



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES

Hussein
(Appellant)
v.
Secretary-General of the United Nations
(Respondent)
JUDGMENT
[No. 2010-UNAT-006]

Before: Judge Kamaljit Singh Garewal, Presiding
Judge Sophia Adinyira
Judge Rose Boyko

Case No.: 2009-007

Date: 30 March 2010

Registrar: Weicheng Lin

Counsel for Appellant: Katya Melliush

Counsel or Respondent: Phyllis Hwang

JUDGE KAMALJIT SINGH GAREWAL, Presiding.

Synopsis

1. The Appellant, Zahra Hussein (Hussein), was interviewed for the post of Procurement Assistant and was the only candidate recommended for the position. Later the recruitment process was cancelled and the post was re-advertised. Hussein again applied for the post. She challenged the first recruitment while being a candidate for the second recruitment, and wanted the first recruitment to be kept in abeyance. Her application was dismissed by UNDT. The UNDT judgment is affirmed.

Facts and Procedure

2. Hussein is a staff member of the United Nations Office at Nairobi (UNON) in the Procurement Travel and Shipping Section (PTSS). On 28 April 2009, she filed an appeal before the Nairobi Joint Appeals Board (JAB) contesting the decision to cancel the recruitment process that was underway in respect of vacancy announcement 08-PRO-UNON-417625-R-Nairobi, Procurement Assistant, G-7. This cancellation took place after Hussein had been interviewed for the post and rated first by the Programme Case Officer (PCO), who had requested that the Head of Department, Alexander Barabanov, forward the recommended list to the Central Review Panel (CRP).

3. The contested administrative decision cancelling the recruitment process simultaneously discontinued Hussein's Special Post Allowance (SPA) and re-launched the vacancy announcement.

4. Hussein's appeal was transferred, on 1 July 2009, from the JAB to the United Nations Dispute Tribunal (UNDT). In a reply filed on 4 August 2009, the Secretary-General stated that Hussein's SPA had been reinstated, leaving only the issue of the cancellation and re-launch of the vacancy announcement in contention. Hussein had applied for the re-advertised position.

5. Hussein filed an application with the UNDT, pursuant to Article 19 of the Rules of Procedure of the UNDT, requesting that the UNDT stay the proceedings in her case pending the outcome of the on-going recruitment process for the re-advertised post.

6. In its ruling of 17 September 2009 [UNDT/2009/020], the UNDT denied Hussein's application and struck out her case in its entirety. It found that

[i]n accepting to become part of the cancellation of the vacancy announcement and a re-launch of the same process over which she had brought a case to the Tribunal by presenting herself as a candidate, the Applicant acquiesces in the process and effectively extinguishes her claims. She cannot approbate and reprobate at the same time. This Tribunal frowns at such antics.

While the Applicant is perfectly entitled to become a candidate in the re-launched advertisement for the new position she seeks, it is only fair that she does so without abusing the process of this Tribunal.

7. On 18 November 2009, Hussein filed her appeal against this ruling, requesting the United Nations Appeals Tribunal (UNAT) to reverse the ruling and reinstate her case.

Submissions

Hussein's Appeal

8. Hussein's argument is that her actions were not an abuse of the process. The sole reason for this finding against her was that she had failed to file observations on the Respondent's reply. This did not demonstrate any malice or frivolousness. If a party feels that there is no need to file further observations this does not amount to an abuse of process. Hussein had a positive obligation to mitigate her damages. Her request for a stay of the proceedings, pending the outcome of the recruitment for the re-advertised vacancy, was a legitimate attempt to preserve her challenge.

9. According to Hussein the UNDT also erred in applying the legal doctrine of "approbation and reprobation". Hussein herself had little choice in the matter; she reacted to the act of the Administration which had unilaterally cancelled the recruitment process. The UNDT had committed a procedural error by striking out her claim for a stay of proceedings.

Secretary-General's Answer

10. According to the Secretary-General the UNDT judgment was delivered on 17 September 2009 and was sent to the parties on the same day. The appeal was filed after 45 calendar days from the receipt of the judgment, on 2 November 2009. Furthermore, it was submitted that the UNDT had correctly determined the case by denying the request for stay.

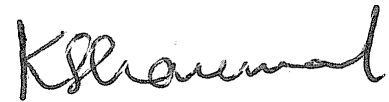
Considerations

11. We have examined the case from all angles and find that the judgment of the UNDT must be upheld. Every staff member is entitled to seek better employment opportunities, and Hussein is no exception. Hussein appears to be in a quandary, but no right of hers has been infringed. She sought a rather unusual order from UNDT to stay the judicial proceedings pending before it. She invoked the provisions of Article 19 of the UNDT Rules of Procedure, under which that tribunal can no doubt pass orders and give directions which “appear[...] to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties”. Hussein wants to challenge the first recruitment process and yet the challenge should be placed in abeyance till the second recruitment process has been completed. This is indeed an unusual request which was rightly declined by UNDT.

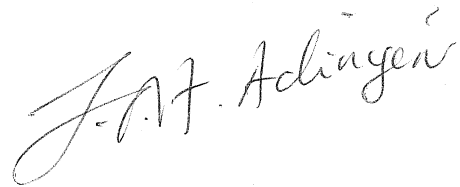
12. While refusing Hussein’s motion the UNDT gave her the liberty to bring a new application before that tribunal at a later date. This is the best option for Hussein. No right of Hussein has been breached. At the present stage she has no cause of action because she has not been denied an opportunity to compete for the post in question. The UNDT referred to Hussein’s request as “an abuse of process of the Tribunal”. It also observed that she should not be permitted to “approbate and reprobate”. Both these terms have wide connotation. We do not propose to go into the question as to whether these were the appropriate terms to use to describe the case. Suffice it to say, Hussein’s application was devoid of merit and was rightly dismissed. The order of the UNDT calls for no interference.

Judgment

13. This Court affirms the UNDT judgment, and dismisses the appeal.



Judge Garewal, Presiding



Judge Adinyira



Judge Boyko

Dated this 30th day of March 2010 in Geneva, Switzerland.

Original: English

Entered in the Register on this 26th day of April 2010 in New York, United States.



Weicheng Lin, Registrar, UNAT