



Before: Judge Coral Shaw
Registry: Nairobi
Registrar: Abena Kwakye-Berko

HAYDAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

George Irving

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

Introduction

1. In her Application dated 3 July 2013, the Applicant alleged that: (a) the African Union - United Nations Mission in Darfur (UNAMID) barred her from resuming duties in El Fasher, Sudan, based on unsubstantiated complaints by the Government of the Republic of Sudan (Sudan); (b) UNAMID refused to investigate or require substantiation of the decision to bar her from the country; (c) she was assigned to Entebbe on a temporary assignment (TDY) and then reassigned to Entebbe to a less suitable position which is not in line with her qualifications and experience as a P-3 Supply Officer; and (d) the Administration failed to institute any investigation into the particular circumstances that led to her removal from her former post and duties in El Fasher with UNAMID.

2. The Applicant submits that these decisions were made on 29 December 2012.

3. On 31 October 2013, the Tribunal issued Order No. 241 (NBI/2013) directing the Applicant to file an amended application which identifies “the precise administrative decision or omission she is challenging including: (a) the date of the decision and/or the date it came to her notice; (b) the author of the decision; (c) date on which management evaluation of that decision was sought; and (d) when, if any, the reply was received”.

4. In her amended Application, filed on 8 November 2013, the Applicant stated that the contested decision is the decision of the Department of Field Support (DFS) not to regularise her status by assigning her to a post commensurate with her duties as a P-3 Supply Officer. She alleges that this was a written decision dated 29 December 2012. She further alleges that there was no specific response to her request of 30 November 2012 for a formal investigation into alleged abuse of authority by UNAMID staff in connection with her removal from her former post in Sudan.

5. While the contested decisions listed in the amended Application are different from those in the original application, they are consistent with the Applicant's request for management evaluation dated 26 February 2013 in which she challenged:

[T]he decisions (of 29 December 2012) rejecting my request to reassign me to a suitable position in line with my qualifications as P3 Supply Officer as set forth in the generic job description and to refuse to institute an investigation into the particular circumstances that led to my removal from my former post and duty station El Fasher, Darfur, with UNAMID.

6. The Applicant is limited to contesting decisions for which management evaluation has been requested. Challenges to decisions which have not been so evaluated are not receivable. This Judgment is therefore limited to the decisions set out in the amended application.

7. In his Reply, the Respondent contests the receivability of the application on grounds that email correspondence from the Chief of the Field Personnel Operations Services (FPOS), DFS, does not constitute a contestable administrative decision and that the amended Application is not receivable as she failed to request management evaluation of the contested decisions.

Background

Employment History

8. On 24 October 2002, the Applicant was appointed for six-months on an appointment of limited duration with the United Nations Assistance Mission in Afghanistan (UNAMA) as a Supply Officer at the P-2 level. After reassignments to other missions, on 1 January 2008, the Applicant was deployed to UNAMID on a one year fixed term appointment as a Supply Officer at the P-3 level in El Fasher, Sudan.

9. Effective 1 April 2009, the Applicant was reappointed as a Supply Officer at the P-3 level on a one-year fixed-term appointment which was subsequently renewed on a yearly basis.

The Applicant's Expulsion from Sudan and Reassignment to Entebbe

10. On 18 December 2011, in a *Note Verbale* to UNAMID, the Ministry of Foreign Affairs of the Government of Sudan requested that the Applicant “leave the country within 72 hours (Undesirable). The [Applicant] was proven to be involved in activities that contribute negatively to [the] peace process in Darfur that contravene the mandate of UNAMID”.¹

11. The Applicant was not in Sudan at the time of this Note, as she was out of the mission area on sick leave. Through a memorandum dated 20 December 2011, she was informed by UNAMID Administration that she had been temporarily assigned to Entebbe, effective 22 December 2011.²

12. In a *Note Verbale* dated 21 December 2011, UNAMID requested the Government of Sudan to “share with the Mission information with regard to [the Applicant's] activities that constituted the grounds for the Ministry's decision”.³

13. On 27 January 2012, the Secretariat of the United Nations sent a *Note Verbale* to the Permanent Mission of the Republic of Sudan to the United Nations requesting the Government to rescind its decision to expel the Applicant and another staff member of the Mission. It noted that the Government had not provided any details on alleged activities of the Applicant and the other staff member which formed the basis of their expulsion from the country.⁴

¹ Respondent's Annex 1.

