



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

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**JUDGMENT**

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**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 7 February 2012, the Applicant contests the decision to deprive her of her functions and effectively evict her from her unit.
2. She requests the Tribunal to rescind the decision, to order the Respondent to pay her the sum of €100,000 as compensation for the damage suffered, and to omit her name from the published judgment.

## **Facts**

3. On 1 September 2009, the Applicant was appointed under a two-year fixed-term contract to the Office of Staff Legal Assistance of the Office of Administration of Justice, United Nations Secretariat. She was initially assigned to Beirut, and shortly afterwards she applied as a 15-day candidate for a similar post within the same Office, in Geneva. She was selected in January 2010, and moved from Beirut to Geneva in June 2010.
4. By memorandum dated 22 August 2011, the Chief of the Office of Staff Legal Assistance recommended that the Executive Officer of the Office of the Secretary-General (“the Executive Officer”) should not renew the Applicant’s contract, which was due to expire on 31 August 2011, on the grounds that her work was unsatisfactory.
5. The Applicant was placed on sick leave for the periods from 22 August to 9 September and from 19 September to 17 October 2011.
6. By memorandum dated 24 August 2011, the Executive Officer informed the Applicant that, on the basis of a recommendation by her department, her contract would be renewed for one month in order to allow her, and her supervisor, to complete her appraisal for the period from April 2010 to March 2011.
7. By e-mail of 23 September 2011, the Applicant requested a management evaluation of the aforementioned decision of 24 August 2011; then on 26 September, she requested a management evaluation of the implicit decision not to renew her contract beyond 30 September 2011.
8. On 27 September 2011, the Applicant filed with the Tribunal an application for suspension of action on the implicit decision not to renew her contract beyond 30 September 2011 (Case No. UNDT/GVA/2011/060).
9. By e-mail of 28 September 2011, the Office of the Secretary-General informed the Applicant that, following 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 contract from 1 October to 11 November 2011.

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. In its Judgment No. UNDT/2011/187 of 4 November 2011, the Tribunal ordered the suspension, for the duration of the management evaluation, of the decision depriving her of her functions (Case No. UNDT/GVA/2011/073).

20. On the same day, the Management Evaluation Unit informed the Applicant that her contract would be extended until the rebuttal processes initiated by the Applicant in respect of her appraisals had been completed.

21. By e-mail of 6 November 2011, the Chief of the Office of Staff Legal Assistance informed the Applicant that he had decided to restore her access to the internal data-sharing system and that he had reassigned to her one case that he had taken from her.

22. On 23 November 2011, the Applicant requested a management evaluation of the decisions taken subsequent to 30 September 2011 to extend her contract only by short periods of time.

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 means to perform them. Consequently, the Management Evaluation Unit considered that the Applicant's request for a management evaluation of the decision depriving her of her functions had become moot.

24. In its Judgment No. UNDT/2011/213 of 16 December 2011, the Tribunal rejected as non-receivable the first appeal on the merits against the decision depriving the Applicant of her functions (Case No. UNDT/GVA/2011/072). It considered that the said decision was not a measure taken following disciplinary proceedings and therefore could not be the subject of an appeal on the merits before the judge while the deadlines for a management evaluation laid down in article 8.1, subparagraph (d) (i), of the Statute of the Tribunal had not been respected.

25. On 19 January 2012, the Applicant submitted an application, entered in the Register as No. UNDT/GVA/2012/009, against the decision of 24 August 2011 to extend her contract by just one month, to 30 September 2011.

26. On 7 February 2012, the Applicant presented this — her second — application on the merits against the decision depriving her of her functions.

27. The Respondent submitted his reply on 9 March 2012.

28. On 4 April 2012, the Applicant submitted an application, entered in the Register as No. UNDT/GVA/2012/027, against the decisions taken subsequent to 30 September 2011 to extend her contract only by short periods of time.

29. On 18 July 2012, the Tribunal held a joint hearing in respect of Cases Nos. UNDT/GVA/2012/009, UNDT/GVA/2012/015 and UNDT/GVA/2012/027. The counsel for the Applicant attended in person, the Applicant by telephone and the counsel for the Respondent by videoconference.

### **Parties' submissions**

30. The Applicant's contentions are:

#### *On the disciplinary nature of the contested decision*

a. A sanction is a punitive measure taken against a staff member on the grounds of conduct deemed wrongful. An administrative authority that has decided to sanction a staff member may, however, be reluctant to resort to disciplinary proceedings because the facts of which the staff member is accused may not, or clearly do not, constitute a disciplinary offence, because the proceedings appear too long or not confidential enough, because they present the disadvantage of being adversarial, or for any other base motive. The sanction is then hidden; the action is disguised

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 re-establish the exact legal nature of the contested action and to draw the relevant conclusions;

b. In the present case, it is clear from the circumstances that the contested decision conceals a disciplinary measure, in other words, a measure deriving from an intention to punish the Applicant, with the object or effect of harming her employment conditions by depriving her of her functions to the point of effectively evicting her from the office;

c. In the absence of a formal and serious charge of misconduct, the Respondent could not be acting in the interests of the Organization by depriving the Applicant of her functions while continuing to pay her, bearing in mind that the Office of Staff Legal Assistance, especially in Geneva, has an excessive workload. Consequently, the contested decision is not based on legitimate grounds or a coherent administrative concept with regard to the interests of the Organization. That is an important element for recognizing a disguised sanction;

d. Furthermore, the decision clearly involves the subjective element characterizing a disguised disciplinary measure, namely the intention of the author of the action to impose a sanction on the concerned staff member on the basis of a expressed grievance against him or her, since the Chief of the Office of Staff Legal Assistance clearly accuses the Applicant of reprehensible conduct, namely the exercise of her right of appeal against her appraisals and the decision not to renew her contract, as is clear from his e-mail dated 19 October 2011. It is significant that he recommended the non-renewal of the Applicant's contract without having conducted her performance appraisal, thereby disregarding the applicable rules and the arguments he himself had upheld before the Tribunal in another case (see *Rees* UNDT/2011/156);

e. Lastly, the decision also involves the objective element characterizing a disguised disciplinary measure, namely the damage caused to the professional situation of the staff member concerned, since the decision deprives the Applicant of her functions and the means to perform them and thereby severely prejudices her rights and her situation;

*On the unlawfulness of the decision as a disciplinary measure*

f. On the lack of competence: Given that the decision was taken by the Chief of the Office of Staff Legal Assistance and not by the Secretary-General, who has sole authority to impose disciplinary measures by virtue of regulation 10.1 of the Staff Regulations, it was taken by a person lacking competence;

g. On the formal defect: The contested decision is vitiated by a formal defect since it lacks adequate justification;

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;

b. The contested decision is a management decision taken by the Chief of the Office of Staff Legal Assistance in the interests of his unit. By virtue of 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 Applicant worked only eight days between 21 July and 17 October 2011. In view of her repeated and prolonged absences, during which she could not be reached and had asked not to be disturbed, the Chief of the Office of Staff Legal Assistance was compelled to reassign to other counsels the cases previously assigned to the Applicant. That decision, taken in order to protect the needs of the beneficiaries of legal assistance, was therefore reasonable and justified;

d. The decision to deny the Applicant access to the internal data-sharing system ("eRoom"), which contains confidential information on all cases, was taken following an altercation between the Applicant and another counsel of the Office of Staff Legal Assistance, in the course of which the Applicant threatened to contact the other counsel's clients. The decision was taken to prevent her from carrying out her threat, and so protect the interests of the beneficiaries of legal assistance and the reputation of the Office of Staff Legal Assistance;

e. The Applicant's allegations that, firstly, her name was removed from the list of recipients of e-mails from the Office of Staff Legal Assistance and, secondly, that she was no longer invited to service



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.

### **Consideration**

32. The Applicant contests the decision depriving her of her functions and effectively evicting her from her unit. While, by its Judgment No. UNDT/2011/213 dated 16 December 2011, this Tribunal ruled that a previous application filed by the same applicant and for the same purposes, was not receivable, the said judgment was based on the fact that the Applicant had filed her application before the expiration of the period within which the Administration is required to respond to a request for a management evaluation. The Applicant was therefore entitled, as she has done through the present application, to refer again to the Tribunal after having received the Administration's response to her request for a management evaluation.

33. Given that the contested decision of the Chief of the Office of Staff Legal Assistance was revoked by a subsequent decision which had the effect of restoring to the Applicant all of her functions, the conclusions presented by the Applicant with a view to rescission must be declared moot.

34. However, bearing in mind that the contested decision took effect before it was revoked, the Tribunal must rule on the request for compensation presented by the Applicant and, thus, before doing so, on the lawfulness of the contested decision. In order for a decision of the Administration to give rise to compensation, it must first be found unlawful by the judge.

35. In the present case, the contested decision, which in fact constitutes several measures concerning the organization of the unit, was taken by the Applicant's direct supervisor and had the sole effect of effectively depriving her of any possibility of performing her functions, whilst requiring her to be present in the unit.

36. The Chief of the Office of Staff Legal Assistance, as the Applicant's direct supervisor, was entitled, particularly on the grounds of the leave taken by the latter, to assign the cases attributed to her to other staff members and to ask her to cease the exchange of over-heated e-mails with him or other colleagues. However, he was not authorized to deprive her, as he did, of her functions into the future.

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