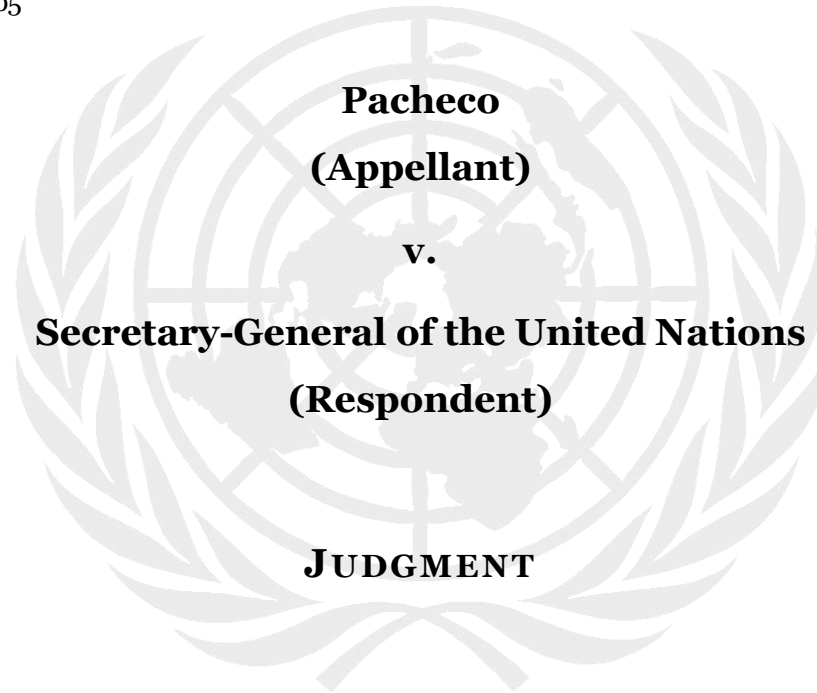




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2012-305



Before: Judge Inés Weinberg de Roca, Presiding
Judge Luis María Simón
Judge Richard Lussick

Judgment No.: 2013-UNAT-281

Date: 28 March 2013

Registrar: Weicheng Lin

Counsel for Appellant: Amal Oummih/Miles Hastie

Counsel for Respondent: Zarqaa Chohan

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Ms. Allegra Pacheco against Judgment No. UNDT/2012/008, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 13 January 2012. Ms. Pacheco filed her appeal on 23 March 2012, and the Secretary-General filed his answer on 1 June 2012.

Facts and Procedure

2. On 8 April 2003, Ms. Pacheco joined the Office for the Coordination of Humanitarian Affairs (OCHA) in Jerusalem as a Humanitarian Affairs Officer (Advocacy) on a one-year project personnel appointment (200 Series of the former Staff Rules) at the L-4 level. Her appointment was subsequently renewed.

3. In May 2008, a new Head of the OCHA office for the Occupied Palestinian Territory (OCHA-OPT) took up his functions, thus becoming Ms. Pacheco's supervisor.

4. In July 2008, OCHA-OPT held an office retreat to discuss the office's "role and objectives with regard to coordination and clusters, protection of civilians and access, advocacy and information management". In order to implement the conclusions of the retreat, it was decided that the structure of the office be revised, with three pillars: a new coordination pillar; the merger of advocacy and information into a second pillar; and a third pillar to ensure adequate support and administrative services to the office.

5. In September 2009, OCHA in New York (OCHA-New York) instructed all OCHA field offices, which were preparing cost plans for 2010, to respect the zero growth policy.

6. By e-mail dated 1 October 2009, the Chief, Americas & the Caribbean, Europe, Central Asia and Middle East Section (ACAEME), Coordination Response Division, OCHA-New York provided to the Head of OCHA-OPT the management's feedback on OCHA-OPT's cost plan for 2010. The e-mail stated that the cost plan could be reduced further, in particular with respect to staff costs, and that some of the advocacy functions could be mainstreamed in order to integrate them better within the coordination/protection and research/reporting units. The Head of OCHA-OPT found that the only way to do so was to abolish the post of Humanitarian Affairs Officer/Chief of Advocacy that Ms. Pacheco

occupied at the time. This suggestion was endorsed by the Director of the Coordination Response Division, OCHA-New York. The 2010 cost plan for OCHA-OPT, as approved by the Under-Secretary-General for Humanitarian Affairs on 3 November 2009, showed that Ms. Pacheco's "temporary post" had been approved for four months only, until 30 April 2010.

7. During a meeting held on 12 November 2009, the Head of OCHA-OPT informed Ms. Pacheco, in the presence of the Finance Officer, that her post would be abolished in 2010. By memorandum dated 13 November 2009, the Officer-in-Charge, Human Resources Unit (OiC/HRU), OCHA-Geneva, confirmed to Ms. Pacheco that the post was being abolished as of 30 April 2010. She was subsequently informed that she was not entitled to a termination indemnity, since her appointment had not been terminated, but that she was being separated as a result of the expiration of her appointment. By e-mail dated 17 November 2009, the OiC/HRU, OCHA-Geneva, assured Ms. Pacheco that her candidature for other posts would be taken into consideration.

8. Further to the contractual reform resulting in the abolition of the 200 Series appointments, Ms. Pacheco's 200 Series appointment expiring 31 December 2009 was converted to a fixed-term appointment effective 1 January 2010, and extended to cover the remainder of the period until the abolition of her post.

9. Ms. Pacheco requested management evaluation of the decision to abolish her post as of 30 April 2010, and to change the category of her "termination" from "abolition of post" to "expiration of contract". Having reviewed Ms. Pacheco's request, the Secretary-General decided to uphold the contested decision.

10. On 9 April 2010, Ms. Pacheco filed two applications with the UNDT, one to appeal the decision to abolish her post and separate her effective 30 April 2010, and the second to request suspension of the contested decision as an interim measure. On 20 April 2010, the UNDT rejected the suspension of action request and Ms. Pacheco was separated from service on 30 April 2010.

11. The UNDT issued Judgment No. UNDT/2012/008 on 13 January 2012, rejecting Ms. Pacheco's application. The UNDT found that

the Tribunal was not presented with evidence that persuaded it that the abolition of [Ms. Pacheco's] post was manifestly unreasonable, motivated by ill-will or a calculated

scheme to remove her from the office and that warranted the Tribunal's interference with the Respondent's discretion. The abolition of [Ms. Pacheco's] post appears to be the result of an acceptable exercise of discretionary power...

The UNDT also rejected Ms. Pacheco's contention that her appointment had not expired, but in fact had been terminated. Similarly, the UNDT rejected Ms. Pacheco's contentions that OCHA had breached its obligations to make a good faith effort to find an alternative suitable post for her and to consider her for a permanent appointment.

12. Ms. Pacheco appeals the UNDT Judgment.

Submissions

Ms. Pacheco's Appeal

13. Ms. Pacheco submits that the UNDT failed to provide her with a meaningful opportunity to present relevant evidence. Her right to cross-examine the Head of OCHA-OPT was unfairly curtailed to one hour of cross-examination and five written interrogatories. It was unreasonable to limit the cross-examination to less than two hours on a vital issue. The UNDT erred in law and in fact in striking out twenty-five of her thirty written questions. These questions were pivotal to proof of extraneous factors in the decision targeting her post for abolition, and proof of unfair implementation of the abolition decision.

14. The 1 October 2009 e-mail was the only document produced by the Secretary-General to demonstrate that all procedures had been followed in the consideration of the abolition of her post. The UNDT erred in law in finding that an e-mail was sufficient evidence to justify a decision to abolish a post.

15. Ms. Pacheco submits that the UNDT erred in admitting testimony that was not in accordance with Article 17(3) of the UNDT Rules of Procedure. The testimony of the Head of OCHA-OPT on 11 May 2011 was not given under oath. The UNDT therefore erred in admitting this evidence. Similarly, this witness' written statement of 3 June 2011 was not provided under oath and should therefore have been deemed inadmissible. The UNDT also erred in admitting an e-mail by that witness by which he amended one of his earlier answers. Ms. Pacheco was only informed of the e-mail at a later stage and was not allowed to make submissions on this document. The UNDT also abused its discretion in excluding Ms. Pacheco's 14 December 2011

submission of an OCHA document, which was in the public domain and which should have been turned over by the Secretary-General.

16. The UNDT erred in law by not ruling on Ms. Pacheco's requests to call witnesses or produce documents in the other party's possession.

17. Ms. Pacheco requests that the Appeals Tribunal award her two years' net base salary as well as unspecified compensation for moral injuries. In the alternative, Ms. Pacheco requests that the Appeals Tribunal remand the matter to the UNDT for a de novo hearing.

Secretary-General's Answer

18. The Secretary-General submits that the UNDT correctly concluded that the decision to abolish Ms. Pacheco's post was an acceptable exercise of his discretionary power. The UNDT extensively considered Ms. Pacheco's case; the proceedings before the UNDT lasted more than 18 months; and, the UNDT ordered the Secretary-General to produce evidence regarding the circumstances surrounding the decision to abolish her post. It held three oral hearings, at which it heard and allowed for cross-examination of Ms. Pacheco's supervisor, and it ordered that the parties submit closing statements. The burden on proving improper motivation lies with the staff member contesting the Organization's decision and Ms. Pacheco has failed to meet this burden.

19. The Secretary-General also submits that Ms. Pacheco has not established any errors warranting either a reversal of the UNDT's conclusion or remanding the case to the UNDT for additional findings of fact. In particular, Ms. Pacheco has failed to establish that the UNDT erred in its approach to conducting the cross-examination of a witness and in making its findings on the evidence.

20. The Secretary-General submits that Ms. Pacheco has failed to demonstrate that the UNDT erred in finding no error in the decision to abolish her post, or harm arising from any error by the Administration.

21. The Secretary-General requests that the Appeals Tribunal affirm the UNDT Judgment and dismiss the appeal in its entirety.

Considerations

22. Both the Appeals Tribunal and the Administrative Tribunal of the International Labour Organization (ILOAT) have held that it is well settled jurisprudence that “an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff”.¹

23. Ms. Pacheco argues that the UNDT made errors of fact concerning the abolition of her post. The UNDT considered all of the evidence and carefully weighed the evidence in light of the specific case argued by Ms. Pacheco in challenging the decision to abolish her post. In her appeal, Ms. Pacheco does not identify any evidence which contradicts the findings of the UNDT regarding the abolition of her post.

24. The Dispute Tribunal has 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 mindful that the Judge hearing the case has an appreciation of all the issues for determination and the evidence before it. “[W]hile Article 17(1) of the UNDT Rules of Procedure permits parties to call witnesses and experts to testify, Article 17(6) gives the Judge the discretion to decide whether the presence of witnesses is required. Under Article 18(5) of the UNDT Rules of Procedure, the Judge may limit oral evidence as he or she deems fit.”²

25. The UNDT exercised its discretion, for example, in reducing the number of written questions in order not to admit evidence, which lacked probative value. In order to establish that the Judge erred, it is necessary to establish that the evidence, if admitted, would have led to different findings of fact and changed the outcome of the case.³ Ms. Pacheco has failed to demonstrate, in light of the foregoing, that the UNDT erred in declining to hear the proffered evidence.

26. Ms. Pacheco’s supervisor gave oral and written testimony. The UNDT held three hearings, during two of which the author of the contested decision was heard and cross-examined. On appeal, Ms. Pacheco alleges that the UNDT erred in admitting oral and written evidence that was not in accordance with Article 17(3) of the UNDT Rules, as the witness had not

¹ *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-236, para. 25.

² *Ibid.*, para. 36.

³ *Abassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 20.

been sworn in prior to giving testimony. A review of the trial record reveals that Ms. Pacheco did not raise any of these issues prior to the witness giving testimony. During the oral hearing of 11 May 2011, the UNDT Judge noticed at the end of the hearing that he had failed to swear in the witness. He acknowledged that this constituted a procedural error, which he sought to correct by swearing in the witness retroactively. The trial record further reflects that Ms. Pacheco did not object, given the lack of time, to submit the questions she wished to put to the witness in writing and to receive his response in writing.

27. We find that the Dispute Tribunal erred in law in allowing testimony to be given at its hearing that was neither sworn, affirmed, nor made under a promise to tell the truth. The UNDT Rules of Procedure provide, in Article 17(3), that “[e]ach witness shall make the following declaration before giving his or her statement: ‘I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth.’”⁴

28. However, Ms. Pacheco must satisfy the Appeals Tribunal that the UNDT Judgment has one or more of the five defects mentioned in Article 2(1)(a) to (e) of the Appeals Tribunal’s Statute. These are the well known parameters by which to successfully challenge judgments of the UNDT. Ms. Pacheco, however, has failed to do so.

Judgment

29. The appeal is dismissed.

⁴ See *Azzouni v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-081.

Original and Authoritative Version: English

Dated this 28th day of March 2013 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Simón

(Signed)

Judge Lussick

Entered in the Register on this 8th day of April 2013 in New York, United States.

(Signed)

Weicheng Lin, Registrar