abusive or defamatory remarks about those whose work is to assist in the proper functioning of the Organization's internal justice system.

40. The second point to be considered is that of the receivability of the application. It suffices to compare the application with the applicant's letter of 16 June 2010 to the Secretary-General to see that the applicant is contesting before the Tribunal decisions that he has not submitted for review to the competent administrative authority. As article 8, subparagraph 1(c), of the Tribunal's Statute provides that an application is only receivable if the contested administrative decision has previously been submitted for management evaluation, the Tribunal can only take into account the decisions contested in the applicant's request for review dated 16 June 2009, namely:

- (a) The convening of the recourse session on 22 June 2009;
- (b) The implied refusal by the Director of DHRM to respond to the applicant's questions regarding the adoption of special criteria for assessing the Chairperson of the UNHCR Staff Council for promotion;
- (c) The absence of action by the Director of DHRM to formulate policy guidance for use in considering the Chairperson of the Staff Council for promotion.

41. The Tribunal must therefore declare as irreceivable all the applicant's petitions regarding decisions other than those listed above.

42. It now behoves the Tribunal to examine the other grounds for irreceivability cited by the respondent.

43. Article 2, paragraph 1 of the Statute of the Tribunal provides that:

“The ... Tribunal shall be competent to hear and pass judgement on an application filed by [a staff member] ... [t]o appeal an

administrative decision that is alleged to be in noncompliance with the terms of appointment or the contract of employment.”

44. In its Judgement No. 1157, *Andronov* (2003), UNAT defined an "administrative decision" that could be subject to a formal challenge in the following terms:

“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. ... 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.”

45. The present Tribunal applied that definition in its Judgments UNDT/2009/077, *Hocking, Jarvis and McIntyre*, UNDT/2009/086, *Planas*, and UNDT/2009/089, *Wilkinson et al.*

46. The above-mentioned contested decisions are all preparatory decisions connected with the promotions session and their legality can only be disputed in the light of the final decision as to a staff member's promotion, a decision within the competence of the High Commissioner. Such preparatory decisions are not in themselves capable of adversely affecting the applicant's legal situation since they modify neither the scope nor the extent of his rights. Consequently, an appeal against such decisions must be considered irreceivable.

47. Moreover, in the case in question, even if the applicant only obtained a promotion to P-5 as a result of the recourse session, he had no further interest at the time at which he submitted his application to the Tribunal in contesting a procedure that had led to his being promoted. The application is therefore irreceivable for this reason too.

48. The application being irreceivable as declared above, there is no need to rule on any of the applicant's other petitions in the present proceedings.

49. The respondent requests the Tribunal to apply article 10, paragraph 6, of its Statute, which provides that:

“Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.”

50. It follows from the above that, in asking for the case to be heard elsewhere than at Geneva, the applicant committed a manifest abuse of proceedings, the terms used to justify the request being clearly outrageous.

51. Furthermore, as has also been said above, the applicant had been promoted by the time he submitted his application and therefore had no interest in contesting the procedure which had led to that result.

52. In the circumstances, the Tribunal considers it appropriate to order the applicant to pay UNHCR costs in the amount of 2,000 Swiss francs (CHF), corresponding to part of the salaries paid to the UNHCR legal officers during the period devoted to responding to the abusive application. UNHCR is hereby authorized to deduct the said sum directly from the applicant's salary.

Decision

53. In view of the foregoing, the Tribunal DECIDES:

- (1) The application is rejected as irreceivable;
- (2) The applicant is ordered to pay UNHCR the sum of CHF 2,000, the amount to be deducted by the respondent directly from the applicant's salary.

(signed)

Judge Jean-François Cousin

Dated this 6th day of May 2010

Entered in the Register on this 6th day of May 2010

(signed)

V́ctor Rodŕguez, Registrar, UNDT,