



Before: Judge Goolam Meeran

Registry: Geneva

Registrar: René M. Vargas M.

EL-KHOLY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Fabrizio Mastrogirolamo, UNDP

Notice: This Judgment has been corrected in accordance with art. 31 of the Rules of Procedure of the United Nations Dispute Tribunal

Introduction

1. On 27 April 2015, the Applicant filed an application by which she contests what she described as “the decision to reinstate the abolished post of Director, Oslo Governance Centre (“OGC”), and advertise it as a vacancy after having removed and replaced the Applicant on the pretext of reorganization”.

2. The Respondent filed his reply on 1 June 2015.

Facts

3. The Applicant joined the United Nations Development Programme (“UNDP”) in 1998, as Policy Advisor (P-4) in the Regional Bureau for Arab States, at the UNDP Headquarters in New York. After various assignments in several duty stations, she was promoted to the P-5 level on 1 July 2002, and to the D-1 level on 1 July 2005. She was granted a permanent appointment on 30 June 2009.

4. On 10 March 2012, following her selection, the Applicant took up the position of Director, OGC (D-1), Democratic Governance Group (“DGG”), Bureau for Development Policy (“BDP”), in Oslo, Norway.

5. The OGC was funded through the UNDP’s Governance Thematic Trust Fund (“DGTTF”). In November 2012, the Norwegian Government indicated that it planned to reduce core funding to UNDP, including funding to DGTTF, by USD3.5 million for 2013.

6. In July 2013, the Deputy Director, BDP, went to Norway to discuss the future of the OGC with the Norwegian Government. It seems that the Applicant was not involved in these and subsequent discussions on OGC with the host government. The Deputy Director, BDP, also acted as Director, BDP, since September 2013.

7. By email of 22 August 2013, the Deputy Director, BDP, informed the Applicant that structural changes within OGC were needed due to the “risk of a continued dearth of funding” for 2014, and that those changes would also affect the position of the Director, OGC.

8. By email dated 13 February 2014, the Deputy Director, BDP, informed the Applicant that BDP decided to abolish the position of Director of the OGC and that the decision “respond[ed] to the need to move forward into a year of transition where the current activities at the OGC [would] be phased out” and as the Applicant was aware “the decision [was] based on the need to urgently revitalize the partnership with Norway, the Donor of this project, and to develop a different programme for the Centre”.

9. By letter dated 20 February 2014, the Officer-in-Charge (“OIC”), Office of Human Resources (“OHR”), UNDP, informed the Applicant that the post of Director, OGC, would be abolished with effect from 31 March 2014. She was also informed that she would be put on “in-between assignment” status, and was encouraged to apply for vacancies at UNDP and other sister agencies. The letter further informed the Applicant that her three-month job search period would start that day and end on 31 May 2014. She was also told that she was not expected to report to work beyond 31 March 2014. Finally, the Applicant was advised of the options she would have should she not find a new assignment by the end of the three-month search period.

10. By email dated 26 February 2014 to the Director, OHR, UNDP, the Applicant raised her concerns about the implementation of the search period and her abrupt relocation from Oslo. She pointed out that no effort had been made to accommodate her reasonable expectation to remain in her current post as OGC Director throughout the entire three-month search period, until the end of May, and stressed that she would prefer to stay in Oslo until then, even if it meant that she would be on “unassigned status”. She identified a number of potentially suitable posts that would become vacant in the following months in Brussels and Geneva. She asked to be provided with more information on these and other suitable posts that would become vacant in Europe.

11. The Applicant left her post on 31 March 2014. As of 3 April 2014, she took up a one year temporary assignment as Senior Adviser to the Executive Coordinator and Deputy Executive Coordinator, United Nations Volunteers (“UNV”), financed by BDP.

12. On or about 1 April 2014, an Officer-in-Charge was assigned to OGC. His designation was changed to Director a.i.. The post of Director, OGC (D-1), was reflected in the new, undated, office organigram of UNDP.

13. On 12 May 2014, the Applicant wrote to the Assistant Administrator and Director, Bureau of Management (“BOM”), UNDP, requesting “a formal review of the manner in which the OGC and its staff were treated over the past months, as well as the process, treatment and rationale underlying the decision by BDP Management to abruptly abolish [her] post as Director, transfer [her] out of Oslo, and replace [her] with an OIC”.

14. On 8 June 2014 the Applicant filed a complaint of harassment and abuse of authority against the Deputy Director, BDP, to the UNDP Office of Audit and Investigations (“OAI”).

15. By letter dated 8 July 2014, the Deputy Director (Investigations), OAI, informed the Applicant that OAI had determined that the case did not amount to abuse of authority or harassment that would constitute misconduct, that an investigation was not warranted, and that the case had been closed.

16. On 16 July 2014, the Applicant sent a request for management evaluation of the decision to reinstate the post of Director, OGC (D-1), and to reinstate recruitment for it.

17. On 27 August 2014, the Assistant Administrator and Director, BOM, UNDP, responded to the Applicant’s request for management evaluation of 16 July 2014 stressing that further to the restructuring exercise of OGC, her post had been abolished, that it was anticipated that it would be replaced by a different function of Head of Research (D-1), that the job description for that post was yet to be determined—pending approval of the OGC project document and funding

commitments from Norway and other donors—and undertaking of a classification process. Hence, no recruitment process had been initiated. He further noted that any request with regard to the abolition of the post of Director, OGC, was time-barred.

18. On 7 November 2014, a vacancy announcement for a D-1 Director, OGC was issued. The classification of that position had been approved by OHR on 6 November 2014.

19. On 7 December 2014, the Applicant sent a new request for management evaluation against the decision to reinstate her previous post of Director, OGC, further to its alleged abolition earlier that year, in light of the publication of the above-mentioned vacancy announcement.

20. On 28 January the Assistant Administrator and Director, BOM, UNDP, responded to the Applicant's request for management evaluation of 7 December 2014, noting that the new post of Director, OGC, was substantially different from the post of Director, OGC, previously encumbered by the Applicant. He reiterated that her claim about that post having been reinstated was, thus, unfounded, and noted that she had elected not to apply for the new position.

21. On 12 February 2015, the Applicant was provided with written notification that since she remained without regular placement following the closure of the structural change job fairs, during which she had not competed for a position, her appointment would be terminated on 30 June 2015.

22. By letter of 9 April 2015, the Applicant informed the Assistant Administrator and Director, BOM, that she decided to accept the option of serving two out of the three months of termination notice, and to receive compensation in lieu of the remaining month of the notice period. Her appointment was terminated on 31 May 2015.

23. The Applicant filed this application on 27 April 2015, and the Respondent filed his reply on 1 June 2015.

24. Pursuant to directions made during a case management discussion held on 15 March 2016 and Order No. 50 (GVA/2016), the Applicant filed clarifications as to the precise administrative decision being challenged together with particulars thereof.

25. The Respondent filed his comments on the Applicant's submission on 28 March 2016, and asked the Tribunal to examine the receivability of the application as a preliminary matter.

Parties' submissions

26. The Applicant's principal contentions are:

- a. She is not contesting the decision to abolish her post, but contends that it was never truly abolished by 31 March 2014, and that it was merely a pretext to get rid of her;
- b. Time limits start to run from the date the staff member knew or should have known of the decision in question;
- c. Prior to the advertisement of the post of Director, OGC, on 7 November 2014, the Respondent had claimed that "no decision had been made to re-create the position of Director, OGC", although this was clearly untrue, since the OIC of the Centre had been given the title of Director, a.i. shortly after he arrived;
- d. The Applicant became aware of the contested decision only on 7 November 2014, when the vacancy announcement for the post in question was advertised. She requested management evaluation of the decision on 7 December 2015, and received a response on 28 January 2015;
- e. In cases of restructuring or abolishment of posts, the Organization is obliged to act conscientiously and fairly towards the affected staff;

f. Although the Tribunal cannot generally intervene in the exercise of discretion when it comes to the reorganization of offices, it can interfere in cases when “the Administration has manipulated the job description and posting and failed to apply the relevant Regulations and Rules in a fair and transparent manner”;

g. Her hasty replacement and abrupt removal as Director, OGC, by an OIC, was unfair and not transparent. She was given no reason why she was deemed unsuitable for the task of handling the transition, nor why she was totally excluded from discussions with the host government about the future of the Centre. She contends that the manner in which she was removed creates a presumption of irregularity;

h. While she objected verbally and in writing to the way she was treated, and since she presumed that the decision was based on valid budgetary or programmatic reasons, she did not initially contest the decision to abolish her post. The real motive behind the decision, that is, to remove her from the post, not to abolish it, became apparent only later;

i. The decision to abolish a post requires a number of steps. It cannot be an *ad hoc* decision that is implemented with immediate effect. As a permanent staff member, her rights under staff rule 9.6(e) were not respected and she was not afforded the opportunity to remain in her post during the three-month search period and the job matching exercise;

j. The new VA was never advertised internally, as per usual practice, but externally. It appears to have been tailor-made for a particular external candidate. A former P-5 Advisor of the OGC, who had resigned, was selected;

k. The Applicant was not invited to apply for the new D-1 post, and she knew that any attempt to do so would be futile; and

