



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/51

Judgment No.: UNDT/2010/035

Date: 26 February 2010

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

MEGERDITCHIAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Duke Danquah, OSLA

Counsel for Respondent:

Peri Johnson, LSO, UNDP

Introduction

1. On 20 March 2009, the Applicant submitted to the Joint Appeals Board (JAB) in New York an appeal against the 16 September 2008 decision whereby the Programme Manager of the Action for Cooperation and Trust (ACT) Project at the United Nations Development Programme (UNDP) field office in Cyprus informed her that she had not been selected for a project associate contract following interviews conducted by UNDP on 3 and 4 September 2008 and that her contract, which would expire on 31 October 2008, would not be renewed.

2. This appeal was referred to the United Nations Dispute Tribunal (UNDT) on 1 July 2009, pursuant to General Assembly resolution 63/253. By order dated 5 August 2009 on a change of venue, the Tribunal ordered that the Applicant's case be transferred from the New York registry to the Geneva registry.

3. The Applicant requests that the selection process in which she took part should be re-opened and that she be compensated for the emotional and financial harm that she suffered following the loss of her post.

Facts

4. The Applicant was recruited on 1 January 2005 as a G-4 programme assistant with UNDP-ACT in Cyprus on a fixed-term appointment under the 100 series of the Staff Rules in force at the time of the contested decision. The Applicant was promoted to G-5 on 1 July 2006. Subsequently, her contract was extended several times, expiring on 31 October 2008.

5. Following an audit conducted in December 2007 by the UNDP Office of Audit and a mission conducted by the UNDP Management Consulting Team in April 2008, it was decided to abolish the Business Centre where the Applicant worked. Five staff members, including the Applicant, lost their posts as part of this process.

6. In a memorandum dated 19 August 2008, the Programme Manager announced to all ACT staff members affected by the restructuring, whether

they held contracts under the 100 series of the Staff Rules then in effect or service contracts, that a competitive job fair for the available positions would be held and limited to the aforementioned staff. It was explained that holders of contracts under the 100 series of the Staff Rules then in effect would be given priority consideration. On 29 August 2008, details on the interview dates and modalities were provided.

7. The Applicant applied for the three project associate posts which were available on the basis of service contracts. She was short-listed and, on 3 September 2008, invited to be interviewed.

8. By a letter dated 16 September 2008, the Applicant was informed that her application for those posts had been rejected and that her contract, which would expire on 31 October 2008, would not be renewed.

9. On 13 November 2008, the Applicant submitted a request for review to the Secretary-General. By a letter dated 19 January 2009 and sent to the Applicant on 20 January 2009, the Assistant Administrator and Director of the UNDP Bureau of Management rejected her request for review.

10. On 20 February 2009, the Applicant submitted an incomplete statement of appeal to the JAB in New York, followed by a complete statement of appeal submitted on 20 March 2009. The Respondent submitted his response on 1 June 2009.

Parties' contentions

11. The Applicant's principal contentions are:

- a. The Applicant disputes the need for the restructuring and emphasizes that the Business Centre where she worked had been set up only recently in order to subsequently justify the abolition of her post. She believes that the management organized the restructuring in order to retain certain individuals on the basis of ethnicity and to remove other long-serving staff of the Organization. Based on a comparison of her duties with the terms of reference of the project associate service contract to be filled,

- she disputes the Administration's claim that 50 per cent of the functions provided for under the service contracts were different from those of the post she had held. The Applicant maintains that the decision not to renew her contract, allegedly due to the abolition of her post as part of the restructuring, violated her acquired rights and that the procedure was improper;
- b. Following the restructuring of her service, the Applicant was forced to apply for the project associate positions. The Administration had indicated clearly, both orally and in writing, that only staff members could apply for the available posts and that holders of contracts under series 100 of the Staff Rules in effect when the contested decision was taken would be given priority. Notwithstanding the Administration's claim, the 19 August 2008 memorandum of the Programme Manager is unequivocal in this respect;
- c. The Applicant, who maintains that she had been in the service of the Organization for eight years, was considered along with candidates who had service contracts and were therefore not staff members. The fact that the Applicant had to compete with less-qualified external candidates for a post that was substantially similar to the post that she held was a violation of her right to be given priority;
- d. The candidates were not treated equitably. Prior to the interviews, two candidates who were subsequently selected and who had previously had service contracts and thus were not staff members, had the opportunity to discuss the new initiatives and were invited by the Administration to participate in the design of the future projects with future partners, which was not the case for the Applicant;
- e. The interview was held improperly in that it was conducted through teleconferencing from abroad by someone who did not know the local office. There were breaks in communication and

recordings of the interview show that the questions asked of the Applicant were irrelevant;

- f. The terms of reference for project associate service contracts stipulate that the contract holders must be familiar with ATLAS, which the candidates who were selected were not;
- g. Thus, the Administration selected the least competent and least qualified candidates without taking into account the Applicant's many qualifications and, instead, retained an unqualified candidate. The selection procedure was biased and designed to exclude the Applicant. The Administration must produce the interview reports so that the objectivity of the candidate assessments can be verified;
- h. The terms of the Applicant's contract were violated because she was not treated in the same way as the other staff members. The contested decision constitutes an abuse of the Administration's discretionary authority. The provisions of the Staff Rules with respect to harassment were violated. The Applicant had a contract under the 100 series of the Staff Rules and, as an internal candidate, she was entitled to priority consideration for the available posts;
- i. Contrary to customs in Europe, where employees whose employment is terminated after a contract of more than six months duration are entitled to redundancy pay, she has not received any such payment;
- j. As to the Respondent's argument that selection for a service contract is a procurement exercise, the Applicant maintains that in that case, UNDP should have advertised the posts externally, which was not done.

12. The Respondent refers the Tribunal to his 1 June 2009 memorandum to the JAB. His principal contentions are:

- a. Following an audit conducted by the Office of Audit in December 1997 and a mission conducted by the UNDP Management

Consulting Team in April 2008, changes in the ACT Project, including abolition of the Business Centre where the Applicant worked, were recommended;

- b. All but one of the local staff posts were restructured. Several new staff posts and service contracts were created and five staff members, including the Applicant, lost their posts. Thus, in this restructuring, the Administration exercised its discretionary power and the United Nations Administrative Tribunal (UNAT) has recognized that it was not competent to examine the appropriateness of such measures;
- c. UNDP is financed by voluntary contributions from Member States and other partners in order to fund specific programmes and projects; this requires regular restructuring of programmes with necessary consequences for its staff members;
- d. The Applicant did not provide any evidence that the restructuring process was conducted for other reasons;
- e. The ACT Project was evaluated midway through its six-year project cycle and it was recommended that it should be restructured with a view to budget savings. Of the 15 local staff posts prior to the restructuring, nine were abolished and three service contracts were created;
- f. While there are some similarities of functions between the programme assistant position and the new project associate service contract, there are also essential differences; inter alia, the holders of service contracts are independent contractors. During the restructuring, it was decided that the office's functions during the second phase of the ACT Project would be better performed by independent contractors. Thus, the service contracts, which differed in function, number and kind from the abolished staff posts, were not a one-for-one substitution for the programme assistant posts;

- g. In accordance with UNDP restructuring procedures, a competitive job fair was held;
- h. Notwithstanding the Applicant's statement, she was a staff member not for eight years, but only as from 1 January 2005. In accordance with rule 104.12 (b) (iii) of the Staff Rules then in effect, services rendered under a service contract or special service agreement are not counted towards seniority;
- i. Notwithstanding the Applicant's statement, her contract was not terminated; it expired, and its non-renewal was at the management's discretion;
- j. In accordance with rule 104.12 (b) (iii) of the Staff Rules in effect at the time of the contested decision, the Applicant also had no right to a different type of appointment. The Administration informed her of her rights and of its intent to assist her in her search for other employment;
- k. There was no staff post to which the Applicant could have applied. Since she was initially appointed to a United Nations post on 1 January 2005 and thus had not accumulated the five years of continuous service envisaged by rule 104.12 (b) (iii) of the Staff Rules in effect at the time of the contested decision, the Administration had no specific obligations to the Applicant following the abolition of her post;
- l. The application is not receivable in as much as it concerns the refusal to award the Applicant a service contract since the awarding of such contracts is a procurement exercise, not a staff appointment, and is not covered by the terms of employment or by the Staff Rules and Regulations. If the Applicant wished to contest the decision not to award her a service contract, she should have registered a formal bid protest with the UNDP Procurement Support Office. Even if the application were receivable, it should be noted that the term "staff" used in the 19 August 2008 memorandum announcing the job fair was used broadly in order to

encompass all personnel affected by the restructuring, including service contract holders. This is clear from the context and from the title of the memorandum, which is clearly addressed to all affected staff (100 series appointments and service contract holders);

- m. The Applicant is confusing a priority in consideration of her application with a guarantee of placement, which should not exist in a job fair. She was short-listed and interviewed but was not considered as qualified as the candidates who were selected. The Applicant did not provide any evidence that the selection procedure was improper and the Respondent objects, in particular, to any claim of racial, ethnic or religious prejudice.

13. The Respondent requests the Tribunal to reject the application in its entirety.

Considerations

14. The Tribunal must first rule on the Administration's request that the confidentiality of certain documents which the Tribunal requested the Respondent to provide be preserved.

15. Under article 18, paragraph 2, of its rules of procedure, the Tribunal may require the parties to produce any document that it deems necessary for disposal of the proceedings and the parties must produce the document, even if they believe it to be of a confidential nature.

16. Under article 18, paragraph 4, of its rules of procedure, the Tribunal may also decide whether a document is confidential and, if so, under its own responsibility, impose measures to preserve the confidentiality of the information provided. In the case at hand, the Tribunal, in considering this application, did not use the confidential documents that it had requested and therefore did not transmit them to the Applicant. In this case, therefore, their confidentiality was preserved.

17. The Applicant is contesting both the refusal to award her a project associate service contract and the refusal to renew her fixed-term contract.

18. With respect to the decision not to award her a project associate service contract, the Tribunal must first rule on its competence in light of the following provisions of its statute.

19. 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, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

20. Article 3, paragraph 1 (a) and (b) of the Tribunal’s statute reads:

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;”

21. It emerges from these provisions that the Tribunal is not competent to consider the application in so far as it concerns a decision not to award the Applicant a project associate service contract since the management awards such contracts to non-staff members. While the Applicant was still a staff member on the date of her application for such a contract, it is clear that such a contract is not governed by the Staff Rules and Regulations and that it is not, therefore, part of the Applicant’s conditions of service or of her employment contract and that the refusal to award her such a contract is not an administrative decision within the meaning of the aforementioned article 2.

22. It is, however, clear from the aforementioned provisions that the Tribunal is competent to consider this application in so far as it concerns the decision not to renew the Applicant's fixed-term contract.

23. Rule 104.12 (b) (iii) of the Staff Rules in effect at the time of the contested decision states "The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment" and rule 109.7 (a), then in effect, states "A temporary appointment for a fixed-term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment".

24. Thus, although, in accordance with the consistent jurisprudence of the UNAT, decisions concerning the renewal of fixed-term contracts lie within the discretionary power of the Secretary-General, it has also been that Tribunal's jurisprudence that such decisions must not be taken arbitrarily or for unlawful reasons (see the Tribunal's Judgements Nos. 885, *Handelsman* (1998); 981, *Masri* (2000); and 1052, *Bonder* (2002)).

25. In contesting the decision not to renew her contract, the Applicant maintains that the decision to reorganise the service was, in reality, taken for the sole purpose of eliminating some staff members by abolishing their posts so that their functions could be assigned to service contract employees. Assuming that the Administration intended to assign the tasks that she performed to non-staff members, this restructuring of the service falls within the discretionary power of the Secretary-General and its appropriateness cannot be contested in Court.

26. While the Applicant alleges that the restructuring decision was taken in light of ethnic criteria, these allegations are not specific enough to allow the Tribunal to rule on the matter. Consequently, the Applicant does not establish the unlawfulness of the decision not to renew her contract.

27. However, the Tribunal must also consider whether the Administration made the Applicant promises that it did not keep. In his memorandum dated 19 August 2008, the Programme Manager announced that a job fair would be held in order to fill staff posts and service contracts. The memorandum stated "Only UNDP-ACT staff affected by the reclassification can apply for

the internal vacancies, whereby 100 series contract holders have priority consideration”. The Tribunal considers that such a promise, in light of its wording, could only be understood by the Applicant as giving her the virtual certainty of receiving a service contract if she applied and if her qualifications corresponded to the requirements.

28. It is clear from the documentary evidence provided, including the terms of reference of the project associate service contract, that the work required of holders of this type of contract is substantially similar to the work that the Applicant was doing and that the Applicant had the necessary qualifications to receive the contract. Thus, in light of the commitment made by the Administration in its memorandum of 19 August 2008, the Applicant, who, unlike the selected candidates, held a 100 series contract, could in good faith consider that there was every likelihood that she would receive a service contract, and thus a salary, from the Organization. The Administration therefore made the Applicant promises that it did not keep and made a commitment to her, as the UNAT decided in its decision No. 444, *Tortel* (1989).

29. By failing to keep its promises, the management caused harm to the Applicant, who could legitimately believe that at the end of term of her appointment with the Organization she would receive a service contract, and thus a salary.

30. Under these circumstances, the Tribunal sentences the Administration to pay the Applicant a lump sum equivalent to three months of her net base salary at the end of her term of employment with the Organization.

Decision

31. For these reasons, the Tribunal DECIDES:

The Respondent shall pay the Applicant a lump sum equivalent to three months of her net base salary at the end of her term of employment with the Organization.

(signed)

Judge Jean-François Cousin

Dated this 26th day of February 2010

Entered in the Register on this 26th day of February 2010

(signed)

Víctor Rodríguez, Registrar, UNDT, Geneva