



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

NIELSEN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

SUMMARY JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Federica Midiri, UNFPA

Introduction

1. On 26 May 2014, the Applicant, a former Procurement Assistant (G-5) in the United Nations Population Fund (“UNFPA”), Procurement Services Branch (“PSB”), Africa team, based in Copenhagen, filed an application contesting the following decisions:

- “a. Not to select [her] for the position of Quality Assurance Assistant, G6 (one of 2 positions);
- b. Not to select [her] for the position of Procurement Assistant, G5 (one of 5 positions);
- c. Continuation of blocking [her] personal emails even after the end of [her] [temporary appointment (“TA”)] contract with UNFPA PSB;
- d. Continuation of UNFPA PSB ordering UN City Security (in UN City Copenhagen) to inform any inviting [her] person/UN agency in UN City Copenhagen that [she was] not allowed to enter UNFPA Copenhagen premises (2 PSB’s wings inside the UN City) even after the end of [her] TA contract with UNFPA PSB;
- e. UNFPA not conducting [her] [Performance Appraisal and Development (“PAD”)] Rebuttal process in principle or not following the due process and not communicating with [her];
- f. The UNFPA Policy on PAD Rebuttal ... saying that the Rebutted PAD is final (...).”

Facts

2. On 28 January 2013, the Applicant entered the service of UNFPA in the Africa team, PSB, on the basis of a one-year TA.

3. As of April 2013, the relations between the Applicant and some of her colleagues and supervisors became difficult. Since measures taken in order to improve the situation were not successful, the Applicant was placed on Special Leave with Full Pay (“SLWFP”) on 23 September 2013.

4. By letter dated 13 November 2013, the Applicant requested management evaluation of the decision to place her on SLWFP. By memorandum dated

11 December 2013, the Executive Director, UNFPA, upheld the contested decision, which the Applicant challenged in an application before this Tribunal, registered under Case No. UNDT/GVA/2014/009, which is currently still under consideration.

5. On 10 January 2014, the Applicant received a letter notifying her of the non-renewal of her TA.

6. On 14 January 2014, her performance evaluation report was completed, and she received the following ratings: for core competencies-“not proficient”, for functional competencies-“developing proficiency”, and for developmental outputs-“partially achieved outputs”.

7. On 26 January 2014, the Applicant’s TA expired and she was separated from UNFPA.

8. On 14 February 2014, she initiated a rebuttal of her performance evaluation, for which she received an acknowledgment of receipt on 3 March 2014. She provided additional documents to her rebuttal case on 30 April 2014, but did not receive any further reply since then.

9. On 13 February 2014, the Applicant tried to access the UN City Building in order to attend a written test held by the World Health Organization (“WHO”) in the context of a job opening for which she had applied. She was, however, denied access to the building by the UN Security, following which she asked UNFPA to clarify that incident.

10. According to the undisputed finding with regard to that issue, contained in the UNFPA Executive Director’s reply to the Applicant’s request for management evaluation, the Director, DHR, UNFPA, in an email of 14 February 2014, confirmed to the Deputy Chief, PSB, UNFPA, and the Chief, PSB, that the Applicant was allowed to enter the UN City upon invitation of any other UN Agency except UNFPA, and that the decision not to give the Applicant access to the UN City Building on 13 February 2014 was taken solely by WHO. By email of the same day, the Director, DHR, UNFPA informed the Applicant that he had

requested PSB to ensure that she would be allowed access to the UN compound if invited by another UN agency.

11. On 27 February 2014, the Applicant received an email from WHO as follows:

UNFPA confirmed that they could not prevent WHO from inviting you to a test session or anything else for that matter. We were simply informed that it has an ongoing disagreement with you and that it does not wish you on THEIR premises. However, as I explained to you, we do not wish to harbour unfriendly relations with any other UN agency that is housed in UN City. This is a decision taken solely by WHO and I am not aware of any other agency having discussed this with UNFPA.

12. By a later email of the same day, WHO confirmed to the Applicant that, in view of the fact that UN agencies in Copenhagen were now housed in the UN City, WHO did not wish to appear “divisive in the One UN philosophy”, hence she could not attend the next testing session.

13. On 27 March 2014, the Applicant was informed of her non-selection to a G-5 and a G-6 post at PSB, UNFPA. She contends that she also noticed on the same day that the emails she was addressing to UNFPA staff members from her private email accounts were blocked, even if her contract with UNFPA had expired on 26 January 2014.

14. On 1 April 2014, the Applicant filed a second request for management evaluation, challenging 1) the fact that she had been denied a “read-only” access to the emails from her UNFPA account, 2) the fact that she had been prevented from entering the UN City Building to participate in a test for a WHO vacancy, 3) the non-extension of her TA, 4) her non-selection to the positions she had applied for in PSB, UNFPA. She was also requesting information as to the reasons why her emails sent from her two private email addresses to PSB, UNFPA, were blocked.

15. By memorandum dated 14 May 2014, the Executive Director, UNFPA, replied to the Applicant’s second request for management evaluation of

1 April 2014, concluding that her request was “not receivable in part and in its remaining parts [was] without merit”.

16. On 26 May 2014, the Applicant submitted the present application, with annexes 80 to 84-containing her diplomas-filed on an *ex parte* basis.

Parties’ submissions

17. The Applicant’s main contentions are:

a. She was not aware of any decision from UNFPA to bar her from entering the UN City premises; in any event, upon her separation from UNFPA, any such decision should have been cancelled, since it prejudiced her in her search for a new position when she was not allowed to enter the building on 13 February 2014 to attend a written test held by WHO, a very humiliating situation;

b. Blocking the emails she sends from her private accounts is a discrimination of her right for “private life” and for being able to defend herself; contrary to what is stated in the reply to her request for management evaluation, her emails were still received by their addressees after the expiration of her TA, she only noticed recently that it was not the case anymore so her request in that respect is not time-barred; such an order to block her emails should be cancelled now that she is not a UNFPA staff member anymore;

c. As regards her applications for the G-5 and G-6 posts, there were flaws in the recruitment procedure and the successful candidates do not possess the required years of experience; contrary to what is stated in the reply to her request for management evaluation, she duly applied for these positions, but the fact that she was placed on SLWFP was used against her to exclude her from the recruitment process;

d. With regard to her rebuttal of her performance evaluation, the lack of answers to her questions and the lack of any action taken until now shows that the rebuttal procedure in her case is not duly followed by UNFPA; the

rebuttal Policy as such should be cancelled with regard to the rule that states that the rebutted performance appraisal is final and cannot be further contested;

e. She requests that all orders issued by UNFPA to bar her from UN City premises or to block her emails be cancelled, and that she be provided with a “good” 2013 performance appraisal. As compensation for the breach of her rights and the damage to her career and reputation, she requests that her TA be extended and then converted into a fixed-term appointment for one of the posts to which she applied, or alternatively an amount corresponding to two years of her salary. She also asks for compensation for the moral damage endured, and requests that all detrimental documents placed in her official status file be removed; finally, she asks that investigations and accountability measures be taken against PSB/UNFPA managers.

Consideration

18. At the outset, it is necessary for the Tribunal to determine which decisions are being challenged by the Applicant and whether they have been duly submitted to the Tribunal.

19. In her application filed with the Tribunal on 26 May 2014, the Applicant identified the contested decisions as follows:

“a. Not to select [her] for the position of Quality Assurance Assistant, G6 (one of 2 positions);

b. Not to select [her] for the position of Procurement Assistant, G5 (one of 5 positions);

c. Continuation of blocking [her] personal emails even after the end of [her] TA contract with UNFPA PSB;

d. Continuation of UNFPA PSB ordering UN City Security (in UN City Copenhagen) to inform any inviting [her] person/UN agency in UN City Copenhagen that [she was] not allowed to enter UNFPA Copenhagen premises (2 PSB’s wings inside the UN City) even after the end of [her] TA contract with UNFPA PSB;

e. UNFPA not conducting [her] PAD Rebuttal process in principle or not following the due process and not communicating with [her];

f. The UNFPA Policy on PAD Rebuttal ... saying that the Rebutted PAD is final (...).”

20. As regards the matters relating to the rebuttal procedure raised by the Applicant in lit. e) of her application, the Tribunal notes that the rebuttal process is still ongoing and that no administrative decision has yet been taken. As already stated in its judgment *Nielsen* UNDT/2014/032, “it is not for the Tribunal to intervene in ongoing administrative procedures such as the rebuttal the Applicant herself initiated on 14 February 2014 and which is still pending”. In the absence of an administrative decision, any application against the rebuttal is therefore premature at this stage.

21. Further, with respect to the UNFPA rebuttal policy that the Applicant also challenges as such in lit. f) of her application, the Tribunal recalls that, according to art. 2.1 of its Statute, it shall be competent to hear and pass judgement on an application to “appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”. The Appeals Tribunal has adopted the definition of an administrative decision based on the jurisprudence of the former United Nations Administrative Tribunal, according to which an administrative decision “is a unilateral decision taken by the Administration in a precise individual case (individual administrative act) which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations) ...” (see e.g. *Al Surkhi et al.* 2013-UNAT-304). It is clear that in the present case, UNFPA rebuttal policy is a regulatory instrument, which does not have the characteristics of an administrative decision as described above, namely it is not of individual application and it does not carry direct legal consequences on the Applicant’s rights, hence that part of her application is not receivable.

22. As regards the decisions challenged in the application under lit. c) and d), namely the fact that the Applicant was denied access to the UN City Building on

13 February 2014 and that her emails were blocked after the end of her contract, the Tribunal notes that they refer to situations that happened after the expiration of her TA with UNFPA on 26 January 2014, as underlined by the Applicant herself. In view of the fact that the Applicant had no appointment at the time of the contested decisions, she has no legal standing to bring those matters before the Tribunal since, as already recalled above, pursuant to art. 2.1 of its Statute the Tribunal is competent to consider applications to appeal an administrative decision “that is alleged to be in non-compliance with the terms of appointment or the contract of employment”. Since the Applicant’s appointment ended on 26 January 2014, for the time following this date and with respect to the issues she challenged under lit c) and d) of her application, she cannot claim any breach of rights as a staff member.

23. The Tribunal observes that all the issues discussed above and pertaining to lit. c) to f) of the application are matters of law, which may be adjudicated even without serving the application to the Respondent for reply and even if they were not raised by the parties (see *Chahrour* 2014-UNAT-406, *Christensen* 2013-UNAT-335). Accordingly, the Tribunal deems it appropriate, at its own initiative and in accordance with art. 9 of its Rules of Procedure, to decide on this part of the present case by way of summary judgment, which has been accepted as an appropriate tool to deal with issues of receivability (see *Chahrour* 2014-UNAT-406, *Gehr* 2013-UNAT-313).

24. With respect to the decisions not to select the Applicant for the above-referenced G-5 and G-6 positions, the proceedings will be continued.

Conclusion

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

The application with respect to its lit. c) to f) is rejected.

(Signed)

Judge Thomas Laker

Dated this 13th day of June 2014

Entered in the Register on this 13th day of June 2014

(Signed)

René M. Vargas M., Registrar, Geneva