



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/107

Judgment No.: UNDT/2011/089

Date: 23 May 2011

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

RAHIMI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Najmia Rahimi

Counsel for Respondent:

Myriam Foucher, UNOG

Marie Boillat, UNOG

Introduction

1. In an appeal submitted on 15 February 2011 to the United Nations Dispute Tribunal, the Applicant, a former staff member of the United Nations Population Fund (“UNFPA”), who was the victim of a fraud related to a fake vacancy announcement, contests the “failure of the Administration, owing to its negligence, to take appropriate measure in identifying, investigating, shutting down and notifying the Applicant on time about the ... scam after having been notified of the same by the Applicant’s representative and later the Applicant herself”.

Facts

2. The Applicant worked as a National Advocacy and Information Management Officer at UNFPA in Afghanistan from October 2007 to June 2010, when she resigned.

3. By email dated 8 February 2010, the Applicant received a forged list of vacant positions in the United Nations Office for the Coordination of Humanitarian Affairs (“OCHA”) in Geneva.

4. In March 2010, the Applicant applied to several positions from the above-mentioned list.

5. On 13 April 2010, the Applicant’s aunt, now her Counsel, had a meeting with the Chief, Office of the Director-General, United Nations Office at Geneva (“UNOG”), during which she allegedly gave him the Applicant’s applications and the vacancy announcements in order for him to transmit them to the Director of the Geneva Office of OCHA.

6. By email dated 28 April 2010, the Applicant received a forged offer of employment for the post of Public Information Officer at the P-4 level in OCHA, Geneva.

7. By email dated 2 May 2010, the Applicant accepted the job offer and returned it to what she thought was the Human Resources Section of OCHA.

8. By email dated 4 May 2010, the Applicant informed UNFPA that she would resign from her post effective 4 June 2010.

9. The Applicant received a forged offer for accommodation in Geneva requesting her to transfer the amount of USD5,150 to the bank Maxwell China Limited. She did so on 26 May 2010.

10. By the end of May 2010, the fraud was discovered.

11. On 2 June 2010, the Counsel for the Applicant informed the Chief, Office of the Director-General, UNOG, about the fraud. On the same day, the latter shared his concern about the situation with the Director of the Geneva Office of OCHA, and pointed out that the fraud needed to be shut down.

12. By email dated 13 July 2010 to the Management Evaluation Unit (“MEU”), UN Secretariat, the Applicant submitted a request for management evaluation in which she explained her situation and requested assistance in finding a solution to her case.

13. By letter dated 3 August 2010, the Chief, MEU, UN Secretariat, noting that the Applicant was a former staff member of UNFPA and that UNFPA has delegation of authority to conduct its own management evaluations, recommended that the Applicant refer her request to the Executive Director of UNFPA.

14. By email dated 21 August 2010 to MEU, the Applicant expressed her disagreement with the reply to her request for management evaluation and pointed out that UNFPA had nothing to do with her case since she had resigned from her post in that Organization.

15. By email dated 1 October 2010 addressed to Counsel for the Applicant, the Under-Secretary-General for Management expressed her concerns in relation to the Applicant’s situation, but clarified that her request for management evaluation could not be considered by MEU because first, she was a former

UNFPA staff member and MEU cannot review requests related to UNFPA staff members and second, because there was no decision on the part of the United Nations that could be appealed. She, however, proposed to draw UNFPA attention to the Applicant's regrettable situation and to ask UNFPA to review her case.

16. On 11 October 2010, Counsel for the Applicant replied to the Under-Secretary-General for Management emphasizing that the request for management evaluation was against OCHA not UNFPA because of the negligence committed by the Director of the Geneva Office of OCHA in relation to the fraud. She pointed out that the Applicant had not requested management evaluation to obtain a job with UNFPA but to bring justice to her case.

17. The Applicant submitted her application to the Tribunal on 15 February 2011 after having been granted three extensions of the time limit to do so. The Respondent submitted her reply on 21 March 2011. The Applicant filed observations on the Respondent's reply on 7 April 2011.

18. On 3 May 2011, an oral hearing took place in which Counsel for the Applicant and Counsel for the Respondent participated.

Parties' submissions

19. The Applicant's principal contentions are:

a. The Administration failed to fulfill its duty of care and take appropriate steps to prevent a foreseeable risk of injury to the Applicant. As a result, she lost her employment with UNFPA, bore financial loss in the amount of USD5,000 and suffered professional and psychological damage;

b. The failure of the Administration to take appropriate measures when there is a duty of care is an implicit administrative decision as recognized in the jurisprudence of the former UN Administrative Tribunal and the Administrative Tribunal of the International Labour Organization;

c. Although her applications and the fake vacancy announcements were handed over to the Director of the Geneva Office of OCHA in April 2010, the Administration did not take any action when the fraud was brought to its attention. In the meantime, the Applicant's contact with the fraudsters was lost which reduced the chances of pursuing them. The failure of the Director of the Geneva Office of OCHA to take reasonable steps to prevent a foreseeable risk of injury to the Applicant amounts to negligence on the Administration's part.

20. The Applicant requested as remedies: restoration of employment in any OCHA Office or an equivalent post within the United Nations, compensation for the financial loss incurred in the amount of USD5,000, compensation for damages related to the loss of her post in UNFPA, payment of moral and exemplary damages in the amount of CHF100,000 for professional and psychological damages, award of legal fees, interest on all amounts awarded at the rate of 8% and that the Respondent be required to undertake an independent investigation into the fraud and that the report of such investigation be shared with the Applicant.

21. The Respondent's principal contentions are:

a. The application is not receivable *ratione materiae*. The Applicant did not contest a decision taken by the Administration which could be challenged before MEU and the Tribunal. OCHA did not make a decision affecting the Applicant's situation;

b. While the Applicant alleges that her Counsel handed over her applications to the Chief, Office of the Director-General, UNOG for him to give them to the Director of the Geneva Office of OCHA, it is submitted that the latter was not yet in function in April 2010, and that it would have been inappropriate for him to interfere in the purported selection process;

c. The Under-Secretary-General for Management, the Chief, Office of the Director-General, UNOG, and the Director of the Geneva Office of

OCHA offered their assistance to the Applicant for her return to UNFPA. She, however, turned the offers down;

d. The Organization took the issue of fraud seriously. The Office of Legal Affairs was informed and specific information about the frauds was added on the OCHA official website.

Consideration

22. In accordance with article 2, paragraph 1(a), of its Statute, the Tribunal has jurisdiction to hear and pass judgement on an application filed by an individual to appeal “an administrative decision” that is alleged to be in non-compliance with the terms of appointment or the contract of employment.

23. The former UN Administrative Tribunal recognized in its jurisprudence that:

An administrative decision is a unilateral decision taken by the Administration in an individual case, affecting the legal rights of the staff member. The Tribunal is well aware, however, that, in certain circumstances, the failure to act on the part of the Administration amounts to an administrative decision (see *Andronov (ibid.)*), as might be the case where the staff member involved has claimed to be the victim of harassment or mobbing, for example, and the failure of the Administration to intervene is adverse to the staff member. (Judgment No. 1383 (2008))

24. Following this line, the Appeals Tribunal has clearly stated that not taking a decision is also a decision (see *Tabari* 2010-UNAT-030). Therefore, the Tribunal considers that an administrative decision can be considered as such if, *inter alia*, it has been taken by the Administration, which implies not only a positive act but also an omission when the duty to take action is established by a rule. In such a case, the Tribunal may consider that the failure of the Administration to act violates an applicant’s right prescribed in a rule.

25. The Applicant contests the failure of the Administration to take appropriate measures in relation to a fraud, committed in the name of OCHA, of which she was a victim. The main issue to determine is thus whether the

Administration had a legal obligation towards the Applicant to take action at any stage.

26. First, there has never been a legally relevant relationship between OCHA and the Applicant within the meaning of the Tribunal's Statute or even as described by the Appeals Tribunal in *Iskandar* 2011-UNAT-116 and *Gabaldon* 2011-UNAT-120. Obviously, such a relationship could not have been based on the fake vacancy announcements with which OCHA had nothing to do and for which it was not responsible. Neither OCHA nor any other Organization can be made liable for criminal abuse of its name and reputation.

27. Contrary to the Applicant's assertion, the fact that her aunt submitted her applications to a UN staff member also did not create a legally relevant relationship. No Organization is legally bound to respond to uninvited applications for jobs the Organization had not previously announced. Although it may be considered a matter of courtesy for the Organization to return the submitted documents together with a clarifying statement, no legal obligation to do so can be found. To find the contrary would imply that the Administration is in the duty to take action in relation to every candidacy received, which would be against the formal selection process system put in place by the Organization.

28. The Applicant also alleges that the Administration failed to fulfill its duty of care and to take appropriate steps to prevent a foreseeable risk of injury. She bases her allegations on jurisprudence of the former UN Administrative Tribunal and the Administrative Tribunal of the International Labour Organization. However, the jurisprudence mentioned is not relevant to the Applicant's case but, in general terms, concerns safety and security arrangements which were or were not made in order for staff members to carry out their functions (see UN Administrative Tribunal Judgment No. 1204, *Durand* (2005)).

29. The Applicant, who resigned from her post in UNFPA and who was not a staff member of OCHA, has no standing to claim that the Administration did not fulfill its duty of care by not preventing the fraud or pursuing its perpetrators, even if such a fraud was committed using the name of OCHA. In this regard, the Tribunal notes that the Organization has taken action to prevent fraud by

including a fraud alert on the UN careers website and in OCHA vacancy announcements.

Conclusion

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

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 23rd day of May 2011

Entered in the Register on this 23rd day of May 2011

(Signed)

Víctor Rodríguez, Registrar, Geneva