



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KEEGAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Monika Bileris

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Nicole Wynn, ALS/OHRM

Introduction

1. The Applicant has challenged the decision of 22 May 2015 to abolish her post with the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO).

2. In her Application dated 10 August 2015, she alleges that there were three procedural errors with the impugned abolition of post process, including:

- a) Failure by the Administration to properly inform her of the 22 May decision;
- b) Failure to submit her post to the Comparative Review Panel (CRP) process, thereby ensuring procedural safeguards as well as her right to an assessment of her post;
- c) Violation of staff rule 1.2(f) prohibiting gender discrimination in the workplace.

3. She also alleged, *inter alia*, that the impugned decision violated the principles of equal treatment; was tainted by bias and prejudice; was retaliatory and an abuse of process.

4. On 9 September 2015, the Respondent filed his reply in which he submitted that the Applicant's claim of gender discrimination is not receivable.

5. On 3 November 2015, the Tribunal issued Order No. 356 (NBI/2015) advising the parties that it had decided to deal with receivability as a preliminary issue and gave the Applicant the opportunity to file submissions on receivability.

6. On 16 November 2015, the Applicant filed her submissions on receivability.

Facts

7. The Applicant joined the Engineering Section of the United Nations Organization Mission in the Democratic Republic of Congo (MONUC)¹ in 2006 on secondment from the United Nations Development Programme (UNDP). She separated from service with UNDP effective 1 September 2009 and was reappointed to MONUC in September 2009. She was separated from service with MONUSCO on 31 July 2015.

8. According to the Applicant, she learned on 12 March 2015 that her post was to be subject to a “dry cut” when she received a document from her Section Chief entitled “Table for the 2015 MONUSCO Retrenchment Exercise”.

9. On 14 April 2015, the Director of Mission Support issued Information Circular 2015/09 (Information circular on downsizing/reduction of posts in 2015/16 budget period: establishment of the Comparative Review Panel (CRP) and review criteria) to announce the establishment of the CRP, which would be responsible for recommending which national and international staff members would be retained in service through the downsizing process. The information circular further informed MONUSCO staff members that the CRP would conduct a comparative review of staff’s employment history and competence.

10. On 18 April 2015, the Applicant received a memorandum dated 17 April 2015 from the Director of Mission Support stating that pursuant to Security Council resolution 2098 her post was being proposed for discontinuation. She was encouraged to apply for all available posts for which she was eligible.

11. On 6 May 2015, the Applicant emailed staff at the Department of Field Support (DFS) in New York regarding the discontinuation of her post.

12. On 18 May 2015, the Director of Mission Support issued Information Circular 2015/11 (Downsizing/reduction of posts in 2015/16 budget period: procedure for recruitment against vacant positions during the downsizing process).

¹ This was the predecessor mission to MONUSCO.

13. The record includes a memorandum dated 22 May 2015 from MONUSCO's Chief Human Resources Officer (CHRO) informing the Applicant that the post she encumbered had been identified for abolition effective 1 July 2015 and that as a result, her appointment would not be renewed beyond 30 June 2015. The Applicant asserts in her Application that she was never provided with this notification and learned of it "through other channels".

14. In an email dated 26 May 2015, the Applicant informed the CHRO that the 17 April 2015 memorandum did not indicate that the Mission would identify a suitable vacant post for her while it did the same for her colleagues. She asked for an explanation of the unequal treatment she was being given. On the same day, she wrote to DFS again to complain about the discrimination she was facing in MONUSCO.

15. On 2 June 2015, the Chief of the Engineering Section sent a request to the Director of Mission support for the Applicant to be placed on one of several vacant posts. According to the Applicant, this request did not receive a response.

16. The Applicant requested management evaluation of the decision to abolish her post on 9 June 2015. The Management Evaluation Unit (MEU) rejected her request in a response dated 6 July 2015.

Respondent's submissions on receivability

17. The Respondent submits that the Applicant's allegations of gender discrimination are not receivable because they are subject to a separate administrative procedure under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The Applicant has failed to exhaust her administrative remedies under this SGB and therefore, her gender discrimination claims are not receivable *ratione materiae*.

18. The Dispute Tribunal does not have competence to investigate complaints of harassment and discrimination. The Dispute Tribunal's jurisdiction to review complaints under ST/SGB/2008/5 is limited to inquiring whether there was a proper investigation of the claims. The Dispute Tribunal may not conduct a *de*

novo investigation of a formal complaint of discrimination or rule on the merits of whether a staff member was subject to gender discrimination.

19. A staff member who asserts that he or she is the victim of discrimination must follow the procedures set out in ST/SGB/2008/5. Ignorance of these procedures cannot be invoked as an excuse by the Applicant for his/her failure to follow them. Since the Applicant has not yet exhausted her administrative remedies, the Dispute Tribunal lacks jurisdiction to review her gender discrimination claims.

Applicant's submissions

20. The Applicant submits that her Application is based on other grounds apart from gender discrimination, including procedural errors. There are no receivability claims in relation to these grounds. The Tribunal is competent to review those grounds and they are therefore receivable. Her Application should be reviewed accordingly.

21. There is a distinction between making a claim pursuant to ST/SGB/2008/5 and claiming that the impugned decision itself was discriminatory based on her gender.

22. Because the Applicant's claim of gender discrimination focuses on the actual decision to abolish her post and not gender discrimination in the workplace preceding the impugned decision, the Tribunal should find her claim receivable and review her Application in its entirety.

23. As a practical matter, even if the Applicant had wished to lodge a claim pursuant to ST/SGB/2008/5 concerning the abolishment of her post, as her release from service was imminent. She could not have been afforded any remedy which would have made filing a complaint under ST/SGB/2008/5 worthwhile, already having been separated from service.

Considerations

24. In *Messinger* 2011-UNAT-123, the United Nations Appeals Tribunal examined the competence of the UNDT under its statute to determine allegations of harassment where there are established procedures under the Staff Rules and administrative issuances for that purpose. It held that:

It is clear that the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute. However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the UNDT to examine allegations of harassment. This is different from a *de novo* investigation into a complaint of harassment.

25. While *Messinger* concerned the conduct of investigations of allegations of harassment and abuse of authority under UNICEF Administrative Instructions the same principle applies to the application of staff rules and administrative instructions that apply to each United Nations entity.

26. The Applicant challenges the decision to abolish her post on the grounds that it was procedurally irregular and that it was ill-motivated. In support of these grounds she identifies specific grounds and examples including gender discrimination. In relation to this ground she states: “The present decision was discriminatory based on the Applicant being a woman, as MONUSCO failed to recruit women to her Section and most recently cut only female posts, leaving the Mission with a disproportionately small number of female staff as compared to male staff”.

27. The Applicant had the option of lodging a formal complaint of gender discrimination under ST/SGB/2008/5 but chose not to. However this does not prevent her from alleging, as she does, that the classification decision which she is challenging was ill-motivated by reason of gender discrimination.

28. In determining whether the decision to abolish her post was ill-motivated the Tribunal is competent to examine each of the Applicant’s allegations against the relevant facts and circumstances.

Decision

29. The Tribunal finds that the Application is receivable in its entirety.

(Signed)

Judge Coral Shaw

Dated this 19th day of January 2016

Entered in the Register on this 19th day of January 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi