UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/102
Judgment No.: UNDT/2016/094
Date: 30 June 2016
Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DALGAMOUNI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY AND RELIEF

Counsel for Applicant:

Nicole Washienko, OSLA

Counsel for Respondent:

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

Introduction and Procedural History

1. The Applicant entered into the service of the United Nations as a United Nations Volunteer (UNV) with the (then) United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) in August 2002.

2. She was appointed as a Supply Officer at the P-3 level at the same Mission in October 2004.

3. The Applicant has since served in various capacities within the United Nations, and has throughout this time been appraised as either "exceeding performance expectations" or as "fully satisfactory."

4. On 1 June 2013, the Applicant was appointed to her fifth duty station as Budget Officer at the Regional Service Centre in Entebbe, Uganda (RSCE), at the P-4 level.

5. The interpersonal difficulties between the Applicant and her First Reporting Officer, Ms. Safia Boly, Chief RSCE, began in September 2013.

6. On 2 September 2013, the then Operations Manager (now Chief RSCE/CRSCE) asked the Applicant to sign a document confirming that a specific post against which the Respondent intended to appoint a new candidate was vacant. The Applicant declined to sign the document explaining that she had no authority to carry out functions that fall within the exclusive purview of a Human Resources Officer.

7. On 6 September 2013, the Applicant was served with a Performance Improvement Plan (PIP) by the CRSCE.

8. On 27 November 2013, the CRSCE informed her that there was no progress in her performance.

9. On 5 May 2014, the CRSCE told the Applicant that her appointment would not be renewed on grounds of unsatisfactory performance. The Applicant was also directed not to act on behalf of the RSCE, and not to respond to any official communication.

10. On 16 May 2014, the Applicant sought management evaluation of the decision not to extend her fixed-term appointment.

11. She also filed an application for suspension of action for a stay of decision not to extend her fixed-term appointment. The Applicant submitted that the decision was made by the Chief RSCE on 24 April 2014, and that she was informed on 5 May 2014.

12. On 23 May 2014, the Tribunal issued Order No. 137 (NBI/2014) granting the injunction that was sought.

13. Following the issuance of Order No. 137 (NBI/2014), the Applicant's performance "appraisal was considered completed, even though it was never completed in Inspira".

14. The Applicant then requested a rebuttal of the performance rating. Pending the outcome of the rebuttal process, the Applicant's appointment was extended on a month-to-month basis.

15. On 19 June 2014, the Management Evaluation Unit informed the Applicant that her request before them is "moot" given that she has challenged her performance appraisal before a rebuttal panel.

16. In August 2014, the Chief RSCE requested that the Applicant's access to the financial system, UMOJA, be discontinued. A form requiring the signature of the Applicant was submitted in support of this request with someone else's signature. The form was signed by another staff member on the instructions of the Chief RSCE.

17. The Applicant was not informed that a request was sent to discontinue her access to UMOJA.

18. When the UMOJA support team and the Supervisor of Information and Communications Technology Operations of MONUSCO (United Nations Organization Stabilisation Mission in the Democratic Republic of the Congo), Mr. Brian Cable, informed the Chief RSCE that the Applicant's signature was required, Ms. Boly replied as follows:

> Dear Brian,
> Thank you for your support. The User is not part of the RSCE anymore and was notified of the same in May 2014. Furthermore, the Controller removed the delegation of authority which is the basis for the UMOJA access.
> Regards,
> Safia

19. On 23 September 2014, the Applicant filed her second Application for Suspension of Action. The Applicant contended that she had been subjected to "a series of actions which cumulatively amount to a decision to constructively dismiss her by depriving her of her functions". The "most recent decision" was made on 19 September 2014.

20. The Applicant sought management evaluation of the impugned decision on 23 September 2014.

21. On 30 September 2014, the Tribunal granted the suspension of action by Order No. 218 (NBI/2014) with the reasoned decision being issued on 10 October 2014 in Order No. 224 (NBI/2014).

22. On 15 October 2014, the Applicant filed a complaint for abuse of authority against the CRSCE to the then Under-Secretary-General for the Department of Field Support (USG/DFS), Ms. Ameerah Haq,

23. On 7 November 2014, the Applicant moved for execution of Order No. 224 (NBI/2014) pursuant to arts. 32.2 and 36 of the UNDT Rules of Procedure.

24. Also, on 7 November 2014, the Applicant received the outcome of her second request for management evaluation.

25. On 12 November 2014, the Applicant filed an Application on the Merits challenging the decision to progressively deprive her of her core functions, and responsibilities, thereby constructively dismissing her.

26. On the same day, the Applicant also filed an Application for Interim Measures seeking suspension of implementation of the decision.

27. On 19 November 2014, the Tribunal issued Order No. 255 (NBI/2014) suspending the impugned decision.

28. On 20 November 2014, the Tribunal issued Order No. 259 (NBI/2014) urging the parties to "consult and deliberate on having this matter informally resolved or mediated".

29. On 11 December 2014, the Applicant filed an Application for Execution of Order alleging that the Respondent failed to comply with Order No. 255 (NBI/2014).

30. On 24 December 2014, the parties jointly informed the Tribunal that "there is a likelihood that the case may settle informally". The parties moved the Tribunal to formally refer the matter "for mediation".

31. On 6 January 2015, the Tribunal issued Order No. 001 (NBI/2015) suspending these proceedings and referred the matter to be mediated by the Office of the United Nations Ombudsman & Mediation Services. Mediation Services was to "advise the Tribunal on the status of the mediation process by 6 February 2015".

32. On 1 February 2015, the Applicant filed an application for leave to file further submissions for an order of execution of Order No. 255 (NBI/2014) pursuant to arts.32.2 and 36 of the UNDT Rules of Procedure.

33. The Respondent replied to that application for execution on 6 February 2015, submitting that the Application was without merit as the Respondent had complied with the Order "to the best of its ability".

34. On 12 February 2015, the Applicant filed a rejoinder to the 6 February 2015 reply and reiterated the request for an order of execution.

35. On 11 March 2015, the Applicant filed a Motion to Resume Proceedings in this matter.

36. The Respondent filed his response to that Motion on 23 March 2015.

37. On 26 March 2015, the Tribunal issued Order No. 103 (NBI/2015) directing the Office of the United Nations Ombudsman & Mediation Services to provide the Tribunal with the Report on the status of the mediation. The Tribunal also directed the "Parties to consult between themselves and provide the Tribunal with a common position as to their willingness to have this matter settled".

38. The Tribunal then opined that it:

> [C]ontinues to take the view that mediation or informal resolution of this dispute would be in the best interest of the Parties; and in the interest of the efficient use of the Tribunal's resources and the expeditious conduct of proceedings.
>
> The Tribunal is also mindful of paragraph 27 of General Assembly resolution 69/203 (Respondent of justice at the United Nations) in which the courts are exhorted to proactively promote the "successful settlement of disputes."[1]

39. On 1 April 2015, the Dispute Tribunal issued its Order No. 111 (NBI/2015) referring the matter to mediation through the Office of the United Nations Ombudsman and Mediation Services.

[1] Paragraph 27 states: "Recalls the emphasis placed by the General Assembly on the resolution of disputes, and requests the Secretary-General to report on the practice of proactive case management by the judges of the United Nations Dispute Tribunal in the promotion and successful settlement of disputes within the formal system in his next report;"

40. On 14 April 2015, the parties began informal dispute resolution discussions.

41. On 22 June 2015, the rebuttal panel concluded that the rating of the Applicant's performance for the period from 1 June 2013 to 31 March 2014 cannot stand and should be replaced with "meets performance expectations".

42. On 13 July 2015, the Respondent communicated this report to the Applicant.

43. On 15 July 2015, the Respondent extended the Applicant's appointment for a period of one year.

44. On 21 July 2015, the Office of the United Nations Ombudsman and Mediation Services informed the Tribunal that the parties were unable to resolve the matter informally.

45. On 22 July 2015 the Applicant filed, under seal, a motion for leave to file further submissions and further evidence, including a report by the psychologist who had been treating the Applicant. The psychologist report showed, according to the Applicant, a "direct link between the damage suffered by the Applicant and the irresponsible actions of the Respondent".

46. On 23 July 2015, the Dispute Tribunal issued Order No. 244 (NBI/2015) directing the parties to file a statement of facts, agreed and disputed; identify the legal issues arising from those facts; settle outstanding discovery issues and advise the Tribunal of their respective positions on the need for an oral hearing of the matter.

47. On 28 August 2015, the Respondent moved for an extension of the deadline set for the filing of those joint submissions by three weeks.

48. The Applicant responded to the Respondent's Motion on 1 September 2015, stating that she did not object to the additional three weeks being granted but would take issue with any further delays in this case.

49. On 2 September 2015, the Tribunal issued Order No. 261 (NBI/2015) setting the matter down for a case management discussion.

50. On 3 September 2015, following a case management discussion, the Tribunal extended the deadline stipulated in Order No. 244 (NBI/2015) to 25 September 2015.

51. On 24 September 2015, the Respondent filed a motion for leave to file additional submissions on grounds that the "Secretary-General has reconsidered his position" in respect of this matter.

52. The Applicant responded to the Respondent's filing on 25 September 2015.

53. Also on 25 September 2015, the parties filed a joint submission on, *inter alia*, the facts and issues in this matter. In this submission, the parties stated that the only two legal issues in the case were the quantum damages to be awarded and whether the matter should be referred to the Secretary-General for accountability.

54. On 21 March 2016, the Applicant sought leave to file, and filed, further submissions providing the Tribunal with more details on her current state of health. While requesting that the details of her condition be maintained under seal, the Applicant argued that compensation should be awarded in the amount of two years' net base salary.

The Application

55. The Applicant contends that many facts lead to the conclusion that the decision to deprive her of her functions, and to marginalise her, was based on extraneous reasons.

56. The Applicant began experiencing problems as soon as she politely refused to comply with a request to sign a document she had no authority to sign. Indeed, her refusal to sign the document on 2 September 2013 led, quickly, to a Performance Improvement Plan (PIP) being imposed on her on 6 September 2013.

57. The PIP was imposed drastically. None of the intermediary measures contemplated in the Administrative Instruction ST/AI/2010/5 was even envisaged. The Applicant's Second Reporting Officer was neither aware nor involved in the preparation of the PIP.

58. The Applicant's First Reporting Officer (FRO) imposed the PIP on her only three months after the Applicant had assumed her duties. During the first three months, the Applicant was not performing "post management" functions (except during the absence of FRO) as she was getting acquainted with the role. The PIP took issue with her performance relating to "post management" functions. It was effectively imposed four days after the Applicant was instructed to assume a "post management" function.

59. Prior to working at the RSCE, the Applicant had always received positive and favourable performance appraisal ratings. The fact that her FRO determined within three months that she was a poor performer is a strong indication that the decision was based on personal animosity.

60. The Applicant was gradually deprived of the allocated human resource support assigned to her, and of her own functions and responsibilities. This was clearly done to undermine her ability to meet performance expectations.

61. The Applicant's FRO stopped communicating with her. Between May and October 2014, the Applicant had received only one email from her FRO. This was in stark contrast to the *circa* 70 emails per month she used to receive before the interpersonal dispute occurred.

62. The Applicant was physically isolated in a building half a kilometre away from the rest of the team, and was excluded from work-related developments, meetings, and training opportunities that directly related to her responsibilities.

63. The Applicant's FRO requested that her certification authority be revoked without informing her.

64. The Applicant's FRO also requested that her access to UMOJA be revoked without informing her. This was done by getting another staff member to sign for the revocation of authority on behalf of the Applicant and unbeknownst to her.

65. These incidences point to personal animosity and therefore, the decision was based on extraneous reasons.

66. The FRO's actions would be unlawful, even without the extraneous factors, because a supervisor cannot lawfully deprive a staff member of her work and her functions.

67. Even when a staff member's performance is unsatisfactory, the Organization cannot lawfully strip that staff member of her functions. ST/AI/2010/5 on the Performance Management System proposes an array of remedial measures.

68. Stripping the Applicant of her functions is not a remedial measure provided for in any statutory provision.

69. The impugned decisions put the Applicant in an impossible situation. At the midpoint review, she was unable to show achievements or progress in performance to justify the extension of her appointment. This was a direct consequence of the Respondent's decision not to assign any functions to a perfectly able staff member.

70. For the period April 2014 through March 2015, the Applicant was left without a work plan. Indeed, an initial draft of the work plan for the Applicant was prepared unilaterally by CRSCE on 17 October 2014.

71. The Applicant is seeking compensation for humiliation and prolonged distress.

72. On 22 July 2014, the Applicant revised her request for monetary compensation from six to 20 months' net base salary. She submitted a psychologist's report, which concludes that she has suffered psychological injury through the conduct of the Chief, RSCE.

73. The Applicant also requested that the matter be referred for accountability pursuant to section 10.5 of the UNDT Statute.

Respondent's Reply

74. The Respondent initially submitted that the Application was not receivable on grounds that the Application was time barred, especially since the Applicant could not specifically identify when her functional responsibilities were stripped off her.

75. On the merits, the Applicant has provided no evidence to substantiate her claim that the Respondent has been taking steps to "constructively dismiss her" from the Organization.

76. The Secretary-General enjoys a broad discretion in the Organization of work and the assignment of tasks to staff members. This discretion is subject to only limited control by the Dispute Tribunal.

77. In order to establish constructive dismissal, the actions of the employer must be such that a reasonable person would believe that the employer was "marching them to the door". In the present case, the Applicant has provided no evidence that a decision had been taken to constructively dismiss her. She remained in post, and has had her functions removed pending an on-going rebuttal process relating to her performance evaluation.

78. The Applicant's performance had been evaluated as poor. Given the nature of the Applicant's functions, the Respondent was obliged to take this information into account in managing the Organization. The Respondent was not obliged to wait until the outcome of the performance assessment process, before it considered and acted on the information known to it.

79. If a manager is of the view that the only way to safeguard the Organization's interests is to take steps to remove functions from a staff member before the performance management procedures have been completed, then they are bound to do

so. In this case, the Applicant's manager had determined that her performance was poor. Accordingly, the Respondent exercised lawful discretion to curtail the Applicant's functions, while her poor performance evaluation was under review by a rebuttal panel, so as not to expose the Organization to potential financial risk.

Radical Change in the Respondent's Position

80. On 15 October 2014, the Applicant submitted a complaint for abuse of authority, against the Chief of RSCE pursuant to ST/SGB/2008/5 on the Prohibition of discrimination, harassment, including sexual harassment and abuse of authority, to Ms. Haq.

81. It was only on 12 February 2015 that Ms. Haq constituted a fact finding panel to investigate the complaint.

82. Between October 2014 and February 2015, the Applicant and her counsel received several emails from various officials in DFS and the Conduct and Discipline Unit encouraging the Applicant to resolve the matter informally.

83. On 13 July 2015, the newly appointed USG/DFS, Mr. Atul Khare, referred the investigation report to the Assistant Secretary-General for Human Resources Management (OHRM) for possible disciplinary action. The matter is still pending.

84. The fact-finding panel's report, and referral to OHRM, is what caused the Respondent to "reconsider his position".

85. In fact on 25 September 2015, the Respondent filed a reply stating the following:

> The respondent acknowledges that the Chief, RSCE (Ms. Safia Boly) took certain decisions, including placing the Applicant on a Performance Improvement Plan (PIP), limiting the Applicant's access to information necessary for her to perform her work, and removing the Applicant from the list of certifying finance officers with Umoja access. Given the referral of the investigation report into the Applicant's complaint under the SGB to OHRM, the Respondent

> accepts that the Dispute Tribunal may order relief in accordance with article 10.5 of the Statute.

86. On the issue of relief, the Respondent submitted the following:

> The Respondent does not challenge that the Applicant has suffered harm. With regard to the degree of harm suffered, the Respondent observes that the PIP is no longer in place, that Applicant has successfully rebutted her performance rating, that her appointment has been renewed until 30 June 2016, and that following her agreement, she is currently on temporary duty assignment with the United Nations Organisation Stabilization Mission in the Democratic Republic of Congo. The Respondent also notes the Organisation's duty under section 6.5 of the SGB to keep the Applicant's situation under review and to take measures to ensure that the objectives of the SGB are met.

87. The Respondent's position is that three months' net base salary would be an appropriate amount of compensation as moral damages for the Applicant.

88. On the issue of accountability, the Respondent submitted:

> The Applicant also seeks the referral of this matter to the Secretary-General for possible action to enforce accountability. The Respondent notes that the matter has already been referred to OHRM for possible disciplinary action. Accordingly, the Secretary-General is taking measures to enforce accountability and there is no need for the Dispute Tribunal to make such an order.

Applicant's Rejoinder

89. None of the reasons listed by the Respondent has any incidence on the quantum of damages that should be awarded.

90. It is worthwhile to recall that, as early as May 2014, the Respondent d adopted and maintained an untenable position for a period of 17 months.

91. The Respondent not only failed to comply with numerous Orders of the Tribunal, but also violated express requests and orders made by the Tribunal.

92. The Respondent failed to mitigate his damages on several occasions. In particular, the Management Evaluation Unit continuously upheld abusive decisions. It

went as far as concluding that when Ms. Boly physically isolated the Applicant in an office away from the rest of the team, she was acting in the best interests of the Applicant! The Respondent had several opportunities to resolve this matter and mitigate his damages. He chose to uphold and subsequently defend abusive decisions by taking a completely unreasonable stance before the Dispute Tribunal.

93. The Respondent either intentionally or negligently delayed the fact-finding process and disciplinary processes against the CRSCE. The Applicant submitted the complaint to Ms. Haq on 15 October 2014. After submitting a complaint under ST/SGB/2008/5, the Applicant had to insist that a fact-finding panel be constituted. Counsel for the Applicant wrote to Ms. Haq to request that she comply with her obligation to constitute a fact-finding panel. A Panel was then constituted on 12 February 2015.

94. During these four months, the Applicant and her counsel received several emails from various officials in the Department of Field Support and the Conduct and Discipline Unit encouraging her to resolve the matter informally. Curiously, the Respondent was not interested in resolving the matter informally before the complaint.

95. It took the Respondent one year to refer the matter to OHRM. This inordinate delay is attributable exclusively to the Respondent. In the meantime, the Respondent was not complying, even partially, with the Tribunal's Orders.

96. The Respondent's argument that the Applicant is entitled to less damages because she successfully rebutted her performance appraisal is frivolous. The fact that the Applicant was compelled to rebut a manifestly abusive performance appraisal over a period of several months only exacerbated the harm. The Respondent should have never allowed such an abusive decision to stand.

97. The fact that the Applicant's appointment was extended is also completely irrelevant. The Applicant contested the decision to deprive her of her functions. The extension of her appointment without reinstating the functions does not diminish the

moral harm that the Applicant suffered as a result of the Respondent's abusive decisions.

98. The Respondent's reliance on the fact that the Applicant accepted a temporary duty assignment is misguided. This temporary duty assignment only confirms that the Applicant was subjected to a prolonged and gratuitous harassment and abuse of authority. The Applicant agreed to be separated from her children and to live in a duty station classified as "E" hardship with the sole purpose of working in an environment free of harassment and abuse of authority. The Applicant would have never agreed to this temporary duty assignment if she had not been continuously harassed and humiliated. Her temporary duty assignment only exacerbated the moral damages that she should be awarded.

99. With respect to an order under article 10.8 of the UNDT Statute to refer the matter to the Secretary-General for accountability, the purpose of such a referral is not punitive only. Such orders also play a preventive role in ensuring that similar cases do not recur. In the present case, the Chief RSCE is not the only individual to be held accountable. It is in the interests of the Organization to find out why the Respondent felt compelled to take an untenable position before the UNDT and failed to comply with its Orders on several occasions.

Deliberations

100. The Respondent who had vehemently been defending the actions of Ms. Boly, from the time the Applicant filed her first suspension of action application, eventually conceded liability. He now agrees that the actions of Ms. Boly were unlawful and had harmed the Applicant.

101. While counsel acting for the Secretary-General act on his instructions, it is important that they are also cognisant of their duties as officers of the court. Legally untenable or duplicitous positions must at all times be scrupulously avoided.

102. The Tribunal will here endorse what Judge Izuako stated in *Maiga* UNDT/2015/048:

> Counsel must realize that in prosecuting a case, they are first and foremost officers of the Tribunal and their efforts at all times must be directed at laying all their cards face up on the table with a view to helping the Tribunal achieve the ends of justice. Counsel at all times must be beyond reproach and not place themselves in a position where they stand or fall with their clients.

