



Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AL-NAJADI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Roland Adjovi
Nicole Nyamai

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

INTRODUCTION

1. The Applicant is an Administrative Officer, at the FS-6 level, with the United Nations Interim Security Force for Abyei (UNISFA). He filed an application on 25 October 2016 contesting the decision to transfer him and the Outstation Management Unit (OMU) to the Joint Logistics Operation Centre (JLOC).

2. On 25 November 2016, the Respondent filed his reply.

THE CLAIM

3. The Applicant complains that he was subjected to a series of transfers the last of which was communicated to him on 17 April 2016 by Mr. Elijah Karambizi, the Chief of Mission Support (CMS), without any prior consultation and without providing any reasons.

4. As a consequence of what he regards as an unlawful transfer, the Applicant complains that his role as the Head of the entire OMU was eliminated and his occupational title was removed resulting in further loss of motivation and morale leading directly to physical stress and depression for which he received medical treatment which he is in a position to substantiate.

5. The Applicant submits that the transfers constituted harassment, that they were discriminatory and an abuse of authority.

6. Being moved on four occasions in a period of less than one year raised in the mind of the Applicant serious questions regarding the *bona fides* of the decision maker and whether the moves were based on Organisational needs and efficiency.

7. The move from an administrative department to a logistics function will have a negative impact on his career progression. The Applicant claims that he is not being provided with proper guidance and training and the lack of supervision will have a negative impact on his ability to perform functions which have not properly been defined.

8. The Applicant seeks the rescission of the contested decision and an Order that should it be considered necessary to move him from OMU to JLOC any such move should be within his functional title of Administrative Officer at the current level or one grade higher. He also seeks compensation for harm suffered both physically and mentally.

THE REPLY

9. The Respondent's primary contention, based on the jurisprudence of what constitutes an administrative decision, is that the application is not receivable *rationae materiae* in that this was not a unilateral decision taken by the Administration producing direct legal consequences for the Applicant.

10. The Respondent further submits that insofar as the Applicant contends that the decision constitutes an abuse of authority, harassment and discrimination, the Tribunal lacks competence to consider the claim since the Applicant was required to file any such complaint under the procedures in ST/SGB/2008/5 (Prohibition of Discrimination, Harassment, including Sexual Harassment, and Abuse of Authority).

11. If the Tribunal finds the application receivable, the Respondent submits that the decision to transfer the Applicant was lawful in that it was part of a genuine restructuring exercise which was carried out procedurally correctly and that it was not motivated by any ill will or other ulterior motive as alleged by the Applicant. The restructuring was a proper exercise of management's discretion to meet UNIFSA's operational needs and organisational priorities.

12. The Respondent denies the Applicant's allegation that the decision was taken without consultation asserting that the CMS consulted with the Chief, Service Delivery Services (SDS) and the Acting Head of Mission before the decision was made to move OMU. Further, the CMS met the Applicant and discussed OMU's move to JLOC.

13. The Respondent submits that the Applicant's contention that he cannot perform the functions of an Administrative Officer in JLOC is without merit given that his performance appraisals show that he has successfully performed similar

functions for two performance cycles receiving end of cycle ratings of "successfully meets expectations" for the period 2013 to 2015. Further that his primary functions as an Administrative Officer remain the same.

14. In response to the allegation of improper motive and abuse of power, the Respondent makes the point that the burden of proof lies with the Applicant and that he has provided no evidence in support of this allegation.

15. The Respondent's final point is that the Applicant's appointment had been renewed to 31st of June 2017 with his functional title, daily functions, grade and level remaining unchanged and that he is not entitled to the relief requested and that, in any event, he has not provided any evidence of harm.

FINDINGS OF FACT

16. On 22 November 2009, the Applicant joined the United Nations Mission in Sudan (UNMIS) as an Administrative Officer at the FS-6 level. On 1 August 2011, he was reassigned to UNIFSA with the same functional title.

17. On 17 April 2016, the CMS, UNISFA issued an inter-office memorandum (IOM) to all Service and Section Chiefs and Mission Support Component, informing them of the transfer of OMU from SDS to JLCO. This memorandum, insofar as it is relevant, reads as follows:

1. The purpose of this IOM is to inform you of the transfer of Outstation Unit from Service Delivery Services to Joint Logistics Operation Centre (JLOC).
2. In order to better and effectively provide the coordination of all support needed by all stations outside Abyei HQ and in order to minimize the layers of coordination, the outstation unit, previously located in the Service Delivery, will transfer to JLOC with immediate effect. Staff members working in outstation unit including the Sector Administrative Officers will report to Chief JLOC.
3. Please note that this arrangement will be regularized in the next Financial Year 2017/18 budget.

18. On 27 April 2016, the CMS met the Applicant to discuss OMU's move from SDS to JLCO.

19. By email dated 30 April 2016, the CMS informed the Applicant that he was expected to move to JLOC's office by 3 May 2016. The Applicant moved to JLCO on 3 May 2016.

20. On 14 June 2016, the Applicant requested management evaluation of the CMS's decision to transfer him and the entire OMU to the JLOC.

21. By letter dated 29 July 2016, the Under-Secretary-General for Management replied to the Applicant's request for management evaluation. The contested decision was upheld.

THE APPLICABLE LAW

22. Article 2.1 of the Dispute Tribunal's Statute provides that it shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of its statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of the alleged non-compliance [...]

23. In relation to the definition of an administrative decision, the former United Nations Administrative Tribunal (UNAdT) held in judgment No. 1157, *Andronov* (2003) as follows:

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 consequences¹.

24. The above-mentioned principle has been repeatedly reaffirmed by the United Nations Appeals Tribunal (“UNAT”) in several cases and most recently in *Smith* 2017-UNAT-768 which directed as follows:

As the Appeals Tribunal has often reiterated, for purposes of judicial review under the Dispute Tribunal’s Statute, the Dispute Tribunal is to apply the definition of administrative decision set forth in Andronov [...]

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 [...] (emphasis added)

18. The key characteristic of an administrative decision subject to judicial review is that the decision must “produce[] direct legal consequences” affecting a staff member’s terms and conditions of appointment; the administrative decision must “have a direct impact” on the terms of appointment or contract of employment of the individual staff member. Additionally, the Dispute Tribunal may consider “the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision”.

25. Staff regulation 1.2(c) provides for the Secretary-General’s authority to reassign staff members:

Staff members 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. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them.

26. In *Pacheco* 2013-UNAT-281, UNAT held that:

Both the Appeals Tribunal and the Administrative Tribunal of the International Labour Organization (ILOAT) have held that it is well settled jurisprudence that “an international organization necessarily has power to restructure some or all of its

¹ See also *Andati-Amwayi* 2010-UNAT-058; *Hamad* 2012-UNAT-269; *Al Surkhi et al.* 2013-UNAT-304; *Ngokeng* 2014-UNAT-460; *Gehr* 2014-UNAT-475; *Lee* 2014-UNAT-481; *Terragnolo* 2015-UNAT-517; *Reid* 2015-UNAT-563 and *Staedtler* 2015-UNAT-578.

departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff².

27. Similarly, in *Hersch* 2014-UNAT-433, the UNAT held that:

This Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members.

28. Regarding the allegations of improper motives, the UNAT held in *Azzouni* 2010-UNAT-081 that:

The UNDT correctly considered that it was Azzouni's responsibility to prove discrimination and other improper motives. This finding is supported by the longstanding jurisprudence of the former Administrative Tribunal that the burden of proving discrimination or improper motivation rests with the party making the allegation. Moreover, this finding is confirmed by several UNDT Judgments³.

CONSIDERATIONS

29. The issues for determination are:

a. Is the application receivable as a challenge to an administrative decision under article 2.1(a) applying the clear direction of the Appeals Tribunal in *Smith* 2017-UNAT-768 that administrative decisions are characterized by the fact that they are unilateral and of individual application?

b. If it is, does it succeed on its substantive merits and, if so, what is the relief to be awarded to the Applicant?

30. The documents on file are entirely consistent with the Administration properly exercising their discretion to restructure in order to meet UNIFSA's operational needs and organisational priorities. It is clear from the Tribunal's jurisprudence that the Organization has a right to carry out restructuring exercises

² See also *Gehr* 2012-UNAT-236.

³ See also *Jennings* 2013-UNAT-329; *Obdeijn* 2012-UNAT-201 and *Beqai* 2014-UNAT-434.

which are, in the judgement of the responsible officials, necessary and or desirable to meet the Organization's operational needs. In the absence of any evidence of impropriety, ulterior motive or arbitrariness, the Tribunal does not have power to interfere because to do so would in fact amount to the Tribunal usurping the functions of management of the Organization's financial and human resources.

31. The IOM of 17 April 2016 from Elijah Karambizi, CMS to all Service and Section Chiefs and Mission Support Component indicates that the decision was of a general kind pursuant to the restructuring and was not a decision of individual application to the detriment of the Applicant. Accordingly, the Tribunal finds that the application is not receivable *rationae materiae*.

32. In any event, the Applicant has provided no arguable case that the restructuring which resulted in his move to another position was motivated by abuse of power, ill will directed against his own interests or any other improper motive.

Judgment

The Application is dismissed.



Judge Goolam Meeran

Dated this 26th day of April 2018

Entered in the Register on this 26th day of April 2018



Abena Kwakye-Berko, Registrar, Nairobi