



**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 of 7.1 months' salary.

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,

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

**THE UNITED NATIONS APPEALS TRIBUNAL**

Judgment No. 2011-UNAT-123

(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;

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 ghoh th0-1.8(e5.6.1( )5.2(-330.e(s)-0.c2(-330.s1qig).i))-1.ot Us230.Dr i( th)a6([.0l97.a(h0-1.s)-35-



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.<sup>1</sup> 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

**T**



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 11<sup>th</sup> 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 19<sup>th</sup> day of April 2011 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar