



Judgment No. 2014-UNAT-443

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6. On 25 August 2004, Ms. Hunt-Matthes' immediate supervisor confirmed to UNHCR's human resources office the decision not to extend Ms. Hunt-Matthes' fixed-term appointment beyond its expiry date on the grounds of unsatisfactory performance. The next day, he finalized Ms. Hunt-Matthes' PAR, without a final discussion with her, rating her performance as "unsatisfactory". However, Ms. Hunt-Matthes was not separated in September 2004. Her appointment was extended as an administrative measure through 30 May 2006.

7. Ms. Hunt-Matthes initiated a PAR rebuttal procedure. A rebuttal panel was constituted. A member of that panel subsequently complained about being approached by the head of the Performance Management Unit (PMU) and being asked to meet with UNHCR's Legal Affairs Section. The rebuttal panel determined that Ms. Hunt-Matthes' case fell within the mandate of the Office of Internal Oversight Services (OIOS) and recommended that the matter be referred to OIOS for action.

8. In October 2004, Ms. Hunt-Matthes was offered a position with the Evaluation and Policy Analysis Unit (EPAU) within UNHCR as a Senior Evaluation Officer at the P-4 level. Her performance there between October 2004 and 1 September 2005 was rated "fully effective". Her PAR for 2003 and 2004 with unsatisfactory performance was allegedly withdrawn from her official status file. Ms. Hunt-Matthes stated to the Dispute Tribunal that as the withdrawal was conditioned upon her dropping her case she did not accept that proposal.

9. In September 2005, the PAR rebuttal panel forwarded Ms. Hunt-Matthes' complaint of misconduct and her PAR rebuttal to the OIOS Vienna Office, but OIOS did not pursue this referral "due to insufficient resources". Neither was her PAR rebuttal completed.

10. Ms. Hunt-Matthes was medically cleared to return to work in March 2006. At the end of May 2006, she was separated from service with the EPAU, which had been replaced by a new unit called Policy Development and Evaluation Service.

11.

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24. Ms. Hunt-Matthes further submits that it is not disputed that she made reports of misconduct and that she faced adverse administrative actions of non-renewal following the report.

Considerations

25. One of the Secretary-General's grounds of appeal is that the UNDT committed an error in procedure such as to affect the decision of the case by denying him an opportunity to present the evidence of Ms. Hunt-Matthes' supervisor both in writing and in person. Since this ground questions the fairness of the trial in the lower tribunal, it is appropriate to consider it first.

26. The Secretary-General alleges that the UNDT's refusal to even consider, let alone give any probative value to, the witness statements of Ms. Hunt-Matthes' supervisor constituted a significant error of law. The Secretary-General claims that "the UNDT indicated during the oral hearings that, absent the supervisor testifying *viva voce*, it would have difficulty placing reliance on his written statement. Yet when the [Secretary-General] requested leave during the hearings to call the supervisor as a witness, ... the UNDT rejected [his] request on the grounds that it had been made too late."¹

27. On the first day of the hearing, 26 February 2013, Ms. Hunt-Matthes called Mr. Verwey as a witness, who gave evidence which was not contained in the summary of his evidence that had been provided to the Secretary-General. At 7:25pm that same day, the Secretary-General filed an application for leave to call Ms. Hunt-Matthes' former supervisor as his witness.

28. The grounds for the Secretary-General's application were that Mr. Verwey gave evidence earlier that day of matters that had not been referred to in the summary of his evidence provided

Secretary-General on the eve of the trial, Ms. Hunt-Matthes failed to make any reference to the testimony of alleged falsification of allegations of breach of confidentiality.

29. The next day, 27 February 2013, the UNDT issued an oral ruling rejecting the Secretary-General's motion to call a witness. This was followed on 15 April 2013 by Order No. 081 (NBI/2013) giving reasons for that decision.

In arriving at its decision, the UNDT considered the following facts:

30. It was clear to the Secretary-General from the beginning that retaliation was a prominent aspect of the case. Ms. Hunt-Matthes had alleged in her application to the UNDT that the IGO managers demonstrated ill will towards her and that "the organizational culture of UNHCR is conducive to incidents of harassment and retaliation, behaviour patterns many of its seni(Ini.4(n9294g7ake)-5.5)

35. Counsel for the Secretary-General did not challenge any of Ms. Hunt-Matthes' evidence relating to her allegations of retaliation and the reasons for the negative PAR she was given by her supervisor, which was used as the reason for not renewing her contract with the IGO.

36. When Mr. Verwey gave evidence, he *generally* followed the synopsis that had been submitted to the [Dispute] Tribunal". (Emphasis added.) He elaborated on the synopsis by

of the case from the beginning. It was referred to in the Application, in the Respondent's reply, the Applicant's chronology and in the agreed bundle of documents. All of these were submitted well before the hearing and the [Secretary-General's] counsel had access to all the documents.

40. The UNDT also took into account that although both Ms. Hunt-Matthes and Mr. Verwey gave evidence about retaliation, neither of them was cross-examined or challenged on the point by the Secretary-General.

41. The UNDT was also mindful that granting the Secretary-General's application at this stage would result in both Ms. Hunt-Matthes and Mr. Verwey having to be recalled and cross-examined, which would not be possible to achieve "in light of the pre-determined and strict timetable agreed by the Tribunal and the parties".

42. In refusing the Secretary-General's motion, the UNDT concluded that

well before the oral hearing of this case the [Secretary-General] had adequate notice of [Ms. Hunt-Matthes'] allegations of retaliation and harassment by her supervisor and a full opportunity to call any witnesses to rebut those allegations if [he] had so chosen. ... Additionally, this late application was not only made out of time but also at a stage of the hearing which, in view of the well-known time restraints, cannot be accommodated. ... The interests of justice would not be met by granting the application.

Conclusions

43. It is not disputed that the evidence Mr. Verwey gave regarding the alleged falsification of allegations of breach of confidentiality by Ms. Hunt-Matthes' former supervisor and the former Deputy Inspector-General was not disclosed in Mr. Verwey's summary of evidence.

44. The Dispute Tribunal erred in not attaching an

45. The preliminary question which the UNDT had to decide was whether the summary of evidence provided to the Secretary-General was a fair and accurate disclosure of the evidence Mr. Verwey had given in his oral testimony. The answer to that was clearly no. That retaliation

49. As stated above, Article 19 of the UNDT Rules of Procedure gives UNDT the discretion to issue any order or give any direction appropriate for the fair and expeditious disposal of the case and to do justice to the parties. In our view, the UNDT improperly exercised its discretion by giving the timetable of the case priority over the fair trial rights of the Secretary-General. While expeditious disposal of a case is important, it can never supersede the parties' right to a fair hearing. The unfairness to the Secretary-General was compounded by the fact that the UNDT refused to consider the written statement of the former supervisor, resulting in the Secretary-General being left with no way to answer an important part of the case against him.

50. We find that, in the circumstances, the UNDT's refusal of the Secretary-General's motion to call a witness was a clear violation of due process, which must result in the Judgment under appeal being annulled and the case being remanded for a hearing *de novo* before a different judge.

51. This conclusion renders it unnecessary to examine the other grounds of the appeal.

Judgment

52. The appeal is allowed in part and the Judgment of the UNDT is set aside. The case is remanded to the UNDT for a hearing *de novo* before a different judge.

Original and Authoritative Version: English

Dated this 27th day of June 2014 in Vienna, Austria.

(Signed)

Judge Lussick, Presiding

(Signed)

Judge Simón

(Signed)

Judge Chapman

Entered in the Register on 29th day of August 2014 in New York, United States.

(Signed)

Weicheng Lin, Registrar