103. The learned Judge also referred to the case of *Dalgaard et al* 2015-UNAT-532, where the United Nations Appeals Tribunal (Appeals Tribunal) observed that:

> Due diligence by the Secretary-General in the presentation of his case would have obviated the instant proceedings. […]
>
> [I]t is the self-evident duty of all counsel appearing before the Tribunals to contribute to the fair administration of justice and the promotion of the rule of law. Counsel for Dalgaard et al. failed in this duty by allowing the Appeals Tribunal to proceed on a factual basis which Counsel should have known to be untrue, resulting in an award of moral damages to which Dalgaard et al. were not entitled.

104. Had the Secretary-General exercised more diligence and circumspection, this case would not have had to come this far. In the circumstances, the record shows repeated violation of orders of this Court, which the Respondent defended with every successive application brought by the Applicant. Worse, the actions of Ms. Boly were not only condoned, but repeatedly defended as being in the "interest of the Organisation".

105. In *Igunda*, the Appeals Tribunal clearly stated that:

> a party is not allowed to refuse the execution of an order issued by the Dispute Tribunal under the pretext that it is unlawful or was rendered in excess of that body's jurisdiction, because it is not for a party to decide about those issues. Proper observance must be given to judicial orders. The absence of compliance may merit contempt procedures.[2]

[2] 2012-UNAT-255. *See also Dalgaard* 2015-UNAT-232 *per* Flaherty J.

106. In *Igbinedion*[3] the Appeals Tribunal held that:

> [I]t is unacceptable that a party before the Dispute Tribunal would refuse to obey its binding decision in this manner, regardless of the fact that, in the instant case, the Order was ultimately vacated by the Appeals Tribunal. To rule otherwise would undermine legal certainty and the internal justice system at its core.

107. The net result of the Respondent's actions is that the Applicant was subjected to an impossibly difficult and intractable situation.

108. The Tribunal is further astonished that even the concession of liability on the part of the Secretary-General did not result in a meaningful settlement of the dispute between the parties.

109. In the peculiar circumstances of this case, it is suggested that the Secretary-General enquire into Ms. Boly's conduct especially with a view to establishing why she was allowed to conduct herself in the way that she did, and continue in her position, despite the multiple adverse findings by this Tribunal, the fact-finding panel's report, and her patent violations of the rules and regulations of the Organization with total impunity. Put very simply, and in other words, who was protecting Ms. Boly and why?

110. Among the issues before the Tribunal is whether Ms. Boly, with the tacit concurrence of the apex of DFS, should be referred to the Secretary-General for accountability for having abused her authority in her dealings with the Applicant, and what compensation the Applicant is entitled to for having been subject to, and suffered, that abuse.

111. Within the context of the United Nations, abuse of authority constitutes prohibited conduct. ST/SGB/2008/5 defines abuse of authority as:

> the improper use of a position of influence, power or authority against another person. This is particularly serious when a person uses his or her influence, power or authority to improperly influence the career or

[3] 2014-UNAT-410.

> employment conditions of another, including, but not limited to, appointment, assignment, contract renewal performance evaluation or promotion. Abuse of authority may also include conduct that creates a hostile or offensive work environment which includes, but is not limited to, the use of intimidation, threats, blackmail or coercion. Discrimination and harassment, including sexual harassment, are particularly serious when accompanied by abuse of authority.

112. Section 2.2 of ST/SGB/2008/5 enjoins the Organization to take all appropriate measure towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed.

113. The Organization takes the abuse of authority by its staff members seriously; and it may lead to disciplinary action. ST/SGB/2008/5 lists elaborate preventive and corrective measures which can be taken in cases of alleged abuse of authority.

114. Section 5 dealing with "Corrective Measures" describes the informal and formal procedures that can be triggered towards a resolution of the issue. It also enjoins individuals who believe that they are victims of abuse of authority to deal with the issue as soon as it has occurred, and directs managers and supervisors to take prompt and concrete action in response to such an allegation.

115. In the present matter, the Applicant did not resort to the corrective measures listed in the Bulletin. The events in the case unfolded in such a manner that the Applicant was caught between the actions of Ms. Boly, and the inaction of her superiors in DFS. So, she came to Court.

116. That too, resulted in little change as Ms. Boly boldly shrugged off the orders of the Tribunal. It was the investigation report that caused DFS, and counsel for the Secretary-General, to take actual cognisance of the situation facing the Applicant, which situation had long before been repeatedly censured in the issuances of the Tribunal.

117. The Tribunal will here set out the events that support the finding of abuse of authority by Ms. Boly, with the tacit support of the then USG/DFS:

i. On 6 September 2013, the Chief RSCE arbitrarily imposed a PIP on the Applicant.

ii. On 27 November 2013, the Chief RSCE informed the Applicant that there had been no progress in improving her performance.

iii. On 5 May 2014, the Chief RSCE informed the Applicant that her appointment would not be renewed as a result of unsatisfactory performance and requested the Applicant to abstain from acting on behalf of RSCE and from responding to official communications. On 16 May 2014, the Applicant filed an application for suspension of action challenging the decision not to extend her fixed-term appointment. The Respondent submitted that the Application should be dismissed as it did not meet the requirements of the test for injunctive relief under art. 2.2 of the UNDT Statute; specifically, the Applicant had failed to show that the impugned decision was *prima facie* unlawful, that the urgency of the matter was not "self-created" and that the implementation of the impugned decision would cause irreparable harm. The Tribunal issued Order No. 137 (NBI/2014) on 23 May 2014, granting the application. As part of Order No. 137, the Tribunal recognised the hostile work environment in which the Parties found themselves and urged them to "engage in meaningful consultations towards having this matter resolved".

iv. On 22 July 2014, the Chief of RSCE requested that the Applicant be removed from the list of certifying officers. The Controller approved this request on 31 July 2014.

v. On 19 August 2014, the Chief RSCE wrote to Mr. Cable and requested that the Applicant's access to the financial system UMOJA be withdrawn.

vi. Ms. Boly wrote that email to Mr. Cable in September 2014 - months after the issuance of Order No. 137 (NBI/2014), and while a rebuttal panel was still being constituted.

vii. On 23 September 2014, the Applicant filed her second application for suspension of action. The Applicant complained that she had been subjected to "a series of actions which cumulatively amount to a decision to constructively dismiss her by depriving her of her functions". The "most recent decision" was made on 19 September 2014. The Respondent argued that the Applicant's second application for suspension of action was not receivable as a matter of substance; that it did not meet the statutory timelines; and that the impugned decision had, in any event, been implemented. The Tribunal issued Order 218 (NBI/2014) on 20 September 2014 granting the suspension of action with full reasons being set out in Order No. 224 (NBI/2014). The Tribunal observed that "Ms. Boly's bad faith and blatant disregard for the rules of the Organisation could not be clearer". The Tribunal went on:

> The circumstances described to the Tribunal by both the Applicant and the witness who testified on her behalf paints the picture of a bad working environment. Staff members cannot be expected to work effectively and productively while being marginalised and humiliated. It makes for poor morale. From the Organisation's perspective, it is equally poor form to have a staff member on payroll with no functions to perform. It is a waste of the Organisation's resources, which cannot be condoned.

viii. Order No. 224 (NBI/2014) was ignored by the Respondent, and on 7 November 2014 the Applicant moved for execution of Order No.224 (NBI/2014) pursuant to arts. 32.2 and 36 of the Rules of Procedure. In response to the motion for execution, the Respondent took the position that the Tribunal did not have the jurisdiction to decide on the motion for execution as Order No. 224 (NBI/2014), which was issued pending management evaluation, was no longer in force. In fact on 7 November 2014, the Applicant received the outcome of her second request for management evaluation. That the Tribunal's order was blithely ignored between 30 September and 7 November seems to have mattered little to the Respondent. The Tribunal would be loath to believe that there was a deliberate ploy to wait for the outcome of the MEU request, so that the Tribunal's order would have lapsed and the Applicant left without a remedy.

118. There is absolutely no doubt in the in the Tribunal's view that the actions taken by Ms. Boly towards the Applicant amount to a clear breach of the authority entrusted to her as Chief of RSCE. Her conduct falls squarely within the definition contained in ST/SGB/2008/5 which is "the improper use of a position of influence, power or authority against another person".

119. It can be reasonably inferred that Ms. Boly either deliberately or negligently ignored the principles governing the role of a manager or supervisor contained in the 2014 Standards of Conduct for the International Civil Service (2014 Standards of Conduct). The 2014 Standards of Conduct were revised by the International Civil Service Commission and approved by the United Nations General Assembly in 2013. The first Standards of Conduct were drafted by the International Civil Service Advisory Board in 1954. It was revised in 2001 and 2013, and approved by the General Assembly in resolution 67/257. It states:

> The values that are enshrined in the United Nation Organisations must also be those that guide international civil servants in all their actions: fundamental human rights social justice, the dignity and worth of the human person and respect for the equal rights of men and women and of nations great and small

120. Under staff rule 1.1 (c) :

> The Secretary-General shall ensure that the rights and duties of staff members, as set out in the Charter and the Staff Regulations and Rules and in the relevant resolutions and decisions of the General Assembly, are respected.

121. The reference to human rights in paragraph 3 of the 2014 Standards of Conduct, and to rights of staff members in staff rule 1.1.(c), is appropriate as the fundamental right to work means that an employee who is subordinate to a supervisor must have his/her rights and dignity respected. The Tribunal will here refer to, and endorse, what it stated in *Tadonki* UNDT/2009/016:

> Employment gives rise to civil rights and this is recognized by various international legal instruments. This right to work is enshrined in Article 23.1 of the Universal Declaration of Human Rights:

> Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
>
> It is also enshrined in Article 6 the International Covenant on Economic, Social and Cultural Rights, where the right to work emphasizes economic, social and cultural development:
>
> (1) The State Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
>
> (2) The steps to be taken by a State party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.
>
> The European Court of Human Rights has ruled that the right to continue in professional practice is a civil right[4]. There is no reason why that principle should not be applicable to all contracts of employment in any civilized society. It follows that disputes arising out of a contract of employment should be dealt with according to fair procedures and the provisions guaranteeing the right to work should be interpreted according to international human rights norms.

122. Paragraphs 16 and 17 of the 2014 Standards of Conduct under the heading "Mutual Respect" make it very clear what the role of managers and supervisors should be:

> Managers and supervisors are in positions of leadership and it is their responsibility to ensure a harmonious workplace based on mutual respect; they should be open to all views and opinions and make sure that the merits of staff are properly recognized. They need to provide support to them; this is particularly important when staff is subject to criticism arising from the performance of their duties. Managers are also responsible for guiding and motivating their staff and promoting their development.
>
> Managers and supervisors serve as role models and they have therefore a special obligation to uphold the highest standards of conduct. It is quite improper for them to solicit favours, gifts or loans from their staff; they must act impartially, without favouritism and

[4] *Albert and Le Compte v. Belgium*, European Court of Human Rights, 10 February 1983, A058.

> intimidation. In matters relating to the appointment or career of others, international civil servants should not try to influence colleagues for personal reasons

123. As a supervisor, Ms. Boly was responsible for fostering and ensuring a healthy work environment at the duty station under her charge.

Quantum of Damages

124. In *Carrabregu* 2014-UNAT-485, UNAT decided that an oral hearing was not necessary where the issues for decision were clearly defined in the parties' written submissions. In the circumstances of this matter, this Tribunal takes the same view.

125. The Tribunal did not consider it necessary to hold a hearing for the following reasons. Liability had been accepted by the Respondent. The Applicant submitted a detailed report from her psychologist describing the significant damage to her health. The pleadings of both parties are quite extensive and comprehensive.

126. In the case of *Abu Jarbou* 2013-UNAT-292 and *Khan* 2014-UNAT-486, the Appeals Tribunal took the view that:

> Like sexual harassment, abuse of authority by itself may be serious misconduct warranting separation from service.

127. It is therefore the duty of the Tribunal, when assessing the quantum of damages in this case, to bear in mind the seriousness, nature and consequences of the abuse of authority and the prejudice sustained by the Applicant.

128. As rightly pointed out by the Applicant, the Respondent failed to mitigate the predicament she was in because of Ms. Boly. The Management Evaluation Unit, for its part, systematically condoned Ms. Boly’s abusive behavior and went so far as to suggest that the physical isolation of the Applicant in an office away from the rest of the team was in the in the best interests of the Applicant!

129. The Applicant accepted a temporary assignment at another duty station to remove herself from the RSCE environment.

130. It is not clear either, to-date, whether the functions she was deprived of have been reinstated following the Respondent's concession of liability.

131. Abuse of authority can include a one-time incident or a series of incidents. Here, the abuse took the form of a systematic series of actions by Ms. Boly who, to the detriment of the Applicant, did not pay the slightest heed to the Orders of the Tribunal.

132. The Applicant is requesting monetary compensation of 20 months' net base salary for humiliation and prolonged period of emotional distress.

133. In *Gakumba* 2013-UNAT-387, the Appeals Tribunal distinguished between an award of compensation under articles 9.1(a) and (b) of the Statute of the Appeals Tribunal, [articles 10.5(a) and (b) of the UNDT Statute]. The Appeals Tribunal determined that the circumstances of the case supported the UNDT's

> finding of humiliation, embarrassment and negative impact of the Respondent's wrongdoing on the staff member, which led the UNDT to award the reasonable amount of seven months' net base salary as compensation.

134. The Appeals Tribunal also analysed the nature of the compensation that may be awarded under articles 9.1(a) and (b) by holding:

> This compensation [for humiliation, embarrassment and negative impact of the Administration's wrongdoing on the staff member] is completely different from the one set in lieu of specific performance established in a judgment, and is, therefore, not duplicative. The latter covers the possibility that the staff member does not receive the concrete remedy of specific performance ordered by the UNDT. This is contemplated by Article 9(1) (a) of the Statute of the Appeals Tribunal as an alternative. The former, on the other hand, accomplishes a totally different function by compensating the victim for the negative consequences caused by the illegality committed by the Administration, and it is regulated in Article 9(1) (b). Both heads of compensation can be awarded simultaneously in certain cases, subject only to a maximum ceiling.

135. In *Eissa* 2014-UNAT-469, the Appeals Tribunal further held that:

> An award under Article 10(5)(a) of the UNDT Statute is alternative compensation in lieu of rescission. It is not an award of moral damages for the fundamental breaches of Mr. Eissa's rights not to be unlawfully terminated from service and to be automatically transitioned to the post of UNMISS Spokesperson. It is not the same remedy and does not serve the same purpose.

136. Subsequently in *Dahan* UNDT/2015/053, the Dispute Tribunal held that:

> Compensation by way of moral damages under art. 9.1(b), which is known in the civil law system as "*dommage moral*" and in the common law system as "non-pecuniary loss" or non-economic loss", is awarded at the discretion of the court. Moral damages are not punitive in nature but are meant to compensate a litigant for physical suffering, mental anguish, loss of reputation, humiliation, and other causes. Moral damages are not solely a question about money but a warning in the field of employment law to employers on how to treat people.

137. The Appeals Tribunal also held in *Eissa* that:

> Moral damages arise from a breach of a fundamental nature, whether the breach stems from substantive or procedural irregularities. Either type of irregularity may support an award of moral damages.

138. In *Assiarotis* 2013-UNAT 309, the Appeals Tribunal set out the principles that should guide the UNDT in the award of moral damages:

> To invoke its jurisdiction to award moral damages, the UNDT must in the first instance identify the moral injury sustained by the employee. This identification can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise:
>
> (i) From a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed (be they specifically designated in the Staff Regulations and Rules or arising from the principles of natural justice). Where the breach is of a fundamental nature, the breach may of itself give rise to an award of moral damages, not in any punitive sense for the fact of the breach having occurred, but rather by virtue of the harm to the employee.
>
> (ii) An entitlement to moral damages may also arise where there is evidence produced to the Dispute Tribunal by way of a medical, psychological report or otherwise of harm, stress or anxiety caused to the employee which can be directly linked or reasonably attributed to a breach of his or her substantive or procedural rights and where the UNDT is satisfied that the stress, harm or anxiety is such as to merit a compensatory award.
>
> We have consistently held that not every breach will give rise to an award of moral damages under (i) above, and whether or not such a breach will give rise to an award under (ii) will necessarily depend on the nature of the evidence put before the Dispute Tribunal.
>
> Following the identification of the moral injury by the UNDT under (i) or (ii) or both, it falls to the Dispute Tribunal to assess the quantum of damages. This will necessarily depend on the magnitude of the breach that may arise under (i). With regard to (ii), it will depend on the contents of any medical or other professional report or evidence before the Dispute Tribunal.

139. In the light of the principles laid down by the Appeals Tribunal, the Tribunal holds that the actions of Ms. Boly amounted to a breach of the Applicant's fundamental rights as an employee of the United Nations. This breach was of a fundamental nature, and it caused considerable damage to her health as evidenced by the medical reports that the Applicant filed under seal.

140. The Tribunal considers that **an award of 20 months net base salary** is just and fair given the circumstance described.

Should Ms. Safia Boly be referred for accountability?

141. Art. 10.8 of the Statute of the UNDT provides that "The Dispute Tribunal may refer appropriate cases to the Secretary-General of the United Nations or the executive heads of separately administered United Nations funds and programmes for possible action to enforce accountability".

142. It has been submitted by the Respondent that the investigation report has been referred to OHRM for possible disciplinary action against Ms. Boly. Accordingly, the Secretary-General "is taking measures to enforce accountability and there is no need for the Dispute Tribunal to make such an order".

143. In *Abboud* UNAT-2011-103, the Appeals Tribunal observed that art. 10.8 of the UNDT Statute "means exactly what it says".

144. The General Assembly has, in Resolution 64/259, stressed that "accountability is a central pillar of effective and efficient management that requires attention and strong commitment at the highest level of the Secretariat" and noted "the absence of a comprehensive accountability system at the United Nations could lead to mismanagement, waste and risks in the Organisation". The General Assembly then defined accountability roles and responsibilities as follows:

> Accountability is the obligation of the Secretariat and its staff members to be answerable for all decisions made and actions taken by them, and to be responsible for honouring their commitments, without qualification or exception. Accountability includes achieving objectives and high-quality results in a timely and cost-effective manner, in fully implementing and delivering on all mandates to the Secretariat approved by the United Nations intergovernmental bodies and other subsidiary organs established by them in compliance with all resolutions, regulations, rules and ethical standards; truthful, objective.

145. Accountability, therefore, is inherent in managerial practice. It cannot be dissociated from the responsibilities, and power, conferred on a manager whose duty it is to conduct him/herself in accordance with the governing rules and regulations. A

manager who acts arbitrarily, is found to be irresponsible or abusive must be called to account for his/her actions.

146. Within the context of the internal justice system of the United Nations, art. 10.8 of the Statute is the mechanism by which conduct calling for accountability is brought to the direct attention of the Secretary-General.

147. Accountability cannot and should not be equated with disciplinary proceedings. A referral for possible action is not punitive in nature. A referral "for accountability" is, quite simply, a message from the Tribunal to the Secretary-General[5]. It is a mechanism that alerts the Secretary-General to possible improper managerial practice, leaving him to take appropriate action if the circumstances so warrant.

148. When there is a referral for accountability it is the prerogative of the Secretary-General, and not OHRM, to determine what the exercise of that discretion entails. There are no procedures set out for the exercise of that discretion. In *Tadonki* 2014-UNAT-400, the Appeals Tribunal stated it this way: "The Secretary-General is vested with the discretionary power to determine a course of action to adopt or not to adopt as sequel to the referral".

149. On the other hand disciplinary proceedings are governed comprehensively in ST/AI/371with various actors involved. A referral of a report to OHRM, in the event that action is taken, on the other hand may result in punitive action. The form that a punitive action may take is listed in staff rule 10.2.

150. Throughout the history of this case, Ms. Boly has conducted herself with wanton disregard of the rules and regulations of the Organization and basic standards of professionalism. She was a blatant bully as a manager, and she showed an implacable indifference to the consequences her actions were having on the working environment where the Applicant was posted. She has behaved in a manner most

[5] *Tadonki* 2014-UNAT-400.

unbecoming of an international civil servant, consistently displaying both disdain and impunity towards the authority of the Tribunal.

151. The Tribunal accordingly refers Ms. Safia Boly to the Secretary-General pursuant to the provision of art. 10.8 of the Statute of the UNDT.

Further observations

152. The Tribunal is saddened to note that this case has brought to light how inaction at the highest levels of DFS resulted in a manager ruling over a duty a station as if it was her fiefdom.

153. In addition to the compensation awarded to the Applicant, the Tribunal directs the Registry to serve a copy of this judgment on the Secretary-General, and the Under-Secretary-General for Field Support, so that their attention is drawn to the conduct of the staff member under their charge.

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Judge Vinod Boolell
Dated this 30th day of June 2016

Entered in the Register on this 30th day of June 2016

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Abena Kwakye-Berko, Registrar, Nairobi