



Case No.: UNDT/GVA/2010/035
(UNAT 1638)

Judgment No.: UNDT/2010/174

Date: 04 October 2010

English

Introduction

1. In September 2008, the Applicant, a former staff member of the United Nations Interim Administration Mission in Kosovo (“UNMIK”), lodged an appeal with the former UN Administrative Tribunal against the following decisions: (i) the refusal to change his grade from P-5 to D-1 level, even though he had fulfilled functions at the D-1 level from March 2002 onwards; (ii) the implicit refusal to hold a competitive selection process for the post of Head, International Judicial Support Division (“IJSD”), which he had occupied from March 2002 to January 2005; and (iii) the decision not to follow up the Investigation Panel’s report on his allegations of discrimination and harassment.

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3. By virtue of the transitional measures set out in General Assembly resolution 63/253, the appeal which was pending before the former UN Administrative Tribunal was transferred to the United Nations Dispute Tribunal on 1 January 2010.

Facts

4. Between 1992 and 2001, the Applicant worked for the United Nations in various field missions with breaks in between. On 18 August 2001, he was reassigned from the United Nations Transitional Administration in East Timor to UNMIK, as Municipal Administrator at P-5 level, on an appointment of limited duration (300 series of the former Staff Rules) for two months and 14 days. His appointment was subsequently renewed continually.

5. On 30 November 2001, the Applicant applied for the D-1 post of Head, IJSD, DOJ, Pillar I for Police and Justice, UNMIK, pursuant to a Vacancy Announcement published by the Department of Peacekeeping Operations (“DPKO”).

6. After being interviewed on 17 March 2002, the Applicant was selected and assumed his responsibilities in the post as Head, IJSD, on 26 March 2002.

7. On 15 July 2002, the Director, DOJ, and the Deputy Special Representative of the Secretary General (“DSRSG”) for Police and Justice (Pillar I, UNMIK), as the first and second reporting officers of the Applicant, requested a change of grade for the Applicant from P-5 to D-1, by means of the Evaluation Review Form for Change of Grade.

8. On 28 September 2002, the UNMIK Local Review Panel, in response

9. On 4 October 2002, the Chief, Administrative Services, submitted to the DPKO Personnel Management and Support Service (“PMSS”) the list of staff members for whom the UNMIK Local Review Panel recommended a change of grade.

10. By memorandum dated 20 January 2003, the UNMIK Chief Civilian Personnel Officer (“CCPO”) notified the Applicant that PMSS, DPKO, had not approved the Local Review Panel’s recommendation to change the Applicant’s grade to the D-1 level, on the grounds that the Applicant had limited experience in legal practice and that he had not been recruited further to a competitive selection process. The CCPO added that PMSS had suggested that a vacancy announcement be issued for the position, for which the Applicant could apply.

11. Further to the above-mentioned memorandum, the Applicant wrote to the UNMIK Director of Administration on 23 June 2003 requesting an upgrade from P-5 level to D-1 level, providing clarifications regarding the issue of his legal experience and explaining that in his view, he had been appointed following a competitive selection process. By fax dated 27 June 2003, the UNMIK Director of Administration forwarded the Applicant’s memorandum to DPKO.

12. By fax dated 16 October 2003, PMSS, DPKO, informed the new UNMIK Director of Administration that after verification, it had been confirmed that the Applicant had not been competitively selected for the

14. By email dated 8 April 2004, the Applicant asked the DSRSG for Police and Justice to confirm whether the latter intended to initiate a competitive selection process for his post.

15. Subsequently, the Applicant continued to lobby various UNMIK senior officers to initiate a competitive selection process for the post he held.

16. By memorandum dated 8 October 2004 addressed to the Applicant via the Director, DOJ, the CCPO regretted the delay in initiating the competitive selection process for the Applicant's post and said that she would advise the Director, DOJ, to advertise the post without delay.

17. By email dated 9 November 2004 addressed to the Civilian Personnel Section, the Applicant expressed concern at the fact that the Director, DOJ, had not reacted to the request by the CCPO to open a competitive selection process.

18. Further to the above-mentioned exchanges, by email dated 11 November 2004, the Officer-in-Charge ("OIC"), Division of Administration, informed the Civilian Personnel Section that he would appreciate it if the Applicant's post were advertised without delay.

19. On 22 November 2004, the Director, DOJ, informed the Applicant that he would not recommend the extension of the latter's contract beyond the expiry date of 31 December 2004, further to a downsizing in the Department.

20. On 24 November 2004, the Applicant wrote the DSRSG to contest the decision not to renew his contract and asked him to open a preliminary investigation in DOJ into the discrimination to which he had been subjected owing to his failure to be promoted and into the harassment campaign

incorporated into a new division. In that connection, the post of Head (D-1), IJSD, and other posts would become superfluous. In addition, given that the only vacant posts at P-5 level were those for international judges and prosecutors, it had not been possible to redeploy the Applicant inside the Department, hence the decision not to renew his contract.

22. By memorandum dated 2 December 2004, the UNMIK Director of Administration informed the DSRSG for Police and Justice that the procedures applicable to downsizing had to be followed, which did not seem to have been the case with the Applicant's post. In addition, given that Pillar I had two vacant D-1 posts and two vacant P-5 posts, it was not necessary to free up the Applicant's post for 1 January 2005. She therefore recommended extending the Applicant's contract until 31 March 2005 in order for the appropriate procedures to be followed.

23. On 10 December 2004, the Chief, UNMIK Administrative Services, informed the Applicant of the composition of the Investigation Panel responsible for investigating his complaint pursuant to administrative instruction ST/AI/371, "Revised disciplinary measures".

24. On 1 February 2005, the Applicant was temporarily reassigned to another post at D-1 level, pending a competitive selection process, as Deputy to the Legal Adviser, Office of the Special Representative to the Secretary-General.

25. On 5 December 2005, the Investigation Panel submitted its report to the OIC, DOA, UNMIK.

26. By fax dated 28 February 2006, entitled "Preliminary investigation requested by Mr. John Ryan on allegations of misconduct against UNMIK Department of Justice staff members", the OIC, Division of Administration, UNMIK, forwarded to the Assistant Secretary-General for Peacekeeping Operations the Investigation Panel's report, on which he commented. He considered in particular that even

did not provide evidence that he had been subjected to harassment and discrimination. Nevertheless, he acknowledged that the Applicant had been a victim of the Administration's inaction as far as advertising his post and granting him an SPA were concerned, and asked for instructions as to the possibility of giving the Applicant an SPA at D-1 level for the period during which he had fulfilled the functions of Head, IJSD.

27. By memorandum dated 5 April 2006, the OiC, Division of Administration, UNMIK, informed the Applicant of his decisions concerning the follow-up to the investigation report, of which he did not forward a copy to the Applicant. In particular, he told the Applicant that in his view, the lack of decision on the part of DOJ management to advertise his post and provide support for a request for SPA were all proof that the Applicant had not been fairly treated. In that connection, he had requested OHRM to provide guidance on appropriate measures that might be taken on hiHow

36. On 23 September 2008, after having been granted an extension by the former UN Administrative Tribunal, the Applicant submitted his appeal.

37. On 21 April 2009, after having been granted two extensions by the Administrative Tribunal, the Respondent submitted his response to the appeal. On 22 April 2009, this response was forwarded to the Applicant, who submitted comments on 23 June 2009.

38. On 30 June 2009, the Applicant left the service of the Organization, following the abolition of his post and the non-renewal of his contract. He would have reached mandatory retirement age on 8 August 2009.

39. The case, which the former UN Administrative Tribunal was unable to hear before it was dissolved on 31 December 2009, was referred to the United Nations Dispute Tribunal on 1 January 2010.

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44. On 22 September 2010, a hearing was held. The Applicant appeared in person, whereas Counsel for the Respondent took part via videoconference.

Parties' contentions

45. The Applicant's contentions are:

a. His appeal is receivable. He cannot be blamed for continuously seeking to resolve a long-standing problem through negotiation and, once the problem persisted, for having delayed in resorting to a formal procedure;

b. Contrary to what JAB held, his request for review relating to his change in grade was not time-barred because the

CCPO, UNMIK, and the fax dated 16 October 2003 from DPKO. The Applicant was entitled to have his requests dealt with fairly;

f. UNMIK failed to fulfil its obligation to protect the Applicant

that it could not approve the recommendation of the UNMIK Local Review Panel for a change of grade. Yet the Applicant did not contest this decision until 16 May 2006, more than three years after his notification, without justifying any exceptional circumstances. On the contrary, he acknowledged that he wished to give priority to consultation and mediation;

b. The Applicant had no right to demand that UNMIK organize a competitive selection process for the post of Head, IJSD, DOJ, UNMIK. No provision in the Staff Rules gives staff members this right. The initiative to institute such a procedure is vested solely in the Secretary-General, who has very broad discretionary powers to do so, as

him an SPA to the D-1 level for the period starting in March 2002, when he took on D-1 functions; second, the refusal of DPKO to change his grade from P-5 to D-1 even though he discharged D-1 level functions from March 2002 onwards; and lastly, the decision not to follow up the Investigation Panel's report on the allegations of discrimination and harassment.

48.

grade, of which the Applicant was notified on 20 October 2003. Thus, pursuant to the above-cited staff rule, the Applicant had exceeded the time limit when he submitted his request for review to the Secretary-General on 16 May 2006, that is, more than three years after the first decision.