² Respondent's Annex 2.

³ Respondent's Annex 1.

⁴ Respondent's Annex 1.

14. On 23 February 2012, UNAMID Administration informed the Applicant of her reassignment to Entebbe as a Supply Officer at the P-3 level, effective 24 March 2012.⁵

15. On 29 February 2012, the Applicant wrote to the Assistant Secretary-General for Field Support (ASG/DFS) requesting his intervention to know what led to “this mysterious, unexplained PNG of a supply officer”. She asked him to “resolve the issue”. She did not specify what resolution she was expecting.⁶

16. On 1 March 2012, the ASG/DFS responded, noting that the Government of Sudan’s decision to expel her was beyond the control of the Organization, and confirmed her reassignment to Entebbe.⁷

17. On 26 March 2012, the Applicant wrote to the former Under-Secretary-General for DFS (USG/DFS) reiterating her request for information and an opportunity to retrieve her personal belongings.

UNAMID’s Investigation of the Applicant

18. On 12 April 2012, the Joint Special Representative (JSR) of UNAMID convened an independent fact-finding panel (Panel) to investigate the circumstances surrounding the decision of the Government of Sudan to expel the Applicant and another staff member.

19. The Chairperson of the Panel contacted the Applicant to inform her of the existence of the Panel, and requested a meeting with her in Entebbe during the period from 19 to 24 April 2012. The Applicant requested the terms of reference and composition of the Panel. When these were not provided, she declined to meet the Chairperson of the Panel.

⁵ Respondent’s Annex 3.

⁶ Respondent’s Annex 4.

⁷ Respondent’s Annex 4.

20. In a memorandum dated 5 May 2012, the Chairperson of the Panel wrote to the JSR/UNAMID, noting that the Government of Sudan had not provided the Panel with the reasons for the decisions to expel the Applicant and the other staff member, or any supporting evidence. The Chairperson noted that “the only custodian of evidence to support the expulsions of ... [the Applicant] is the Government ... and without this evidence an accurate finding of facts surrounding the expulsions cannot be made”.

21. On 4 June 2012, the Panel submitted its report to the JSR/UNAMID, concluding that it was not possible for the Panel to verify why the decision was made to expel the Applicant, and the Government of Sudan provided no evidence to substantiate its allegations against the Applicant and the other staff member.

22. The Respondent maintains that UNAMID has and continues to raise the issue of the Applicant’s expulsion in numerous meetings between representatives of the Mission and the Government of Sudan, and in tri-partite meetings between the Mission, the African Union (AU) and the Government of Sudan. The Applicant says that in the absence of specific evidence in this regard, she is not in a position to accept this as a statement of fact.

23. In an e-mail dated 30 November 2012, the Applicant requested the USG/DFS to conduct a formal investigation into the circumstances of her expulsion by the Government of Sudan as she believed it was precipitated by United Nations staff who wanted to target her.

24. On 19 December 2012 the Applicant wrote to the USG/DFS. She said the purpose of her communications was to address the unexplained and unresolved circumstances that led to her current lack of a proper assignment following her abrupt removal from her post in Sudan. She said her present lack of a real assignment has affected her professional standing.

25. The Applicant also said that she had initially accepted the reassignment in good faith pending regularisation of her status but as time went on it had become clear that no long term solution was being sought. She said she “needed to return to her duties as a P-3 supply officer in line with her TOR and generic job description or find a comparable assignment to the one she had in El Fasher, Darfur”.

26. On 29 December 2012, the Chief of FPOS/DFS, replied to the Applicant:

Dear [Applicant],

Thank you for your letter dated 19 December 2012 to Ms. Haq.

As Ms. Haq had informed you during her meeting with you in Entebbe, DFS has protested in several instances the refusal from the Government of Sudan to authorise your re-entry in the country. Meanwhile as it was unlikely that the Government of Sudan would revisit their decision, DFS has also made all efforts to find a suitable placement for you and you were successfully reassigned to Entebbe to perform the functions of Supply Officer effective 24 March 2011. This placement is not temporary in nature and I understand this has been communicated to you by several DFS officials, including ASG Banbury in the message attached herewith. With the creation of the RSC, Entebbe has become a major Logistic hub and in this context your reassignment from El-Fasher is justified. In addition Entebbe is a family duty station with good living conditions which was taken into account while reassigning you after the stressful events you had gone through.

That being said, I am also aware that you have expressed the wish to move to another duty station. In this regard, you are in contact with the Career Development Unit of FPD who has been assisting you along with many other field staff members. You were advised that any move from Entebbe needs to take place under the provisions of the Staff selection System (ST/AI/2010/3). The fact that you are FCRB cleared for Supply Officer P-3 is, in this context, a major advantage, as hiring managers who have a vacancy for which they consider you the most suited candidate can select you without reference to a central review body. In addition to the efforts made by the Career Development Unit to flag your profile to Hiring Managers, I encourage you to also directly make contact with possible supervisors to alert them on your keen interest in joining their team.

However, I want to draw your attention, as this has already been done, to the global consolidation and downsizing context in which

we operate. As you know, the reality today is that the number of posts in field missions is going down, resulting in lower vacancy rates and accordingly less placement opportunities. In a few days UNMIT will close and UNAMA, UNAMI, BINUCA, BNUB will cut a significant number of posts resulting in more than a hundred of our international staff colleagues losing their jobs, in this context, and as I am sure you will understand, our utmost priority is the placement of our colleagues who lose their posts.

I encourage you to continue to work with Field Personnel Division on possible reassignment options bearing in mind the difficulties we are facing as an Organisation.

Wishing you a Happy Holiday season and a Successful New Year.

Best regards

27. In an e-mail dated 8 January 2013, the Applicant wrote to the Chief/FPOS again requesting a reassignment to another position.

28. On 26 February 2013, the Applicant submitted a request for management evaluation.

29. On 8 April 2013, the Under-Secretary-General for Management informed the Applicant that the Secretary-General had decided to uphold the contested decisions.

Applicant's Submissions

30. The lack of any serious inquiry into the origins of the complaints or their relation to the subsequent actions of the Government echoes the findings in *Haydar* UNDT/2012/201. The Respondent should be held accountable for the resulting harm to the Applicant from the lack of compliance with her due process rights as well as the failure to honour the terms of its contractual obligations to her.

31. Although the Applicant has maintained her grade level, this action constitutes a disguised disciplinary decision in violation of staff regulation 1.2 that requires the Secretary-General to exercise his authority over assignments in a fair manner.

32. As the Applicant was unable to return to her former post through no fault of her own, the Respondent must make good faith efforts to find her a suitable assignment in accordance with the terms of her contract of employment. Instead, she has been kept in an uncertain state made more precarious by the possible downsizing of the mission.

Respondent's Submissions on Receivability

Timeliness

33. The amended Application is not receivable as she failed to request management evaluation of the decisions to bar her from resuming her duties in El Fasher and to reassign her to Entebbe within the 60 day time limit stipulated in staff rule 11.2(c).

Administrative Decision

34. The Applicant does not challenge an administrative decision as defined in article 2.1 of the UNDT Statute.

35. The Dispute Tribunal does not have subject-matter jurisdiction because no final administrative decision under article 2.1(a) of the UNDT statute has been taken.

36. Under article 2.1(a) of the Statute, the Dispute Tribunal is competent to hear and determine an appeal against a contested administrative decision, not a reiteration of a previous administrative decision taken on 24 March 2012. Accordingly, the Applicant has failed to identify a contestable administrative decision that directly affects the terms and conditions of her appointment.

Applicant's submissions on Receivability

37. In her response to the Respondent's submission on receivability the Applicant submitted that a contested decision may entail an action or a failure to act and cites the case of *Tabari* 2010-UNAT-030. She alleges that the "gravamen of the dispute is DPKO's refusal" to regularise her status by assigning her to appropriate functions.

38. It is the case for the Applicant that in her letters dated 30 November 2012 and 19 December 2012, she formulated specific requests for DFS to act on. That request was rejected in the reply from the Chief/FPOS dated 29 December 2012 informing her that her assignment to Entebbe is a permanent transfer as opposed to a temporary assignment and that no action would be taken by DFS to place her in a more appropriate job.

39. There was no specific response to her request of 30 November 2012 for a formal investigation into alleged abuse of authority by UNAMD staff in connection with her removal from her former post in Sudan. Since the response of 29 December 2012 refers to that matter but makes no reference to an investigation, it is construed as having been decided against her and is therefore included in her request for review by the Tribunal.

40. The original request for an investigation was made to DFS and later to OIOS. Instead of an independent investigation, the Mission re-convened an *ad hoc* panel which failed to conduct a proper inquiry.

41. Given these circumstances the Applicant submits that her appeal was timely.

Considerations on Receivability

42. The Tribunal does not accept the Applicant's submission that the Respondent made a contestable administrative decision concerning her reassignment on 29 December 2012.

43. The Applicant was clearly informed of the decision to temporarily reassign her to Entebbe on 22 December 2011.⁸

44. This decision was subsequently reiterated on 23 February 2012 and became effective on 24 March 2012.⁹

45. There can be no doubt that the Applicant was aware of the decision at the time it was made, and in any case well before December 2012.

46. The Applicant herself wrote to the ASG/DFS on 29 February 2012 requesting his intervention with the Government of Sudan, which correspondence the ASG responded to on 1 March 2012.

47. In her letter of 19 December 2012, the Applicant did not ask for a new or different decision from that which she had queried on 29 February 2012. It was reiteration of her concerns about the reassignment and the reasons for it.

48. Similarly, the Chief/FPOS' response to that letter on 29 December 2012, as reproduced above, was a reiteration of the reasons for the decision to reassign the Applicant in February 2012.

49. It is settled law that a decision is considered final when the Organisation decides to take a particular course of action, which has direct legal consequences on the rights and obligations of a staff member as an individual.¹⁰

⁸ Respondent's Annex 2.

⁹ Respondent's Annex 3.

50. It is also settled law that timelines as stipulated in article 7.1(a) of the Rules of Procedure and article 8.1(d)(i) of the Statute must be strictly observed. The United Nations Appeals Tribunal (UNAT) has consistently held that:

Strict adherence to filing deadlines assures one of the goals of our new system of administration of justice: the timely hearing of cases and rendering of judgments.¹¹

51. The principles governing the issue of whether a reiteration of a decision already made constitutes a new decision for the purposes of article 7.1(a) of the Rules of Procedure and article 8.1(d)(i) of the Statute have been established by the Tribunal in *Ryan* UNDT/2010/174; *Bernadel* UNDT/2010/210 and by UNAT in *Sethia* 2010-UNAT-079.

52. The jurisprudence is consistent in that reiterations of administrative decisions which are repeatedly questioned by a staff member do not serve to reset the clock in respect of the stipulated timelines for a challenge of those decisions. Time begins to run from the date the decision was originally made. Repeated restatements of the original claim will not alter the deadline for a challenge against the impugned decision.

53. A new decision is one that is made under new circumstances and is, as such, subject to review.

54. The Tribunal finds that the Respondent did not make a new contestable administrative decision concerning her reassignment on 29 December 2012. It confirmed the original decision made in February 2012. As the Applicant did not seek management evaluation of the original decision within the required 60 days, her application is not receivable by the Tribunal.

¹⁰ UN Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

¹¹ *Cooke* 2012-UNAT-275 referring to *Mezoui* 2010-UNAT-043 and *Tadonki* 2010-UNAT-005.

55. The Tribunal also finds, for the same reasons, that the Applicant's claim relating to her request for the Respondent to institute an investigation into the particular circumstances that led to her removal from El Fasher, Darfur not receivable.

56. The Tribunal finds that the requests in November and December 2012 were reiterations of the request made by the Applicant in February 2012.

57. In the absence of a request for a new decision based on new circumstances the Tribunal holds that there is no receivable administrative decision to review.

58. The Tribunal also notes that on the basis of evidence submitted the Respondent appears to have acted upon the Applicant's initial requests for an investigation. The results of that investigation were thwarted by the lack of response from the government concerned and also by the lack of participation by the Applicant.

59. The Application is dismissed.

(signed)

Judge Coral Shaw

Dated this 24th day of April 2014

Entered in the Register on this 24th day of April 2014

(signed)

Abena Kwakye-Berko, Registrar, Nairobi