



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

MOHAMED

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Joseph Grinblat

Counsel for Respondent:

Christine Graham, ALD/OHR, UN Secretariat

Introduction

1. On 12 January 2017, the Applicant filed this application contesting the “non-selection of [the] Applicant for a [Senior Human Resources Policies Officer] P-5 post ... [“the Post”] and selection of a non-qualified candidate instead”.
2. On the same day, the case was assigned to Judge Alessandra Greceanu and thereafter considered by her.
3. After various case management discussions and two hearings (on 15 March and 23 October 2017, respectively), both parties submitted their respective closing submissions on 16 May 2018.
4. On 22 December 2018, the General Assembly decided not to extend the *ad litem* judge position in New York, which expired on 31 December 2018 (see General Assembly resolution 73/276 [Administration of Justice at the United Nations]).
5. On 8 January 2019, the Applicant filed a submission titled, “New information about [the Office on Internal Oversight Services] and [the International Civil Service Commission (“ICSC”)]”, and appended additional new documentation.
6. On 18 January 2019, the Respondent filed (a) a motion to file amended closing submissions and (b) the said proposed amended closing submissions.
7. On 11 January 2019, the case was reassigned to the undersigned Judge.
8. By Order No. 37 (NY/2019) dated 15 February 2019, before entering into an examination of the merits of the present case and referring also to the Appeals Tribunal’s jurisprudence on the requirement of management evaluation, the Tribunal ordered the parties by 1 March 2019 to file submissions on the issue of whether the Applicant’s claim that the selection process was tainted by her having allegedly

rejected the sexual advances by the ICSC Chairman is receivable as part of the present case. The parties duly did so.

Consideration

9. As a preliminary matter, the Tribunal notes that it is competent to raise a receivability issue on its own initiative as confirmed by the Appeals Tribunal in, for instance, *Tintukasiri et al.* 2015-UNAT-526, para. 32, where it held that:

... Initially, the Appellants complain that the Dispute Tribunal exceeded its competence when it raised *sua sponte* the question of whether the applications were receivable *ratione materiae* in Order No. 14. There is no merit to this complaint. As our jurisprudence makes clear, the Dispute Tribunal “is competent to review its own competence or jurisdiction” under Article 2(6) of the UNDT Statute and “[t]his competence can be exercised even if the parties or the administrative authorities do not raise the issue, because it constitutes a matter of law [...]”. [*Christensen* 2013-UNAT-335, paras. 20-21 and *Chahrour* 2014-UNAT-406, paras. 28-29].

10. In the Applicant’s submission on the receivability of the issue of sexual harassment, she submits that the present case concerns a tainted selection process about which two legal arguments were presented to the Management Evaluation Unit (“MEU”): (a) the selected candidate did not possess the minimum requirements for the post, (b) the Applicant’s name was not in the short list, even though she had been found to be the best candidate by a neutral external assessment, because of discrimination against her by the Chairman of ICSC. Being the victim of sexual harassment from the Chairman was not a legal point in this case; it was only an explanation as to why the Chairman arranged for her not to be on the short list. There is a separate legal case concerning the sexual harassment allegations which was sent to the Office of Internal Oversight Services (“OIOS”) for investigation. The fact that Respondent had removed paras. 19 to 21 from his original closing submission is an implicit acknowledgment that the Applicant was, indeed, the victim of sexual harassment by the Chairman, which OIOS had recognized in an investigation that, according to the Secretary-General, found that the accusation was “credible”. This resulted in the Chairman resigning from

his post. Both legal issues, namely the selected candidate not being eligible, and Applicant's name being suspiciously without cause excluded from the short list, were presented to the MEU. The application is, therefore, receivable.

11. The Respondent contends that the Applicant's claim that the selection process was tainted by her having rejected the ICSC Chairman's sexual advances has not been the subject to management evaluation. Nowhere in the Applicant's management evaluation request is that claim made, either explicitly or implicitly. Consequently, the management evaluation outcome makes no reference to any such claim. To ensure that the purpose of the management evaluation process is met, namely exhaustion of administrative remedies, an applicant has an obligation to clearly identify the administrative decision that is in dispute. In the same vein, an applicant has a duty to clearly identify the grounds upon which he or she challenges the lawfulness of the contested decision. The Appeals Tribunal's judgment in *Aliko* 2015-UNAT-540 supports this proposition, which serves to foster judicial economy within the formal system of administration of justice. Accordingly, the Respondent is "open" to the Dispute Tribunal to find the claim not receivable.

12. The Tribunal observes that it follows from the consistent jurisprudence of the Appeals Tribunal that all claims and/or allegations must undergo management evaluation since this is mandatory for the issue at stake under staff rule 11.2 (as cited below). For instance, as referenced by the Respondent, in *Aliko* 2015-UNAT-540, para. 38, it was found that:

... Lastly, [the Dispute Tribunal] properly refused to address Mr. Aliko's various claims related to harassment on the ground Mr. Aliko "did not establish any proof of harassment against him, let alone how these allegations might have impacted on his non-selection of the disputed post". [reference to footnote omitted] [the Dispute Tribunal] did not err in reaching this conclusion. The allegations of prior discrimination were not set forth in the detailed request for management evaluation Mr. Aliko made on 10 December 2012; thus, [the Dispute Tribunal] had no competence to address them. Moreover, as [the Dispute Tribunal] properly found, such claims were of general discrimination, rather than "demonstrating specific discrimination when

[Mr. Aliko] was denied appointment to” the Post; [reference to footnote omitted] thus, they did not affect the selection process.

13. After closely perusing the case file and the parties’ contentions, on a preliminary basis and without prejudice to any findings in the judgment on the merits, it appears to the Tribunal that four independent issues had been submitted for the Dispute Tribunal’s review, namely (see Order No. 37 (NY/2019)):

- a. Whether the selected candidate possessed the minimum educational requirements outlined in the vacancy announcement?
- b. If the Chairman of ICSC inappropriately favoredized the selected candidate?
- c. If the Applicant was substantively more qualified for the position than the selected candidate?
- d. Whether the selection process was tainted by ulterior motives on the basis that the Applicant had allegedly rejected sexual advances from the Chairman of ICSC;

14. In the Applicant’s submission on the receivability of the issue of sexual harassment, her Counsel submitted that this matter is not a “legal point” in the present case, but merely “an explanation” of why the ICSC Chairman acted against her interests. However, the Tribunal observes that the Applicant, nevertheless, pleads the question as an independent issue in the closing statement dated 16 May 2018. Also, in comparison to the other issues outlined *supra*, the question is defined by its own factual circumstances and evidence and governed by its own legal framework. The question can, therefore, further be construed and identified as a separate and individual administrative decision, namely the decision not to selection the Applicant because of her rejection of the ICSC Chairman’s sexual advances, and therefore also constitutes its own distinct issue, or case, for the matter.

15. The Tribunal notes that, as relevant to the present case, staff rule 11.2 regarding management evaluation describes the requirements of such an evaluation, and the exceptions thereto, as follows:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

(b) A staff member wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General, or of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process is not required to request a management evaluation.

...

16. As the alleged decision not to select the Applicant because of her rejection of the ICSC Chairman's sexual advances is not (a) an administrative decision taken pursuant to advice obtained from technical bodies pursuant to ST/AI/2018/7 (technical bodies) or (b) of a decision taken at Headquarters in New York to impose a disciplinary or non-disciplinary measure pursuant to staff rule 10.2 following the completion of a disciplinary process, it therefore follows that the Applicant was under the obligation to request management evaluation before presenting her case to the Dispute Tribunal.

17. In the Applicant's submission of 21 February 2019, her Counsel admits that the issue had never undergone management evaluation. A perusal of the case file confirms this because:

a. In the request for management evaluation of the Applicant's non-selection, she brought issue with: (i) the successful candidate's qualifications; (ii) the content of the vacancy announcement; (iii) that the assessment panel was not impartial as all but one member were subordinates of the Chairman of

ICSC; and (iv) gender discrimination. No mention was made of the Applicant allegedly having rejected any sexual advances of the ICSC Chairman.

b. In the management evaluation letter dated 5 December 2016, the-then Under-Secretary-General for Management addressed the following three issues: (i) the selection procedure; (ii) the propriety of the vacancy announcement; and (iii) gender equality. Like the management evaluation request, nothing was stated about the alleged rejection of the Applicant of any sexual advances of the ICSC Chairman.

c. In the application to the Dispute Tribunal, the Applicant challenged her non-selection by referring to the following matters: (i) the successful candidate's qualifications; and (ii) that an assessment panel member was not consulted about the final short-list. Similarly, the application made no mention of the Applicant's allegedly having rejected some sexual advances of the ICSC Chairman.

d. In the Applicant's submissions dated 10 May 2017, her Counsel for the first time raised the issue that he described as follows: "that [the Applicant] being kept out of the short list, and thus being denied the promotion to P-5, is a vengeance [sic] from the Chairman of ICSC for having refused his repeated sexual advances". Her Counsel explained that, "[The] Applicant felt too embarrassed to mention in her original application that she was the object of frequent sexual approaches by [the ICSC Chairman], but was convinced by [C]ounsel that it was".

e. The issue of the ICSC Chairman's alleged sexual advances towards the Applicant thereafter became a topic at the hearing and in separate submissions made by both parties, including their closing submissions.

18. Consequently, it appears to the Tribunal that, in accordance with staff rule 11.2, the separate and independent issue of whether the selection process was tainted by the

Applicant having allegedly rejected sexual advances of the ICSC Chairman has not been the subject of management evaluation to date as otherwise required by staff rule 11.2(a).

Conclusion

19. In light of the above, the Tribunal orders that:

a. The Applicant's claim that the the selection process was tainted by ulterior motives on the basis that the Applicant had allegedly rejected sexual advances from the Chairman of the ICSC is not receivable;

b. By **4:00 p.m. on Monday, 8 April 2019**, the parties are to file a jointly-signed statement in which, under separate headings, they shall provide the following information in light of the Tribunal's new delineation of the issues in the present case:

i. A consolidated list of the agreed facts. In chronological order, this list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning;

ii. A consolidated list of the disputed facts. In chronological order, the list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning. If any evidence is relied upon to support a disputed fact, clear reference is to be made to the appropriate annex and/or page and line in the relevant hearing transcript, as applicable. At the end of the disputed paragraph in square

brackets, the party contesting the disputed fact shall set out the reason(s);

- iii. Insofar as any of the parties wishes to refer to a witness testimony provided at the hearings on 15 March and 23 October 2017 before Judge Greceanu, each party is to confirm that the undersigned Judge may rely on the transcript of the hearing or state if the relevant witness(es) instead need(s) to be heard again.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 26th day of March 2019

Entered in the Register on this 26th day of March 2019

(Signed)

Nerea Suero Fontecha, Registrar