



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/009
UNDT/GVA/2012/027
Judgment No.: UNDT/2012/110
Date: 20 July 2012
Original: English
French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Cédric Vareil

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. By application filed with the Registry of the Dispute Tribunal on 19 January 2012 under No. UNDT/GVA/2012/009, the Applicant contests the decision of 24 August 2011 to extend her fixed-term appointment for only one month, until 30 September 2011 ("Decision A").

2. By application filed on 4 April 2012 under No. UNDT/GVA/2012/027, the Applicant contests the subsequent decisions dated 28 September, 10 October and 3 November 2011 to renew her appointment until 11 November 2011 and then until 11 December 2011 ("Decision B").

3. For Decision A, she requests the Tribunal:

- a. To rescind the contested decision;
- b. To order the Respondent to take a new decision to renew her appointment effective 1 September 2011, the date on which the decision should have been taken; and otherwise, to order the Respondent to compensate her for the damage suffered as a result of losing the opportunity to have a decision taken on the renewal of her appointment on the basis of factors that could normally have been taken into account on the date on which the decision should have been made, that is, before 31 August 2011. The damage is estimated at 24 months' remuneration, from which the remuneration received by the Applicant after 31 August 2011 should be deducted;
- c. To order the Respondent to pay her damages of €200,000 for moral harm;
- d. To omit her name from the published judgment.

4. For Decision B, she requests the Tribunal:
 - a. To rescind the contested decision;
 - b. To order the Respondent to remove the contested decision from all of the Applicant's official status files and destroy it;
 - c. Based on the Tribunal's decision in case No. UNDT/GVA/2012/009 concerning Decision A, to order the Respondent to take a new decision restoring the Applicant's functions as of 1 October 2011, or as of 12 November 2011 or 12 December 2011, the date on which the decision should have been taken; and otherwise, to order the Respondent to remedy the material damage by paying the Applicant the remuneration she would have received had her appointment been renewed for a period of two years, after deducting her occupational earnings.
 - d. To order the Respondent to pay her damages of €200,000 for moral harm;
 - e. To omit her name from the published judgment.

Facts

5. On 1 September 2009, the Applicant was given a two-year appointment to the Office of Staff Legal Assistance of the Office of Administration of Justice, United Nations Secretariat. She was initially assigned to Beirut and was transferred to Geneva in June 2010. On the expiration of her appointment on 31 August 2011, it was renewed for periods of one to three months, namely, for one month until 30 September 2011, then successively until 11 November 2011, 11 December 2011, 11 March 2012 and 11 June 2012. Effective 12 June 2012, her appointment was renewed for one year.

6. On 20 and 26 March 2010, respectively, the Applicant and her first reporting officer, the Chief of the Office of Staff Legal Assistance, prepared the Applicant's workplan for the period from 1 September 2009 to 31 March 2010. On 29 and 30 November 2010 they completed the mid-point review in the performance appraisal report for that period ("2009-2010 e-PAS").

7. On 7 February 2011, the Applicant completed and signed the last part of her 2009-2010 e-PAS relating to her self-evaluation.

8. By e-mail of 16 May 2011, the Chief of the Office of Staff Legal Assistance, noting that he had to finalize the Applicant's 2009-2010 e-PAS, informed her that he would await the outcome of the mediation process he had recently begun with her before deciding how to proceed with her performance appraisal.

9. During the Applicant's home leave from 22 July to 15 August 2011, the Chief of the Office of Staff Legal Assistance completed her 2009-2010 e-PAS, giving her an overall performance rating of "does not meet performance expectations" and finding in particular that her competencies of communication and teamwork were "unsatisfactory". The second reporting officer, the Executive Director of the Office of Administration of Justice, took note of the first reporting officer's assessment on 10 August 2011.

10. On 18 August 2011, the Applicant added her comments to the aforementioned e-PAS, which the first reporting officer and second reporting officer signed on 22 and 23 August, respectively.

11. From 22 August to 9 September 2011, the Applicant was placed on sick leave.

12. By memorandum of 22 August 2011, the Chief of the Office of Staff Legal Assistance recommended that the Executive Officer of the Executive Office of the Secretary-General ("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.

13. By memorandum of 24 August 2011 (Decision A), the Executive Officer informed the Applicant that, on the basis of a recommendation by her department, her contract would be extended for one month, until 30 September 2011, in order to allow her and her supervisor to complete her e-PAS for the period from 1 April 2010 to 31 March 2011 ("2010-2011 e-PAS").

14. From 19 September to 17 October 2011, the Applicant was once again placed on sick leave.

15. On 23 September 2011, she requested a management evaluation of the aforementioned decision of 24 August 2011 (Decision A).

16. By e-mail of 28 September 2011 (the first of the three decisions constituting Decision B), the Executive 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 ("UNOG") had been requested to extend her contract from 1 October to 11 November 2011.

17. On 10 October 2011, UNOG extended the Applicant's appointment until 11 November (the second of the three decisions constituting Decision B).

18. On her return from sick leave on 18 October, 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.

19. The Applicant signed her 2009-2010 e-PAS on her return from sick leave on 20 October 2011, and on 28 October 2011 she initiated a rebuttal process against the performance appraisal report.

20. By letter of 31 October 2011, the Applicant requested a management evaluation of the decision whereby she had been deprived of her functions and *de facto* evicted from her unit. Then, by an application dated 1 November 2011, the Applicant requested suspension of action on that decision.

21. On 31 October and 2 November 2011, respectively, the Applicant and the Chief of the Office of Staff Legal Assistance prepared the Applicant's workplan for her 2010-2011 e-PAS. On 2 and 8 November 2011, they completed the mid-point review of that e-PAS.

22. The Applicant was informed on 3 November 2011 that her appointment, which was due to expire on 11 November, would be extended for a further month (the last of the three decisions constituting Decision B).

23. 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.

24. On the same day, the Management Evaluation Unit informed the Applicant that her contract would be extended until the rebuttal procedures initiated in respect of her e-PAS documents had been completed. It therefore considered that her request for management evaluation of the decision of 24 August 2011 (Decision A) to extend her contract only to 30 September 2011 had become moot.

25. On 18 November 2011, the Chief of the Office of Staff Legal Assistance completed the Applicant's 2010-2011 e-PAS, again giving her an overall performance rating of "does not meet performance expectations" and finding that her competencies of communication and teamwork were "unsatisfactory". The second reporting officer, the Executive Director of the Office of Administration of Justice, signed the e-PAS on 21 November 2011.

26. On 23 November 2011, the Applicant requested a management evaluation of the decisions dated 28 September, 10 October and 3 November 2011 to extend her appointment for short periods of time (Decision B).

27. By e-mail of 1 December 2011, the Applicant was informed that her contract would be extended for an additional three months.

28. On 19 December 2011, the Applicant initiated a rebuttal process against her 2010-2011 e-PAS.

29. By letter of 6 January 2012, the Management Evaluation Unit informed the Applicant that the Secretary-General had decided to uphold the decisions of 28 September, 10 October and 3 November 2011 to renew her appointment for short periods of time (Decision B).

30. On 19 January 2012, the Applicant filed an application contesting the decision of 24 August 2011 (Decision A). The Respondent filed his reply on 18 February 2012 and on 16 March 2012 the Applicant filed a response to the reply.

31. On 7 February 2012, the Applicant filed an application, entered in the Register under No. UNDT/GVA/2012/015, contesting the decision whereby she was deprived of her functions and *de facto* evicted from her unit.

32. In its report dated 12 March 2012, the rebuttal panel found that the Applicant's 2010-2011 e-PAS should be set aside:

Given the very significant delay in completing all of the required procedural steps envisaged in ST/AI/2010/5 (workplan, mid-point review, end-of-cycle assessment), the fact that the entire process was carried out not in distinct stages, throughout the one-year performance cycle, but within a matter of 22 days and more than seven months after the end of the performance cycle (and without a written performance improvement plan), the E-PAS document which is before the Panel does not reflect a performance appraisal in accordance with either the letter or the spirit of the pertinent UN rules on performance management and development as set out in ST/AI/2010/5.

...

The Panel is aware that in compliance with S[ection] 15.4 of ST/AI/2010/5, it is the duty of the rebuttal panel to prepare a report setting forth the reasons why the original rating should or should not be maintained. However, in the present case, for the reasons stated above, the Panel is of the view that the "performance appraisal" as reflected in E-PAS is null and void and should ... therefore be set aside in its entirety.

33. By e-mail of 19 March 2012, the Executive Office of the Secretary-General requested the rebuttal panel to review its finding and designate a new rating for the Applicant, in accordance with section 15.4 of ST/AI/2010/5 (Performance Management and Development System).

34. The rebuttal panel completed its report on 28 March 2012 by changing the Applicant's overall rating and designating a rating of "successfully meets performance expectations".

35. On 2 April 2012, the rebuttal panel submitted its report on the 2009-2010 e-PAS, in which it also decided to change the Applicant's overall rating and designate a rating of "successfully meets performance expectations".

36. On 4 April 2012, the Applicant filed an application contesting the decisions of 28 September, 10 October and 3 November 2011 (Decision B). The Respondent filed his reply on 4 May 2012.

37. On 25 April 2012, the Applicant was assigned on temporary duty to the Office of the United Nations High Commissioner for Human Rights.

38. On 7 June 2012, the Respondent informed the Tribunal, in connection with cases Nos. UNDT/GVA/2012/009 and UNDT/GVA/2012/027, that the Applicant's appointment had been extended by one year effective 12 June 2012, that is, until 11 June 2013, on a recommendation of the Office of Administration of Justice dated 4 May 2012.

39. 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. Counsel for the Applicant attended in person, the Applicant by telephone and counsel for the Respondent by videoconference.

Parties' submissions

40. The Applicant's contentions are:

a. With respect to Decision A, the Applicant's appointment was not renewed but was merely extended by one month. This appears to be an interim measure taken by the Administration pending the preparation of the missing e-PAS document for the 2010-2011 cycle. The extension of the Applicant's appointment involves extending the term fixed for the current appointment, whereas renewal involves a new legal act of the same nature as the preceding one – which ceases to apply – and comprising the same conditions, including the term, unless otherwise indicated;

b. Decision A is not a preliminary measure and it has binding legal consequences that alter the Applicant's legal status. In deciding to extend the Applicant's appointment by one month, the Administration took a decision not to renew it, or at least to defer such renewal, which constitutes an administrative decision that adversely affects her and is subject to appeal;

On the external lawfulness

c. On the lack of authority vitiating Decisions A and B: Under staff regulation 4.1, the power of appointment, and therefore the power to renew or extend an appointment, rests with the Secretary-General. Decision A was taken by the Executive Officer, that is, by an official lacking authority. ST/AI/234/Rev.1 (Administration of the Staff Regulations and Staff Rules), which was cited by the Respondent and mentions non-existent provisions,

violates the principle of the intelligibility of regulations and is therefore unlawful. Decision B is also unlawful because the person who took it lacked the necessary authority;

d. On the procedural irregularity arising from taking an unauthorized opinion into account in taking Decision A: The lack of an e-PAS for the Applicant on 24 August 2011 is evidence of a wrongful failure by the first reporting officer to comply with ST/AI/2010/5; the Administration cannot use a staff member's performance of his or her duties as the basis for a decision that has adverse effects without duly assessing that performance. The recommendation of 22 August 2011 is therefore fundamentally vitiated and could not be used to support the contested decision. The recommendation of 22 August 2011 is also vitiated by the fact that the person who took it is motivated by deep animosity towards the Applicant;

e. On the procedural defect stemming from a violation of due process in relation to Decisions A and B: A decision that has adverse effects, particularly if it is taken in 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). The contested decisions, all of which are based on the negative appraisal of the Applicant's performance made by her supervisor before her e-PAS documents were prepared, could not be taken without first allowing the Applicant to provide her comments;

On the internal lawfulness

f. On the error of law, the misuse of authority, the absence of legal basis and the violation of the principle of legal certainty vitiating Decision A: The Administration committed an error of law and a misuse of authority in justifying the contested decision, firstly by failing to follow its own regulations on the evaluation and rating of staff members, and secondly by

failing to prepare an e-PAS before taking a decision as to renewal. Moreover, when it came to granting the Applicant a salary increment in September 2011, the Administration did not defer its decision. Furthermore, the decision has no legal basis and violates the principle of legal certainty since there was no specific provision authorizing the Administration to take the contested decision on the stated grounds. It is incorrect to maintain, as the Respondent has done, that the Applicant and her supervisor agreed to hold the e-PAS in abeyance until the end of the mediation process; that decision was taken by the supervisor, as is shown by the e-mail of 16 May 2011. Moreover, the mediation was unrelated to the problems with the e-PAS procedure;

g. On the violation of the principle of legitimate expectations vitiating Decision A: The contested decision fails to meet the Applicant's expectations arising from her appointment and staff rule 4.13. She could legitimately expect that the question of the renewal of her appointment would be considered before its expiration on 31 August 2011 and that a decision would be taken solely on the basis of the legal and factual circumstances obtaining at that time. It also fails to meet the expectations of renewal given to the Applicant when her supervisor authorized her on 8 June 2011 to take Spanish classes until December 2011;

h. On the violation of the principles of concern and loyalty vitiating Decision A: In deciding to extend the term of the Applicant's appointment in order to belatedly prepare an e-PAS and then take a decision of non-renewal rather than dismissal, the Administration violated the principle of concern in its relations with the Applicant. It also violated the principle of loyalty by manipulating the term of the Applicant's appointment in order to reach a decision on its renewal after changing the factors to be taken into account;

i. On the violation of staff rule 4.13 vitiating Decisions A and B: The contested decisions violate staff rule 4.13, which sets a minimum term of one

year for fixed-term appointments. Allowing the authority with the power of appointment to extend a fixed-term appointment for a short period of time goes against the spirit of the Staff Regulations and Rules, which make a distinction between different types of appointments that meet distinct needs and give staff members different degrees of job security;

j. On the error of fact vitiating Decision B (decisions of 28 September and 10 October 2011): According to the Management Evaluation Unit, the contested decisions were taken pursuant to section 15.6 of ST/AI/2010/5, according to which an appointment should be extended until the completion of the rebuttal process. However, no rebuttal process was pending when these decisions were taken;

k. On the error of law vitiating Decision B: The basis for this decision is staff rule 11.2 (d) regarding the time limit for a response from the Secretary-General to a request for management evaluation. There is no conceptual link between this provision and the term of an appointment, and therefore the decision is based on erroneous legal grounds;

l. Secondly, on the error of law and the manifest error in judgment vitiating Decisions A and B: If the other arguments are unsuccessful, it is also contended that the contested decisions are vitiated by a manifest error in judgment in that the extensions of one to three months were clearly too short to cover the belated preparation of the e-PAS for the 2010-2011 cycle and the rebuttal process, unnecessarily placing the Applicant in a precarious, stressful and uncertain situation with respect to her future. This error in judgment stems from an error of law in the interpretation of staff rule 4.3.

41. The Respondent's contentions are:

a. The applications are moot and are therefore not receivable. The Applicant's appointment was extended without interruption until 11 June 2012

and then until 11 June 2013. The contested decisions to extend the Applicant's contract for only short periods of time were not final decisions regarding the renewal of her appointment for a longer term and are therefore not subject to appeal under article 2.1 of the Tribunal's statute. The distinction drawn by the Applicant between the notions of renewal and extension is unfounded (see *Gehr* UNDT/2011/150). Therefore the decisions to extend the Applicant's contract do not in themselves imply, as she avers, a decision not to renew her appointment;

b. On the merits, the contested decisions are in compliance with the rules and practice of the Organization. They were taken in order to ensure that the appraisal of the Applicant's professional performance could be finalized in accordance with staff rule 1.3 and section 15.6 of ST/AI/2010/5, which stipulates that "[s]hould unsatisfactory performance be the basis for a decision of non-renewal of an appointment and should the appointment expire before the end of the rebuttal process, the appointment should be renewed for the duration necessary to the completion of the rebuttal process". The e-PAS procedures were suspended from late 2010 until mid-2011 to allow the parties to reach an amicable settlement of their differences. Those efforts failed in June 2011, while the Applicant's appointment was due to expire on 31 August 2011. The performance appraisal process then resumed;

c. Moreover, staff rule 4.13 (b) provides that a fixed-term appointment "may be renewed for any period up to five years at a time". Consequently, there is no mandatory minimum period for which such an appointment can be renewed. This is confirmed by section 15.6 of ST/AI/2010/5 and annex IV to ST/AI/234/Rev.1. It also follows from ST/AI/234/Rev.1 that, contrary to the Applicant's contentions, the Executive Office of the Secretary-General had the delegated authority to extend her contract;

d. Staff regulation 4.5 stipulates that "[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service". The fact that the Applicant's supervisor authorized her on 8 June 2011 to take Spanish classes until December 2011 did not create a legitimate expectancy of renewal;

e. The contested decisions respected due process, since the Applicant's appointment was extended despite the recommendations of her supervisor and second reporting officer. She was able to express her views during the performance appraisal procedures and initiate a rebuttal process;

f. The decision is not based on unlawful grounds. While the Applicant alleges that her supervisor harbours animosity towards her, that allegation is baseless. The Applicant has not provided evidence for her claim and moreover the contested decision was taken by the Executive Office of the Secretary-General;

g. The Tribunal does not have the authority to order an extension of the Applicant's appointment for two years. She offers no evidence of the moral harm that she claims to have suffered.

Consideration

42. By the two applications above filed by the same staff member, she contests decisions to renew her fixed-term appointment for only short periods of time. There is therefore a sufficient link between the applications to warrant ruling on them by a single decision.

43. The Tribunal must first examine the receivability of the pleas entered by the Applicant seeking the rescission of the contested decisions. As was mentioned above, the contested decisions are decisions to extend the Applicant's fixed-term appointment for short periods of approximately one month. The Tribunal finds that

each contested decision in fact comprises two decisions, one to extend the Applicant's appointment and the other to set a date beyond which the appointment will not be renewed.

44. Staff rule 4.13 (c) on fixed-term appointments states that:

A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service

45. It follows from the above-mentioned provision that when a staff member's fixed-term appointment expires, the staff member is not entitled to its renewal. Therefore decisions to extend the appointment, even for a short period, cannot be regarded as administrative decisions that are likely to infringe on the rights of the staff member deriving from his or her status or previous contract; rather, such decisions are in themselves favourable and are therefore not subject to appeal before the Tribunal. The Applicant's pleas, insofar as they seek the rescission of the decisions to renew her appointment, are not receivable because they are directed against decisions that do not adversely affect her.

46. However, as was mentioned in paragraph 43 above, the Applicant's pleas for rescission must also be considered as directed against the decisions not to renew her appointment on the expiration dates of 30 September 2011, 11 November 2011 and 11 December 2011. While these decisions are obviously administrative decisions that are likely to adversely affect the Applicant, as at the date of this judgment these decisions to terminate her appointment have been withdrawn, since her appointment has been extended until 11 June 2013. It is not necessary to rule on the pleas which seek the rescission of decisions that no longer exist.

47. The Applicant also submitted pleas seeking compensation for the harm caused to her by the successive decisions to terminate her appointment. The Tribunal is obliged to find that the Applicant has not suffered any material harm from the series

of renewals of her appointment for short periods of time since that appointment was renewed and as at the date of this decision she is still working for the Organization.

48. The Applicant requested the Tribunal to award compensation for the moral harm caused by the successive decisions to terminate her appointment. For a decision of the Administration to give rise to compensation, it must first be adjudged unlawful by the court. As was mentioned above, insofar as the contested decisions extend the Applicant's appointment they are favourable decisions that cannot therefore cause her any moral harm. However, insofar as the same contested decisions terminated her appointment, those decisions, even if subsequently withdrawn, were liable to cause disruption to the Applicant's living conditions during the time they were in effect.

49. The Tribunal must therefore determine whether the successive decisions to terminate the Applicant's appointment were lawful.

50. The evidence in the case shows that the recommendation by the Chief of the Office of Staff Legal Assistance not to renew the Applicant's appointment upon its expiration on 31 August 2011 was based on the alleged underperformance of the Applicant, particularly during the 2009-2010 cycle, an appraisal of which the Applicant was informed only on 18 August 2011 and for which she initiated a rebuttal process on 28 October 2011.

51. The reasons why her appointment was renewed several times for short periods were, firstly, because at the end of her first appointment in August 2011 her performance appraisal for the 2010-2011 cycle had not been finalized, and secondly, because the outcome of the rebuttal process for the previous cycle was not yet known. The successive decisions to terminate the Applicant's appointment on dates that were postponed several times were based on the Applicant's underperformance, although the appraisal for the first cycle had been contested and the appraisal for the second cycle had not been finalized. Having been based on mistaken grounds, these decisions to terminate the Applicant's appointment are unlawful and the Applicant is entitled to claim compensation for the moral harm suffered.

52. This harm results from the Applicant's having remained, at least for the period from September 2011 to May 2012, in a position of great uncertainty owing solely to the Administration's delay in evaluating her performance for both the 2009-2010 and 2010-2011 cycles. A medical certificate produced by the Applicant indicates in particular that the situation in which the Administration wrongfully placed her was the cause of significant stress for which she can be fairly compensated with a lump-sum payment of CHF 10,000.

53. The Applicant requests the Tribunal to order that her name be omitted from the published judgment, as it agreed to do in Judgments Nos. UNDT/2011/187 and UNDT/2011/213. In the present case, the Tribunal should accede to her request on the same grounds as in the aforementioned judgments.

Conclusion

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

- a. The Secretary-General is ordered to make a lump-sum payment of CHF 10,000 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.

Judge Jean-François Cousin

Dated this 20th day of July 2012

Entered in the Register on this 20th day of July 2012

René M. Vargas M., Registrar, Geneva