



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/120

Judgment No.: UNDT/2011/157

Date: 6 September 2011

Original: English

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**Before:** Judge Thomas Laker

**Registry:** Geneva

**Registrar:** Anne Coutin, Officer-in-Charge

LORAND

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Amal Oummih, OSLA

**Counsel for Respondent:**

Shelly Pitterman, UNHCR

## **Introduction**

1. On 20 June 2011, the Applicant, a staff member of the United Nations High Commissioner for Refugees (“UNHCR”), filed with the Tribunal an application against the decision to terminate her indefinite appointment effective 1 January 2011.

2. At the time the application was filed, the Deputy High Commissioner had already rescinded the contested decision on 21 March 2011, as a result of the management evaluation, following a Tribunal’s order granting suspension of action on the contested decision.

3. The Applicant requests compensation in the amount of USD30,000 for the violation of her rights and the moral damage suffered.

4. The Respondent requests the Tribunal to reject the application in its entirety and to make a determination in accordance with article 10.6 of its Statute as to whether the Applicant has manifestly abused the proceedings before it and, in the affirmative, to award costs against her.

## **Facts**

5. The Applicant joined UNHCR in September 1999 on a three-month short-term appointment (300 series of the former Staff Rules) and in January 2000, like all UNHCR staff members at the time, she was granted an indefinite appointment under rule 104.12(c) of the then applicable Staff Rules. When the contested decision was taken, she was working in the Global Issues Unit of the Brussels office, as a Senior Secretary at level G-5.

6. By letter dated 18 March 2010, the Head of Unit informed her that due to a “reorganization of responsibilities in the Global Issues Unit”, the office intended to discontinue the post she encumbered. The letter added that upon approval of the proposal by the Budget Committee, she would be informed of the effective date of the discontinuation of her position.

7. In another letter of 28 May 2010, the Head of Unit informed the Applicant that the decision had been made on 17 May 2010 to discontinue her post with effect from 30 November 2010. She was advised to apply for any suitable vacant position in Brussels and that in the absence of a new appointment, the office would initiate a comparative review process in accordance with established guidelines. The Applicant did not contest this decision.

8. In October 2010, the Regional Appointments, Postings and Promotions Committee (“Regional APPC”) was tasked with performing the functions of a Comparative Review Panel (“CRP”). The CRP, which was comprised of six members, thus undertook a comparative review of the Applicant with three staff members on similar positions holding fixed-term appointments, two at level G-5 like the Applicant and one at level G-6.

9. On 20 October 2010, the CRP concluded that, compared to the other three staff members, it could not “recommend that [the Applicant] be retained for any of the positions determined to be similar at the Brussels duty station”, because of her poor English skills and other professional and behavioural weaknesses as highlighted on several occasions over the years by different supervisors in her performance appraisal reports.

10. The case was then submitted to the Appointments, Postings and Promotions Committee at Headquarters (“Headquarters APPC”) for review. The Headquarters APPC, which is composed of six members, held four meetings between 19 November and 9 December 2010 to review the case. On 9 December 2010, the APPC concluded that it “could not find any reason not to retain [the Applicant] against one of the [two] available G-5 positions”. It therefore recommended that the Applicant and another staff member “be retained against the two available G-5 positions”.

11. The conclusions of the CRP and APPC were then submitted for decision to the Assistant High Commissioner for Protection. She substituted the UNHCR Representative in Brussels to avoid any conflict of interest. On 23 December 2010, the Assistant High Commissioner concluded that the procedure followed by the Headquarters APPC was fundamentally flawed. She therefore decided to

endorse the CRP recommendation not to retain the Applicant in service. On the same day, the Director of the Division of Human Resources Management (“DHRM”) endorsed the Assistant High Commissioner’s decision.

12. By letter dated 29 December 2010, the Applicant was informed that following the comparative review, it had been determined that “her services could [not] appropriately be utilised on another post” and that her indefinite appointment would therefore be terminated effective 1 January 2011, with compensation in lieu of notice.

13. By email dated 30 December 2010, copied to the Director of DHRM and the Staff Council, the Applicant submitted to the Deputy High Commissioner a request for management evaluation of the decision to terminate her indefinite appointment. On the same day, she filed with the Tribunal an application requesting it to suspend the implementation of the contested decision.

14. By Order No. 93 (GVA/2010) of 31 December 2010, the Tribunal suspended, during the pendency of the management evaluation, the implementation of the decision to terminate the Applicant’s appointment effective 1 January 2011.

15. On 4 March 2011, the Applicant was placed on special leave with full pay as there was “no requirement in the office for staffing support in [her] specific skills area”.

16. By memorandum dated 21 March 2011, the Deputy High Commissioner notified the Applicant of the outcome of her request for management evaluation. Adopting the findings of the Tribunal in Order No. 93 (GVA/2010), he concluded that “certain procedural irregularities were present in the comparative review process leading to the termination of [the Applicant’s] contract”, in particular “the [CRP] was composed of members of the Regional APPC” and “the Panel’s recommendation was subsequently reviewed by the Headquarters APPC, which is not consistent with applicable rules and regulations”. He informed the Applicant that “[d]ue to these technical shortcomings”, the decision to terminate her contract was being rescinded and a new comparative review process would be initiated.

17. On 20 June 2011, the Applicant filed the present application and on 19 July, the Respondent submitted his reply.

18. On 5 September 2011, after seeking and obtaining leave from the Tribunal, the Applicant filed observations on the Respondent's reply.

19. Both parties agreed that an oral hearing was not necessary.

### **Parties' submissions**

20. The Applicant's contentions are:

#### *On receivability*

a. The rescission of a decision that does not put the applicant in the same position he or she would have been in had the Organization complied with its contractual obligations is subject to judicial review. In the instant case, UNHCR did not fully rescind the contested decision, and therefore did not restore the *status quo ante*, because doing so would have required returning the Applicant to performing her functions as she did prior to being served the termination notice and would have required UNHCR to afford her protection against retaliation, as a staff member who made out a *prima facie* case of retaliation via a properly filed complaint with the Ethics Office;

#### *On the merits*

b. The Respondent concedes in its management evaluation review of 21 March 2011 the unlawfulness of the contested decision, admitting that the comparative review process leading to the termination decision was fraught with procedural irregularities, including an unlawful composition of the members of the CRP and unlawful review by the Headquarters APPC;

c. There were additional procedural irregularities in how the Respondent conducted the comparative review process, which were in

violation of the applicable rules and regulations and in violation of the Applicant's due process rights. Moreover, the Respondent did not respect the Applicant's rights as a long serving staff member on an indefinite appointment and failed to accord her the rights associated with said appointment, in particular in relation to giving her priority consideration and assisting her in finding an alternative suitable post;

d. She was given a three-day notice of termination of her appointment contrary to the notice period required in the context of termination of contract for abolition of post to staff on indefinite appointments. This act is not only unlawful but may have been undertaken in bad faith, to frustrate the Applicant's efforts to seek timely judicial intervention;

e. The circumstances of the case justify an award of compensation not only for the procedural violations conceded by the Respondent, but also for the moral injury and stress caused to the Applicant as a result of the Respondent's actions in connection with its initial decision to terminate her indefinite appointment and its subsequent failure to mitigate the damages to the Applicant in its partial rescission of the decision.

21. The Respondent's contentions are:

*On receivability*

a. The Applicant contests a decision that has already been rescinded and as such the application is not receivable because, through the rescission, the legal effects of the decision were annulled *ex tunc*. Consequently, at the time of the application, the contested decision could not, by default, be in non-compliance with the terms of appointment or the contract of employment of the Applicant;

b. An application against a decision that has already been rescinded three months earlier in the context of a management evaluation is not only redundant but abusive and seriously undermines the purpose of the management evaluation, which is to give management a chance to correct

itself or provide acceptable remedies in cases where there has been flawed decision-making and to reduce the number of cases that need to proceed to formal litigation. The Organization has demonstrated its good faith, impartiality and fairness in correcting itself in the context of the management evaluation. However, the Applicant continues to litigate against a decision which no longer affects her rights, thus abusing the proceedings before the Tribunal;

*On the merits*

c. In view of the outcome of the management evaluation, it is unnecessary to comment on the Applicant's submissions regarding the "unlawfulness of the contested decision";

d. Concerning the Applicant's requests for relief, it must be noted that: (i) The infringement of UNHCR policies has been remedied by the rescission of the contested decision; (ii) With respect to moral damages as claimed by the Applicant, the Appeals Tribunal stated in *Hastings* 2011-UNAT-109 that "moral damages may not be awarded without specific evidence supporting the award", whereas the Applicant did not substantiate, let alone give evidence of any moral damage; (iii) As regards the alleged damage in relation to the placement on special leave with full pay, this decision has been reviewed in the context of another request for management evaluation filed by the Applicant on 22 March 2011, it has been upheld by the Deputy High Commissioner's letter dated 14 April 2011, but it has not been appealed by the Applicant and is consequently not under the Tribunal's scrutiny; in addition, the Applicant did not provide evidence of any damage allegedly caused by this decision; (iv) The Applicant has remained employed at all times; and (v) the Applicant did not identify which complaints have allegedly been handled with delay, let alone substantiate any damage resulting from such alleged delay.

## **Consideration**

22. With the consent of the parties, this case was decided on the papers before the Tribunal, without an oral hearing.

23. At the outset, it has to be highlighted that the only matter in dispute in this case is the decision to terminate the Applicant's indefinite appointment effective 1 January 2011, which had been notified to her on 29 December 2011.

24. It is the Applicant's contention that the above-mentioned decision was not fully rescinded, and therefore is subject to judicial review, because the Applicant did not return to perform her functions as she did prior to being served the termination notice. The Tribunal notes, however, that the Applicant not being returned to her functions is the consequence of another decision, to wit, the discontinuation of her post with effect from 30 November 2010, which had been formally notified to her on 28 May 2010. As the Applicant did not contest this decision in accordance with the established rules and procedures, any claim in this respect before the Tribunal is not receivable.

25. The Tribunal finds that the decision to terminate the Applicant's appointment was fully rescinded by the decision of the Deputy High Commissioner dated 21 March 2011, since the latter had the effect of retaining the Applicant in service, pending completion of a new comparative review process. Accordingly, the application, in so far as it impugns a decision that has been rescinded, must be rejected as irreceivable.

26. The Applicant's claims related to her placement on special leave with full pay and the delays in investigating her complaint for retaliation are not properly before the Tribunal and must also be rejected as irreceivable.

27. Concerning her claim for compensation for moral injury allegedly arising from the contested decision, the Applicant submitted two medical certificates in support thereof, as annexes to her observations on the Respondent's reply. The first one is dated 15 July 2011, that is, six and a half months after the contested decision had been notified to the Applicant and four months after she had been



informed of its rescission; it states that the Applicant suffers from insomnia due to the sudden termination of her appointment and that medication has been prescribed as from 15 July 2011. The second medical certificate is dated 5 September 2011, that is, the same date on which the Applicant's observations on the Respondent's reply were due, and states that the Applicant suffers from depression and anxiety due to the termination of her appointment.

28. Neither of these medical certificates states from which date the Applicant started suffering from the troubles they describe or on which date the Applicant consulted a physician for the first time. Given the time elapsed between the notification of the contested decision and the issuance of these certificates, and considering in addition that these certificates were issued respectively four and five and a half months after the contested decision had been rescinded, the Tribunal considers that the causal effect between the Applicant's troubles and the contested decision has not been demonstrated by evidence. For these reasons, the Tribunal rejects the Applicant's claim for moral damages, without it being necessary to rule on the receivability of such claim.

29. The Respondent seeks the award of costs against the Applicant. Article 10.6 of the UNDT Statute provides for the award of costs against a party when the Tribunal determines that this party has manifestly abused the proceedings before it. In the case at hand, the Tribunal finds no grounds to make such a determination and therefore rejects the Respondent's request.

### **Conclusion**

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

The application is rejected in its entirety.

*(Signed)*

Judge Thomas Laker

Dated this 6<sup>th</sup> day of September 2011

Entered in the Register on this 6<sup>th</sup> day of September 2011

*(Signed)*

Anne Coutin, Officer-in-Charge, Geneva Registry