Translated from French

UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/GVA/2011/073
Judgment No.:	UNDT/2011/187
Date:	4 November 2011
	English
Original:	French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Anne Coutin, Officer-in-Charge

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON APPLICATION FOR SUSPENSION OF ACTION

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 1 November 2011, the Applicant requests the Tribunal to order a suspension of action on the decision depriving her of her functions and de facto evicting her from her unit.

Facts

2. On 1 September 2009, the Applicant was granted a two-year fixed-term appointment to the Office of Staff Legal Assistance, Office of Administration of Justice, United Nations Secretariat. Having previously worked in Beirut, she currently occupies a P-3 post in Geneva.

3. By memorandum dated 22 August 2011, the Chief of the Office of Staff Legal Assistance recommended non-renewal of the Applicant's contract, which was due to expire on 31 August 2011, on the grounds that her performance was unsatisfactory.

4. By letter dated 24 August 2011, the Applicant was informed that, based on her department's recommendation, her appointment would be extended for one month, in other words until 30 September 2011, in order to allow her, and her supervisor, to complete her performance appraisal report (e-PAS) for the period from April 2010 to March 2011.

5. On 27 September 2011, the Applicant filed with the Tribunal an application for suspension of action on the implied decision not to renew her appointment beyond 30 September 2011.

6. By e-mail of 28 September 2011, the Executive Office of the Secretary-General informed the Applicant that, in line with a recommendation by the Management Evaluation Unit at United Nations Headquarters in New York, the United Nations Office at Geneva had been requested to extend her appointment from 1 October to 11 November 2011.

7. On 29 September 2011, the Applicant informed the Tribunal that she had decided to withdraw her application for suspension of action. The Tribunal took formal note of that fact in Order No. 165 (GVA/2011) of 29 September 2011.

8. The Applicant was placed on sick leave for the periods from 22 August to 9 September and from 22 September to 17 October 2011.

9. On her return on 18 October, she 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.

10. 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 reassigned 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.

11. 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 advise 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.

12. On 25 October 2011, the Applicant wrote to the Information Systems Assistant of the Office of Administration of Justice, noting that she had been deprived of access to the internal information-sharing system ("eRoom") by order 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.

13. 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.

14. By letter dated 31 October 2011, the Applicant requested a management evaluation of the decision whereby she had been deprived of her functions and de facto evicted from the Office.

15. By application dated 1 November 2011, the Applicant appealed the said decision under article 2, paragraph 1, of the Statute of the Tribunal. By the present application, also dated 1 November 2011, she requested a suspension of action on the decision pursuant to article 14 of the Tribunal's rules of procedure and, subsidiarily, article 13 of the said rules.

16. On 2 November 2011, the Applicant filed a request for disclosure of evidence, which was rejected by Order No. 190 (GVA/2011) dated 3 November 2011.

17. On 3 November 2011, she was informed that her appointment, which was due to expire on 11 November, would be extended for an additional month.

Parties' submissions

18. The Applicant's contentions are:

a. The contested decision to deprive her of her functions and evict her from her unit results from several decisions, in particular the decision to take her off cases that had previously been assigned to her, the failure to invite her to the Office's weekly staff meetings, and the refusal to assign to her the cases handled by her former colleague in Geneva or allow her to access her computer and the eRoom. Although the decision has already been implemented, the Applicant is entitled to request its suspension insofar as it has continuous effects;

b. She submitted a request for a management evaluation and, at the same time, filed an application against the contested decision, such that her application for suspension of action meets the conditions laid down in

articles 13 and 14 of the Tribunal's rules of procedure. She therefore requests a suspension of action on the said decision under article 14 and, subsidiarily, article 13.

c. The contested decision is a disciplinary measure that violates the principle of the lawfulness of disciplinary measures established by rule 10.3 of the Staff Rules. Given that the decision was taken by the Chief of the Office of Staff Legal Assistance and not by the Secretary-General, who is the only authority with disciplinary power by virtue of regulation 10.1 of the Staff Regulations, it was taken by a person lacking competence. It is also vitiated by procedural defects in that it ignores due process, and the obligation to hold an investigation and notify the staff member concerned of the misconduct of which he or she is charged, as recognized by rule 10.3 of the Staff Rules. Furthermore, the contested decision is vitiated by a formal defect since it lacks adequate justification. It is also vitiated by an error of fact given that the Applicant has not committed any breach of her professional obligations or adopted a provocative attitude;

d. The contested decision constitutes a retaliatory measure, prohibited under rule 1.2 of the Staff Rules, and is vitiated by an abuse of power;

e. It 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;

f. The contested decision is so grossly unlawful that it should be declared non-existent;

g. Owing to this decision, the Applicant was deprived of access to the working documents she needed to rebut her e-PAS for the period from September 2009 to March 2010 and she is unable to participate in preparing her e-PAS for the period from April 2010 to March 2011;

h. The Applicant finds herself in an untenable position. She can no longer speak to the beneficiaries of legal assistance who she previously

represented, even if they inform her that they do not understand the change of counsel and are dissatisfied with it;

i. No financial compensation could retroactively remove the extreme emotional distress that the Applicant is suffering and would suffer if the contested decision is upheld;

j. Her eviction from the Office cannot be hidden from third parties since she is the only legal officer of the Office of Staff Legal Assistance in Geneva and they are bound to assume that the treatment inflicted on her is attributable to particularly serious and ignominious misconduct. Consequently, her reputation and career prospects, as well as her health, have been seriously harmed.

k. As someone in whom the beneficiaries of legal assistance had put their trust, the Applicant is suffering irreparable moral and professional damage since she is caught between the hierarchical principle, on the one hand, and the Guiding Principles of Conduct for Office of Staff Legal Assistance Affiliated Counsel in the United Nations, on the other.

19. The Respondent's contentions are:

a. The decisions to reassign the cases previously assigned to the Applicant and to curtail her access to related confidential electronic case files are not administrative decisions within the meaning of article 2 of the Statute of the Tribunal, since they do not produce direct legal consequences. The Applicant does not have the right to be assigned specific cases or to access files that have not been assigned to her;

b. The contested decisions are not disciplinary measures. Under the Secretary-General's bulletin ST/SGB/2010/3 (Organization and terms of reference of the Office of Administration of Justice), the Chief of the Office of Staff Legal Assistance coordinates representation of staff members and supervises the work of the staff of the unit; furthermore, he manages the human, financial and other resources allocated to the unit, as

required, and advises the Executive Director of the Office of Administration of Justice on administrative, human resources and logistical matters related to the operational activities of the Office of Staff Legal Assistance;

c. In the present case, the Chief of the Office of Staff Legal Assistance decided to reassign to other counsels the cases previously assigned to the Applicant and to curtail her access to related confidential electronic case files, giving due consideration to the needs of staff members requiring representation and the available human resources, particularly in view of the Applicant's extended absences and the fact that she had failed to meet performance expectations. Those decisions therefore correspond to the needs of the Office and constitute a reasonable exercise of the discretion of the said Chief;

d. The Applicant's argument concerning access to work documents does not establish any urgency. The Applicant does not need to access the files of cases that are no longer assigned to her in order to prepare her performance rebuttal and she should be able to document her work through her own means. Furthermore, she maintains access to her official e-mail account, her office and her hard copy files;

e. Moreover, the Applicant presents no evidence that the beneficiaries of legal assistance that she previously represented would be prejudiced by the reassignment of their cases to other counsels;

f. The Applicant has not demonstrated that the implementation of the contested decisions would cause her irreparable harm. Both her caseload and her access to resources remain an internal and confidential matter of the Office of Staff Legal Assistance and, contrary to her claim, her situation has not been disclosed to third parties. The Applicant's assertion that others are bound to conclude that she is engaged in particularly serious and ignominious misconduct is mere speculation. The decision to reassign her cases can very well be explained by her extended absences.

Consideration

20. In requesting the Tribunal to order a suspension of action, the Applicant does not identify a particular decision with a specific date but refers to several decisions that might have had the purpose and effect of depriving her of her functions and evicting her from her unit. Consequently, the Tribunal must first consider if the decision challenged is a genuine administrative decision able to be contested before the Tribunal.

21. The facts as set out above establish that the Applicant, upon her return from sick leave on 18 October 2011, was informed by the Chief of the Office of Staff Legal Assistance, her direct supervisor, that he had decided to replace her as counsel by another staff member of the said Office in a case pending before the Appeals Tribunal.

22. By e-mail of 19 October 2011, the Chief of the Office of Staff Legal Assistance also informed her that all the cases for which she was responsible in Geneva had been reassigned to another counsel of the Office and, the same day, he informed her that he would himself contact two applicants whom she had previously represented in order to advise 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 ordered the Applicant not to contact the Registry of the Tribunal or the two applicants concerned.

23. The Applicant also maintains that, as of 25 October 2011, she was deprived of access to the eRoom by order of the Chief of the Office of Staff Legal Assistance.

24. Lastly, on 28 October 2011, the Chief of the Office informed her that the cases handled by another counsel stationed in Geneva would not be assigned to her after the departure of the said counsel but would be assigned to other staff members of the Office.

25. It appears to the Tribunal that, while the aforementioned decisions of the Chief of the Office, taken separately, can be considered to be measures concerning the organization of work that are for him to take and that cannot be contested before the Tribunal, the combination of those measures has had the purpose and effect of depriving the Applicant of all functions within her unit. That combination of measures therefore constitutes an administrative decision that may be contested before the Tribunal. It is clear from the Applicant's individual workplan that the tasks assigned to her essentially consist in providing legal assistance to current and former staff members and performing case management. Thus, the contested decision that, in particular, had the effect of depriving her of her legal assistance role, an essential component of her work, is likely to be prejudicial to the rights arising from her status and her contract.

Lawfulness of the contested decision

26. The Tribunal must therefore decide whether a staff member's supervisor may lawfully deprive him or her, for a certain period, of the bulk of his or her work without basing the decision on any body of rules, as in the present case. It is beyond dispute that the supervisor's intention was both to deprive the Applicant of all contact with individuals likely to request her counsel owing to her position as a staff member of the Office of Staff Legal Assistance at Geneva and to reduce to a minimum the working relationships between her, on the one hand, and her direct supervisor and the other staff members of the Office, on the other.

