



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/044
(UNAT 1667)
Judgment No.: UNDT/2011/160
Date: 15 September 2011
English
Original: French

Before: Judge Jean-François Cousin
Registry: Geneva
Registrar: Anne Coutin, Officer-in-Charge

DOUAJI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Aref R. Zafari

Counsel for Respondent:

Adèle Grant, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the failure of the Administration to implement the Secretary-General's decision of 14 June 2004, which ordered that, for a period of six months, the United Nations Disengagement Observer Force (UNDOF) Administration should give her priority consideration for appointment to any future vacancy in UNDOF for which she was found qualified.

2. The Applicant requests the Tribunal to order that:

- a. Priority consideration should be accorded to her in obtaining a post commensurate with her qualifications;
- b. The period from the time the Applicant terminated her service to the date she is reinstated should be considered as special leave with full pay;
- c. Compensation should be awarded to her for damages suffered.

Facts

3. The Applicant was recruited by UNDOF on 7 September 1981 on a one-month contract as a Clerk-typist at the G-3 level. Her contract was extended several times, and on 31 May 1984, was converted to a temporary indefinite appointment. She was promoted to the G-4 level as a Secretary on 1 October 1987.

4. The Applicant was separated from service on 31 August 1992 following the abolition of her post. Prior to her separation, she was offered another post outside Damascus, which she first refused but later accepted. However, at that point, the post had already been filled.

5. In October 1992, the Applicant appealed the termination of her service with the Joint Appeals Board. While the Board found that the Applicant did not have a legal claim on the Organization, it recommended that her name should be

retained on the roster of candidates for employment by UNDOF Administration and that she should be given priority consideration for appointment to any future vacant post for which she was qualified.

6. On 29 April 1993, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had directed that her name should be retained on the roster of candidates for employment by the UNDOF Administration and that she should be given priority consideration for appointment to any future vacant post for which she was qualified.

7. On 22 April 1997, the Applicant filed a complaint with the Joint Appeals Board, claiming that the UNDOF Administration had not carried out the Secretary-General's instructions as contained in the letter of 29 April 1993. On 24 July 1997, the Presiding Officer of the Joint Appeals Board advised the Applicant that her appeal was not receivable because the Secretary-General's instruction was not an appealable administrative decision within the meaning of Chapter XI of the Staff Rules in force at the time.

8. Following an appeal by the Applicant, in its Judgment No. 916, *Douaji* (1999), the former United Nations Administrative Tribunal found that the Board's Presiding Officer had improperly rejected the Applicant's appeal and remanded the case to the Joint Appeals Board for consideration on the merits.

9. On 4 March 2004, the Board recommended that the Applicant should be paid five months' net base salary as compensation for the delay in consideration of her appeal. In addition, the Board found that the decision of 29 April 1993 was still valid and therefore recommended that priority consideration should be given to the Applicant for appointment to any future vacancy for which she was qualified, within six months.

10. On 14 June 2004, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to accept the recommendations of the Joint Appeals Board.

11. On 25 July 2004, Counsel for the Applicant wrote to UNDOF, alleging that four or five employees had recently been recruited and that the Applicant had not been considered for the vacancies, despite the fact that she was qualified.

12. In a meeting with UNDOF Administration, Counsel for the Applicant was informed that there was a General Service post available and that the Applicant could sit for the associated tests.

13. On 6 August 2004, the Applicant was invited to sit for a competitive recruitment examination in respect of the post of Procurement Assistant (G-5). On 9 August, Counsel for the Applicant wrote to UNDOF, stressing that the post was not suitable for the Applicant as her experience was “mainly administrative”. He further noted that in this case, she should be provided with specific training for the job or the post should be offered to a staff member with experience in procurement, whose post would then be offered to the Applicant.

14. On 11 August, UNDOF informed the Department of Peacekeeping Operations that it would no longer consider the Applicant for the Procurement Assistant post but would consider her for other future vacancies.

15. On 14 August 2004, Counsel for the Applicant once again wrote to UNDOF, contending that giving priority consideration to the Applicant meant that she should be given any available post for which she was qualified and could perform the duties and denouncing irregularities in the recruitment process.

16. On 27 November 2004, Counsel for the Applicant asked UNDOF to shortlist the Applicant for two vacancies then available. On 14 December, he made a similar request with regard to an opening for a Procurement Assistant post, requesting that the Applicant be offered training that would allow her to compete under equal terms.

17. By a letter dated 10 December 2004, UNDOF informed the Applicant that in future, when there was an opening for an administrative post, her personal history form would be transmitted to the Section Chiefs to enable her inclusion in the shortlist of candidates for testing and interview.

18. On 21 December 2004, Counsel for the Applicant wrote to UNDOF to express his concern that the Applicant had not yet been recruited.

19. On 25 February 2005, the Applicant sat a competitive examination for a Procurement Assistant (G-5) post announced on 22 December 2004. She received 27.50 marks out of 100, the lowest score among the four shortlisted candidates.

20. On 18 March 2005, she sat the competitive examination for a temporary post of General Services Clerk (G-4) announced on 7 March 2005 and scored 64 marks out of 100, the lowest score among the four shortlisted candidates.

21. By a letter dated 27 March 2005, Counsel for the Applicant once again expressed concern at the fact that the Applicant had not yet been recruited. He wrote to UNDOF again on 4 April 2005.

22. On 10 April 2005, the Applicant filed an application with the former Administrative Tribunal, claiming that the Administration had not implemented the Secretary-General's decision of 14 June 2004.

23. On 11 April 2005, the Applicant sat the competitive examination for a post as Administrative Assistant (G-5) in the Transportation Section, which was announced on 25 March 2005. Her score of 55 marks out of 100 was the lowest among the six shortlisted candidates.

24. In its Judgment No. 1316 (2006), pursuant to article 10.2 of its Statute, the former Administrative Tribunal remanded the case to the Joint Appeals Board in order for it to determine whether the Administration had given priority consideration to the Applicant's candidature, and awarded her compensation of three months' net base salary for the procedural delay.

25. On 13 March 2007, the Applicant filed an appeal with the Joint Appeals Board and on 20 May 2008, the Board issued its report. The Board decided that the Secretary-General's decision of 14 June 2004 had been implemented.

26. By a letter dated 25 November 2008, the Applicant was informed that the Secretary-General had rejected her appeal.

27. On 4 January 2009, the Applicant filed an appeal with the former Administrative Tribunal.

28. The case, which was pending before the Administrative Tribunal when it was abolished on 31 December 2009, was transferred to the United Nations Dispute Tribunal on 1 January 2010 pursuant to the transitional measures set out in United Nations General Assembly resolution 63/253.

29. By a letter dated 14 January 2011, the Registry informed the parties that the Tribunal did not find a hearing necessary for the case in question and invited them to express their views on the matter. Neither party expressed any objection.

Parties' contentions

30. The Applicant's contentions are:

- a. A number of facts demonstrate that the Administration had no real intention to reinstate her. Among other issues, the results of the tests and interviews were tampered with;
- b. Giving the Applicant priority consideration for a post does not mean that she will be offered the post only if she is the most qualified candidate;
- c. The Administration did not make every effort to offer her a new post.

31. The Respondent's contentions are:

- a. The Administration gave priority consideration to the Applicant's candidature for several vacancies at UNDOF. According to the Administrative Tribunal's jurisprudence, giving priority consideration to a candidate does not mean automatic appointment, but rather that when a candidate afforded priority consideration has the same qualifications as other candidates, preference shall be given to that candidate;

b. The decisions not to appoint the Applicant were not taken for improper reasons and it is for the Applicant to prove the irregularities that she alleges. The panels that conducted the three competitive examinations were all different, which counteracts any notion that there was a scheme to deliberately prevent the Applicant from being re-engaged by UNDOF;

c. The Administration made a considerable effort to give priority consideration to the Applicant for all vacancies at UNDOF for which she was qualified. The Applicant obtained the lowest results in all of the impartial recruitment exercises and was therefore not qualified for any of the posts.

Consideration

Receivability

32. The Tribunal must first decide on its own motion whether it is competent to rule on the present application.

33. In this connection, it should be borne in mind that the application in the present case was transferred to the Dispute Tribunal pursuant to General Assembly resolution 63/253, which decided that all cases pending before the former Administrative Tribunal on 1 January 2010 would be transferred with effect from that date to the present Tribunal.

34. Article 2.1 of the Statute of the former Administrative Tribunal provided that the Tribunal was “competent to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of employment of such staff members ...”. That Tribunal made clear in its jurisprudence that, in order to be receivable, an application must invoke an administrative decision whereby the applicant was harmed. It also defined, notably in its Judgment No. 1157, *Andronov* (2003), what was meant by an “administrative decision”. That definition was adopted by the present Tribunal and the Appeals Tribunal (see

Tabari 2010-UNAT-030). In addition, the former Administrative Tribunal declared in its Judgment No. 1213 (2004):

The Tribunal must first make a determination on the issue of receivability. A finding that the case is not receivable would negate the need to enter into its merits.

