



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).

harm done to the Applicant for violation

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

(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

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.

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

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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

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