



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/035
(UNAT 1638)
Judgment No.: UNDT/2010/174
Date: 04 October 2010
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

RYAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Self-represented

Counsel for respondent:

Marcus Joyce, ALS/OHRM, UN Secretariat

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.

2. The Applicant requests the Tribunal to order:

a. That he be promoted retroactively to D-1 level with effect from 26 March 2002 or, in the alternative, to pay him the difference between his salary at the P-5 level and the D-1 salary he would have received since 27 March 2002 had he been promoted, with deduction of the Special Post Allowance (“SPA”) granted for the period from 27 March 2002 to 31 January 2005, with interest payable at eight per cent per annum as from 90 days from the date of distribution of the judgment until payment is completed;

b. That compensation to the maximum amount be paid to the Applicant for the lost career opportunities as well as the moral damage caused by his harassment by those responsible in the Department of Justice (“DOJ”);

c. That the case be remanded to the Office of Human Resources Management (“OHRM”) for further investigation, as requested by the Investigation Panel, and that disciplinary proceedings be brought against those responsible for the acts of harassment and discrimination against the Applicant.

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 to the above-mentioned request, recommended the Applicant’s change of grade. On 1 October 2002, the UNMIK Chief of Administrative Services endorsed the Panel’s recommendation.

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 post and maintained its decision not to approve an upgrade from the P-5 to the D-1 level. On 20 October 2003, the CCPO, UNMIK, forwarded a copy of this fax to the Applicant.

13. By email dated 20 January 2004, the Applicant asked the Director, DOJ, to implement the DPKO recommendation to initiate a competitive selection process for his post. On 26 January 2004, the Director, DOJ, informed the Applicant that he had discussed the matter with the DSRSG for Police and Justice.

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 against him by some of his colleagues.

21. By memorandum dated 29 November 2004, the DSRSG for Police and Justice confirmed to the UNMIK Director of Administration that DOJ was to undergo downsizing, affecting among others IJSD, which was to be

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 though the report showed that the Applicant did not have good relations with some of his DOJ colleagues, it

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 the issue. On the other hand, regarding the Applicant's other allegations against certain staff in Pillar I and in particular in DOJ, the OiC said that he had not found sufficient evidence of harassment or discrimination in the investigation report.

28. On 14 April 2006, the Applicant responded to the above-mentioned memorandum by expressing his satisfaction at the conclusion of the OiC, Division of Administration, concerning the lack of decision by DOJ to proceed with a competitive selection for his post and to provide support for a request for SPA. He also accepted the conclusion set out therein regarding his allegations of discrimination for, as he pointed out, they concerned solely his failure to be promoted to D-1 level and the non-granting of an SPA. However, he contested the conclusion that there was insufficient evidence to substantiate his allegations of harassment and asked that disciplinary action be taken against those responsible, in accordance with the procedures laid down in administrative instruction ST/AI/371.

29. The Applicant said that he had obtained shortly thereafter, from a third party, a copy of the Investigation Panel's report and the fax dated 28

February 2006 from the OiC, Division of Administration, to the Assistant Secretary-General for Peacekeeping Operations.

30. On 16 May 2006, the Applicant submitted to the Secretary-General a request for review of three decisions, namely, first, the decision not to grant him an SPA to the D-1 level for the period starting in March 2002; second, the decision not to change his grade from P-5 to D-1 even though he had been performing D-1 functions since March 2002; and lastly, “the lack of a decision by DPKO/OHRM to provide guidance to the Officer-in-Charge, Division of Administration, (OiC, DOA) on the appropriate measures to be taken based on the findings and conclusions of the Preliminary Investigation Panel following his request to do so, some two and a half months ago, on 28 February 2006”.

31. By fax dated 20 July 2006, in response to the above-mentioned fax dated 28 February 2006, DPKO informed UNMIK that PMSS had approved the grant of SPA to the D-1 level for the Applicant from 27 March 2002 to 31 January 2005, i.e. the period he had served as Head, IJSD, DOJ.

32. On 19 September 2006, the Applicant submitted an incomplete statement of appeal to the New York Joint Appeals Board (“JAB”), followed by a complete statement of appeal on 18 October 2006.

