



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 level at the same Mission in October 2004.

3. The Applicant has since served in various capacities within the United Nations, and T09 teig(t)-27(i)37(a)-16(n)19(t)473 tni09 m19(db7(e)3(v)193(v)19n(,)-10()-4pp20

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,

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

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 of damages 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 in confidence, the Applicant argued that compensation should be awarded in the amount of two years' net base salary.

The Application

55. The Applicant contends that any 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

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 and was effectively imposed four days after the Applicant was instructed to assume "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, which 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 were 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

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 received 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 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 ongoing 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 was considered and acted on the information known to it.

79. If a manager is of the view that the only way to safeguard 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 RSCE pursuant to ST/SGB/2008/5 on the Prohibition of discrimination, harassment, including sexual harassment and abuse of authority 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, was 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 71vd16, see m-10e alcante8

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

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 misg

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

Counsel must realize that in prosecuting a case, ~~they~~ 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~~ place themselves in a position where they stand or fall with their clients.

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

Due diligence by the ~~S~~ecretary 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~~ly 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 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 ~~subject~~ to an ~~impossibly~~ difficult and intractable situation.

108. The Tribunal is further astonished that even ~~the~~ ~~cession~~ 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~~ continue in her position despite the multiple ~~adverse~~ findings by this Tribunal, the ~~finding~~ panel's report and her patent violations of the rules he 0 - [(f)12(i)174ingns is tis92(f)-372

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

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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 224 (NBI/2014). The Tribunal observed that “Ms. Boly’s bad faith and blatant disregard for the rules of the Organisation could not be cleared.” 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 224 (NBI/2014) pursuant to arts. 32.2 and 36 3()-90(de)3(c)-16(i)17(s)-11(i)37(j) TJ ET Q q BT)-16(i)17(s7()-210

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 RSC. 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 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

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 of 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

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, the Appeals 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 of the abuse of authority and the prejudice sustained by the Applicant.

128. As rightly pointed out by the Applicant, the R

130. It is not clear either to-date, whether the function 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. Bolyho, 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 *case* supported the UNDT

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 Administrator'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. It 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

An award under Article 10(5)(a) of the UNDT Statute is alternative

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

Should Ms. Safia Bolybe 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/T Q 98144 8712 T1oq BT /F1 12 Tf C

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 accounta

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 level of DFS resulted in a manager ruling over a duty 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.

Judge Vinod Boolell
Dated this 30th day of June 2016

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

Abena Kwakye Berko, Registrar Nairobi