The essential element of an appeal is that there is a contested “administrative decision”.

35. Article 8 of the Statute of the present Tribunal provides that “an application shall be receivable if [among other conditions], [t]he [...] Tribunal is competent to hear [...] the application, pursuant to article 2 of the present Statute”.

Article 2.1 of the Statute states:

The [...] Tribunal shall be competent to hear [...] an application filed [...] against the Secretary-General as the Chief Administrative Officer of the United Nations [...] [t]o 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.

36. Thus, the jurisdiction of the former Administrative Tribunal, like that of the new Dispute Tribunal, is limited to ruling on the lawfulness of administrative decisions.

37. The Tribunal must therefore examine whether the Applicant is challenging an appealable administrative decision. It is clear from the foregoing that, following the abolition of her post, the Applicant separated from service on 31 August 1992 and contested the decision to terminate her contract. In response to this contestation, on 29 April 1993, the Under-Secretary-General for Administration and Management informed her of the Secretary-General’s decision that her name would be retained on the roster of candidates for employment by UNDOF Administration and that she would be given priority consideration for appointment to any future vacant post for which she was qualified. Subsequently, following several appeals by the Applicant, the Under-Secretary-General for Management informed her on 14 June 2004, that the Secretary-General had decided that for a period of six months, starting from the date of her receipt of the

decision, the UNDOF Administration should give her priority consideration for appointment to any future vacancy in UNDOF for which she was found to be qualified.

38. Thus, the Secretary-General's decision of 14 June 2004, which is the only one contested in the present application, is, despite the fact that it was taken when the Applicant was no longer a staff member, an administrative decision directly linked to the Applicant's termination of employment and therefore meets the criteria for an administrative decision that is appealable to the Tribunal.

39. In the present appeal, the Applicant challenges the Administration's failure to comply with an administrative decision: the Secretary-General's promise to give priority consideration to her candidature for vacancies at UNDOF. Thus, the Applicant claims that the Administration failed to respect her rights under her original contract. The present Tribunal must therefore declare itself competent, as the former Administrative Tribunal did in its Judgment No. 916, *Douaji* (1999), wherein it ruled on its competence to rule in a dispute analogous to the present case.

Merits

40. Given that the Administration is accountable for its failure to keep its promises to staff members, the Tribunal must first assess the precise scope of the promises made by the Secretary-General to the Applicant and then determine whether the Administration acted in accordance with those promises.

41. The Tribunal wishes to clarify that, as stated by the Appeals Tribunal (see *Megerditchian* 2010-UNAT-088), a promise to give priority consideration, such as the one made to the Applicant on 14 June 2004, should be understood as giving preference to the Applicant over other candidates only if her qualifications are the same as theirs. In other words, if there are candidates with better qualifications than the Applicant, the Administration is in no way bound to offer her the available post.

42. The Tribunal must now consider whether the Administration respected the Secretary-General's promise to give the Applicant priority consideration for appointment to vacancies at UNDOF for a period of six months beginning on 14 June 2004.

43. The Respondent claims, without any serious refutation by the Applicant, that between 6 August 2004 and 11 April 2005, she was shortlisted and considered for four vacancies. On 6 August 2004, she was invited to sit for an examination for a Procurement Assistant post at the G-5 level. The Applicant declined the invitation and requested that she should be given specific training for the post or that the post should be offered to a staff member with qualifications in the area of procurement, whose post would then be offered to the Applicant. Following the announcement of another vacancy for a similar post, on 22 December 2004, the Applicant sat the competitive examination but obtained the lowest score. On 18 March 2005, the Applicant sat another competitive examination for a General Services Clerk at the G-4 level and again scored the lowest among the four shortlisted candidates. Lastly, following a vacancy announced for an Administrative Assistant post, issued on 25 March 2005, the Applicant scored the lowest of the six candidates shortlisted for the post.

44. In view of the foregoing, the Applicant is not justified in claiming that the Administration did not keep its promise of 14 June 2004. The application must therefore be rejected in its entirety.

Conclusion

45. For these reasons, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 15th day of September 2011

Translated from French

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Entered in the Register on this 15th day of September 2011

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry