



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

SAFFIR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Lennox S. Hinds

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. On 25 March 2013, the Applicant, a staff member in the Meetings Support Section, Department of General Assembly and Conference Management (“DGACM”), filed an application with the Dispute Tribunal contesting the decision of Mr. Franz Baumann, Assistant Secretary-General, DGACM (“ASG/DGACM”) to initiate the recruitment of 19 candidates for the future operation of the Publishing Section apparently without the approval and authorization of the General Assembly (see *Saffir* Suspension of Action Order No. 49 (NY/2013) dated 22 February 2013).

Relevant Background

Contested decision

2. On 10 February 2013, the ASG/DGACM sent an email titled “Update on developments in the Publishing Section”, whereby he stated:

...The plan to phase out offset printing and related services by the end of the 2013, as envisaged in the Secretary-General’s budget proposal for 2012-2013, was accelerated by the impact on the space and equipment in the NL 3B of super-storm Sandy.

...

In the coming days, ten posts (1 GS-7, 3 GS-6, 3 GS-5, and 3 GS-4) will be posted on [the United Nations online recruitment system (“Inspira”)]. The incumbents of these posts will provide in-house printing services using digital equipment. Soon thereafter, as soon as the presently ongoing review by OHRM is completed, nine more posts (1 GS-7, 3 GS-6, 3 GS-5, and 2 GS-4) will also be posted. The incumbents of these posts will provide distribution services. Together with the existing PS Front Desk and Front Office, the printing and distribution operations will be integrated, with the Desktop Publishing Unit, the Meetings Servicing Unit (formerly in CPCS) and the PaperSmart operation, in the new Meetings Support Section.

...

* All New York Secretariat Departments have been contacted by the ASG/OHRM with the request to identify opportunities to place PS

staff. In this connection, but also for purposes of applying to the above-mentioned PS posts which will be advertised, it is important for all PS staff to complete and update their PHPs.

* Training sessions to assist staff with this transition will be organized by OHRM and by the Department.

* The OHRM/DGACM working group continues to identify issues, discuss solutions and assist in the transition process.

...

We had hoped to engage the PS staff representatives in discussions and consultations in various fora, including the last SMC meeting on Friday, 25 January 2013 which, regrettably, they did not attend. Nevertheless, management remains open to discussions with staff and staff representatives, open to queries and suggestions from all and committed to minimizing the negative impact on staff of the transition to the new business model. Managers at all levels are committed to respond to your concerns and your ideas as we manage this important transition in the Publishing Section.

3. The Tribunal finds that the contents of this email caused a significant degree of alarm and anxiety on the part of the Applicant and several staff members who were concerned at the prospect of losing their jobs.

4. On 11 February 2013, as part of its plan to hire 19 new staff members, DGACM posted vacancy announcement # 26759 for three posts at the GS-5 level within the Meetings and Publishing Division. The posts included responsibilities for operating digital printing equipment and required that the applicants have a minimum of five years of progressively responsible experience in digital printing.

Management evaluation and suspension of action

5. On 20 February 2013, the Applicant requested management evaluation of the decision to initiate recruitment for nineteen staff in the Publishing Section. The following day the Applicant filed a request for suspension of. This case was assigned Case No. UNDT/NY/2013/011. On 22 February 2013, by Order No. 49 (NY/2013), the Tribunal granted the request for suspension of action pending the outcome of the management evaluation on the grounds that it would appear “that DGACM did not have the authority to undertake a restructuring exercise on a scale that would involve

the deletion of 59 posts and the creation of 19 new ones ... that it would appear that the contested measures have only recently been submitted to the General Assembly as part of its consideration of the 2014–2015 biennium budget...[and] the Applicant is facing the prospect of ... an unquantifiable impact on his prospects for continued employment and career development within the [Publishing] Section”.

Application on merits

6. On 25 March 2013, the Applicant filed the present application regarding the same issues as those previously addressed by the Tribunal in Case No. UNDT/NY/2013/011 in which he had requested a suspension of action of the decision which appeared to the Tribunal as having been made without lawful authority.

