



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-150



**Kaddoura
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before: Judge Luis María Simón, Presiding
Judge Sophia Adinyira
Judge Mary Faherty

Judgment No.: 2011-UNAT-151

Date: 8 July 2011

Registrar: Weicheng Lin

Counsel for Appellant: Self-represented

Counsel for Respondent: Amy Wood

JUDGE LUIS MARÍA SIMÓN, Presiding.

Synopsis

1. The United Nations Dispute Tribunal (UNDT or Dispute Tribunal) is authorized under its Rules of Procedure (Rules) to assess the relevance of evidence offered by a party to prove essential facts in the case and to deny receiving evidence related to non relevant facts of the main issues involved. In order to establish that the UNDT erred in making this assessment, this Court must determine whether the evidence, if admitted, would have led to different findings of fact and changed the outcome of the case.

2. This Court holds that the Executive Secretary of the Economic and Social Commission for Western Asia (ESCWA) had the authority to transfer Nadine Kaddoura (Kaddoura) to a different section, and that there are no grounds to find that the decision to confirm the Deputy Executive Secretary's decision to transfer Kaddoura was arbitrary, biased, discriminatory or it violated her rights. The decision taken by the Deputy Executive Secretary, which was found unlawful by the UNDT, does not result in the illegality of the later confirmation act. Therefore, the UNDT did not err when it did not order the reinstatement as specific performance or a higher compensation than the one awarded in its Judgment.

3. Kaddoura alleges that the UNDT erred by rescinding the original decision on her reassignment, without specifying an amount of compensation that the Administration could elect to pay in lieu of the specific performance. This Court points out that the order of a specific performance is an alternative to the rescission of an administrative decision, depending on the circumstances of each case and subject to the reasoned discretion of the Judge. Under Article 10(5)(a) of the UNDT Statute, an order for compensation in lieu of a specific performance is only required when the administrative decision which is rescinded concerns appointment, promotion, or termination, which is not the case here.

Facts and Procedure

4. In November 2001, Kaddoura joined ESCWA on a short-term appointment as a G-4 Administrative Assistant in the Office of the Executive Secretary. Her appointment was renewed several times until 30 April 2002. On 1 May 2002, Kaddoura was given a fixed-term appointment for three months which was renewed until 30 November 2002.

Effective 1 December 2002, Kaddoura was awarded a one-year fixed-term appointment as Administrative Assistant at the G-5 level in the Office of the Executive Secretary. On 1 December 2003, she was promoted to the G-6 level and her appointment was renewed for two years. On 1 December 2005, her appointment was again renewed for two years.

5. Effective 19 July 2006, Kaddoura was awarded a special post allowance at the P-2 level to take on temporarily the responsibilities of a P-3 Administrative Officer. The special post allowance was extended until 8 August 2007.

6. On 31 May 2007, following the departure of the then Executive Secretary of ESCWA, the Deputy Executive Secretary was appointed Acting Executive Secretary effective 1 June 2007. On 30 July 2007, a new Executive Secretary was appointed with effect from 1 August 2007.

7. By letter dated 8 August 2007, the Deputy Executive Secretary informed Kaddoura of her transfer with immediate effect to the Facilities Management Unit, Administrative Services Division. The reason given for the transfer was that a review of the functions and duties of the staff of the Office of the Executive Secretary had shown that Kaddoura's functions and duties were no longer needed there.

8. The same day, Kaddoura ceased to perform her functions as Associate Administrative Officer and payment of her special post allowance was discontinued.

9. On 12 August 2007, Kaddoura submitted to the Secretary-General a request for administrative review of the decision to transfer her to the Facilities Management Unit, Administrative Services Division.

10. On 16 August 2007, the new ESCWA Executive Secretary confirmed the Deputy Executive Secretary's decision of 8 August 2007 and also confirmed that authority for all administrative matters had been vested in the Deputy Executive Secretary.

11. By letter dated 12 September 2007, Kaddoura tendered her resignation effective 7 November 2007. On 8 November 2007, Kaddoura was appointed to an FS-6/P-3 post with the United Nations Assistance Mission for Iraq.

12. By interoffice memoranda dated 20 and 28 September 2007, the Executive Secretary announced decisions to reorganize his office.

13. By letter dated 5 October 2007, the Administrative Law Unit, Office of Human Resources Management, informed Kaddoura that, following a review of the contested decision, the Secretary-General considered that the decision had not violated her rights.

14. On 4 December 2007, Kaddoura appealed the Secretary-General's decision under the internal justice system then in place. On 28 August 2009, her case was transferred to the Dispute Tribunal in Geneva.

15. On 30 March 2010, the UNDT issued Judgment No. UNDT/2010/050. The UNDT found that the decision taken by the Deputy Executive Secretary on 8 August 2007 was illegal, because there was no evidence that, at that stage, the new Executive Secretary had delegated power to his Deputy to take such decision, and because it was inadequately justified by the Deputy Executive Secretary.

16. The UNDT then went on to determine whether the confirmation decision was lawfully taken. It rejected Kaddoura's contention that the contested decision constituted retaliation by the Deputy Executive Secretary for her reporting of irregularities she had discovered at ESCWA, because the confirmation decision was not taken by the Deputy Executive Secretary, but by the new Executive Secretary who only joined the office on 1 August 2007, and therefore could not be held to have had anything to do with such retaliation.

17. The UNDT further held that the reasons given by the Executive Secretary for his confirmation decision appeared clearly in the memoranda of 20 and 28 September 2007 to the Chief, Administrative Services Division, which show that, after taking up his new duties, the new Executive Secretary wanted to restructure his Office by assigning to the Administrative Services Division a number of administrative tasks previously dealt with by his Office and, in particular, Kaddoura.

18. The UNDT also rejected Kaddoura's contention that she had been replaced in her functions in the Office of the Executive Secretary because the Respondent categorically denied that contention and Kaddoura failed to proffer any evidence to support it. The UNDT concluded that the confirmation decision was lawful.

19. The UNDT ordered the rescission of the original decision dated 8 August 2007 and ordered that Kaddoura be awarded compensation in the amount of her special post allowance that she should have received from 8 to 16 August 2007, the time from the original decision to the confirmation decision.

20. Kaddoura appeals the UNDT Judgment.

Submissions

Kaddoura's Appeal

21. Kaddoura submits that the UNDT violated her due process rights by rejecting her request to present evidence in support of her contention that the new Executive Secretary did not know Kaddoura and had never been consulted or had agreed to her reassignment.

22. Kaddoura further avers that the UNDT erred in fact and law in finding that the memoranda of 20 and 28 September 2007 from the Executive Secretary showed that the new Executive Secretary, a few days after taking up his duties, wanted to restructure his Office by assigning to the Administrative Services Division a number of administrative tasks previously dealt with by his Office and, in particular, Kaddoura. Kaddoura contends that those memoranda could not justify and regularize a posteriori his confirmation decision of 16 August 2007. Moreover, the UNDT failed to consider that the memoranda did not reference the functions that Kaddoura had performed. She contends that the reassignment decision of 8 August 2007 referred to an alleged review of the functions of the Office which did not take place and in support of which the Secretary-General failed to produce evidence. Moreover, neither she nor her supervisor was consulted prior to the original decision.

23. Kaddoura challenges the UNDT's finding that she had not presented any evidence that she had been replaced in the functions she had discharged in the Office of the Executive Secretary. She points to evidence that she alleges the UNDT failed to take into account.

24. Kaddoura challenges the UNDT's order that she be paid compensation in the amount of her special post allowance that she should have received between the time of the original decision and the confirmation decision. She submits that the UNDT itself

noted that Kaddoura ceased to exercise those special functions the day of the original decision. Instead, she should receive compensation for the violation of her due process rights on the basis that the reason given for her reassignment was different from those officially cited, and her reassignment was part of retaliatory actions taken against her.