51. However, the Applicant holds that, contrary to what the Secretary-General considered, his request for review was not time-barred because he had subsequently asked on several occasions to be promoted to D-1 level, that, to obtain satisfaction, he had opted for negotiation, and that it was only when negotiation had failed that he had instituted a formal

the above-mentioned staff rule 111.2(f). Yet he did not mention any exceptional circumstances, that is, “circumstances beyond the control of the Applicant, which would have prevented him from submitting a request for review ... on time”, as defined by the former UN Administrative Tribunal, this Tribunal and the Appeals Tribunal (see for example judgment No. 1301 (2006) of the former UN Administrative Tribunal; judgments UNDT/2010/083, *Barned*, and UNDT/2010/102, *Abu-Hawaila*, by this Tribunal; and judgment 2010-UNAT-029, *El-Khatib*, by the Appeals Tribunal.

55. Whereas the Applicant holds, contrary to what the Secretary-General considered, that his request for review is not time-barred since, to obtain satisfaction, he opted for dialogue rather than dispute, and it was only when dialogue failed that he instituted a formal procedure, it should be recalled that the search for an agreement does not normally have the effect of suspending the time limits for the filing of an internal appeal or an appeal with the Tribunal, and that this does not in any case constitute exceptional circumstances (see for example judgments No. 1211, *Muigai* (2004), and 1386 (2008) of the former UN Administrative Tribunal; and judgment UNDT/2010/102, *Abu-Hawaila*, by this Tribunal.

56. Finally, whereas the Applicant holds that the decisions of 20 January and 16 October 2003 were not final decisions starting from which the time limits began to run, but rather conditional decisions that depend on UNMIK advertising his post in accordance with the instructions given by DPKO, it is clear from the memorandum of 20 January 2003 and the fax dated 16 October 2003 that the decision by DPKO to refuse the request for a change in grade for the Applicant was a final decision.

57. It follows from the above that the appeal can only be rejected as time-barred insofar as it contests the decision not to change the Applicant's grade from P-5 to D-1 starting in March 2002.

58. For the sake of completeness, the Tribunal may add, first of all, that the decision not to change the Applicant's grade was taken by the DPKO Administration within the exercise of its discretionary power, without it appearing from the facts of the case that the decision in question was arbitrary, motivated by factors inconsistent with proper administration, or based on erroneous, fallacious or improper motivation (see judgment 2010-UNwe.u

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followed up, and on 11 November 2004, the OiC, Division of Administration, informed the Personnel Section that he would appreciate it if the Applicant's post were published without delay. On 22 November 2004, in the course of a meeting, the Director, DOJ, informed the Applicant that he

and attaching documentary evidence ... relevant to the alleged misconduct.

68. It can be seen from the facts as set out above that in December 2005, the Investigation Panel established subsequent to the complaint lodged by the Applicant submitted its report to the OiC, Division of Administration, UNMIK.

69. The conclusions of the report were as follows. First of all, the Investigation Panel found that the following constituted discrimination: (i) an attempt by the DSRSG to exclude the Applicant from the selection of judges and prosecutors, given that the Applicant's terms of reference foresaw participation in such a procedure; and (ii) the attempt by the Director, DOJ, and the DSRSG not to renew the Applicant's contract. Second, it also qualified as harassment the Administration's inaction to upgrade the Applicant to D-1 level and ensure that he obtained an SPA. Lastly, the Investigation Panel noted "questionable management practices and a lack of professionalism in the Department of Justice", while noting that none of the above might rise to the technical level of wrongdoing. On that basis, the Investigation Panel concluded that "consideration [should] be given to further examination" of the Applicant's allegations.

70. It emerges from the fax addressed to the Assistant Secretary-General for Peacekeeping Operations on 28 February 2006 and the letter addressed to the Applicant on 5 April 2006 by the OiC, Division of Administration, that the latter had concluded that DOJ had treated the Applicant unfairly by failing to hold a competitive selection process for his post and by not supporting his request for an SPA, which was why he asked OHRM, UN Secretariat, for instructions as to the possibility of granting the Applicant an SPA at D-1 level. It can further be seen from the above-mentioned fax and letter that the OiC, Division of Administration, had also concluded that the Investigation Panel's report did not contain sufficient proof to support the allegations of harassment and discrimination brought by the Applicant against certain Pillar I staff members, in particular from DOJ.

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71.

75. Moreover, whereas the Applicant requests that disciplinary proceedings be instigated against the persons allegedly responsible for acts of harassment and discrimination against him, it is not for the Tribunal to order the Secretary-General to take the initiative of instituting disciplinary proceedings against a staff member. The Tribunal can therefore only reject such a request.

Decision

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

The application is rejected.

(signed)

Judge Jean-François Cousin

Dated this 4th