Motion for interim relief

7. On 27 March 2013, the Applicant filed a motion for interim measures seeking the suspension of the implementation of the contested decision pending a resolution of the present matter on its merits. By Order No. 77 (NY/2013), dated 27 March 2013, the Tribunal granted interim relief suspending the implementation of the decision to conduct a recruitment exercise via Inspira for 19 new posts in the Publishing Section, for a period of 60 days or until a final determination of the substantive merits of the application, whichever came first, or until such further Order as was deemed appropriate by the Tribunal.

Rescission of contested decision

8. On 5 April 2013, the acting head of DGACM notified the Applicant and other DGACM staff members at a town hall meeting that the decision to initiate a recruitment exercise for the 19 positions had been rescinded. The staff members were further notified that these posts would be re-advertised at a later date should the General Assembly approve the 2014-2015 biennium budget proposed by the Secretary-General.

9. On 9 April 2013, the MEU informed the Applicant that the rescission of the decision to conduct a recruitment exercise rendered the Applicant's request for management evaluation moot.

10. On 10 April 2013, the Respondent filed a motion for leave to have receivability considered as a preliminary issue on the grounds that, as a result of the decision to rescind the recruitment of the 19 posts, the application was now moot and not receivable. Furthermore, the Respondent also stated that the positions would be advertised later in 2013 if the General Assembly, during the main part of its 68th session, approved the budget for 2014–2015 as proposed by the Secretary-General. The following day, the Tribunal (Judge Ebrahim-Carstens) issued Order No. 95 (NY/2013) directing the Respondent to file a reply limited to the issue of receivability to which the Applicant was to file a response within a week.

11. In his response dated 26 April 2013, the Respondent repeated the substance of his 10 April 2014 motion that the rescission of the contested decision resulted in the application before the Tribunal being moot. The Respondent added that the Applicant was not contesting an administrative decision from which any harm or compensation flowed. The Applicant responded to the Respondent's submission on 3 May 2013 stating that the application was not moot since the unlawfulness continued thus causing the Applicant continuous harm. The Applicant also submitted that the decision before the Tribunal remained a contestable administrative decision.

12. On 23 May 2013, taking into consideration the fact that the decision to recruit 19 candidates had been rescinded, by Order No. 131 (NY/2013), the Tribunal (Judge Ebrahim-Carstens) deferred consideration of the merits of this case.

13. A case management discussion was held on 3 October 2013. By Order No. 239 (NY/2013), dated 4 October 2013, the Tribunal ordered the parties to file a submission on whether this case should be combined with other pending cases on the same subject matter (see *A-Ali and 45 others* UNDT/2013/155 and *A-Ali and 45*

others UNDT/2013/169) and whether there remained a contestable administrative decision.

14. On 11 October 2013, the parties filed a joint submission whereby they stated that the present case and the two *A-Ali et al.* cases contained overlapping facts and legal issues. The Respondent did not object to these cases being joined whereas the Applicant noted that they had some concerns that the joinder of case UNDT/2013/169 might result in procedural delays. The parties did not agree as to whether there remained a contestable administrative decision.

15. On 17 October 2013, the Applicant filed an *ex parte* request for measures to protect the confidentiality of his medical file. The Applicant stated that he had medical evidence in support of his claim that the contested decision resulted in him suffering stress and anxiety the details of which he wished to remain confidential. That same day, by Order No. 258 (NY/2013), the Tribunal ordered that the Applicant was not required to file the medical evidence referred to. The Tribunal further ordered that the Applicant was to bring the original of the said medical information to any future hearing so that the Tribunal may, if necessary, determine the means and terms of disclosure.

16. On 18 October 2013, the Applicant filed a submission in response to Order No. 239 on the question whether there remained a contestable administrative decision and whether the Applicant had suffered harm as a result of the said decision. The Respondent filed his response to the Applicant's submission on 25 October 2013.

17. By email dated 26 March 2014, the Tribunal instructed the Registry to inform the parties to attend a hearing on the merits and, if appropriate, compensation on 8 April 2014. Due to the unavailability of counsel, the hearing was rescheduled for 10 April 2014.

18. On 10 April 2014, the Tribunal held a hearing for the purpose of clarifying the Respondent's contention that there was no contestable administrative decision identified by the Applicant and to receive evidence from the Applicant regarding his

claim for compensation. At the conclusion of the hearing the Tribunal raised certain questions regarding the continuation of the proceedings. Taking into consideration the observations made by the Tribunal, the parties agreed to engage in discussions in an attempt to resolve their differences. By Order No. 66 (NY/2014), dated 11 April 2014, the Tribunal suspended the proceedings to enable the parties to explore the possibilities of resolving their differences. On 9 May 2014, the parties informed the Tribunal that they were not able to reach a resolution.

Consideration

Administrative decision

19. The competence of the Dispute Tribunal is determined by the provisions of art. 2.1(a) of its Statute which states that the Dispute Tribunal shall be competent to hear and pass judgment on an application contesting an administrative decision that is *alleged* to be in non-compliance with the terms of appointment or the contract of employment of a staff member.

20. The Respondent states that, due to the preparatory nature of the 10 February 2013 announcement, the implementation of the decision to hire 19 new staff members had yet to be carried out and that it had no impact on the Applicant's own terms of appointment.

21. The announcement of the creation of these new posts was presented as the result of a "plan to phase out offset printing and related services by the end of the 2013", namely the Applicant's section. Further, the day after the transmittal of this announcement, DGACM posted some of the announced vacancies on Inspira. Therefore, the Tribunal considers that it is incorrect to characterize this decision as being purely preparatory in nature as the contested decision had been, in fact implemented by then. It remained in force until 5 April 2013 when it was rescinded following the Tribunal's Order No. 49 (NY/2013) dated 22 February 2013 suspending the implementation of that decision which appeared to be unlawful.

Accordingly, until the decision was rescinded the Applicant was entitled to compensation for any harm that he could prove that he suffered as a result of the impugned decision.

22. The Tribunal finds that the decision to hire new staff members is an administrative decision and that, in the present case, the outcome of that selection process could adversely affect the Applicant. Such a finding is consistent with the Administration's own statement that the selection would result in the phasing out of the Applicant's section and therefore potentially his post. Consequently, while the Tribunal acknowledges that, at the time of the decision, the Applicant had yet to be officially advised as to whether his post would be cancelled, that is not the decision being contested. Even if the Tribunal was to consider the narrow approach that an administrative decision needs to have a *direct* impact on an applicant's terms of appointment to be receivable, the Tribunal considers that by phasing out the Applicant's post, as a result of the hiring of 19 new staff members, and also requiring that he apply for these new posts, thereby incurring the risk that he may not be appointed, the impugned decision directly affected the Applicant's terms and condition of employment. Moreover, as discussed in the suspension of action (*Saffir* Order No. 49 (NY/2013)), this decision appears to have been taken and implemented in breach of the requirement that any such selection process and organizational restructuring be first formally approved by the General Assembly.

Is The Decision Moot?

23. The Respondent submits that, in view of the 5 April 2013 decision to cancel the selection process, there no longer remained a contestable administrative decision to be adjudicated upon by the Tribunal and the Applicant's claims are therefore moot. However, the Applicant contends that his right to pursue his claim is not moot simply on account of the fact that the decision has been rescinded and that the harm from that decision is ongoing and he is entitled to compensation for anxiety and stress caused by the notification of this decision.

24. In *Gehr* 2012-UNAT-253, the United Nations Appeals Tribunal stated that the Tribunal had the right, upon being “satisfied that the Appellant, for a period of time, was exposed to a breach of a fundamental procedural right warranting a compensatory award, to assess such compensation”.

25. However, it is for the Applicant to show not only that the decision was unlawful and affected his rights but that there was a causal link between the breach on the part of the Respondent and the damage he suffered. Furthermore, the Tribunal would need to consider whether the cancelling of the decision was sufficient to cure the loss or damage stemming from the original decision as not every violation will lead to an award of compensation (see *Wu* 2010-UNAT-042, *Kamal* 2012-UNAT-204 and *Mirkovic* 2013-UNAT-290).

26. The Tribunal finds the application receivable in that there was a contestable administrative decision which affected the Applicants rights under his contract of employment.

Injury

27. In April 2014, the Applicant gave evidence of the existence of a contentious relationship between himself and the Organization that started in 1998 when he was previously separated from service prior to a finding that his separation was the result of an unlawful process. This loss of employment was the first instance for which the Applicant had to seek treatment. The Applicant further explained that prior to the recent announcement that his division would be abolished, there was a meeting with the staff representatives in 2012 during which they were informed that there would be a downsizing and restructuring within the Publishing Section, DGACM. The Applicant explained that this 2012 announcement created a heightened state of anxiety for him resulting in trouble sleeping, loss of appetite and depression. The Applicant explained that although he felt better upon his request for suspension of action of the contested decision being granted, within two days, due to learning of plans to allegedly go ahead with the restructuring plan and hiring of new staff

members, his anxiety returned until October 2013 when his transfer to another post was made permanent.

28. In response to cross-examination by the Respondent, the Applicant stated that while he undertook to participate in various training opportunities offered by the Organization he did not apply for any post as there were none that appeared to be a good fit, nor did he apply for any temporary post as he felt that this would give the impression that his current post was expendable. The Applicant agreed with the Respondent's suggestion that the anxiety he suffered was due to the changing nature of the Publishing Section from paper to electronic distribution. However, the Applicant did not agree that this was unavoidable as a normal and expected consequence of a restructuring exercise. The gist of the Applicant's case on this point was that the recruitment exercise had not been approved by the General Assembly. It was, therefore, unlawful and he suffered as a result of having been subjected to an ordeal that had no legal justification at that stage. Finally, the Applicant strenuously denied any suggestion that he suffered no harm or that any such harm was negligible because the contested decision was only in place for 12 days. He submitted that any proposal to abolish a post and/or restructuring still needed to be decided by the General Assembly and that he therefore continued to feel threatened after the decision to hire 19 new staff members was suspended and ultimately cancelled.

29. The Applicant provided the Tribunal with documents in support of his claim that he suffered anxiety and stress during this time period. These documents were seen by the Tribunal as well as by Counsel for the Respondent.

30. In *Simmons* UNDT/2012/163, the Tribunal found that, while useful, an Applicant is not always required to produce a medical report to be

35. ... entitled to claim damages for anxiety and stress. ... Clearly, if such medical evidence exists it will make the factual finding in relation to psychological harm much easier. However, the key question for the Tribunal to consider is whether or not it has, in a particular case, sufficient evidence and/or other information to

enable it to make a factual finding that an applicant did, in fact, suffer from stress and anxiety. In the absence of any such evidence and/or other information, the Tribunal is clearly precluded from making any such award. In the present case, the Tribunal has no hesitation in finding not only that the Applicant was distressed but that such a condition was in all the circumstances only to be expected and was a reasonable reaction ...

31. Similarly, in this case, having heard the Applicant give evidence and having had an opportunity to form an assessment of the Applicant, the Tribunal is satisfied that he has provided it with sufficient evidence to indicate that, as a result of previous negative experiences, the potential restructuring of his division, as reflected by the announcement of the hiring of 19 candidates for a new section, resulted in a significant level of anxiety that affected the Applicant to the point where an award of damages is reasonable and warranted.

32. It is a long standing principle that a Respondent has to take his victim as he finds him or her. While the Respondent may argue that the 10 February 2013 announcement, in and of itself, cannot be considered responsible for the stress and anxiety presented by the Applicant, it is reasonable to infer that such a decision could create a certain amount of distress to a staff member and particularly one who is already vulnerable. Accordingly, taking into account the Applicant's own prior experience of being separated from the Organization, it is reasonable for the Tribunal to conclude that his previous experience made him more vulnerable to the stress caused by this recent decision resulting in him suffering compensable harm.

