



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/059

Judgment No.: UNDT/2010/159

Date: 3 September 2010
English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

IBEKWE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Jacques Vignes

Counsel for Respondent:
Bettina Gerber, UNOG

Introduction

1. On 21 April 2009, the Applicant contested the decision of the Secretary-General to reject her request for compensation for the prejudice suffered as a result, first, of the harassment of which she had been a victim for 10 years, second, of the placement of unfavourable documents on her personnel file, and last, of the decision not to select her for posts for which she was qualified, especially the post published under Vacancy Announcement No. 07-HRI-OHCHR-41-4977-R-Geneva.

2. The Applicant requests the following:

- a. That her pension retirement rates be recalculated to take into account the promotion she should have been given and the payment of the difference in salary she should have received during the period running from 29 May to 28 August 2008;
- b. That the Organization be ordered to pay her the sum of USD250,000 as compensation for the moral damages suffered and the sum of USD25,000 as costs, all with interest.

Facts

3. The Applicant began her service with the United Nations in May 1980 as a clerk/stenographer with the United Nations Volunteer Program (“UNVP”) of the United Nations Development Program (“UNDP”) in Geneva at the G-3 level, on a fixed-term contract. She resigned in December 1982.

4. On 30 January 1984, the Applicant joined the United Nations Conference on Trade and Development (“UNCTAD”) on a short-term contract as a typist at the G-3 level, where her contract was extended several times. On 18 November 1985, she joined the Centre for Human Rights (“CHR”) as a clerk on the G-3 level, also on a short-term contract that was extended several times. On 1 March 1988, the Applicant was appointed

Secretary at the G-4 level, and was promoted to the G-5 level on 1 October 1989 in the Office of the Assistant Secretary-General for Human Rights, CHR.

5. On 13 December 1995, the Chief of the Personnel Service of the United Nations Office at Geneva (“UNOG”) requested the Applicant to provide comments on a collective complaint she had lodged with other colleagues. By memorandum dated 27 February 1996, the Chief, Personnel Service, UNOG, informed the Applicant that given the general nature of the allegations contained in the complaint, with no details as to the facts, the procedure opened with regard to discriminatory and racist practices in UNOG had been closed.

6. On 6 November 1997, the Chief, Personnel Service, UNOG, answered the Applicant’s letter of 15 October 1997 referring to irregularities in the selection of staff in the Office of the United Nations High Commissioner for Human Rights (“OHCHR”). In her letter, the Chief, Personnel Service, UNOG, noted that after checking those allegations, she had deemed them unfounded and that the case had been closed.

7. The Applicant was offered a permanent appointment on 1 September 2006.

8. On 13 July 2007, the post of G-6 Secretary at OHCHR was advertised under Vacancy Announcement No. 07-HRI-OHCHR-414977-R-Geneva, with a deadline of 12 August 2007 for the submission of candidacies. The Applicant submitted her application on 6 August 2007 and was interviewed on 13 September 2007 as a 30-day mark candidate. Subsequently, the Applicant was informed that she did not meet the requirements and another candidate was chosen for the post.

9. The Applicant then applied for another post of G-6 Secretary, advertised on 18 September 2007 under Vacancy Announcement No. 07-HRI-OHCHR-415305-R-Geneva, with a deadline of 18 October 2007. Although the Applicant was a 30-day mark candidate, her candidacy was not

released for evaluation and another candidate eligible at the 15-day mark was selected.

10. By letter dated 28 November 2007, the Applicant requested the Secretary-General to review the decision to place adverse material in her personnel file. In that same letter, she drew the Secretary-General's attention to the treatment that had been inflicted on her for the past 10 years and asked him to investigate the discrimination of which she had been a victim.

