UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/050
Judgment No.: UNDT/2018/137
Date: 21 December 2018
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

GIZAW

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Esther Shamash, UNDP

Introduction

1. On 10 October 2016, the Applicant, a staff member appointed at the P-3 level, step 11, as a "Change Release and Testing Specialist" with the United Nations Development Programme ("UNDP"), filed an application contesting "the refusal to address and rectify the inconsistencies and duplication in the job descriptions and duties of Change Release and Testing Specialist [her post] and Quality Assurance Specialist". As a remedy, the Applicant requests that the contested decision be rescinded and that the Tribunal:

> … order the elaboration of proper job descriptions reflective of the division of labor presently in effect and to award [the Applicant] compensation for material and moral damages in the amount of two years' net base pay for the resulting damages to the Applicant's professional career and reputation, loss of opportunity for proper recognition of her role and for the stress and anxiety resulting from the hostile working environment that has been created.

2. The Respondent submits that the Applicant's application is not receivable because the contested decision, namely the refusal to amend the job description and functional title of the Applicant's colleague, is not an administrative decision subject to judicial review as it produces no direct legal consequences affecting the Applicant's terms and conditions of appointment. The Respondent further submits that the Applicant's claim is time-barred for her failure to request a management evaluation of the contested decision within the required time. The Respondent submits that the contested decision was notified on 14 October 2014 and yet the Applicant did not request management evaluation until 10 August 2016. The Respondent submits that while the Applicant sought reconsiderations of the original decision before filing a management evaluation, subsequent responses to the Applicant's requests for reconsideration confirming the original decision do not restart the time limits for initiating formal proceedings.

3. The Applicant responds that the contested decision affected her right to a properly classified post and personal grade level commensurate with the duties and

responsibilities expected of the staff member and the creation of a parallel job and the steps taken to sideline the Applicant constitute a *de facto* abolition of her post. The Applicant further responds that she received repeated assurances that the matter would be addressed, and the contested decision was the reversal of a stated course of action, which represents a new decision for the purposes of initiating a management evaluation and is not a mere reiteration of a prior decision.

Facts

4. The following outline of facts is based on the parties' submissions and the documentation on the record and only reflects those circumstances that are relevant to the issue of the receivability.

5. The Applicant joined UNDP on 1 July 1987 and has been performing the functions of Change Release and Testing Specialist since 1 June 2008.

6. On 12 August 2014, the Applicant received a notification from the Office of Human Resources ("OHR"), Bureau of Management ("BoM"), that her position was not affected by the then ongoing structural change process and thus her current position and the terms of her appointment remained unchanged.

7. On 1 October 2014, Mr. CH, the then Deputy Director of the Office of Information Services and Technology ("OIST") and the Applicant's supervisor, wrote an email to the Applicant, "[w]e will all be aware of the need to ensure that the new Quality Assurance [S]pecialist takes on tasks that are not redundant with tasks that are currently under control".

8. Two days later, on 3 October 2014, the Applicant wrote an email to Ms. SH, the then Director of OIST, seeking her urgent intervention to resolve this issue as her discussion with her supervisor did not result in a satisfactory response.

9. On 8 October 2014, Ms. SH responded to the Applicant that Mr. CH would continue to work with her on the clarification of the roles and responsibilities while UNDP was aligning the functions to make OIST fit for purpose.

10. On 13 October 2014, a meeting was held between the Applicant and Mr. CH regarding the duplication of job duties. According to the note provided by the Applicant, Mr. CH told the Applicant that the new Quality Assurance Specialist position, whose job description was cleared by OHR, would not be revised since the recruitment process was already completed. Mr. CH further told the Applicant that this position was to back up the Applicant in her absence and the Applicant was required to train the new Quality Assurance Specialist on quality assurance specialties so that the new Quality Assurance Specialist could have the Applicant's skill set. They further discussed the issue and the Applicant said that she did not understand the reason for the duplication of job duties except that she felt that she was subjected to an unfair situation due to her dark skin color. In the end, the Applicant was not satisfied with Mr. CH's response and told him that she would escalate the issue.

11. On the following day, via email, Mr. CH provided the Applicant with a summary of the meeting. On the same day, the Director Ms. SH wrote to the Deputy Director Mr. CH that "we needed and was originally cleared by [Mr. JW, the Assistant Administrator] to have [the Quality Assurance Specialist] position at a P5/P4 level. What happened in the process, that has led to [the Applicant]'s concerns on the duplication of effort? What steps have been taken to address these concerns?" Forwarding this email to the Applicant, Ms. SH wrote, "I will continue to follow up until we have an understanding on the matter".

12. On 24 October 2014, Ms. SH informed the Applicant that OIST did not have an option to adjust the job description after the post was offered and accepted by another staff member.

13. On 26 October 2014, the Applicant wrote an email to Ms. DG, the then Deputy Director of BoM, raising her concerns about the duplication of duties between her job and the Quality Assurance Specialist. The Applicant wrote that she was concerned that "this duplication of duties, if not formally corrected, may result in confusion, redundancy and subsequent position abolishment".

14. On 5 November 2014, the Applicant had a meeting with Ms. DG, which she followed up with an email dated 6 November 2014. In this email, the Applicant suggested that using a work plan to differentiate the two job descriptions' roles and responsibilities was a short-term solution. In her response on the same day, Ms. DG wrote that "[t]he purpose of having focused and well integrated work plans is to ensure proper division of labour, robust responsibilities and accountabilities lines, and functional and horizontal alignment. Therefore, in my humble opinion the duplication issue will be addressed by this measure".

15. On 1 December 2014, Ms. SH wrote an email to the Applicant:

> In pursuance of my message of 12 Nov, I wish to communicate to you the decision of the management regarding your concerns for the position of Quality Assurance Specialist in OIST.
>
> As previously conveyed to you in our meeting of 5 Nov, followed by your request of 06 Nov, this message provides a written documentation and confirmation of the management decision to use a work plan compact clearly outlining delineation of responsibilities and accountability lines between the positions of Quality Assurance Specialist and Change Release & Testing Specialist in order to avoid any possible overlap or duplication of functions. As such, please be assured that I will work closely with your supervisor in establishing this compact in consultation with all the concerned parties, and I sincerely hope that it will address your concerns and lead to a harmonious working arrangement within OIST.

16. On 23 February 2015, Mr. CH wrote an email as a follow-up to a meeting held on 19 February 2015 to discuss 2015 work plans, in which each team member's work plan bullet points were summarized.

17. On 1 March 2015, the Applicant sent an email to Ms. SH, copying Mr. CH, claiming that "[Mr. CH] refused to finalize the two 2015 work plans as recommended by management on 5th November 2014 to address [her] concern of duplication of job descriptions … [Mr. CH] informed [her] that [Ms. SH] also agreed with this approach of not proceeding with the 5th November 2014 recommendation".

18. On 2 March 2015, in response, Mr. CH wrote that since he was "not aware of the 5th November commitment/recommendation" and did not know its parameters, he could not fulfil the requirement. He then wrote that "the key priorities for the two P3 positions, which cover very different activities, show that there is no unwanted duplication or redundancy between those two workplans".

19. On 20 March 2015, Ms. SH wrote that the two work plans at issue were distinct and separate. On the same day, the Applicant responded acknowledging that the two 2015 work plans were distinct and separate, and requesting that OHR make necessary adjustments to the job descriptions as the purpose of a work plan is different from that of a job description.

20. On 14 July 2015, the Applicant was notified that after the BoM Phase II realignment process, her post remained unchanged.

21. On 23 July 2015, the Applicant wrote to Ms. RK of OHR requesting to confirm, as per her request of March 2015, that the duplication of job duties has been permanently addressed by removing the activities listed under her job description from the job description of the Quality Assurance Specialist position.

22. On 27 October 2015, Ms. RK of OHR wrote to the Applicant that she escalated the issue to Ms. MHL, the Director of OHR, who would speak to Mr. CH.

23. On 21 December 2015, the Applicant met with Mr. JW, the Assistant Administrator, to discuss the issue.

24. On 20 January 2016, Ms. PM, the Chief of Directorate of Bureau for Management Services ("BMS"), wrote an email to the management consulting team within OHR, as follows (emphasis omitted):

> Having heard the views of the staff member and management of the office, all parties have agreed that there is overlap in the [job description]s. From what we understand the intention in the second [job description] (Quality Assurance) which is a new post was to develop a profile that that is aligned more to portfolio management given that the first [job description] (Change Release and Testing) is aligned to the change, release and testing function. [The Applicant] has also requested that the title of her position be changed to Quality Assurance Specialist. We are confident that both questions can be resolved amicably.
>
> The request from all parties, including our office/ is therefore for you to review and support alignment of both [job description]s in this context based on existing classification rules and processes. We have also noted that the [job description]s are not consistent with the standards implemented during the structural change process and would be grateful of this alignment is also undertaken and completed.
>
> Grateful of the drafts could be shared with us by 28 January 2016 for review and endorsement before finalization and sign off.

25. According to the Respondent, on 29 January 2016, the management consulting team advised that a revision of the job descriptions was not warranted as there were sufficient distinctions between two job descriptions.

26. On 9 February 2016, the Applicant followed up with Ms. PM, and on 16 February 2016, Ms. PM responded that her case was "being worked on" and they would revert back to her within the next two weeks.

27. On 1 March 2016, the Applicant wrote to Mr. JW regarding this matter as follows:

> As you all know, I have requested and have been waiting for the correction of the duplicate Quality Assurance job description for more than 17 months. Last year, a patch was applied using a 2015 Annual Workplan, and that was also completed on 31 January 2016. After the

> discussion I had with you last December 2015 regarding this case, three deadlines passed to give resolution, and now I don't even know where the case stands.

28. On 7-8 March 2016, the Applicant exchanged emails with a project manager regarding her role in the Yammer Project implementation. Specifically, she questioned why there was a second quality assurance role when there is one project quality assurance role under Prince II standard, the role which she performed.

29. On 23 March 2016, Ms. PM responded to the Applicant stating that this matter had been assigned to another person.

30. On 28 June 2016, in response to another follow-up by the Applicant, Ms. PM wrote that "progress is being made towards resolution and we should have a response by end of the week".

31. On 19 July 2016, in response to another follow-up by the Applicant, Ms. PM wrote that "we request your indulgence in finalizing the case as it involves a second staff member as well".

32. The Applicant received the letter of 28 July 2016 from Mr. BM, the Director of Office of Operations, Legal and Technology Services, BMS, on 2 August 2016:

> Multiple reviews of the two Job Descriptions, the "Change Release and Testing Specialist" [job description] and the "Quality Assurance Specialist" [job description], have determined that both Job Descriptions describe activities and duties that are appropriate and necessary. Both positions are currently encumbered, and the staff in the positions fill duties and roles that are currently needed by OIMT. It is the management conclusion that the two Job Descriptions will remain and are not in need of revision. More specifically, neither the title nor the text of the "Quality Assurance Specialist" will be changed.

33. On 10 August 2016, the Applicant submitted her request for management evaluation, and on 8 September 2016, the management evaluation was issued. The management evaluation found the Applicant's request not receivable as the challenged decision has no direct legal consequences affecting her terms and

conditions of appointment in that she is not entitled to challenge the title or functions of a position which she does not encumber. It further found her request not receivable as time-barred, as the final decision on this matter was made either on 23 October 2014 or 5 November 2014, at the latest, and the Organization's efforts in trying to resolve this matter informally, upon her multiple requests for reconsideration thereafter, do not reset the statutory deadline for the filing of a request for management evaluation. On the merits, the management evaluation found that the decision not to change the job description and title of the Quality Assurance Specialist was a valid exercise of managerial discretion.

Procedural background

34. On 10 October 2016, the Applicant filed the present application.

35. On 10 November 2016, the Respondent filed a reply stating, *inter alia*, that the application is not receivable as the contested decision is not an administrative decision subject to judicial review and in any case the application is time-barred. In the alternative, the Respondent states that the application is without merit.

36. On 21 November 2016, the Applicant filed a motion to admit additional evidence, seeking to admit an affirmation by the President of the UNDP/UNFPA/UNOPS and UN Women Staff Council, which the Applicant asserted relates to receivability of the application.

37. On 9 December 2016, pursuant to Order No. 268 (NY/2016), the Respondent filed a response to the Applicant's motion of 21 November 2016 requesting that the Tribunal dismiss the motion.

38. On 5 June 2017, the Applicant filed a motion for interim measures pursuant to art. 10.2 of the Dispute Tribunal's Statute and art. 14 of its Rules of Procedure, requesting:

> […] the Tribunal to suspend action on the proposal to exclude her name as the official responsible for Project Quality Assurance from

> the recent Project Initiation Document ["PID"] and subsequent PIDs, by removing attribution for her contribution and the organization's established project management methodology in accordance with the established PRINCE 2 methodology. Her supervisor, […] took this measure on the grounds that 1) the Applicant had filed a case with the Tribunal, and 2) to avoid duplication and confusion of tasks. It is thus directly tied to her pending application and prejudges the outcome.

39. On 8 June 2017, the Respondent filed his response arguing that the motion was not receivable, *inter alia*, on the grounds that the decision was not the subject of substantive proceedings before the Tribunal. Furthermore, if the Tribunal determined that the motion was receivable, it was without merit.

40. On 13 June 2017, by Order No. 151 (NY/2017), the Tribunal granted the Applicant's motion for interim measures and suspended the contested decision, namely the "[r]ejection of the Applicant's request for proper recognition of her project quality assurance responsibilities in present and future [PIDs] contrary to the Organization's project management standard […]", pending the Dispute Tribunal's proceedings.

41. On 17 August 2017, the Respondent filed a "Motion for Expedited Review" stating that, in the interests of justice and to avoid irreparable harm to the Organization and to the incumbent of the Quality Assurance Specialist post, a non-party to the proceedings, the Dispute Tribunal should proceed with an expedited review of the case.

42. On 22 August 2017, the Applicant filed a motion requesting leave to comment on the Respondent's motion for expedited review and, "in the interests of economy", provided her comments as part of the motion. The Applicant's submission addressed in large part the factual assertions underlying the Respondent's motion, highlighting developments recent at the time.

43. On 1 November 2017, by Order No. 244 (NY/2017), the Tribunal instructed the parties to participate in a Case Management Discussion ("CMD") set for 8 November 2017. On the following day, the Respondent filed a motion for extension

of time, and on 7 November 2017, by Order No. 249 (NY/2017), the Tribunal granted the Respondent's motion for postponement of the CMD.

44. On 9 November 2017, the Applicant filed a motion requesting leave to submit additional documentation "relevant to the Applicant's situation and to address some of the issues surrounding the Tribunal's Order on interim measures and related matters". The Applicant stated that the additional documentation "concerns actions taken with respect to past and ongoing projects and quality assurance issues raised in recent official documentation" and was relevant to some of the Respondent's contentions, and would facilitate an expedited hearing of the issues.

45. On 14 November 2017, by Order No. 253 (NY/2017), the Tribunal granted the Applicant's motion to file additional relevant documentation and submissions on the relevance of each of the documents submitted by 27 November 2017, without prejudice to the Tribunal's final determination of the relevancy thereof. The Tribunal directed the Respondent to file a reasoned response and objections, if any, to the Applicant's submission by 18 December 2017.

46. On 21 November 2017, the Tribunal was notified of a change of Counsel for the Respondent.

47. On 22 November 2017, pursuant to Order No. 253 (NY/2017), the Applicant filed her submission on additional evidence, in which she reiterated, *inter alia,* the Respondent's failure to implement the Tribunal's order in good faith, and expressed her concern that she may not be fairly credited for her work and achievements in quality assurance for the reporting period up to December 2017.

48. On 18 December 2017, pursuant to Order No. 253 (NY/2017), the Respondent filed his response to the Applicant's submission, addressing in large part the factual assertions, rationale, and underlying basis for the current application of functions and designations.

