



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/018/
UNAT/1618
Judgment No.: UNDT/2012/100
Date: 29 June 2012
Original: English

Before: Judge Coral Shaw

Registry: New York

Registrar: Hafida Lahiouel

PERELLI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

SUMMARY JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant has appealed against the decision of the Secretary-General to uphold her summary dismissal for engaging in sexual harassment of her staff.

2. The Applicant was summarily dismissed by letter dated 2 December 2005. Her case was later reviewed by the then Joint Disciplinary Committee (“JDC”), which recommended, in its Report No. 188 (“JDC Report”), to rescind the dismissal. On 6 December 2007, the Secretary-General decided to reject this recommendation and maintain the dismissal.

3. The Applicant filed two appeals with the former United Nations Administrative Tribunal, one on 30 January 2008 (“Case 1”), and the next approximately eight months later, on 20 August 2008 (“Case 2”). The parties agreed at a case management hearing that the Dispute Tribunal would hear and determine Case 1. In *Perelli* UNDT/2012/034, rendered in Case 1 on 9 March 2012, the Tribunal stated that it would consider Case 2, including whether it is receivable, after Case 1.

Background

Case 1

4. In her first application (Case 1), the Applicant identified the contested administrative decision as that made on 6 December 2007 (see *Perelli* UNDT/2012/034). She relied extensively on the JDC Report and requested the Tribunal to find that “the findings of the JDC were based on a thorough and comprehensive review” and should have been relied on by the Secretary-General. In the parties’ joint submission of 4 August 2010, the Applicant stated that she was “prepared to adopt the facts contained in paragraphs 64 to 290 of the JDC Report”.

The Applicant also told the Tribunal at the hearing that she agrees with the factual findings made by the JDC.

5. Based on these submissions, the Tribunal found that the scope of the Applicant's first appeal encompasses the entire process leading up to her dismissal, including the decisions of 2 December 2005 and 6 December 2007.

6. The Tribunal considered whether it should re-assess the evidence collected during the fact-finding investigation and the JDC process, but decided that, in view of the parties' acceptance of the JDC Report's factual findings, that course of action was not necessary to do justice in this case. The role of the Tribunal in disciplinary cases is to conduct a judicial review of the administrative decision in question to determine, as stated by the United Nations Appeals Tribunal in *Sanwidi* 2010-UNAT-084, if it was "reasonable and fair, legally and procedurally correct, and proportionate".

7. A hearing was held on 2 and 3 February 2012, at which both parties called witnesses. On 9 March 2012, the Tribunal rendered *Perelli* UNDT/2012/034.

8. The Tribunal found, *inter alia*, that "the scope of the Applicant's first appeal [i.e., Case 1] encompass[e] the entire process leading up to her dismissal, including the decisions of 2 December 2005 and 6 December 2007" (see para. 6 of *Perelli* UNDT/2012/034). Accordingly, the Tribunal considered the entirety of the decision to summarily dismiss the Applicant and the process leading up to it. The Tribunal made the following findings based on the JDC Report which was adopted by both parties, documents produced by the parties, and evidence given at the hearing (see para. 114 of *Perelli*):

- a. The preliminary fact-finding investigation was initiated properly, but was flawed, because the Applicant was not re-interviewed or given the opportunity to answer the allegations of sexual harassment in writing after the full scope of allegations became known to the investigation panel. However,

these flaws did not vitiate the ultimate decision of 6 December 2007 as they were cured in the process that followed;

b. The findings of the fact-finding investigation report and the accompanying documents justified the decision to initiate the formal disciplinary process by way of the charge letter of 3 August 2005;

c. The Applicant's due process rights were respected during the formal disciplinary process;

d. The decision to discipline the Applicant was reasonable and lawful;

e. The formal disciplinary process, including the JDC proceedings, and the decision of the Secretary-General to maintain the summary dismissal of the Applicant were not vitiated by any improper considerations;

f. The Applicant's actions as established by the JDC and accepted by her amounted to sexual harassment of which she had constructive notice;

g. The disciplinary measure imposed on the Applicant was within the range of what was reasonably available to the Secretary-General and was not arbitrary or unnecessarily harsh.

Case 2

9. In her second application filed on 20 August 2008, approximately eight months after the first application, the Applicant referred again to the decision dated 6 December 2007 and requested the Tribunal to find that "the findings of the JDC were based on a thorough and comprehensive review and absent any demonstrable errors" and that they should have been relied on by the Secretary-General. She requested the Tribunal to, *inter alia*, rescind the decision of the Secretary-General

rejecting the findings and recommendations of the JDC and maintaining the contested decision to summarily dismiss the Applicant.

Parties' submissions

10. On 11 May 2012, following the publication of *Perelli* UNDT/2012/034, the Tribunal issued Order No. 100 (NY/2012), directing the parties to “file and serve a joint submission giving reasons, if any, why [the present case] should be continued or alternatively consenting to its closure”.

