



Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BHARATY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Julia Lee, OSLA

Counsel for the Respondent:

Nusrat Chagtai, ALS/OHRM

Introduction

1. At the time of this application, the Applicant was an Associate HIV/AIDS Officer with the United Nations Interim Force in Lebanon (UNIFIL). She served on a fixed term appointment and was based in Naqoura.

Procedural History

2. On 19 July 2017, the Applicant filed an application challenging the Respondent's decision to not renew her contract.

3. The Respondent filed his reply to the application on 21 August 2017.

4. On 4 September 2018, the Tribunal issued Order No. 130 (NBO/2018) setting this matter down for a case management discussion (CMD).

5. The CMD took place, as scheduled, on 19 September 2018. Following the discussion, the parties were given deadlines within which to file a Motion for Disclosure and response thereto.

6. The Applicant filed the subject motion on 21 September 2018.

7. The Respondent replied to this motion on 28 September 2018.

8. On 19 October 2018, the Tribunal issued Order No. 161 (NBI/2018) which decided the Applicant's Motion for Disclosure which, in part reminded the parties that this Tribunal is awaiting their responses to paragraph 5(ii) of Order No. 130 (NBI/2018) on whether they are amenable to the adjudication of this matter on the basis of their written submissions.

9. On 22 October 2018, the Respondent filed a "Response to Order No. 161 (NBI/2018) wherein he stated that he "believes that the matter can be decided on the basis of the Parties' written submissions without an oral hearing."

Issues

10. The issues in this case are as follows:
 - a. Does the Secretary-General have the duty and authority to laterally reassign or take appropriate measures to protect the employment rights of a staff member who has been declared *persona non grata* (PNG) by a host Government?
 - b. If so, is the Secretary-General required to reassign the Applicant notwithstanding that she served on a fixed term appointment limited to a single mission – UNIFIL?
 - c. Did the Applicant have a legitimate expectancy of the renewal of her appointment?

Facts

11. The Applicant is a trained physician, specifically, a gynecologist. She joined the United Nations in 1 July 2008. Since then she has been on successive fixed-term appointments, at one year intervals, the most recent of which was 1 July 2016 to 30 June 2017 at the P-2 level, as Associate HIV/Aids Officer with UNIFIL in Naqoura, Lebanon.

12. On 25 November 2016, the Lebanese Armed Forces (LAF) informed the UNIFIL Head of Mission (HoM) that the Applicant had engaged in activities and made statements that did not “conform to the nature of her job in UNIFIL.” The LAF suggested that UNIFIL terminate the Applicant’s tenure in UNIFIL and stated that she could be exposed to hardships if her actions were leaked to citizens living in her neighborhood or cause resentment from her Lebanese and foreign colleagues.

13. On 29 November 2016, the Deputy Chief Security Officer (DCSO) and another security officer visited the Applicant at her residence to inform her of the LAF

allegations against her. The Applicant stated that she was unaware of the allegations. The DCSO reported back to the HoM and the Director of Mission Support the same evening, advising them that there was no immediate danger to the staff member.

14. On 11 December 2016, without warning, Drazenka Vujanovic, UNIFIL Special Investigations Unit (SIU) and the DSCO visited the Applicant at her apartment in the evening. They told her there was a complaint against her regarding pictures she posted on Facebook and statements that she made that Israelis are better than Lebanese. They asked if she had noticed any suspicious activity around her residence, to which she replied in the negative.

15. On 13 December 2016, the Applicant received an email from Mr. Vujanovic inviting her to an interview the next day, as a part of a “fact finding investigation in regard to the allegations made by LAF” (Lebanese Armed Forces). The email did not indicate whether the Applicant was a subject or witness. The Applicant submitted to an interview the following day, regarding her trip to Israel.

16. The Applicant had previously been authorized to participate in HIV training in Jerusalem in March 2016. Subsequently, in May/June 2016, the Applicant undertook training in Mizra with the Galilee Management Institute, entitled “Post Graduation in HIV/AIDS and Infectious Disease Management.”

17. SIU asked the Applicant about the trip, pictures she took, her Facebook account, and whether she would suspect anyone who would make a complaint against her.

18. In early February 2017, the Director of Protocol for the Lebanon Ministry of Foreign Affairs called a meeting during which he informed the UNIFIL Deputy HoM that the Ministry of Foreign Affairs had prepared a *note verbale* (not appended to the documentation submitted to the Tribunal) declaring the Applicant PNG and demanded her departure in a week. On 7 February 2017, the UNIFIL Chief Human Resources Officer (CHRO), Chief Security Officer and senior management in the Political Affairs

section met with the Applicant to apprise her of the most recent communication with the Lebanese government and to discuss associated risks and possible solutions.

19. On 7 February 2017, Dr. Bharaty was called to a meeting with the Chief of Security Alberto Gomez Castro, Deputy Head of Mission/Chief Department of Political Affairs Imran Riza, Chief of Social Affairs Albagir Adam, and CHRO Christine Botejue-Kyle. The Applicant was told that there was a security threat against her and that she needed to leave the mission by the weekend (three days later). Initially, she was told to go home and use annual or home leave.

20. The Applicant immediately wrote all concerned with specific follow-up questions, to which she did not receive any direct replies.

21. After not hearing anything for three days, the Applicant requested a meeting with Major General Michael Beary, the Force Commander and Head of Mission of UNIFIL, with whom she met on 10 February 2017.

22. Also on 10 February 2017, the DCSO provided an updated security assessment that there was a risk to the Applicant's safety and security and that she should leave the mission given the Lebanese authorities continued scrutiny of her actions, the potential risk to her personal security, and the government's intention to expel her from the country.

23. On 12 February 2017, the Applicant received a memo from the Force Commander. The memo indicated that the security situation with regard to the Applicant had "disimproved" and that it had "arranged for [her] departure." The Applicant was placed on a temporary duty assignment (TDY) to the UN Office to the African Union (UNOAU) in Addis Ababa, effective 13 February. The memo also advised that UNIFIL was continuing to work on her case and that they were consulting with the relevant offices in HQ NY.

24. The same day the Applicant was given in hard copy, another memo, dated 11 February from UNIFIL CHRO Christine Botejue-Kyle, which confirmed her TDY and point of contact upon arrival.

25. The Applicant departed Lebanon on 13 February 2017. The Applicant submits that she was asked to leave the mission, like a criminal, being forced to return her United Nations identification card and UNIFIL badge, as well as all equipment.

26. On 28 February 2017, the Applicant participated in a conference call with a panel of UNIFIL management comprised of: DMS Wolfgang Weiszegger, Wanda Carter (Conduct and Discipline Officer), Stephen Talugende (Chief HIV/Aids Unit), Colonel Bergin (Chief of Special Staff from Force Commander's Officer), Liljana Ivetic (Staff Counsellor) and Blerim Hoxha (Human Resources Officer).

27. After several weeks of the Applicant's requests and follow-ups, UNFIL provided her with written minutes of this telephone meeting.

28. During this meeting, she was told that the allegations against her were found not to be misconduct, but UNIFIL was still actively assessing the threat level against her. The HR Officer advised that UNIFIL was still liaising with the Field Personnel Division (FPD) regarding job openings and roster possibilities.

29. In May, the Applicant's TDY with UNOAU was extended.

30. On 22 May, the Applicant received a memo from UNIFIL dated 19 May, which stated that her fixed-term contract would not be renewed. The memo reiterated the Applicant's PNG status in Lebanon, and that it could not reassign her because she was not on a regularized post, nor had she been previously rostered.

31. On 2 June 2017, the Applicant requested management evaluation of the contested decision.

32. On 23 June 2017, the Applicant received the evaluation letter from the Management Evaluation Unit (MEU), which upheld the contested decision. The MEU

found that UNIFIL had fulfilled its duty of care to follow up with the Lebanese authorities as to the reason for its decision and that because the Applicant's appointment was limited to UNIFIL, it was justified in not renewing her because her expulsion meant she was no longer able to fulfil her duties.