27. If the Chief of the Office of Staff Legal Assistance considered that it was in the interest of the Organization that the Applicant should no longer perform any of the main tasks assigned to her, it was for him to use the many procedures provided by the Staff Rules and Regulations to that effect, for example, special leave with full pay in the interest of the Organization, non-renewal of contract or termination of appointment. But he could not lawfully deprive her of the bulk of her work since work, as well as being a duty for active staff members, is also a right.

28. Thus, while the Tribunal does not find the contested decision to be a disciplinary measure, it considers that it appears prima facie to be unlawful as it is not based on any body of rules.

Applicable procedure

29. In requesting a suspension of action on the contested decision, the Applicant first of all relies on article 14 of the Tribunal's rules of procedure. She considers, in effect, that since the contested decision is a disciplinary measure, she was not required, pursuant to rule 11.2 (b) of the Staff Rules, to request a management evaluation of it.

30. Article 14 of the rules of procedure provides, in accordance with article 10, paragraph 2, of the Statute of the Tribunal:

> **Suspension of action during the proceedings**
>
> 1. At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

31. It follows from the above provision that the Tribunal may only grant a suspension of action on a decision under the said provision if an application on the merits has been filed against the same decision.

32. In the present case, such an application has in fact been filed but the Tribunal must, furthermore, verify whether the application on the merits appears receivable.

33. Under article 2, paragraph 1, of the Statute of the Tribunal, the latter is competent to hear applications to appeal an administrative decision on the merits. Article 8, paragraph 1 (c), of the said Statute provides that an application shall be receivable if an applicant has previously submitted the contested administrative decision for management evaluation, where required. Article 8, paragraph 1 (d),

requires, moreover, that the application has been filed within 90 calendar days of the applicant's receipt of the response by management to his or her submission, or within 90 calendar days of the expiry of the relevant response period for the management evaluation, or else, in cases where a management evaluation of the contested decision is not required, within 90 calendar days of the applicant's receipt of the administrative decision.

34. Since the Tribunal concluded above that the contested decision was not a disciplinary measure, it is clear from the aforementioned provisions that the Applicant may only appeal the contested decision on the merits before the Tribunal after having received a response to her request for a management evaluation or after the expiry of the relevant response period. It is clear that, in the present case, no response to the request for the management evaluation has been provided and the relevant response period has not expired. Thus, the Applicant cannot rely on article 14 of the rules of procedure to request a suspension of action on the contested decision.

35. Subsidiarily, the Applicant submitted her request for a suspension of action based on article 13 of the rules of procedure.

36. Under article 2, paragraph 2, of its Statute, the Tribunal is competent to hear applications requesting it to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its application would cause irreparable damage.

37. Similarly, article 13, paragraph 1, of the rules of procedure provides:

> **Suspension of action during a management evaluation**
>
> 1. The Dispute Tribunal shall order a suspension of action on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of

> an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

38. In the present case, the Applicant submitted a request for a management evaluation of the contested decision on 31 October 2011. The present request for a suspension of action must therefore be deemed to have been submitted under article 13 of the rules of procedure.

39. The Tribunal has already found that the contested decision appears prima facie to be unlawful. It must now determine whether the request for a suspension of action meets the other two conditions laid down in article 2, paragraph 2, of the Statute and article 13, paragraph 1, of the rules of procedure.

Urgency

40. It appears from the documents on record that, since at least 19 October 2011, the Applicant has been paid by the Organization without doing the slightest work. This situation seriously damages the image of the Office of Staff Legal Assistance since, moreover, given the departure of the other staff member stationed in Geneva, the Office of Staff Legal Assistance in Geneva is currently unable to function. The Tribunal therefore considers that this situation should be brought to an end as soon as possible in the interests of the Organization and the Applicant, particularly since the Applicant's contract was extended by one month until 11 December 2011.

Irreparable damage

41. It is beyond dispute that the Applicant, who is required to report for duty at her workplace, is not authorized by her supervisor to perform the advisory work that pertains to her, when staff members seeking legal advice come to her office. This situation damages the Applicant's professional reputation and that moral damage is unlikely to be remedied by any financial compensation. The Tribunal therefore considers that the condition of irreparable damage is met.

42. It follows from the foregoing that there are grounds to order a suspension of action on the decision of the Chief of the Office of Staff Legal Assistance depriving the Applicant of the functions attributed to her.

43. This decision to order a suspension of action necessarily implies that the tasks corresponding to the said functions should be assigned to the Applicant and that the necessary tools should be restored to her.

Conclusion

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

The decision depriving the Applicant of her functions is suspended for the duration of the management evaluation.

(*Signed*)

Judge Jean-François Cousin

Dated this 4th day of November 2011

Entered in the Register on this 4th day of November 2011

(*Signed*)

Anne Coutin, Officer-in-Charge, Geneva Registry