



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/61

Judgment No.: UNDT/2010/050

Date: 30 March 2010

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

KADDOURA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

None

Counsel for respondent:

Alan Gutman, ALS, UN Secretariat

Introduction

1. By letter dated 4 December 2007, the applicant filed an appeal with the New York Joint Appeals Board (JAB) against the decision dated 8 August 2007 by which the Deputy Executive Secretary of the Economic and Social Commission for Western Asia (ESCWA) transferred her from the Office of the Executive Secretary to the Facilities Management Unit, Administrative Services Division.

2. The applicant requests that:

a. The above-mentioned decision be rescinded and all correspondence concerning it be withdrawn from the official files of ESCWA;

b. The Deputy Executive Secretary be held accountable for the injury caused her;

c. The Office of Internal Oversight Services or the new management of ESCWA review all the decisions taken by the Deputy Executive Secretary;

d. Payment of her special post allowance be extended until the end of 2007;

e. She be appointed to a P-3 post as an Administrative Officer in the Administrative Services Division, ESCWA.

3. Having been pending before JAB when that body was dissolved on 1 July 2009, the case was, pursuant to the transitional measures set out in General Assembly resolution 63/253, transferred to the United Nations Dispute Tribunal (UNDT).

Facts

4. In November 2001, the applicant joined ESCWA on a short-term contract as a G-4 Administrative Assistant in the Office of the Executive Secretary. Her contract was renewed several times until 30 April 2002. On 1 May 2002, she was given a fixed-term appointment for three months; this was renewed until 30 November 2002. With effect from 1 December 2002

she 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 contract was renewed for two years. On 1 December 2005, her contract was again renewed for two years.

5. With effect from 19 July 2006 she was awarded a special post allowance at the P-2 level (Associate Administrative Officer) to take on temporarily the obligations and responsibilities of a P-3 Administrative Officer. The special post allowance was extended until 8 August 2007. On 2 November 2007, the applicant left ESCWA following her resignation.

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

7. On 30 July 2007 a new Executive Secretary was appointed with effect from 1 August 2007.

8. By letter dated 8 August 2007, the Deputy Executive Secretary informed the applicant 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 the applicant's functions and duties were no longer needed there.

9. On the same date the applicant ceased to perform her functions as Associate Administrative Officer and payment of her special post allowance was discontinued.

10. On 8 August 2007, the new Executive Secretary commenced work at ESCWA and, on 9 August 2007, the applicant had an interview with him.

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

12. On 14 August 2007, the applicant sought suspension of the contested decision from JAB. JAB rejected her request on the ground that the decision

had already been implemented. The Under-Secretary-General for Management accepted the JAB recommendation.

13. 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.

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

15. By interoffice memorandums dated 20 and 28 September 2007, the Executive Secretary announced decisions to reorganize his Office.

16. By letter dated 5 October 2007, the Administrative Law Unit, Office of Human Resources Management, informed the applicant that, following a review of the contested decision, the Secretary-General considered that it had not violated her rights. The applicant received that letter the same day.

17. By letter dated 4 December 2007, the applicant appealed against the decision of 8 August 2007.

18. By Order dated 28 August 2009, the case was transferred from the New York Registry of UNDT to the Geneva Registry.

Parties' contentions

19. The applicant's contentions are:

- a. The Deputy Executive Secretary had had no authority to order her transfer because, on the date of the contested decision, he had been holding a short-term appointment and had received no written delegation of authority for human resources management from the Executive Secretary. The Deputy Executive Secretary abused his authority because he had no power to restructure the Office of the Executive Secretary;

