



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

COX

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:
Michael Shanahan

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Alister Cumming, ALS/OHRM

Introduction

1. The Applicant, a Fire Officer at the Security Section, United Nations Mission in the Republic of South Sudan (UNMISS), contests a decision dated 27 November 2013 described in his Application as the “restructuring of the department resulting in the removal of [his] assigned responsibilities and their subsequent transfer to (another staff member)”.

Procedural history

2. In Judgment No. UNDT/2015/096, the Tribunal found the Application dated 11 June 2014 was receivable.

3. In his Application, the Applicant requested that the Tribunal interview a named witness for further information regarding his claims. However, in his response dated 18 September 2015 to Order No. 287 (NBI/2015), the Applicant requested the Tribunal to decide the matter on the papers. The Respondent advised that the matter was amenable to being decided on the papers.

4. In a later joint response the Parties submitted facts agreed by both of them as well as facts submitted by the Applicant which are not accepted by the Respondent.

5. The Tribunal has examined all of the facts, both agreed and alleged and is of the view that the case may be decided on the papers without the need for an oral hearing.

Facts

6. While on a career break from the Greater Manchester Fire Service in the United Kingdom, the Applicant served as a United Nations Volunteer with the United Nations Mission in the Democratic Republic of Congo from 19 April 2006 to 30 June 2007. He was appointed as a Fire Service Officer with the United Nations Mission in Timor-Leste on 5 December 2007. On 9 November 2010, he was reassigned to the United Nations Mission in Sudan (UNMIS). Following the

closure of UNMIS on 9 July 2011, he joined UNMISS as a Fire Service Officer at the FS-6 level. His appointment was renewed on a number of occasions.

7. Prior to April 2012, the Fire Safety Unit (FSU) of UNMISS was organized as one unit. The Officer-in-Charge (OiC) of the Fire Safety Unit is a senior staff member who is responsible for managing the unit effectively but does not hold a substantive position. Fire Safety Officer, NF, was OiC until April 2012 when he was reassigned to Syria. Following NF's departure, the Applicant was appointed to FSU from the Mission's Aviation Section.

8. The Applicant says, but this is not accepted by the Respondent, that he was advised that he was to take charge of all functions across the Mission including Fire and Rescue. When MB, the staff member temporarily in charge, was informed of this decision he formally objected to it. A full comparative analysis undertaken between the Applicant and MB determined the Applicant to be the most experienced/best placed for the post however MB would not accept the decision.

9. In subsequent weeks, the Chief Security Advisor (CSA) instructed that the "Fire Function" be split into fire safety provision and fire and rescue options with MB taking the fire safety side. The Applicant was appointed OiC of the Operations Section and MB was appointed OiC of the Policy Section.

10. The Applicant believes that this split adversely affected the cohesive provision of either safety or response services and was contrary to any comparative analysis undertaken or indeed any consideration of workloads, prior performance, etc. He contends that MB continued to exert an adverse influence on progression of the "Fire Function" across the Mission.

11. The Applicant says, but it is not accepted by the Respondent, that after much debate and many requests for help, he eventually persuaded the Mission to re-recruit NF from Syria to provide him with support and assistance. In October 2013, NF returned to UNMISS.

12. On 20 November 2013, the Applicant left the Mission on emergency sick leave. On 26 November 2013, he sent an email to the Deputy Chief Security Advisor for Administration and Support, advising that he was ill and was being admitted to hospital. He has not returned to the Mission since.

13. On 26 November 2013, at a meeting of the international staff within the Unit, it was agreed that following NF's return, the Unit would be reintegrated under NF's leadership. NF was reappointed as OiC of the reintegrated unit and all international staff members were directed to report to him. NF was reappointed because of his expertise and seniority in grade, length of service in the Organization and experience in South Sudan. The decision was taken to re-integrate the unit for better service and operational delivery and to utilize scarce and highly specialized human resources appropriately in a decentralized mission. With the reintegration of the Unit, the roles of OiC Operations and OiC Policy which had been performed by the Applicant and MB, respectively, were abolished. NF became the sole OiC.

