



UNITED NATIONS APPEALS TRIBUNAL

TRIBUNAL D'APPEL DES NATIONS UNIES

Case No. 2010-088

Megerditchian
(Respondent/Applicant)

v.

Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before: Judge Sophia Adinyira, Presiding

Judge Kamaljit Singh Garewal

Judge Luis María Simón

Judgment No.: 2010-UNAT-088

Date: 27 October 2010

Registrar: Weicheng Lin

Counsel for Respondent/Applicant: Amal Oummih

Counsel for Appellant/Respondent: Jessica M. Elbaz

JUDGE SOPHIA ADINYIRA, Presiding.

Synopsis

1. The Secretary-General appeals against the decision by the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) to receive and determine the application of Lora Megerditchian (Megerditchian) in relation to the award of a service contract; and to award damages for failure to keep “promises” of priority consideration made to her.
2. The Appeals Tribunal finds that 1) the UNDT erred in receiving an application in respect of a service contract; and that 2) a promise of priority consideration in a job application does not by itself give rise to a legal right on the part of Megerditchian or an obligation on the part of the Secretary General. The Appeals Tribunal allows the appeal, rescinds the UNDT Judgment, and vacates the award of damages.

Facts and Procedure

3. Megerditchian joined the United Nations Development Programme (UNDP) on 1 January 2005 as a G-4 programme assistant with the Action for Cooperation and Trust (ACT) Project in Cyprus on a fixed-term appointment under the 100 series of the Staff Rules in force at the time of the contested decision. On 1 July 2006, she was promoted to the G-5 level. Her contract was extended several times, expiring on 31 October 2008.
4. Following an audit conducted in December 2007 by the UNDP Office of Audit and a mission conducted by the UNDP Management Consulting Team in April 2008, it was decided to abolish the Business Centre where Megerditchian worked. Five staff members, including Megerditchian, lost their posts as part of this process.
5. In a memorandum dated 19 August 2008, the Programme Manager announced to all ACT staff members affected by the restructuring, whether they held contracts under the 100 series of the Staff Rules then in effect or service contracts, that a competitive job fair for the available positions would be held and limited to the aforementioned staff. The memorandum stated that holders of contracts under the 100 series of the Staff Rules then in effect would be given priority consideration.
6. Megerditchian applied for three project associate posts which were available on the basis of service contracts. She was short-listed and interviewed for the posts. On

16 September 2008, she was informed that her application for the posts had been rejected and that her contract, which would expire on 31 October 2008, would not be renewed.

7. Megerditchian's request for administrative review to the Secretary-General was rejected. Her appeal to the Joint Appeals Board was transferred to the UNDT, which issued its Judgment on 26 February 2010.

8. The UNDT found that it was not competent to consider the application in so far as it concerned a decision not to award her a project associate service contract since such contract is awarded to non-staff members. It, however, found that it was competent to consider the application in so far as it concerned the decision not to renew her fixed-term appointment. It stated that under Rule 104.12(b)(iii) of the Staff Rules, in effect at the time of the contested decision, a "fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment"; and under Staff Rule 109.7(a), in effect at the time of the contested decision, a "temporary appointment for a fixed-term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment". It recalled that the former Administrative Tribunal held that decisions concerning non-renewal of fixed-term contracts lie within the discretion of the Secretary-General, but must not be taken arbitrarily or for unlawful reasons.

9. The UNDT found that Megerditchian did not establish the unlawfulness of the decision not to renew her contract. It, however, noted that the Administration had made promises to Megerditchian which it failed to keep. The Programme Manager had announced that a job fair would be held in order to fill staff posts and service contracts. The memorandum he issued stated that only UNDP-ACT staff affected by the reclassification could apply for the internal vacancies, whereby 100 series contract holders would have "priority consideration". The UNDT considered that such a promise could only be understood by Megerditchian to mean that she would receive a service contract if she applied and if her qualifications corresponded to the requirements. It noted that

the work required of holders of this type of contract is substantially similar to the work that [Megerditchian] was doing and that [she] had the necessary qualifications to receive the contract. Thus, in light of the commitment made by the Administration in its memorandum of 19 August 2008, [she], who unlike the selected candidates, held a 100 series contract, could in good faith consider that there was every likelihood that she would receive a service contract, and thus a salary from the Organization.

10. The Dispute Tribunal found that, by failing to keep its promises, the Organization caused harm to Megerditchian who could have legitimately believed that, at the end of her appointment, she would receive a service contract, and thus a salary. It ordered the Administration to pay a lump sum equivalent to three months of Megerditchian's net base salary at the end of the term of her employment.

11. On 5 May 2010, the Secretary-General filed an appeal against the UNDT Judgment and, on 21 June 2010, Megerditchian filed her answer.

Submissions

Secretary-General's Appeal

12. The Secretary-General submits that the UNDT erred in law in considering the case receivable. Since the UNDT's analysis of the non-renewal of Megerditchian's fixed-term contract revolved around the award of a service contract, it should have ruled that it had no jurisdiction. He requests that the UNDT Judgment be reversed on the ground of receivability.

13. In the alternative, the Secretary-General submits that the UNDT erred in law in its interpretation of the memorandum, in particular in its interpretation of "priority consideration". The UNDT had to determine whether the Organization violated its undertaking to provide "priority consideration" for available jobs to 100 series contract holders affected by the restructuring. According to the UNDT, Megerditchian could reasonably infer from the wording that she merely had to apply for a position and, if her qualifications corresponded to the job requirements, it was a virtual certainty that she would be offered that position. This interpretation is flawed in that it is inconsistent with the former Administrative Tribunal's interpretation, the Secretary-General's discretion as it relates to appointments, and Article 101(3) of the Charter.

14. The former Administrative Tribunal held that priority consideration does not preclude consideration of other candidates for the same post; only if the applicant has the same qualifications as another candidate, preference shall be given to the applicant. "Priority consideration" cannot take precedence over the requirements to select the best candidate for a post under Article 101(3) of the Charter. Given Megerditchian's poor

performance at the interview, the Organization acted in accordance with Article 101(3) of the Charter in not awarding her a contract.

15. The Secretary-General further contends that the UNDT erred in placing undue emphasis on the similarity between the terms of reference of the posts for which Megerditchian applied and of the post she held. Pursuant to the reasoning of the UNDT, substantive similarity between the terms of reference of the post would have been sufficient and an interview was not required. According to this reasoning, Megerditchian should have been offered a service contract based on the terms of reference alone which would contravene the principles set forth in the Charter.

16. Furthermore, the memorandum set out the steps for the envisioned job fair, including “[c]areful screening of the applicants; and [a] competitive selection that emphasizes merit and the required competencies for the job”. The “competitive selection” included an interview and the “required competencies” were tested during such sessions. Megerditchian scored poorly compared with other candidates during her competency based interview.

Megerditchian’s Answer

17. Megerditchian responds that the UNDT did not err in law on the issue of receivability. Contrary to the Secretary-General’s assertion, the crux of the case is not about the award of the service contract, but the arbitrariness of the decision not to renew her fixed-term appointment. The Secretary-General does not contest the UNDT’s finding that the Organization breached its promise to give priority consideration to internal candidates. Megerditchian points out that the basis on which the UNDT considered itself competent was that “the Tribunal must also consider whether the Administration made the Applicant promises that it did not keep”. These promises were made to a staff member.

18. Because Megerditchian was a staff member at the time of the contested decision and the contested decision related to a promise by the Administration to give her priority consideration, the award of a service contract is only incidental and not central to her legitimate expectancy of continued employment with the Organization.

19. Megerditchian further submits that the UNDT did not err in its interpretation of “priority consideration”. The Secretary-General failed to explain why the UNDT’s finding that the Organization had made a promise to her would constitute an error in law. The UNDT correctly found, in accordance with the jurisprudence of the former Administrative Tribunal, that “priority” must mean that Megerditchian must have preference over other candidates, unless it was clearly established that she did not meet the criteria established as well as her competitors. She submits that criteria such as merit, seniority, experience, integrity, geographical distribution, are expected to be taken into account in making the selection. While, under the Charter and the appropriate resolutions of the General Assembly, the Secretary-General must consider various yardsticks, the UNDT held that he should also have been fully conscious of the commitment held out to her. The UNDT correctly held that the Secretary-General failed to meet his burden in this regard and that Megerditchian was entitled to compensation.

20. The UNDT made the right literal interpretation of “priority consideration”. The interpretation is consistent with the spirit by which that term is applied in the selection of personnel; that is to safeguard the rights of staff members by giving them consideration first and foremost. Such interpretation is also consistent with the UNDT’s analysis of the Organization’s obligation to give priority consideration in the context of ST/AI/2006/3. In this context, the UNDT held that “priority consideration” of a 15-day candidate meant that only where a suitable 15-day candidate cannot be found, can the programme manager review the pool of 30-day candidates.

21. Megerditchian submits that, in any event, it was the Secretary-General’s burden of showing that the promise had been fulfilled, but he provides no reason as to why three external candidates were selected instead of her.

Considerations

Receivability

22. Megerditchian contested before the UNDT both the Secretary-General’s refusal to award her a project associate contract and his refusal to renew her fixed-term appointment.

23. The Dispute Tribunal rightly found that it was not competent to consider the application as far as it concerned the decision not to award her a project associate service contract since such contracts are awarded to non-staff members.

24. The Dispute Tribunal however considered that the Administration made Megerditchian promises that it did not keep and awarded damages on that basis. However, this question ultimately concerns the award of a service contract. The UNDT had therefore no competence to consider Megerditchian's application and erred in law in doing so. The UNDT Judgment must therefore be reversed on that basis.

Priority Consideration

25. The Appeals Tribunal notes that, in any event, the UNDT also erred in its interpretation of the term "priority consideration" as contained in the memorandum.

26. The memorandum stated in part: "Only UNDP-ACT staff affected by the reclassification can apply for the internal vacancies, whereby 100 series contract holders have priority consideration." The UNDT considered that such a promise meant that Megerditchian would receive a service contract if she applied and if her qualifications corresponded to the requirements.

27. We note that the memorandum clearly set out that there was to be a "[c]areful screening of the applicants" and a "competitive selection that emphasizes merit and the required competencies for the job" including an interview. It was therefore clear from the memorandum that, in addition to having the requisite qualifications, Megerditchian was also required to pass an interview before being given priority consideration. She did not establish any evidence that the interview process was flawed.

28. It should be emphasised that "priority consideration" cannot be interpreted as a promise or guarantee to be appointed or receive what one is considered in priority for. To hold otherwise would compromise the highest standards of efficiency, competency, and integrity required in selecting the best candidate for staff positions under Article 101 of the Charter.

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29. The Appeals Tribunal therefore holds that the UNDT erred in finding that the Administration caused harm to Megerditchian who could legitimately believe that at the end of her appointment, she would receive a service contract and thus a salary.

Judgment

30. For the foregoing reasons, the Appeals Tribunal allows the appeal, rescinds the UNDT Judgment, and vacates the award of damages.

Dated this 27th day of October 2010 in New York, United States.

Original and authoritative version: English

(Signed)

(Signed)

(Signed)

Judge Adinyira, Presiding

Judge Garewal

Judge Simón

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

(Signed)

Weicheng Lin, Registrar