



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2013/010

Judgment No.: UNDT/2013/170

Date: 16 December 2013

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

DAHL

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, United Nations Secretariat

Introduction

1. By application filed on 13 March 2013, the Applicant, a Senior Appeals Counsel (P-5) at the International Criminal Tribunal for the former Yugoslavia (“ICTY”), contests the decision dated 29 August 2012 by which her first reporting officer had her reassigned from the Appeals Division of the International Tribunal to other functions, including providing support to a number of teams in managing tasks related to a project for giving accused persons access to confidential trial materials (the Access Project), and carrying out other duties for the Office of the Prosecutor.

2. She requests:

- a. rescission of the above-mentioned decision of 29 August 2012 and the award of material and moral damages;
- b. referral of the dispute to mediation and suspension of the procedure during the mediation;
- c. removal of her name from the text of the judgment.

Facts

3. The Applicant entered the service of ICTY in 2006 and was appointed to the post of Senior Trial Attorney (P-5) on 15 May 2006 for a one-year contract. In May 2007, her contract was extended and her job title was changed in her letter of appointment to Senior Appeals Counsel. Her appointment was regularly extended from that time onward, and she is currently serving against post No. HLA-094-03140-T-P-5-003, which is funded through the end of 2013.

4. On 25 August 2012, the Applicant was advised that her performance evaluation rating for 2011/12 was "does not meet performance expectations".

5. By e-mail dated 29 August 2012, her first reporting officer and supervisor, Mr. P. K., advised her that her performance evaluation for 2011/12 had been completed. In the same e-mail, he informed her that in view of her assessment, he

had decided, as he had informed her before her departure on leave, to reassign her from the Appeals Division to other responsibilities, consisting of providing support to several teams in managing access by accused persons to confidential trial documents (the Access Project), as well as other duties for the Office of the Prosecutor, thereby terminating her appeals responsibilities.

6. By e-mail dated 31 August 2012 replying to the e-mail from her first reporting officer, the Applicant indicated her intention to file a request for rebuttal of her performance evaluation and also requested that the decision to remove her from the Appeals Division be suspended.

7. By e-mail dated 15 October 2012, the Senior Legal Adviser to the Prosecutor advised the Applicant that she should continue her duties with the Access Project, as discussed, and establish her workplan for the new performance evaluation period based on the duties assigned.

8. On 22 October 2012, the Applicant filed a request for rebuttal proceedings in regard to her performance evaluation.

9. On 29 October 2012, she requested a management evaluation of the contested decision.

10. On 31 October 2012, in reply to an e-mail she had sent, the Applicant received confirmation from the Senior Legal Adviser for the Prosecutor that her office would be moved to another part of the building close to the Prosecutor's Office, and that she had indeed been reassigned from the Appeals Division to tasks pertaining to the Access Project.

11. On 18 February 2013, the rebuttal panel modified the Applicant's performance rating to "partially meets performance expectations", and on 5 March 2013, her fixed-term appointment was extended from 1 April 2013 to 31 December 2013.

12. On 13 March 2013, the Applicant filed the present application with the Tribunal, which ordered the Respondent to reply by 15 April 2013.

13. By e-mail dated 28 March 2013, the Prosecutor informed the Applicant that the contested decision would not be implemented and that she would remain in her post in the Appeals Division, but would nonetheless remain assigned to assist with the access work.

14. That same day, 28 March 2013, the reply to the Applicant's management evaluation request stated that the request was moot, as the contested decision had not been implemented.

15. On 2 April 2013, the Respondent filed a motion requesting authorization from the Tribunal to reply only to the question of the receivability of the application, given the most recent communications to the Applicant dated 28 March 2013.

16. By e-mail dated 8 April 2013, the Applicant replied to the Prosecutor, asking him to give full effect to his decision by permitting her to resume her work as Senior Appeals Counsel and to return to appellate work.

17. By e-mail dated 12 April 2013, the Prosecutor replied to the Applicant that her assignments would continue to be determined based on the operational needs of the Office, but that the Senior Legal Adviser to the Prosecutor would consider the possibility of adding a component of appeals work to her assignments.

18. On 19 April 2013, the Applicant filed her observations on the Respondent's motion, maintaining that the contested decision had been implemented, as the duties assigned to her had not changed, and asking the Tribunal to refer the dispute to mediation and suspend the proceedings.

19. By Order No. 47 (GVA/2013) of 29 April 2013, the Tribunal rejected the Respondent's request for authorization to reply solely to the question of the receivability of the application and rejected the request to suspend the proceedings.

20. On 24 May 2013, the parties jointly requested the Tribunal to suspend the proceedings, as they had decided to refer the matter to the Office of the United Nations Ombudsman and Mediation Services ("UNOMS"). By Order

No. 65 (GVA/2013) of 27 May 2013, the Tribunal again rejected the request for suspension, pending confirmation from the Mediation Division that it was willing to mediate the case.

21. By Order No. 69 (GVA/2013) of 30 May 2013, following confirmation from the Director of the Mediation Division, received that same day, the Tribunal referred the dispute to the Mediation Division and suspended the proceedings for two months.

22. By Order No. 113 (GVA/2013) of 31 July 2013, the Tribunal ordered the resumption of the proceedings following the acknowledgement of failure of the mediation process and ordered the Respondent to file a reply to the application by 30 August 2013.

23. On 30 August 2013, the Respondent filed his observations, requesting the Tribunal to dismiss the application.

24. On 26 September 2013, the Applicant was advised that her post would be abolished at the end of December and that her contract would not be extended.

25. By Order No. 142 (GVA/2013) of 1 October 2013, the Tribunal ordered the Respondent to transmit to it all letters of appointment or contracts signed by the Applicant since the start of her service with ICTY. The Respondent submitted those documents on 4 October 2013.

26. By Order No. 149 (GVA/2013) of 8 October 2013, the Tribunal informed the parties that the matter would be ruled upon without a hearing and that they had a final opportunity to submit observations, which the Applicant did on 18 October 2013.

Parties' submissions

27. The Applicant's contentions are:

- a. Her 2011/12 performance evaluation was not in compliance with the procedure set forth in administrative instruction ST/AI/2010/5

(Performance Management and Development System), nor was the rebuttal process that followed it;

b. The decision to remove her from the Appeals Division and relieve her of her duties was based on the invalid performance assessment. A decision based on a performance rating that is later rebutted is unlawful;

c. The decision caused irreparable harm to her professional reputation and career aspirations;

d. Contrary to the Respondent's contentions, the contested decision was implemented, even though the Prosecutor stated that it would not be; the change in her functions and tasks was not like other temporary loans of appeals counsel to the Front Office or the Trial teams so that they did not stand idle;

e. She is carrying out duties that are appropriate neither to the Appeals Division nor to a P-5 staff member. Since the contested decision, she has been assigned no appellate work, and continues to carry out only those duties related to the management of the Access Project.

28. The Respondent's contentions are:

a. The application is not receivable because on 28 March 2013, the Prosecutor informed the Applicant that the contested decision would not be implemented. The Applicant considers herself to be a member of the Appeals Division;

b. Moreover, the contested decision is not an administrative decision that can be challenged before the Tribunal, as it in no way infringes upon the rights conferred by the Applicant's contract or by her status as a staff member. The Applicant still occupies the same post as before. She has the same title, grade, step and compensation, and the date of expiration of her contract has not changed;

- c. The choice of work assigned to her is at the discretion of the Prosecutor, who makes the best possible use of his Office's resources. As stated in his report to the Security Council (S/2012/354), the Prosecutor has been forced to redeploy Appeals Division staff to other work for his Office, owing to staff attrition, and this was, in part, the case for the Applicant;
- d. While the rebuttal panel upgraded her performance rating, the rating it gave her was merely “partially meets performance expectations”;
- e. The Applicant’s request for anonymity should be denied, owing to the absence of exceptional circumstances that could justify it and in order to preserve the transparency of the system of administration of justice;
- f. The Applicant has suffered no material harm, nor has she provided evidence of moral prejudice.

Consideration

29. The Tribunal must first determine the scope of the matter before it. By her application filed on 13 March 2013, the Applicant contests the decision of 29 August 2012 by which her first reporting officer and supervisor, Mr. P. K., reassigned her from the Appeals Division to other functions consisting of providing support to a number of teams in managing tasks related to a project for giving accused persons access to confidential trial documents (the Access Project), as well as other duties for the Office of the Prosecutor, thus terminating her appeals responsibilities. This is the same decision for which the Applicant requested a management evaluation on 29 October 2012. While in her latest submission, dated 18 October 2013, the Applicant contests the validity of the rebuttal process related to her 2011/12 performance evaluation, as well as its outcome, that process was not formally contested in the request for management evaluation, and is therefore not properly before the Tribunal.

30. It is not disputed that on 28 March 2013, the Prosecutor wrote to the Applicant to inform her that the contested decision would not be implemented and

that she would remain in her post in the Appeals Division. Thus, as of the date of the present judgment, the contested decision has been withdrawn and there is no need for the Tribunal to rule on the legality of a decision that has been rescinded.

31. However, the Applicant maintains that the contested decision has in fact been partially implemented, as the duties assigned to her since the date of the decision are not consistent with those of a Senior Appeals Counsel in the Appeals Division, the post for which she was recruited in her letter of appointment. While, as noted above, the contested decision has been officially rescinded, given that the Applicant is still serving against the same post, at the same grade and compensation, and she is administratively still a member of the Appeals Division in accordance with her letter of appointment, the Respondent acknowledges that in practice, the Applicant is assigned a variety of tasks, many of which are unrelated to appeals. The Tribunal must therefore consider whether the duties assigned to the Applicant are consistent with those provided for in her letter of appointment and appropriate to her P-5 post and, if that is not the case, whether the Prosecutor had the right to assign her those duties.

32. The Respondent notes that the Applicant was assigned mainly to the Access Project, which is described as important work requiring significant legal knowledge, because the three appeals cases for which she was responsible did not involve much work during the second half of 2012. The Applicant maintains that she has received no appeals work since the contested decision was taken, even though it was officially rescinded, and that the three appeals assigned to her were transferred to other appeals counsel.

33. The Tribunal is thus of the view that, while it is not disputed that since 2012 the Applicant has been assigned almost no appellate work, she has not established that the duties assigned to her are inconsistent with those of a legal officer at the P-5 level.

34. The Tribunal will therefore consider whether it was lawful for the Prosecutor to assign her the duties she has been performing.

35. Regulation 1.2 (c) of the Staff Regulations of the United Nations states that “[s]taff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations”. According to annex IV of administrative instruction ST/AI/234/Rev.1 (Administration of the Staff Regulations and Staff Rules), a “[d]ecision to assign staff members to any activity within the department or office” under regulation 1.2 of the Staff Regulations falls within the authority “of the heads of departments or offices”. The Appeals Tribunal has, moreover, recalled in its judgments the Administration’s broad discretion in this area (see especially *Pérez-Soto* 2013-UNAT-329; *Lauritzen* 2013-UNAT-282; *Allen* 2011-UNAT-187).

36. The regulation and instruction cited above therefore allowed the Prosecutor, who must, in the present case, be considered the head of his Office, to assign any type of work to the Applicant, subject to operational requirements, as long as these activities are consistent with the usual responsibilities of a legal officer at the P-5 level. The Prosecutor had broad discretion in this regard to make the best use of his staff. The Tribunal holds that these exigencies of service are clearly set forth in the Prosecutor's report to the Security Council, which explains why, in view of the downsizing of the ICTY staff, he must reassign duties among the staff members still employed there.

37. The Prosecutor did not, therefore, abuse his discretion in asking the Applicant to take on responsibilities other than appeals work, and the Applicant has not established that this change in her duties was directly tied to her 2011/12 performance rating, given the Applicant's acknowledgement that non-appeals duties had already been assigned to her from time to time in previous years.

38. It follows from the foregoing that the application and the request for anonymity in the published judgment must be rejected. Anonymity would not be justified in this case, given the principle of transparency in effect in proceedings before this Tribunal, as confirmed by case law (such as *Servas*, Order No. 127 (UNAT/2013) and *Servas*, 2013-UNAT-349, para. 25; *Williams*, Order No. 146 (UNAT/2013); and *Ahmed*, Order No. 132 (UNAT/2013)).

Conclusion

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

The application is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 16th day of December 2013

Entered in the Register on this 16th day of December 2013

(Signed)

René M. Vargas M., Registry, Geneva