



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/043/
UNAT/1709
Judgment No.: UNDT/2011/045
Date: 3 March 2011
Original: English

Before: Judge Goolam Meeran
Registry: New York
Registrar: Santiago Villalpando

ROSENBERG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George Irving

Counsel for Respondent:
Fabrizio Mastrogirolamo, UNDP

Introduction

1. On 29 June 2009, the Applicant filed an appeal before the former United Nations Administrative Tribunal against the Secretary-General's failure to take any action as a result of an investigation and report by the Joint Appeals Board ("JAB").

2. The Applicant asserted that the JAB was provided with ample documentary evidence which they had failed to consider and in consequence thereof failed to find that she was the victim of a predetermined course of action by senior managers of the United Nations Development Programme ("UNDP") who wished to replace her with a pre-selected external candidate.

3. The Applicant requested the former UN Administrative Tribunal to rescind the decision of the Secretary-General and to order reinstatement with retroactive effect from 1 January 2007. Furthermore, she asked the Tribunal to find that the JAB committed errors of fact and law in failing to recommend that she be provided with adequate compensation for the harm done to her and for violation of her rights.

4. The Applicant asked for compensation in the sum equivalent to three years' net base salary for violation of her rights and for the consequential moral damages that she suffered. In lieu of specific performance, she requested that the Tribunal award her three years' net base salary in view of the special circumstances of the case. Finally, she asked for costs in the sum of USD10,000 in legal fees and USD500 in expenses and disbursements.

5. On 7 January 2010, the parties were informed that the case had been transferred to the United Nations Dispute Tribunal in accordance with para. 45 of General Assembly resolution 63/253 of 24 December 2008 and sec. 4 of ST/SGB/2009/11 (Transitional measures related to the introduction of the new system of administration of justice).

Background

6. The Applicant has had a long and distinguished career in the field of development and poverty reduction. She received a PhD from Stanford University in German Studies, comprising a multi-disciplinary analysis of German-speaking societies and cultures. As part of her studies, she specialised in both sociology and political economy. She has extensive professional academic experience, including teaching and research. Prior to her position with UNDP, she was a Senior Researcher at the Institute for International Economic and Political Studies at the Russian Academy of Sciences in Moscow. She has worked as a consultant for several UN agencies and has publications in various professional journals in English, German and Russian.

Issues

7. In a joint submission filed on 28 May 2010, the parties agreed that the legal issues in the case could be summarised as follows:

- a. Whether the Applicant had a legal expectancy of renewal of her 200 series contract;
- b. Whether the abolition of the Applicant's post was a valid exercise of the Organization's discretion; and
- c. Whether the Applicant was fully and fairly considered for the newly created posts with the Poverty Group, Bureau of Development Policy ("BDP"), UNDP.

It should be noted that the precision and clarification provided in the agreed formulation of the issues is different in form but not in substance to the appeal that was filed with the former UN Administrative Tribunal wherein the Applicant requested the Tribunal "to find and rule that the Joint Appeals Board erred in matters of fact and of law in failing to provide appropriate and adequate compensation for the

harm done to the Applicant for violation of her rights under the Staff Rules and Regulations.”

8. The first point to observe in a case of this kind is that it is not the function of this Tribunal to carry out a comprehensive investigation into the Applicant’s allegations, but to address the question whether the complaint that the JAB committed an error of fact or law is well founded or not. The primary task for the Tribunal is to consider whether the JAB misdirected itself or committed any error of procedure including whether it ignored material evidence, drew the wrong inferences from such evidence as it found, failed to take fully into account material evidence and/or misdirected itself in applying the relevant legal principles. If the Tribunal were to find that the JAB committed no error of procedure, fact or law and came to a conclusion that any reasonable panel properly directing itself on the law and facts could have reached, the Tribunal will be unable to uphold the complaint. Whether the Tribunal itself could have come to a different conclusion is immaterial. The parties are reminded that in so far as the Tribunal is dealing with appeals that were initially lodged with the former UN Administrative Tribunal which were subject to the JAB and Joint Disciplinary Committee procedures, it is constrained to some extent in the full exercise of its fact-finding powers. This is a problem which is largely historic and will not apply to applications filed directly with the Dispute Tribunal under the procedures governing the new internal system of justice which commenced on 1 July 2009.

Relevant legal principles

9. The decision on whether or not to renew a fixed-term appointment is a matter of discretion. However, a long line of authorities from the former UN Administrative Tribunal established that this discretion is not absolute and must be exercised free of bias, discrimination or other extraneous motives.

10. It is instructive to refer to judgments of other international tribunals. In Judgment No. 269, *In re Gracia de Muñiz* (1979), a case in which the complainant

challenged a decision to abolish her post, the Administrative Tribunal of the International Labour Organisation (“ILOAT”) usefully described the extent to which such decisions of, in this case, the Director General of Food and Agriculture Organization of the United Nations (“FAO”), can be reviewed as follows:

[H]is decision is not wholly free from review by the Tribunal. It may be quashed if it violates a rule of form or procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if it is tainted with abuse of authority, or if a clearly mistaken conclusion has been drawn from the facts. In particular the Tribunal will find that there has been abuse of authority where the abolition of a post is motivated, not by relevant and objective considerations, but by a desire to remove a staff member for whose dismissal there are no lawful grounds.

11. The Applicant held a 200 series appointment. By their nature, such appointments are of limited duration and there is no legal expectation of renewal. The jurisprudence of the former UN Administrative Tribunal established that whilst there is no absolute right to renewal of such contracts, an expectation of renewal may be inferred from the circumstances surrounding the decision, and the decision whether or not to renew a contract must not be made in an arbitrary or capricious manner.

12. Former staff rule 204.3 provided as follows:

Types of appointment

Project personnel shall be granted temporary appointments as follows:

(a) Temporary appointments shall be for a fixed term and shall expire without notice on the date specified in the respective letter of appointment. They may be for service in one or more mission areas and may be for short, intermediate or long term, as defined in rule 200.2 (f).

(b) Project personnel who are initially granted appointments for less than one year but whose appointments are subsequently extended so that the total continuous contractual service is one year or more but less than five years shall be considered to be in intermediate-term status with effect from the date from which their appointment is extended or converted to intermediate-term status.

(c) Project personnel in intermediate-term status who complete five years continuous service and whose appointments are extended for at least one further year shall be considered to be in long-term status with effect from the date on which they complete five years continuous service.

(d) A temporary appointment does not carry any expectancy of renewal.

On retaliation

13. An applicant will have to prove that the decision-maker was aware of the act which the applicant submits triggered the particular decision, which I shall refer to as “the protected act”, which was to her detriment. In this case, the Applicant alleges that on 13 July 2006 she made a report alleging abuse and harassment of a colleague by one of the key decision-maker’s, Ms. Nora Lustig, the then Director, Poverty Group, BDP. The next step would be to show that there was a causal link between the doing of the act and the detrimental decision that had been taken. It is useful in such cases to apply the “but for” test. In other words, but for the act that attracts protection, would the outcome have been different or more favourable.

On organisational restructuring

14. There is a principle that is widely followed by labour courts and tribunals internationally. An employer is entitled to re-organise the work or business to meet the needs and objectives set by the employer at a particular time. It is not for the labour court or tribunal to dictate to an employer how the employer should run the business or undertaking. The court will not interfere with a genuine organisational restructuring even though it may have resulted in the loss of employment for the complainant. However, the court would be vigilant to guard against restructuring and reorganisation decisions which are made for the ulterior purpose of disadvantaging the individual applicant in a case before it. Reorganising and restructuring of the workplace should not be used as a mechanism for getting rid of an employee whom management may regard as being troublesome or whose continued presence was no

longer deemed desirable. Issues relating to an individual's conduct are to be dealt with through the appropriate internal procedures.

15. The Tribunal will consider whether the decision in this case was a valid exercise of the Respondent's discretionary authority and in line with what the Respondent genuinely believed was an appropriate management decision to meet its needs and obligations as defined at the time. A further point to bear in mind is that even if the restructuring decision was a valid exercise of managerial authority, staff members are entitled to be treated fairly in the steps taken to give effect to that decision. Above all, the manager concerned has a duty to bear in mind that reorganising and restructuring the work or the workplace is bound to induce a high level of anxiety. Staff members detrimentally affected by a decision are entitled to fair dealing and to be treated with sensitivity and respect, particularly if their jobs/functions may be at risk.

16. ILOAT Judgment No. 2933 (2006), at para. 10, provides:

According to firm precedent, decisions concerning the restructuring of an international organisation's services, such as a decision to abolish a post, may be taken at the discretion of its executive head and are consequently subject to only limited review. For this reason, while it is incumbent upon the Tribunal to ascertain whether such a decision has been taken in accordance with the rules on competence, form or procedure, whether it rests on a mistake of fact or of law, or whether it constituted abuse of authority, it may not rule on its appropriateness, since it may not supplant an organisation's view with its own

Findings of fact

17. The Applicant joined the BDP on 10 December 2001 on an intermediate 200 series appointment at the L-5 level as a Policy Adviser for poverty reduction with the UNDP in Bratislava. In 2002 she was reassigned to the Poverty Group in New York as Policy Adviser. Her contract expired on 31 December 2006.

18. On 14 July 2006, the Applicant met with Ms. Greet de Leeuw, Human Resources Advisor, BDP, to report an incident of Ms. Lustig's inappropriate

treatment of a colleague. On 14 August 2006, the Applicant went to the Office of Audit and Performance Review to file a complaint against Ms. Lustig.

19. Notice of the decision not to extend her contract was sent to the Applicant by a letter dated 29 August 2006. She was told that her post would be abolished with effect from 1 October 2006. She was given a limited extension until 31 December 2006.

20. On 11 September 2006 a meeting was held between the Applicant and Ms. Lustig and other staff to clarify the reasons for the abolition of the Applicant's post. The Applicant was dissatisfied with the reasons given.

21. On 26 September 2006, the Applicant filed a request for administrative review of the decision to abolish her post. It was unsuccessful. On the same day, she filed a formal complaint against Ms. Lustig alleging harassment and abuse of authority and retaliation. A fact-finding mission was set up to investigate the complaint, against Ms. Lustig. Based on the findings of this mission, the Office of Human Resources of UNDP produced a report on 21 November 2006 into the complaint made by the Applicant against Ms. Lustig.

22. At paragraph 107 of the report of the fact-finding mission, it is said that whilst there was not a continuous pattern of incidents which constituted a hostile environment, there was certainly a serious problem "which adds up to a situation which is intimidating to staff". At paragraph 108 of the same report, the fact-finding mission comments on a complex set of parameters and factors which it says "contributed to creating an environment of continuous stress, uncertainty and discomfort, and sometimes of alienation fear and intimidation" on the part of staff members. The Director, BDP, stressed that he had never been made aware of any harassment having taken place. However, he admitted that there were "some rough edges on the new management style" that needed to be softened. It should be noted that the mission report also commented on positive and friendly behaviours on the part of Ms. Lustig. The question for the Tribunal is whether Ms. Lustig retaliated

against the Applicant by deliberately setting out to ensure that there would be no place for her in the new structure.

23. The Applicant relies on her reporting of the incident (on 14 July 2006) whereby Ms. Lustig was alleged to have harassed a colleague as the protected act which gave Ms. Lustig cause to retaliate against her. It was necessary for the Tribunal to establish whether there was a causal link between the making of the report and the decision to restructure. The Tribunal has seen no documentation, nor did the JAB, indicating that consideration was being given, prior to July 2006, for re-profiling and abolishing the post. However, the Tribunal heard convincing evidence from Mr. Shoji Nishimoto, former Assistant Administrator and Director, BDP, that as early as April 2006, the Bureau Director had identified the Applicant's post as a candidate for revisiting in the context of structural and functional changes to be made in response to the 2005 World Summit on Poverty. The Tribunal also heard from Ms. de Leeuw that before the end of June 2006, Mr. Selim Jahan, Cluster Leader, Strategies and Policies for Poverty Reduction, asked for her advice on re-profiling the position occupied by Ms. Rosenberg.

24. Finally, according to para. 127 of the fact-finding mission report, the fact-finding mission was able to interview all 19 witnesses referred to in the report, 16 in person and three by telephone. In addition, the fact-finding mission contacted two other witnesses by email and received their email replies. The fact-finding mission concluded, after a detailed examination, that the restructuring exercise was taken for genuine organisational needs.

Consideration

25. Mr. Nishimoto was clear that the Applicant's post was re-profiled because of the new basic requirement for very strong leadership to manage a group of highly-skilled economists and to be able to liaise with other institutions. Management preferred a person with an advanced degree in economics, preferably at PhD level and demonstrable skill at leading high-level economists. Ms. de Leeuw confirmed

that senior management was in search of a highly-qualified person with qualifications and experience as a microeconomist. She said that it was not for the Office of Human Resources to question the needs of the BDP or the Poverty Group. It was common ground that the Applicant did not have the requisite academic degree as a microeconomist, nor did she have experience of leading a team of high-level economists. Furthermore, the proposed restructuring was being considered prior to the doing of the protected act by the Applicant. In those circumstances, the JAB did not wrongly conclude that the Applicant was not the victim of retaliation or any unfair practice aimed at getting rid of her.

Legal expectancy of renewal

26. The Applicant held a 200 series fixed-term appointment. Her contract was due to expire on 30 June 2006. The position she held was abolished on 1 October 2006, for operational reasons. She did not meet the requirements for former staff rule 204.3(c) in that she was not a person with five years' continuous service whose appointment was extended for a further year. The Applicant has not established facts in support of her contention that she had a legal expectancy of renewal nor could such an inference be drawn from the evidence.

Abolition of post

27. The JAB relied in part on the findings of the fact-finding mission that, as early as April 2006, the Applicant's post was being considered for reprofiling. In the circumstances, the conclusion that the re-profiling of the post started before the Applicant had made allegations of misconduct against Ms. Lustig is a conclusion which the JAB was entitled to draw on the evidence before it. The unanimous conclusion of the JAB was that the Applicant did not produce sufficient evidence that the post which she occupied at the time was abolished on the basis of factors that were extraneous to those specified by the Respondent and were for illegitimate or impermissible reasons. In the circumstances the JAB decided to make no recommendation in relation to the Applicant's appeal. The Secretary-General

decided, after examining the JAB's report, that it was not appropriate for him to take any further action in this matter. The Tribunal finds that the decision of the Secretary-General to take no further action following the presentation of the JAB's review and report was a permissible option for the Secretary-General to have taken in the circumstances. The decision to abolish the post held by the Applicant was a valid and lawful exercise of managerial discretion and not tainted with abuse of authority or other impermissible considerations.

Did the Applicant receive full and fair consideration for appointment within the new structure?

28. The Tribunal heard evidence, and considered documents, relating to the Applicant's complaint that her non-selection for one of the vacant posts in the new structure was motivated by improper consideration. Mr. Mastrogirolamo, for the Respondent, submitted that this complaint ought first to have been submitted for an administrative review under the procedure applicable at the time. Setting aside the potential legal and factual issues with regard to receivability, the Tribunal considered first whether there is an arguable point that the Applicant did not receive full and fair consideration for appointment.

29. The evidence before the Tribunal, including the testimony of witnesses involved, did not support the contention that the selection processes were flawed, particularly in light of the broad discretion enjoyed by the Respondent in matters related to appointments. There was no evidence that the Applicant's non-selection was motivated by improper considerations.

30. The Applicant had significant hurdles to overcome. The senior managers decided that it was necessary to strengthen their capacity in macroeconomics and microeconomics. In particular, they decided that a strong background in microeconomics was required. The Applicant did not meet this essential requirement. Management was entitled to establish selection criteria to deliver its revised mandate and work programme. Unless the Tribunal has evidence to support the contention that the essential requirements were engineered to exclude the

Applicant, the Tribunal cannot interfere. Persuasive evidence to this effect has not been provided.

31. The Applicant is aggrieved at an organisational restructuring and shift in focus whereby she lost the opportunity of continued employment. Given that her claim with regard to not receiving full and fair consideration for other posts following the restructure fails on the evidence, the Tribunal does not consider an analysis of the receivability of these claims to be necessary.

32. It is understandable that the Applicant, who has an impressive record of achievement, should feel wronged by the consequences of the restructuring exercise. However, the Respondent was entitled to make structural and functional changes in response to the 2005 World Summit on Poverty and to set its selection criteria to deliver the programme. In the absence of evidence that the restructuring exercise and the reprofiling of the Applicant's post were to achieve the ulterior purpose of excluding the Applicant from continued employment, this application must fail.

Conclusion

33. The application fails and is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 3rd day of March 2011

Entered in the Register on this 3rd day of March 2011

(Signed)

Santiago Villalpando, Registrar, New York