33. At the time of this application, the Applicant was awaiting confirmation that her appointment would be extended for the purpose of utilizing sick leave entitlements. She was awaiting travel for medical evacuation purposes.

34. Prior to the expiration of her appointment on 30 June 2017, the Applicant requested and was granted certified sick leave. Accordingly, the Applicant's appointment was extended pursuant to ST/AI/2013/1, Administration of fixed term appointments, articles 4.19 and 4.10, solely to enable her to utilize her sick leave entitlements.

Submissions

Applicant

35. It is the Applicant's case that but for having been declared *persona non grata*, an extension of her appointment with the Mission was "virtually guaranteed." The Respondent cannot properly punish the Applicant for actions which were outside of her control and which do not constitute misconduct. The Respondent could and should have continued with her temporary deployment or reassigned her to a different mission or office.

36. It is not enough for the Mission to have engaged with the Lebanese authorities and reacted on the basis of the host country's position that the Applicant's posts on Facebook were "biased to the enemy Israel."

37. The Applicant's travel to Israel was for official training. Having established that, the host country's objections to the Applicant cannot be construed as misconduct for

the purposes of the United Nations. The Respondent had the duty to ensure that the terms and conditions of her employment with it are not altered.

Respondent

38. The impugned decision was lawful. The Applicant had no legitimate expectation of renewal of her appointment. UNIFIL was not obliged to renew the Applicant's appointment and made no express promise to do so.

39. The Applicant's appointment expired on 30 June 2017. It has been extended only to allow the Applicant to utilize her accrued sick leave entitlements whilst on certified sick leave.

40. There is no exception to staff rule 4.13(c) in cases where staff members are declared PNG. It was lawful and reasonable for UNIFIL to decide not to renew the Applicant's appointment where the host country would not permit the Applicant's presence in Lebanon to perform her duties under the contract.

41. The Organization was not required to reassign the Applicant to another position as the Applicant claims. The Organization fulfilled its obligation to provide the Applicant work at the same grade and level of her appointment for the term of her appointment. The Applicant has not been competitively selected for a generic or position specific job opening pursuant to ST/AI/2010/3. For that reason, her appointment remained limited to UNIFIL. To reassign her to a position outside the normal competitive selection process would not only exceed any contractual obligation of the Organization, but would also be patently unfair to other staff members who have or must compete for vacant positions during a time of downsizing in the Department of Peacekeeping Operations.

Considerations

Does the Secretary-General have the duty and authority to laterally reassign or take appropriate measures to protect the employment rights of a staff member who has been declared persona non grata by a host Government?

42. Staff Regulation 1.2 states: “(c) 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...”

43. Absent lawful reassignment, staff members have not only the duty but the right to work in the post for which they were hired: 2010-UNDT-172 (*Lauritzen*) at para. 69, aff’d 2013-UNAT-282 at para. 42. (See also *Applicant v. Secretary-General*, UNDT/2011/187, at para. 27).

44. In *Lahoud* UNDT/2017/009, para. 51, the UNDT stated

...the United Nations Appeals Tribunal has consistently affirmed that the reassignment of staff members’ functions comes within the broad discretion of the Organization to use its resources and personnel as it deems appropriate and that such decisions may be set aside on limited grounds. (*Gehr* 2012-UNAT-236; *Kamunyi* 2012-UNAT-194; *Allen* 2011-UNAT-187; *Kaddoura* 2011-UNAT-151; *Hepworth* 2015-UNAT-503, *Rees* 2012-UNAT-266).” On a general note, in the seminal case of *Sanwidi* 2010-UNAT-084, UNAT stated:

When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored

and irrelevant matters considered, and also examine whether the decision is absurd or perverse.”

45. The situation of a staff member declared PNG was the issue in the case *Hassouna vs. the Secretary General*, UNDT/2014/094. The Tribunal discussed the predicament of the staff member and the duty of the Organization as follows:

49. It is within the sovereign prerogative of a State to ask that a foreigner leave its soil. Although one would expect such a decision to be taken judiciously, this may not always be the case. When a staff member is asked to leave the territory of a host country, the Secretary-General would normally ask for reasons or request that the decision be reversed. In the case of the Applicant, the Secretary-General did this. When that approach failed to yield results, there was not much else that the Secretary-General could do. He could not, of course, return the staff member to a duty station located in the territory of a host country that is hostile to that staff member.

50. Under these circumstances, what then is the duty of the United Nations towards a staff member who has been declared *persona non grata*? Specifically, what were the duties of the United Nations in respect of the Applicant?

51. Non-renewal or renewal on adverse terms and conditions is an option open to the Secretary-General depending on the circumstances surrounding the PNG decision by the host country. In some cases, staff members are declared *persona non grata* for overstepping their TORs (Terms of Reference) and the mandate of the mission. Where the host country provides the information requested and the SG decides, pursuant to section 20 of the Convention, that the staff member acted outside his/her official capacity, non-renewal is an option. However in the case of a staff member who has been declared *persona non grata* and the host country is not forthcoming with information as to the basis for his/her expulsion or the reasons, if any, do not justify a PNG decision, other considerations may apply. Under these circumstances, a change in the terms and conditions of the staff member’s contract or *non-renewal is not an option open to the Secretary-General*. The Tribunal takes the view that under such circumstances it is the duty of the Organization to take steps to alleviate the predicament in which the staff member finds himself/herself following his/her expulsion from the host country.

52. In the present matter, the Secretary-General cannot plead frustration of the contract by force majeure and so use the conduct of a third party to exempt him from his obligations towards the Applicant.

53. The Tribunal finds that the Applicant should properly have been given a one year extension in Entebbe so that he would have been entitled to the benefits and entitlements that ordinarily accompany such a contract. While the Secretary-General has wide discretion as to where he deploys the Applicant, it would have been prudent to ensure that such redeployment did not adversely affect him. (emphasis added)

46. In this case, the Applicant has been declared *persona non grata* by Lebanon (or they intend to do so, as referenced in the 19 May memo). However, UNFIL has found that she has committed no misconduct, and in the 19 May memo only refer to asking the host State about the basis for the PNG status. They have not communicated to the Applicant any result, nor declared that she acted outside of her authority:

Non-renewal of your fixed term appointment with UNIFIL

1. I am writing to notify you that regretfully, in the absence of any positive outcome before 30 June 2017, your fixed-term appointment limited to service with UNIFIL as Associate HIV/AIDS Officer (P-2), will not be renewed upon its expiration.

2. You will recall that following the request made by the host government to remove you from the country, a security report determined that the risk for your safety and security was potentially “high to very high”. Thanks to the Mission’s intense outreach efforts, we were able to identify a temporary duty assignment (TDY) to UNOAU through 30 June 2017, end of your fixed-term appointment with the Organization.

3. While the TDY addressed security and safety risks, it didn’t address the longer term issue of your ability to work in UNIFIL. Therefore, since the notification from the Government, UNIFIL has made all efforts to address the situation with the host country as well as to support you in your efforts to identify a new position in another mission or office.

4. With regards to the host country, UNIFIL has reminded the authorities that their intention to declare you *persona non grata*, has no application to the United Nations and its personnel. The Mission has made all efforts to fulfill its duty to protect you as a staff member, including vis-a-vis the host State, which included inquiry with the host government as to the basis for declaring a person’s presence undesirable, in line with Article 20 of the Convention on Privileges and

Immunities. Unfortunately, despite the Mission's best efforts, the host authorities have confirmed that they will not accept your presence in Lebanon.

5. At the time the Mission learnt about the host country's position, we also immediately reached out to you regarding placement options outside of UNIFIL in case our efforts with the Government would not be fruitful.

6. We advised you that as you are not regularized and have an appointment limited to UNIFIL, the fact that you are not rostered at your level, or on any roster is complicating the matter further. This means you cannot be reassigned under the USG DFS (Under Secretary-General's Department of Field Support) Delegation of Authority which allows for the lateral reassignment of regularized staff members. We have therefore advised you to actively apply to all regular vacancies that you feel qualified for.

7. We would encourage you again to apply to all regular vacancies that you feel you are qualified for. However, unless there are positive outcomes before 30 June 2017, regretfully, your appointment with UNIFIL will not be renewed beyond that date.

47. The MEU, in its evaluation letter, appears to focus on the Organization fulfilling its duty by following up with the Lebanese authorities regarding Dr. Bharaty's PNG status, and that because her appointment was limited to UNIFIL, it could not place her elsewhere. The MEU also relied on *Tal* Order No. 109 (NBI/2017), to limit the Organization's duty (in this case to reassign Dr. Bharaty or renew her contract) to what can be done with due diligence and is reasonable under the circumstances.

48. However, this view cuts too deeply into the case law of *Hassouna*; where, the UNDT drew a distinction between cases where the host country and the United Nations agree essentially that a staff member acted outside his/her capacity, and those cases where the host country is not forthcoming OR they provide reasons which do not justify a PNG decision. Dr. Bharaty's case is the latter. It is not enough that UNIFIL engaged with the Lebanese authorities, and received the answer that Dr. Bharaty's alleged Facebook posts and verbal statements were "biased to the enemy Israel."

49. Rather, they should have concluded that those reasons do not justify her *persona non grata* status. Additionally, in contrast to the Lebanese position that these were purely personal acts, it is important to recall that Dr. Bharaty's travel to Israel was for United Nations sponsored training. Dr. Bharaty does not expect that UNIFIL or the Organization would quarrel with the Lebanese authorities about the reasons for her *persona non grata* status, but once it verbally stated and once it determined and notified Dr. Bharaty that the allegations were not considered misconduct, it had a duty per *Hassouna* to not change the terms and conditions of its contract. The Secretary-General, notwithstanding the Applicant's lack of roster status, has the power to exceptionally reassign Dr. Bharaty and should have done so.

50. Therefore, according to *Hassouna* above, the Organization cannot resort to the non-renewal of the Applicant's contract.

The Secretary-General is required to reassign the Applicant notwithstanding that she served on a fixed-term appointment limited to a single mission – UNIFIL.

51. Notwithstanding roster or appointment status, *Hassouna* held that the Organization has a duty to take steps to alleviate a staff member's predicament of being expelled from the host country without justification and cannot change the terms and conditions of the staff member's contract. Section 24.2 of ST/AI/2016/1 lists the situations in which USG/DFS is limited to reassigning staff members whose appointment is not limited to a particular mission. Although the Applicant's appointment is limited to UNIFIL, her PNG status or accommodation are not contemplated by Section 24.2. As such, the Secretary-General can override this due to his obligation in *Hassouna*.

The Applicant has a legitimate expectancy of the renewal of her appointment.

52. The Applicant previously held multiple fixed-term appointments mostly at yearly intervals for the same position. It was virtually guaranteed that but for the PNG status, the Applicant would have had her contract renewed. The Organization cannot punish

the Applicant for actions which were outside of her control and were not deemed to have encompassed misconduct. Rather the Secretary-General has wide discretion and could have continued the Applicant's TDY at the UN Office to the African Union (UNOAU) in Addis Ababa where she was previous assigned or reassigned her to another mission or office.

53. And contrary to the 19 May memo cited above, UNIFIL has also not supported or assisted the Applicant in any manner to identify or gain employment in another office or mission at the same or higher level.

54. The Tribunal finds that the Applicant should properly have been given a one year extension in Addis Ababa or elsewhere so that she would have been entitled to the benefits and entitlements that ordinarily accompany such a contract. While the Secretary-General has wide discretion as to where he deploys the Applicant, it would have been prudent to ensure that such redeployment did not adversely affect her.

JUDGMENT

55. This application succeeds.

56. The impugned decision is rescinded.

57. The Applicant is granted one year net base salary for the loss of her one year fixed term contract renewal and three months' net base salary for unfair treatment due to the Organization's lack of due diligence in finding a suitable substitute assignment commensurate with the duties outlined in her original Letter of Appointment.

Case No.: UNDT/NBI/2017/061

Judgment No.: UNDT/2019/021

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 20th day of February 2019

Entered in the Register on this 20th day of February 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi