

UNDT/2010/174, Ryan

UNAT Held or UNDT Pronouncements

The Tribunal found that the appeal against the first decision was both time-barred and without merits, and that the appeal against the second decision was time-barred. The Tribunal further concluded that the respondent had properly exercised his discretionary authority in deciding not to refer the investigation panel's findings to the ASG/OHRM. **Confirmative decisions:** When a staff member repeats the same request to the Administration, only the first decision denying it is subject to appeal and the time limits for appeal start running from that first decision. Subsequent refusal decisions are confirmative decisions which are not subject to appeal. The Administration has the obligation to examine a new request only when it is supported by new circumstances; the resulting decision is not a confirmative decision. **Implied decisions:** For the purpose of calculating time limits, the Tribunal determines, based on the facts of the case, when it was clear to an applicant that an implied decision was made. **Exceptional circumstances:** Circumstances beyond the control of the applicant that prevented him/her from submitting an appeal in time. **Negotiations & time limits:** Negotiations between the parties do not normally have the effect of suspending the time limits for the filing of an internal appeal or an appeal with the Tribunal and they do not constitute exceptional circumstances. **Request for review:** The Tribunal is competent to hear applications against decisions which have been the subject of a request for review to the Secretary-General. In the present case, even though the applicant did not explicitly identify in his request for review one of the decisions he now contests before the Tribunal, the Tribunal interpreted his letter to the Secretary-General and concluded that it was his intention to contest that decision at the time. **Discretionary authority:** Discretionary decisions must not be arbitrary, motivated by factors inconsistent with proper administration, or based on erroneous, fallacious or improper motivation. **Preliminary investigation and referral for disciplinary proceedings:** Pursuant to para. 3 of ST/AI/371, it falls within the managerial discretion of the head of office or responsible officer to draw conclusions from the preliminary investigation report. While s/he is bound by the facts as established by the investigation, s/he is not

bound by their legal characterization and it falls within his/her discretion to determine whether or not the investigation produced sufficient evidence of misconduct. Such discretion is not unfettered, however, and the Tribunal must examine whether the head of office or responsible officer drew clearly erroneous conclusions from the investigation report. The Tribunal is not competent to order the Secretary-General to initiate disciplinary proceedings.

Decision Contested or Judgment/Order Appealed

In 2003, DPKO rejected a recommendation to upgrade the applicant from P-5 to D-1, on the grounds, *inter alia*, that he had not been appointed further to a competitive selection process. In the course of 2004, the applicant requested on several occasions that his post be advertised: he did not receive a response until November 2004, when he was informed that his contract would not be renewed; eventually, he was redeployed to another post in another Department. At the end of 2004, he filed a complaint for harassment and discrimination. While the investigation panel concluded that the applicant had been the victim of harassment and discrimination, the head of office considered that there was not sufficient evidence and did not refer the matter to the ASG/OHRM for further action pursuant to ST/AI/371. It was not until May 2006 that the applicant filed a request for review of (i) the decision not to upgrade him from P-5 to D-1, (ii) the implied decision not to advertise his post, and (iii) the decision not to take appropriate action on the investigation report.

Legal Principle(s)

N/A

Outcome

Dismissed as not receivable

Full judgment

[Full judgment](#)

Applicants/Appellants

Ryan

Entity

UNMIK

Case Number(s)

UNDT/GVA/2010/035

Tribunal

UNDT

Registry

Geneva

Date of Judgement

3 Oct 2010

Duty Judge

Judge Cousin

Language of Judgment

English

French

Issuance Type

Judgment

Categories/Subcategories

Investigation

Jurisdiction / receivability (UNDT or first instance)

Temporal (ratione temporis)

Applicable Law

Administrative Instructions

- ST/AI/371

Former Staff Rules

- Rule 111.2(a)
- Rule 111.2(f)

Other UN issuances (guidelines, policies etc.)

- UNMIK Standard Operating Procedures for the recruitment of international Staff for Pillar I, Pillar II

Related Judgments and Orders

2010-UNAT-021

2010-UNAT-029

UNDT/2010/083

UNDT/2010/102

UNDT/2010/155