



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/068

Judgment No.: UNDT/2012/027

Date: 16 February 2012

English

Original: French

**Before:** Judge Jean-François Cousin

**Registry:** Geneva

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

SERVAS

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Self-represented

**Counsel for Respondent:**

Stéphanie Cochard, ITC

## **Introduction**

1. On 27 October 2011, the Applicant, a former staff member of the International Trade Centre (“ITC”), filed an application to enforce the implementation of a settlement agreement reached through mediation, pursuant to paragraph 2 of article 8 of the Tribunal’s Statute.

2. The Applicant maintains that by failing to change the functional title on her performance appraisal under the Performance Appraisal System (“PAS”) from G-5 Programme Assistant to P-2 Associate Advisor and demonstrating bad faith and negligence in the payment of the P-2 salary retroactively owed to her, ITC failed to comply with its obligations under the agreement.

3. She requests that the Tribunal rule on her allegations of retaliation, grant compensation for the loss of her job and moral prejudice, order ITC to remove from her file all adverse material, and remove her name from the judgment.

## **Facts**

4. The Applicant was recruited by ITC in Geneva on 20 January 2009 as a G-5 Programme Assistant for a short-term appointment that was renewed through 19 July 2009. Following the entry into force on 1 July 2009 of the new Staff Regulations and Rules, the Applicant was reappointed on 20 July 2009 to the same post, this time on a temporary contract.

5. On 1 June 2010, the Applicant was transferred to another unit, the Division of Country Programmes in the Office for Africa.

6. On 26 October 2010, the Applicant submitted to the Secretary-General a request for a management evaluation of the ITC decision finding her ineligible for a P-2 vacancy in the Division. According to the Applicant, since 1 June she had been performing some of the duties attached to that post.

7. After initially rejecting as irreceivable the request for a management evaluation, the Management Evaluation Unit at United Nations Headquarters in

New York determined on 11 February 2011 that an attempt to settle the case informally would be appropriate. The case was thus referred to the United Nations Ombudsman and Mediation Services.

8. On 5 April 2011, the Applicant signed her PAS for the period from 1 June through 31 December 2010, which gave her title as G-5 Programme Assistant.

9. On 29 June 2011, when the mediation was concluded, the parties signed a settlement agreement whose first paragraph stipulated as follows:

- a. The parties understand that all claims, demands, proceedings and/or appeals, except investigations, that the parties have against each other form the subject matter of this mediation.
- b. The International Trade Centre shall retroactively separate and reappoint [the Applicant] to the P-2 level, step I as from June 1<sup>st</sup> 2010 until the expiration of [the Applicant's] current appointment on July 18<sup>th</sup> 2011. If necessary to guarantee the maintenance of the level of her take home pay and pension fund contributions during this period, [the Applicant] shall be granted a "personal transitional allowance" in respect of either or both, as applicable.
- c. Upon expiration of [the Applicant's] appointment on 18<sup>th</sup> July 2011, the International Trade Centre shall have no further obligations, financial or otherwise to [the Applicant] except as indicated in this Settlement Agreement ...

10. By a letter dated 11 July 2011, the Applicant requested that her PAS for the period from 1 June to 31 December 2010 be changed, with the title of P-2 Associate Programme Adviser replacing that of G-5 Programme Assistant.

11. The Applicant's temporary contract was renewed through 18 July 2011, at which time she left the employ of ITC. That same day, she received an amended letter of appointment from ITC which retroactively covered the period from 1 June 2010 to 18 July 2011 and bore the title of P-2 Associate Adviser.

12. By letter dated 21 July 2011, ITC held that it had met all the conditions of the settlement agreement and rejected the Applicant's request to change her title as given on her PAS.

13. All personnel action forms for retroactive reappointment of the Applicant at the P-2 level were completed on 29 July 2011.

14. During August and September 2011, exchanges took place between the Administration of ITC, the Payroll Unit of the United Nations Office at Geneva (“UNOG”) and the Applicant regarding the precise amount of emoluments retroactively due to her.

15. Following a number of administrative errors in figuring the amounts due to the Applicant, errors that would have resulted in losses to her, and following the intervention of the Regional Ombudsman, an initial payment of CHF9,211.65 was made. On 3 October 2011, the Chief of the Payroll Unit at UNOG contacted the Ombudsman, confirming that the Applicant’s calculations were correct and that the total amount due her was in fact CHF17,082.87. The balance was paid to her on 13 October of that same year.

16. On 27 October 2011, the Applicant filed the present application to enforce implementation of the settlement agreement of 29 June 2011. The Respondent submitted his reply on 28 November 2011 and the Applicant submitted observations on 8 December 2011.

17. Also on 28 November 2011, the ITC Staff Council filed a motion with the Tribunal to file a friend-of-the-court brief, which the Tribunal denied in its Order No. 19 (GVA/2012) of 19 January 2012.

18. On 15 February 2012, the Tribunal held a hearing in which the Applicant and Counsel for the Respondent participated in person.

**Parties’ submissions**

19. The Applicant’s contentions are:

- a. Under the settlement agreement of 29 June 2011, ITC was required to change the functional title on her PAS to reflect the title mentioned in her amended letter of appointment of 18 July 2011, that is, P-2 Associate Programme Adviser rather than G-5 Programme Assistant. As the primary

condition of the agreement had to do with her retroactive reappointment at the P-2 level, she was entitled to all the benefits that accompany that type of appointment. She thus had a legitimate expectation that her title would be retroactively corrected in all official documents, including her PAS, even in the absence of an explicit stipulation thereto in the agreement;

b. In fact, her original PAS bore the title of P-2 Associate Programme Adviser when her work plan was set in June 2010 and during the mid-point review in September 2010. It was not until April 2011 that the Administration deleted that reference with correction fluid and, using a typewriter, inserted the title of G-5 Programme Assistant;

c. By allowing contradictory information regarding her title and level to remain in her administrative file and her PAS, ITC deliberately undermined her reputation and her chances of appointment to a post at the Professional level within the United Nations;

d. While ITC did in the end pay the difference between the salary she received at the G-5 level and that which she should have received at the P-2 level, the bad faith and negligence of ITC in meeting this requirement resulted in damages that entitle her to redress. ITC cannot claim that the delay in payment and the repeated calculation errors to her detriment that occurred before payment was made were purely the result of technical difficulties. There was an evident desire to delay payment in order to reduce the Organization's financial liability;

e. The bad faith of ITC in carrying out its obligations under the settlement agreement of 29 June 2011 stems from a desire to retaliate against the Applicant for contesting the decision to consider her ineligible for a P-2 post.

20. The Respondent's contentions are:
- a. The only question before the Tribunal is whether the Respondent has met all of his obligations under the settlement agreement of 29 June 2011;
  - b. In accordance with paragraph 1(b) of the agreement of 29 June 2011, the obligations of ITC were limited to retroactively reappointing the Applicant to the P-2 level as from 1 June 2010 until the expiration of her appointment on 18 July 2011 and to paying her the difference between the salary she received at the G-5 level and the one she should have received at the P-2 level during the relevant period. The Respondent has fulfilled all of these obligations;
  - c. The delay in paying the amounts owed to the Applicant was due solely to administrative and technical matters which had to be resolved in order to make payment. There was no bad faith or negligence on the part of ITC;
  - d. Revising the Applicant's title on her PAS was not one of the obligations ITC assumed under the settlement agreement of 29 June 2011. Moreover, the Applicant never raised that issue during the mediation, which lasted from February to June 2011. ITC agreed only to compensate the Applicant financially as an acknowledgement of the fact that she had taken on the duties of a higher-level post than the one she occupied and in accordance with the principle of equal pay for equal work;
  - e. Making a revision to the Applicant's PAS would not be in line with the spirit and aim of the evaluation system. Her performance was assessed based on the expectations for a G-5 Programme Assistant. The expectations would have been different for a staff member at the P-2 level, and therefore the assessment of the Applicant's performance would probably also have been different. A revision of the Applicant's title on her PAS would therefore be inconsistent with the content of the PAS;

f. Article 1(a) of the settlement agreement of 29 June 2011 states: “[A]ll claims, demands, proceedings and/or appeals, except investigations, that the parties have against each other together form the subject matter of this mediation.” Article 2 further provides that: “The Settlement Agreement is in full and final resolution of any and all claims, demands, proceedings and/or appeals, except investigations, that the parties have against each other.” The agreement thus precludes the Applicant from reopening claims existing before the agreement was signed. This applies not only to the matter of the Applicant’s PAS but also to her allegations of abuse of authority and retaliation which are, moreover, baseless.

### **Consideration**

21. The Applicant brought a case before the Tribunal on the basis of article 2.1(c) of its Statute, which states:

The Dispute Tribunal shall be competent to hear and pass judgement on an application filed ... [t]o enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.

22. Article 8.2 of the Statute stipulates:

An application shall not be receivable if the dispute arising from the contested administrative decision had been resolved by an agreement reached through mediation. However, an applicant may file an application to enforce the implementation of an agreement reached through mediation, which shall be receivable if the agreement has not been implemented and the application is filed within 90 calendar days after the last day for the implementation as specified in the mediation agreement, or, when the mediation agreement is silent on the matter, after the thirtieth day from the date of the signing of the agreement.

23. It is thus clear that when a case is brought before the Tribunal on the basis of the provision cited above, its sole function is to verify whether the conditions of the agreement reached through mediation have been enforced.

24. In this case, the Applicant maintains, first, that the Administration was late in paying the amounts owed to her following her retroactive appointment to the

P-2 level starting on 1 June 2010. The Applicant, who is not contesting before the Tribunal that the amounts finally paid indeed match what she was supposed to receive, maintains that before it paid her what she was owed, the Administration committed a number of errors in its calculations which demonstrated an evident desire to delay payment.

25. However, while the case materials indicate that errors were made by the Administration in calculating the amounts to be paid to the Applicant, the Tribunal is of the opinion that they were rectified within reasonable time frames, as the agreement reached through mediation was signed on 29 June 2011 and the Applicant received the balance owed to her on 13 October 2011. The Administration should therefore be considered to have met this obligation.

26. Second, the Applicant maintains that the Administration was required to place her retroactively in the same administrative situation as she would have been if she had been appointed starting on 1 June 2010 as P-2 Associate Programme Adviser, and that the Administration must therefore retroactively change her functional title on her PAS from G-5 Programme Assistant to P-2 Associate Adviser.

27. The settlement agreement signed by the parties on 29 June 2011 necessarily involves retroactively placing the Applicant as of 1 June 2010 in the administrative situation she would have been if she had been appointed to a P-2 post, and it thus involves, as she is requesting, the revision of her PAS for the period from 1 June 2010 to 31 December 2010 to take the settlement agreement into account. Since the Administration has declined to accede to this request of the Applicant, the Tribunal has no option but to order ITC to revise the PAS so that it is clear from the information contained therein that the Applicant was evaluated as a P-2 Associate Programme Adviser.

28. However, in this case, the Tribunal finds that the Applicant has not substantiated any damages caused by the failure to make this correction, and that it would not therefore be appropriate to grant her compensation.



29. Third, the Applicant requested that the Tribunal rule on the retaliation she claims to have suffered following the mediated agreement, to grant compensation for the loss of her job, and to order ITC to remove from her file all adverse material.

30. The Tribunal cannot but recall its earlier statement that when an application is filed under article 2.1(c) of its Statute, its sole function is to verify whether the conditions of the agreement reached through mediation have been enforced. Thus, assuming that the Applicant was the victim of retaliation by ITC after the settlement agreement was signed, that could be addressed only in the context of a different dispute from the one presently before the Tribunal. The same would apply to her requests for compensation for the loss of her job and for moral prejudice on the one hand, and, on the other hand, to her request that the Tribunal order ITC to remove from her file all adverse material.

31. Finally, while the Applicant requests removal of her name from the present judgment of the Tribunal, she has provided no basis for this request and the Tribunal sees no convincing grounds for doing so.

### **Conclusion**

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

- a. ITC must, within 30 days from notification of this judgment, transmit to the Applicant a PAS covering the period from 1 June 2010 to 31 December 2010 containing information indicating that the Applicant was appraised as a P-2 Associate Programme Adviser;
- b. The Applicant's other demands are rejected.

*(Signed)*

Judge Jean-François Cousin

Dated this 16<sup>th</sup> day of February 2012

Entered in the Register on this 16<sup>th</sup> day of February 2012

*(Signed)*

Anne Coutin, Officer-in-Charge, Geneva Registry