



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/55

Judgment No.: UNDT/2010/021

Date: 4 February 2010

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

DE PORRES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Edward P. Flaherty

Counsel for Respondent:

Ivan Koulov, HRMS, UNOG

Application

1. In a letter to the United Nations Dispute Tribunal (UNDT) dated 23 July 2009, the Applicant requested it to:
 - a. Rescind the decision of 23 December 2008 whereby the Secretary-General refused to grant her compensation following the conclusions of the Joint Appeals Board (JAB);
 - b. Summarily dismiss the staff member whom she considers to be guilty of sexual harassment;
 - c. Rescind the selection process for the two text processing operator posts in the Spanish unit of the text processing section, at the G-3 level;
 - d. Order the Administration to pay her the sum of 496,000 CHF as compensation for the injury suffered.

Facts

2. The Applicant joined the United Nations Office at Geneva (UNOG), Conference Services Division, text processing section, Spanish unit, on 12 August 2002, as a text processing operator at the G-3 level, on a short-term contract. The Applicant subsequently held a number of short-term contracts, with a number of intervals in between. The Applicant's most recent contract at the United Nations Office at Geneva ended on 28 December 2006. The Applicant was later recruited by the World Health Organization and the International Labour Organization.
3. On 12 January 2007, vacancy announcement No. 07/GS/INT & EXT/000002 for two text processing operator posts in the Spanish unit of the text processing section, at the G-3 level, was published.
4. The Applicant applied for these posts on 22 January 2007 as an external candidate. On completion of the selection process, two other candidates were appointed to the two vacant text processing operator posts.

5. On 26 April 2007, the Applicant sent the Secretary-General a request for review of the administrative decision not to select her for one of the text processing operator posts.

6. On 13 June 2007, the Applicant submitted a complaint of sexual harassment by a supervisor to the Assistant Secretary-General for Human Resources Management.

7. The request for review was rejected on 23 July 2007 in a letter from the Acting Chief of the Administrative Law Unit of the Office of Human Resources Management (ALU/OHRM) of the United Nations Secretariat in New York. In that letter, the Acting Chief of the ALU/OHRM informed the Applicant that her sexual harassment complaint would be dealt with separately, in accordance with administrative instruction ST/AI/379.

8. The Applicant submitted an incomplete statement of appeal to the Joint Appeals Board in Geneva on 25 July 2007, and a full statement of appeal on 28 September 2007, against the decision not to select her for one of the vacant text processing operator posts.

9. The Joint Appeals Board that considered the appeal submitted its report on 20 October 2008, concluding that the decision not to select the Applicant for one of the text processing operator posts had not been tainted by procedural irregularities and had not been taken on unlawful grounds.

10. In his decision of 23 December 2008, communicated to the Applicant in January 2009, the Secretary-General did not follow the recommendations of the Joint Appeals Board. He found that the candidacy of the Applicant had not been properly considered, but refused to award her compensation.

11. In a letter dated 30 March 2009, the counsel for the Applicant submitted a *pro forma* application to the United Nations Administrative Tribunal (UNAT) instituting proceedings against the Secretary-General's decision of 23 December 2008, in which he requested an extension of time to file a full statement of appeal. After several extensions, the counsel for the Applicant filed an application instituting proceedings with the UNDT in a letter dated 23 July 2009. The counsel for the Applicant filed a supplement

to the application on 2 October 2009 and the Respondent submitted his response to the application on 9 November 2009.

12. In a letter dated 12 January 2010, the Tribunal informed the parties that the Judge considering the application was likely to raise *ex officio* the question of receivability and invited the parties to submit their comments on that issue. The counsel for the Applicant responded in a letter dated 27 January 2010 and noted that the Applicant was withdrawing her submissions regarding the rescission of the decision rejecting her candidacy for the text processing operator posts but was maintaining the other submissions made in the application.

13. In response to the letter of 12 January 2010 from the Dispute Tribunal, the Respondent maintained that the application concerned the decision not to select the Applicant for a post announced after her separation from service and not the non-renewal of her contract.

Arguments from the parties

Applicant's arguments

14. The Applicant argues that her candidacy was not examined objectively even though she had all the necessary skills and experience to be chosen for one of the two posts as a result of her numerous contracts at the United Nations Office at Geneva. She had more experience and seniority than one of the candidates who was recruited. No selection panel had been set up and no interviews were conducted. The decision was taken at the discretion of only one person, namely, the Chief of the Text Processing Section. It turns out, however, that she had been the victim of sexual harassment by that person since 2003 and has made a complaint in that regard.

Respondent's arguments

15. The Respondent argues that the Applicant had been partially satisfied with the Secretary-General's decision of 23 December 2008, which ran counter to the recommendations of the Joint Appeals Board. The Secretary-General had

explicitly recognized that the selection process had been flawed and that the Applicant's rights had not been respected.

16. The Respondent argues that if the Applicant believes that the decision not to launch disciplinary proceedings against the accused staff member was unlawful, she should submit a request to the Secretary-General for a review of that decision, something that she has not done; hence, the legality of that decision has not been formally referred to the Tribunal.

Judgment

17. The Applicant contests the decision of 23 December 2008 whereby the Secretary-General, though considering that the rejection of her candidacy for the text processing operator posts had been unlawful, had refused to grant her compensation in that regard.

18. The Tribunal must first determine the scope of the dispute, taking into consideration the provisions of rule 111.2 (a) of the Staff Rules in force at the time the decision not to select the Applicant was taken:

“A staff member wishing to appeal an administrative decision, pursuant to staff regulation 11.1, shall, as a first step, address a letter to the Secretary-General, requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing ...”.

19. In this case, it is quite evident from the request for review addressed to the Secretary-General on 26 April 2007 that the Applicant merely contested therein the rejection of her candidacy for the above-mentioned posts. While she also mentions the alleged harassment in the same request, it is only for the purpose of supporting her complaint about the rejection of her candidacy. Therefore, the only claim of which this Tribunal can be legitimately seized is the rejection of the Applicant's candidacy, and the submissions relating to the other claims mentioned must be rejected as irreceivable, in particular the one relating to the alleged harassment of the Applicant.

20. In a letter dated 12 January 2010, the UNDT informed the parties that the Judge was likely to raise the question of the receivability of the present request under article 2, paragraph 1, and article 3, paragraph 1, of the statute of the Tribunal, even though that question had not been raised as a defence by the Administration. The Tribunal must therefore examine that question immediately, before proceeding to any other consideration.

21. The Tribunal recalls that according to article 2, paragraph 1, of its statute:

“The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute ... (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment ...”.

22. According to article 3, paragraph 1, of the statute of the Tribunal

“An application under article 2, paragraph 1, of the present statute may be filed by:

(a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes; ...”.

23. Therefore, a combined reading of the two aforementioned texts is called for, consistent with the Tribunal’s previous ruling in an order on suspension of action (Order No. 3 (GVA/2010)), and it must be considered that the Dispute Tribunal is competent to rule on requests submitted by former staff members only in cases where the Applicant is appealing an administrative decision that is alleged to be in non-compliance with the terms of appointment as set out in contracts previously concluded with the Organization.

24. In this case, the documents in the file show that the Applicant’s last contract with the UNOG ended on 28 December 2006. On 12 January 2007, the date on which the vacancy announcement for the two text processing operator posts was published, the Applicant was no longer a staff member

and applied for those posts as an external candidate. The Applicant is therefore a former staff member contesting the decision not to be selected for a post that was published after her separation from service, and she cannot therefore allege any violation of the terms of appointment as set out in her previous contracts with the Organization. Therefore, in accordance with the aforementioned texts, the disputed decision cannot be appealed and the request for compensation in that regard can only be declared irreceivable before the UNDT.

25. However, the Tribunal can take into consideration the fact that the case was only transferred to it under paragraph 4.2 of ST/SGB/2009/11 on “Transitional measures related to the introduction of the new system of administration of justice”, and that, since the case had been initiated at a time when the former system of administration of justice was in force, the application would have been heard by UNAT had the deadlines not been extended.

26. The Dispute Tribunal must therefore examine whether the application would have been admissible by UNAT. According to article 2 of the statute of UNAT:

“1. The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words ‘contracts’ and ‘terms of appointment’ include all pertinent regulations and rules in force at the time of alleged non-observance ...

2. The Tribunal shall be open:

(a) To any staff member of the Secretariat of the United Nations even after his or her employment has ceased ...

3. In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal”.

27. Therefore it must be noted that the competence criteria of UNAT with regard to former staff members are the same as those of the UNDT, and that if the present application had been heard by UNAT, it could only have been

considered inadmissible, as UNAT had ruled in a similar case in its judgment No. 575, *Burtis* (1992).

28. In addition, the Dispute Tribunal finds that the request for review made to the Secretary-General on 26 April 2007 and the appeal before the Joint Appeals Board ought to have been declared irreceivable at that stage of the proceedings, for the same reasons as those stated above.

29. For these reasons, the Dispute Tribunal DECIDES that:

The application is rejected in its entirety.

(signed)

Judge Jean-François Cousin

Dated this 4th day of February 2010

Entered in the Register on this 4th day of February 2010

(signed)

Víctor Rodríguez, Registrar, UNDT, Geneva