49. On 29 January 2018, by Order No. 20 (NY/2018), the Tribunal instructed the parties to attend a CMD on 13 February 2018, which was rescheduled to 23 February 2018.

50. On 23 February 2018, the Tribunal conducted the scheduled CMD in the court room in New York, at which the Applicant, her Counsel, and the Respondent's Counsel participated in person. On the same day, by Order No. 44 (NY/2018), the Tribunal instructed the parties to file a jointly signed submission by 2 March 2018 indicating whether the parties agreed to attempt informal resolution, and, if so, whether the parties required a suspension of the proceedings.

51. On 1 March 2018, the parties filed a joint submission pursuant to Order No. 44 (NY/2018) informing the Tribunal that "[d]espite consultations, the parties have not agreed to engage in amicable discussion. The parties are consequently not in a position to request suspension of the proceedings". In the joint submission, the parties made additional submissions, respectively, concerning the Respondent's compliance with the Tribunal's Order No. 151 (NY/2017).

52. On 19 March 2018, the Respondent filed a "Request for Clarification of Order No. 151 (NY/2018) on Interim Measures", requesting interpretation of the scope of the said order, pursuant to art. 30 of the Tribunal's Rules of Procedure.

53. On 21 March 2018, pursuant to Order No. 62 (NY/2018), the Tribunal granted the Applicant's motion to submit comments to the Respondent's motion for clarification of Order No. 151 (NY/2017).

54. On 2 April 2018, the Applicant filed comments on the Respondent's motion for clarification of Order No. 151 (NY/2017), submitting *inter alia* "that the Respondent's [m]otion should be rejected in its entirety. Coming as it does, nine months after the Order in question was issued, the Respondent's request is not germane and appears contrived merely to create confusion and to avoid proper compliance with the Order". The Applicant further advised the Tribunal that "as of 2 April 2018, in order to address the impact of the negative working environment, she

will temporarily report to a different supervisor while continuing her same responsibilities. It appears that the proposed functional review exercise that has been envisaged for UNDP over the next few months may help to clarify further the issues raised in the Application as well as in the Respondent's [m]otion".

55. On 4 April 2018, the Respondent filed a "Request to Respond to the Applicant's Comments".

56. On 26 April 2018, by Order No. 90 (NY/2018), the Tribunal ordered the parties to inform the Tribunal as to the progress of the efforts for informal resolution of the case, including the outcome of the proposed functional review exercise within UNDP and its impact on the Applicant's case, if any, by 18 June 2018.

57. On 18 June 2018, the parties filed a joint submission pursuant to Order No. 90 (NY/2018) informing the Tribunal, *inter alia*, that the parties had not been able to engage further in informal settlement discussions. In the joint submission, each party set out their further comments regarding the Respondent's compliance with Order 151 (NY/2017) concerning the format of the PIDs and the Respondent confirmed that "the functional review is currently ongoing and will not be completed before September".

58. On 20 June 2018, the Applicant filed a motion for leave to submit additional documentation.

59. On 1 August 2018, by Order No. 152 (NY/2018), the Tribunal instructed the parties to attend a CMD on 28 August 2018, on which date the Tribunal conducted the scheduled CMD, at which the Applicant, her Counsel, and the Respondent's Counsel participated in person.

60. On 29 August 2018, by Order No. 166 (NY/2018), the Tribunal instructed the Applicant to file the additional submission and documentation, including submissions on the relevance of each of the documents submitted, without prejudice to the Tribunal's final determination of the relevancy and admission into evidence thereof,

by 31 August 2018, and instructed the Respondent to file a reasoned response and objections if any, to the Applicant's submission, by 7 September 2018.

61. On 31 August 2018, pursuant to Order No. 166 (NY/2018), the Applicant filed her submission on additional evidence, in which the Applicant reiterated, *inter alia*, that the Respondent had failed to implement the Tribunal's Order No. 151 (NY/2017) in relation to two PIDs released in December 2017 and four recently issued PIDs and that the quality assurance role was removed from the Applicant's performance management documents, which was intended to accomplish indirectly what the Tribunal's interim measures order had prohibited directly.

62. On 7 September 2018, pursuant to Order No. 166 (NY/2018), the Respondent filed his response to the Applicant's submission, stating, *inter alia*, that Order No. 151 (NY/2017) is not applicable to four documents referenced by the Applicant since three PIDs were approved before the issuance of Order No. 151 (NY/2017) and the fourth document is not a PID but a Quality Manual and hence outside the scope of Order No. 151 (NY/2017). Regarding the other two PIDs referenced by the Applicant, the Respondent submitted that they are simplified PIDs used for small and medium scale projects and do not include a list of roles and responsibilities. The Respondent further submitted that the performance management documents do not fall under the ambit of Order No. 151 (NY/2017).

63. On 11 September 2018, the Applicant submitted a motion to submit comments on the Respondent's submission disputing the Respondent's factual assertions.

64. On 17 September 2018, the Respondent asked the Tribunal to allow the Respondent to submit its own comments should the Tribunal decide to grant the Applicant's Motion dated 11 September 2018.

