



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/034
UNDT/GVA/2012/046
Judgment No.: UNDT/2013/097/Corr.1
Date: 9 July 2013
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

RAHMAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Bettina Gerber, UNOG

Susan Maddox, ALS/OHRM, UN Secretariat

Notice: This Judgment has been corrected in accordance with article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. By a first application, filed on 16 April 2012 and entered in the Registry of the Dispute Tribunal on 20 April 2012, the Applicant contests the decision of the Secretary-General of the United Nations not to appoint him to the post at the D-2 level of Director, Division on Africa, Least Developed Countries and Special Programmes, United Nations Conference on Trade and Development (UNCTAD).
2. By a second application, filed on 3 May 2012 and entered in the Registry of the Dispute Tribunal on 4 May 2012, the same Applicant contests the decision, of which he was notified on 12 December 2011, by which the Under-Secretary-General for Management informed him that he would be returning to UNCTAD in Geneva as of 1 June 2012 and specified under what conditions that decision would be implemented by UNCTAD.
3. The Applicant requests in particular:
 - a. That he be provided with a harmonious working environment;
 - b. That he be given priority for any D-2 post for which he may apply and for which he is qualified;
 - c. Compensation for the moral and material damages suffered as a result of the retaliatory actions taken against him, the attacks on his career and the violations of the ethics policy;
 - d. That the recommendations of the Ethics Office be implemented without further delay;
 - e. That he be given access to the reports of the Office of Internal Oversight Services (“OIOS”) and any other related documentation so that he can fully appreciate the damage to his career perspectives and take appropriate measures;
 - f. That the staff members responsible for acts of retaliation against him be held to account.

Facts

4. The Applicant joined UNCTAD in Geneva on 25 February 1991 as Special Adviser. After several promotions and changes of position, he was promoted to the D-1 level in 2005.

5. In July 2008, after having worked in the Executive Office of the Secretariat of the United Nations, the Applicant returned to UNCTAD in Geneva where he was designated as Chief of the Division on Technology and Logistics. In April 2009, the Applicant was also appointed as the Chief of the Division of Management.

6. In May 2009, the Applicant drew the attention of the management at UNCTAD and OIOS to an e-mail sent on 10 May 2009 by Mr. Chutikul, Special Adviser to the Secretary-General of UNCTAD, and to another e-mail sent on 4 June 2009 by the same staff member.

7. On 4 June 2009, the Applicant wrote to OIOS to report possible misconduct by Mr. Chutikul.

8. On 5 June 2009, the Secretary-General of UNCTAD confirmed the Applicant in his post as Chief of the Division of Management.

9. On 8 June 2009, the Applicant informed the Deputy Secretary-General of UNCTAD about the letter sent on 4 June 2009 to OIOS. The Deputy Secretary-General informed the Secretary-General of UNCTAD.

10. The Secretary-General of UNCTAD removed the Applicant from his duties as Chief of the Division of Management on 17 June 2009.

11. On 26 June 2009, the Applicant filed a request for protection against retaliation with the Ethics Office, to which he felt he had been subjected by the Secretary-General for having reported misconduct.

12. On 30 June 2009, the Secretary-General of UNCTAD informed all staff that an OIOS investigation had been opened into UNCTAD following a report of misconduct by one of its staff members.

13. On 2 November 2009, a vacancy announcement for the post of Director (D-2), Division on Africa, Least Developed Countries and Special Programmes, UNCTAD, was published in the Galaxy e-staffing system under No. 09-ECO-UNCTAD-6422454-R-Geneva (G). In total, 123 applications, including the Applicant's, were received. Five were from internal candidates.

14. On 14 January 2010, the Ethics Office referred the Applicant's complaint to OIOS for investigation, having determined that there might be a case of retaliation.

15. On 16 February 2010, the Applicant asked the Human Resources Management Section of UNCTAD whether he would be interviewed for the post of Director for which he had applied.

16. On 1 March 2010, the Applicant requested a management evaluation of the decision to not interview him for the post of Director for which he had applied.

17. On 28 April 2010, the Applicant was invited for an interview scheduled to take place on 10 May 2010. On the day of the interview, he refused to participate because of the person chosen as an *ex-officio* member of the selection panel. Another invitation was sent to the Applicant on 21 May 2010 for an interview on 25 May 2010, which he declined as he was ill.

18. On 21 May 2010, the Secretary-General of UNCTAD was questioned by OIOS investigators following the Applicant's complaint of retaliation.

19. After a third interview date was refused, the Applicant was invited for a fourth time to attend an interview on 22 June 2010. He proposed another date because he would be on leave that had already been approved. Although the Applicant had repeatedly expressed his wish to be interviewed by the selection panel in person, he agreed to a telephone interview on 22 June 2010.

20. After the interviews had been conducted, the selection panel recommended to the Secretary-General of UNCTAD the three strongest candidates, including the Applicant, who was considered by the panel to have met one of the necessary competencies only partially, while the two other recommended candidates were considered to have met all five of the necessary competencies fully.

21. On 2 July 2010, the Management Evaluation Unit informed the Applicant that it was no longer necessary to decide upon his request with respect to an interview, since he had been interviewed.

22. On 20 October 2010, the Senior Review Group requested the Secretary-General of UNCTAD to re-advertise the vacancy announcement for the post of Director (D-2), Division on Africa, in order to attract new female candidates. The post was re-advertised from 3 November 2010 to 3 December 2010 in Inspira under vacancy announcement 10-ECO-UN CONF ON TRADE AND DEVELPMT-17024-R-GENEVA.

23. On 20 November 2010, on the recommendation of the Ethics Office, the Applicant was temporarily assigned to the United Nations Office for Partnerships in New York.

24. Following the re-advertisement of the vacancy announcement for the post on 3 November 2010, the Applicant applied again for the post of Director (D-2), Division on Africa. During that second round, candidates who had already been interviewed were not reinterviewed, and three male candidates, including the Applicant, were again recommended by the selection panel, since no qualified female candidates had been identified. On 7 February 2011, their names were submitted to the Senior Review Group, which, on 25 February 2011, asked UNCTAD once again to reopen the vacancy for an additional 30 days, on the grounds that no female candidate had been recommended.

25. On 8 March 2011, the Director of the Ethics Office wrote to the Applicant to inform him that, further to the OIOS report, the Director considered the Applicant to have been the victim of retaliatory action by two staff members of the Office of the Secretary-General of UNCTAD and that he had recommended to the Under-Secretary-General of the Department of Management that disciplinary actions should be instituted against them. In addition, the Director of the Ethics Office informed the Applicant that he had recommended that the Secretary-General of the United Nations should transfer the Applicant laterally to another United Nations agency with the same grade and level of responsibility.

26. After a third round of interviews had been held according to the same procedures as before, the Applicant and four other candidates were again recommended by the selection panel: the Applicant having met four competencies fully and the fifth partially, while the other four had met the five competencies fully.

27. On 24 July 2011, the list of five recommended candidates was sent to the Senior Review Group by the Secretary-General of UNCTAD. The Senior Review Group recommended four candidates to the Secretary-General, excluding the Applicant because he did not meet all the requisite competencies. The Chef de Cabinet of the Secretary-General selected one of the candidates recommended by the Senior Review Group and, on 19 September 2011, the Applicant was notified in writing that he had not been selected for the post.

28. On 14 November 2011, the Applicant requested a management evaluation of the decision not to select him for the post in question.

29. On 12 December 2011, the Under-Secretary-General for Management informed the Applicant that he would be returning to UNCTAD in Geneva as of 1 June 2012 once certain conditions had been met.

30. On 23 December 2011, the Counsel for the Applicant wrote to the Director of the Ethics Office to remind her that her recommendations had not yet been implemented by the Secretary-General.

31. On 4 January 2012, the Applicant requested a management evaluation of the decision to return him to UNCTAD as of 1 June 2012 and the refusal to implement the recommendations of the Ethics Office.

32. On 17 January 2012, the Management Evaluation Unit rejected the Applicant's request with regard to the decision not to select him for the post of Director (D-2), Division on Africa.

33. By letter of 24 January 2012, the Director of the Ethics Office replied to the letter from the Counsel for the Applicant of 23 December 2011, informing him that, given the difficulties of effecting the lateral transfer of the Applicant, her Office would comply with the conditions for his return to UNCTAD decided by the Secretary-General.

34. On 25 January 2012, the Counsel for the Applicant wrote to the Director of the Ethics Office in particular to express his opposition to the Applicant's return to UNCTAD.

35. On 16 April 2012, the Applicant filed an application, which was registered on 20 April 2012 by the Geneva Registry of the Tribunal under number UNDT/GVA/2012/034, in which he contests the decision not to select him for the post of Director (D-2), Division on Africa.

36. On 30 April 2012, in response to his request for a management evaluation of the decision given on 12 December 2011, the Applicant was informed that the Secretary-General had decided, *inter alia*:

- a. To confirm the closure of his complaint of harassment and retaliation;
- b. To appoint him, as of 1 June 2012 and until his retirement date, to a D-1 level post as Principal Officer in the United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS) in New York.

37. On 3 May 2012, the Applicant filed an application, which was registered on 4 May 2012 by the Geneva Registry of the Tribunal under the number UNDT/GVA/2012/046, in which he contests the decision of the Under-Secretary-General for Management to reassign him to UNCTAD in Geneva.

38. On 17 May 2012, the Applicant requested that Case No. UNDT/GVA/2012/046 be transferred to the New York Registry.

39. By Order No. 97 (GVA/2012) of 22 May 2012, the judge hearing the case in Geneva ordered the Applicant to indicate whether he wished Case No. UNDT/GVA/2012/034 also to be transferred to New York.

40. On 21 May 2012, the Respondent submitted his response in Case No. UNDT/GVA/2012/034.

41. On 23 May 2012, the Applicant informed the Tribunal that he requested that Case No. UNDT/GVA/2012/034 also be transferred to New York. The same day, the Respondent requested the Tribunal that neither of the cases be transferred to New York.

42. On 25 May 2012, the Respondent requested an extension of the time limit to file his reply in Case No. UNDT/GVA/2012/046. On 30 May 2012, the Applicant submitted comments on that motion.

43. By Order No. 100 (GVA/2012) of 30 May 2012, the judge hearing the cases in Geneva granted an extension to the Respondent to submit his reply in Case No. UNDT/GVA/2012/046 until 18 June 2012.

44. By Order No. 103 (GVA/2012) of 1 June 2012, the judge hearing the cases in Geneva rejected the Applicant's motion for a change of venue.

45. On 18 June 2012, the Respondent submitted his reply in Case No. UNDT/GVA/2012/046.

46. On 6 August 2012, the Applicant requested that the President of the Tribunal recuse Judge Cousin from hearing the two cases in Geneva. In his Judgment No. UNDT/2012/136 *Rahman* of 11 September 2012, that request for recusal was rejected by the President of the Tribunal.

47. On 24 August 2012, the Applicant asked the Tribunal for permission to submit additional comments in Case No. UNDT/GVA/2012/046, to which the Respondent objected on 19 September 2012.