11. The Applicant was separated from service upon retirement from the Organization, on 31 December 2007.

12. By letter dated 25 January 2008, the Chief, Human Resources Management Service ("HRMS"), UNOG, replied to the Chief, Administrative Law Unit ("ALU"), Office of Human Resources Management ("OHRM"), New York Secretariat, that since the claims of harassment and discrimination put forward by the Applicant dated back 10 years and that the Applicant had not identified any precise administrative decision, her request for administrative review was not admissible in that respect. He further noted that with regard to the Applicant's request for administrative review against the administrative decisions not to select her for one of the two above-mentioned posts, the applicable procedure had been followed and the Applicant's rights had not been violated. With regard to the filing of adverse material on the Applicant's personnel file, the Chief, HRMS, UNOG, stated that the Applicant's personnel file did not contain any such material. He also emphasized that the fact that she had been granted a permanent appointment in 2006 served to prove that her efficiency, competence and integrity had been recognized by the Organization.

13. On 29 May 2008, the Applicant was appointed on a short-term contract until 28 July 2008 as Secretary, at the G-5 level, step 12. This appointment was renewed until 28 August 2008.

14. On 4 February 2008, the Officer-in-Charge, ALU, OHRM, denied the Applicant's request for review.

15. On 27 March 2008, the Applicant appealed to the Geneva Joint Appeals Board (“JAB”) against the decisions not to select her for the two above-mentioned posts and against the letter of 25 January 2008 from the Chief, HRMS, UNOG, and the corresponding reply from the ALU dated 4 February 2008. In her appeal, the Applicant went on to stress that she was not contesting the decision not to select her for the post published under Vacancy Announcement No. 07-HRI-OHCHR-415305-R-Geneva and that the decision not to select her for the post published under Vacancy Announcement No. 07-HRI-OHCHR-41-4977-R-Geneva stemmed from the discrimination she had allegedly faced for 10 years and from the fact that the Chief of the Branch, which was behind her not being recommended for the post, had a bias against her.

16. The Respondent submitted a reply on 12 June 2008 and the Applicant responded with comments on 11 July 2008. The JAB submitted its report on 4 December 2008, recommending that the Secretary-General reject the appeal in its entirety.

17. By letter dated 26 January 2009, the Deputy Secretary-General transmitted a copy of the JAB report to the Applicant and informed her that the Secretary-General had decided to reject her appeal.

18. The Applicant filed a *pro forma* application with the former UN Administrative Tribunal on 21 April 2009. The Applicant then filed an application on 30 June 2009, which was returned to her, as it did not meet the requirements of art. 7 of the Tribunal’s rules. The Applicant’s Counsel then filed a complete appeal, which was dated 11 September 2009 and was received by the Tribunal on 6 October 2009. The Respondent submitted its reply on 30 December 2009. The appeal was transferred to the United Nations Dispute Tribunal (“UNDT”) on 1 January 2010, where it was registered under No. UNDT/GVA/2010/059. The Applicant was asked to provide her comments on the Respondent’s reply, which were conveyed to the Respondent for information.

19. By letter of 21 May 2010, the Applicant's Counsel informed the Tribunal that he was no longer defending the Applicant.

20. By e-mail dated 28 May 2010, the Office of Staff Legal Assistance ("OSLA") informed the Tribunal that it was defending the Applicant at her request.

21. By letter dated 28 July 2010, the Judge in charge of the case informed the parties that he intended to raise on his own initiative the question of the inadmissibility of part of the application, given that the request for review submitted to the Secretary General on 28 November 2007 only pertained to the decision to place adverse material on the Applicant's personnel file.

22. On 9 August 2010, the counsel assigned to the case by OSLA informed the Tribunal that he was no longer defending the Applicant.

23. A hearing was held on 30 August 2010, at which the Applicant was present with a new counsel.

Parties' contentions

24. The Applicant's contentions are:

- a. She was subjected to harassment and discrimination for over 10 years, which affected her career progression;
- b. The discrimination and harassment she faced also stemmed from the fact that adverse material, namely two memoranda from the Chief, Personnel Service, dated 13 December 1995 and 6 November 1997, were placed on a separate personnel file and not in her Official Status File ("OSF"), in violation of administrative instruction ST/AI/292;
- c. The Applicant explained that she only discovered the document while replying to the memorandum from the Chief, HRMS, UNOG, on 25 January 2008, and that it was only at that moment that she understood the impact that those memoranda had had on

her career. In that respect, according to Judgment UNDT/2009/011, *Sefraoui*, it is only when an applicant learned the identity of the successful candidate that he could reasonably have apprehended that there were grounds for submitting a request for review; therefore time began running from the date of discovery of the identity of the successful candidate. In the Applicant's case, the deadline for submitting a request for review could only start to run once she realized the impact that the two memoranda had had on her candidature. Her claim in this respect should therefore be found to be admissible. In addition, the Administration did not give her an opportunity to respond to the memoranda of 1995 and 1997 contemporaneously with their submission. Notwithstanding the Respondent's assertions, the two memoranda constitute adverse material;

- d. The Applicant applied for over 20 posts unsuccessfully and was repeatedly denied advancement. The Respondent misused its discretionary power in the selection decision for the post published under Vacancy Announcement No. 07-HRI-OHCHR-41-4977-R-Geneva, which constitutes a *détournement de pouvoir*; in particular, the Chief of the Branch in which the post was located was biased against her, which came out when the Chief of the Branch gave testimony at a Joint Disciplinary Committee case involving the Applicant. The Applicant's candidacy was not accorded fair consideration. The Applicant therefore requests the Tribunal to vitiate the decision not to select her for the above-mentioned post;
- e. The Applicant has adduced proof of her allegations and recalls a recent example of the present Tribunal regarding the burden of proof (UNDT/2009/095, *Sefraoui*);
- f. As for the Respondent's argument that the Applicant's complaint concerning the harassment and discrimination to which she has been subjected for 10 years is inadmissible, even if one considers that these requests cannot be treated like a separate request, they

are in any event admissible as elements of proof making it possible to corroborate the Applicant's other requests.

25. The Respondent's contentions are:
- a. The Applicant's general claims of harassment and discrimination do not constitute an administrative decision that can be appealed and are thus not admissible;
 - b. The claim is inadmissible as regards the adverse material placed on the Applicant's OSF since the Applicant refers to documents dating back over 10 years; the documents were placed on the Applicant's OSF pursuant to administrative instruction ST/AI/292. In particular, there is nothing adverse about these documents and they certainly contain nothing that supports the Applicant's claims of harassment;
 - c. As for the decisions not to select the Applicant for two posts, the Respondent submits that the two decisions were a legitimate exercise of the Administration's discretionary authority with regard to selection and that the Applicant had no right to selection for the two posts in question. The assessment of candidates for posts is the sole responsibility of the Administration and the Tribunal cannot substitute its view for that of the Secretary-General;
 - d. With regard to the post published under Vacancy Announcement No. 07-HRI-OHCHR-415305-R-Geneva, the procedure laid down in administrative instruction ST/AI/2006/3 was followed. Section 7.1 of this administrative instruction provides that "in considering candidates, programme managers must give first priority to lateral moves of candidates eligible to be considered at the 15-day mark...". In the case at hand, a 15-day candidate was selected and the 30-day candidates, including the Applicant, were not called for an interview;

- e. Similarly, for the post published under Vacancy Announcement No. 07-HRI-OHCHR-41-4977-R-Geneva, the Respondent submits that the procedure foreseen by administrative instruction ST/AI/2006/3 was followed and the decision not to select the Applicant constitutes a valid exercise of administrative discretion. The Applicant's rights were respected and the claim is unfounded;
- f. The decisions not to select the Applicant were not tainted by improper motives and the Applicant did not produce any such evidence. The Applicant's candidacies were given full and fair consideration;
- g. The Applicant's plea for payment at the G-5, step 12 level instead of Step 1 for a short-term assignment after she had already retired is inadmissible, pursuant to staff rule 111.2(a), as the Applicant did not present it at the time of initial administrative review;
- h. The Applicant's pleas for monetary compensation are unfounded and should be rejected.

Judgment

26. It is necessary to begin by deciding whether the claim is inadmissible.

27. Staff rule 111.2(a) in force at the time provided as follows:

A staff member wishing to appeal an administrative decision ... 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.

28. Thus, the request for the review of an administrative decision was a prerequisite for subsequently challenging such decision through the avenues of formal contestation open to staff members. The lack thereof would mean

that the application is inadmissible (see Judgments UNDT/2009/070, *Planas*; UNDT/2009/054, *Nwuke*; UNDT/2009/035, *Caldarone*).

29. However, as can be seen from the letter dated 28 November 2007 which the Applicant sent to the Secretary-General, the only request for review in the file is that the Applicant is asking, on the one hand, that the decision to place adverse material on her personnel file be reviewed and, on the other hand, that an inquiry be conducted into the discrimination to which she was allegedly subjected over 10 years. Thus, contrary to what the Officer-in-Charge, ALU considered in his letter of 4 February 2008, the Applicant did not ask the Secretary-General to review the decisions not to select her for the post published under Vacancy Announcement No. 07-HRI-OHCHR-415305-R-Geneva or the post published under Vacancy Announcement No. 07-HRI-OHCHR-41-4977-R-Geneva, but merely referred thereto in her request for review as an argument with a view to substantiating her allegations of harassment and discriminatory treatment.

30. Given that the Tribunal may only examine the conformity of the decisions that form the subject-matter of a request for review submitted to the Secretary-General, the appeal is not admissible insofar as it contests the decisions not to select her.

31. With regard to the allegations of harassment and discrimination against the Applicant, it should be noted that the jurisdiction of the Tribunal is limited pursuant to article 2.1(a) of the Statute of the Tribunal, to hearing and passing judgment on the conformity of an “administrative decision”. Yet, although the Applicant asked the Secretary-General, in her letter of 28 November 2007, to investigate the discrimination she allegedly faced over a 10-year period, she did not refer to any express or implicit decision that the Administration had allegedly taken refusing to conduct such an investigation. Thus, as there is no contested administrative decision, the appeal can only be declared inadmissible as far as the allegations of harassment and discrimination are concerned.

32. With regard to the memoranda dated 13 December 1995 and 6 November 1997 which were placed on the Applicant's OSF, she maintains that they constitute two adverse documents as defined by administrative instruction ST/AI/292 and that they were included in an unofficial file, given that they were not in her OSF when she consulted it in the early 2000s.

33. Assuming that the two contested documents may be deemed to be adverse material as defined by administrative instruction ST/AI/292, in any event, the Tribunal noted that the documents in question were in the Applicant's OSF. In view of the fact that, quite regrettably, the documents contained in these files bear neither reference codes nor numbers, it is impossible to determine the exact date on which they were placed on file. As it is incumbent upon the Applicant to prove her allegations, the Tribunal can only note that the Applicant has failed to do so.

34. In addition, the Applicant herself recognized during the hearing that she had received the documents in question when they were drafted in 1995 and 1997. Thus, contrary to what she asserts, she was in a position to submit comments if she had deemed them unfavourable. Finally, if the Applicant had wished to contest these memoranda via a formal review, she had to respect the time limit of two months laid down in rule 111.2(a) of the former Staff Rules and to submit her request for review by early 1996 at the latest for the former and by early 1998 for the latter. As a result, any contesting of the memoranda of 13 December 1995 and 6 November 1997 can only be deemed not to have respected the statutory time limit.

Decision

35. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(signed)

Judge Jean-François Cousin

Dated this 3rd day of September 2010

Entered in the Register on this 3rd day of September 2010

(signed)

Víctor Rodríguez, Registrar, UNDT, Geneva