Applicant's submissions

65. The Applicant's principal contentions may be summarized as follows:

a. The management evaluation found the Applicant's claim not receivable on the grounds that a staff member has no right to question another staff member's job description, but the failure to clarify work assignments within the context of an office work plan and in apparent contradiction with formal job descriptions has direct legal consequences for the Applicant. The creation of a parallel job and the steps taken to sideline the Applicant constitute a *de facto* abolition of her post, without any of the procedures or protections associated with such an undertaking. This lack of transparency contradicts the underlying duty of fair treatment inherent in all contracts of employment;

b. Staff regulation 2.1 states that "[i]n conformity with principles laid down by the General Assembly, the Secretary-General shall make appropriate provision for the classification for posts and staff according to the nature of the duties and responsibilities required". The right to a properly classified post and personal grade level commensurate with the duties and responsibilities expected of the staff member is an essential element of equitable and fair treatment. The Appeals Tribunal in *Aly et al.* 2016-UNAT-622 has recognized,

> 41. The classification system is promulgated under the Staff Regulations and Rules and is part of the conditions of employment for all staff members as the rules are incorporated by reference into all United Nations employment contracts.
>
> 42. In reliance on Staff Regulation 2.1, the former United Nations Administrative Tribunal ["UNAdT"] consistently held that the classification of posts of staff members is part of their conditions of service, and classification of a post is to be done according to its job description, and failure to regularize the discrepancy between the level of classification and an

> employee's functions is a breach or a violation of a staff member's rights;

c. The right to a job description that accurately reflects the duties and responsibilities expected is an essential element in the proper classification of posts and people. It is self-evident that job descriptions should reflect reality and aim to distinguish between functions and responsibilities of staff as they also serve to regularize and rationalize the working environment. Furthermore, the job description is presently of particular importance in UNDP as it was used to determine job matching in the latest round of retrenchment, which is expected to be repeated in the near future;

d. The gravamen of the Applicant's claim revolves around the exploitation of her services by in effect giving credit for her professional accomplishments to another staff member who is performing separate and distinct functions, which are not properly described in her job title or job description. The only possible reason for not wanting to rectify this anomaly is an ulterior motive, as it has the potential of being used to terminate her services in the event of another restructuring. Since the Applicant's performance cannot be faulted and she occupies a unique post, the creation of a false equivalent serves no rational purpose. An examination of the facts underlying her position demonstrates a pattern of abuse of authority, exploitation and discriminatory treatment that supports this conclusion;

e. UNAdT expressed concern on a number of occasions with surreptitious manipulations aimed at replacing long serving staff. In UNAdT Judgment No. 879, *Karmel* (1998), at para. V, it observed, "the manipulations to which the Applicant was subject are becoming a habit in the [United Nations] Administration. The Tribunal notes that by this simple device, some staff are dismissed and others are placed in their stead" and labeled it "an elementary exercise in deviousness". The UNAdT also declared, "creating another post to be assigned to a staff member performing the same functions

clearly constitutes misuse of procedure" (UNAdT Judgment No. 1072, *Chuteaux* (2002), at para. VIII);

f. The second basis for challenging receivability is *ratione temporis*. This is based on a lack of understanding of the long pattern of delay and prevarication by the Respondent in handling this matter including an abrupt change in official position. The Applicant should not be held responsible for the malfeasance and procrastination of the Respondent, which has been marked by repeated assurances that the matter would be addressed, only to be followed by refusals to follow through on commitments to achieve a fair and just settlement;

g. It is clear from the correspondence from Ms. PM, the Chief of Directorate, BMS, that the Bureau had decided in January 2016 that "all parties have agreed that there is overlap in the [job descriptions]" and that a decision had been taken to "review and support alignment of both [job descriptions] in this context based on existing classification rules and processes". Yet in July 2016, there was a complete about-face. Early that month the Applicant was advised by Ms. PM that a new job description had been developed for the Quality Assurance Specialist position, but that the implementation of the new job description had failed. It was later argued in the management evaluation that the matter had been referred to a management consulting team which came to the conclusion it was not needed. There is no classification expertise on the management consulting team and no such decision was communicated at the time. A short time later, the Applicant received the contested decision from Mr. BM stating that nothing was going to be changed. This was the first statement in writing setting forth that position;

h. This reversal of a stated course of action represents a new decision for the purposes of initiating a management evaluation and is not a mere reiteration of a prior decision. Any other interpretation would render

prejudicial all efforts at settling cases amicably by precluding a further review. As the Appeals Tribunal held in *Fiala* 2015-UNAT-516 at para. 40,

> What was relayed to her was not a mere restatement of the position which was adopted by the Administration in its communications of 28 September 2006 and 28 September 2007, but rather the fruits of the review undertaken in 2009. We are fortified in this conclusion by the contents of a draft unsigned facsimile of 27 February 2009 from FPD/DFS where reference is made to a "careful review" having been carried out pursuant to MONUC's request of 22 February 2009. Thus, there was no re-setting of the deadline for challenging the May 2006 decision, as contended by the Secretary-General.

Respondent's submissions

66. The Respondent's principal contentions may be summarized as follows:

The contested decision is not an administrative decision subject to judicial review

a. First, the contested decision is not an administrative decision subject to judicial review since the refusal to amend the job description and functional title of the Applicant's colleague produces no direct legal consequences affecting the Applicant's terms and conditions of appointment;

b. For the purposes of art. 2.1 (a) of the Dispute Tribunal's Statute, it is not sufficient for the Applicant to merely establish that there was an administrative decision with which she disagrees. To have standing before the Tribunal, the Applicant must show that a contested administrative decision applies in an individual case and affects her legal rights (*Li* UNDT/2014/56, para. 27). As the Appeals Tribunal has consistently held, an appealable administrative decision is a unilateral decision taken by the administration in a precise individual case (an individual administrative act), which produces direct legal consequences (UNAdT Judgment No. 1157, *Andronov* (2003); *Al Surkhi* 2013-UNAT-304; *Lee* 2014-UNAT-481, para. 48);

c. The Applicant encumbers a properly classified post with a personal grade commensurate with the duties and responsibilities she performs, in accordance with staff regulation 2.1. As far as the Applicant's rights are concerned, appropriate provisions were made for the classification of her post according to the nature of her duties and responsibilities. The Applicant has not received notification of a decision to terminate her appointment or to abolish her post;

d. By requesting the amendment of her colleague's functional title and job description because she perceives the duties set out therein as "duplicative", the Applicant seeks to arrogate to herself rights over her colleagues' terms of appointment. No such rights exist in the Staff Regulations and Rules. Regardless of whether or not there are potential or actual duplicative duties between the two job descriptions, this duplication produces no direct legal consequences on the Applicant's rights;

e. The Applicant claims that the contested decision has direct legal consequences on her rights because of the failure to clarify work assignments within the context of an office work plan, which she alleges is in apparent contradiction with the job descriptions. She claims in her application that the creation of a "parallel" job and the steps taken to sideline her constitute a *de facto* abolition of her post;

f. The Respondent submits that the email communications of February and March 2015 show that work assignments for the Quality Assurance Specialist and the Applicant's position were clarified in the respective work plan. Further, there has been no *de facto* abolition of the Applicant's post, which she still encumbers;

g. Consequently, the contested decision does not have any direct legal consequences on the Applicant's terms and conditions of appointment. As

there is no administrative decision subject to judicial review under staff rule 11.2 (a), the application is not receivable;

The Applicant failed to request a management evaluation of the contested decision within the required time

h. The Applicant was notified of the decision she contests—the refusal to grant her request to amend the title and job description of the Quality Assurance Specialist position—through the response of the then Deputy Director of OIST on 14 October 2014 following his meeting with the Applicant. As indicated, the Applicant was notified by the then Deputy Director of the decision to deny her request on 14 October 2014. The decision of 14 October 2014 denying the Applicant's request clearly stated that this was due to the fact that "1. The title of the position is defined in the [Structural Change] BoM Organogramme; 2. The [job description], including the job title, has been approved (classified) by OHR; 3. The position, using the current job title and [job description], was recently competed via the [Structural Change] Job Fair, and the position was offered and accepted less than two weeks ago". The Applicant acknowledged receipt of this decision in her email of 20 October 2014 to the then Director of OIST and expressed her disagreement with this decision. Accordingly, the Applicant should have filed a request for management evaluation by 13 December 2014. The Applicant did not request management evaluation until 10 August 2016;

i. Under staff rule 11.2(c), a request for management evaluation shall not be receivable unless it is requested within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. Further, under art. 8.3 of the Dispute Tribunal's Statute, the Dispute Tribunal does not have authority to suspend or waive the deadlines for management evaluation (*Costa* 2010-UNAT-036) and the time limits to formally contest the decision are to be strictly enforced (*Diab* 2015-UNAT-495). Further, the Appeals Tribunal has consistently held that the reiteration

of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines; rather time starts to run from the date on which the original decision was made (*Staedtler* 2015-UNAT-546). As the Appeals Tribunal has recognized, subsequent responses to a staff member's requests for reconsideration simply confirm the original decision and do not have the effect of suspending or re-starting the time limits for initiating formal proceedings (*Cremades* 2012-UNAT-271);

j. In this regard, notwithstanding the fact that she had received a decision from the then Deputy Director of OIST on 14 October 2014, the Applicant requested that the then Director of OIST also provide her with a decision on the matter. In response, the then Director of OIST reiterated, on 24 October 2014, the decision of the then Deputy Director that it was not possible to amend the job description and title of the Quality Assurance Specialist position. The Applicant acknowledged receipt of this email on 26 October 2014. Even if the Dispute Tribunal were to consider that the Applicant was notified of the decision on 24 October 2014, a request for management evaluation should have been filed by 23 December 2014. The Applicant nonetheless failed to file a request for management evaluation;

k. As indicated, the Applicant pursued the matter with the then Deputy Assistant Administrator and Deputy Director of BoM who confirmed on 6 November 2014 the management's decision to use the work plan. Even though the Applicant attempted to characterize the resolution of her concerns through using the work plans as "short-term", she was clearly informed by the then Deputy Assistant Administrator and Deputy Director of BoM that the use of the work plans was the solution decided upon and not an interim measure. Even if the decision of 6 November 2014 of the then Deputy Assistant Administrator and Deputy Director of BoM is to be considered the decision

on the matter, the Applicant was obligated to file a request for management evaluation by 5 January 2015 at the latest, which she failed to do;

l. In fact, following the email of 1 December 2014 sent by the then Director of OIST, the Applicant, as indicated, confirmed her agreement in emails with the decision to use the work plan in her emails on 23 February 2015 and 1 March 2015. Notwithstanding this agreement, it appears she thereafter changed her mind and reverted to her previous claim that the work plan was a short-term solution by appealing to OHR to remove the purported duplication in job descriptions. She then sought the same at the Directorate, BMS. On 28 July 2016, she received the notification of the Director, Office of Operations, Legal and Technology Services, BMS, which she now contests. While the Respondent does not question the right of the Applicant to change her mind as to whether she agreed that the solution resolved her grievances, doing so clearly does not reset the statutory deadline for the filing of requests for management evaluation;

m. The fact that the Administration repeatedly engaged with the Applicant to resolve her grievances only speaks to the commitment of the Organization to try to resolve matters and should not be considered as resetting the administrative decision. Allowing the messages of management reiterating the decision to reset the administrative decision would enable staff member to keep the same administrative decision alive by seeking resolution of the matter through successive layers of management. To conclude otherwise would have significant consequences for the efforts of management to address grievances and a chilling effect on informal resolution of staff member's grievances, informal resolution being in accordance with the General Assembly resolution 63/253 (Administration of Justice at the United Nations);

n. While the Applicant relies on *Fiala* 2015-UNAT-2016 to contend that the letter of Director, Office of Operations, Legal and Technology Services,

BMS was the "first statement in writing setting forth that position", this contention is, at best, misleading. The circumstances of the present case are entirely distinguishable from the situation in *Fiala* as there was, in that case, production of new substantive evidence. The Applicant was presented with the same decision for the same reasons repeatedly from October 2014. Upon being notified on 14 October 2014 that her request was dismissed, the Applicant failed to pursue the procedure available under the Staff Rules to seek redress, but rather sought to raise the issue to higher management. While the Respondent does not object to the Applicant's efforts to resolve matters informally, the Applicant accepted, then rejected, the solution proposed. The 28 July 2016 letter simply reiterated the management's decision that was unequivocally communicated to the Applicant in writing via emails on 14 October 2014 and thereafter confirmed on 24 October 2014, 6 November 2014 and 1 December 2014;

o. Consequently, the Applicant's request of 10 August 2016 for management evaluation of the refusal to grant her request was filed more than 18 months after the statutory deadline and is time-barred.

Consideration

Scope of the case and the definition of the impugned administrative decisions identified by the Applicant

67. In this case, the Respondent claims that the application is not receivable as the contested decision, namely the refusal to amend the job description and functional title of the Applicant's colleague, is not an administrative decision subject to judicial review as it produces no direct legal consequences affecting the Applicant's terms and conditions of appointment.

68. The Tribunal notes that, in her application, the Applicant identifies the contested administrative decision as "the refusal to address and rectify the

inconsistencies and duplication in the job descriptions and duties of Change Release and Testing Specialist [her post] and Quality Assurance Specialist". The Applicant claims that "[t]he creation of a parallel job and the steps taken to sideline the Applicant constitute a *de facto* abolition of her post, without any of the procedures or protections associated with such an undertaking". The Applicant further submits that "[t]he gravamen of the Applicant's claim revolves around the exploitation of her services by in effect giving credit for her professional accomplishments to another staff member who is performing separate and distinct functions". As a remedy, the Applicant asks the Tribunal to order the elaboration of proper job descriptions reflective of the division of labour presently in effect and to award her compensation.

69. When deciding on the scope of the case, the Tribunal is not limited to the parties' own identification and definition of the contested administrative decision(s) and may, based on the submissions, seek to identify the subject(s) of judicial review by itself. See, for instance, the Appeals Tribunal in *Fasanella* 2017-UNAT-765, para. 20, where it stated:

> ... Thus, the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review. As such, the Dispute Tribunal may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed.

70. This issue of duplication of job functions was first raised in August 2014, when the Applicant was notified that there was no change in her functions and her position was not affected by restructuring. According to the Applicant, in the same month, a vacancy was announced for a newly created position of the Quality Assurance Specialist, and the Applicant noticed that "the primary functions of her own position were duplicated in the newly created Quality Assurance Specialist position". The Applicant raised her concerns regarding duplication in the job descriptions of her post and that of a newly created post and attempted to rectify this issue through various channels before filing the present application with this Tribunal.

71. The Respondent claims that issues relating to the job description of the Quality Assurance Specialist only concern her colleague's terms of appointment and the Applicant has no right to challenge such. However, a close review of the Applicant's claims shows that the Applicant contests the inconsistencies and duplications in the job descriptions and duties between her job description and her colleague's job description because it allegedly affected her individual rights adversely. Specifically, she claims that the contested decision, by attributing the Applicant's job functions and duties to her colleague in the latter's job description, affected her rights to have a job description that accurately reflects her responsibilities and accomplishments. The Applicant claims that her colleague's job description gave credit for her professional accomplishments to her colleague, who performs separate and distinct functions, and the contested decision sidelined and marginalized her in the office. The Tribunal notes that the Applicant joined UNDP in July 1987 and has been performing the functions of Change Release and Testing Specialist since 1 June 2008. It is of some significance that the quality assurance role has been removed from the Applicant's performance management documents. Surely, this has impacted on the Applicant's terms and conditions.

72. If the Applicant's allegations are found to be substantiated, it may follow that the Applicant was deprived of her functions in violation of the Organization's rules, such as rules governing classification and/or realignment, especially considering that the Applicant was officially notified twice that there was no change to her functions and her post and yet she submits that her functions were in fact changed in a way that her primary and defining functions were shifted to her colleague. While staff regulation 1.2(c) gives the Secretary-General broad discretionary powers when it comes to organization of work, 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 (*Pérez-Soto* 2013-UNAT-329, para. 29).