48. By Order No. 167 (GVA/2012) of 28 November 2012 (Case No. UNDT/GVA/2012/034), the Tribunal ordered the Respondent to file additional documents.

49. On 10 December 2012, the Respondent submitted six confidential documents in reply to Order No. 167 (GVA/2012).

50. By Order No. 1 (GVA/2013) of 10 January 2013 (Case No. UNDT/GVA/2012/034), the Tribunal ordered the Respondent to file additional documents.

51. On 24 January 2013, the Respondent submitted four confidential documents in reply to Order No. 1 (GVA/2013).

52. By Order No. 19 (GVA/2013) of 15 February 2013 (Case No. UNDT/GVA/2012/034), the Tribunal transmitted to the Applicant some of the documents received on 10 December 2012 and 24 January 2013, after having taken steps to ensure their confidentiality. In addition, the Tribunal ordered the Applicant to file his comments on the documents in question by 8 March 2013 at the latest.

53. On 21 February 2013, the Applicant requested that the Tribunal extend the deadline for the submission of his comments on the documents received in reply to Order No. 19 (GVA/2013).

54. By Order No. 24 (GVA/2013) of 21 February 2013 (Case No. UNDT/GVA/2012/034), the Tribunal extended the deadline for the Applicant's submission of comments until 28 March 2013, which was respected by the Applicant.

55. By Order No. 39 (GVA/2013) of 10 April 2013 (Cases Nos. UNDT/GVA/2012/034 and UNDT/GVA/2012/046), the Tribunal ordered the parties to attend a substantive hearing on 22 May 2013.

56. On 22 May 2013, a hearing was held, attended by the Applicant and his Counsel, the main Respondent and a Co-respondent.

57. Following the hearing, by Order No. 60 (GVA/2013) of 24 May 2013 (Case No. UNDT/GVA/2012/034), the Tribunal ordered the Respondent to file additional documents.

58. On 27 May 2013, the Respondent requested an extension of the deadline for the submission of the documents requested by Order No. 60 (GVA/2013).

59. By Order No. 66 (GVA/2013) of 28 May 2013, the Tribunal extended the deadline for the Respondent's submission of additional documents in Case No. UNDT/GVA/2012/034 until 7 June 2013.

60. By Order No. 70 (GVA/2013) of 4 June 2013 (Cases Nos. UNDT/GVA/2012/034 and UNDT/GVA/2012/046), the Tribunal transmitted four OIOS reports to the Applicant and ordered him to file any comments on those reports by 14 June 2013 at the latest.

61. On 7 June 2013, the Respondent submitted 11 confidential documents in reply to Order No. 60 (GVA/2013).

62. On 14 June 2013, the Applicant submitted comments in response to Order No. 70 (GVA/2013). In addition, the Applicant included observations in respect of Order No. 60 (GVA/2013).

63. By Order No. 79 (GVA/2013) of 12 June 2013 (Case No. UNDT/GVA/2012/034), the Tribunal ordered the Respondent to submit written testimony statements from the four members of the selection panel.

64. On 19 June 2013, the Respondent filed three out of the four written testimony statements in reply to Order No. 79 (GVA/2013). Those statements were transmitted to the Applicant by Order No. 84 (GVA/2013) of 21 June 2013 (Case No. UNDT/GVA/2012/034), giving him until 25 June 2013 to make any comments.

65. On 21 June 2013, the Applicant, in reply to Order No. 84 (GVA/2013), stated that he could not comment because he did not have the document on which the members of the selection panel had based their written testimony statements.

66. By notification dated 23 June 2013, the Geneva Registry of the Tribunal informed the Applicant that the document on which the members of the selection panel had based their written testimony statements had already been sent to him. Nevertheless, a copy of the document was attached to the notification sent to the Applicant.

67. On 26 June 2013, the Respondent filed the fourth written testimony statement in reply to Order No. 79 (GVA/2013). That statement was transmitted to the Applicant by Order No. 89 (GVA/2013) of 26 June 2013 (Case No. UNDT/GVA/2012/034), giving him until 1 July 2013 to make any comments.

68. On 28 June 2013, the Applicant submitted his comments in response to Order No. 89 (GVA/2013).

Parties' submissions

Case No. UNDT/GVA/2012/034

69. The Applicant's contentions are:

- a. His interview had not been held under the same conditions as those of the other candidates; he had therefore been treated unequally. The Chair of

the selection panel, who organized the interviews, showed hostility towards him;

b. It has not been proven that his competencies, as evaluated during his interview, were weaker than those of the other recommended candidates. He had been considered fully qualified for another D-2 post in UNCTAD. He has very long experience in dealing with issues of least developed countries; his communication skills had been acquired over the course of his career and had been recognized previously by the Secretary-General of UNCTAD himself, in particular during his 2008/09 appraisal and when he applied for the post of Director of the Division on Technology and Logistics;

c. Within the Organization there is no staff member at the D-2 level who is a national of Bangladesh; therefore, under the geographical distribution policy, he should have been selected. With regard to the criteria of mobility and diversity, his application was better than that of the selected candidate. Thus the selection criteria were not applied correctly;

d. He was a victim of discrimination. The two staff members, who the Ethics Office found to have carried out retaliatory actions against him, may have influenced the decision not to select him; that decision must be examined in the context of the retaliation he suffered. The Chef de Cabinet of the Secretary-General of the United Nations acknowledged in his reply of 30 April 2012 that even at that time, the UNCTAD management could not guarantee that, if he returned to Geneva, he could work there in a harmonious environment. Incidentally, the Secretary-General of UNCTAD and his Deputy were among those he accused of retaliation in his complaint to the Ethics Office.

e. It is the second time that he has been denied a promotion to the D-2 level, although he had been found fully qualified. Had he not requested a management evaluation of the first decision not to invite him to an interview, his application would not have been considered, because the Administration had the wrong text.

70. The Respondent's contentions are:
- a. The Secretary-General has a broad discretion with regard to the choice of staff members selected for a post, as recognized by the Appeals Tribunal, which also held that administrative decisions were presumed to be lawful, meaning that the burden of proof of an irregularity lies with the Applicant. Yet, the Applicant has not submitted any evidence that the Secretary-General failed to apply the selection criteria of mobility and career diversity correctly;
 - b. The vacancy announcement was published on 2 November 2009, in other words when ST/AI/2006/3 was in force;
 - c. The Applicant was shortlisted for an interview that was supposed to take place on 10 May 2010. On 6 May 2010, the Applicant requested the presence of an invigilator, that is, an independent observer or supervisor. The first person suggested by UNCTAD was rejected by the Applicant, then a second suggested invigilator was also rejected. Finally, ten minutes before the interview, the Applicant refused to participate. There was no legal obligation for UNCTAD to nominate an independent invigilator and none of the members of the selection panel had any links with the investigation into retaliation against the Applicant;
 - d. On 7 June 2010, the Applicant was invited to an interview scheduled for 22 June 2010. The Applicant declined because he would be on leave and would be taking his daughter from New York to Boston. The Administration offered to rent a hotel room for him for the time of the interview and to reimburse him for the cost of the room. The telephone interview, a common practice when staff members cannot attend in person, took place and the Applicant was not disadvantaged by this interview method;

e. The selection panel considered that the Applicant met one of the competencies only partially, while the other recommended candidates met the five requisite competencies fully;

f. The Applicant has not demonstrated that the two staff members who engaged in retaliatory conduct against him intervened in the selection process. They were not part of the panel or the Senior Review Group and the final decision was taken by the Secretary-General of the United Nations. UNCTAD was not involved in the selection process;

g. The Applicant has not suffered any material damage since he was recommended;

h. The Tribunal is requested not to share with the Applicant the evaluations of the other recommended candidates, which must be treated confidentially.

Case No. UNDT/GVA/2012/046

71. The Applicant's contentions are:

a. In his most recent comments submitted in writing on 24 August 2012 following the decision of the Secretary-General to rescind his decision of 12 December 2011 reassigning him to UNCTAD in Geneva, he noted that what is in dispute is the fact that the Secretary-General has failed to follow the recommendations of the Ethics Office and denied him access to the OIOS investigation reports on the perpetrators of the retaliatory actions against him;

b. Contrary to the statements made by the Respondent, the decision to assign him to a post in New York funded by UNCTAD has not been carried out. Instead, he is being kept at OHRLLS, which creates uncertainty over his future should UNCTAD not fund the post to which he should be assigned. Since November 2010, he has not been assigned to a real post with a proper job description;

c. The decision to assign him to New York has caused him material damages since he has been living in New York with a household in Geneva. He should have received daily subsistence allowance for 549 days totalling US\$ 144,198. In addition, he has not received all that he was entitled to in terms of post adjustment;

d. He should be compensated for damages resulting from the violation of his rights, from being separated from his family, from injury to his reputation and from having been the victim of unfounded accusations. His career prospects will also be affected;

e. He should receive as compensation for these damages the amount of three years' net base salary. He should also receive a payment of USD100,000 to cover his legal expenses;

f. He requests that he be provided with the OIOS investigation reports on the persons who may have engaged in retaliatory action against him and the disciplinary sanctions imposed on the perpetrators of those retaliatory actions.

72. The Respondent's contentions are:

a. In his most recent comments, the Respondent requested the Tribunal to strike the Applicant's recent comments as they are an attempt to enlarge the scope of his application. With regard to the issues surrounding the funding of his post at OHRLLS and that job description, they were not contested in his initial application. They therefore cannot be raised at this stage of the proceedings as they were not raised in the management evaluation request. The same is true of the payment of the daily subsistence allowance;

b. There is no need to adjudicate the contested decision since the Applicant was informed by a memorandum dated 30 April 2012 that the decision to reassign him to UNCTAD in Geneva had been rescinded and that he would be assigned to New York until his retirement in 2016 on a post funded by UNCTAD;

c. The Applicant's other requests are not receivable. The recommendations made by the Ethics Office were, in fact, implemented. The Tribunal does not have jurisdiction to entertain complaints about conduct that does not constitute an administrative decision;

d. The Organization handled the Applicant's complaint, submitted to the Ethics Office, in good faith and in accordance with the applicable rules;

e. The Applicant had no right to be provided with the OIOS reports. The recommendations of the Ethics Office were rightly submitted to the Secretary-General of the United Nations, rather than the Secretary-General of UNCTAD, as the former is the only one who has the authority to effect a lateral transfer from UNCTAD to the Secretariat;

f. The Applicant has not suffered financial loss since the Organization has paid him the difference in post adjustment between Geneva and New York. The contested decision has not caused him any damages since it was rescinded.

Consideration

73. Given that the two applications mentioned above were submitted by the same Applicant, that they refer to the same Respondent, that the Applicant maintains in both cases that he was the victim of retaliatory acts, and further, that the documents in one of the case files could prove useful in hearing the other case, the judge in charge of the case decided, following a joint hearing for the two cases, to link them and issue a single decision.

74. At the start of the hearing, the Applicant proposed to the Respondent that they attempt to reach an amicable agreement. The hearing was briefly suspended, the Respondent declined the Applicant's proposal and the hearing resumed.

75. Before adjudicating the present application, the Tribunal must point out that it has examined only those documents that the parties submitted to the case files and that were also transmitted to both parties. Although the Respondent asked the Tribunal not to consider certain of the Applicant's comments that were submitted late, the Tribunal has considered them and given the Respondent the opportunity to respond to them.

76. The Applicant indicated at the start of the hearing that he wanted particular witnesses to testify before the Tribunal, but the Tribunal, noting that a written request had not been made in advance, stated that, for that reason, it would not grant the request at that stage of the proceeding; the Tribunal added, however, that should it become apparent in the course of the hearing that it would be useful to call witnesses, the parties would be invited to another hearing for that purpose. The Tribunal subsequently determined that oral testimony from witnesses would not be necessary.

The legality of the decision not to appoint the Applicant to the D-2 post of Director, Division on Africa, Least Developed Countries and Special Programmes, United Nations Conference on Trade and Development (UNCTAD)

77. The documents in the case file indicate that the list of candidates recommended for the vacant post was sent to the Senior Review Group on 24 July 2011; that the list contained the names of the Applicant and four other candidates; and that in the view of the selection panel, the Applicant fully met four of the competencies called for in the vacancy announcement and met the fifth only partially, whereas the other four candidates fully met the five competencies. None of this is in dispute. The Respondent maintains that the sole reason that the Applicant was not selected was that he met the communication competency only partially.

78. To contest the above decision, the Applicant maintains, first of all, that his interview with the selection panel took place under conditions that placed him at a disadvantage compared to the other candidates. The Tribunal must therefore recall the conditions under which the interview took place.

79. On 28 April 2010, the Applicant was invited to an interview set for 10 May 2010. The Applicant declined to participate in it, owing to doubts he had regarding the impartiality of the person appointed as the independent invigilator. On 21 May 2010, the Applicant was again invited for an interview, scheduled for 25 May 2010, a date that the Applicant declined owing to illness. After a third interview was proposed and declined, the Applicant was invited for a fourth time to an interview set for 22 June 2010. Since the Applicant had planned to be on leave on that date, he initially declined. Then, although he had several times expressed the desire to be interviewed by the panel in person, the Applicant agreed, at the insistence of the Deputy Secretary-General of UNCTAD, to a telephone interview with the selection panel, to take place on 22 June 2010. That interview occurred while he was in his vehicle, stopped at the side of the road. The Tribunal can only point out that, while telephone hiring interviews take place frequently in the Organization, as a cost-saving measure, the conditions under which this interview was conducted were not the most appropriate. However, the case materials and, in particular, numerous e-mails between the Deputy Secretary-General, the chair of the panel, and the Applicant indicate that the chair of the panel had done everything possible to ensure that this interview took place under optimum conditions for the Applicant. The Tribunal is therefore of the view that while the conditions under which the interview took place were rather unusual, that was to a large extent the responsibility of the Applicant, who had not made himself available in a timely manner, and there is nothing to indicate that the conditions under which the interview took place hampered the panel in its evaluation of the Applicant's competencies.

80. The Applicant's second argument challenging the decision not to select him is that this was an act of retaliation against him on the part of the UNCTAD senior management. Given the context against which the selection panel considered the Applicant's candidacy, which could lend plausibility to his allegations, this argument ought to be considered very carefully.

81. First, the sequence of some events should be highlighted, even though they have been described above. In May 2009, the Applicant alerted OIOS to misconduct by Mr. Chutikul, Special Advisor to the Secretary-General of UNCTAD, who had attempted to pressure UNCTAD staff members to support the re-election of the incumbent Secretary-General of UNCTAD by the General Assembly.

82. On 5 June 2009, the Secretary-General of UNCTAD confirmed the Applicant in his post as Chief of the Division of Management and then, several days later, the Secretary-General relieved the Applicant of his duties as Chief of the Division of Management, effective 17 June 2009. The Applicant lodged a complaint with the Ethics Office requesting protection against the retaliatory measure of being relieved of his duties by the Secretary-General for pointing out misconduct committed by the Secretary-General's adviser.

83. Following the issuance on 2 November 2009 of a vacancy announcement for the D-2 post of Director of the Division on Africa, Least Developed Countries and Special Programmes at UNCTAD, the Applicant applied for this post. On 14 January 2010, the Ethics Office referred the Applicant's complaint to OIOS for investigation, having determined that it was a possible case of retaliation.

84. On 21 May 2010, OIOS investigators heard testimony by the Secretary-General of UNCTAD in connection with the retaliation complaint lodged by the Applicant. On 22 June 2010, the Applicant was interviewed for the disputed post by the selection panel.

85. The Applicant maintains that the senior management of UNCTAD influenced the selection panel to determine that he met the communication competency only partially, thereby depriving him of any chance of being selected, while the panel determined that the other four recommended candidates met the competency criteria in full.

86. Subsequently, the Ethics Office and later, the Secretary-General of the United Nations, recognized that following his accusation of misconduct, the Applicant had been the victim of retaliatory acts by two UNCTAD staff members: Mr. Chutikul and Mr. Galindo. However, the OIOS investigators found that the decision of the Secretary-General of UNCTAD to relieve the Applicant of his duties was not taken in retaliation for his denunciation, and no action was taken on the Applicant's complaint against the Secretary-General.

87. Given the circumstances described above, the Tribunal could find the Applicant's allegations credible. As the selection process for a D-2 post at UNCTAD was proceeding, the Secretary-General of that Organization, whose actions had been challenged by the Applicant, was under investigation by OIOS. The Tribunal has therefore considered very carefully the documents submitted by the parties, requested documents that could be of interest and asked the panel members to certify in writing, under oath, that the record of the panel's discussions included in the case file is a true reflection of what transpired during those discussions.

88. The person responsible for appointing a candidate other than the Applicant was the Chef de Cabinet of the Secretary-General of the United Nations. There is no convincing reason to conclude that he may have wished to engage in retaliatory acts against the Applicant. By the same token, there is nothing in the case file that would lead the Tribunal to find that, in deciding not to recommend the Applicant, the Senior Review Group was engaging in retaliatory acts against him. The motivation for not recommending him is in fact clear: the Senior Review Group was of the view that it should recommend only those candidates who met all of the competencies. The Tribunal therefore finds that the interview panel's

assessment of the Applicant's competencies alone was the true reason that he was not selected.

89. The selection panel had only four voting members. Of those four, two were from outside UNCTAD, and there is no reason to question their independence. Although the context given above could lead one to think that the Secretary-General of UNCTAD might have influenced the other two members of the panel, who were UNCTAD staff members, this is pure speculation, which is not based on any document. In its Judgment No. 2013-UNAT-311, *Pirnea v. the Secretary-General of the United Nations*, the United Nations Appeals Tribunal stressed that a judge could not base a judgment on pure speculation. Even if the Deputy Secretary-General of UNCTAD, who served as chair of the panel, could have been susceptible to pressure by the Secretary-General of UNCTAD, something in no way reflected in the case file, the Applicant's competencies were evaluated by the four panel members, and there is no evidence that casts doubt on the integrity of the panel members.

90. After the Applicant challenged the authenticity of the Interview Panel Report at the hearing on the grounds that it had not been signed by the panel members, the Tribunal asked the Administration to transmit to it various documents and notes related to the Applicant's interview with the panel. The Administration provided some documents that did not appear sufficiently complete for the Tribunal to be certain that the panel report provided to the Review Group and included in the case file did in fact reflect what had been discussed by all panel members. It therefore asked the four panel members to confirm under oath that, with regard to the Applicant, the report was an exact reflection of what they had collectively decided. The four voting members of the panel provided these certifications to the Tribunal and, although no signed document was included in the case file, the Tribunal no longer has any doubt that the panel did indeed decide that the Applicant met the communication competency only partially.

91. It follows that the Applicant did not meet the burden of proof that he had been the victim of retaliatory acts during the selection procedure for the D-2 post of Director, Division on Africa, Least Developed Countries and Special Programmes, UNCTAD. The Tribunal must therefore reject his request for compensation for damages resulting from his non-selection.

The legality of the decision announced on 12 December 2011 to transfer the Applicant back to UNCTAD in Geneva as of 1 June 2012 and indicating the terms attaching to implementation of this decision by UNCTAD

Scope of the dispute

92. Given that the scope of the dispute was contested by the parties, it falls to the Tribunal to establish precisely which administrative decisions have been duly contested before it as part of this application.

93. To that end, it should be recalled that, in accordance with the article below, it is, first of all, the administrative decisions of which a management evaluation was requested that determine the scope of the dispute.

94. Rule 11.2 of the United Nations Staff Rules states:

Management evaluation

(a) 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.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested.

95. The rule cited above requires the staff member who submits a request for management evaluation to indicate which administrative decisions, explicit or implicit, he or she is contesting. The letter of 4 January 2012 from the Applicant indicates that the Applicant requested a management evaluation of the decision of 12 December 2011 to reassign him to UNCTAD in Geneva as of 1 June 2012, a decision which set forth the terms of his return to Geneva. The explicit decision is thus clearly identified by the Applicant. The Applicant also noted in his request for management evaluation that he was contesting the implicit decisions that resulted from the explicit decision cited above, on the one hand, the closure of his case despite the fact that the Ethics Office recommendations had not been implemented in full, and, on the other hand, the tacit refusal by the Secretary-General to take action to protect him from harassment and retaliatory acts and ensure him a proper work environment. The Applicant thus clearly indicated the administrative decisions he was contesting as part of the request for management evaluation and, given that he did not request a management evaluation of a decision of the Secretary-General not to compensate him for all damages resulting from retaliatory acts against him, the Tribunal cannot take up this matter.

96. Following the reply to his request for management evaluation, an Applicant must inform the Tribunal which decisions he is still contesting. The reply to the request for management evaluation may, in some cases, provide relief, and the Applicant may decide not to continue contesting before the Tribunal decisions contested in the request for management evaluation.

97. Article 8 of the Statute of the United Nations Dispute Tribunal states:

1. An application shall be receivable if:

...

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required

98. In his application entered in the Tribunal Registry on 4 May 2012, the Applicant stated that he was contesting the decision of 12 December 2011 reassigning him to UNCTAD in Geneva, failure to implement the recommendations of OIOS and the Ethics Office and the delays in providing him with a proper work environment and preventing further acts of retaliation.

99. Pursuant to the above, the Tribunal can only note that the dispute is limited to the administrative decisions referred to above and as set forth in the request for management evaluation and repeated in the application and that it has not been duly seized by the Applicant with the issue of compensation for all damages resulting from the retaliatory acts against him.