1. She requests the Tribunal to refer the issue of accountability to the UNDP Administrator. She seeks compensation for the material and moral damages she suffered as a direct consequence of an unlawful termination of her employment contract.

27. The Respondent's principal contentions are:

a. Although requested by the Tribunal to do so, by Order No. 50 (GVA/2016), on 23 March 2016, the Applicant failed to clarify the contested administrative decision;

b. The application is not receivable *ratione materiae*, since the decision to advertise the new post of Director, OGC, or the purported decision to "reinstate the abolished post" does not constitute an administrative decision under staff rule 11.2(a), as defined by the Appeals Tribunal, which endorsed the jurisprudence of the former Administrative Tribunal. The decision was one of general application to anyone who wished to apply, including the Applicant. It did not have direct legal consequences for the Applicant, who elected not to apply;

c. While the Applicant claims that she is not contesting the decision to abolish the post of Director, OGC, by impugning the decision to advertise the new post, she is in effect challenging the decision to abolish the post. However, since a challenge to that decision would be time-barred, this application is a "pretence to litigate a decision she failed to challenge in a timely manner previously";

d. The application is not receivable, *ratione temporis* because the decision to abolish the post of Director, OGC, was notified to the Applicant on 13 February 2014, by email from the Director, BDP, a.i.. She should have filed a request for management evaluation of that decision by 14 April 2014. However, the Applicant chose to contest "the decision to re-instate her position" on 16 July 2014;

e. The foregoing arguments on receivability notwithstanding, the D-1 position advertised in November 2014 was not the same as the one formerly encumbered by the Applicant, which was abolished following a valid exercise of managerial discretion, taken on the basis of serious funding constraints and the need to reconsider the OGC's mission in consultation with the Donor. The new position of Director, OGC, is different from the post previously encumbered by the Applicant; and

f. The application should be rejected as non-receivable and, in any event, as unsubstantiated and devoid of merit.

Consideration

Receivability

Contested administrative decision

28. In light of the broad terms used by the Applicant in her application, in which she identified the contested decision as “the decision to reinstate the abolished post of Director, [OGC], and advertise it as a vacancy after having removed and replaced the Applicant on the pretext of reorganization”, the Tribunal sought clarification from her with respect to the decisions she was contesting.

29. The Applicant informed the Tribunal that she was not contesting the decision to abolish the post she had encumbered, but rather the implied decision *not* to abolish her post, of which she became aware only upon the publication of the vacancy announcement.

30. In response to guidance given at the CMD and in Order No. 50 (GVA/2016), the Applicant failed to provide the necessary clarification of the contested decision that was described in rather confused terms in the application. The Tribunal agrees with the Respondent's submission that the reformulated claim does not provide the clarification requested.

31. It is an essential and inherent part of the duties of a Judge to clarify, interpret and comprehend what the claim is to “identify what is in fact being contested” (*Massabni 2012-UNAT-238*).

32. The Tribunal finds that by challenging the decision to advertise the post of Director, the Applicant is effectively trying to contest the decision to abolish the post she previously encumbered. A significant part of her arguments and submissions on the merits refer to the abolition of and her removal from the post of Director, OGC.

33. The decision to abolish the post of Director, OGC, and to remove her from that post was notified to the Applicant at the latest on 20 February 2014. The Tribunal noted that on 12 May 2014, the Applicant wrote to the Assistant Administrator and Director, BOM, UNDP, requesting a formal review “of the process, treatment and rationale underlying the decision by BDP Management to abruptly abolish [her] post as Director, transfer [her] out of Oslo, and replace [her] with an OIC”.