33. On 19 February 2008, JAB adopted its report, in which it concluded that there was no basis to make a recommendation in favour of the Applicant. On 12 March 2008, JAB forwarded its report to the Secretary-General.

34. On 11 April 2008, JAB forwarded a copy of its report to the Applicant.

35. On 17 June 2008, the Deputy Secretary-General forwarded a copy of the JAB report to the Applicant and informed him of the Secretary-General’s decision to accept the JAB conclusions and to take no further action in the matter.

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.

40. By letter dated 15 June 2010, the Tribunal informed the parties that it did not deem a hearing necessary in the case at hand and asked them to submit their views on the question within one week's time.

41. On 17 June 2010, the Respondent stated that he agreed with the Tribunal that a hearing was not necessary. That same day, the Applicant wrote the Tribunal that he intended to be present at the hearing and to plead his cause in person and requested further details with regard to the planned date, indicating his preference for the month of September 2010.

42. By letter dated 26 August 2010, the Tribunal informed the parties that a hearing would be held on 22 September 2010.

43. On 10 September 2010, the Applicant submitted three supplementary annexes to his appeal, then four others on 17 September 2010 and finally two additional annexes on 20 September 2010. That same day, he also submitted a second version of the "oral submission" he had prepared for the hearing.

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 impugned decisions of 20 January and 16 October 2003 were not final decisions but rather conditional decisions that depend on UNMIK advertising his post, in accordance with the instructions given by DPKO;

c. UNMIK and DPKO failed to honour their contractual obligation to promote the Applicant to D-1 level pursuant to the verbal agreement made between the Applicant and the Director, DOJ, Pillar I;

d. A Civil Affairs Officer from Pillar II, UNMIK, who had been recommended for a change of grade to the P-4 level by the same memorandum of 4 October 2002 as the Applicant, was promoted without a competitive selection process, solely on the recommendation of his supervisor, which demonstrates the discriminatory treatment of the Applicant by those responsible in DOJ, Pillar I;

e. UNMIK subsequently failed in its obligation to implement the "requests, recommendations and instructions" of DPKO, the Chief of Staff, the Director of Administration and the CCPO to hold a competitive selection process for the post of Head, IJSD. Those requests were contained in particular in the memorandum of 20 January 2003 from 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 against the acts of harassment and discrimination to which he was subjected, as can be seen from the Investigation Panel's report. This document states among other things that the indecisiveness of DOJ senior management to take the necessary steps for the Applicant's promotion to D-1 level, as well as the denial of a SPA and the attempted non-renewal of his contract, constituted acts of harassment;

g. There was *de facto* in Pillar I, and especially in DOJ, a plot fomented by some of the Applicant's colleagues to undermine his position. The Investigation Panel concluded that his complaint for discrimination and harassment was well founded and that the Organization should give it further examination;

h. Although it is true that the Administration has discretionary power to follow up the conclusions of the investigation report pursuant to administrative instruction ST/AI/371, this must not, as in the case at hand, be arbitrary. It is clear from the Investigation Panel's report that senior management from Pillar I, in particular from DOJ, were guilty of misconduct as defined by the above-mentioned administrative instruction. The decision of the OiC, Division of Administration, not to refer the matter to the Assistant Secretary-General, OHRM, as per paragraph 3 of the said administrative instruction, was not adequately reasoned or justified given the glaring contradictions between his conclusions and those of the Investigation Panel.

46. The Respondent's contentions are:

a. The Applicant's request for review of the decision not to grant him a promotion to the D-1 level is not receivable because it is time-barred pursuant to staff rule 111.2(a) in force at the time. By a memorandum dated 20 January 2003, the Applicant was notified that DPKO had decided

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 the former UN Administrative Tribunal recognized;

c. The conclusions of the Investigation Panel did not establish that the Applicant had been subjected to discrimination or harassment. The Investigation Panel's report was forwarded to the Assistant Secretary-General for Peacekeeping Operations. The UNMIK Administration did not find in the report any evidence of discrimination or harassment, thus there were no grounds for pursuing the inquiry or instituting disciplinary proceedings. As the former UN Administrative Tribunal recognized, it is the privilege of the Organization itself to initiate disciplinary proceedings and to decide whether or not misconduct has occurred, and it is not legally possible for anyone to compel the Administration to take disciplinary action against another party;

d. The Applicant was adequately compensated for the irregularities committed by means of the retroactive granting of SPA for the period during which he discharged the functions of Head, IJSD.

Judgment

47. On 16 May 2006, the Applicant submitted to the Secretary-General a request for review of three decisions, namely, first, the decision not to grant

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. Before the Tribunal, the Applicant contests the above-mentioned second and third decisions. He further contests the implicit refusal of UNMIK to open a competitive selection process for the post of Head, IJSD, which he occupied from March 2002 to January 2005. However, he no longer contests the decision relating to the SPA, as this was granted to him shortly after his request for review. The Tribunal therefore need not rule on this decision.

Change of grade from P-5 to D-1

49. Staff rule 111.2 in force at the time of the facts stipulates as follows:

(a) A staff member wishing to appeal an administrative decision ... shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing.

...

(f) An appeal shall not be receivable unless the time limits specified in paragraph (a) above have been met or have been waived, in exceptional circumstances, by the panel constituted for the appeal.

50. It emerges from the facts as related above that, first, the Applicant was informed by a memorandum dated 20 January 2003 from the CCPO, UNMIK, that DPKO had not approved the recommendation made by the UNMIK Local Review Panel to change the Applicant's grade from P-5 to D-1, on the grounds that the Applicant had limited experience in legal practice and had not been recruited further to a competitive selection process. Moreover, on 16 October 2003, in response to a request by the Applicant, DPKO confirmed its previous decision to refuse the change of

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 procedure.

52. Accordingly, the Tribunal must rule on the question of whether the Applicant's further requests subsequent to the decision of 20 January 2003 were able to create explicit or implicit decisions of refusal that would not be merely confirmative of the previous decisions and that could be the subject of requests for review.

53. When a staff member has submitted requests to the Administration on several occasions, only the first decision of refusal is appealable, and this appeal must be lodged within the time limits which run from the moment of the first decision of refusal. Subsequent decisions of refusal by the Administration are merely confirmative decisions that cannot be appealed. It is only when the staff member's new request is accompanied by new circumstances that the Administration must review it and the ensuing decision cannot be considered as a confirmative decision (see for example judgment No. 1301 (2006) of the former UN Administrative Tribunal, as well as judgment UNDT/2010/155, *Borg-Oliver*, by this Tribunal). In the case at hand, the Applicant does not mention any new circumstances subsequent to the decision of 16 October 2003 that could have obliged the Administration to take a new decision.

54. Moreover, at the hearing and in the written version of his oral submission, the Applicant held that there were grounds in his case to apply

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-UNAT-021, *Asaad*, by the Appeals Tribunal). Second, although the Applicant holds that UNMIK and DPKO had a contractual obligation to promote him to D-1 level further to a verbal agreement reached on 17 March 2002 between the Applicant and the Director, DOJ, the Tribunal notes that the Applicant failed to provide proof of such a verbal agreement. On the contrary, in an email dated 19 March 2002 which the Applicant submitted to the Tribunal on 10 September 2010, as well as on two occasions in his request for review to the Secretary-General, the Applicant explains that during his meeting with the Director, DOJ, the latter said that he "would recommend" his promotion. The Applicant cannot seriously argue that a contractual obligation to promote him flows from the commitment undertaken—and moreover respected—by the Director, DOJ, to recommend him.

Advertisement of the post of Head, IJSD

59. Before the Tribunal, the Applicant also contests the implicit refusal of UNMIK to advertise the post of Head (D-1), IJSD, which he occupied from March 2002 to January 2005. Whereas the Respondent holds that the Applicant had no right to demand that UNMIK organize a competitive selection process for his post, the Tribunal notes on the contrary that in accordance with paragraph 7 of the "Standard operating procedures (SOP) for the recruitment of international staff for Pillar I and Pillar II", UNMIK had an obligation to advertise the post of Head, IJSD, within three months following the Applicant's redeployment to that post. The Applicant was therefore entitled to ask the Respondent to apply the above-mentioned rule in his case.

60. However, in his request for review addressed to the Secretary-General, the Applicant did not explicitly identify the implicit refusal of UNMIK as an impugned decision.

61. At the hearing, Counsel for the Respondent raised the question of the inadmissibility of the appeal insofar as it contests the refusal to advertise the Applicant's post, on the grounds that the Tribunal only has jurisdiction to examine appeals against decisions that been the subject of a prior request for review. When questioned by the Tribunal as to whether in his letter to the Secretary-general he had also intended to contest that decision, the Applicant replied in the affirmative, without however substantiating that affirmation.

62. The Tribunal considers that, in his letter requesting review, the Applicant must be regarded as having contested the Respondent's implicit refusal to advertise his post.

63. The Tribunal must therefore decide when the Respondent took such an implicit decision, by examining the exchanges between the Applicant and the Administration which led to the dispute being brought before the Tribunal.

64. The Applicant's first request for his post to be advertised was an email dated 20 January 2004 which he addressed to the Director, DOJ, that is, his direct supervisor and thus the person in charge of the post to be filled. The Director answered him on 26 January 2004 that he had raised the matter with the DSRSB for Police and Justice, to whom it fell to take the decision. On 7 April 2004, at a meeting with the DSRSB, the Applicant asked that his post be advertised. According to the Applicant—and this version was not contradicted by the Respondent—the DSRSB replied that he was prepared to authorize a competitive selection process for the Applicant's post, after consultation with the future Director, DOJ, who was scheduled to take up his functions four to six weeks later. On 8 October 2004, the CCPO asked the said Director to advertise the Applicant's post. This request was not

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 had decided not to renew the latter's contract beyond its expiry date of 31 December 2004 due to downsizing in DOJ, and on 1 February 2005 the Applicant was reassigned to another post in another Department.

65. The Tribunal considers that at least on the date of 22 November 2004, the Applicant was surely aware of the implicit refusal to advertise his post. What is more, no doubt could remain after his reassignment on 1 February 2005 to another post in another Department. Consequently, by only submitting his request for review to the Secretary-General more than one year later, in May 2006, the Applicant exceeded the time limit and his appeal, insofar as it is directed against the refusal to hold a competitive selection process for his post, can only be rejected as being time-barred.

Investigation Panel's report

66. The Applicant further holds that UNMIK did not take appropriate follow-up steps in response to the report by the Investigation Panel that was designated further to his complaint for harassment and discrimination dated 24 November 2004.

67. Administrative instruction ST/AI/317 of 2 August 1991, which applied at the date on which the Applicant submitted his complaint, stipulates as follows:

2. Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake a preliminary investigation...

3. If the preliminary investigation appears to indicate that the report of misconduct is well founded, the head of office or responsible officer should immediately report the matter to the Assistant Secretary-General, Office of Human Resources Management, giving a full account of the facts that are known

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.

71. Pursuant to the provisions of paragraph 3 of administrative instruction ST/AI/371, it is for the head or responsible officer to draw the conclusions from the investigation report. Although he is bound by the facts as set out in the report, he is not bound by their qualification, and it falls to him to determine whether the investigation has produced enough elements indicating that misconduct has occurred. In the case at hand, given that the OiC, Division of Administration, considered that the allegations of harassment and discrimination had not been sufficiently established, he was not obliged to report the matter to the Assistant Secretary-General, OHRM.

72. Notwithstanding, the discretionary power conferred upon the head of office or responsible officer by the above-mentioned administrative instruction is not unfettered, and it is for the Tribunal to verify that he has not drawn clearly erroneous conclusions from the investigation report.

73. After having examined the investigation report and the corresponding analysis by the OiC, Division of Administration, the Tribunal considers that the conclusions of the Investigation Panel, as set out in its report, are not supported by sufficient evidence considering how the facts were qualified. The Tribunal considers, first, that no misconduct of a disciplinary nature may be imputed to the individuals identified by the Investigation Panel as having committed acts of discrimination, as the said acts amounted to poor management at most. The Tribunal further notes that, with regard to the facts or circumstances described by the Investigation Panel as having constituted harassment, these are not punishable by disciplinary sanctions because they are failings of the “Administration” and not acts by specific identified individuals.

74. The Tribunal therefore concludes that the OiC, Division of Administration, did not draw clearly erroneous conclusions from the investigation report and that the procedure foreseen by administrative instruction ST/AI/371 was properly followed.

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 day of October 2010

Entered in the Register on this 4th day of October 2010

(signed)

Víctor Rodríguez, Registrar, UNDT, Geneva