Duration and cause of injury

33. The Applicant stated that he first became concerned about the possibility of a restructuring exercise within his division following a meeting of staff representatives in October 2012. He added that DGACM's plans to restructure the Publishing Section, via the new 2014-2015 biennium budget presented to the General Assembly, resulted in continuing stress but that his anxiety levels receded and he started feeling at ease with his professional situation upon obtaining a new post in October 2013.

34. In *Ali and 45 others*, 46 staff members, including the Applicant, filed a consolidated application contesting the decision to submit a proposed programme budget to the General Assembly for the 2014–2015 biennium, which included the abolition of 59 posts in the Publishing Section, DGACM. The issues raised by the Applicant regarding the long standing plan to abolish posts within the Publishing Section and the fact that he was experiencing harm as a result thereof, potentially as far back as 2011 or 2012 to date, were addressed by the Tribunal in Judgment No. UNDT/2013/169.

35. In the present case, the Tribunal is not asked to consider the decision to restructure the Publishing Section but rather the decision, without lawful authority, to give effect to the restructuring decision by the announcement, on 10 February 2013, to hire new staff members and the effects of that decision on the Applicant. It is only upon DGACM's announcement that they would hire new staff members, and the commencement of the process of phasing out posts, that the Applicant can justifiably be considered to have begun suffering harm.

36. The decision which the Applicant claims caused him such distress was suspended by the Dispute Tribunal on 22 February 2013 pending the completion of management evaluation and rescinded by the acting head of DGACM on 5 April 2013.

37. The contested decision was in effect for a period of 12 days only. The Tribunal does not accept the Applicant's contention that the Tribunal should take account of the fact that the damage continued because of the impending submission to the General Assembly for approval of the biennium budget. Any such damage is not a matter that would have been causally linked to the decision which is before the Tribunal, namely the 10 February 2013 decision to hire 19 new staff members. Any issue regarding the continuing effect of a proposal before the General Assembly is not a matter before this Tribunal in this case.

Award

38. The Applicant seeks compensation for emotional and psychological harm.

39. The Tribunal endorses the finding in the judgment of the Dispute Tribunal in *Nguyen-Kropp and Postica* UNDT/2013/004, para. 152, and by the Dispute Tribunal for the United Nations Relief and Works Agency (“UNRWA), *Abdel Khaleq* UNRWA/DT/2013/022, at para. 84, regarding the steps that the Tribunal should take when assessing whether moral damage should be awarded regarding an allegation of harm suffered following a decision by the Organization.

40. The Tribunal is persuaded by the oral evidence presented by the Applicant regarding his history of mistrust with the Organization and the extent of the injury suffered as a result of the decision to hire 19 new staff members as part of the plan to phase out his post. Given the range of awards by the Dispute Tribunal for stress and moral damages, the Tribunal assesses this case at the lower end of the scale of severity.

41. The Tribunal finds, on the evidence before it, that the Applicant suffered non-pecuniary loss and orders the Respondent to pay to the Applicant the sum of USD1,000.

Conclusion

42. The Applicant’s claim is well founded.

43. The Respondent is ordered to pay to the Applicant the sum of USD1,000 as compensation for the anxiety and stress suffered.

44. Under art. 10.5 of the Statute of the Dispute Tribunal, the sum of compensation as detailed in para. 41 above is to be paid to the Applicant within 60 days of the date that this Judgment becomes executable, during which period the US Prime Rate applicable as at that date shall apply. If the total sum is not paid

within the 60-day period, an additional five per cent shall be added to the US Prime Rate until the date of payment.

(Signed)

Judge Goolam Meeran

Dated this 24th day of July 2014

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

(Signed)

Hafida Lahiouel, Registrar, New York