



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/029
(UNAT 1626)
Judgment No.: UNDT/2010/064
Date: 14 April 2010
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Registrar: Víctor Rodríguez

FUENTES

v.

SECRETARY-GENERAL OF THE
UNITED NATIONS

JUDGMENT

Counsel for applicant:
Antonio Lombardi

Counsel for respondent:
Stéphanie Cochard, UNOG

Application

1. The applicant came before the Tribunal seeking the annulment of the Secretary-General's decision to follow the recommendation of the Joint Appeals Board (JAB) in Geneva, on the one hand as it relates to the decision not to reclassify the post she occupied, and on the other hand as it relates to the refusal to conduct an investigation into the harassment she had complained of.

2. The applicant was requesting reclassification of her post to the G-5 level, retroactive to 31 January 2003, and her promotion to the said post without the need for a vacancy notice.

3. The applicant further asked that the administration be ordered to pay her the sum of 240,000 Swiss francs as damages for the harassment she had complained of, and to compensate her for the inconvenience of being obliged to take days of leave when she was ill.

Facts

4. On 5 June 1989 the applicant was recruited to the United Nations Office at Geneva (UNOG), Division of Conference Services, Publications Services, Distribution and Sales Section, as a Distribution Officer, at the G-2 level, under a short-term appointment of twenty-five days (series 300 of the Staff Regulations being then in effect). She afterwards obtained several short-term appointments with short interruptions of service, the last expiring on 30 June 1991.

5. On 1 July 1991, the applicant obtained a six-month fixed-term appointment (series 100 of the Staff Regulations being then in effect). Her contract was renewed several times. In January 1993, she was formally selected for the post of Distribution Officer and her post was thus regularized. On 1 January 1994, she was promoted to G-3 level as a Distribution Officer II. Her contract was thereafter regularly extended for one-year periods.

6. On 1 September 2001, the applicant was promoted to the G-4 level as Records Clerk, Distribution and Sales Section. On 1 January 2002, she was given a two-year fixed-term appointment.
7. On 31 January 2003, the applicant and her line supervisors requested reclassification of her post to the G-4 level.
8. On 1 January 2004, her contract was extended for two years and, on 1 September 2004, she was assigned to the Sales and Marketing Section.
9. In January 2005, the applicant was informed that the reclassification request of January 2003 had been denied; on 28 January 2005, she complained to her supervisor, the Head of the Sales and Marketing Section, regarding the non-reclassification of her post.
10. On 22 February 2005, the applicant sent a memorandum to the New York Ombudsman complaining of “physical and administrative harassment”.
11. On 29 March 2005, the applicant sent a memorandum to the Chair of the Classification Appeals Committee.
12. On 9 May 2005, the applicant submitted to the Office of Internal Oversight Services a complaint concerning her transfer from Publications Services to the Sales and Marketing Section, which she claimed was to her disadvantage, and asked for an investigation to be conducted, adding that since 2001 her complaints of harassment had not been addressed.
13. On 8 June 2005, the applicant sent a memorandum to the Chief of the Division of Administration complaining of the transfer of her post to the Sales and Marketing Section.
14. On 5 August 2005, the Office of Internal Oversight Services informed the applicant that her complaint had been reviewed and that it was within the purview of the Human Resources Management Service of UNOG.
15. On 1 November 2006, the applicant’s appointment was extended for a year.

16. On 19 January 2006 the applicant's counsel sent a letter to the UNOG Director of Administration asking the administration to reclassify her post, do a performance appraisal and credit her with her annual leave, and asking the Office of Internal Oversight Services to investigate the numerous complaints of harassment filed by the applicant since 1998.

17. On 24 January 2006, the applicant's counsel sent another letter to the UNOG Director of Administration, followed by a third letter on 14 February 2006 and a fourth on 16 May 2006.

18. On 30 January 2006, the UNOG Director of Administration replied to the applicant's counsel that the administrative procedures necessary to extend the applicant's contract had been begun and that the other issues raised in his letters were under review; she would be contacting him again as soon as possible.

19. On 19 July 2006, a new three-year contract was offered to the applicant, retroactive to 1 January 2006.

20. In a letter dated 21 July 2006, the applicant's counsel submitted to the Secretary-General a request for review of the issues relating to compensation for the harassment to which the applicant had been subjected, the refusal to renew her contract for a period of three years and the refusal to investigate how she had been treated, and requested an apology from the Organization for not having put a stop to the harassment she had endured.

21. In a letter dated 3 August 2006, the officer in charge of the Administrative Law Unit acknowledged receipt of the applicant's request for review dated 21 July 2006.

22. On 30 October 2006, the applicant's counsel sent the Secretary-General another letter whose contents were almost identical to those of his letter of 21 July 2006.

23. The same day, the applicant submitted an incomplete appeal to the Geneva Joint Appeals Board (JAB), which was completed on 11 January 2007.

24. The Geneva JAB submitted its report to the Secretary-General on 28 November 2007. The Board concluded on the one hand that the only points at issue were the decision not to grant the applicant an extension of her contract for a period of three years, the decision not to reclassify her position at the G-6 level, and finally the decision of the Office of Internal Oversight Services not to conduct an investigation, and on the other hand that her appeal against these decisions was either moot or time-barred. The Board therefore recommended that the appeal be dismissed.

25. In a letter dated 8 February 2008, the Under-Secretary-General for Management informed the applicant that the Secretary-General had decided to follow the recommendation of the Geneva JAB.

26. On 10 April 2008, the applicant's counsel applied for an extension of the 90-day time limit to submit a application to the United Nations Administrative Tribunal. As of 10 July 2008, a motion to institute proceedings was submitted.

27. On 1 January 2009, the applicant's appointment was extended for three years. As of 2 February 2009, the applicant was temporarily transferred to the NGO Liaison Unit within the Office of the Director-General.

28. On 1 December 2009, following her application, the applicant was selected for the post of Liaison Assistant in the Director General's Office and promoted to the G-5 level.

29. Under the transitional measures set out in resolution 63/253 of the United Nations General Assembly, the case being still pending before the United Nations Administrative Tribunal when that body was dissolved on 1 January 2010, it was referred to the United Nations Dispute Tribunal.

30. In a letter dated 18 March 2010, the Tribunal informed the parties that the judge intended to raise the issue of the lateness of the appeal under Administrative Instruction ST/AI/1998/9 "System for the Classification of Posts" and invited them to make submissions on that point.

31. On 23 March 2010, the applicant's counsel responded to the above-mentioned letter, pointing out that the applicant had never received official notification of the decision to refuse the reclassification of her post.

Contentions of the parties

32. The Applicant's principal contentions are:

- a. As regards the refusal to reclassify her post at the G-5 level:
 - (i) The applicant claims that on 29 March 2005 she filed an appeal with the Classification Appeals Committee against the refusal to reclassify her post, pursuant to the procedure set out in Administrative Instruction ST/AI/1998/9, Section 5. That appeal was submitted within the 60-day time limit following notification by her line supervisor, in late January 2005, of the classification decision on her post;
 - (ii) On 22 April 2005, the Chair of the Classification Appeals Committee acknowledged receipt of the appeal and forwarded the files to the Human Resources Management Service, which never responded thereto;
 - (iii) The applicant had preferred to take an informal approach to resolving her conflict with the administration, who had led her to believe that a decision would be made. On 30 January 2006, the Director of Administration advised her that she would respond to her request at a later date. Hence, the administration entrapped the applicant into submitting her request late;
 - (iv) Contrary to JAB's view, however, her appeal was not submitted late. The Director-General had himself reminded staff, in a letter dated 25 March 2004, of the time limits for the administration to respond to staff members' requests;

- (v) The applicant challenged the weight given to a number of classification factors. In particular, she noted that for factor 9, “training/experience”, because the minimum requirements for the post were secondary education and six to seven years’ experience, including at least four years within the Organization, the post should have been rated D, counting 120 points, rather than C (90 points). That would have raised the post’s point count to 1305, G-5 level;
 - (vi) Going against the practice of more than five years’ standing, the classification specialist never interviewed the applicant, and for reasons of his own did not answer her memoranda.
- b. With respect to the refusal by the Office of Internal Oversight Services to undertake an investigation:
- (i) In cases of discrimination and harassment, there is no time limitation;
 - (ii) The applicant has been subjected to harassment. This was not a mere interpersonal conflict, and she repeatedly alerted the administration to it. She endured harassment by all male staff members, not just by her immediate supervisor;
 - (iii) The administration failed to afford the applicant the protection it owes to its staff members, as she was insulted and threatened by a staff member. Her supervisor’s behaviour was unclear and made her job more difficult;
 - (iv) The applicant alerted all levels of the hierarchy, without result. The administration made it impossible for her to obtain a thorough investigation by arbitrarily eliminating the Panel on Discrimination and Other Complaints;

- (v) The Ombudsman did not play his role in a transparent manner and made no attempt to resolve the dispute;
- (vi) The Office of Internal Oversight Services failed in its mission by refusing to undertake an investigation on the grounds that her complaint was, instead, a matter for the Chief of Human Resources. That inaction by the Office of Internal Oversight Services allowed the harassment endured by the applicant to continue,
- (vii) That harassment had worsened her state of health and brought on the depression from which she was now suffering;
- (viii) Since 2001 the applicant has received no performance appraisals, despite her numerous complaints. That situation has been to her detriment in many ways, in particular because her contract could not be renewed;
- (ix) She has been a victim of discrimination in that area of promotion, as she ought to have been promoted to the G-5 level at the same time as her colleagues;

33. The respondent's principal contentions are:

- a. The application is inadmissible on the grounds that it is time-barred;
- b. The Tribunal is asked to reject requests for production of documents when the application is inadmissible;
- c. Regarding the request for reclassification of the applicant's post, her application is inadmissible since the applicant did not meet the deadline for appeals under Staff Rule 111.2. The applicant never received any reply to her applications for reclassification, and an absence of reply constitutes refusal. The applicant did not ask the Secretary-General to review her post until 21 July 2006, several years after her first reclassification request. The applicant ought to have

realized that her reclassification application had been implicitly rejected and submitted her request for review to the Secretary-General before 1 June 2006;

- d. As regards the application relating to the applicant's allegations of harassment, she had two months to ask the Secretary-General to reconsider the refusal of the Office of Internal Oversight Services to investigate. She was informed of the Office's refusal to investigate on 5 August 2005 and so had until 5 October 2005 to challenge that decision before the Secretary-General. In fact she did not do so until 21 July 2006;
- e. The applicant's other requests are inadmissible on the grounds that no appeal was made to the Secretary-General.

Judgment

As regards the refusal to reclassify the applicant's post to the G-5 level

34. The applicant contests the decision whereby the Secretary-General followed the recommendation of the Geneva JAB, which considered that her appeal against the refusal to reclassify her post to a higher level was time-barred.

35. In taking that decision, the Secretary-General based himself on the failure to meet the appeal deadline laid down in Staff Rule 111.2(a) then in effect, which reads as follows:

“A staff member wishing to appeal an administrative decision pursuant to Staff Regulation 11.1 shall, as a first step, address a letter to the Secretary-General requesting that the administrative decision be reviewed; such letter must be sent within two months from the date the staff member received notification of the decision in writing.”

36. However, it is clear from the evidence that in challenging the refusal to reclassify her position the applicant based herself on the provisions of Administrative Instruction ST/AI/1998/9,

37. That instruction reads, in section 5:

“The decision on the classification level of a post may be appealed by the head of the organizational unit in which the post is located, and/or the incumbent of the post at the time of its classification, on the ground that the classification standards were incorrectly applied, resulting in the classification of the post at the wrong level.”

38. Section 6 of the same instruction provides that:

“6.1 Appeals shall be submitted in writing...

6.3 Appeals must be submitted within 60 days from the date on which the classification decision is received.

6.4 The appeal shall be referred for review to: [...]

b) In the case of appeals submitted to the Head of Office, the local Human Resources Service or Section, which will submit a report with its findings and recommendation for decision by, or on behalf of, the Head of Office.

6.6 If it is decided to maintain the original classification, or to classify the post at a lower level than that claimed by the appellant, the appeal [...] shall be referred to the appropriate Classification Appeals Committee established in accordance with the provisions of section 7 below.”

39. On 31 January 2003, the applicant’s immediate supervisor applied for reclassification of the G-4 level post held by the applicant. Though the supervisor was notified of the refusal to reclassify her post in December 2004, the applicant maintains that she had not become aware of that decision until the end of January 2005. In view of the fact that, despite the opportunity it was given by the Tribunal to explain that point, the administration failed to provide evidence of the date on which the applicant was notified of the refusal to reclassify her post, as required by the above-mentioned provisions, the applicant was not late when, on 29 March 2005, she challenged that decision in a memorandum sent to the President of the Classification Appeals Committee, thus meeting the 60-day deadline laid down in the above-mentioned provisions. Hence, her appeal was not late in that context.

40. Section 6.14 of Administrative Instruction ST/AI/1998/9 reads as follows:

“The Assistant Secretary-General, OHRM, or the Head of Office, as appropriate, shall take the final decision on the appeal. A copy of the final decision shall be communicated promptly to the appellant, together with a copy of the report of the Appeals Committee. Any further recourse against the decision shall be submitted to the United Nations Administrative Tribunal.”

41. It appears from the record, and is not disputed by the administration, that the applicant’s appeal was submitted in April 2005 to the Human Resources Management Service by the Chair of the Classification Appeals Committee and, since that date, the applicant has not received any information on the outcome of her appeal.

42. The administration holds that that non-response implicitly constituted a refusal, which was not challenged by the applicant within the time limit laid down in Staff Rule 111.2(a), quoted above.

43. However, it appears very clearly that administrative instruction ST/AI/1998/9 was intended to create a special procedure to challenge a refusal to reclassify a post; hence, the Rule quoted is not applicable.

44. In the case before us, the applicant undertook a particular proceeding before the Classification Appeals Committee but received no response either from the said Committee or the administration in spite of her counsel’s repeated requests beginning in January 2006.

45. The administration argues that the applicant must have been aware that its non-response was to be considered an implicit refusal, which it was up to her to challenge.

46. However, an appeal by a staff member to the Classification Appeals Committee, or to any other Appeals Committee, such as JAB, must be considered a procedure intended to safeguard the staff member’s interests, and such a committee, once the appeal is referred to it, must be considered obligated to make a recommendation in that regard. If we say that when the administration fails to follow up a classification appeal it has implicitly denied that appeal, we are effectively saying that the administration may ignore the recommendation of the Classification

Appeals Committee. That is obviously contrary to the above-mentioned Administrative Instruction.

47. Thus, as the Committee gave no ruling, no implicit decision can be inferred, and the applicant was within her rights in applying, as she did, to the United Nations Administrative Tribunal to have the refusal to reclassify her post overturned.

48. It follows from the foregoing above that the decision to refuse the reclassification of the applicant's post was illegal, as the administration failed to follow the specific appeals procedure set out in Administrative Instruction ST/AI/1998/9. That decision must therefore be overturned.

49. A ruling is now required on the damage resulting from the unlawful decision above, which is now overturned. On 31 January 2003 the applicant and her supervisor requested a reclassification of the G-4 post she held, but she received no notification of the refusal until the end of January 2005, some two years later—an unusually long time for such a decision process. It is apparent from the file that the decision announced in January 2005 contained at least one error, regarding the number of points awarded to factor 9, "training/experience", in the post's rating sheet. As a result, the applicant lost a good chance to have her post reclassified within a reasonable time, which in the Tribunal's view would be three months from the application for reclassification.

50. It may further be supposed that the applicant, had she obtained the reclassification of her post to the G-5 level, would have had a good chance to be appointed to that post within a reasonable time, which the Tribunal estimates at nine months.

51. Thus, if the administration had, without unreasonable delay, made a decision on the applicant's request, she would have had a good chance of being appointed to a G-5 level post by January 2004 and so of being paid at that level. The damages suffered by the applicant must be calculated as follows: the difference in salary received between the G-4 and G-5 levels during the period from 1 February 2004 to 1 December 2009, on which date she was actually promoted to the G-5 level, an

amount of 49,000 Swiss francs; in this case, however, that compensation shall be divided by two to reflect the fact that the damage suffered is only that of losing a good *chance* to receive the above-mentioned sum. The respondent is therefore ordered to pay the applicant the sum of 24,500 Swiss francs inclusive of interest.

Regarding the refusal to investigate the harassment the applicant claims to have suffered

52. On 9 May 2005, the applicant asked the Office of Internal Oversight Services to conduct an investigation into the harassment she claimed to have been subjected to since 2001. She was informed on 5 August 2005 that the Office declined to conduct such an investigation. Under Staff Rule 111.2(a), she then had until 5 October 2005 to challenge that decision before the Secretary-General. In actual fact, she did so only on 21 July 2006, and so did not meet the prescribed time limit. The applicant maintains that no time limitation applies to the denunciation of harassment. Even if we suppose that to be correct, in this case what we are ruling to be time-barred is not the reporting of the facts, but only the appeal against the refusal to conduct an investigation into the truth of the report. Therefore, we must dismiss her application as inadmissible inasmuch as its intent is to overturn the decision not to undertake an investigation into the harassment she claims to have been subjected to and to obtain compensation for the harm resulting from the alleged harassment.

53. Finally, since no application for review, as called for in Staff Rule 111.2(a) then in effect, was made to the Secretary-General with respect to the other claims submitted to the Tribunal, these can only be declared inadmissible and so dismissed.

Decision

54. In view of the foregoing, the Tribunal DECIDES:

- a) The refusal to reclassify the applicant's position is overturned;
- b) The respondent is ordered to pay the applicant the sum of 24,500 Swiss francs inclusive of interest;

- c) The applicant's other claims are dismissed.

Judge Jean-François Cousin

So ruled on 14 April 2010

Entered in the Register on 14 April 2010

Víctor Rodríguez, Registrar, UNDT (Geneva)