



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/011

Judgment No.: UNDT/2020/047

Date: 1 April 2020

Original: English

Before: Judge Eleanor Donaldson-Honeywell

Registry: New York

Registrar: Nerea Suero Fontecha

FRAENKEL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Camila Nkwenti, UNEP

Introduction

1. The Applicant, a staff member of the Secretariat of the Convention on Biological Diversity (“CBD”) of the United Nations Environment Programme (“UNEP”) filed an application contesting the decision to abolish her post.
2. The Respondent replied that the application was not receivable because the Applicant was not challenging an administrative decision with direct legal consequences on her terms of employment.
3. For the reasons below, the Tribunal rejects the application.

Relevant facts and procedure

4. On 3 August 2018, the Applicant filed a complaint of harassment and abuse of authority concerning her supervisor at the time in accordance with ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).
5. On 13 September 2018, the Applicant was informed by her former supervisor and other managers of UNEP that some of the functions of her office would be merged with other divisions as part of the restructuring of the CBD and her post would eventually be abolished.
6. From October 2018 onward, the Applicant was placed on different temporary positions.
7. On 9 November 2018, the Applicant requested management evaluation of the decision to abolish her post.
8. On 20 December 2018, the Applicant was notified in writing of the abolition of her post.

9. On 12 February 2019, the Applicant filed the present application. From May to June 2019, the parties held discussions to resolve this dispute amicably. However, on 21 June 2019, the parties jointly informed the Tribunal that they had been unable to reach a settlement.

10. On 11 February 2020, the Respondent informed the Tribunal that the Applicant had been appointed Executive Secretary of the Convention on the Protection of Migratory Species of Wild Animals at the D-1 level.

11. On 5 March 2020, the Applicant submitted that she maintained her appeal against the decision to abolish her post and her request for compensation for the moral damages she suffered as a result of the actions of the Administration. On 10 March 2020, the Respondent filed a submission maintaining the position that the application was non-receivable.

Consideration

Scope of the case

12. In the Applicant's 5 March 2020 submission, she argues that her selection for the new position does not resolve this matter because the abolition of the Applicant's post "was part of a series of steps by [the former Executive Secretary of the Secretariat of the Convention on Biological Diversity, UNEP] to strip the Applicant of her responsibilities, isolating her and then ultimately attempting to terminate her appointment", which lead the Applicant to file a complaint under ST/SGB/2008/5.

13. The Applicant further argues that "the issue under review relates to the unlawful removal of the Applicant's functions and consequent abolition of her post". She further claims that "[t]he facts as submitted by the Applicant have subsequently been established through the investigation/disciplinary process and eventual [...] resignation of [the Executive Secretary]. [The Executive Secretary's] actions vis-à-vis the Applicant were determined by the Administration to have constituted misconduct".

14. The Applicant finally requests a full hearing in this case to determine the lawfulness of the decision to abolish her post.

15. The Respondent opposes that there should be such a hearing. He submits that once the Applicant has been placed on an established post at her same level, the application is not receivable because the Applicant is not contesting an administrative decision having direct legal consequences in the Applicant's employment. He states that the issue of the investigation into the Applicant's complaint of harassment is a separate matter.

16. In light of the parties' arguments, the Tribunal will first determine the scope of the case before it.

17. In *Loeber* 2018-UNAT-844, the Appeals Tribunal recalled its constant jurisprudence stating that the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment.

18. In the same judgment, the Appeals Tribunal went on to recall that the Administration has power to restructure its departments. This discretion extends to the abolition of posts and the Tribunal may not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. An applicant cannot challenge the discretionary authority of the Administration to restructure the Organization or to abolish his or her post. The Applicant, however, may challenge an administrative decision resulting from the restructuring once that decision has been made.

19. In light of this jurisprudence, it is clear that the Applicant cannot contest the abolition of her post but only such administrative decisions that resulted from the abolition.

20. From the Applicant's submissions, the Tribunal understands that the Applicant identified two sets of actions resulting from the abolition of her post: on the one hand,

the Applicant sought to be placed on another post at the D-1 level and, on the other hand, she sought compensation for the moral harm suffered from the actions of her former supervisor. The Tribunal will review its jurisdiction over these two issues.

Placement of the Applicant in an alternate position

21. The evidence shows that the Applicant was never separated from the Organization. She was placed on several temporary positions until her ultimate selection to the post of Executive Secretary of the Convention on the Protection of Migratory Species of Wild Animals at the D-1 level. The Applicant's request to be placed on a post at the D-1 level post is therefore moot.

Request for moral damages

22. The Tribunal will review the entire procedural history of this case to determine the scope of the moral damages claimed by the Applicant.

23. In the Applicant's request for management evaluation, she identified four issues for review: that the abolition of the post was designed to remove the Applicant from her post; that the abolition decision was unlawful because it did not have the required approval of the governing body; that the Applicant's post was marked for abolition without a comparative review, and that the Administration made no efforts to find an alternative post for the Applicant. As remedies, the Applicant sought (a) the rescission of the decision to abolish her post and (b) the establishment of a comparative review to determine which one of the D-1 level posts in the CBD ought to be downsized or the placement of the Applicant on a D-1 level position.

24. In her application, the Applicant reiterates her appeal against the abolition of her post. As compensation she seeks the payment of moral damages "for the subversion of the administrative and procedural rules which has resulted in her being singled out for abolition".

25. In the Applicant's 5 March 2020 submission, she states that the "abolition of the Applicant's post was part of a series of steps by [the Applicant's supervisor] to strip the Applicant of her responsibilities, isolating her and then ultimately attempting to terminate her appointment. Consequently, the Applicant was forced to file a complaint of Harassment and Abuse of Authority pursuant to Secretary-General Bulletin ST/SGB/2008/5, submissions that relate to this current case.". She claims further that "the issue under review relates to the unlawful removal of the Applicant's functions and consequent abolition of her post. The facts as submitted by the Applicant have subsequently been established through the investigation/disciplinary process and eventually resignation of [the Applicant's supervisor] herself. [The Applicant's supervisor]'s actions vis-à-vis the Applicant were determined by the Administration to have constituted misconduct."

26. In essence, the Applicant is requesting compensation for moral damages resulting from a pattern of harassment of abuse of authority. By the Applicant's own description of the complaint, which predates the notification of the abolition of the Applicant's post, the complaint relates to a pattern of conduct which includes her former supervisor's involvement in the decision to abolish the Applicant's post. It is clear, therefore, that the complaint of harassment and abuse of authority and its outcome constitutes a separate administrative decision from that of the abolition.

27. The Tribunal notes, however, that the outcome of the complaint of harassment was not included in the management evaluation request as such complaint was, at the time, still under investigation.

28. Pursuant to art. 8.1(c) of the Tribunal's Statute, an application is receivable if the applicant has previously sought management evaluation of the contested decision. The Tribunal will therefore examine the Applicant's management evaluation request to determine the scope of the contested administrative decision under review.

29. Therefore, without delving into the merit of the Applicant's request for moral damages resulting from the misconduct allegedly established by the investigation into

the complaint of harassment and abuse of authority, the Tribunal finds that it has no jurisdiction to review that administrative decision because it was not reviewed by the management evaluation unit under art.8.1(c) of the Tribunal's Statute.

Conclusion

30. In light of the foregoing, the application is dismissed as non-receivable.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 1st day of April 2020

Entered in the Register on this 1st day of April 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York