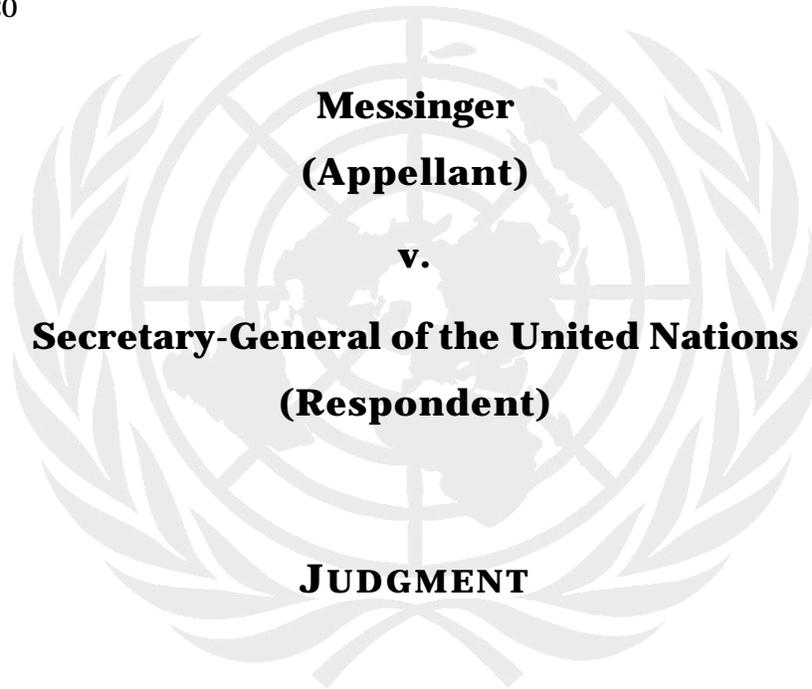




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-120



**Messinger
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before: Judge Sophia Adinyira, Presiding
Judge Kamaljit Singh Garewal
Judge Luis María Simón

Judgment No.: 2011-UNAT-123

Date: 11 March 2011

Registrar: Weicheng Lin

Counsel for Appellant: George G. Irving

Counsel for Respondent: Melanie Shannon

JUDGE SOPHIA ADINYIRA, Presiding.

Synopsis

1. Rudolf Messinger (Messinger) is a Senior Human Resources Manager with the United Nations Children's Fund (UNICEF) in Pakistan. In this case, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) rejected Messinger's application in which he contested decisions relating the abolition of his post in the Division of Human Resources (DHR) of UNICEF in New York and his non-selection for another post in the Division. The UNDT also found that Messinger's formal complaint of harassment against the Director and Deputy Director of the Division was not properly investigated and awarded him compensation.

2. In his appeal, Messinger contends that the UNDT failed to exercise its jurisdiction to investigate and make findings concerning his allegations of harassment. This Tribunal holds that the UNDT correctly found that it did not have jurisdiction to conduct a *de novo* investigation of Messinger's formal complaint of harassment.

3. This Tribunal holds that the UNDT did not make any errors of procedure in deciding upon the weight to be given to written statements tendered by Messinger. We are not persuaded that the UNDT made any errors of fact, resulting in a manifestly unreasonable decision, in concluding that the abolition of Messinger's post was not motivated by ill-will or a calculated scheme to remove him from the DHR. With respect to the UNDT's decision concerning Messinger's challenge to his non-selection for another post in the DHR, we hold that the UNDT did not make an error in its interpretation of former Staff Rule 109.1(c), which required that preference be given to Messinger as a staff member occupying a post due to be abolished, or in finding that the Rule was followed in the selection process for the post. Messinger has failed to establish any errors warranting a reversal of the Judgment and his appeal is dismissed.

Facts and Procedure

4. Messinger joined UNICEF in 1999 at the P-4 level on a permanent appointment. In 2001, Messinger was promoted to the P-5 level as Chief, Recruitment and Career Development, DHR, in New York.

5. In February 2006, Messinger was appointed Chief, Talent Management Section (TMS), in the DHR. In June 2007, Messinger was informed verbally of the abolishment of his post as part of a restructuring exercise. On 15 July 2007, Messinger submitted a formal complaint of abuse of authority and harassment against the Director and Deputy Director of DHR. Messinger alleged that he was subject to harassment from November 2004, resulting in the abolition of his post.

6. On 27 August 2007, Messinger was advised in writing of the abolishment of his post on 31 December 2007, and his separation on 29 February 2008. In September 2007, Messinger was interviewed for the post of Chief, Organizational Learning and Development Section (OLDS), DHR in New York. Messinger was not selected for the post. On 15 February 2008, Messinger was appointed to the post of Senior Human Resources Manager with UNICEF in Pakistan at the P-5 level.

7. Messinger contested three administrative decisions before the Joint Appeals Board (JAB) relating to (1) the mishandling of the investigation of his complaint of harassment against UNICEF's Human Resources Director and Deputy Director; (2) the abolition of his post of Chief, TMS, DHR; and (3) his non-selection for the post of Chief, OLDS, DHR.

8. Messinger's two cases before the JAB were transferred to the UNDT, which were heard together.

9. The UNDT rendered Judgment No. UNDT/2010/116 on 25 June 2010. In relation to the decision to abolish Messinger's post, the UNDT found that there was no evidence that the restructuring of the DHR was manifestly unreasonable, was a result of ill-will, or a calculated scheme to remove Messinger. With regard to the non-selection of Messinger as Chief of OLDS, the UNDT found that the recommendation by the panel of the successful candidate was proper and the selection process did not prejudice Messinger's chances of being selected. In particular, there was no error concerning the application of former Staff Rule 109.1(c), which provided that preference be given to staff members whose posts were to be abolished. Further, there were no irregularities concerning Messinger's selection for the post of Senior Human Resources Manager in Pakistan. The UNDT dismissed Messinger's applications in respect of the abolition of his post and his non-selection for the post of Chief, OLDS, DHR.

10. The UNDT found that the investigation of Messinger's formal complaint of harassment, under Administrative Instruction CF/AI/2005-017, was compromised by the lack of independence of the investigators. Further, the UNDT held that it did not have jurisdiction to decide the complaint as its duty was to make a judicial determination, not conduct an investigation and produce a fact-finding report. The UNDT directed that the investigation report of 15 October 2007 be quashed, and that a fresh investigation be initiated and undertaken with all due diligence if Messinger indicated in writing within 14 days of the date of the Judgment that he required such an investigation. The UNDT awarded compensation of USD 5,000 for the breach of the Secretary-General's contractual obligations to Messinger under CF/AI/2005-017.

11. Messinger did not request a fresh investigation of his complaint. After being granted an extension of time to file an appeal with the Appeals Tribunal, Messinger filed his appeal on 19 August 2010. The Secretary-General filed his answer to the appeal on 22 October 2010 in accordance with Order No. 8 (2010) of the Appeals Tribunal.

Submissions

Messinger's Appeal

12. Messinger submits that the UNDT made an error in law as it failed to exercise its jurisdiction to investigate and make findings concerning his allegations of harassment. Messinger claims that his underlying complaint of harassment and discrimination was never properly investigated. Messinger argues that, in its analysis of the claims concerning the abolition of his post and his non-selection for the post of Chief of OLDS, the UNDT reached a decision in isolation from his central contention of a continuing pattern of harassment and abuse of authority, which influenced decisions affecting his career.

13. Messinger contends that the UNDT made an error of procedure in excluding 18 written statements from his witnesses who were not called to give oral evidence at the hearing, or deciding not to place any weight on those statements. He asserts that the treatment of this evidence by the UNDT was not in accordance with the case management orders concerning the hearing.

14. Messinger argues that the UNDT made an error of law in interpreting former Staff Rule 109.1(c), which required that preference be given to staff members who occupied posts due to be abolished. Further, the UNDT made an error of fact in finding that the Rule was followed during the selection for the post of Chief of OLDS. Finally, Messinger claims that the UNDT made errors of fact, resulting in a manifestly unreasonable decision, in evaluating the evidence regarding the incidents of harassment and the abolishment of Messinger's post.

15. Messinger requests that this Tribunal vacate the Judgment and award compensation to him.

Secretary-General's Answer

16. The Secretary-General submits that the jurisdiction of the UNDT is limited to reviewing administrative decisions. The UNDT correctly held that, under the Statute of the Dispute Tribunal (UNDT Statute), it does not have the authority to conduct investigations into general allegations of harassment.

17. The Secretary-General argues that in reviewing the contested decisions, the UNDT considered specific events which Messinger asserted formed a pattern of harassment and correctly came to the conclusion that there was no harassment.

18. With regard to Messinger's non-selection for the post of Chief of OLDS, the Secretary-General submits that former Staff Rule 109.1(c) and UNICEF's Human Resources Manual required preferential treatment for a candidate occupying a post due to be abolished only if his or her qualifications in substance matched those of the other best qualified candidates. The UNDT correctly found that the Rule was followed during the selection process. Messinger was not found to be equally suitable as another candidate for the post and was not entitled to be given any preference.

19. Finally, the Secretary-General submits that the UNDT did not make an error regarding the admissibility or weight to be given to the 18 witness statements tendered by Messinger.

20. The Secretary-General requests that this Tribunal dismiss the appeal.

Considerations

Preliminary issue

21. Messinger requests an oral hearing to clarify the legal and factual issues in dispute. We deny the request as there is sufficient material in the submissions and annexes filed by the parties to determine this appeal.

Main issues raised by the appeal

Errors in law and failure to exercise jurisdiction

22. Article 2(1) of the Statute of the Appeals Tribunal provides as follows:

The Appeals Tribunal shall be competent to hear and pass judgment on an appeal filed against a judgment rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

23. The first ground of appeal raised by Messinger is that the UNDT erred in law in deciding that it did not have jurisdiction to conduct an investigation of his harassment complaint. The UNDT found that the formal investigation of Messinger's harassment complaint, conducted under Administrative Instruction CF/AI/2005-017, was compromised due to the lack of independence of both investigators. Further, the UNDT held that it did not have jurisdiction to decide on the complaint: its duty was to make a judicial determination, not to conduct an investigation and produce a fact-finding report.

24. The competence of the UNDT is set out in Article 2 of the UNDT Statute, and the relevant provisions of Article 2 are as follows:

- 1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in noncompliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

(b) To appeal an administrative decision imposing a disciplinary measure;

(c) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.

25. It is clear that the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute. However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the UNDT to examine allegations of harassment. This is different from a *de novo* investigation into a complaint of harassment.

26. There are established procedures under the Staff Rules and administrative issuances of each organization for that purpose. The procedure for conducting investigations of allegations of harassment and abuse of authority by staff members of UNICEF is set out in Administrative Instruction CF/AI/2005-017. In this case, Messinger followed the procedure and filed a formal complaint of harassment and abuse of authority against the Director and Deputy Director but his claim was dismissed. Messenger claimed that the investigation was biased.

27. In our view, it was not the task of the UNDT to conduct a fresh investigation into the harassment complaint; rather its task in this case was to determine if there was a proper investigation into the allegations. The UNDT undertook this exercise and held, inter alia, that the circumstances of the investigators raised questions about the appearance of the impartiality of the investigation. The UNDT concluded that Messinger did not receive the “investigation that he [was] entitled to have” and found the Secretary-General to be in breach of his contractual obligations towards Messinger as embodied in CF/AI/2005-017.

28. The UNDT therefore directed that the investigation report of 15 October 2007 be quashed and that a fresh investigation be initiated with due diligence if Messinger requested one in writing within 14 days of the Judgment. The UNDT further awarded Messinger compensation in the amount of USD 5,000 for the breach by the Secretary-General of his contractual obligations.

29. The foregoing clearly demonstrates that the UNDT did not fail to exercise its jurisdiction with respect to Messinger's claim that his harassment complaint against his supervisors was mishandled. Messinger chose not to request a fresh investigation into his complaint following the Judgment. This Tribunal considers that the UNDT awarded adequate compensation to Messinger for the infringement of his rights.

30. Accordingly, we hold that the UNDT did not err in deciding that it had no jurisdiction to conduct a *de novo* investigation of the harassment complaint.

Error of procedure

31. Messinger also appeals against the Judgment on the ground that the UNDT committed an error in procedure such as to affect the decision in the case. Prior to the hearing, the UNDT ordered Messinger to file and serve the statements of evidence upon which he intended to rely. The Secretary-General was ordered to indicate which witnesses, if any, were required for cross-examination. Messinger filed and served not less than 18 witness statements, some of which were prepared in connection with the investigation in 2007 of his harassment complaint. The Secretary-General indicated that he did not require any of the witnesses for cross-examination. At the hearing, Messinger sought to rely on the written statements. He only called one of the witnesses to give evidence at the hearing. The UNDT Judge admitted the statements into evidence but concluded that he could not attach great weight to them since he was unable to assess their credibility in person, the Secretary-General was not able to cross-examine the witnesses and not much reliance could be placed on such statements in respect of significant matters in real dispute between the parties (paragraphs 12 and 40 of the Judgment).

32. Messinger argues that the UNDT erred in deciding upon the weight to be attached to the witness statements in light of its Order concerning witness statements.

33. There is a distinction between the admissibility of evidence and the weight to be attached to such evidence. The Dispute Tribunal has a broad discretion to determine the admissibility of any evidence under Article 18(1) of its Rules of Procedure and the weight to be attached to such evidence. This Tribunal is also mindful that the Judge hearing the case has an appreciation of all of the issues for determination and the evidence before the UNDT. The fact that the Secretary-General indicated that he would not require Messinger's

witnesses to be cross-examined on their statements did not mean that all of the evidence contained in the witness statements would be taken to be relevant to the matters in dispute or accorded full weight when assessed in light of the other evidence. At the hearing, Messinger chose to call only one of the witnesses who provided written statements. The weight to be attached to admitted evidence is within the discretion of the UNDT Judge and Messinger has failed to convince us of any error in the procedure adopted with respect to the admission of the witness statements or in deciding upon the weight to be attached to the witness statements.

Errors of fact

34. Messinger submits that the UNDT made a number of errors and omissions in fact and drew erroneous conclusions from the facts, resulting in a manifestly unreasonable decision.

35. In order to determine Messinger's challenge to the administrative decisions concerning the abolition of his post and his non-selection for the post of Chief of OLDS, the UNDT addressed a number of specific events, which formed part of Messinger's claim of a pattern of harassment against him. These events included the criticisms by the Director and Deputy Director of Human Resources of a professional development programme administered and managed by Messinger; a change in reporting lines of one of Messinger's supervisees; comments made by the Director and Deputy Director regarding Messinger; and miscellaneous statements by Messinger's colleagues.

36. What is the standard of review on appeal for determining if the UNDT has made an error of fact? It is not sufficient for an appellant to state that he or she disagrees with the findings of fact or to repeat the arguments submitted before the UNDT. An appellant must identify the apparent error of fact in the Judgment and the basis for contending that an error was made.¹ The appellant must satisfy this Tribunal that the finding of fact was not supported by the evidence or that it was unreasonable. This Tribunal considers that some degree of deference must be given to the factual findings by the UNDT as the court of first instance, particularly where oral evidence is heard. The UNDT has the advantage of

¹ *Ilic v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-051.

assessing the demeanour of each witness while he or she is giving evidence and this is critical for assessing the credibility of the witness and the persuasiveness of his or her evidence.²

Abolition of Post

37. Messinger contends that the restructuring in the DHR, which resulted in the abolition of the TMS and his post, was motivated by ill-will or malice. He complained that the UNDT accepted the documented assertion of the Secretary-General that the restructuring was managerially desirable without undertaking a more detailed examination of the facts and circumstances leading up to the abolition of his post.

38. We find the criticism by Messinger unfounded as the UNDT, in addition to considering documents concerning the restructuring, also heard evidence from the Director and Deputy Director, who testified that the restructuring was necessary. The UNDT noted that counsel for Messinger failed to refute the evidence of the Director in this regard and chose to rely on the fact that Messinger's post was the only encumbered post abolished to prove that the proposal was aimed at removing Messinger rather than to fulfil genuine organizational requirements.

39. Messinger also argues that the UNDT made other errors of fact concerning the restructuring, the authority of the Director of DHR to deploy staff, and attributing to Messinger evidence regarding the timing of the abolition of his post. The Secretary-General argues that the UNDT did not make any error regarding the authority of the Director, and that the other alleged errors did not result in a manifestly unreasonable decision. The UNDT considered all of the evidence, which included *viva voce* evidence, in some detail and carefully weighed the evidence in light of the specific case argued by Messinger in challenging the decision to abolish his post. In his appeal, Messinger does not identify any evidence which contradicts the findings of the UNDT regarding the abolition of his post. Further, we are not persuaded that the errors made were of such significance to conclude that UNDT's findings were unreasonable in light of the totality of the evidence.

40. We find no reason to overturn the UNDT's findings concerning the decision to abolish Messinger's post.

² *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110.

Non-selection for the post of Chief of OLDS

41. Messinger complained that the UNDT erred in finding that former Staff Rule 109.1(c) was properly applied during the selection for the post of Chief, OLDS.

42. The relevant provisions of former Staff Rule 109.1(c) are as follows:

(i) Except as otherwise expressly provided in subparagraph (ii) b below, if the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, and staff members with probationary appointments shall be retained in preference to those on fixed-term or indefinite appointments, provided that due regard shall be had in all cases to relative competence, to integrity and to length of service. Due regard shall also be had to nationality in the case of staff members with no more than five years of service and in the case of staff members who have changed their nationality within the preceding five years when the suitable posts available are subject to the principle of geographical distribution.

43. Messinger asserts that there was no evidence that the Rule was applied during the selection process for the post of Chief of OLDS. He also contends that the UNDT erred in its interpretation of the Rule. Messinger refers to the jurisprudence of the former Administrative Tribunal, which interpreted the Rule as requiring that a good faith effort be made by the Organization to find alternate posts for permanent staff members whose posts were to be abolished.

44. The UNDT in its Judgment stated:

26. ... Of course, that rule [Staff Rule 109.1 (c)] cannot be relevant to an evaluation of the comparative attributes of candidates: it cannot make the staff member who is entitled to invoke it a better candidate. Nor did it require the applicant to be recommended for appointment in preference to a better qualified candidate. *He was entitled to preferential appointment over a staff member with a fixed-term or indefinite appointment only if his qualifications in substance matched those of the other staff member. I note that the reference to the abolition of his post indicated that the panel was aware of the potential application of this rule – it necessarily implied in the circumstances a reference to his permanent status which, of course, they must have known.*³

³ Emphasis added.

45. The UNDT went on:

27. The evidence does not permit the conclusion that the panel was mistaken in its evaluation of the comparative claims of the applicant and the preferred candidate. ... Nor is there any reason to suppose that the members of the panel were influenced by any extraneous or irrelevant factors, including any adverse opinion of the applicant (if there was one) by the Director or the Deputy Director.

46. In our view, the UNDT correctly concluded that there was sufficient evidence to find that the panel was aware of the application of former Staff Rule 109.1(c) to Messinger's candidature and the Rule was followed during the selection process. Messinger argues that the UNDT's interpretation of the Rule effectively renders the Rule inoperable as the determination that another candidate is more suitable than the staff member occupying the abolished post would suffice to cancel the operation of the Rule. However, it is clear from the Rule that it does not confer on a staff member occupying an abolished post an absolute right to be given preference in applying for another post. We consider that the UNDT did not make any errors in interpreting former Staff Rule 109.1(c). Further, this Tribunal holds that the UNDT did not make any errors in finding that the recommendation of a candidate other than Messinger for the post of Chief of OLDS was proper, and that the selection process was not otherwise flawed.

47. From the foregoing, the appeal fails.

Judgment

48. There is no merit in the appeal and it is dismissed. The Judgment of the UNDT is affirmed.

Original and Authoritative Version: English

Dated this 11th day of March 2011 in New York, United States.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Garewal

(Signed)

Judge Simón

Entered in the Register on this 19th day of April 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar