



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/015

Judgment No.: UNDT/2012/111

Date: 20 July 2012

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Cédric Vareil

Counsel for Respondent:

Alan Gutman, ALS/OHRM, United Nations Secretariat

Introduction

1. By application filed with the Registry of the Dispute Tribunal on

10. On 29 September 2011, the Applicant informed the Tribunal that she had decided to withdraw her application for suspension of action. The same day, by Order No. 165 (GVA/2011), the Tribunal took formal note of the Applicant's withdrawal and struck out Case No. UNDT/GVA/2011/060.

11. On her return from sick leave on 18 October 2011, the Applicant learned in the course of an e-mail exchange with the Chief of the Office of Staff Legal Assistance that, in her absence, she had been replaced by another counsel of the said Office in a case brought before the Appeals Tribunal to which she had previously been assigned.

12. By e-mail of 19 October 2011 sent to the Executive Director of the Office of Administration of Justice and the Chief of the Office of Staff Legal Assistance, the Applicant complained that another case for which she had been appointed as counsel had been assigned in her absence to another counsel, without her being informed. The Chief of the Office of Staff Legal Assistance replied to her the same day by return e-mail:

... In light of your extended absence from [the Office of Staff Legal Assistance] and general unprofessional behaviour, I had to reassign your cases to other counsel. You have complained that you should have been informed. Consider yourself so informed. Note that you specifically communicated you did not wish to be disturbed [with] work-related issues while on sick leave. This was respected apart from the matter of your performance evaluation ...

Further, what I have seen from our own research (as you have not provided an updated case list) is that you do not have many active files, so the workload can be managed by others.

Given your continued unprofessional and provocative behaviour towards myself as your supervisor as well as other colleagues ... you cannot be trusted as fellow counsel in [the Office of Staff Legal Assistance]. Your actions, or lack thereof, have been extremely disruptive to the Office. I have never experienced such a difficult personnel situation in my almost twenty years in the UN system.

I will discuss your situation again [with the Executive Director of the Office of Administration of Justice] and whoever else is required ... In the meantime please refrain from calling or sending unhelpful, angry emails to colleagues, including myself.

The fact you are pursuing a formal complaint against the [Office of Administration of Justice/Office of Staff Legal Assistance] and are intent on litigating against the Organi[z]ation is a further consideration. I cannot imagine how [the Office of Staff Legal Assistance] can have a colleague handling files and accessing confidential office information in that circumstance.

13. Also by e-mail dated 19 October, the Chief of the Office of Staff Legal Assistance informed the Applicant that he would himself contact two applicants that she had previously represented in order to inform them that she had been taken off their case and that another counsel from the Office would henceforth represent them. He also specified that he would inform the Dispute Tribunal of that fact and he ordered the Applicant not to contact the Registry of the Tribunal or the two applicants concerned.

14. On 25 October 2011, the Applicant wrote to the Information Systems Assistant of the Office of Administration of Justice, noting that she had been denied access to the internal data-sharing system (“eRoom”) on the instructions of the Chief of the Office of Staff Legal Assistance. A little later the same day, she wrote to the Executive Director of the Office of Administration of Justice to inform him of that fact and request his intervention.

15. On 28 October, she enquired whether she could take back the cases that had been assigned to her Geneva colleague, whose secondment to the Office of Staff Legal Assistance was coming to an end. The Chief of the Office replied to her that, apart from some cases that would continue to be followed by that colleague, the cases in question would be assigned to other counsels within the Office.

16. By letter dated 31 October 2011, the Applicant requested a management evaluation of the decision whereby she had been deprived of her functions and effectively evicted from her unit.

17. By applications dated 1 November 2011, the Applicant filed a first appeal on the merits against the decision depriving her of her functions (Case No. UNDT/GVA/2011/072) and requested suspension of action on that decision (Case No. UNDT/GVA/2011/073).

18. The Applicant was informed on 3 November 2011 that her contract, which was due to expire on 11 November, would be extended for a further month.

19.

23. By letter of 15 December 2011 addressed to the Applicant, the Management Evaluation Unit stated that on 23 November 2011, it had been informed by the Office of Administration of Justice that the latter and the Office of Staff Legal Assistance had accepted the conclusions of Judgment No. UNDT/2011/187 and that the Applicant had received new tasks and the

so that it takes on a neutral appearance, in the interests of the Organization. In that case, it is the responsibility of the judge, who is never bound by the description given by the Administration to its actions, to

- h. On the procedural defects: The decision is vitiated by multiple procedural defects, notably in that it violates due process, it was not preceded by any investigation, and the Applicant did not receive prior notification of the misconduct of which she was charged and her right to be assisted by counsel;
- i. On the error of law committed with regard to rule 1.2 of the Staff Rules, both the abuse of power and the violation of the right of appeal: The contested decision is partially motivated by the Applicant's use of her right of appeal, as is clear from the e-mail dated 19 October 2011 from the Chief of the Office of Staff Legal Assistance. However, the Applicant did not commit misconduct by exercising her right of appeal and rule 1.2 (f) of the Staff Rules prohibits any retaliation against staff members exercising their rights and duties under the said Rules;
- j. On the error of law committed with regard to rule 10.2 of the Staff Rules: The contested decision is a measure of a disciplinary nature that is not provided for under rule 10.2 and that violates the principle of the legality of disciplinary measures;
- k. On the error of fact: The decision is also vitiated by an error of fact given that the Applicant has not engaged in any misconduct;

On the unlawfulness of the decision as a non-disciplinary measure

- l. Procedural defect stemming from a violation of due process: A decision causing harm, particularly if it is taken in express consideration of the person to whom it applies, cannot lawfully be taken unless the individual concerned has been given the opportunity to present the arguments in his or her defence (see *Lauritzen* UNDT/2010/172, para. 60). In the present case, the Applicant was not given the opportunity to make known her position on the proposed measure before it was taken;
- m. On the violation of the general principle of the right to be assigned duties relating to the post occupied and commensurate with the grade: The decision also contravenes the general principle of law according to which all staff members are entitled to be assigned actual duties relating to the post they hold and commensurate with their grade;
- n. On the error of law committed with regard to rule 1.2 of the Staff Rules, both the abuse of power and the violation of the right of appeal: The contested decision constitutes a retaliatory measure, prohibited under rule 1.2 (f) of the Staff Rules, and is vitiated by an abuse of power;

On the conclusions

- o. Even if the decision has been revoked, which is still uncertain, the Applicant retains an interest in requesting its rescission. There is a risk that her supervisor may take a further retaliatory measure against her for the same reason as that on which the contested decision was based;

p. The decision and its execution have caused the Applicant moral damage entitling her to compensation. She has suffered from the decision, owing to its grounds, its object and its effects. She has been placed in a humiliating situation with regard to her colleagues, the beneficiaries of legal assistance and the Tribunal. This abuse of power was committed when the Applicant, who was returning from a period of sick leave, was already in a highly vulnerable situation. The Chief of the Office of Staff Legal Assistance sought to deprive her not only of her functions, but of her rights and her dignity. The Applicant's health remains in a significantly deteriorated state and her professional prospects have also been badly affected.

31. The Respondent's contentions are:

a. The contested decision is not a disciplinary measure within the meaning of the Staff Rules, as, moreover, the Tribunal determined in its Judgment No. UNDT/2011/187. Nor is it a disguised disciplinary measure;ontested dd from French

meetings, are false. Moreover, she continued to have access to her workspace and her files. The allegation that she had effectively been evicted from the unit is therefore unfounded and must be rejected;

f. The Chief of the Office of Staff Legal Assistance acted solely in the interests of the Organization and his decisions constitute a reasonable exercise of the authority delegated to him;

g. The compensation of €100,000 claimed by the Applicant is disproportionate to the damage suffered. The decision is lawful and does not give rise to any entitlement to compensation. Even assuming that the Applicant suffered some harm, it would be limited to the 12 working days that preceded the revocation of the contested decision on 6 November 2011.

37. Thus, the object of the contested decision was to deprive the Applicant of the bulk of her work when a staff member has not only a duty but also a right to perform the work for which he or she has been recruited. For that reason alone, the decision of the Chief of the Office of Staff Legal Assistance was therefore unlawful.

38. Since the contested decision is in itself unlawful, there is no need to examine whether it can be deemed to be a disguised disciplinary measure.

39. In the present case, the period during which the Applicant was deprived of her functions runs from 18 October 2011, the date of her return from sick leave, to 6 November 2011, when the Chief of the Office of Staff Legal Assistance informed her of his decision to reassign work to her.

40. The Tribunal considers that the Applicant is entitled to maintain that she sustained significant moral damage following that unlawful decision; moreover, she indicated, particularly at the hearing, that her health had suffered as a result.

41. In the present circumstances, the Tribunal considers that fair compensation for the damage she suffered would consist of a lump-sum payment of CHF 9,000.

42. The Applicant requests the Tribunal to order that her name be omitted from the published judgment, as it had agreed to do in Judgments Nos. UNDT/2011/187 and UNDT/2011/213. In the present case, the Tribunal should accede to her request.

Conclusion

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

- a. The Secretary-General is ordered to make a lump-sum payment of CHF 9,000 to the Applicant;
- b. The aforementioned compensation shall bear interest at the United States prime rate with effect from the date the present judgment becomes executable, plus 5 per cent with effect from 60 days from the date the present judgment becomes executable until payment of the said compensation;
- c. The Applicant's other requests are rejected.

(Signed) Judge Jean-François Cousin

Dated this 20th day of July 2012

Entered in the Register on this 20th day of July 2012

(Signed) René M. Vargas M, Registrar, Geneva