UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/90
Judgment No.: UNDT/2010/022
Date: 05 February 2010
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

FAGUNDES

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Joseph Grinblat, OSLA

Counsel for Respondent:
Arnold Kreilhuber, ALU/OHRM, UN Secretariat

The issues

1. In an application filed before the United Nations Dispute Tribunal (UNDT) on 12 November 2009, the Applicant contests the rejection of her appeal before the United Nations Administrative Tribunal (UNAT), as per Judgement No. 1525, rendered on 31 July 2009.

Facts

2. The Applicant entered service of the United Nations in November 2000 on a fixed-term appointment, as a Radio Producer in the Department of Public Information, UN Secretariat, at the P-3 level. On 26 October 2004, she joined the office of the Global Programme of Action of the United Nations Environment Programme (GPA/UNEP) in The Hague, on a one-year fixed-term appointment as a P-3 Programme Officer.

3. The Applicant was on sick leave from 8 August to 17 November 2005. There was disagreement between the Applicant and the Respondent on the certification of this period of sick leave.

4. On 23 September 2005, the Applicant requested the Nairobi Joint Appeals Board (JAB) to suspend action on the Administration's decision not to renew her contract due to performance concerns. Having found that the decision in question was vitiated by several irregularities in the appraisal process, the JAB recommended suspension of action pending the completion of the PAS rebuttal process. The Secretary-General informed the Applicant of his decision to accept such recommendation on 24 October 2005.

5. After the Rebuttal Panel upheld the Applicant's performance appraisal and upon expiration of her contract, she was separated effective 31 December 2005. The Applicant requested that a Medical Board be convened to review her sick leave entitlements for the period 8 August to 17 November 2005. She submitted a formal request therefor on 7 January 2006.

6. A number of exchanges took place on the composition of the Medical Board, in the course of which the Applicant claims to have rejected the inclusion in it of the doctor ultimately selected as its third member.

7. The Applicant was notified, on 27 April 2006, that the Medical Board had certified the period from 8 August to 7 September 2005, but that the remaining balance (8 September to 17 November 2005) was not certified. On 8 June 2006, the Applicant received her final payment. On 17 August 2006, she requested a copy of the Medical Board's report. The Administration answered on 21 August 2006 that such documents were considered confidential in nature and only the resulting decision was communicated to the concerned staff member. This was reiterated by e-mail of 8 September 2006.

8. On 20 September 2006, the Applicant requested administrative review concerning the "violation of due process and harassment" against her.

9. On 30 January 2007, upon receipt of a statement of appeal by the Applicant, the Nairobi JAB advised her counsel that it was not competent to review Medical Board decisions and suggested a direct appeal to UNAT.

10. On 22 February 2007, the Applicant filed an application with UNAT. On 31 July 2009, UNAT issued Judgement No. 1466 (2009), rejecting such application in its entirety as time-barred.

11. On 12 November 2009, the Applicant filed her application with UNDT. In reply, the Respondent submitted a motion for dismissal of the application on 23 December 2009, followed by the Applicant's comments thereon, dated 1 January 2010.

Parties' Contentions

12. The Applicant's main contentions are as follows:

a. The judgement of UNAT is based on a misstatement of the facts of the case. UNAT justifies the rejection of her application by saying that she "was notified on 27 April 2006 of the ruling of the Medical Board, which decision she appealed against. The Application to the Tribunal was filed on 22 February 2007, well

beyond the time limit of article 7.3. Accordingly the Application is time-barred." In reality, the application to UNAT was not an appeal against the decision of the Medical Board, but an appeal against the decision to deny her a copy of its report, which was a violation of the Applicant's due process rights;

b. The Applicant took all necessary steps in order to contest this decision according to the rules and in due time;

c. UNAT has no excuse for this gross mistake on the facts, since the Applicant stated in her pleas that she requested the Tribunal to find, on the merits, that she had been the victim of a violation of due process, and to order that the Applicant should be given a copy of the report of the Medical Board, with no mention of appealing the decision of the Board. Furthermore, this was the follow-up of a similar appeal before the JAB;

d. This application to UNDT is, *stricto sensu*, not an appeal but a request for revision of the judgement in question that would have been submitted to the old UNAT if the latter had still been in existence. Given UNAT disappearance, it is up to UNDT to take up the case for revision;

e. Article 12 of the UNAT Statute provided that "the applicant may apply … for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor…". While referring to facts unknown to the Tribunal, the logic of it applies even more to facts known to, but ignored by, the Tribunal;

f. The same article also foresees that errors arising from omission may be corrected by the Tribunal. UNAT made a gross error in omitting to see that this was an appeal against the decision to deny the Applicant a copy of the report of the Medical Board;

g. On the substance, it is obvious that the Applicant's submission to UNAT was made within the prescribed time limits, and should not have been rejected as being time-barred;

h. On the procedure, there is nothing in UNAT statutes that forbids the revision of a judgement if it is discovered that a gross error on the facts was made. Furthermore, Article 26 of the Rules of UNAT set out that "[a]ll matters which are not expressly provided for in the present rules shall be dealt with by decision of the Tribunal upon the particular case";

i. Moreover, the possibility for revision of a UNAT judgement has been recognized in its case-law, under certain circumstances, and UNESCO General Conference, in its 30th session, recommended that this possibility be developed;

j. Based on all that precedes, the Applicant requests that UNDT,

(i) Find the application at hand receivable;

(ii) Find that her application to UNAT was receivable;

(iii) Proceed to render a judgement on the substance of the application as presented to UNAT on 22 February 2007. In this connection, she reiterates her requests to be given a copy of the report of the Medical Board, to be paid the 46 days of sick leave that were not approved by the Medical Board, to be awarded an indemnity of two years salary as damages for the harassment and violation of due process of which she has been the victim and their consequences.

13. The Respondent's main contentions are the following:

a. The application under review is not receivable;

b. The contested decision is Judgement No. 1466, the judgement rendered by UNAT in Case No. 1525. As per article 11 of its Statute, judgements of the UNAT are "final and without appeal";

c. UNDT is not competent to hear appeals against judgements rendered by UNAT as these judgements do not fall under the purview of article 2 of its statute. In accordance with article 2, paragraph 7 (b), of the statute, only if a case was transferred from UNAT, is UNDT competent to hear and pass judgement on it. In

the instant case, UNAT has rendered a judgement, which does not qualify under any of the sections of article 2 as a subject matter that is open to review by UNDT;

d. In light of these considerations, the Respondent requests that the Tribunal dismiss the present case in its entirety.

Considerations

14. The material scope of the Tribunal's jurisdiction is defined in article 2 of the UNDT statute. Under its paragraph 1, UNDT may consider applications against "an administrative decision" allegedly contrary to the terms of appointment or the contract of employment of the concerned staff member. The Tribunal's competence is thereby circumscribed to "administrative decisions". The notion of "administrative decision" may be disputable. On the one hand, the Tribunal has upheld a well-established definition (see Judgments UNDT/2009/077, *Hocking, Jarvis, McIntyre*, paragraph 44, and UNDT/2009/086, *Planas*, paragraph 10, referring to Judgement No. 1157, *Andronov* (2004)). On the other hand, it has been said that there may be no precise and limited definition of this concept (see UNDT/2010/018, *d'Hellencourt*, paragraph 40). Some find unnecessary to understand it in any special or technical sense (see Order No. 19 (NY/2010), *Wasserstrom*, paragraph 28). But, at least, it is beyond question that administrative decisions must by essence be taken by the Administration.

15. In the present case, however, the decision challenged is a judgement issued by UNAT, i.e. a jurisdictional body. In other words, it is a judicial decision, as opposed to an administrative one, and, as such, it does not fall within the competence of UNDT.

16. Pursuant to paragraph 7 of the same article 2, the Tribunal is competent, as a transitional measure related to the change of justice system effective 1 July 2009, to review cases "transferred to it from the United Nations Administrative Tribunal". This provision is to be read in conjunction with paragraph 45 of General Assembly resolution 63/253 and with section 4.2 of ST/SGB/2009/11, *Transitional measures related to the introduction of the new system of administration of justice*, which provide respectively that "all cases from the

United Nations and separately administered funds and programmes pending before the United Nations Administrative Tribunal shall be transferred to the United Nations Dispute Tribunal, as from the abolishment of the United Nations Administrative Tribunal", and that "… [c]ases not decided by the United Nations Administrative Tribunal by 31 December 2009 will be transferred to the United Nations Dispute Tribunal as of 1 January 2010".

17. There is no doubt, in light of the above-cited provisions, that the Tribunal's competence covers cases still pending before UNAT at the time of its abolishment, but not those on which judgement had already been passed at that point. The Applicant's case by no means could be deemed to be still pending before UNAT, inasmuch as UNAT already decided upon it by Judgement No. 1466. It follows that UNDT is not competent to examine the application at hand by virtue of the aforementioned transitional measures.

18. Having determined that the present application does not fall within the Tribunal's purview according to article 2 of its statute, it is appropriate to stress that Judgement No. 1466 (2009) - like all UNAT judgements - was final and without appeal, as expressly provided by article 11 of the UNAT Statute. The case in question was the object of a judgement by the last instance of the justice system in force over the entire period when it was lodged, considered and disposed of, and must accordingly be regarded as *res iudicata*.

19. Yet, the Applicant submits that she does not seek appeal, but revision of the UNAT decision, this being an avenue that would have been available to her – subject to the statutory conditions – had the old system remained in place, despite a final and non-appealable decision having been issued on the matter.

20. Article 12 of the UNAT Statute, indeed, allowed an Applicant to apply for UNAT to revise one of its judgements, provided that "some fact of such a nature as to be a decisive factor" had been discovered. The Applicant further argues that, since UNAT is no longer in a position to receive any request, it is for UNDT, as its successor, to consider such an application.

21. This contention does not have any legal basis. As a matter of law, the Tribunal's mandate was defined by the General Assembly in its resolution 63/253 and the UNDT statute, and it is plain from their wording that the power to revise

UNAT judgements is not included. It would not be warranted to infer additional competencies for UNDT from the statute governing the former UNAT.

22. In view of the foregoing, the application under review must be deemed irreceivable, as falling outside the Tribunal's competence.

Conclusion

23. For the reasons stated above, the Tribunal DECIDES that:

The application be rejected in its entirety.

(*Signed*)

Judge Thomas Laker

Dated this 5th day of February 2010

Entered in the Register on this 5th day of February 2010

(*Signed*)

Víctor Rodríguez, Registrar, UNDT, Geneva