



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NB/2009/011
Judgment No. UNDT/2010/018
Date: 29 January 2010
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

D'HELLENCOURT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:
Maître Jean-Didier Sicault

Counsel for respondent:
Miouly Pongnon, UN-HABITAT

Notice: The format of this judgment has been modified for publication purposes in accordance with Article 26 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. This case concerns a staff member of the United Nations Office for Human Settlements (UN-HABITAT) who is contesting a decision taken on 21 October 2008, by the Director of the Regional Office Asia-Pacific (ROAP), UN-HABITAT, alleging that the Respondent transferred the responsibilities incumbent to [her] post, as Country Programme Manager (CPM) in Afghanistan, to an *ad interim* Deputy Country Programme Manager (DCPM) and that this decision is prejudicial to her.

2. The Applicant prays the Tribunal to order that:
 - a. The Applicant be restored in all the functions and authority corresponding to the post she occupies;
 - b. That benefits corresponding to her promotion be paid;
 - c. That she be granted a contract renewal until the date of her mandatory age of retirement;
 - d. That she be fully compensated for the prejudice suffered in the amount of 18 months of her gross salary with post adjustment and other allowances, plus her legal costs.

Facts

3. The Applicant worked with several United Nations agencies such as the United Nations Development Fund for Women (UNIFEM), the United Nations Children's Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC) and the United Nations Development Programme (UNDP) in Tajikistan and Afghanistan between 1999 and 2007. Thereafter, the Applicant joined UN-HABITAT on 12 February 2007, at the L-5, step 5 level, under a one-year intermediate contract as CPM in Afghanistan. On 12 February 2008, her contract was extended for one year.

4. By memorandum dated 8 April 2008, the Director of the ROAP recommended that the Applicant's level be upgraded from L-5 to L-6.
5. On 21 October 2008, the Director of UN-HABITAT/ROAP issued a memorandum on "Interim Administrative Arrangements" advising the Senior Management Team that, during the process of selecting a candidate for the position of DPCM, he had designated Mr. [X] to act as DPCM effective 21 October 2008.
6. On 19 December 2008, the Applicant requested the Secretary-General to review the decision to appoint a DPCM as of 21 October 2008. The Applicant did not receive any reply from the Secretary-General.
7. On 27 March 2009, the Applicant submitted a statement of appeal to the Nairobi Joint Appeals Board (JAB) in which she contested the decision of 21 October 2008, following which the Respondent submitted his reply to the Applicant's statement of appeal on 2 June 2009.
8. On 1 July 2009, this matter was transferred to the United Nations Dispute Tribunal (UNDT) in accordance with ST/SGB/2009/11. On 8 July 2009, the Applicant was informed that her appeal, then pending before the Nairobi JAB, had been transferred to the UNDT.
9. On 17 July 2009, Counsel for the Applicant submitted observations to the Respondent's reply dated 2 June 2009.
10. On 5 November 2009, Counsels were invited to attend a status conference, following which Counsel for the Respondent submitted on 19 December 2009 a statement of "undisputed facts" and a motion on the non-receivability *ratione materiae* of this application. Counsel for the Applicant contested the

Respondent's presentation of "undisputed facts" and argued that the case was receivable.

Applicant's Submissions

11. On the issue of receivability, the Applicant avers that the challenged decision undoubtedly breached the right of an employee of an organization to a proper administrative position. A staff member should both hold a post and perform the duties pertaining thereto. The Applicant further argues that the impugned decision unnecessarily harmed her in breach of a general principle of law stressing the duty that any international organization owes its staff to treat them with respect for their dignity and good name. Therefore, in the Applicant's view, the impugned decision affects her terms of appointment.
12. The Applicant argues that her performance has always been very well-appreciated. In a memorandum to the Executive Director (ED) dated 8 April 2008, the Director praised her performance and recommended her for promotion to the L-6, which was approved by the ED on 20 May 2008. The said promotion has, however, never been implemented.
13. The Applicant claims that, as a result of the challenged decision, her responsibilities were progressively reduced thereby affecting her dignity and good name, as well as her career prospects.
14. The Applicant prays the Tribunal to restore the Applicant in all the functions and authority corresponding to the post she held; that benefits corresponding to her promotion be paid; that she be granted a contract renewal until the date of her mandatory age of retirement; that she be fully compensated for the prejudice suffered in the amount of 18 months of her gross salary with post adjustment and other allowances, plus her legal costs.

Respondent's Reply

15. In response to the Applicant's contentions, the Respondent argues that, given the broad discretion the Secretary-General enjoys in assigning activities to staff members, there is a longstanding jurisprudence from the United Nations Administrative Tribunal (UNAT) stating that the Secretary-General's assignments to staff may only be vitiated upon a showing that it was motivated by impermissible or extraneous considerations (UNAT Judgments No. 362, *Williamson* (1986); No. 469, *Lackner* (1987); No. 834, *Kumar* (1997); No. 1069, *Marshashi* (2002)).

16. In the present case, the Respondent states that the need for the recruitment of a DCPM was recognized by the Applicant and was fully justified on the basis of the tripling of the budget of the UN-HABITAT programme in Afghanistan by March 2008. The decision to appoint a DCPM was, therefore, a valid exercise of administrative authority.

17. The Respondent did not injure the Applicant's rights as a staff member and further claims that there is no evidence which indicated that the decision to change the Applicant's duties and appoint a DCPM was tainted by prejudice, discrimination or other improper motive, or in violation of the applicable procedures.

18. In the Respondent's view, the Applicant has made no attempt to allege any facts to demonstrate that UN-HABITAT's decision to appoint a DCPM affected her terms of appointment in any way. The Applicant has made no allegation or produced any documentation showing that her terms of employment were affected by the impugned decision. She did not refer to any single rule or regulation to prove the vitiation of the decision to appoint a DCPM. Instead, the Applicant alleges breaches of "general principles of law".

19. The Respondent avers that the decision did not amount to a hidden sanction. The impugned decision was taken in the best interests of the Organization. The Applicant's dignity and professional reputation were not harmed by the implementation of the contested decision. The Respondent argues that this case lacks merit.
20. Concerning the Applicant's contract of employment, the Respondent recalls that the Applicant does not have a right to be granted a contract renewal until the date of her mandatory age of retirement. The Applicant holds a fixed-term contract, which does not carry any expectancy of renewal or of conversion to any other type of appointment.
21. The Respondent prays the Tribunal to find this application non-receivable *ratione materiae* and reject this case in its entirety.

Review of the Case by the Tribunal

22. The Respondent challenges the jurisdiction of this Tribunal to entertain this application. The Respondent argues that the impugned decision was not an administrative decision falling within the purview of Article 2 (1) (a), of the UNDT Statute and Staff Rule 11.4 (a) and 11.4 (g). Citing Judgment No. 459, *Lackner* (1987) as issued by the UNAT, the Respondent stresses that "the subject-matter of the appeal must be an allegation of non-observance of the staff member's terms of appointment by the administrative decision contested".
38. The opening words of Article 11.4 of the Staff Rules read, *A staff member may file an application against a contested administrative decision.*
39. Article 2.1 (a) of the UNDT Statute reads:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an Application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To 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;

40. In the case of *Andati-Amwayi*¹, the Tribunal recalled that what constitutes an administrative decision would depend on a number of factors like the status of the decision maker, the nature of the act, the law or regulation under which the act was performed and the nature of the consequences of the act on one or more individuals. Reference was made to the case of *Teffer*², where it was stated that, *Given the nature of the decisions taken by the administration, there cannot be a precise and limited definition of such a decision. What is or is not an administrative decision must be decided on a case by case basis and taking into account the specific context of the surrounding circumstances when such decisions were taken.*

41. The Tribunal takes the view that the decision taken by the administration to appoint an *ad interim* DCPM and to reallocate responsibilities and duties pursuant to that appointment was an administrative decision.

42. For the purposes of Article 2. 1 (a) of the UNDT Statute, it is not sufficient for the Applicant to merely establish that an administrative decision was taken in

¹ UNDT Judgment 2010/010 dated 22 January 2010.

² UNDT Judgment 2009/090 dated 17 December 2009.

the overall context of the position she holds or held. The Applicant should also prove that the impugned administrative decision was in non compliance with her terms of appointment or her contract of employment.