34. On 16 July and 7 December 2014 the Applicant filed two further requests for management evaluation, against the reinstatement/re-advertisement of the post she had previously encumbered. By failing to submit a request for management evaluation against the decision to abolish her post on or before 21 April 2014, the Applicant failed to comply with the statutory time limits, under staff rule 11.2(c).

35. The Applicant continues to sustain the argument that she did not initially contest the decision to abolish the post because she believed it to be a genuine restructuring exercise, and that it was only when she saw the advertisement on 7 November 2014, that she realised that the purported abolition of the post was used as a pretext to get rid of her, and that the post itself had not been abolished.

36. The Tribunal finds that this line of argument is inconsistent with the Applicant’s contention that she had been systematically excluded from the restructuring exercise of the OGC, and subject to arbitrary decision-making processes by senior management of BDP, since 2013. She sent several emails to senior managers within UNDP expressing her concerns about the manner in

which the restructuring was being carried out. These emails included the email of 26 February 2014 to the Chief, Office of Human Resources, UNDP, and the email of 10 April 2014 to the Administrator, UNDP, soon after she had been informed that the post of Director, OGC, was going to be abolished. Her concern about the restructuring process and the abolition of her post are also clearly set out in her request for review to the Assistant Administrator, dated 12 May 2014, which was time barred (cf. 33 above). These emails predate the advertisement of 7 November 2014. Taking them as a whole, the Tribunal is unable to accept the Applicant's submission that prior to the advertisement, she believed that the abolition of the post was a *bona fide* decision taken as a result of a genuine restructuring exercise.

37. In regard to the Applicant's contention that the advertisement of 7 November 2014 provided evidence in support of her belief that the restructuring was not a *bona fide* exercise, it would appear that the Applicant is confusing the date of notification of the decision to abolish her post with the evidence in support thereof. In any event, it is settled law that time limits do not begin to run anew simply because and when an Applicant is provided with a reasonable belief that there were grounds to request management evaluation of a decision that was notified at an earlier stage (cf. *Rahman* 2012-UNAT-260).

38. The Applicant failed to submit a timely request for management evaluation of the decision to abolish her post. Under art. 8, para. 3, of its Statute, the Tribunal is precluded from waiving time limits for management evaluation. It has no jurisdiction *ratione materiae* to consider this matter (cf. *Egglesfield* 2014-UNAT-402).

39. The Tribunal notes that on 12 May 2014, the Applicant submitted a timely request for management evaluation of the decision, taken on or about 1 April 2014, to replace the post of Director, OGC, by the appointment of an OIC. She did not submit a timely application in this respect, as required, under art. 8, para. 1(d)(i)(b) of the Tribunal's Statute. Without prejudice to the question whether the decision to appoint an OIC constitutes an administrative decision for the purpose of art. 2, para. 1(a) of the Tribunal's Statute, the Tribunal finds that an

application challenging this decision would, in any event, be not receivable, *ratione temporis*.

40. Finally, the Tribunal notes that the Applicant did file a timely request for management evaluation of the decision to reinstate the abolished post/to advertise it as a vacancy, or, of what she described as the implied decision *not* to abolish the post she had encumbered.

41. However, the Tribunal finds that that decision does not fulfil the requirements of the definition of an administrative decision, adopted by the Former United Nations Administrative Tribunal in Judgment No. 1157 *Andronov* (2003), and endorsed by the Appeals Tribunal (*Al Surkhi et al.*, 2013-UNAT-304):

There is no dispute as to what an “administrative decision” is. It is acceptable by all administrative law systems, that an “administrative decision” is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.

42. The decision to re-advertise the post, apart from apparently giving the Applicant reasons to believe that the justification for removing her from the post of Director, OGC—namely post abolition—was allegedly untrue, does not have direct legal consequences that did not already result from the decision of February 2014 to abolish the post she encumbered until 31 March 2014.

43. The decision, on 7 November 2014, to advertise the vacancy for Director, OGC, is not one taken in a precise individual case, but one of general application, in that it was addressed to all potential candidates for that post. The Tribunal notes that the Applicant chose not to apply for the vacancy.

44. In view of the foregoing, and insofar as the Applicant seeks relief in respect of the decision to reinstate the post previously encumbered by her, the application is not receivable, *ratione materiae*.

Judgment

45. It is the Judgment of the Tribunal that

The application fails and is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 13th day of April 2016

Entered in the Register on this 13th day of April 2016

(Signed)

René M. Vargas M., Registrar, Geneva