



UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2020-1372

Domitilla Bianca Icha

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

ORDER No. 390 (2020)

1. Ms. Domitilla Bianca Icha is a former staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).
2. By letter from the Human Resources Section dated 26 October 2017, Ms. Icha was informed that “[p]ursuant to the required reduction of staff because of the decreased MONUSCO budget allotment for 2017/2018 decided by the General Assembly”, her fixed-term appointment was to be terminated effective 31 October 2017 in accordance with Staff Regulation 9.3(a)(i) and Staff Rule 9.6(c)(i).
3. On 16 February 2018, Ms. Icha filed an application with the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) contesting the decision to terminate her fixed-term appointment. On 7 February 2020, the Dispute Tribunal in Nairobi issued Judgment No. UNDT/2020/024 dismissing the application.
4. On 28 February 2020, Ms. Icha filed an appeal and on 4 May 2020, the Secretary-General filed his answer.
5. During its 2020 Fall Session held from 19 to 30 October 2020, the United Nations Appeals Tribunal (Appeals Tribunal) considered Ms. Icha’s appeal.

6. With respect to Ms. Icha's ground of appeal that the UNDT erred in fact in requiring Ms. Icha to rebut the presumption of regularity of the Administration's acts without giving her an opportunity to contest the Secretary-General's arguments, the Appeals Tribunal noted that in her application to the UNDT, Ms. Icha had stated that "several similarly situated colleagues who were also in need of placement [had been] found posts and remain[ed] in service, including the colleagues, who [had] initially [been] identified along with her for separation". In his response to the application, the Secretary-General conceded that another FS-5 staff member also due to be separated (Mr. D R-B) had been reassigned to a newly created position in Kananga, funded by the Department of Political Affairs. There was no vacancy announcement for this position.

7. Ms. Icha did not ask the Administration to provide further explanations regarding this reassignment. However, by Order No. 022 (NBI/2020) of 27 January 2020, the UNDT requested that the Secretary-General provide further and more precise details on the process used to select Mr. D R-B, and not the other two similarly situated colleagues, for the reassignment to the newly created position.

8. On 3 February 2020, the Secretary-General presented evidence and explained that due to gender considerations, Ms. Icha and Ms. A Z had been considered not suitable for reassignment and "[a]fter considering all of the criteria, MONUSCO recommended the reassignment of Mr. D R-B".

9. In its Judgment, the UNDT stated that:¹

[t]he Respondent concedes that one similarly situated staff member was placed in a post after taking into account an objective selection criteria that included, gender, bearing in mind that the post was in a security risk area and it was preferable to assign a man rather than a woman. This explanation meets the standard of proof that the selection was regular. The Applicant has not rebutted this presumption by adducing any evidence to show that the selection of Mr. D R-B instead of her was irregular.

10. The Appeals Tribunal finds that the evidence and the explanation provided by the Secretary-General in response to Order No. 022 (NBI/2020) of 27 January 2020 raise serious legal issues. The recruitment limited to male staff members and the decision that the Appellant and Ms. A Z were considered not suitable for this reassignment could be

¹ Impugned Judgment, para. 67.

inconsistent with the Organization's gender policy. Furthermore, this recruitment appears to have been carried out without any vacancy announcement and with a lack of transparency.

11. Prior to the UNDT Judgment, Ms. Icha had no indication that she had been excluded from selection based on her gender. We find that there is a due process violation where a party is not given the opportunity to be heard on a specific argument at trial and that this failure could have had an impact on the outcome of the judgment.² In the present case, the time period between the Secretary-General's response to Order No. 022 (NBI/2020) and the UNDT Judgment was so short (three days) that we find that Ms. Icha was not given the opportunity to effectively challenge the specific legal issue raised by that response, which had an impact on the outcome. Accordingly, we find that the UNDT erred in procedure resulting in a due process violation which may be remedied by hearing the arguments and/or reviewing the evidence the UNDT failed to hear/review at trial.

12. According to Article 2(5) of the Appeals Tribunal Statute, the Appeals Tribunal shall not remand the case to the Dispute Tribunal, if a decision can be taken without oral testimony or other forms of non-written evidence. In the present case, the legal issue in question does not appear to require such evidence. Therefore, we order the parties to provide any documentary evidence and submissions that we may need in order to reach an informed and reasoned decision regarding the compliance of Mr. D R-B's reassignment with the Organization's gender policy and the impact that any non-compliance could have in this case.

13. The Appeals Tribunal will resume its consideration of the present case upon receipt of the aforementioned evidence and submissions.

² See Article 2(1)(d) of our Statute (emphasis added): The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has: ... (d) Committed an error in procedure, *such as to affect the decision of the case*".

IT IS HEREBY ORDERED that Ms. Icha submit the aforementioned documentary evidence and submissions by 16 December 2020 and the Secretary-General submit documentary evidence and submissions by 16 January 2021.

Original and Authoritative Version: English

Dated this 16th day of November 2020
in Brussels, Belgium.

(Signed)
Judge Jean-François Neven,
Presiding

Entered in the Register on this 16th day
of November 2020 in New York, United States.

(Signed)
Weicheng Lin, Registrar