



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2014/011
UNDT/GVA/2014/013
UNDT/GVA/2014/054
Judgment No.: UNDT/2014/143
Date: 10 December 2014
Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

KUSUMA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Laurence Fauth

Counsel for Respondent:
Bart Willemsen, UNICEF

Introduction

1. The present judgment concerns the following three applications:
 - a. An application registered under Case No. UNDT/GVA/2014/011 where the Applicant challenges:
 - i. the decision of 28 October 2013 to reassign her from the position of Chief, Internal Audit, of the Comprehensive Nuclear Test Ban Treaty Organization (“CTBTO”) to that of Special Assistant on Oversight Activities of the Executive Secretary, CTBTO, in breach of the agreement governing her reimbursable loan, and
 - ii. the failure of the United Nations International Children’s Emergency Fund (“UNICEF”) to act in accordance with such agreement and thus to protect the Applicant’s interest, which came to her attention upon notification of the above-mentioned decision of 28 October 2013;
 - b. An application registered under Case No. UNDT/GVA/2014/013 where the Applicant challenges the implied decision not to pay her damages for UNICEF breaching the agreement governing her reimbursable loan and failing to protect her interests, as per a letter of the Executive Director, UNICEF, Chief, Policy and Administrative Law Unit (“C/PALU”), Division of Human Resources, UNICEF, dated 23 December 2013; and
 - c. An application registered under Case No. UNDT/GVA/2014/054 where the Applicant challenges the explicit rejection of her request for payment of damages, as per another letter of the C/PALU, UNICEF, dated 27 February 2014.
2. Under all three applications, the Applicant requests, as remedies, moral and material damages in the amount of two years net base salary plus legal costs.

Facts

3. Effective 7 July 2009, the Applicant, a UNICEF staff member since March 1986, was loaned to CTBTO on the basis of a document entitled *International Agreement Covering the Reimbursable Loan of [the Applicant] from the United Nations Children’s Fund (UNICEF) to the Provisional Technical Secretariat of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO)* (“the Agreement”). The Agreement, signed on 3 July 2009, provided for an initial loan duration of 24 months, with a one-time extension until 30 November 2013 to enable the Applicant to reach early retirement with UNICEF at the age of 55. It further provided that effective 1 December 2013 the Applicant would be transferred from UNICEF to CTBTO on an inter-agency transfer basis. This was in line with the terms and conditions set by UNICEF to release the Applicant on a reimbursable loan, as per memorandum dated 6 April 2009 from the Chief, Recruitment & Staffing Section, Division of Human Resources, UNICEF, to the Executive Secretary of CTBTO, as well as per a memorandum from UNICEF to the Applicant dated 22 June 2009.

4. The Agreement further stipulated that the Applicant, while under the administrative supervision of CTBTO, was subject to the United Nations Staff Rules and Regulations and continued to be employed by UNICEF though on a CTBTO letter of appointment. It also stated that while on loan, the Applicant was to be assigned as Chief, Internal Audit, CTBTO, and that any amendments or changes to the Agreement required the written agreement of CTBTO, UNICEF and the Applicant.

5. Upon her loan to CTBTO, the Applicant initially served as Chief, Internal Audit Section (P-5), CTBTO. As from August-September 2012, she was reassigned within CTBTO as Special Assistant on Oversight Activities of the CTBTO Executive Secretary (hereinafter “Special Assistant”). The Applicant emphasizes that she accepted this reassignment on the understanding—and upon the former Executive Secretary’s explicit commitment—that it would be of a

temporary nature. Neither CTBTO nor the Applicant informed UNICEF about the reassignment at the time.

6. By memorandum dated 28 October 2013, the Chief, Human Resources Section, CTBTO, confirmed the Applicant's permanent lateral reassignment within CTBTO to the Office of the Executive Secretary, as the latter's Special Assistant.

7. About one month later, by email sent after close of business on Friday, 22 November 2013, the Applicant informed the Human Resources Manager, Division of Human Resources, UNICEF, of the decision by CTBTO to reassign her to the position of Special Assistant, and asked "whether UNICEF was consulted or informed about this".

8. Upon expiration of her loan on 30 November 2013, and in compliance with the terms of the Agreement, the Applicant became a staff member of CTBTO effective 1 December 2013 through an inter-agency transfer.

9. By letter dated 9 December 2013, the Applicant requested that the Executive Secretary, CTBTO, review the decision to make her lateral reassignment permanent. She claimed, *inter alia*, that such reassignment was against her wishes, in breach of the commitment of the former Executive Secretary, CTBTO, and that she had accepted to take up the duties of Special Assistant only temporarily to assist the former Executive Secretary prior to his departure. She also argued that the reassignment violated the terms of the Agreement.

10. On 20 December 2013, the Applicant submitted to the Executive Director, UNICEF, a request for management evaluation of the 28 October 2013 decision to permanently reassign her to the post of Special Assistant of the Executive Secretary, CTBTO. She explained that "since at the operative time [she] was subject to the United Nations Staff Regulations and Rules, and even though the decision was taken by CTBTO, it appear[ed] that she was obligated to request this management review from UNICEF in order to preserve [her] rights". She

requested her return to the post of Chief, Internal Audit, CTBTO, payment of moral damages and reimbursement of her legal fees.

11. By letter dated 23 December 2013, the C/PALU, Division of Human Resources, UNICEF, replied to the Applicant that her management evaluation request was not receivable, given that the contested decision was not taken on behalf of the Executive Director, UNICEF, or with his acquiescence, and that he was, therefore, neither accountable for it nor able to repair its alleged unlawfulness.

12. The Executive Secretary, CTBTO, replied to the Applicant's request for review of 9 December 2013 by memorandum dated 7 January 2014. He noted that para. 7 of the Agreement stipulated that the Applicant would be assigned to CTBTO as Chief, Internal Audit, and concluded that the original temporary reassignment and the decision to permanently reassign the Applicant was not in accordance with the Agreement, as no written agreement from UNICEF had been received regarding the temporary assignment, nor was the Applicant's or UNICEF written agreement received for the permanent reassignment. Accordingly, he decided "to review the decision to permanently transfer [the Applicant] ... effective 13 August 2013, and to set the permanent transfer date as 1 December 2013," date at which the Applicant became a staff member of CTBTO.

13. On 20 February 2014, the Applicant sent a letter to the Executive Director, UNICEF, stating that she had claimed in her request for management evaluation that UNICEF had breached the Agreement, and that this had not been denied in UNICEF response dated 23 December 2013. She asked for "payment of damages for UNICEF breach of [her] terms of appointment in the amount of one year net base salary".

14. On the same date, the Applicant sent another letter, equally addressed to the Executive Director, UNICEF, reiterating that her reassignment within CTBTO was in breach of the Agreement and stating that UNICEF response to her management evaluation request contained an implied decision to reject any

compensation for UNICEF breach of the Agreement. She requested review of the decision to reject payment of damages for breach of contract.

15. By two separate letters dated 27 February 2014, the C/PALU, UNICEF, replied to each of the Applicant's letters of 20 February 2014. One of these letters stated that the reassignment decision was not attributable to UNICEF, and that this decision would amount to a breach of the Agreement on the part of CTBTO, not on the part of UNICEF, which had "no role in or awareness of the decision prior to its implementation or prior to the Applicant's transfer from UNICEF to CTBTO". In the second letter, the C/PALU, UNICEF, noted that his letter of 23 December 2013 was a response to the Applicant's request for management evaluation of her reassignment within CTBTO, not a management evaluation of the alleged breach of the Agreement by UNICEF, which had not been addressed in the letter of 23 December 2013; as a consequence, the letter did not contain any implied decision to reject compensation for any alleged breach on behalf of UNICEF.

16. On 20 March 2014, the Applicant filed the application registered under Case No. UNDT/GVA/2014/011 (see para. 1.a above). On 9 April 2014, the Respondent filed his reply, which also comprised a motion for summary judgment and for award of costs. On 16 April 2014, the Applicant filed observations on the Respondent's reply and made a cross-motion for summary judgment.

17. On 4 April 2014, the Applicant filed the application registered under Case No. UNDT/GVA/2014/013 (see para. 1.b above). On 9 April 2014, the Respondent filed his reply, comprising as well a motion for summary judgment and for award of costs. On 16 April 2014, the Applicant commented on the reply and made a cross-motion for summary judgment.

18. Also, by letter dated 4 April 2014, the Applicant requested management evaluation of UNICEF decision of 27 February 2014 not to grant her compensation in relation to her reassignment, as requested by the Applicant by letter of 20 February 2014.

19. By letter dated 9 April 2014, the C/PALU, UNICEF, replied to the Applicant's 4 April 2014 letter advising that her request for compensation was inapposite and that her request for management evaluation was moot.

20. On 7 July 2014, the Applicant filed the application registered under Case No. UNDT/GVA/2014/054 (see para. 1.c above). On 24 July 2014, the Respondent filed his reply, comprising as well a motion for summary judgment and for award of costs. On 26 July 2014, the Applicant commented on the reply and made a cross-motion for summary judgment.

21. The Applicant was separated from CTBTO effective 7 July 2014.

Parties' submissions

22. The Applicant's principal contentions are:

a. The applications are not moot. CTBTO amended the effective date of reassignment on 7 January 2014, not as a remedy but to retrospectively avoid the effects of the Agreement; it did not reverse the substantive permanent reassignment. By 7 January 2014, UNICEF had already been informed about the reassignment by email of 22 November 2013, and it was not known at the time that the effective date would be changed. The lawfulness of the reassignment decision is judged from the time it was taken;

b. As regards the Respondent's contention that the Applicant made no efforts to halt her transfer to CTBTO, UNICEF had made it very clear that there would be no extension of the Agreement after 30 November 2013;

c. The Executive Director, UNICEF, is also responsible for the reassignment decision since until 30 November 2013, the Applicant was a UNICEF staff member and UNICEF was informed about the reassignment of the Applicant before that date. As such, UNICEF owed her a duty of good faith and fair dealing, including an obligation to protect and safeguard her rights and to comply with the Agreement. In this connection, it is

well-settled that the failure to act can constitute an administrative decision for the purpose of the Tribunal's competence;

d. Both CTBTO and UNICEF have admitted that the reassignment breached the Agreement. The consent of the three parties to the Agreement was required to amend its content; however, the Applicant never gave her consent to her reassignment, which amounted to an amendment of the Agreement, and UNICEF consent was not sought or obtained. UNICEF failed to act in accordance with the Agreement; its position that it had no knowledge of or responsibility for the reassignment is disingenuous. At the minimum, discovery should be allowed to proceed on this issue. It is reasonable to assume that there was contact between the two Organizations to address the Applicant's status; it was not the Applicant's duty to keep UNICEF apprised of the changes being contemplated by CTBTO, and, even if it were, it would not have been appropriate to do so from a hierarchical perspective. Yet, UNICEF had an opportunity to intervene after being informed by the Applicant's email of 22 November 2013, which remained unanswered. By not taking action, UNICEF became part of the breach of the Agreement;

e. The Respondent's argument that UNICEF failure to protect the Applicant is a separate decision and should have been subject to a separate request for management evaluation should be rejected. The Applicant's request for review was broad enough and encompassed the decision not to take action. In circumstances where it is not possible to clearly identify the administrative decision taken, since it is not in writing, and where it is implied in the written decision subject to the management evaluation itself, the burden of identifying the decision is satisfied;

f. In its reply to the Applicant's initial request for management evaluation, UNICEF denied responsibility for the decision and thus implicitly rejected the claim for a remedy. On 20 February 2014, the Applicant wrote to the Executive Director, UNICEF, requesting

compensation for breach of the Agreement, a request that was rejected by letter of 27 February 2014, although not expressly stated, inasmuch as it repealed any responsibility. Later, by letter of 4 April 2014, the Applicant requested management evaluation of this denial of compensation. Again, UNICEF denied any responsibility in its response dated 9 April 2014. UNICEF has refused to pay damages following an express demand. Despite the refusal of compensation, it is a live issue in the Applicant's first application, in abundance of caution, she filed a second and third application on the implicit and explicit decision not to pay damages for the breach of the Agreement;

g. On the Respondent's argument that her email of 22 November 2013 did not request any action from UNICEF, the Applicant should not be penalized for the failure of the Human Resources Department, UNICEF, to accept its responsibility to take action. Asserting that reacting to her email of 22 November 2013 would have made no difference is a speculative statement to cover up UNICEF lack of action;

h. She should not be made to pay legal fees for alleged abuse of process; she cannot be faulted for pursuing her remedies as diligently as possible from a recalcitrant Respondent;

i. She was *de facto* demoted from a post of high responsibility and prestige with concomitant duties to a type of floater position with no real duties and responsibilities. Her appointment as Chief, Internal Audit, was not extended. She could not accept the reassignment and was separated on 7 July 2014. Had she not been reassigned and the Agreement respected, she would have stayed for another two years with CTBTO, until the end of her tenure in 2016. The decision thus resulted in the loss of two years' salary, benefits and other emoluments. Moreover, she suffered a severe depression and was unable to return to service after mid-October 2013;

j. These cases are ripe for summary judgment, since there is no dispute on the facts. She requests a summary judgment in her favour, as well as an order to brief on the issue of damages.

23. The Respondent's principal contentions are:

a. The applications are moot. As a result of the internal appeals process that the Applicant initiated against her reassignment, CTBTO amended the effective date of the reassignment to 1 December 2013. Consequently, from UNICEF viewpoint, the Applicant was transferred to CTBTO in accordance with the Agreement without any objection from the Applicant—as she made no attempt to halt her inter-organization transfer prior to 1 December 2013 notwithstanding her reassignment—and, after the transfer, the Applicant was reassigned within CTBTO. This is not in the least a matter for UNICEF;

b. The applications are irreceivable, as the Executive Director, UNICEF, cannot be held accountable for the decision to reassign the Applicant within CTBTO. This decision was not taken on behalf of the Executive Director, UNICEF, or with his acquiescence. In this respect, the Applicant has challenged her reassignment through the appeals mechanism available under CTBTO Staff Regulations and Rules;

c. As for the implied decision not to intervene on the Applicant's reassignment, this was not the object of her request for management evaluation dated 20 December 2013. It is patent from the terms and title of that request that it was limited to her reassignment within CTBTO. UNICEF was not aware of the reassignment decision before 22 November 2013. The Applicant did not request a management evaluation of the alleged implied decision not to intervene in her reassignment within CTBTO and/or to protect her interests under the Agreement within the prescribed 60-day time limit;

d. The Applicant's claim that UNICEF failed to comply with an alleged obligation to intervene in her reassignment and to protect her interests is without identifiable merit. All the Applicant requested in her email of 22 November 2013 was whether UNICEF had been informed or consulted about her reassignment; she did not request any other action from UNICEF and she made no attempt to follow-up on this email until well after her inter-organization transfer. The Applicant's claim borders on the disingenuous, considering that she did not request any intervention or protection from UNICEF when she was temporarily reassigned within CTBTO in 2013, which, in her own line of argument, constituted a breach of the Agreement;

e. There is no act or omission on the part of UNICEF that can be construed as a breach of the Agreement. To this extent, her request for compensation is without identifiable merit;

f. Even on the hypothesis that UNICEF was under an obligation to take some action upon receipt of the Applicant's email, in view of the fact that the Applicant did not attempt to halt her inter-organization transfer it cannot be argued that she suffered any harm, never mind in the amount of two years net base salary;

g. The applications being moot, irreceivable and/or without identifiable merit, it is warranted to dismiss them by summary judgment;

h. The Applicant's decision to approach the Tribunal, in particular in view of the amendment of the effective date of her reassignment until after her inter-organization transfer, and her full awareness that her claims against UNICEF are moot prior to filing her applications, constitutes a manifest abuse of the Tribunal's proceedings. An award of costs against the Applicant under art. 10.6 of the Tribunal's Statute is thus warranted.

Consideration

Procedural issues

24. The three applications at bar are inextricably interrelated. For fairness and procedural economy, the Tribunal decided to examine them together and to adjudicate all three cases by one judgment.

25. Pursuant to art. 16. 1 of the Tribunal's Rules of Procedure, it is for the judge hearing a case to decide whether an oral hearing is appropriate. In each of the three cases, the Respondent requested a ruling by summary judgment and the Applicant, in turn, cross-moved for summary judgment. The foregoing shows that the parties saw no need for a hearing in the cases. With this in mind, and considering that there is no dispute as to the material facts, the Tribunal did not see any use in convening an oral hearing and decided to adjudicate the cases on the basis of the parties' written pleadings.

26. The initial decision from which the disputes presently before the Tribunal stem is the Applicant's permanent reassignment within CTBTO. As a matter of fact, the Applicant's reassignment is one of two decisions challenged in Case No. UNDT/GVA/2014/011.

27. This decision was exclusively made by CTBTO. Not only did UNICEF not intervene in any manner in the decision-making process, but, in fact, it has no bearing, in law or in practice, on the reassignment of any staff member within CTBTO. As such, the Applicant's reassignment within CTBTO falls beyond the Tribunal's jurisdiction, as clearly delimited by art. 2 of its Statute. Indeed, pursuant to sub-para. 1 of that article, the Tribunal is competent to hear and pass judgment on an application "against the Secretary-General as the Chief Administrative Officer of the United Nations". The reassignment having been decided, unilaterally, by CTBTO, the Applicant did not contest an administrative decision taken by the Secretary-General as the Chief Administrative Officer of the United Nations.

28. Additionally, under art. 2.5, of its Statute, the Tribunal's jurisdiction may extend to applications filed against a specialized agency or other international organizations or entities participating in the common system, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Dispute Tribunal.

29. CTBTO has not concluded any such agreement under the terms of art. 2.5 of the Tribunal's Statute. As a consequence, the Tribunal lacks competence to assess the legality of a decision emanating from CTBTO and, therefore, Case No. UNDT/GVA/2014/011 is irreceivable *ratione materiae* with regard to the reassignment decision (see *Espinosa* UNDT/2014/053).

Merits

30. The second decision contested in Case No. UNDT/GVA/2014/011 is UNICEF alleged failure to act to prevent the Applicant's reassignment, given that her change in duties—at least, as originally decided—run contrary to the terms of the Agreement.

31. Indeed, this “implied decision” may not have been submitted to management evaluation in a sufficiently clear way. However, considering that it is inseparably related to the Applicant's reassignment, for which she requested management evaluation, the Tribunal will enter into the merits to sustain the Applicant's interest.

32. The Applicant argues that this omission amounts to a breach of duty of good faith and fair dealings that UNICEF owes to its staff members.

33. This and the Appeals Tribunal have recognized that the Organization has an obligation to act fairly and in good faith with its staff and a duty of care concerning its employees (e.g., *Pirnea* 2013-UNAT-311; *Allen* UNDT/2010/009; *McKay* UNDT/2012/018, confirmed in *McKay* 2013-UNAT-287). In this connection, it is not disputed that, during her loan, the Applicant remained a staff member of UNICEF.

34. The Tribunal notes that the Applicant informed UNICEF of her reassignment only in the evening of Friday, 22 November 2013, although she had been formally notified about it on 29 October 2013, i.e., nearly a month earlier. Since the Agreement foresaw that the Applicant would cease being a UNICEF staff member as of 1 December 2013, this effectively barely left UNICEF five working days to react upon learning about the reassignment.

35. While the Applicant avers that UNICEF ought to have been in contact with CTBTO about her status and that, hence, it may be presumed to have been aware of her reassignment prior to her email dated 22 November 2013, there is nothing to support this assertion. Rather, it should be recalled that several months before her permanent reassignment within CTBTO, the Applicant had already been temporarily reassigned to new functions. This temporary reassignment, which appears just as much at odds with the Agreement, was effected with the Applicant's consent but without her or CTBTO informing UNICEF and seeking its consent. At the time, the Applicant, who was fully aware of the terms of her loan, did not contact UNICEF, and she ostensibly did not expect it to undertake any action in this respect.

36. In these circumstances, it stands that UNICEF only came to know about a potential breach of the Agreement a few days before its authority over the Applicant as a UNICEF staff member was to cease. This effectively deprived it from any meaningful opportunity to intervene.

37. In addition, the email the Applicant sent to the Division of Human Resources, UNICEF, on 22 November 2013, in no manner asked for help or protection. By that email, the Applicant simply enquired whether UNICEF had been consulted or informed about her permanent reassignment within CTBTO. The reader of that sparing message cannot be expected to conclude that the Applicant wished UNICEF to intervene, in her interest, vis-à-vis the CTBTO under the terms of the Agreement.

38. The duty of care, incumbent on the Organization, does not imply an obligation to take action within a matter of days when the concerned staff member

omitted to timely inform his/her employer; this is all the more true when the staff member has at no point requested his/her employer's assistance. By taking no action following the Applicant's email of 22 November 2013, UNICEF did therefore not breach its duty of care vis-à-vis the Applicant.

39. Thirdly, in her second and third applications (see paras 1.b and 1.c above), the Applicant challenges UNICEF refusal to pay compensation for its failure to oppose her reassignment. Having concluded that there was no breach by UNICEF of the Applicant's terms of appointment, the Tribunal finds that any request for compensation for such alleged breach is necessarily without merit.

40. Finally, the Respondent moved for the Applicant to be ordered payment of litigation costs under art. 10.6 of the Tribunal's Statute. The Tribunal does not find there to be a manifest abuse of the proceedings on the part of the Applicant warranting such a sanction. For the sake of the principles of good faith and due process of law granting access to justice (see *Balogun* 2012-UNAT-278), the Tribunal rejects the award of costs against the Applicant.

Conclusion

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

The applications are rejected.

(Signed)

Judge Thomas Laker

Dated this 10th day of December 2014

Entered in the Register on this 10th day of December 2014

(Signed)

René M. Vargas M., Registrar, Geneva