



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/095

Judgement No.: UNDT/2011/087

Date: 20 May 2011

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

BENHAMOU

v.

**SECRETARY-GENERAL
OF THE UNITED NATIONS**

JUDGEMENT

Counsel for Applicant:

n.a.

Counsel for Respondent:

Myriam Foucher, UNOG

Application

1. On 2 July 2010, the Applicant filed an application with the Dispute Tribunal in which he challenged, first, the decision of the Director, Division of Conference Management, United Nations Office at Geneva (“UNOG”), dated 30 September 2009, to have a memorandum dated 7 September 2009 added to his personnel file, which memorandum might be to his disadvantage, and, second, the same Director’s decision, on 23 October 2009, not to have placed in the personnel files of some of the Applicant’s superiors memoranda the latter had written on 17 and 24 September 2009.

Facts

2. The Applicant entered the service of UNOG on 18 February 1974 on a short-term appointment as a distribution clerk at G-1 level. At the material time and as of the date of publication of this judgement, he had been working since 2004 in the Distribution Section, Publications Services, Division of Conference Management, as a Meeting Services Assistant, at G-6 level. He holds a permanent appointment.

3. On 23 June 2009, the monthly meeting of the Distribution Section was held; it was attended by 20 staff members, including the Chief of Publications Services, to which the Distribution Section belongs, the section chief, several unit chiefs within the section, and the Applicant.

4. On 26 June 2009, the Applicant sent a memorandum to the Chief of Publications Services, with copies to more than 20 high-ranking officials, including the Secretary-General, to complain of the Chief’s behaviour towards him at the meeting of 23 June 2009 and what he considered to be harassment and abuse of authority on the part of the Chief.

5. On 7 September 2009, the Chief of the Distribution Section and four unit chiefs who had attended the meeting of 23 June 2009 sent to the Director of the Division of Conference Management, with a copy to the Applicant, among others, a memorandum challenging the latter’s allegations and complaining of his behaviour during the meeting. They asked to put on record the fact that the Applicant’s allegations were just another provocation and an attempt to distort reality.

6. On 14 September 2009, the Director of the Division of Conference Management wrote to the Human Resources Management Service to ask whether the memorandum of 7 September 2009 should be added to the Applicant’s personnel file and whether he should be so informed.

7. In a memorandum dated 17 September 2009, amended on 24 September 2009, that was sent to the Director of the Division of Conference Management and copied to some 20 high-ranking officials, including the Secretary-General, the Applicant stated that the memorandum of 7 September 2009 was false and asked that his memoranda dated 26 June 2009 and 17 September 2009 be placed in the personnel files of the staff members, namely, the Chief of Publications Services, the Chief of the Distribution Section, and the four unit chiefs within the Section.

8. On 18 September 2009, the Director of the Division of Conference Management again wrote to the Human Resources Management Service to ask whether the memorandum of 7 September 2009 could be added to the Applicant’s personnel file.

9. In an e-mail dated 25 September 2009, the Human Resources Management Service replied to the Director of the Division of Conference Management that under the provisions of Administrative Instruction ST/AI/292 of 15 July 1982, entitled “Filing of adverse material in personnel records”, the memorandum of 7 September 2009 could be placed in the Applicant’s personnel file.

10. In a memorandum dated 30 September 2009, the Director of the Division of Conference Management informed the Applicant that the memorandum of 7 September 2009 would be placed in his personnel file.

11. On 2 October 2009, in a memorandum to the Chief of the Human Resources Management Service, the Applicant requested details of the procedure for placing documents in a staff member's personnel file under Administrative Instruction ST/AI/292. The same day, the Applicant sent another memorandum to the Director of the Division of Conference Management, reiterating his request that his memoranda of 26 June and 17 and 24 September 2009 be placed in the personnel files of the staff members concerned, namely the Chief of Publications Services, the Chief of the Distribution Section, and the four unit chiefs within the Section.

