

Translated from French



United Nations Dispute Tribunal

Case No.: UNDT/GVA/2009/37
Judgment No.: UNDT/2009/072
Date: 11 November 2009
English
Original: French

Before: Judge Jean-François Cousin
Registry: Geneva
Registrar: Victor Rodríguez

ISHAK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Self-represented

Counsel for respondent:
Shelly Pitterman, DHRM/UNHCR

Application

1. In his appeal to the Geneva Joint Appeals Board, registered on 24 June 2009, the applicant requested it to recommend:

- Rescission of the decisions communicated to him on 2 February 2009 by which the Inspector General of the Office of the United Nations High Commissioner for Refugees (UNHCR) decided, first, to entrust to an external investigator a review of the facts reported to him by the applicant, and, second, to endorse the results of the review by the investigator, who considered that there were no grounds for pursuing the applicant's claim;
- The undertaking without delay of an investigation, the award to the applicant of three years' salary in compensation for the violation of his rights, and the deduction of part of that amount from the salary of the Inspector General pursuant to rule 112.3 of the Staff Rules.

Background facts

2. The applicant joined UNHCR in September 1984. At the time of his appeal, the applicant was a Senior Inspection Officer, at the P-4 level, in the Office of the Inspector General (IGO) in UNHCR.

3. On 3 November 2008 the applicant filed with the IGO a report concerning the alleged misconduct of a supervisor, the Head of Service, Inspections and Investigations, IGO.

4. On 2 February 2009 the Inspector General took the contested decisions in question; on 26 March 2009 the applicant requested an administrative review of those decisions; on 20 April 2009 the applicant received a reply.

5. On 28 May 2009 the Secretary of the Joint Appeals Board informed the applicant that the Chairperson of the Board had decided not to follow up his request for conciliation.

6. In its resolution 63/253 the General Assembly decided that all cases pending before the Joint Appeals Board as at 1 July 2009 would be transferred to the United Nations Dispute Tribunal.

Applicant's submissions

7. The consideration of his complaint was not in accordance with the existing rules, in particular the terms of the Memorandum of Understanding of 21 September 2006 between the High Commissioner and the United Nations Office of Internal Oversight Services (OIOS), pursuant to which the investigation has to be undertaken by OIOS in cases of alleged misconduct involving senior staff of the IGO. Yet in this instance the Inspector General entrusted the investigation to an external person, not to OIOS. The applicant informed the Inspector General that the supervisor claimed that he had been appointed on 1 April 2008 to the post of Deputy Inspector General, when in fact the post had been abolished.

8. Since in a similar, earlier case the Inspector General's decision had been different, the decision in this case must have been motivated by the desire not to reveal embarrassing facts. By endorsing the findings of the investigator, the Inspector General became enmeshed in a conflict-of-interest situation, and his

decision not to pursue the claims was tainted by arbitrariness, abuse of authority and conflict of interest.

9. The review was conducted irregularly: the applicant was not interviewed, and disclosure of the report on the review to the person complained about exposed him to possible reprisals. Contrary to what is maintained, therefore, his rights were violated by the contested decisions.

10. The request for a review was considered irregularly: the Chairperson of the Joint Appeals Board failed to follow the prescribed procedure in the Board, and the applicant received no explanation as to why his request for conciliation was dismissed.

Respondent's observations

11. At the request of the Inspector General, an independent review was conducted by an external investigator into the applicant's allegations of professional misconduct on the part of the Chief of Service, Inspections and Investigations, IGO. The investigator's report found that there were no grounds for following up the complaint, and on 2 February 2009 the Inspector General communicated the findings of that report to the applicant.

12. In this case, the decision of the Inspector General not to follow up the allegations of professional misconduct does not violate the applicant's rights under his contract or the Staff Regulations.

13. Rule 10.1 (c) of the Staff Rules provides that the discretionary authority to impose a disciplinary measure lies with the Secretary-General or an official to whom he delegates that authority. With respect to UNHCR, the Secretary-General has delegated discretionary authority in this regard to the High Commissioner. UNHCR administrative issuance IOM/FOM No. 54/2005 concerning the role, functions and modus operandi of the Inspector General's Office provides that, where there is reason to believe that this is necessary, the Inspector General shall undertake a preliminary investigation and has the discretionary authority to refer the case to OIOS.

14. The applicant cannot rely on the agreement in the memorandum signed by the High Commissioner and OIOS. In any event, the agreement is not at variance with the aforementioned issuances. The comparisons which the applicant makes between the various procedures followed in similar cases are not relevant, since the Inspector General decided in one case to refer the matter to OIOS and considered in the other that the allegations did not merit further investigation.

Judgment

15. The applicant requests rescission of the decisions by which the UNHCR Inspector General decided not to follow up the applicant's report concerning the existence of professional misconduct. In asking the judge to reject the appeal, the respondent maintains that the decisions in question cannot be contested. Since the appeal was submitted to the Joint Appeals Board in Geneva, and since pursuant to General Assembly resolution 63/253 all cases pending before the Joint Appeals Board as at 1 July 2009 have been transferred to the United Nations Dispute Tribunal, the judge is required to determine first of all whether the appeal was receivable under the rules applicable to the Joint Appeals Board.

16. According to regulation 11.1 of the Staff Regulations: “The Secretary-General shall establish administrative machinery with staff participation to advise him or her in case of any appeal by staff members against an administrative decision alleging the non-observance of their terms of appointment, including all pertinent regulations and rules.” It follows therefrom that the applicant cannot contest an administrative decision unless it violates his rights.

17. It seems from the applicant’s very imprecise narration of the facts that he, a member of staff in the UNHCR Office of the Inspector General, sent to the Inspector General a report on the conduct of the Chief of Service, Inspections and Investigations, IGO, stating that the latter had wrongly claimed to be the Deputy Inspector General, a title that no longer existed in UNHCR, when his post was in fact that of Chief of Service, Inspections and Investigations, IGO. The applicant submitted the report on the basis of provision 5.4.2 of UNHCR administrative issuance IOM/FOM No. 54/2005, to the effect that all staff have a duty to report instances of misconduct and any related information that may come to their notice.

18. It is clear that the applicant has a right and a duty to report to his management any misconduct that comes to his notice. However, when, as in this case, the alleged misconduct does not in any way affect his rights, the applicant has nothing to gain by contesting the management’s follow-up to his report.

19. Even if the applicant’s allegations concerning his supervisor are accurate, and even if using a title that no longer exists constitutes professional misconduct, the contested decisions, by which the Inspector General filed away the applicant’s report without following it up, in no way violate the applicant’s rights. In this case, the decisions in question are non-appealable internal measures pertaining to the organization and management of the service.

20. Thus the applicant’s request for rescission of the contested decisions and, consequently, his request for compensation for injury sustained are rejected, and there is no need to respond to his submissions.

21. For these reasons, the Tribunal DECIDES:

The application is rejected.

Judge Jean-François Cousin
Dated this 11th day of November 2009

Entered in the Register this 11th day of November 2009

Victor Rodríguez, Registrar, United Nations Dispute Tribunal, Geneva
