



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

GIZAW

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
George G. Irving

Counsel for Respondent:
Esther Shamash, UNDP

Introduction

1. This judgment concerns the merits of this matter, following the Dispute Tribunal's reasoned decision on receivability dated 21 December 2018 in Judgment No. UNDT/2018/137, wherein the detailed facts and extensive procedural history is more fully set out. 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 As a remedy, the Applicant requests that the contested decision be rescinded and that the Tribunal: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 contends that there is no duplication between the two job descriptions and argues that the refusal to change the title and job description of the Quality Assurance Specialist was a valid exercise of managerial discretion. The Respondent further submits that the Applicant has not met her burden of proof that the contested decision was motivated by extraneous factors or improper motives.

Facts

3. In a joint submission dated 13 February 2019, the parties submitted the following agreed facts:

... the Applicant joined [UNDP] on 1 July 1987 and has been in the employ of UNDP continuously since 2002. After a number of appointments under the former 300-series and 200-series of the Staff

Rules, since 1 June 2008 she has worked in the then-Office of Information Services and Technology [(“OIST”)], now Office of Information Management Technology [(“OIMT”)], located in the then-Bureau of Management [(“BoM”)] (now Bureau of Management Services [(“BMS”)]). The Applicant holds a permanent appointment. The functional title of the position she encumbers at the P3 level is “Change, Release and Testing Specialist” [(“CRTS”)].

... in 2013, the Executive Board approved a new Strategic Plan for UNDP requiring the Organization to improve its institutional effectiveness. In order to align UNDP's organizational structure with the strategic direction set out in the Strategic Plan, UNDP conducted a Structural Review exercise and engaged in the process of redesigning its structure at Headquarters and at the Regional level led by Price Waterhouse Cooper [(“PWC”)].

... under the provisions of the Structural Review exercise, staff members whose positions were abolished or had a significant change would be informed that they were affected and invited to participate in successive rounds of Job Fairs. Those whose positions were not affected would be asked to confirm their acceptance of the position they encumbered. They were not eligible to participate in the Job Fair and compete with affected staff members.

... on 12 August 2014, the Applicant received a letter from the Office of Human Resources [(“OHR”)] informing her that, given that there was no change in her functions, her position was not affected by the Structural Review (no change letter). The Applicant accepted the no-change letter for her position and was thus precluded from competing in the Job Fair for other positions with affected staff members whose post were changed or abolished.

... in mid-August 2014, the Structural Change Governance Group [(“SCGG”)] approved a new OIST Organogram on the basis of which new positions were created in OIST, including that of “Quality Assurance Specialist” at the P3 level.

... following the preparation of the Job Description and its classification by OHR on 20 August 2014, the Quality Assurance Specialist post was advertised during the Job Fairs process. It was filled on 1 November 2014.

... on 1 October 2014, the Applicant wrote to her supervisor, [then-Deputy-Director, OIST] to express her concerns that there was a duplication of tasks between the job description of the Quality Assurance Specialist post and the job description of the Change Release and Testing [Specialist] post she encumbered. She requested that the functional title and the job description of the Quality Assurance Specialist post be amended.

... on 1 October 2014, the then-Deputy Director, OIST wrote to her that “[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”.

... on 3 October 2014, the Applicant wrote to [the then-Director, OIST]. On 8 October 2014, the then-Director, OIST informed the Applicant that the then-Deputy Director, OIST, was committed to working with her on the clarification of roles and responsibilities, and invited the Applicant to continue to engage with him.