11. On 21 May 2012, the parties filed a joint submission stating that they were unable to agree on a joint position.

12. The Applicant submitted that she had filed an appeal against *Perelli* UNDT/2012/034 and that since the outcome of the appeal process may affect the approach taken in regard to Case 2, she believes it may be advisable to postpone its consideration. Her reasons are that the legal issues presented in the two cases are “fundamentally different involving separate decisions based on different processes which require a separate review”; that she is entitled to a separate hearing on the merits in Case 2; and that any findings in *Perelli* UNDT/2012/034 that relate to the Case 2 are “premature”. In the submission of 21 May 2012, however, the Applicant failed to explain in what respect Case 1 and Case 2 are different from one another.

13. The Respondent's position is that Case 2 should be dismissed on the following grounds: Case 2 was not receivable under the statutory framework at the time it was filed; the case is moot in light of the findings in Case 1; and the scope of Case 1 encompassed the entire disciplinary process leading to the Applicant's dismissal and the Tribunal has fully and fairly heard the Applicant's legal and factual claims in both cases.

Consideration

Judicial review of disciplinary cases

14. Generally, in reviewing disciplinary cases the role of the Dispute Tribunal is to examine:¹

- a. whether the facts on which the disciplinary measure is based have been established;
- b. whether the established facts legally amount to misconduct under the Staff Regulations and Rules;
- c. whether the disciplinary measure applied is proportionate to the offence;
- d. whether there were any procedural irregularities.

Scope of Case 1 and Case 2

15. The Applicant failed to articulate in her submission of 21 May 2012 what is the alleged difference between Case 1 and Case 2. It appears, however, that the Applicant's present position is that Case 1 concerned exclusively the original decision of 2 December 2005 to summarily dismiss her, whereas Case 2 covers exclusively the later decision of 6 December 2007, by which the Secretary-General decided to maintain that dismissal following the JDC process.

16. The Applicant's submission of 21 May 2012 does not accurately represent the scope of Case 1 and Case 2 as they were expressed in her applications filed on 30 January 2008 and 20 August 2008. Nor does it reflect accurately the submissions

¹ See *Mahdi* 2010-UNAT-018, *Abu Hamda* 2010-UNAT-022, *Haniya* 2010-UNAT-024, *Maslamani* 2010-UNAT-028, *Masri* 2010-UNAT-098.

of the parties in the course of the proceedings and the scope of the hearing held on 2–3 February 2012.

17. In particular, in both the January 2008 (Case 1) and August 2008 (Case 2) applications, the Applicant:

a. identified the contested decision as that communicated by letter of “6 December 2007” (see para. 6 on p. 3 of the application filed on 1 January 2008 and para. 6 on p. 3 of the application filed on 20 August 2008);

b. extensively relied on the JDC Report throughout;

c. requested the Tribunal to find that “the findings of the JDC were based on a thorough and comprehensive review and absent any demonstrable errors” (see para. 8 on p. 4 of the application filed on 1 January 2008 and para. 8 on p. 4 of the application filed on 20 August 2008);

d. requested the Tribunal to find that the findings of the JDC should have been relied on by the Secretary-General (see para. 8 on p. 4 of the application filed on 1 January 2008 and para. 8 on p. 4 of the application filed on 20 August 2008).

18. Thus, both applications identified the same contested decision (that of 6 December 2007), discussed and relied extensively on the findings of the JDC, and requested the Tribunal to find that the findings of the JDC should have been relied on by the Secretary-General. Furthermore, both applications were filed after the completion of the entire disciplinary process. Although the application in Case 2 contained additional argumentation and claims, particularly regarding the relief sought, it was substantially an application against the same disciplinary decision and surrounding decision-making process.

19. The Tribunal therefore finds that the Applicant's applications in Case 1 and Case 2 concerned the same decision and legal issues.

Tribunal's consideration of Case 1

20. In the hearing and consideration of the Applicant's application in Case 1, the disciplinary process against the Applicant was considered in its entirety, as required by the case law of the Dispute and Appeals Tribunals (see para. 64 of *Perelli* UNDT/2012/034). It is important to underscore here that it was the understanding all along in the course of the proceedings in Case 1 that the Tribunal would consider the contested decision and the disciplinary process in its entirety, pursuant to the established case law. No limitations to the contrary were established. Both parties were invited to call witnesses they found relevant and the Applicant had ample opportunity to introduce evidence and witnesses she considered relevant to her case. Notably, in the joint submission of 21 May 2012 the Applicant does not identify what, if any, additional evidence would be required to be heard in order for Case 2 to be considered separately.

21. There is no basis to the Applicant's view that the two cases concerned exclusively some particular stages of the disciplinary process that should be dealt with separately. Not only is this approach contrary to the established jurisprudence of the Dispute and Appeals Tribunals, but it also creates an artificial and unnecessary separation of issues relating to the same case. To re-litigate this case would be an abuse of process.