- b. An Administrative Assistant from another division was deployed to the Office of the Executive Secretary to carry out the same functions she had been discharging. Consequently, the reason given by the Administration for taking the decision was incorrect. Moreover, no other staff member from the Office of the Executive Secretary had been transferred;
- c. The P-3 post on the basis of which she was paid a special post allowance remained vacant from 9 August 2007 until April 2008;
- d. The contested decision was taken without taking into consideration her career aspirations, her training and her field of experience and she was not informed in advance either of it or of her new functions in the Facilities Management Unit, where there was no vacant post;
- e. The Executive Secretary was not informed of, and never approved the decision to transfer her. Furthermore, the decision by the Deputy Executive Secretary was taken on the new Executive Secretary's first day at work and the Secretary of the Commission, her direct supervisor, was not given advance notice of it either;
- f. The contested decision was linked to her request for protection against retaliation for having informed the Ethics Office and the Office of Internal Oversight Services in March 2007 of irregularities and violations of the Staff Regulations and Rules at ESCWA;
- g. The decision was arbitrary and she had been the victim of harassment by the Deputy Executive Secretary and other senior ESCWA officials;
- h. The post of Administrative Officer at the P-3 level was redeployed to the Administrative Services Division and remained vacant from the date payment of her special post allowance at the P-2 level was terminated. The selection procedure for the post was improper since her candidacy was not given priority consideration although she was a 15-day candidate.

20. The respondent's contentions are:
- a. The decision to reassign the applicant within ESCWA was taken in accordance with Staff Regulation 1.2 and section 2.4 of administrative instruction ST/AI/2006/3/Rev.1 ("Staff selection system");
 - b. The decision was made by the proper authority. The Deputy Executive Secretary had the authority to take decisions in the absence of the Executive Secretary. The question of the nature of the Deputy Executive Secretary's contract is irrelevant;
 - c. The decision was taken after a review of functions within the Office of the Executive Secretary showed that the applicant's functions and duties were no longer needed. The Deputy Executive Secretary had realized that he needed to transfer human resources functions from the Office of the Executive Secretary to the Human Resources Management Section;
 - d. The applicant provides no evidence that the decision was tainted by prejudice, discrimination or other improper motive;
 - e. The applicant's reporting of alleged misconduct within ESCWA occurred long before the Deputy Executive Secretary was appointed;
 - f. The decision was made after the new Executive Secretary was appointed and had requested an evaluation of the functions in the Office of the Executive Secretary. Such a review was within his discretion. The Executive Secretary subsequently decided to transfer administrative matters that had until then been handled within the Office of the Executive Secretary to the Human Resources Management Section and the Administrative Services Division;
 - g. A staff member was temporarily assigned to the Office of the Executive Secretary because a post as Administrative Assistant

became vacant there following the resignation of another staff member in March 2007;

- h. The applicant does not substantiate her allegations of harassment by the Deputy Executive Secretary and other senior ESCWA officials.

Judgment

21. The applicant seeks the rescission of the decision of 8 August 2007 whereby the Deputy Executive Secretary of ESCWA transferred her from the Office of the Executive Secretary to the Facilities Management Unit, Administrative Services Division.

22. The applicant disputes the legality of that decision on the ground first of all that the decision was taken by an incompetent authority inasmuch as, the new Executive Secretary having taken office, the Deputy Executive Secretary, who had been serving as Acting Executive Secretary, no longer had the requisite power.

23. It appears from the above and from the respondent's reply as registered on 4 April 2008 that the new Executive Secretary officially took office on 1 August 2007 and that he was in office on the date on which the Deputy Executive Secretary took the contested decision. Although, by e-mail dated 16 August 2007, the Executive Secretary confirmed his deputy's decision to transfer the applicant and confirmed that he had delegated authority for administrative matters to the Deputy Executive Secretary, the respondent provides no written evidence that by the date of 8 August 2007 on which the contested decision was taken the Executive Secretary had already delegated power to take such a decision to his deputy. Furthermore, the fact that the Executive Secretary confirmed the contested decision after the date on which it was taken cannot be deemed as regularizing *a posteriori* an illegal action committed by the Deputy Executive Secretary in taking a decision for which he provides no proof of his having held delegated authority.

24. The applicant further contends that the Deputy Executive Secretary's decision was taken not in the interests of the Organization but for improper motives and in particular that it was a reprisal against her for having denounced misconduct at ESCWA. Without having to go into the question of the truth of the applicant's allegations of retaliation, the Tribunal notes that the maker of the contested decision, who provided no detailed justification for it, had no good reason to take such a decision on the new Executive Secretary's first day at work. There is no document in the case file to show that by the date of the contested decision, 8 August 2007, the new Executive Secretary had demonstrated any intention of restructuring his Office by transferring administrative duties from it to the Administrative Services Division

25. In a letter dated 29 February 2008, the Chief, Administrative Services Division seeks to justify the Deputy Executive Secretary's contested decision by stating that towards the end of her tenure the former Executive Secretary realized that the applicant had exceeded her authority and ceased to rely on her. That statement is, however, contradicted by other items in the file, in particular the applicant's Performance Appraisal System report for the period April 2006 to March 2007, in which she is rated as having "fully met performance expectations", and the Executive Secretary's agreement of 4 May 2007 to the awarding to the applicant of a special post allowance. The applicant is, therefore, entitled to claim that the contested decision was taken for reasons other than the interests of the Organization and was consequently illegal.

26. For the above two reasons, the Tribunal finds that the decision of 8 August 2007 must be rescinded.

27. However, in the interest of the proper administration of justice, the applicant must be considered as having also wished to contest the Executive Secretary's decision of 16 August 2007 confirming the decision by the Deputy Executive Secretary, and the Tribunal must therefore rule on its legality.

28. It follows from the above that, by confirming his deputy's decision, the Executive Secretary made it and, in particular, the reasons it was taken his own and hence that the applicant's pleas against the rescinded decision must also be taken as pleas against the confirmatory decision.

29. In the circumstances, the first thing to be said is that all of the applicant's arguments to the effect that the contested decision constituted retaliation by the Deputy Executive Secretary for her reporting of irregularities she had discovered at ESCWA are invalid because the decision now under review was taken not by the Deputy Executive Secretary but by the new Executive Secretary, who, having entered office on 1 August 2007, cannot be held to have had anything to do with such retaliation.

30. The Tribunal must therefore examine the reasons for the Executive Secretary's decision to confirm the decision to transfer the applicant to the Administrative Services Division. Those reasons appear very clearly from the new Executive Secretary's memorandums of 20 and 28 September 2007 to the Chief, Administrative Services Division, which show that the new Executive Secretary wanted, a few days after taking up his duties, 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, by the applicant.

31. While the applicant contends that she was replaced in the functions she had discharged in the Office of the Executive Secretary, the respondent categorically denies that contention and the applicant provides no proof of it.

32. It is beyond dispute that such restructuring of his Office was within the sole competence of the Executive Secretary and that it was undertaken solely in the interests of the Organization.

33. It follows that the application for the rescission of the Executive Secretary's decision of 16 August 2007 must be rejected.

34. Accordingly, the Tribunal finds that the applicant is entitled to payment of the special post allowance pertaining to her post up until the date of 16 August 2007 on which she was lawfully transferred to her new post and that the respondent must pay her the sum in question.

35. The applicant's other pleas must be rejected since they entail giving orders to the respondent, a matter beyond the competence of the Tribunal.

Decision

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

- The decision of 8 August 2007 by the Deputy Executive Secretary of ESCWA to transfer the applicant to the Facilities Management Unit, Administrative Services Division, is rescinded;
- The respondent is ordered to pay an amount corresponding to the special post allowance that the applicant should have received during the period 8-16 August 2007;
- The rest of the application is rejected.

(signed)

Judge Jean-François Cousin

Dated this 30th day of March 2010

Entered in the Register on this 30th day of March 2010

(signed)

Victor Rodríguez, Registrar, UNDT, Geneva