25. Kaddoura submits that the UNDT failed to exercise the jurisdiction vested in it when it accepted the addendum to her application, but did not consider the claims contained therein.

26. Kaddoura alleges that the UNDT erred by rescinding the original decision on her reassignment, without specifying an amount of compensation that the Administration could elect to pay in lieu of specific performance. She requests that the Appeals Tribunal award compensation representing “compensation in lieu of the rescission” of the contested decision. She seeks reinstatement to ESCWA and, in the alternative, compensation in the amount of two years’ net base salary.

Secretary-General’s Answer

27. The Secretary-General responds that Kaddoura’s submissions regarding the UNDT’s findings with respect to the original decision on her reassignment do not affect the outcome of the Judgment and as such are not receivable.

28. The Secretary-General contends that the UNDT correctly concluded that the reassignment decision was lawful, since the reassignment was based on a reorganization of the Office of the Executive Secretary.

29. The Secretary-General submits that the UNDT did not commit any errors of procedure which warrant a reversal of the UNDT Judgment. He contends that the UNDT correctly declined to consider the additional allegations and related evidence contained in the addendum to Kaddoura’s application. The evidence and allegations contained in the addendum are entirely unrelated to the administrative decision under review.

30. Moreover, the UNDT’s decision not to call certain witnesses does not constitute an error of procedure. The UNDT enjoys a broad discretionary power and may decline to examine or call any witness it deems unnecessary. In the instant case, the UNDT did not deem it necessary to call the two witnesses suggested by Kaddoura.

31. The Secretary-General submits that Kaddoura has failed to establish any errors warranting an amendment of the remedy ordered by the UNDT.

Considerations

32. As a preliminary issue, this Court must consider Kaddoura's allegation that the UNDT erred in refusing to hear witnesses proffered by Kaddoura in support of her contention that the new Executive Secretary did not know her and had never been consulted or had agreed to her reassignment. This question will have a direct impact on the outcome of this case: If the UNDT did err, the UNDT Judgment should be vacated, and the case would be remanded to the UNDT which would need to receive that evidence. Accordingly, this Court would not proceed to examine the merits of the appeal.

33. Under Article 18(1) of the UNDT Rules "[t]he Dispute Tribunal shall determine the admissibility of any evidence". Article 18(5) states that "[t]he Dispute Tribunal may exclude evidence which it considers irrelevant, frivolous or lacking in probative value. The Dispute Tribunal may also limit oral testimony as it deems appropriate".

34. In *Abbassi*,¹ this Court held that

[t]here is a difference between admissibility of evidence and the weight attached to the admitted evidence. Evidence is admissible if it is relevant to the facts in issue. The Dispute Tribunal has a broad discretion to determine the admissibility of any evidence under Article 18(1) of its Rules of Procedure. The UNDT exercised its discretion not to admit the evidence because it lacked probative value. This Tribunal is mindful that the Judge hearing the case has an appreciation of all of the issues for determination and the evidence before the UNDT. In order to establish that the Judge erred, it is necessary to establish that the evidence, if admitted, would have led to different findings of fact and changed the outcome of the case.

In light of the foregoing, this Court finds that the UNDT did not err in declining to hear the proffered evidence.

35. In the present case, the denied testimonies related to facts that were not specifically in dispute and, even if accepted as alleged by Kaddoura, could not have refuted the uncontested fact that the Executive Secretary indeed confirmed the original

¹ *Abbassi v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-110, para. 20.

administrative decision to transfer Kaddoura, giving his consent to it in that way. Therefore, the main issue in this case was that related to the consequences of that confirmation and that the Dispute Tribunal could disregard evidence that could not affect directly the consideration of that key question. The Dispute Tribunal was authorized, under its Rules, to assess the relevance of the evidence offered by the parties to prove essential facts in the case and to deny receiving evidence related to non relevant facts.

36. Considering the merits of the case, this Tribunal holds that Kaddoura failed to demonstrate that the UNDT erred in concluding that the confirmation decision was lawful and in awarding her compensation only in the amount of the special post allowance she would have received from 8 to 16 August 2007. Similarly, the UNDT did not err by failing to order her reinstatement or compensation in lieu thereof.

37. The UNDT found in favour of Kaddoura, rescinded the decision of 8 August 2007 taken by the Deputy Executive Secretary, and awarded compensation in the amount of the special post allowance she would have received from 8 to 16 August 2007. The UNDT denied her other requests – which are not subject to an appeal – for an award of a higher compensation equivalent to the special post allowance till the end of 2007 and for an appointment at the P-3 level in the Office to which she had been transferred. On appeal, Kaddoura seeks a much higher compensation, and reinstatement or compensation of two years' net base salary in lieu of reinstatement.

38. The Executive Secretary had the authority to reassign Kaddoura, and Kaddoura has not demonstrated that the decision was arbitrary, biased, discriminatory or it violated her rights. The decision taken by the Deputy Executive Secretary, which was found unlawful by the UNDT, does not result in the illegality of the later confirmation act. This Tribunal does not accept Kaddoura's contention that the illegality of the decision taken by the Deputy Executive Secretary on 8 August 2007 extended automatically to the decision adopted by the Executive Secretary himself on 16 August 2007. The illegal reassignment of 8 August was not an obstacle to a valid reassignment on 16 August, by a new decision, taken independently, objectively, and by the proper authority. Therefore, this second decision is valid, despite the irregularity of the previous one. This conclusion does not imply a retroactive validation of a previous invalid action, as Kaddoura alleges. It simply recognizes the lawful consequences of a later valid

decision. Essentially, this is what happened when the Executive Secretary confirmed the reassignment because, by so doing, the ESCWA Administration adopted again the will to transfer, from the competent authority and, in a valid way in this instance. Even Kaddoura acknowledges that there was no question of retaliation or discrimination against her regarding the Executive Secretary's conduct. Hence, the decision to reassign was taken within the discretion of the Administration and without violation of the law.

39. Kaddoura's arguments related to the delegation of authority, the restructuring of the office, or the lack of consultation of her supervisor or herself do not invalidate the main argument in support of the impugned Judgment: The Executive Secretary had the power to order the reassignment and there is no evidence that he abused that power.

40. It must be taken into account that the reassignment did not affect the position held by Kaddoura; that she had no right to be consulted; that she failed to substantiate her allegation that another person performed her functions; that she was awarded an amount corresponding to the special post allowance for the period of time between the unlawful decision of 8 August 2007 and the lawful one of 16 August 2007; and that she had no right to be reinstated to the Office of the Executive Secretary after 16 August 2007 because that would have meant invalidating the administrative decision of reassignment taken on that date. Therefore, the UNDT did not err in not ordering the reinstatement as specific performance or a higher compensation than the one awarded in its Judgment.

41. This Court points out that the order of a specific performance is an alternative to the rescission of an administrative decision, depending on the circumstances of each case and subject to the reasoned discretion of the Judge. Under Article 10(5)(a) of the UNDT Statute, an order for compensation in lieu of a specific performance is only required when the administrative decision which is rescinded concerns appointment, promotion, or termination, which is not the case here.

42. For the foregoing reasons, and notwithstanding any error of fact alleged by Kaddoura which, even if accepted by this Court, would have no impact on the outcome of Kaddoura's case, we find that Kaddoura has failed to demonstrate any errors warranting the reversal of the impugned Judgment.

Judgment

43. This Court affirms the UNDT Judgment and dismisses the appeal.

Original and Authoritative Version: English

Dated this 8th day of July 2011 in Geneva, Switzerland.

(Signed)

Judge Simón, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Faherty

Entered in the Register on this 29th day of August 2011 in New York, United States.

(Signed)

Weicheng Lin, Registrar