Applicant's submission of 21 May 2012

22. The Applicant asserted in the submission of 21 May 2012 that Case 2 "was specifically excluded from consideration in the proceedings [in Case 1] and the Applicant was not afforded an opportunity to address the facts and issues raised in [Case 2]". This submission misrepresents what occurred in the proceedings.

23. Contrary to the Applicant's submission of 21 May 2012, there was no agreement between the parties or order by the Tribunal that various separate stages of the disciplinary process would be dealt with in separate cases and proceedings. Instead, the Tribunal decided that, firstly, Case 1 would be heard in full, and, secondly, that the Tribunal would then turn its attention to Case 2, including in order to determine whether any consideration of it was actually required.

24. Indeed, in Order No. 232 (NY/2011), dated 6 October 2011—prior to the hearing on the merits in Case 1—the Tribunal summarized the case management hearing of 13 September 2011 as follows:

Issue 1: The Two Cases

3. At the case management hearing, the Respondent expressed reservations about the Applicant trying to reserve the right to “double dip” by having the two cases heard.

4. Having been given time to consider her position on this point, in her submission of 27 September 2011, the Applicant submitted that, as the outcome of the second case may be rendered moot by the outcome of Case 1, the Tribunal should consider and determine the issues arising in Case 1 as a matter of first priority. This submission was based on the understanding that the Applicant has not abandoned her claims under Case 2, including her claim for compensation in that case.

5. The Tribunal will hear Case 1 at this stage, noting that the Applicant has not abandoned Case 2. The status of Case 2 will be determined after the finalisation of Case 1.

25. Notably, the Applicant's closing submission, filed at the conclusion of the hearing on the merits on 3 February 2012, contains references to both Case 1 and Case 2 on the cover page and on page 1 of the submission (“Case No. UNDT/NY/2010/002/UNAT/1566 & UNDT/NY/2010/018/UNAT/1618”), further confirming that it was the Applicant's own understanding at the time that the matter was heard fully and that the two cases were, in fact, duplicative.

26. As referred to above, when the Tribunal heard Case 1 as a matter of first priority, it was on the understanding that Case 2 would be reviewed in light of the outcome of Case 1. The Applicant herself recognized that Case 2 may be rendered moot, as reflected in Order No. 232 (NY/2011).

27. In light of the extensive review of the evidence concerning the entire disciplinary process in the course of the hearing of Case 1, the Tribunal finds that the outcome of Case 1 renders Case 2 moot and the issues addressed in it *res judicata*. It rejects the Applicant's submission that the legal issues presented in the two cases are "fundamentally different involving separate decisions based on different processes which require a separate review" and that she is entitled to a separate hearing on the merits in Case 2.

Additional observation on receivability of Case 2

28. Further, even if the Applicant were able to demonstrate that Case 2 were found to deal exclusively with some separate stage of the disciplinary process, the Tribunal would be bound to find it not receivable for the following reasons.

29. The Applicant was not summarily dismissed twice, but only once. The summary dismissal process at the time generally involved the following steps: (i) the actual summary dismissal decision, (ii) an appeal to the JDC, (iii) a report with recommendations issued by the JDC, and (iv) a decision of the Secretary-General on the recommendations of the JDC, following which the staff member concerned could appeal the summary dismissal to the then United Nations Administrative Tribunal.

30. It was obviously not required or expected of the staff members under the former system of justice to file separate appeals against each intermittent stage of the disciplinary process. It is impossible to artificially split the disciplinary process into separate stages after its completion and file separate appeals with the Tribunal with respect to each stage, expecting that they would be considered piece-meal. Moreover,

even if that were possible, the Applicant would have been required to submit separate appeals to the JDC or file separate requests for administrative review and appeals to the Joint Appeals Board with respect to each of the intermittent decisions. However, no such separate requests or appeals were filed in relation to Case 2, with the application in that case relying on the same JDC Report as Case 1. Therefore, even accepting the Applicant's argument that Case 2 dealt with some particular aspect of the disciplinary process, Case 2 could not be considered by the Tribunal as it would not be receivable due to the Applicant's failure to initiate separate internal appeal procedures prior to the filing of Case 2 with the Administrative Tribunal.

Conclusion

31. The Tribunal concludes that all of the legal and factual issues relevant to the summary dismissal of the Applicant were dealt with during the course of the hearing on the merits and in *Perelli* UNDT/2012/034. Contrary to the Applicant's submission of 21 May 2012, no matters remain pending adjudication. Case 2 is moot, not receivable, and manifestly inadmissible. There is no good reason to hold a second hearing in relation to the same facts and legal issues already canvassed by the Tribunal. Such a hearing would be an abuse of the Tribunal's time and resources.

Order

32. For these reasons the Tribunal finds that Case No. UNDT/NY/2010/018/UNAT/1618 shall be dismissed.

(Signed)

Judge Coral Shaw

Dated this 29th day of June 2012

Entered in the Register on this 29th day of June 2012

(Signed)

Hafida Lahiouel, Registrar, New York