43. With regards to assigning activities to staff members, staff regulation 1.2 (c) provides that, *Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations [...]*. By analogy, the same reasoning may be applied when considering the exercise of the discretion of the Respondent to appoint staff members and redistribute responsibilities, a power that is to be exercised fairly and keeping in mind the principle to be found in Article 101.3 of the United Nations Charter which reads, *The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity.*
44. The UNAT applied this principle in the case of *Van der Valk*³ in which the Tribunal stated that, *it cannot substitute its judgment for that of the Administration in respect to reorganization of posts or staff in the interest of economy and efficiency.* In other words, the Secretary-General has the discretion to take decisions in the overall interest of the Organization so as to maintain or improve the effectiveness of the Organization.
45. Admittedly no discretion can be absolute. The exercise of the discretion should not be exercised in an unfair manner. In the case of *Seaforth*⁴, the UNAT recalled that, *Only where the Respondent's discretion is tainted by extraneous factors, such as prejudice, arbitrariness, improper motive, discrimination, for example, is such discretion subject to limitation.*

³ UNAT Judgment No. 117 (1968), para. IV.

⁴ UNAT Judgment No. 1163 (2003) para. X.

46. The Tribunal also notes that the UNAT's view in the case of **Raj**⁵, which reads, *The mere fact that a reorganization may hinder the prospects or in any way affect the career of a staff member does not necessarily point to the existence of discrimination or improper motives in the Administration and thus, does not in itself give grounds for any claim against the decision taken. Responsibility of the Administration would only arise if the reorganization had been carried out for improper motives; in this case with the deliberate intention of damaging a staff member's position. It is for the staff member concerned to prove that the Administration exercised its discretion in this improper way.*

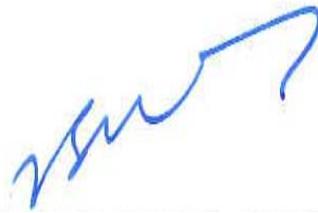
47. Examining the Applicant's allegations, according to which the decision was taken in breach of a general principle of law, namely that any international organization has a duty towards its staff to treat them with respect for their dignity and good name, the Tribunal could not find evidence that the decision was tainted by prejudice, discrimination or other improper motive against the Applicant⁶. There is no evidence either in support of the Applicant's contention according to which her reputation, dignity as well as career prospects have been affected.

48. The Tribunal notes that the Applicant did not spell out in clear terms the duties encumbered on her before the appointment of the *ad interim* DCPM. The Tribunal also observed that the challenged appointment was made at one level higher than the Applicant's. The Tribunal could not, therefore, find to what extent the Applicant's terms of appointment or her contract of employment were made worse or affected in any manner by the appointment of the *ad interim* DCPM or the new distribution of duties.

⁵ UNAT Judgment No. 350, (1985), Para. IV.

⁶ UNAT Judgment No. 834, *Kumar*, (1997) and Judgment No. 1069, *Madarshashi* (2002).

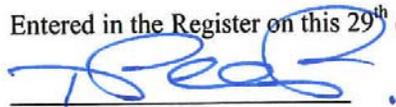
49. The Tribunal found evidence, though, that the UN-HABITAT programme in Afghanistan was considered as one of the most important programmes in Afghanistan, which could have justified the creation of DPCM position and an *ad interim* appointment to oversee the senior management team, a matter which is at the discretion of the Secretary-General.
50. The Tribunal concludes, therefore, that there was a valid and rational exercise of the discretion by the Respondent in the decision making process and the decision leading to the appointment of an *ad interim* DCPM.
51. In the light of the foregoing, it is the finding of the Tribunal that, though there was an administrative decision taken by the administration within the meaning of Article 2.1 (a) of the UNDT Statute and, as explained above, the decision did not affect the terms of employment of the Applicant or her contract of employment.
52. The Applicant also prays that she be granted a contract renewal until the date of her mandatory age of retirement. The Applicant holds a fixed-term contract, which, as a rule, carries no expectation of renewal pursuant to Staff Rule 104.12 (b). It is not within the power of the Tribunal to order the Administration to renew her fixed-term contract indefinitely. This is a matter for the Administration. The Tribunal is only empowered to rule whether the terms of appointment or the contract of their employment have been fairly considered. The Applicant has not shown that the Administration has sought or is seeking to terminate her employment at this stage and there is therefore no live issue in respect of the duration of her contract before the Tribunal.
53. In the light of the Tribunal's review of the case, all prayers are rejected.



Judge Vinod Boolell

Dated this 29th day of January 2010

Entered in the Register on this 29th day of January 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi