



JUDGE DEBORAH THOMAS -FELIX , PRESIDING .

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/ 030, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 28 February 2018, in the case of *Cardwell v. Secretary-General of the United Nations*. Mr. Mark Cardwell filed the appeal on 27 April 2018, and the Secretary-General filed his answer on 26 June 2018.

Facts and Procedure

2. The following facts are uncontested:¹

... [The] Applicant joined [the United Nations Development Programme (UNDP)] on 27 September 2009 when he was appointed to the post of Chief, Corporate Online Communications and Multimedia at the P5 level (“the Applicant’s post”) in what is now the Online and Digital, Communications Group [“CG”], Bureau of External Relations and Advocacy [“BERA”].

... Between 2013 and 2014, UNDP underwent a restructuring/realignment process. The features and details of the restructuring/realignment process are set out in the UNDP document “People Realignment Policy and Processes”.

... On 19 May 2014, the UNDP Administrator announced that pursuant to the new Strategic Plan for UNDP, new organograms reflecting the relocation, revision and reduction of a number of posts and grades would be released on 21 May 2014. The announcement stated that “many people

... Following some minor modifications to the text, the Team Manager post was formally classified at the P4 level. On 1 August 2014, ODU informed the Assistant Administrator, BERA, that they had finalized the review and classification of the post of Team Manager, Online and Digital, CG, BERA, as P4.

... On 26 July 2014, the Applicant applied for the Deputy Director P5 post. On 7 September 2014, the Applicant applied for additional posts of DI Senior Advisor, Development Effectiveness in [BPPS] and P5 Global Policy Advisor, Knowledge Management and Innovation, BPPS.

... By 8 October 2014, the Applicant was informed that he was unsuccessful in the job fairs, including for the P5 post of Deputy Director. An external candidate was selected for the Deputy Director P5 post.

... On 16 October 2014, the Applicant filed a request for management evaluation ("RME") challenging the "1) decision to reclassify [the Applicant's] post downwards; 2) decision to separate [the Applicant] on the basis of reclassification of [his] post; 3) decision to remove all of [his managerial responsibilities until year-end, a constructive dismissal; 4) decision to foreclose the possibility of appropriate reassignment through the job fair by: (a) pre-selecting particular posts to go to external candidates[; and] (b) generating an opaque, perpetually morphing and apparently ad hoc process of change managli1to pobans-0005 Tc .0338(t)1w [4 N(onm5.1)6.6(b2)4.9(r 20)3.5

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Mr. Cardwell had received full and fair consideration for the Deputy Director post at the P-5 level. Therefore, the burden of proof had shifted to Mr. Cardwell who had to show through clear and convincing evidence that the selection process was motivated by bias in favour of an external candidate. The UNDT found that Mr. Cardwell provided no evidence to support the said contention. Based on the foregoing, the UNDT held that Mr. Cardwell's appeal against the decision not to renew his fixed-term contract was not receivable *ratione materiae* and that Mr. Cardwell had failed to establish that his candidacy for the Deputy Director post at the P-5 level was not given full and fair consideration.

Submissions

Mr. Cardwell's Appeal

5. Mr. Cardwell submits that the UNDT erred in law and fact by finding the issue of non-renewal of his fixed-term contract and his subsequent separation from service to be non-receivable based on the conclusion that he had failed to request management evaluation of the decision not to renew his contract. In particular, the UNDT took the most restrictive interpretation possible when it

disingenuous in light of the then ongoing actions abolishing his post and relieving him of his managerial responsibilities even before his separation was formally communicated.

7. Mr. Cardwell asserts that the decision not to renew his fixed-term appointment is the direct result of an abuse of discretionary authority in that it appears to have been engineered solely to effect his separation. The Appeals Tribunal has held that it may examine the circumstances surrounding the ab

10. Moreover, the UNDT erred by unfairly shifting the onus of proof to him to show that his candidacy was not given full and fair consideration. Mr. Cardwell contends that “[o]nce challenged, the burden is on the [Secretary-General] to demonstrate that [staff member’s] candidacy was given full and fair consideration. The [Secretary-General] is specifically obliged to produce the records of the selection process.” Consequently, the UNDT’s conclusion that the Secretary-General minimally demonstrated that Mr. Cardwell had received full and fair consideration based on the list of agreed facts cannot be seen to meet this burden of proof.

11. Mr. Cardwell requests that the Appeals Tribunal vacate the contested Judgment and find in his favour. He also requests that the Appeals Tribunal order reinstatement or, in the alternative, award compensation in the amount of two years’ net base salary. In addition, Mr. Cardwell requests that the Appeals Tribunal award him USD 5,000 for the Office of Staff Legal Assistance’s (OSLA) failure to articulate his claims in a proper manner, including his RME.

The Secretary-General’s Answer

12. The Secretary-General submits that the UNDT properly concluded that Mr. Cardwell had failed to request management evaluation of the decision not to renew his appointment and on that basis, it correctly dismissed his claim.

13. In particular, the UNDT rightly pointed out that the 4 November 2014 decision not to renew Mr. Cardwell’s appointment post-dated his RME of 16 October 2014. Mr. Cardwell

at the time.”² Consequently, he cannot raise new arguments on appeal that were not made before the UNDT, though available at the time.

17. Further, whereas Mr. Cardwell claims that the Director of BERA announced at the meeting of 13 June 2014 in front of “numerous witnesses” that he had received approval to advertise the P-5 Deputy Director post in question externally and that he had expected to place one of the shortlisted candidates for another post as the Deputy Director, Mr. Cardwell failed to call any of the alleged “numerous witnesses”. Even assuming, *arguendo*, that the Director of BERA had made the alleged announcement, such statement would not have shown by clear and convincing evidence that the decision was motivated by bias or was in any other way unlawful. In fact, the Director of BERA was not on the panel that reviewed the applications for the P-5 Deputy Director post in question, nor did he have a role in recommending a candidate during the desk review. Rather, it was the panel who decided independently not to recommend an internal candidate after two rounds of advertising the post. Therefore, the UNDT correctly held that Mr. Cardwell provided no evidence whatsoever that the selection process had been tainted. It was thus within the UNDT’s discretion to find that Mr. Cardwell had failed to establish his case to the required standard.

18. Finally, the Secretary-General submits that Mr. Cardwell has not justified any of his claims for compensation or other relief. With respect to his request for compensation for moral harm, the Appeals Tribunal has held that an award of moral damages that is not supported by evidence must be rejected. Mr. Cardwell has not produced any evidence of moral harm. As for his request for compensation for his counsel’s “failure to articulate his claims in a proper manner, including his RME”, the Appeals Tribunal has held that, even where a staff member has relied on erroneous advice from OSLA, there were no exceptional circumstances that would have allowed the staff member to circumvent the legal requirements for contesting an administrative decision. As such, Mr. Cardwell should not be awarded compensation for his own failures or those of his counsel.

19. Mr. Cardwell has failed to establish any basis for reinstatement to a P-5 position or for an award of compensation in the alternative. Accordingly, the Secretary-General requests that the Appeals Tribunal affirm the Judgment

Considerations

20. Mr. Cardwell has contested his non-selection in the retention exercise and also the non-renewal of his fixed-term contract. The UNDT found that Mr. Cardwell had failed to request management evaluation of the decision not to renew his fixed-term contract and, as such, his claim in this regard was not receivable. Mr. Cardwell contended that the UNDT took the most restrictive interpretation possible when it held that he was precluded from challenging the 4 November 2014 decision not to renew his fixed-term contract.

21. Therefore, the first issue to be determined is whether the UNDT erred on a question of law in finding that the issue of non-renewal of Mr. Cardwell's fixed-term contract was not receivable *ratione materiae* on the basis that he had failed to request management evaluation of that decision.

22. It is an established principle that a request for a management evaluation is the first step in the appeal process of an administrative decision; this first step is mandatory. Indeed, Staff Rule 11.2(a) provides as follows³

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.

23. Moreover, the Appeals Tribunal has held that "[i]t is the role of the Dispute Tribunal to adequately interpret and comprehend the application submitted by the moving party, whatever name the party attaches to the document, as the judgment must necessarily refer to the scope of the parties' contentions. Thus, the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review".⁴

24. The second issue is whether the UNDT erred in law when it rejected Mr. Cardwell's claim that his candidature for the P-5 post of Deputy Director did not receive full and fair consideration.

25. Mr. Cardwell questioned why none of the internal candidates who applied for the P-5 post were found qualified, and also questioned the credibility of the "mere desk review" of the posts, as opposed to the competitive selection processes, to which he had applied. We note that according to UNDP's People Realignment Policy and Processes, competitive selection process for posts at the P-5 level and above may entail interviews *or* desk reviews. Therefore, it was within the Administration's discretion to determine whether conducting a desk review of the candidates' applications would be suitable under the circumstances.

26. The UNDT found that the Secretary-General had been able to at least minimally demonstrate that Mr. Cardwell had received full and fair consideration in the selection process for the P-5 post and it was therefore left for Mr. Cardwell to show that the process was motivated by bias. As we stated in *Aliko*, "[i]t is not the function of the Dispute Tribunal [...] to take on the substantive role with which the interview panel was charged. Rather, the Dispute Tribunal reviews the challenged selection process to determine whether a candidate[] ha[s] received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration. The burden is on the candidate challenging the selection process to prove through clear and convincing evidence that he or she did not receive full and fair consideration of his or her

THE UNITED NATIONS APPEALS TRIBUNAL

Judgment No. 2018-UNAT-876

Judgment

29. The appeal is dismissed and Judgment No UNDT/2018/030 is hereby affirmed.

Original and Authoritative Version: English

Dated this 26th day of October 2018 in New York, United States.

(Signed)

Judge Thomas-Felix
Presiding

(Signed)

Judge Raikos

(Signed)

Judge Lussick

Entered in the Register on this 20th day of December 2018 in New York, United States.

(Signed)

Weicheng Lin, Registrar