... on 13 October 2014, the Applicant met with the then-Deputy Director. By email of 14 October 2014, the then-Deputy Director sent to the Applicant a summary note of their meeting, *inter alia*, that:

“In [their] meeting [the previous day] and in [their] prior discussions, the then-Deputy Director, OIST had] identified the focus of the position on the quality of project and portfolio management processes, as indicated by the first item in the Primary Responsibilities (“Support Project and Portfolio Management”) and first item in the Technical/Functional Responsibilities (“Portfolio Management”). The job description is clearly focused on improving the quality of project and portfolio management documents, libraries, and activities, and that is a main focus that [he intended] for the position. The project/portfolio quality focus has little risk overlap with [the Applicant’s] areas of coverage, and [he committed] to ensure that overlap and duplication do not occur. In the meeting [he] noted that the only area of redundancy would be the intentional redundancy to have a back-up for the Change Release and Testing processes when [the Applicant was] unavailable. This need was made clear to [him] in August when some of the Release 2014.08 activities were covered by [him] and a member of the development team in [the Applicant’s] absence - not an optimal situation in terms of coverage and segregation of duties. Having the Quality Assurance Specialist as a backup would reduce that risk [The Applicant had] mentioned [her] concerns about training the incoming person to be that backup, and that [was] a challenge that [they could] work together to resolve. As [he] mentioned in the meeting, [he had] no reason to remove responsibilities from [the Applicant] and [he had] no intention to take any such action. [He] stated [his] goal to avoid duplication, and that [he would] pursue that goal as the day-to-day tasks of the Quality Assurance Specialist [were] finalized. [He] noted in the meeting that the specific steps [the Applicant had] requested, changing the job title and revising the Job Description, would be challenging to pursue at this time, for a few reasons:

- *The title of the position [was] defined in the SC BOM Organogramme (page 58).*

- *The job description, including the job title, ha[d] been approved (classified) by OHR.*

- *The position, using the current job title and job description, [had been] recently competed via the SC Job Fair, and the position [had been] offered and accepted less than 2 weeks [before]*”.

... the Applicant acknowledged receipt of this email and told him she felt it was discriminatory and she would escalate the matter.

... by email of 20 October 2014, the Applicant again raised her concerns with the then-Director, OIST. On 22 October 2014, she requested to be informed of “the status of this case” and that the Quality Assurance Specialist job description and its title be revised. On 23 October 2014, the Applicant further requested to receive the decision of the then-Director, OIST “by tomorrow [close of business]”.

... on 24 October 2014, the then-Director, OIST and [the then-Chief, Organizational Design Unit [(“ODU”), OHR] met with the Applicant. By email on the same date, the then-Director, OIST sent a summary of the meeting to the Applicant in which she stated that it was not possible to grant her request to change the job description of the Quality Assurance Specialist position because the job description could not be changed after the post had been offered and accepted by a staff member.

... on 26 October 2014, the Applicant sought the intervention of the then-Deputy Assistant Administrator and [Deputy Director, BoM], over her concerns.

... the Quality Assurance Specialist commenced work on 1 November 2014.

... on 5 November 2014, the Applicant met with the then-Deputy Assistant Administrator and Deputy Director, OHR, the Director, OIST, and [HR Advisor].

... on 6 November 2014, the Applicant emailed the then-Deputy Assistant Administrator and Deputy Director, OHR stating that a differentiation between the two Job Descriptions by using individual work plans amounted to a short-term solution and would not address her main concern. On the same day, the then-Deputy Assistant Administrator and Deputy Director responded, noting 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,” and that she disagreed that “the work plan [was] a short-term solution to [the Applicant's] concern”.

... on 7 November 2014, the Applicant sent an email to the then-Director, OIST acknowledging receipt of the decision to use the work plan and indicated her intent to “*escalate the matter further until long term solution that removes the duplication is in place*”.

... on 1 December 2014, the then-Director, OIST emailed the Applicant, as follows: “[a]s 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”.

... on 23 February 2015, the Applicant then wrote to the then-Deputy Director, OIST stating that “*as per our discussion on 5 November 2014, the Annual Work Plan will be used to define and clarify the roles, responsibilities and accountabilities of the two positions to address my concerns*”. She also requested that the work plan be finalized “*as agreed ... and [to] close this long overdue case*”. On 1 March 2015, the Applicant reiterated that she “*agreed to the proposal by the management to use work plans of the two positions to remove these duplication, even though [her] request was to get a permanent solution by removing these activities already included in [her job description] from that of the newly created position, in the spirit of teamwork*”. On 18 March 2015, she requested that the then-Director, OIST provide an official confirmation that the duplication of duties between the two Job Descriptions had been removed by using the work-plans. On 20 March 2015, the then-Director, OIST replied that there were “*two distinct and separate work-plans*”. On the same day, the Applicant stated in an email that the two work-plans were distinct and separate but that the purposes of the work plan and job descriptions were different. Therefore, in the same email, she requested to amend the title and job description of the Quality Assurance Specialist position and requested that OHR make adjustments to the Quality Assurance Specialist's job description.

... on 14 July 2015, following a Bureau specific exercise in 2015, the Applicant received a second “No change letter”, which she accepted.

... on 23 July 2015, the Applicant reiterated her requested to [Chief of Directorate, OHR] to confirm “*if this duplication has been permanently addressed by removing the activities listed under [her]*

position's job description from the job description of the Quality Assurance Specialist Position during the BOM 2.0 exercise".

... on 3 September 2015, [the then-Director, OIST] addressed a handover note to [then-Deputy-Director, OIST] requesting him to take responsibility to address the situation.

... on 27 October 2015, after several further discussions, Chief of Directorate, OHR wrote that she had referred the matter to [Director, OHR] to speak to the then-Deputy Director, OIMT.

... on 21 December 2015, not having heard back, the Applicant met to discuss the issue with [Assistant Administrator] and Director, BMS. The discussion was positive, and he suggested the issue would be solved after the holidays.

... on 21 December 2015, the Applicant sought to raise the matter with the Director, BMS. On 20 January 2016, in an effort to resolve her concerns, [Chief of Directorate, BMS] referred the Quality Assurance Specialist job description to the Management Consulting Team [{"MCT/OHR"}], which is mandated, *inter alia*, to review Job Descriptions, stating the following: "Having heard the views of the staff member and management of the office, all parties have agreed that there is overlap in the Job Descriptions. 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". On 29 January 2016, however, MCT/OHR advised that a revision of the Job Descriptions was not warranted as the two Job Descriptions were sufficiently distinct. The Applicant submits she was not informed of this advice.

... on 22 January 2016, [Chief, Project Management Office ("PMO")] sent a list of PMO Focal Points to OIMT Senior Managers. In the email he stated that the Applicant remained transversal focal point for all projects' acceptance criteria, planning testing, testing and change management. The Project Focal Point assignment included three PMO staff, including the Chief, PMO, and the Quality Assurance Specialist was assigned as a Focal Point for eight projects.

... on 16 February 2016, the Chief of Directorate, BMS assured the Applicant that her case was being worked on.

... on 23 March 2016, the Applicant received a further email from the Chief of Directorate, BMS that her case would be handled by [Director, Operations, Legal and Technology Services ("OOLTS")/BMS].

... on 24 June 2016, the Chief of Directorate, BMS informed the Applicant that the Assistant Administrator, and Director, BMS had reassigned the case to her, and she had requested that a new job description for the [Quality Assurance] Specialist position be developed and confirmed, “progress is being made towards resolution, and we should have a response by end of the week”.

... on July 2016, following further informal inquiries, the Applicant was informed verbally by the Chief of Directorate, BMS that the implementation of the new job description had failed and emailed the following explanation: *"While we do appreciate the anxiety, this matter is causing, and your misunderstanding that the process has failed, we request your indulgence in finalizing the case as it involves a second staff member as well"*.

... on 28 July 2016, following efforts by the Staff Council and the Ombudsman, additional consideration having been given to the matter, the Director, OOLTS/BMS informed the Applicant in an email that *"neither the title nor the text of the [Quality Assurance Specialist] position will be changed"*.

... on 10 August 2016, the Applicant filed a request for management evaluation. On 7 September 2016, the Associate Administrator responded, stating that the decision she challenged was not receivable and that there was no factual or legal basis for overturning it.

... on 8 September 2016, [Staff Council Chair] expressed his serious concerns to [Associate Administrator of the UNDP], over his decision recalling [Associate Administrator]'s previous discussion and request for the Staff Council's intervention to resolve this issue. [Associate Administrator] expressed concern over the possible abolition of the Applicant's post and offered to send a message guaranteeing the position from [Assistant Administrator]. On the same day, the Director, BMS met with the Applicant and later wrote to her assuring her that her functions were necessary and that the Bureau was committed to a positive working environment.

Procedural background

4. The procedural history of this case prior to the issuance of Judgment No. UNDT/2018/137 on receivability dated 21 December 2018, is set out extensively in the aforesaid judgment.

5. Subsequent to the issuance of the Judgment No. UNDT/2018/137, on 13 February 2019, pursuant to Order No. 11 (NY/2019) dated 14 January 2019, the

parties filed a joint submission, in which they listed agreed and disputed facts, together with the legal issues as defined by each party. The Applicant requested leave to submit project documents reflecting the role of the Applicant and an updated confidential medical record and both parties requested leave to submit closing submissions. The parties further confirmed that the case can be decided on the papers without a hearing. The Respondent produced the documents pursuant to Order No. 11 (NY/2019) (namely, the outcome of the management consulting team's review of the job descriptions of Quality Assurance Specialist and Change Release and Testing Specialist and all the relevant rules, regulations, policies, and procedures governing classification, job alignment, and structural change process), save that the functional review document was submitted by the Respondent on an *ex parte* basis.

6. On 21 February 2019, by case management Order No. 40 (NY/2019), the Applicant was directed to file the additional documentation as requested in the joint submission and both parties were directed to file closing statements. The Respondent's request for *ex parte* submission of the functional review document because it contained a confidential business analysis was denied, on the grounds *inter alia* that the Applicant could not, without reviewing the document itself, verify or rebut the Respondent's claims that it did not result in a reorganization of the Applicant's office nor the realignment of the job responsibilities of the staff. The Tribunal ordered that the document be released to the Applicant on specific confidentiality conditions stated at para. 12 of Order No. 40 (NY/2019). On 22 February 2019, the Respondent filed a motion for leave to submit certain documentation, which motion was subsequently withdrawn.

7. On 26 February 2019, the Applicant submitted the additional documentation pursuant to Order No. 40 (NY/2019). In addition, the Applicant disclosed that the functional review document the Respondent attempted to file *ex parte* was not confidential nor privileged in any event, as it was distributed to BMS staff for discussion.

8. The Tribunal noted that on 1 March 2019, the Respondent only then acknowledged that the functional review document should not have been submitted on an *ex parte* basis, and thereafter submitted the complete copy. The Tribunal notes that this does not augur well in so far as the issue of full disclosure and good faith is concerned, but is aware that Counsel may have acted on the instruction of client.

9. On 7 March 2019, the parties filed closing statements for the matter to be dealt with on the papers.

Consideration

Preliminary matter

10. Prior to consideration of the merits, the Tribunal will dispose of the Respondent's motion for clarification of Order No. 151 (NY/2018), extensively referred to in Order No. 166 (NY/2018) dated 29 August 2018. Even though events may have overtaken the purport of the motion, it must be addressed for the sake of completeness.

11. In Order No. 166 (NY/2018), the Tribunal indicated that it did not wish to deal with the substance of the request for interpretation of the interim measures order in question at that time, especially in light of the Applicant's submission that she would be reporting to a different supervisor while continuing her same responsibilities, that the proposed functional review exercise could possibly clarify issues, and that she was hopeful of a positive outcome of the ongoing informal discussions. However, the Tribunal admonished that there should be timely and diligent execution and implementation of the Tribunal's judgments and orders, including any interim measures orders which are immediately executable unless otherwise stated (see in particular at para. 27 of said order).

12. The Tribunal gave strong indications in Order No. 166 (NY/2018) that the motion was ill-fated particularly at para. 28 observing that applications for interpretation should be made in a timely manner:

As stated at para. 21 in *Adorna* UNDT/2010/205 “[a]lthough art. 30 does not specify the time within which an application for interpretation of a judgment may be made, it has to be made within a reasonable time”. The Tribunal noted that the Respondent’s request dated 19 March 2018 was for clarification of Order No. 151 (NY/2017) issued on 13 June 2017, nine months after the issuance of the Order. Furthermore, as stated by the Appeals Tribunal, it is not expected “that the [Dispute Tribunal] in the interpretation of its own orders would reverse or review such orders” (*Tadonki* 2010-UNAT-010).

13. The application for interpretation is based on art. 12.3 of the Dispute Tribunal’s Statute, which provides that “[e]ither party may apply to the Dispute Tribunal for an interpretation of the meaning or the scope of the final judgment, provided that it is not under consideration by the Appeals Tribunal”. This provision is also reiterated in art. 30 of the Tribunal’s Rules of Procedure.

14. As the Appeals Tribunal clearly stated in *Kasmani* 2010-UNAT-064,

[a]n application for interpretation is not receivable if its actual purpose is to have the [Tribunal] re-examine its decision, even though its judgments are final and without appeal, or to have it comment on its decision. It is only admissible if the wording of the judgment is not sufficiently clear, owing to ambiguity or incoherence, such that a party might, in good faith, be unsure of the meaning or scope of that judgment.

15. In *Porter* UNDT/2017/024, the Dispute Tribunal stated that an application for interpretation is “to clarify the meaning of a judgment where there are reasonable doubts about the will of the Tribunal or the arguments leading to a decision. But if the judgment is comprehensible, whatever the opinion the parties may have about it or its reasoning, an application for interpretation is not admissible”.

16. In the present case, the Tribunal reiterates that the Respondent’s request dated 19 March 2018 is for clarification of interim measures Order No. 151 (NY/2017) issued on 13 June 2017, such request being made some nine months after the issuance of the Order.

17. The Tribunal further notes that while the Applicant continued to raise concerns that the Respondent failed to implement the Tribunal's interim measures order in good faith, the Respondent, by his own admission, only started to comply with Order No. 151 (NY/2017) following the issuance of Order No. 20 (NY/2018) on 29 January 2018.

18. The Tribunal notes with great concern that the Respondent admitted having failed to timely and diligently execute the Tribunal's Order for at least seven months, claiming initially that there was a misunderstanding regarding the scope of Order No. 151 (NY/2018) as applying to the PIDs at issue at the time, and then requesting the interpretation of Order No. 151 (NY/2018) nine months after the issuance of the Order.

19. The Tribunal considers that the application for interpretation was and is ill-founded. It was clear what the Applicant requested as a remedy in her motion for interim measures and what the Tribunal ordered in Order No. 151 (NY/2018). Considering that the Applicant explicitly requested the remedy sought to be applied to "the recent Project Initiation Document ["PID"] *and subsequent PIDs*", the Tribunal finds the claim that the Respondent initially misunderstood this Order as applying only to the PIDs at issue at the time disingenuous. The Tribunal further finds the Respondent's subsequent application for interpretation as an attempt to have the Tribunal re-examine its Order, which is not a proper way to seek a reversal or modification of the Tribunal's Order. As the Appeals Tribunal clearly stated, the exercise of interpretation under art. 30 of the Dispute Tribunal's Rules of Procedure is not an avenue for review or the basis for a fresh judgment. It goes without saying that the motion is not receivable and must be dismissed.

