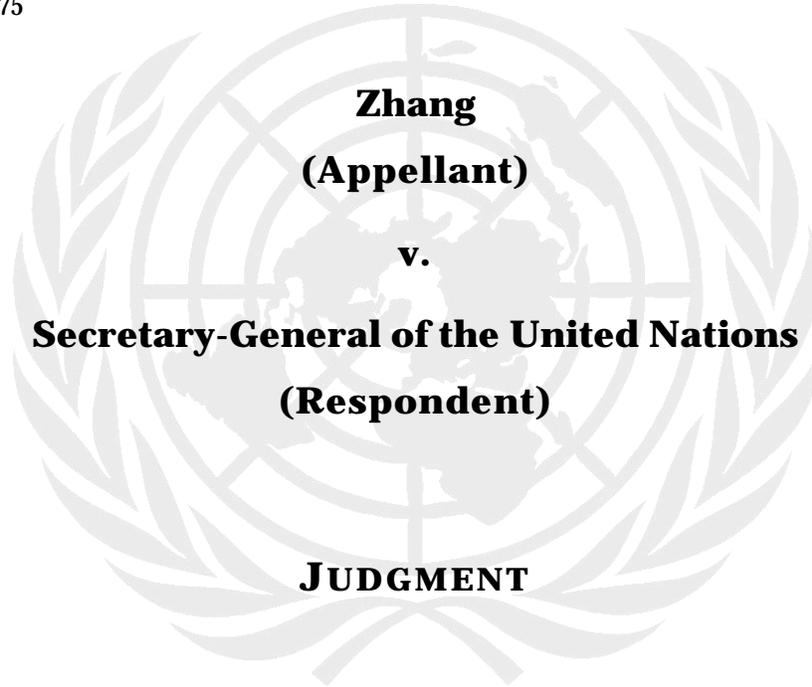




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-075



Before: Judge Mark P. Painter, Presiding
Judge Inés Weinberg de Roca
Judge Rose Boyko

Judgment No.: 2010-UNAT-078

Date: 29 October 2010

Registrar: Weicheng Lin

Counsel for Appellant: Edwin Nhliziyo

Counsel for Respondent: Amy Wood

JUDGE MARK P. PAINTER, Presiding.

Synopsis

1. Even after finding this case non-receivable, the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) undertook a final review of the allegations of retaliation by Li-Wen Zhang (Zhang). The Dispute Tribunal found no evidence that her treatment was motivated by retaliation but was a predictable outcome of her temporary assignment. Zhang's claim that her medical evaluation by the Medical Services Division (MSD) was retaliatory and was done with intent to label her as disabled was not accepted. The Dispute Tribunal found that there was no satisfactory evidence that the impugned decisions were motivated by retaliation.

2. Thus Zhang's case, even if receivable, failed on the facts. This being an appellate court, we hold that the UNDT did not err in finding that the decisions contested in the application did not constitute administrative decisions and thus her application was not receivable. This appeal must be dismissed.

Facts and Procedure

3. Zhang joined the then Department of Conference Services of the United Nations (now the Department of General Assembly and Conference Management (DGACM)) in 1985. Zhang alleges that on 10 September 1997 the Section Chief shouted at her and pushed her violently, and that the reporting of this incident to the senior management of DGACM led to a pattern of retaliation against her over a period of 12 years.

4. From July 1998 until May 1999, Zhang took special leave without pay to pursue graduate studies, after which she returned to work in DGACM. From 2001 to 2006, Zhang worked on the United Nations Economic and Social Council (ECOSOC) Repertory Report. In February 2006, Zhang was assigned on an ad hoc basis for one year to the United Nations System Influenza Coordinator (UNSIC). On 1 March 2007, Zhang was temporarily assigned to the Department of Economic and Social Affairs (DESA) for six months, which was later extended to 31 October 2007. On 1 November 2007, Zhang was assigned to the ECOSOC Affairs Branch of DGACM.

5. On 7 November 2007, the MSD informed the Executive Office of DGACM that Zhang's ongoing medical condition limited her capacity to use a computer and perform other tasks. After objecting to being assigned to one post due to her medical problems, Zhang was assigned to DESA pursuant to another ad hoc arrangement from 7 April 2008 to 15 March 2009.

6. On 9 February 2009, Zhang was informed by the Executive Office of DGACM that the temporary assignment to DESA was due to expire and she was expected to return to DGACM. Zhang agreed to undergo an evaluation for functional capability by an independent medical evaluator. On 13 March 2009, the MSD cleared Zhang to return to work, with permanent activity restrictions based on the independent medical evaluation.

7. In March 2009, Zhang filed a case with the Panel on Discrimination and Other Grievances and reported her allegations of retaliation to the Ethics Office, which later found no prima facie case of retaliation. On 10 April 2009, Zhang requested administrative review of the evaluation by the MSD and her transfer back to DGACM as from 16 March 2009. On 11 June 2009, Zhang appealed to the Joint Appeals Board (JAB). Her appeal was transferred to the Dispute Tribunal following the introduction of the new internal justice system. A hearing was held before the Dispute Tribunal on 28 January 2010. Six witnesses testified at the hearing: three for Zhang and three for the Secretary-General.

8. After the hearing, and without the approval of her counsel, Zhang wrote to the Dispute Tribunal. She asserted that the hearing was a directions hearing and sought to introduce into evidence further documents relating to her application. Counsel for Zhang later wrote to the Registry of the Dispute Tribunal acknowledging that the hearing on 28 January 2010 was a final hearing on the merits.

9. On 25 February 2010, the Dispute Tribunal issued Judgment No. UNDT/2010/033, which rejected Zhang's application. The Dispute Tribunal found that Zhang's application was not receivable. Without deciding on the test for what constitutes an administrative decision under Article 2(1)(a) of the Statute of the Dispute Tribunal (UNDT Statute), the Dispute Tribunal found that the communication on 9 February 2009 to Zhang regarding her return to DGACM was a confirmation of an existing arrangement and did not result in a determination or new action. Therefore, the communication did not contain a decision over which the Dispute Tribunal had jurisdiction. The Dispute Tribunal also found that it was

doubtful that the MSD evaluation constituted an administrative decision as the medical evaluation was voluntarily attended by Zhang and resulted in recommendations which she was entitled to waive in writing and she could have sought review of them through other avenues. Although many of the events which occurred after September 1997 could be classified as administrative decisions, the Dispute Tribunal found that Zhang was time-barred from challenging these decisions.

10. In the interests of justice, the Dispute Tribunal undertook a final review of Zhang's allegations. The Dispute Tribunal found that her return to DGACM in March 2009 was not motivated by retaliation but was a predictable outcome of Zhang's temporary assignment to DESA. Zhang's claim that the MSD's evaluation was retaliatory and was done with intent to label her as disabled was not accepted. The Dispute Tribunal found that there was no satisfactory evidence that the impugned decisions were motivated by retaliation. Further, the administrative actions taken since the assault on Zhang in September 1997 were not retaliatory.

11. After being granted a 20-day extension of the time limit to appeal, Zhang filed an appeal against the Dispute Tribunal's Judgment on 29 April 2010. The Secretary-General filed an answer to the appeal on 18 June 2010.

12. On 6 October 2010, Zhang filed a "Request to submit newly received but relevant information to the Appeals Tribunal" under Article 2(5) of the Statute of the Appeals Tribunal (Statute). The Secretary-General did not file a response to the request.

Submissions

Zhang's Appeal

13. Zhang submits that the Dispute Tribunal failed to exercise its jurisdiction. The Dispute Tribunal has "a duty to right a wrong" and there was sufficient evidence to find in favour of Zhang, in particular: (1) no formal investigation was carried out after Zhang reported the incident in September 1997; (2) there was immediate retaliation as she was removed from her G-7 post; (3) she was assigned to work in the "printing shop" after obtaining her MBA degree; and (4) the Dispute Tribunal failed to enquire why she was assigned the duties she was when she had Ph. D in social economics.

14. Zhang also submits that the Dispute Tribunal erred on a question of law by not addressing the jurisprudence regarding internal vacancies. The Dispute Tribunal made errors of fact by not taking into account: (1) the continuation of retaliation against Zhang; and (2) the failure by the Administration to investigate Zhang's allegations of sexual harassment and physical assault as required under the relevant Staff Regulations and Rules.

15. Zhang contends that she was unable to present newly discovered documents to the Dispute Tribunal after the hearing in January 2010. The documents establish that in August 2007, the Executive Office of DGACM ordered UNSIC to destroy correspondence that would prove that Zhang worked for UNSIC.

16. Zhang argues that there was a pattern of conduct which proved discrimination or retaliation against her, in particular: (1) her work history since she reported the incident in September 1997; (2) she was assigned to the "printing shop" after her return from unpaid leave in 1999; (3) she was not provided with an appropriate reference for a job she applied for with the United Nations Development Programme; (3) she was prevented by DGACM from applying for an internal DESA post in 2008; (4) she was sexually harassed by her Section Chief before he physically assaulted her in September 1999; (5) action was taken to recover an overpayment of her G-7 special allowance post in 1999; (6) DGACM failed to provide her with a computer or telephone at certain times in 1997 and 2009; and (7) she was referred to a psychiatrist by the MSD in 2008.

17. Zhang contends that the Dispute Tribunal erred in deciding that her application was not receivable as she sought to resolve the matter through other avenues before filing her appeal with the JAB. Zhang also seeks to respond to various aspects of the Judgment and correct the record. In particular, Zhang asserts that: (1) the refusal or failure of DGACM to help her achieve her career goals constituted adverse decisions against which she has a right of appeal; (2) the Dispute Tribunal erred in not characterizing the actions taken against her after she reported harassment by her Section Chief as retaliation; and (3) the Dispute Tribunal failed to inquire about the internal workings and practices of DGACM and the role played by the Executive Office in failing to support her.

18. Zhang requests that the Appeals Tribunal remand the matter back to the Dispute Tribunal for a rehearing on the errors of fact and law. Alternatively, Zhang seeks compensation for suffering, an order that the Secretary-General to facilitate her transfer out

of DGACM or she be paid moral damages equivalent to a G-7 salary to the date of her retirement.

Secretary-General's Answer

19. The Secretary-General submits that Dispute Tribunal correctly concluded that the application was not receivable as Zhang did not challenge any administrative decisions. Further, any application in respect of the decision to transfer Zhang to DESA in April 2008 was time-barred: the two-month time limit to request administrative review under former Staff Rule 111.2(a) expired in June 2008 and her request was only filed in April 2009.

20. The Secretary-General submits that Zhang does not allege that the Dispute Tribunal committed any errors that would require a reversal of its decision that her application was not receivable. Zhang's contentions regarding the issue of what constitutes an administrative decision do not provide any legal basis for reversing the Dispute Tribunal's determination.

21. The Secretary-General argues that the Dispute Tribunal was correct in finding that, while some of the actions contested by Zhang may be regarded as administrative decisions, any challenge to these decisions was time-barred.

22. The Secretary-General contends that the Dispute Tribunal correctly declined to hear additional evidence after the final hearing on the merits. Zhang does not explain why the new information she wishes to present was previously unavailable to her. Further, the new information does not address the issue of receivability.

23. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

24. Zhang has made two requests under Article 2(5) of the Statute to adduce additional evidence. First, Zhang contends that she was unable to present newly discovered documents to the Dispute Tribunal after the hearing on 28 January 2010. The Dispute Tribunal quite properly refused to allow Zhang to adduce further evidence after the hearing. We also reject her request, as this evidence was known to Zhang and should have been presented before the Dispute Tribunal. In her second request, Zhang seeks to adduce evidence regarding her

selection in September 2010 for the post of Social Sciences Assistant, at the G-6 level, in the Department of Political Affairs and her activities as a teacher at Seton Hall University. We decline to admit this additional evidence as it is not relevant to the issues that will determine the outcome of the appeal.

25. Even after finding the case non-receivable, the Dispute Tribunal undertook a final review of Zhang's allegations. The Dispute Tribunal found that her return to DGACM in March 2009 was not motivated by retaliation but was a predictable outcome of Zhang's temporary assignment to DESA. Zhang's claim that the MSD's medical evaluation was retaliatory and was done with intent to label her as disabled was not accepted. The Dispute Tribunal found that there was no satisfactory evidence that the impugned decisions were motivated by retaliation. The Dispute Tribunal also found that administrative actions taken since the assault on Zhang in September 1997 were not retaliatory. Thus Zhang's case, even if receivable, failed on the facts.

26. This being an appellate court, we hold that the UNDT did not err in finding that the decisions contested in the application, namely Zhang's return to DGACM and the MSD's evaluation, did not constitute administrative decisions and thus her application was not receivable. Zhang's appeal does not identify with any clarity any errors in the reasoning of the UNDT, and we can find no basis for disagreeing with the UNDT. This appeal must be dismissed.

Judgment

27. For the foregoing reasons, the appeal is dismissed.

Dated this 29th day of October 2010 in New York, United States.

Original and authoritative version: English

(Signed)

Judge Painter, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Boyko

Entered in the Register on this 29th day of December 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar