



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/010

Judgment No.: UNDT/2012/028

Date: 16 February 2012

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

BAJNOCI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Miguel Angel Longone

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member of the International Criminal Tribunal for the former Yugoslavia (“ICTY”), challenges the “Chief of Section and Head of Organ’s conduct during the review process of [her] eligibility and suitability for conversion to a permanent appointment”, as well as the Management Evaluation Unit’s decision “to determine the Applicant[’s] case as moot and closing thereafter the request for management evaluation without addressing the Applicant’s requests”.

2. She seeks compensation for the breach of her contractual rights “by applying subjective beliefs of high standards [of efficiency] in her contractual review and recommendations”, for “the unnecessary physical and mental stress and anxiety suffered as a results of the abuse of authority and arbitrary and unequal treatment manifested in the treatment of her case”, and for the Management Evaluation Unit’s “lack of treatment of [her] request for management evaluation in accordance to their mandate”. She further requests the Tribunal to “call into order the ICTY managerial responsibilities of the Chief of Section and the Head of Organ in this case and the omission from [the Management Evaluation Unit] for not processing [her] request in accordance to their administrative mandate”.

Facts

3. The Applicant joined ICTY in May 2001 as a General Service staff member.

4. On 23 June 2009, the Secretary-General issued the Secretary-General’s bulletin ST/SGB/2009/10 on the consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009. Guidelines on the consideration for conversion were further approved by the Assistant Secretary-General for Human Resources Management on 29 January 2010.

5. In May 2010, the Applicant was found to be eligible for consideration for conversion.

6. On 16 July 2010, the Applicant's Chief of Section informed the Applicant verbally that she had decided not to recommend her for conversion because she considered that she did not meet the highest standards of efficiency and competence required as per section 2 of ST/SGB/2009/10.

7. By memorandum dated 2 September 2010, following the Applicant's request, the Applicant's Chief of Section provided her with written reasons for the decision to not recommend her for conversion to permanent appointment. She reiterated that she had not recommended the Applicant because she "felt that with respect to efficiency and competence, [her] performance was inconsistent" and therefore, she was "unable, at the time, to certify that [her] performance has 'shown that [she] meet[s] the high standards of efficiency [and] competence ... established in the Charter'" (emphasis in original).

8. On 15 September 2010, the Applicant requested management evaluation of her Chief of Section's decision to not recommend her for conversion to permanent appointment.

9. By letter dated 27 September 2010, the Management Evaluation Unit ("MEU") at the United Nations Secretariat Headquarters informed the Applicant that her case would be submitted to the local Central Review Panel ("CRP") and that since a final determination had yet to be made by the CRP, it would put her request for management evaluation in abeyance pending further developments.

10. By letter dated 30 September 2010 addressed to the CRP, the Applicant contested the Chief of Section's decision not to recommend her for conversion to permanent appointment.

11. By memorandum dated 15 October 2010, the Chief of the Human Resources Section at ICTY informed the Applicant that the CRP had found that she met the conditions of section 2 of ST/SGB/2009/10 and had therefore "recommended that the ICTY Human Resources submit [her] recommendation to [the Office of Human Resources Management] for conversion to a permanent

contract”. On 18 October 2010, ICTY forwarded the Applicant’s name to OHRM as suitable for conversion.

12. By letter dated 19 November 2010, MEU informed the Applicant that further to the CRP recommendation in her favour, it considered that her request for management evaluation of 15 September was moot.

13. The Applicant filed the present application on 17 February 2011 and the Respondent submitted his reply on 24 March 2011.

14. By Order No. 30 (GVA/2012) of 8 February 2012, the Tribunal informed the parties that it considered that the case could be dealt with on the papers, without a hearing, and gave them one week to file objections, if any. Neither party objected to a judgment being rendered without a hearing.

Parties’ submissions

15. The Applicant’s principal contentions are:

- a. Her Chief of Section and Head of Organ failed to comply with their obligations and violated her rights in not recommending her for conversion. They should be held accountable;
- b. Her request for management evaluation was not moot. None of the important managerial and contractual issues submitted to MEU in her request and communications were addressed by MEU;
- c. MEU failed to comply with its obligation to respond to her request for management evaluation of the abusive conduct of her Chief of Section and Head of Organ. It disregarded the impact of such conduct on her contractual rights and on her physical and psychological well-being.

16. The Respondent’s principal contentions are:

- a. The Applicant does not contest an appealable administrative decision within the meaning of article 2 of the Tribunal’s Statute but the “conduct” of her Chief of Section. As conduct does not constitute an

administrative decision “which produces direct legal consequences to the legal order”, it cannot be appealed;

b. Further, the Applicant has failed to request a management evaluation of the “conduct” of her Chief of Section. In her request for management evaluation, the Applicant challenged the decision not to recommend her for conversion. Accordingly, the application in so far as it concerns the conduct of the Chief of Section is not receivable;

c. In addition, the Applicant did not file a formal complaint related to the challenged conduct. Her claims in this respect cannot be heard by the Tribunal because it is not the role of the Tribunal to conduct a preliminary investigation into the Applicant’s allegations related to the conduct of her Chief of Section;

d. Even interpreting the application as challenging the decision of the Chief of Section to not recommend the Applicant for conversion, this decision was overturned by the CRP and the application is therefore moot. In addition, the Chief of Section’s decision not to recommend the Applicant is only a preliminary step in a decision-making process and a claim against this preliminary step is not receivable;

e. The Applicant’s claim against MEU is also not receivable. A response to a request for management evaluation is not an administrative decision within the meaning of article 2 of the Tribunal’s Statute. While the findings of a management evaluation may be reviewed by the Tribunal in the context of the challenge to an underlying administrative decision, they do not form an independent administrative decision subject to appeal;

f. The Applicant’s claims are also without merit. She does not present any legal arguments as to how the conduct of the Chief of Section violated her terms of appointment. Despite the Chief of Section’s decision not to recommend her, she was eventually recommended. Under these circumstances, she fails to establish how her rights have been breached. Further, the Chief of Section’s interpretation of ST/SGB/2009/10 was reasonable and she acted in good faith;

g. The Tribunal cannot award compensation for distress, frustration or disappointment absent a breach of legal rights and a showing of actual damages.

Consideration

17. In her application, the Applicant describes the contested decision as the “Chief of Section and Head of Organ’s conduct during the review process of [her] eligibility and suitability for conversion to a permanent appointment and MEU [d]ecision to determine the Applicant[’s] case as moot and closing thereafter the request for management evaluation without addressing the Applicant’s requests”.

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

19. Article 8.1 of the Statute of the Dispute Tribunal provides *inter alia* that:

An application shall be receivable if: (a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present Statute ... [and] (c) An applicant has previously submitted the contested administrative decision for management evaluation ...

20. Article 2.1 of the Statute stipulates that:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed ... [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.

21. The “conduct” contested by the Applicant in her application, and which in her view amounts to abuse of authority, is not an administrative decision subject to appeal pursuant to the above-quoted provisions. The application is therefore not receivable pursuant to article 8.1(a) of the Tribunal’s Statute. A staff member who believes he or she is a victim of abuse of authority by another staff member, including his or her supervisor, must follow the procedure prescribed in ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The Applicant did not follow this procedure.

22. Furthermore, in her request for management evaluation, the Applicant did not contest the “conduct” of her “Chief of Section and Head of Organ”, but the “administrative decision taken by the Chief of ... Section not to recommend [her] conversion to a permanent appointment”. As the Tribunal consistently held, a request for management evaluation is a necessary step in the appeal process. Accordingly, the application, inasmuch as it challenges the conduct of the above-mentioned staff members, is not receivable pursuant to article 8.1(c) of the Tribunal’s Statute either.

23. Even assuming that in fact, in her application, the Applicant intended to contest, as in her request for management evaluation, the decision of her Chief of Section not to recommend her for conversion, such decision is only a preparatory decision which does not affect the scope or extent of the Applicant’s rights and which is thus not subject to appeal. As the Tribunal held in *Payman* UNDT/2011/193,

[t]he one-time review for conversion to permanent appointment involves a series of interlocutory findings which lead to an administrative decision. These findings may be challenged only in the context of an appeal against the outcome of the consideration for conversion to permanent appointment but cannot be, alone, the subject of an appeal to the Tribunal.

24. The challenge of the decision not to recommend the Applicant for conversion is therefore not receivable (see also *Ishak* UNDT/2010/085, *Elasoud* UNDT/2010/111, *Price* UNDT/2011/095, *Gehr* UNDT/2011/178).

25. Moreover, at the time the Applicant filed the present application with the Tribunal, the decision not to recommend her for conversion had been reversed following the submission of her case to the local CRP. The application is therefore irreceivable for this reason too (see *Calvani* UNDT/2010/027, *Ishak* UNDT/2010/085).

26. The Applicant seeks compensation for the moral damage resulting from her non-recommendation. The Tribunal notes in this respect that even if it were established that the non-recommendation was unlawful, the Tribunal is satisfied that the Administration, by reversing it within three months, acted diligently and that the specific circumstances of the case do not justify the award of damages.

27. As regards the Applicant's claim against MEU, the Respondent rightly points out that while the findings of a management evaluation do not form an independent administrative decision subject to appeal, they may be reviewed by the Tribunal in the context of the challenge to an underlying administrative decision. In some circumstances, an applicant may even seek and obtain compensation from the Tribunal on account of the Administration's acts during the management evaluation. However, it would be for the applicant to establish, first, that the Administration's acts were procedurally or substantively flawed and, second, that such acts have caused prejudice to him/her. In the present case, neither of these conditions is met. Accordingly, the Applicant's claim must be rejected.

Conclusion

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

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 16th day of February 2012

Entered in the Register on this 16th day of February 2012

(Signed)

Anne Coutin, Officer-in-Charge, Geneva Registry