



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-y

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.

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 D-0bsl eTw[(hof)0002 Tc.0502 J-r69gcounsel on a By e-mail of 28 S6

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

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:

...

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

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

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 pr

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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

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

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 th

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

René M. Vargas M., Registrar, Geneva