73. When a staff member alleges, as the Applicant does in this case, that the contested decision is not in compliance with his or her contract of employment, the

Tribunal is competent to hear and decide the case under its Statute. Therefore, the Tribunal finds that the contested decision is an administrative decision subject to judicial review.

74. The Tribunal observes that the Applicant cites two cases, *Karmel* and *Chuteaux*, *supra*, where UNAdT found, *inter alia*, that there had been manipulations in the processes of redeployment and abolishment of posts of long serving staff members, whilst creating similar parallel posts, which were then occupied by other staff members performing the same functions. Whilst the Applicant's post has not been abolished in this instance, she appears to suggest that the pattern of events and the manner in which the Administration has dealt with her case, and the overlapping of functions may result in this eventuality in the foreseeable future. Any submissions in this regard are of course a matter for the merits.

Did the Applicant fail to file a request for management evaluation within 60 days from receiving the contested decision?

75. Staff rule 11.2(c) provides that "[a] request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested".

76. The issue in this case is when the Applicant was notified of the contested decision and whether her request for management evaluation was filed timely.

77. The Appeals Tribunal held in *Kazazi* 2015-UNAT-557, at para. 28, that the date of an administrative decision is determined based on objective elements that both parties can accurately determine. It is well established that the reiteration of an original administrative decision, if repeatedly questioned by a staff member, does not reset the clock with respect to statutory timelines (see *Staedtler* 2015-UNAT-546, para. 46). However, an unambiguous re-examination by the Administration of an earlier decision would give rise to a new and separate administrative decision (see *Fiala* 2015-UNAT-516, para. 40; *Abu Malluh et al.* 2016-UNAT-690, para. 47).

78. The Respondent submits that the Applicant was notified of the contested decision on 14 October 2014, and the same decision was merely reiterated and confirmed on 24 October 2014, 6 November 2014, 1 December 2014, and 28 July 2016. Thus, the Respondent submits that the Applicant's request for management evaluation on 10 August 2016 was filed more than 18 months after the statutory deadline and is therefore time-barred.

79. The Applicant, on the other hand, submits that in January 2016 she was notified that the Administration was to review and align both job descriptions based on existing classification rules and processes, but in July 2016, a previous decision was reversed and a new decision was made.

80. To determine when the Applicant received notification of the contested decision, the Administration's messages communicated to the Applicant over time need to be closely examined.

81. The Respondent claims that the email of 14 October 2014 should be considered the notification of the contested decision. On 14 October 2014, Mr. CH, the Applicant's supervisor and the then Deputy Director of OIST, sent an email summarizing their meeting on the previous day, during which he told the Applicant that a job description of the Quality Assurance Specialist position would not be revised. On the same day, however, Ms. SH, the then Director of OIST, noted that the Quality Assurance Specialist position was originally cleared at the P-4/P-5 level and questioned what led to the Applicant's concerns on the duplication of job functions, and told the Applicant that she would continue to follow up on this matter. Considering this email from Ms. SH which clearly stated that she would follow up on this matter, Mr. CH's email of 14 October 2014 cannot be considered a clear and definitive administrative decision.

82. The next communication at issue is the email of 24 October 2014, in which Ms. SH informed the Applicant that the job description of the Quality Assurance Specialist could not be adjusted since the post was offered and accepted by another

staff member. This communication seems to be a clear and definitive notification of the administrative decision not to amend the Quality Assurance Specialist's job description. The question then is whether the Administration subsequently made a new and separate decision by unambiguously re-examining a prior decision.

83. On 5 November 2014, the Administration and the Applicant agreed to use work plans to define and distinguish responsibilities between the two jobs, and subsequent communications show that parties were working toward this goal. However, on 20 March 2015, the Applicant again requested that necessary adjustments be made to the job descriptions, and several communications between the Administration and the Applicant followed.

84. On 20 January 2016, Ms. PM, the Chief of Directorate of BMS requested the management consulting team of OHR to "review and support alignment of both [job descriptions] based on existing classification rules and processes", noting that "there is overlap" in the job descriptions and the job descriptions are "not consistent with the standards implemented during the structural change process". This communication is clearly not a reiteration of an earlier decision. Rather, this communication shows that the Administration acknowledged the issues concerning job descriptions in question and re-examined a prior decision that the job description could not be adjusted.

85. While the Respondent submits that on 29 January 2016 the management consulting team advised that a revision of the job descriptions was not warranted, there is no evidence that this decision was communicated to the Applicant. Instead, the February 2016 communications show that Ms. PM advised the Applicant that this matter was still under review. In subsequent follow-up communications between March and July 2016, the Applicant was told that this case was being finalized and progress was being made towards resolution.

86. On 28 July 2016, contrary to earlier communications between January and July 2016, the Applicant was notified that after multiple reviews of the two job descriptions, it was decided that the two job descriptions would not be revised.

87. Considering the Administration's intervening decision to re-examine an earlier decision, as clearly shown in the 29 January 2016 email, it cannot be said that the 28 July 2016 communication is a mere reiteration of an original administrative decision. It follows from the foregoing that the Applicant only received notification of the final and unambiguous administrative decision on 28 July 2016. Therefore, the request for management evaluation on 10 August 2016 is not time-barred and the application is receivable.

Conclusion

88. In view of the foregoing, the Tribunal finds that the application is receivable.

(*Signed*)

Judge Ebrahim-Carstens

Dated this 21st day of December 2018

Entered in the Register on this 21st day of December 2018

(*Signed*)

Nerea Suero Fontecha, Registrar, New York