Legality of the contested decisions

Decision of 12 December 2011 to reassign the Applicant to UNCTAD in Geneva

100. On 30 April 2012, the Applicant was advised that the Secretary-General had decided to place him at the D-1 level as Principal Officer in the Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLLS) New York as of 1 June 2012 until his retirement date. Thus, on 3 May 2012, the date when the Applicant submitted his application, the contested decision of 12 December 2011 to transfer him back to Geneva had been abrogated by the decision of 30 April 2012; the Applicant thus contested before the Tribunal a decision that was no longer in effect, which renders his application non-receivable, insofar as it concerns the decision of 12 December 2011.

Refusal of the Secretary-General to fully implement the recommendations of the Ethics Office and to protect the Applicant and ensure him an adequate work environment

101. It is therefore necessary to consider the legality of the decisions taken by the Secretary-General following the recommendations of the Ethics Office.

102. The Secretary-General's Bulletin ST/SGB/2005/21 on Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations describes the roles of the Ethics Office and the Secretary-General when retaliatory acts have been established:

Section 6

Protection of the person who suffered retaliation

6.1 If retaliation against an individual is established, the Ethics Office may, after taking into account any recommendations made by OIOS or other concerned office(s) and after consultation with the individual who has suffered retaliation, recommend to the head of department or office concerned appropriate measures aimed at correcting negative consequences suffered as a result of the retaliatory action. Such measures may include, but are not limited to, the rescission of the retaliatory decision, including reinstatement, or, if requested by the individual, transfer to another office or function for which the individual is qualified, independently of the person who engaged in retaliation.

6.2 Should the Ethics Office not be satisfied with the response from the head of department or office concerned, it can make a recommendation to the Secretary-General. The Secretary-General will provide a written response on those recommendations to the Ethics Office and the department or office concerned within a reasonable period of time.

6.3 The procedures set out in the present bulletin are without prejudice to the rights of an individual who has suffered retaliation to seek redress through the internal recourse mechanisms. An individual may raise a violation of the present policy by the Administration in any such internal recourse proceeding.

Section 7

Action against the person who engaged in retaliation

Retaliation against an individual because that person has reported misconduct on the part of one or more United Nations officials or cooperated with a duly authorized audit or investigation of the Organization constitutes misconduct which, if established, will lead to disciplinary action and/or transfer to other functions in the same or a different office.

103. The facts as set forth above indicate that the complaint submitted on 26 June 2009 by the Applicant was referred by the Ethics Office to OIOS on 14 January 2010 for investigation, the Ethics Office having determined that it might involve a case of retaliation. Then, in November 2010, at the recommendation of the Ethics Office, the Applicant was temporarily transferred to the United Nations Office for Partnerships in New York. His temporary appointment was then periodically renewed until 31 May 2012. On 8 March 2011, the Director of the Ethics Office advised the Applicant that in response to the OIOS report, it found that he had been the victim of retaliation by two staff members in the Office of the Secretary-General of UNCTAD, that it had recommended to the Under-Secretary-General for Management that disciplinary measures be instituted against them and that, in addition, it had recommended to the Secretary-General of the United Nations that he receive a lateral transfer to another United Nations office, maintaining his current grade level and managerial responsibility.

104. After initially deciding to reassign the Applicant to UNCTAD in Geneva as of 1 June 2012, the Secretary-General decided on 30 April 2012, in response to the Applicant's objections, to assign him to a D-1 post as Principal Officer of UN-OHRLLS in New York.

105. In his most recent statement, the Applicant maintains that the Secretary-General did not comply with the recommendation of the Ethics Office to transfer him laterally to another United Nations office because the post to which he was transferred is funded by UNCTAD, rendering it temporary in nature.

106. It should be recalled that under sec. 6 of ST/SGB/2005/21, the Ethics Office only makes recommendations, either to the head of the department or office concerned or to the Secretary-General. In this case, after noting that the Applicant's return to UNCTAD in Geneva could result in new retaliation against him, the Ethics Office recommended that the Secretary-General grant him a transfer to another United Nations office. Having pointed out that the principle of competitive selection would make the assignment of the Applicant to another

office difficult, the Secretary-General decided to transfer him to New York to a D -1 post as Principal Officer of UN-OHRLLS. The Tribunal holds that in deciding to transfer him to New York until the date of his retirement, in conformity with the desire initially voiced by the Applicant, the Secretary-General carried out the recommendation of the Ethics Office as well as possible and protected the Applicant from retaliation on the part of the UNCTAD staff members, which was the objective to be met. While it is unfortunate that as of the date of the present decision, the Applicant will not yet have his job description in hand, that is no basis for contesting the decision of the Secretary-General, nor is the fact that the post would be funded by UNCTAD on a temporary basis only.

107. The Applicant maintains, moreover, that in taking the decisions that he did, the Secretary-General acted belatedly. However, the Tribunal notes that the solutions that the Secretary-General sought in order to protect the Applicant from retaliation and ensure him a proper working environment were not easy ones, given the obligation that the Secretary-General had to comply with lawful selection procedures. In fact, having the Applicant return to UNCTAD in Geneva, as was planned at one point, was then deemed harmful to the Applicant, as he could again fall victim to retaliatory acts perpetrated by the most senior officials of that Organization. What is more, as was stated above, under the staff selection rules, transferring the Applicant would have in most cases required him to undergo competitive selection processes. Given these issues, the time that it took the Secretary-General to find a solution that was in accordance with the recommendations of the Ethics Office and acceptable to the Applicant was not excessive.

108. As part of his claim that the Secretary-General failed to comply fully with the recommendations of the Ethics Office, the Applicant maintains, moreover, that he should have been informed of the disciplinary measures imposed upon Mr. Galindo and Mr. Chutikul, who had retaliated against him.

109. By letter dated 8 March 2011, the Director of the Ethics Office advised the Applicant that he had recommended that the Under-Secretary-General for Management institute disciplinary measures against Mr. Galindo and

Mr. Chutikul for professional misconduct in committing retaliatory acts against him. However, while the Respondent has confirmed that both staff members had indeed been disciplined, the Applicant maintains that the recommendation of the Ethics Office to the Secretary-General to discipline the staff members for retaliatory acts against another staff member necessarily involves informing the victim of the nature of the disciplinary measures imposed. It thus falls to the Tribunal to make a determination on that matter.

110. Section 7 of ST/SGB/2005/21, which provides for disciplinary measures against those who commit retaliatory acts, does not mention whether the victim is to be informed regarding the nature of the disciplinary action. In general, there is no legal provision requiring the Secretary-General to disclose disciplinary measures imposed on staff members. However, professional misconduct involving retaliation against another staff member is a special case, in which the victim is entitled to know whether the disciplinary measure was commensurate in gravity with the misconduct. The situation is similar to that of a victim of a criminal attack, who, having lodged a complaint against his or her attacker learns that the latter has been found guilty without being able to find out what the punishment was. In this case, the Tribunal is of the view that, given that the Secretary-General decided to follow the recommendation of the Ethics Office to discipline two UNCTAD staff members, it was his responsibility, in order to dispense justice for the victim, to inform the latter as to the nature of the disciplinary measures imposed on Mr. Galindo and Mr. Chutikul. In this sense alone, contrary to what is provided for in ST/SGB/2005/21, the Secretary-General did not do everything in his power to alleviate the harmful effects that the retaliation may have had on the Applicant, and the Tribunal is of the view that there is no reason for the Applicant not to be informed of the disciplinary measures imposed.

111. The Tribunal has considered, above, the legality of all the administrative decisions with which it has been duly seized. However, in his application instituting proceedings, as well as in his most recent comments, the Applicant has attempted to enlarge the scope of the dispute. The Tribunal's response to these requests, which is given below, is to reject them.

Providing access to the OIOS reports

112. In his request for management evaluation and, later, in his application before the Tribunal, the Applicant sought access to the OIOS investigation reports on four UNCTAD staff members who may have engaged in retaliatory acts against him. The Tribunal, which followed up on his request and received copies of these reports, holds that these disputes could not be heard without the Applicant being informed of the content of these reports. It therefore transmitted them to him with orders to preserve their confidentiality. There is thus no further need to rule on the Applicant's request for access to the reports.

Compensation for damages

113. The Tribunal has stated above which administrative decisions were duly contested before it. With regard to the damages that the Applicant claims to have suffered, the Tribunal, as it has already stated above, can rule only on the damages resulting from those decisions, i.e., the decision of 12 December 2011, the alleged failure to implement the OIOS and Ethics Office recommendations and the delays in ensuring him a proper working environment and preventing future retaliatory acts.

114. It was stated above that there was no need to rule on the legality of the decision of 12 December 2011, which had been rescinded. The Tribunal notes that it was never carried out and therefore resulted in no damages to the Applicant. Later, the Tribunal determined that the decisions taken by the Secretary-General to ensure the Applicant a proper working environment had been taken without excessive delay and that they were not irregular. Thus there can be no compensation of any kind.

115. While the Tribunal found that the Applicant was entitled to know what disciplinary measures were imposed on Mr. Galindo and Mr. Chutikul, the fact that the Secretary-General has not yet done so has caused the Applicant no material or even moral damages that could be compensated. It is clear from the foregoing that the Applicant has failed to establish that he has suffered damages related to duly contested decisions.

116. Further, the Applicant requested compensation for damages resulting from retaliatory acts against him, as well as for those related to his transfer from Geneva to New York. As stated above, the Tribunal has been duly seized only with the question of the legality of the Secretary-General's failure to implement the recommendations of OIOS and the Ethics Office and delays in ensuring him a proper working environment and preventing future retaliatory acts. The damages for which the Applicant is requesting redress above, i.e., moral damages resulting from retaliatory acts and additional expenses resulting from his transfer to New York, are in no way related to the decisions contained in the e-mail of 12 December 2011, which, it should be recalled, involved transferring him back to Geneva without implementing the recommendations of the Ethics Office. In order to request compensation for all damages resulting from the retaliation against him, the Applicant must first submit to the Administration a request for compensation, and, should that request be declined, he should then request the relevant management evaluation, and, finally, if he considers that there is a basis for it, he should submit his application to the present Tribunal.

117. Finally, the Applicant asked that the Secretary-General be compelled to reimburse the expenses he incurred in these cases. Article 10.6 of the Statute of the Tribunal states that "[w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party." This is the only situation in which the Tribunal could order a party to cover expenses incurred by the other party. The Tribunal points out that the Respondent has not abused the proceedings, as almost all of the Applicant's claims have been dismissed. While the Applicant maintains that the head of the Management Evaluation Unit engaged in misconduct in failing to maintain the confidentiality of the informal discussions with Applicant's counsel, that is a matter for another dispute which has not been duly opened before the present Tribunal. As a result, the Tribunal dismisses the request to award costs against the Respondent.

Conclusion

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

- a. The Secretary-General shall inform the Applicant as soon as possible regarding the nature of the disciplinary measures imposed on Mr. Galindo and Mr. Chutikul;
- b. The Applicant's other requests are dismissed.

(Signed)

Judge Jean-François Cousin

Dated this 9th day of July 2013

Entered in the Register on this 9th day of July 2013

(Signed)

René M. Vargas M., Registrar, Geneva