



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/015

Judgement No.: UNDT/2011/088

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 18 March 2011, the Applicant filed with the Dispute Tribunal an application in which he challenged the decision of the Chief of the Human Resources Management Service (“HRMS”) of the United Nations Office at Geneva (“UNOG”), dated 28 October 2010, to place in his personnel file a memorandum, dated 16 September 2010, which he had sent to the Applicant, as well as the memorandum of 28 October in which he notified the Applicant of the disputed decision.
2. He asks the Tribunal, in particular:
 - (a) To order the Administration to respond to staff members’ complaints in the official language in which the complaint is written;
 - (b) To order the removal from his personnel file of all negative memoranda placed thereon;
 - (c) To order placement in the personnel file of the Chief of HRMS of the Applicant’s memoranda and of this judgement;
 - (d) To direct the Chief of HRMS to stop harassing him and abusing his power.

Facts

3. The Applicant entered the service at 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.
4. On 7 September 2009, the Chief of the Distribution Section and four unit chiefs 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 a meeting. They asked to put on record the fact that the Applicant’s allegations were just another provocation and an attempt to distort reality.
5. 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.
6. On 18 February 2010 the Applicant sent a memorandum, in French, to the Management Evaluation Unit, United Nations Secretariat, New York, to request that the decision dated 30 September 2009, inter alia, be subject to management evaluation.
7. 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 contested decisions.
8. In an e-mail dated 12 May 2010, the Applicant sent to the Executive Secretary of the UNOG Staff Coordinating Council, with a copy to more than two dozen officials, the aforementioned letter, complaining that he had received a reply in English, a language he does not understand, and asking him to intervene with the Secretary-General “for the defence of the French language”.
9. On 14 May 2010, the Executive Secretary of the UNOG Staff Coordinating Council replied to the Applicant stating, in particular, that he supported his request and that he would write to the Under-Secretary-General for Management to ensure that he received a French translation of her letter.
10. On 2 July 2010, the Applicant filed with the Tribunal an application against the disputed decisions concerning his request for management evaluation of 18 February 2010 (see judgement No. UNDT/2011/087 in case No. UNDT/GVA/2010/095).

11. As the Executive Secretary failed to act on his promises, the Applicant again wrote to him on 22 July 2010, with copies to 30 high-ranking officials, including the Secretary-General, the Under-Secretary-General for Management, the UNOG Director-General and the President of the Coordinating Council, to complain of that inaction. He ended his e-mail by asking whether he had to “resign himself to the idea that [the] representatives just spout a load of bull to get [staff members’] votes until the next election”.

12. In an e-mail dated 23 July 2010, the President of the Coordinating Council replied to the Applicant in the following terms:

I shall defer to [the Executive Secretary of the Coordinating Council] for an answer regarding his conversations with [the Under-Secretary-General for Management].

However, while we defend the French language at the UN, I do not think the vulgar language you employ toward the Council deserves our support, or the Organization’s.

13. The Applicant responded the same day to the following effect, in an e-mail sent to the same people as his letter of 22 July:

Pending the reply from [the Executive Secretary of the Coordinating Council], I think your answer is what we might call a cop-out.

And I think you and your majority colleagues should be thanking me for giving you a great opportunity to weasel out of commitments you never intended to honour in the first place.

Having said that, with age, my memory is not what it was.

So I would appreciate your refreshing my memory as to the last action taken by the Council majority in defence of the French language.

14. There then ensued, between the end of July and 9 August 2010, an exchange of bitter e-mails between the Applicant and other members of the Coordinating Council.

15. In a memorandum of 16 September 2010, the Chief of HRMS responded to the Applicant’s e-mail to the President of the Coordinating Council of 23 July 2010 as well as another message to the Office of Staff Legal Assistance. He reminded the Applicant that procedures were in place to allow staff members to defend their rights, specifically mentioning the new internal justice system and Secretary-General’s bulletins ST/SGB/2008/5 and ST/SGB/2005/21. He also suggested that the Applicant follow the procedures in question rather than conducting his scattershot letter-writing campaign to a wide range of uninvolved persons at every management level, and noted in that regard that the computer resources made available to staff members were to be used in keeping with bulletin ST/SGB/2004/15 and the principle of mutual respect. Finally, he warned him about the tone of his many communications to a multitude of officials.

16. In a memorandum dated 14 October 2010 addressed to the Secretary-General with copies to a dozen officials and services, entitled “Abuse of power, threats and intimidation against me by the Chief of the Human Resources Management Service”, the Applicant complained of the “petty manoeuvrings” of the Chief of the Human Resources Management Service to do him harm, including the latter’s “threatening letter” of 16 September 2010.

17. In a memorandum dated 28 October 2010, the Chief of HRMS responded to the memorandum explaining to the Applicant that his intention had not been to offend but to remind him of his rights and obligations and the procedures to be followed if he wanted to file a harassment complaint. He also expressed concern about the tone and content of the Applicant’s memorandum of 14 October 2010. Finally, he informed the Applicant that that memorandum, as well as those of 16 September and 14 October 2010, would be placed in his personnel file.

18. In a memorandum of 10 November 2010 to the Chief of HRMS, the Applicant challenged the decision of 28 October 2010 and said he would continue to inform the Secretary-General and other senior officials of the harassment, threats and intimidation he faced.

19. In a memorandum to the Secretary-General dated 10 December 2010, sent by the Applicant to Mr. Ban Ki-moon's e-mail address on 13 December 2010, he requested a management evaluation of the decision made on 28 December 2010 by the Chief of HRMS.

20. On 10 January 2011, the Applicant sent an e-mail to the Registry of the Dispute Tribunal in Geneva and the Management Evaluation Unit in New York, noting that he had not received a response to his request of 10 December 2010 for management evaluation and wondering whether he should turn first to the Management Evaluation Unit or could apply directly to the Tribunal. The same day, the Registry and the Management Evaluation Unit replied to the Applicant. The Registry stated that in the case of a staff member in Geneva, the Secretary-General had 45 days to respond to a management evaluation request and that if he had not responded by the end of that period the staff member then had 90 days to submit an application to the Tribunal. The Management Evaluation Unit, for its part, asked the Applicant to provide a copy of his request to the Secretary-General.

21. On 18 March 2011, the Applicant filed an application before the Tribunal, and on 26 April the Respondent submitted its Answer.

22. By Order No. 62 (GVA/2011) of 3 May 2011, the Tribunal summoned the parties to a hearing on that application as well as the Applicant's first case (see paras. 4-10), to be held on 19 May 2011.

23. On 13 May 2011 the Applicant submitted comments on the Respondent's Answer.

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

Parties' contentions

25. The Applicant's contentions are:

(a) His application is admissible since he sent his request for management evaluation to the Secretary-General on time, as evidenced by his e-mail to Mr. Ban Ki-moon of 13 December 2010, and the acknowledgment he received the same day;

(b) The impugned decision of the Chief of HRMS is only the latest episode in a long history of harassment he has been subjected to since 2005 on the part of the Chief and other staff members, mostly Russian;

(c) The Chief of HRMS had no business intervening in a conflict that did not concern him between the Applicant and the Executive Secretary and other members of the Coordinating Council and taking sides for the latter. In so doing he had violated at least one convention of the International Labour Organization concerning the independence of staff representation;

(d) There is no good reason for the decision by the Chief of HRMS to have the memoranda of 16 September and 28 October 2010 placed in the Applicant's personnel file;

(e) In his memorandum of 16 September 2010, the Chief of HRMS intervened in a conflict that did not concern him to rebuke, threaten and intimidate the Applicant, who is persecuted while the perpetrators of discrimination act with impunity;

(f) The impugned decision infringes the principle of equal treatment of staff members. The memoranda placed in his personnel file by the Chief of HRMS constitute harassment and abuse of power, which is prohibited under Secretary-General's bulletin ST/SGB/2008/5.

26. The Respondent's contentions are:

(a) The application is inadmissible, for there is no way to ascertain that the Applicant indeed sent the Secretary-General a request for management evaluation. The Management Evaluation Unit informed the Applicant on 10 January 2011 that it had not received his request and asked him to resend it. Rather than comply with the Management Evaluation Unit's request, the Applicant chose to make an application to the Tribunal without the mandatory step of management evaluation;

(b) On the merits, while it is true that the documents placed in the Applicant's file by the Chief of HRMS may be considered adverse material within the meaning of Administrative Instruction ST/AI/292, the procedure laid down therein was followed, as the additions to his file were brought to his attention and he was able to submit his own comments.

Judgement

27. Administrative instruction ST/AI/292 of 15 July 1982, entitled "Filing of adverse material in personnel records", states that:

2. "Adverse material" shall mean any correspondence, memorandum, report, note or other paper that reflects adversely on the character, reputation, conduct or performance of a staff member. As a matter of principle, such material may not be included in the personnel file unless it has been shown to the staff member concerned and the staff member is thereby given an opportunity to make comments thereon. It shall be handled and filed in accordance with the procedures set out below, depending upon its source.

3. Adverse material may originate from sources outside the Organization or from other staff members in their personal capacity commenting on a staff member's behaviour or activities. If the material is anonymous, it will be discarded. Otherwise, the incoming communication will be shown to the staff member, who will be asked to comment on the allegations, if a question of his or her conduct is involved. Both the adverse material and the staff member's comment will be kept in the non-privileged portion of the confidential file to which the staff member will have access.

28. It appears from the above provisions that the staff member must be informed by the Administration of any adverse material placed in his personnel file. In this case, it cannot be disputed that the documents in the Applicant's case were brought to his attention; indeed, he made comments in reply.

29. Thus, and without any need to rule on the admissibility of the application, the Applicant has not established that the Chief of HRMS committed an illegal act of the placing the documents in question in his file. Contrariwise, the Tribunal has a duty to recall that the Administration not only can but must place in staff members' personnel files all documents related to their service, provided they are in compliance with the above provisions, which in particular allow staff members to make comments on any material whose content they consider unfavourable.

30. It follows from the foregoing that the application must be dismissed.

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