14. The Applicant's position did not change as a result of this decision. He was to continue to perform the same duties, although he was no longer required to perform the additional task of acting as the supervising officer of staff in the Operations Section of the Unit.

15. The CSA advised all staff in the Unit including the Applicant by a group email dated 27 November 2013.

Dear All,

I thank all for your inputs in the Fire Safety Unit meeting held yesterday. We are glad to note that the Fire Safety Unit staff want to work as one unit where both prevention and operations would fall under the same umbrella. We all concur that it is important for synergetic productivity and accurate/prompt response in any emergency situation. We highly commend all the good work done by [the Applicant] and the team in the recent past in upgrading the operational preparedness of the Fire Safety Unit under supervision of DCSA Ops/MW. We also highly appreciate prevention work done by MB with the help of AM.

As we all know NF is a welcome new addition to the Fire Safety team. To continue and build upon all this good work and

considering that NF is the senior most and highly experienced Fire Safety Officer in the team, the following restructuring is done with immediate effect:

1. Mr. NF will be the OiC of Fire Safety Unit effective immediately. The Fire Safety Unit will be working as one unit including operations and prevention wings. Thus, MB, [the Applicant], JI and IM and any new arrivals will report to NF in this one single unit.
2. All international staff members working in the Fire Safety Unit will thus report to NF as their FRO.
3. DCSA Operations RW will be the FRO of NF and he will be the SRO for all other international staff in the Fire Safety Unit.

Many thanks to all and let us continue with the good teamwork!

16. As the Applicant was on sick leave prior to the meeting he could not attend it and was not aware of the discussion.

17. The Applicant says, but this is not accepted by the Respondent, that on 27 November 2013 while he was on sick leave and three hours prior to his admission to hospital for acute medical treatment, he was advised via email that NF (recruited by him only weeks previously) was to assume control of the entire fire function with the Applicant and MB answering to him, effectively stripping the Applicant of all managerial responsibility. The Applicant received no prior notice of these changes and was not consulted. The decision was not based on the best interests of the Organization, but rather the result of a campaign orchestrated by MB stemming from his personal prejudice and bias against the Applicant. There was no other basis for the decision which spontaneously and improperly removed the Applicant's responsibilities, as none was provided, but the decision was patently motivated by MB's animosity against the Applicant, which ultimately affected the CSA's decision.

18. The Applicant further states, but this is not accepted by the Respondent, that following what he alleges to have been the procedurally and substantively irregular decision to remove him, he was released on sick leave and placed in an in-patient facility. This medical condition was directly attributable to the stress and unhealthy work environment that the Organization has fostered, which

culminated in the blatantly irregular administrative decision that failed to comport with obvious and simple procedures ensuring due process, and the need to prohibit personal prejudice and bias from influencing administrative decisions. This is also not accepted by the Respondent.

19. Following his departure from the Mission, the Applicant exhausted 195 days of sick leave entitlement at full pay on 15 April 2014. He was then placed on half sick leave and half annual leave, which was exhausted on 3 July 2014. Sick leave with half pay then continued until 12 November 2014, when the Applicant separated from service. He transitioned to new employment in December 2014.

Conclusions on material facts

20. Prior to April 2012, the FSU was a single unit with one OiC, NF. The position of OiC is not a substantive position. When NF left in April 2012, FSU was divided into two sections. The Applicant became OiC of the Operations Section and MB became OiC of the Policy Section.

21. The former OiC returned to the mission in October 2013.

22. On 20 November 2013, the Applicant left the Mission on emergency sick leave. He was hospitalised with a serious medical condition for which he has received ongoing treatment. He has not returned to the Mission and was separated on 12 November 2014.

23. The Administration met with the FSU staff members on 26 November 2013 and reached agreement on the restructuring of the unit. On 27 November 2013, the CSA announced to all staff the restructuring which combined the two existing wings under the leadership of one OiC with immediate effect.

24. These changes had the effect of restoring the status quo prior to April 2012.

25. The effects of the restructuring was to alter the reporting lines within the unit but otherwise had no impact on the duties or conditions of employment of the Applicant save that he no longer had managerial responsibilities.

Applicant's submissions

26. It is the Applicant's case that staff members of the United Nations have the unequivocal right to be notified of any proposed changes to their professional responsibilities before they are made and a right to be consulted regarding such changes.

27. Similar to the case of *Morsy* UNDT/2012/043, his core responsibilities were changed in a way that altered his working conditions and level of responsibility.

28. He was not notified of the proposed changes in advance, nor was he given the opportunity to provide input to the changes.

29. The decision was made in his absence, without any consultation, constituting a blatant managerial error.

30. No reasons were given for the decision. This alone can be enough to award damages.

31. The Applicant submits that the decision was improperly motivated. He describes these as personal prejudice, bias, and a pattern of harassment which led to a decision that was not in the best interests of the Organization. As such it was a flagrant abuse of power.

32. He submitted that the personal prejudice and bias were associated with MB who was threatened by the Applicant's role and jaded by the previous decision to split the managerial responsibilities.

33. MB's continuous inquiries and allegations influenced the decision by the CSA. There are no other valid reasons for the decision.

34. The substantive and procedural errors caused damage to the Applicant's health and career demanding appropriate remedies.

35. He requests reinstatement to his previous role and responsibilities or constructive return via compensation to the position he would have been in had he retained his professional responsibilities.

Respondent's Submissions

36. Staff members of the United Nations are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations.¹ The Secretary-General has broad discretion to reassign staff. In doing so he must act in good faith and the decision must not be tainted by improper motive.

37. The Administration has broad discretion to restructure and reorganize its services.

38. The burden is on the Applicant to show that the contested decision was improperly motivated. He has provided no evidence that the contested decision was driven by a colleague's prejudice and bias against him.

39. Reasons were provided by the CSA in the email of 27 November 2013.

40. Allegations of harassment should be raised under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The Applicant has not exhausted this internal remedy.

41. As to remedies, the Tribunal cannot order an investigation into the circumstances of the contested decision.

42. The Applicant produced no evidence of moral or other harm caused by the decision.

¹ Staff regulation 1.2(c).

43. There is no basis to award legal fees. There has been no manifest abuse of the proceeding before the UNDT.

Issues

44. Did the Administration breach any lawful obligation it had to the Applicant when it made the organizational changes in the Fire Safety Unit?

Considerations

45. Staff regulation 1.2(c) provides: “Staff members are subject to the authority of the Secretary-General and assignment by him or her to any activities or offices of the United Nations”.

46. In *Perez-Soto* 2013-UNAT-329, the United Nations Appeals Tribunal (Appeal Tribunal) stated that:

Staff Regulation 1.2(c) thus gives the Secretary-General broad discretionary powers when it comes to organization of work. It is well established that, notwithstanding the width of the discretion conferred by this Regulation, it is not unfettered and can be challenged on the basis that the decision was arbitrary or taken in violation of mandatory procedures or based on improper motives or bad faith.

47. The Applicant alleged that the decision was unlawful for three reasons: lack of consultation with him; lack of reasons for the decision; and improper motives.

Consultation

48. ST/SGB/274 (Procedures and terms of reference of the Staff-Management Consultation Machinery at the Departmental or office level) prescribes procedures and terms of reference of the staff management consultation machinery at the departmental level. In accordance with sec. 5, consultation should occur about issues or policies that affect the entire department or office or at least a significant number of staff in a particular unit or service of the department or office.

49. Sec. 5(c) provides that in cases where managerial decisions are taken that may have substantial implications on the career, welfare and working conditions of the staff in the department or office, the staff affected should be informed of any such changes in advance and provided an opportunity for consultations on such matters at the departmental or office level.

50. It was an agreed fact that the position of OiC of the FSU is not a substantive position. The Tribunal finds that the Applicant's position and core responsibilities did not change as a result of the decision to reintegrate the Unit into one. He was to continue to perform the same duties, albeit he was no longer required to perform the additional task of acting as the supervising officer of staff in the Operations Section of the Unit.

51. Although the impugned decision involved some changes for some staff members including the Applicant, these did not have substantial implications for the careers, welfare and working conditions of the staff. They were not reassigned or transferred. There were no alterations to their conditions of service.

52. The case of *Morsy* can be distinguished. In that case, the Tribunal found that the changes made to the applicant's functional and reporting arrangements significantly and adversely altered his working conditions and level of responsibility. In the present case the changes were not of the same magnitude and did not alter the Applicant's substantive position.

53. For these reasons the Administration was not strictly obliged under section 5(c) to inform the staff in advance and provide an opportunity for consultation but in spite of that the CSA consulted with staff present at the duty station.

54. As the Applicant was on medical leave at that time it was not possible for him to be included in the staff meeting. While this was undoubtedly a disappointment to him it was not in breach of any of the obligations of the Administration. As he did not return to the Mission to take up his functions again due to ill health he could not be said to have been adversely affected by the decision.

Reasons for the decision

55. The Applicant's allegation that no reasons were given for the decision is factually incorrect. The first paragraph of the 27 November 2013 email to all affected staff members stated that the restructuring was important for productivity and accurate/prompt response in any emergency situation. The choice of the new OiC was based on his seniority and experience.

56. There is no merit in this submission.

Improper motives

57. The Applicant alleges that the decision to remove his responsibilities was motivated by bias, prejudice and a pattern of harassment against him by one of his colleagues. The Applicant maintains that this colleague's behaviour affected the CSA's managerial decisions because there were no other valid reasons for the removal of his responsibilities.

58. In *Messinger* 2011-UNAT-123, the Appeals Tribunal held:

It is clear that the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute. However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of harassment. This is different from a *de novo* investigation into a complaint of harassment.

59. A staff member who claims that he or she is being harassed has the right to make a complaint formally or informally pursuant to ST/SGB/2008/5. The Applicant did not make any such complaint. In as much as the Applicant's Application can be interpreted to include a separate claim for harassment, the Tribunal finds that he did not exhaust his remedies under ST/SGB/2008/5 and that it lacks jurisdiction to make findings on these allegations.

60. In *Bye* UNDT/2009/083, this Tribunal held:

It has been UNAT's long lasting jurisprudence that anyone alleging harassment, prejudice, discrimination or any other extraneous factor or improper motivation of a particular decision, has the *onus probandi* of such an assertion (Cf. Judgments No.

554, Fagan (1992); No. 553, Abrah (1992); No. 312, Roberts (1983) and No. 428, Kumar (1988)). This is in fact in line with a well-known maxim of law that the party who alleges a fact bears in principle the burden of proving its veracity.

61. Thus the Applicant bears the burden of proving that the CSA's decision was ill motivated. The Applicant's allegations of ill motivation are specifically against a colleague who was OiC of the Policy Section and whose responsibilities were also affected by the restructuring decision. There is no evidence at all that the alleged animosity by that colleague towards the Applicant was shared by the CSA or that it improperly influenced her decision. In her memo she commended the good work by the Applicant. That memo also outlined a rational basis for the decision.

62. The Tribunal finds that the Applicant has not met the burden of proof to establish that the contested decision was improperly motivated.

Conclusions

63. None of the allegations in support of the unlawfulness of the decision to restructure the FSU have been made out. The Tribunal finds that the decision was a proper exercise of the Administration's discretionary powers conferred by staff regulation 1.2(c).

Judgment

64. The Application is dismissed in its entirety.

(Signed)

Judge Coral Shaw

Dated this 30th day of October 2015

Entered in the Register on this 30th day of October 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi