



UNITED NATIONS APPEALS TRIBUNAL

TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2010-099

Case No. 2010-100

Fuentes
(Appellant and Respondent)

v.

Secretary-General of the United Nations
(Respondent and Appellant)

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Jean Courtial Judge Mark P. Painter
Judgment No.:	2011-UNAT-105
Date:	11 March 2011
Registrar:	Weicheng Lin

Counsel for Adriana Fuentes: Antonio Lombardi

Counsel for the Secretary-General: Phyllis Hwang

JUDGE INÉS WEINBERG DE ROCA, Presiding.

Synopsis

1. Adriana Fuentes (Fuentes) failed to request an administrative review within two months as prescribed under the Staff Rules applicable at the time. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) rightly found her appeal regarding an investigation by the Office of Internal Oversight Services (OIOS) time-barred. The UNDT Judgment on this matter is affirmed.

2. The UNDT also correctly held that it is the special procedure under Administrative Instruction ST/AI/1998/9 and not Rule 111(2)(a) of the former Staff Rules that applied to appeals of classification decisions. The Administration failed to respond to Fuentes' appeal against the reclassification decision. For these reasons, we confirm the UNDT's conclusion that the decision not to reclassify Fuentes' post was illegal.

Facts and Procedure

3. Fuentes joined the Publication Service of the United Nations Office at Geneva (UNOG) in June 1989, at the G-2 level. She received a series of short-term contracts from 1989 to 2002, working as a Distribution Clerk and then as a Document Clerk. On 1 January 2002, she received a fixed-term appointment of two years at the G-4 level. On 1 January 2004, Fuentes' appointment was extended for two years.

4. On 31 January 2003, Fuentes' supervisor requested the reclassification of Fuentes' post to the G-5 level. On 25 November 2004, a Classification Officer in UNOG decided to maintain the post at the G-4 level. He informed Fuentes' supervisor in December 2004 who, in turn, informed Fuentes in January 2005.

5. On 22 February 2005, Fuentes filed a complaint with the Ombudsman claiming that she had been subjected to physical and administrative harassment.

6. On 29 March 2005, she appealed the decision not to reclassify her post under section 5 of ST/AI/1998/9. In April 2005, she was informed that her appeal had been forwarded to the Human Resources Management Service (HRMS). The Classification Officer of HRMS contacted Fuentes' supervisor inquiring whether the job description could

be augmented with more substantive functions to justify a reclassification. But Fuentes' supervisor who retired in December 2005 did not respond. Hence, Fuentes received no answer to her appeal of the decision not to reclassify her post.

7. On 9 May 2005, Fuentes requested OIOS to investigate her harassment allegations.

8. On 1 January 2006, Fuentes' appointment was extended for one year.

9. By letter dated 30 January 2006, the UNOG Director of Administration responded that the required administrative procedures to extend the appointment further had been initiated; that the other questions raised were under consideration; and that she would get back to Fuentes as soon as possible.

10. From January to May 2006, Fuentes sent several letters to the UNOG Director of Administration requesting the reclassification of her post as well as action on her harassment complaints.

11. On 19 July 2006, Fuentes received a three-year appointment, retroactively effective 1 January 2006.

12. On 21 July 2006, Fuentes filed a request for administrative review. On 30 October 2006, she filed an incomplete appeal with the Joint Appeals Board (JAB) and, on 11 January 2007, she filed her complete appeal.

13. The JAB examined three decisions challenged by Fuentes: the decision to only give her a one-year appointment in 2006; the decision not to reclassify her post and promote her; and the decision by OIOS not to investigate her harassment allegations.

14. The JAB noted that, since the one-year appointment in 2006 had been replaced by a three-year appointment, her claim on this point had become moot. It considered time-barred both her appeal against the decision not to reclassify her post and the OIOS decision not to investigate her harassment claims. On 8 February 2008, the Deputy Secretary-General informed Fuentes that the Secretary-General had accepted the JAB's recommendations.

15. Following several extensions of time, Fuentes filed an appeal with the former Administrative Tribunal on 10 July 2008. Following the abolition of the former

Administrative Tribunal, the appeal was transferred to the UNDT. In the meantime, on 1 December 2009, Fuentes was selected for a post in another office and promoted to the G-5 level.

16. On 14 April 2010, the UNDT issued Judgment No. UNDT/2010/064. It noted that Fuentes had received no response to her appeal of the non-classification decision; that the Administration had failed to respect the procedures under ST/AI/1998/9; and that the decision not to reclassify her post was therefore illegal.

17. It further concluded, based on its own review, that there was at least one error concerning the number of points given to the element of “work experience” on the form for the classification of the post. It found, based on this error, that Fuentes’ post would have normally been reclassified within three months from the request and that, once it was reclassified, she would have had a good chance to be appointed to the post within nine months. It therefore ordered the Secretary-General to pay half of the difference between the G-4 and G-5 salaries for the relevant period (from 1 February 2004 to 1 December 2009). The UNDT halved the difference in the salary because it considered that Fuentes had a “serious chance” as opposed to the certainty of being promoted.

18. Both parties appeal the Judgment.

Submissions

19. Fuentes requests that the Appeals Tribunal consider and determine the number of points to be attributed to factor 9 “Education/Experience”; recognize that the number of points attributed to the classification of her post amounted to 1305; decide that her post should have been classified as a G-5 post; and list her name on the *registre de promotions* (promotion list) as from January 2004, the date from which the UNDT considered that she had a serious chance to be appointed to a G-5 post.

20. Fuentes requests that the Appeals Tribunal consider her claim regarding harassment timely and annul the UNDT decision in this respect. She requests the Appeals Tribunal to find that she had been a victim of continued harassment and award her compensation in the amount of 120,000 Swiss Francs. Fuentes requests that the Appeals Tribunal reimburse the annual leave days that she used to compensate for the lack of sick leave days; and that her

sick leave days which she used during the period she suffered from depression as a result of the harassment be restored.

21. The Secretary-General requests that the Appeals Tribunal annul the UNDT Judgment and remand the case to the UNDT so that the UNDT may order the Secretary-General to institute the appeals procedure set out in ST/AI/1998/9 for reviewing the decision not to reclassify Fuentes' post.

Considerations

22. The parties raise several grounds of appeal, which the Appeals Tribunal will address in turn.

23. Fuentes contests the UNDT's finding that her appeal against the OIOS decision not to investigate the allegations of harassment was time-barred. OIOS informed Fuentes on 5 August 2005 of its decision not to conduct the requested investigation. It noted that Fuentes' allegations "would be more appropriately handled by the Human Resources Management Service UNOG". Fuentes argues that the OIOS communication could not be considered an administrative decision. A review of the record shows that Fuentes accepted the decision as final, and only appealed it the following year. The specific procedure before the OIOS concluded for Fuentes when she received OIOS' decision on 5 August 2005.

24. Under Rule 111(2)(a) of the former Staff Rules, she then had two months to "address a letter to the Secretary General requesting that the administrative decision be reviewed". It was only on 21 July 2006 that Fuentes contested the decision. Because Fuentes failed to request an administrative review within two months as prescribed under the Staff Rules applicable at the time, the UNDT rightly found her appeal time-barred. The UNDT Judgment on this matter is therefore affirmed.

25. We next turn to the Secretary-General's challenge to the UNDT's conclusion that the decision not to reclassify Fuentes' post was illegal.

26. On the standard of judicial review of classification decisions, we note and endorse, in principle, the jurisprudence of the Administrative Tribunal of the International Labour Organization (ILOAT) which repeatedly held that

[it] will not undertake an exercise to classify or reclassify posts in an organisation's structure ..., since decisions in this sphere lie within the discretion of the organisation and may be set aside only on limited grounds. Such is the case, for example, if the competent bodies breached procedural rules, or if they acted on some wrong principle, overlooked some material fact or reached a clearly wrong conclusion In the absence of such grounds, the Tribunal will not remit the case to the organisation, nor will it substitute its own post evaluation for that of the competent bodies...¹

27. In the instant case, the UNDT Judgment specifically states that the Administration did not follow the special procedure set out in Administrative Instruction ST/AI/1998/9. ST/AI/1998/9, Section 6, specifically and unambiguously sets out the appeal procedure for matters regarding classification of posts. As noted in the UNDT Judgment, Section 6.14 of the ST/AI establishes that “[t]he Assistant Secretary-General for Human Resources Management or the head of office, as appropriate, shall take the final decision on the appeal. A copy of the final decision shall be communicated promptly to the appellant, together with a copy of the report of the Appeals Committee. Any further recourse against the decision shall be submitted to the United Nations Administrative Tribunal.”

28. The UNDT correctly pointed out that it is this special procedure for classification under ST/AI/1998/9 and not Rule 111(2)(a) of the former Staff Rules that applies. The Administration failed to respond to Fuentes’ appeal against the reclassification decision. For these reasons, we confirm the UNDT’s conclusion that the decision not to reclassify Fuentes’ post was illegal.

29. The UNDT awarded damages, which both parties appeal. Fuentes requests the Appeals Tribunal to find that her post should have been reclassified and that her name be listed in the *registre de promotion* [promotion list] from January 2004, date from which the UNDT considered that she had a serious chance to be appointed to a G-5 post.

30. But, as set out above, this Tribunal will not undertake an exercise to classify or reclassify posts in an organization’s structure; and Fuentes does not show any error in the UNDT’s reasoning warranting our intervention.

31. The Secretary-General requests this Tribunal to annul the UNDT Judgment and to remand the case to the UNDT, so that the UNDT may order the Secretary-General to

¹ ILOAT Judgment No. 2807, 4 February 2009, “Consideration 5”.

institute the appeals procedure under ST/AI/1998/9. The Secretary General thereby admits that the procedure was flawed. But since Fuentes has, in the meantime, been promoted, a remand could not offer a remedy to Fuentes' position.

32. The Appeals Tribunal therefore upholds the UNDT Judgment. No additional damages are awarded. The Appeals Tribunal confirms the UNDT's order that the Secretary-General pay 24,500 Swiss Francs as compensation for the illegal decision not to reclassify her post.

Judgment

33. For the foregoing reasons, the Appeals Tribunal dismisses the appeals in their entirety.

Original and Authoritative Version: English

Dated this 11th day of March 2011 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Courtial

(Signed)

Judge Painter

Entered in the Register on this 19th day of April 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar