



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

LEE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

SUMMARY JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat
Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 13 November 2013 and completed on 15 November 2013, the Applicant, a G-5 Programme Management Assistant in the Department of Management (“DM”), New York, contests the decision to abolish two posts within the Management Support Services (“MSS”), Office of the Under-Secretary-General for Management (“OUSG/DM”), as of 31 December 2013.

Facts

2. The Applicant joined the Organization on 21 July 2004 as an Administrative Assistant at the G-3 level, and was granted a fixed-term contract as of 21 January 2005. Effective 17 February 2009, she was promoted from the G-4 to the G-5 level, with a functional title of Management Analysis Assistant, in the MSS, OUSG/DM. This position is being financed through post No. 6003 in the regular budget of MSS, OUSG/DM. Along with other staff members in DM, the Applicant was assigned to work on the Enterprise Resource Planning project (“ERP” or “Umoja”) within the Department. As explained by the Respondent, “Umoja is a project designed to facilitate and streamline information between all business functions within the United Nations Secretariat, and will be the Organization’s new central administrative system”.

3. By a “note” dated 17 September 2009, the Director of Umoja requested approval from the USG/DM to integrate MSS and the Change Management Team (“CMT”, within the Umoja project) “into a single entity by assigning MSS to Umoja for the duration of the project”. The USG/DM approved the request by a “note” of 25 September 2009, and the integration of several MSS posts—1 D-1, 1 P-5, 1 P-2 and 1 GS (OL) from the regular budget and 2 P-4s from the support account—to Umoja became effective on 1 October 2009. The GS (OL) post was post No. 6003, i.e. the G-5 position of Management Analysis Assistant referred to above. In her note, the USG/DM also stated “[s]ince the integration of the MSS is temporary for the duration of the ERP Project, it will not be reflected in the

current or future budget fascicles. Upon liquidation of the ERP Project, the post and non-post resources of MSS will return to the front office of OUSG/DM”.

4. As of 22 November 2010 and until 31 January 2012, the Applicant was temporarily assigned, at the G-6 level, to the Policy, Evaluation and Training Division in the Department of Peacekeeping Operations, and, according to the Applicant, upon her return to Umoja she performed the functions of Personal Assistant to the Umoja Director.

5. By memorandum dated 11 June 2012 and addressed to the Chief of the Global Field Support Services (“GFSS”) project Implementation Coordination Team, Department of Field Support, the Project Director *a.i.* of Umoja approved an extension of the assignment of the Chief, MSS, to the GFSS project, and the Applicant was temporarily assigned to work in the GFSS team, as of 15 October 2012 and until 8 May 2013.

6. On 1 February 2013, during a meeting with the Executive Officer of DM, the Chief, MSS, OUSG/DM, and the Director of Umoja, she was informed that the OUSG/DM would propose to the General Assembly the abolition of post No. 6003, as well as of one P-2 post in the MSS, and that the General Assembly would consider and decide on such proposal in December 2013. The Applicant was also informed that since business process improvement was incorporated into Umoja, the functions of the G-5 position of Management Analysis Assistant and of the P-2 position of Associate Programme Management Officer in MSS, OUSG/DM, were no longer needed.

7. On 4 February 2013, the Applicant sent an e-mail to the persons who had attended the meeting of 1 February 2013 recapping what had been discussed at that meeting, and in reply to her e-mail on 5 February 2013, the Applicant’s First Reporting Officer and Chief, GFSS/MSS, stated that she had “never been consulted on any discussions related to current or future status of MSS posts”.

8. On 18 April 2013, the Proposed Programme Budget for the OUSG/DM for the biennium 2014-2015 was published (A/68/6 Sect.29A). It included the proposal to abolish post No. 6003 and the above-mentioned P-2 post.

9. On 1 May 2013, the Applicant's fixed-term appointment as Management Analysis Assistant within "DM/Umoja" was renewed until 31 December 2013, and as of 9 May 2013, she was assigned to the Office of the Administration of Justice, where she stayed until 4 October 2013.

10. By e-mail of 28 August 2013 entitled "abolishment of your post", the Administrative Officer, Executive Office, DM, referred to a previous discussion on 14 August 2013 regarding the abolition of the Applicant's post and encouraged her to apply to temporary vacancies as well as openings in Inspira.

11. By e-mail of 24 September 2013 from the Administrative Officer, Executive Office, DM, the Applicant was informed of her selection for a temporary job opening as Administrative Assistant in the Office of Information and Communication Technology ("OICT"). The email also stated the following:

[P]lease note that Umoja has agreed to your release on temporary assignment to OICT/PMD/KMS effective 5 October 2013 through 31 December 2013. As advised by Umoja, since your post in that office will be abolished effective 1 January 2014, they are not in a position to reabsorb you beyond 31 December 2013. As advised in my e-mail to you of 28 August 2013, you are encouraged to apply to positions both within and outside of Inspira.

12. On 11 October 2013, the Applicant submitted a request for management evaluation of the decision to abolish two posts in MSS, OUSG/DM, which was acknowledged on 17 October 2013.

13. On the same day, *i.e.* on 11 October 2013, the Applicant sought clarifications from the Executive Office, DM, with respect to the sentence "S/M has no lien against Umoja post" that figured on the Personnel Action issued to reflect her assignment to OICT.

14. By e-mail of 14 October 2013, the Administrative Officer, EO/DM, responded to the Applicant's query reminding her of her "meeting with the Executive Office earlier this year and [her] telephone conversation and email to [the Applicant] in August 2013 regarding the abolishment of [her] post effective 1 January 2014", and confirmed to the Applicant that "she [does] not have a lien

on [her] post in Umoja beyond that date". The Applicant replied on 16 October 2013 asking for further clarifications about her situation.

15. On 13 November 2013, the Applicant filed her application with the Dispute Tribunal, which she completed on 15 November 2013 and on 16 November 2013, she filed a motion for interim measures pending proceedings, along with a request for confidentiality, which were both rejected by this Tribunal on 25 November 2013 by Orders No. 182 and 183 (GVA/2013), respectively.

16. On 19 November 2013, the Applicant received a reply to her request for management evaluation, upholding the contested decision.

17. The Secretary-General's proposal to abolish post No. 6003, as contained in the proposed programme budget for the OUSG/DM for the biennium 2014-2015 (A/68/6), was recommended by the Advisory Committee on Administrative and Budgetary Questions ("ACABQ") to the Fifth Committee. At the date of the present judgment, the proposal was still pending for consideration by the Fifth Committee.

Parties' submissions

18. The Applicant's principal contentions are:

a. The decision violates her contractual rights and her right to due process;

b. Until now the Administration has not given her the reasons for the contested decision, neither did it respond to her request for management evaluation, nor has it provided evidence to support the decision to abolish the MSS posts; this is in contradiction with the Organization's duty to provide reasons to staff members so that they may exercise their right to appeal and take whatever action they deem necessary;

c. Based on the correspondence between the USG/DM and the Director, Umoja, she had reasonable expectation to believe that MSS posts would be returned to the Office of the USG/DM following the completion of Umoja;

d. MSS posts are regular budget posts and “it doesn’t seem a fair and reasonable explanation to abolish [them]” since they were “already working to support Umoja”;

e. The Chief, MSS, herself was not even consulted throughout the decision-making process, and she did not get any response to her requests for information regarding the status of her posts; “she would have made an entirely different decision and [the Applicant] [has] no doubt that she would have granted an extension of [her] fixed-term appointment beyond 31 December 2013”;

f. There has been no transparency in the decision making process, and it is unclear why funds are available to recruit three GS staff for 11 months for the Umoja project and at DM, advertised as from July 2011, “yet no funding to continue [her] post or reabsorb [her] following conclusion of [her] temporary assignment” is available;

g. It is “upsetting” that the responsible officers in Umoja did not speak to her in person about the posts being abolished; it seems to be “personally motivated” despite the fact that she thought she had left Umoja “on good terms”;

h. “The Organization has been intentionally evasive throughout the entire process”, certainly due to the fact that “during the period that MSS posts were integrated with Umoja, Umoja continued to submit requests for additional posts and resources without including MSS posts and resources as part of their organizational structure so as to strengthen their justification to Member States for additional staff”.

19. Based on the above, the Applicant requests “review of the decision, confirmation whether MSS posts are to be abolished, written justification for the decision to abolishment (*sic*) MSS posts, rescission of the decision, and compensation for the stress and harm caused from the unlawful decision”.

Consideration

20. Article 9 of the Tribunal's Rules of Procedure provides:

A party may move for summary judgement when there is no dispute as to the material facts of the case and a party is entitled to judgement as a matter of law. The Dispute Tribunal may determine, on its own initiative, that summary judgement is appropriate.

21. In the instant case, the chronology of facts as set forth in the Applicant's submission cannot be disputed; however, it raises questions about the receivability *ratione materiae* of the application, as already discussed in the order on interim measures rendered by this Tribunal on 25 November 2013 (Order No. 182 (GVA/2013)). Since the only issue to be addressed is that of the application's receivability—which may be assessed as a matter of law even without serving the application to the Respondent and even if not raised by the parties (see *Gehr* 2013-UNAT-313, and *Christensen* 2013-UNAT-335)—the Tribunal determines that summary judgment is appropriate at this stage, without awaiting the Respondent's reply to the application.

22. At the outset, it is necessary for the Tribunal to determine which decision is being challenged by the Applicant. Indeed, it is not obvious what exactly she wishes to contest. The Tribunal recalls, however, as it already did in the above-mentioned Order No. 182 (GVA/2013), what the Appeals Tribunal held in *Massabni* 2012-UNAT-238, namely that:

2. The duties of a Judge prior to taking a decision include the adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content they assign to them, as the judgment must necessarily refer to the scope of the parties' contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties' submissions.

3. Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and so, subject to judicial review which could lead to grant or not to grant the requested judgment.

23. In her application on the merits and in her motion for interim measures pending proceedings, the Applicant identified the contested decision as being the “decision to abolish Management Support Services (MSS) posts”. Further, in her request for management evaluation, she specified that the decision to be evaluated was “the decision to abolish two posts in Management Support Service, OUSG/DM”. From the parties’ submissions, it was understood that two posts in the regular budget of MSS, OUSG/DM, namely a P-2 post and post No. 6003, Management Analysis Assistant (G-5), which the Applicant encumbered, were proposed for abolition in the OUSG/DM Proposed Programme Budget for the biennium 2014-2015 submitted by the Secretary-General to the General Assembly. Based on the above, and since the Applicant obviously has no legal standing with respect to the P-2 post also proposed for abolition, the Tribunal considers that she wishes to contest only the decision to abolish post No. 6003, Management Analysis Assistant (G-5).

24. Having defined the scope of the present application, the Tribunal further recalls that art. 2.1(a) of the Tribunal’s Statute reads:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

...

25. It results from art. 2.1(a) of the Tribunal's Statute, applicable to the present case, that for an application to be receivable, the decision that is being challenged has to be an "administrative decision" under the provisions of the Tribunal's Statute.

26. In that context, the United Nations Appeals Tribunal recently recalled, in its judgement *Al Surkhi et al.* 2013-UNAT-304, the definition of an "administrative decision", quoting the former Administrative Tribunal, which held in *Andronov* (Judgment No. 1157 (2003)) that:

It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. (Emphasis added)

27. In the present case, the Tribunal notes that the abolition of the Applicant's post has not yet been formally approved by the General Assembly. As it is exclusively the prerogative of the General Assembly to decide on the budget of the Organization (see art. 17.1 of the Charter of the United Nations), the abolition of post No. 6003 is nothing more than a proposal that the General Assembly could decide not to entertain.

28. What the Applicant is in fact challenging is the Administration's submission of the proposal to abolish post No. 6003 to the General Assembly. However, when applying the test set out in *Andronov*, such action cannot be constitutive of an "administrative decision", because it does not produce "direct legal consequences". As shown above, such direct legal consequences could only result from a decision by the General Assembly which, at the date of the present decision of the Tribunal, has not yet been taken and has to be considered as "open"—the General Assembly may or may not approve the proposal.

29. Since the Applicant did not challenge an administrative decision under the terms of the Tribunal's Statute, the application is not receivable *ratione materiae*, and the Tribunal is not in a position to assess its merits (see *Servas* 2013-UNAT-349).

Conclusion

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

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 26th day of November 2013

Entered in the Register on this 26th day of November 2013

(Signed)

René M. Vargas M., Registrar, Geneva