12. On 7 October 2009, the Chief of the Human Resources Management Service informed the Applicant that Administrative Instruction ST/AI/292 of 15 July 1982 was still in force and that the decision to place a document in a staff member's file could be subject to management evaluation.

13. In a memorandum dated 22 October 2009, the Applicant replied to the Chief of the Human Resources Management Service indicating that the latter's response of 7 October 2009 was incomplete and informing him of his intention to ask the Management Evaluation Unit to review the Chief's decision.

14. In a memorandum dated 23 October 2009, the Director of the Division of Conference Management responded to the Applicant's memorandum of 2 October 2009 and suggested he approach the Human Resources Management Service if he wanted to have his memoranda of 17 and 24 September 2009 placed in his superiors' personnel files.

15. On 6 November 2009, the Applicant responded to the above-mentioned memorandum.

16. On 18 February 2010 the Applicant sent a memorandum, in French, to the Management Evaluation Unit, United Nations Secretariat, New York, asking that a management evaluation be done, first, of the decision of 30 September 2009 whereby the memorandum of 7 September 2009 had been placed in his personnel file and, second, of the decision not to place his memoranda of 17 and 24 September 2009 in the personnel files of certain of his superiors. In his letter, he said he was aware that he had not met the deadline of 60 days for making his request, but explained that he had "failed to understand circular ST/AI/292, which exists only in English, to defend [his] rights properly" and that he had not had the opportunity to consult with Counsel in February 2010.

17. In a letter dated 3 May 2010 in response to his application management evaluation, the Under-Secretary-General for Management informed the Applicant, in English, that the Secretary-General had decided to confirm the decisions contested.

18. On 2 July 2010, the Applicant, through his Counsel, a member of the Office of Staff Legal Assistance, made an application to the Tribunal, in English, and on 27 August 2010, the Respondent submitted its Answer, also in English.

19. On 27 September 2010, the Office of Staff Legal Assistance informed the Tribunal that it no longer represented the Applicant before the Tribunal.

20. In an e-mail dated 14 October 2010 addressed to the Office of Staff Legal Assistance, a copy of which was sent, in particular, to the Tribunal and to the Chief of the Human Resources Management Service, the Applicant complained of the attitude of his former Counsel towards him and the inability of the Office of Staff Legal Assistance to provide him with Counsel "sufficiently proficient in the French language". It appears from the correspondence in question that it is the Applicant who requested a change in Counsel after the person assigned to him said she was not shocked at the fact that the Respondent had not submitted its Answer in French.

21. In a memorandum dated 22 October 2010 addressed to the Respondent's Counsel, with a copy to the Tribunal, the Applicant complained of not being able to comment on the Respondent's Answer because he did not understand English and said he was awaiting a reply to his application in French.

22. By Order No. 82 (GVA/2010) of 25 October 2010, the Tribunal noted that in submitting the application and reply in English, the Applicant's Counsel and the Counsel for the Respondent had

acted in strict accordance with the Statute of the Tribunal and other relevant enactments. Noting however that the Applicant was now without Counsel and affirmed that he did not understand English, the Tribunal ordered, pursuant to article 19 of its Rules of Procedure and to allow the procedure to continue without affecting the Applicant's rights, that the proceedings continue in French, and asked the Respondent to send the Applicant a French translation of its Answer.

23. On 10 November 2010, the Respondent sent the Applicant the French translation of its Answer and on 6 December the Applicant submitted observations.

24. By Order No. 55 (GVA/2011) of 20 April 2011, the Tribunal invited the parties to a hearing on the admissibility of the application, to be held on 19 May 2011.

25. The Applicant and Counsel for the Respondent attended the hearing, which was held as scheduled on 19 May 2011, in person.

Parties' contentions

26. The Applicant's contentions are:

(a) His application is admissible. Not being a lawyer, he had no way of knowing the deadlines laid down for applying for management evaluation. Moreover, the Office of Staff Legal Assistance had assigned two inexperienced English-speaking lawyers who themselves considered that the deadlines had been met. In addition, the Management Evaluation Unit had itself deemed his application admissible in view of the exceptional circumstances. Finally, he had not understood the meaning of a sentence in English in the letter of 7 October 2009 from the Chief of the Human Resources Management Service concerning the possibility of requesting management evaluation;

(b) On the merits, he has not been able to submit his comments on the allegations contained in the memorandum of 7 September 2009 placed in his personnel file, contrary to the provisions of Administrative Instruction ST/AI/292. That was confirmed by the Management Evaluation Unit and the Respondent's Answer;

(c) Even supposing that his memoranda of 17 and 24 September 2009 could be regarded as comments in response to the said allegations, those two documents had not been placed in his personnel file;

(d) On the principle that all staff members should be treated on an equal footing by the administration, there was no reason for his request that a document be placed in his superiors' personnel files to be treated differently from a request for a document to be placed in his own file. He has been a victim of discrimination;

(e) There was no preliminary investigation before the decision was made to place the said document of 7 September 2009 in his file. His complaint of 26 June 2009 relates to the provisions of Secretary-General's bulletin ST/SGB/2008/5 ("Prohibition of discrimination, harassment, including sexual harassment and abuse of authority"); yet no investigation has taken place concerning the events of the meeting of 23 June 2009. Other staff members under the authority of the Chief of Publications Services have also been harassed;

(f) Only five persons, one quarter of those who attended the meeting, testified against him in the memorandum of 7 September 2009. They had given false evidence; all were either against him or had signed without understanding what they were signing. The Tribunal must ask the Chief of Publications Services to explain, making a sworn statement at the hearing;

(g) He is a victim of harassment and discrimination on the part of the management of the Division of Conference Management and the Human Resources Management Service as well as others at UNOG.

27. The Respondent's contentions are:

(a) The application is inadmissible on grounds of lateness, for the disputed decision, to place the memorandum of 7 September 2009 in the Applicant's personnel file, was communicated to him in writing on 30 September 2009. Pursuant to Rule 11.2 (c) of the Staff Rules, the Applicant had 60 calendar days to request management evaluation, that is, until 30 November 2009; but in fact he made that request only on 18 February 2010, more than two months late;

(b) It is true that under that rule, the Secretary-General may extend the period of 60 days where informal resolution is attempted by the Office of the Ombudsman, but only in that case is a time extension authorized;

(c) Even supposing it were nevertheless possible to grant an extension of time in exceptional circumstances, such circumstances do not exist in this case, and indeed it is up to the Applicant to show that they do exist. He does not in fact show any such thing, since, contrary to what he claims, Administrative Instruction ST/AI/292 is available in French on the iSeek website under "Human Resources Handbook". In addition, the Applicant, who had been working at the Division of Conference Management for 36 years, could have got help from his colleagues there, many of whom are fluent in French and English. In addition, in his personnel file, the Applicant acknowledges "a practical knowledge of English". In a communication dated 13 May 2003, the Applicant cited Administrative Instruction ST/AI/292 in support of one of his claims without mentioning that he could not understand the content; moreover, in the reply he received from Human Resources, the relevant extracts of the said instruction were cited in French;

(d) Though the Applicant maintains he was unable to contact a representative of the Office of Staff Legal Assistance in Geneva before February 2010, he had every opportunity to do so in New York;

(e) In addition, the Applicant addressed his request for management evaluation to the Chief of the Management Evaluation Unit, not the Secretary-General, as laid down in Rule 11.2 (a) of the Staff Rules;

(f) His application, insofar as it challenges the decision not to place his memoranda of 17 and 24 September 2009 in the personnel files of a number of staff members, is not only inadmissible on account of lateness, that decision having been communicated to the Applicant on 23 October 2009, it is also inadmissible in that there is no direct infringement of the Applicant's rights, as he has no right to insist that a document be placed or not be placed in another staff member's personnel file;

(g) On the merits, the procedure established by Administrative Instruction ST/AI/292 was respected. The disputed document dated 7 September 2009 was communicated to the Applicant, and in his memoranda of 17 September and 2 October 2009, he had the opportunity to submit his comments, which were also placed in his personnel file;

(h) The Applicant has not submitted any shred of evidence to suggest he was the victim of abuse of authority or harassment during the meeting of 23 June 2009. Thus, there was no need to investigate, nor is there any evidence in the record that the Applicant ever submitted a formal written complaint pursuant to section 5.11 of Secretary-General's bulletin ST/SGB/2008/5. Moreover, the decision not to investigate was never the subject of a management evaluation request, and the application, to the extent that it is directed against that decision, is inadmissible.

Judgement

28. In asking the Tribunal to dismiss the application, the Respondent maintains, first, that it is inadmissible since the Applicant failed to meet the deadline laid down in Rule 11.2 of the Staff Rules, which reads in part as follows:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

29. Article 8.3 of the Statute of this Tribunal provides that:

The Dispute Tribunal may decide in writing, upon written request by the Applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

30. The Tribunal's attention must first focus on the admissibility of the first of the two disputed decisions, namely that of 30 September 2009, whereby the Director of the Division of Conference Management informed the Applicant that the memorandum of 7 September 2009, signed by the Chief of the Distribution Section and four unit heads within that Section would be placed in his personnel file.

31. It is not in dispute that the Applicant did not send a memorandum to the Management Evaluation Unit, requesting that the decision of 30 September 2009 be subject to management evaluation, until 18 February 2010. Thus, it is clear that the Applicant did not comply with the time limit referred to above. It has been confirmed and reiterated by the Appeal Tribunal in several of its judgements, including *Costa* 2010-UNAT-036, *Trajanoska* 2010-UNAT-074 or *Ajdini et al.* 2011-UNAT-108, that the above provisions of the Dispute Tribunal's Statute are clear and forbid it to decide whether the staff member may, in exceptional circumstances, be granted more than 60 days to submit his or her application for management evaluation. There is therefore no need for the Tribunal to consider whether the reasons given by the Applicant to explain the delay in filing his request for management evaluation can be considered exceptional circumstances.

32. However, the Applicant contends that the Under-Secretary-General for Management, in her reply of 3 May 2010 to his request for management evaluation, herself acknowledged that the delay in filing his request for management evaluation might be justified by exceptional circumstances, and that that acknowledgement is binding on the Tribunal.

33. The Tribunal reminds the Applicant that pursuant to Rule 11.2 (c) of the Staff Rules, quoted above, the deadline may be extended by the Secretary-General in one case only: namely, pending efforts for informal resolution conducted by the Office of the Ombudsman. In this case, as the Office of the Ombudsman did not receive any request for informal resolution, it was not within the remit of the Under-Secretary-General for Management to grant as she had done, an extension of the deadline.

34. The rules in effect are binding both on the Administration and on staff members, and as it happens the Administration had no power to decide whether the reasons for delay adduced by the Applicant could constitute exceptional circumstances.

35. It follows from the foregoing that the Applicant was late in requesting management evaluation of the decision of 30 September 2009 and so his application, as it relates to that decision, is inadmissible before this Tribunal.

36. Regarding the second disputed decision, namely that of 23 October 2009, whereby the Director of the Division of Conference Management rejected the Applicant's request of 2 October 2009, namely that his letters of 17 and 24 September 2009 be placed in his superiors' personnel files, the Applicant was clearly aware of it no later than 6 November 2009, on which date he replied to it. And yet, as noted above, the Applicant did not send a memorandum to the Management Evaluation Unit, to request management evaluation of the decision, until 18 February 2010. Thus, for the same reasons outlined above, and without any need for the Tribunal to rule on the other objection of inadmissibility raised by the defendant, the application, inasmuch it is directed against the decision of 23 October 2009, can only be declared inadmissible also.

Decision

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

The application is dismissed.

(signed) _____

Judge Jean-François Cousin

So ruled this 20th day of May 2011

Entered in the Register on 20 May 2011

(signed) _____

Víctor Rodríguez, Registrar, Geneva