20. In instances such as these a court may well order costs against the moving party when a party has manifestly abused the proceedings before it (art. 10.6 of the Dispute Tribunal's Statute). However, the Tribunal notes that this matter has had a prolonged history, that the subject matter is particularly complex, that Counsel no doubt act on the instructions of client, and that there have been several changes of

Counsel on the part of the Respondent. Therefore, the Tribunal will say no more about it save that it does not bode well for good faith in dealing with workplace issues, and raises contempt and accountability issues in the proceedings before the Tribunal.

21. The Tribunal will now turn to the consideration of the substance of this matter.

Scope of the case

22. The Tribunal recalls that in *Gizaw* UNDT/2018/137, the Tribunal found that the impugned administrative decision was notified to the Applicant in the letter of 28 July 2016 from the Director of Office of Operations, Legal and Technology Services, BMS:

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.

23. The Applicant challenges the above administrative decision on several grounds, which the Tribunal will consider in turn. It is recalled that the Applicant specifically challenges the duplication of job functions regarding the position of Quality Assurance Specialist newly created in August 2014, with that of her own primary functions, and as more particularly set out at para. 70 and 71 of Judgment UNDT/2018/137.

Applicable legal framework

24. The Tribunal stated in Judgment UNDT/2018/137 at para 72:

If the Applicant's allegations are found to be substantiated, it may follow that she 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 (*Perez-Soto* 2013-UNAT-329, para.29).

25. The Appeals Tribunal articulated the standard of review in judging the validity of the Secretary-General's exercise of discretion in administrative matters in *Sanwidi* 2010-UNAT-084 as follows:

40. 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. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

...

42. In exercising judicial review, the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decisionmaker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

*The merits*The basis of the contested decision

26. As stated above by the Appeals Tribunal in *Sanwidi*, the Tribunal needs to decide if the impugned administrative decision is reasonable and fair, legally and procedurally correct, and proportionate. As the Appeals Tribunal elaborated in *Belkhabbaz* 2018-UNAT-873, the Tribunal's role is to decide whether there is a rational connection between the materials presented to the Tribunal and the contested decision.

27. In response to the Applicant's claim that the contested decision resulted in the duplication of job functions and her quality assurance functions were taken away from her, the Respondent submits that the crux of the case is a disagreement between the Applicant and the Respondent regarding the meaning of the term "Quality Assurance". The Respondent submits that UNDP is of the position that quality assurance is concerned with the analysis of documentation, the preparation of reports, and the identification of risks and mitigations for those risks, and the quality control is concerned with the testing of products prior to their release. The Respondent submits that the Quality Assurance Specialist conducts the quality assurance work while the Applicant conducts the quality control work, and these two functions are distinct and complementary. The Respondent submits that the Applicant was repeatedly assured that the existence of the Quality Assurance Specialist does not put the Applicant's job in any danger of abolition.

28. The Tribunal notes from the agreed facts that in 2013 the Executive Board approved a new Strategic Plan to improve its institutional effectiveness and the Structural Review exercise was conducted. As a result, in August 2014, the Structural Change Governance Group approved a new OIST Organogram on the basis of which new positions were created in OIST, including the Quality Assurance Specialist post, and following the preparation of the Job Description and its classification by OHR, the Quality Assurance Specialist post was advertised and filled.

29. The Tribunal further notes that the Applicant's job description from the outset provides that the incumbent is "responsible for the change, release and test planning within OIST in accordance with PRINCE2 practices for projects and ITIL", and that the Quality Assurance Specialist job description provides that UNDP is "engaging in the services of the Quality Assurance Specialist with strong background and experience in project management, budgeting, quality analysis, monitoring and reporting" and "[t]he incumbent will contribute substantially to the smooth functioning of the OIST portfolio of services and projects by analyzing documentation, preparing reports, and identifying risks and mitigations for those risks. The purpose for quality assurance is to ensure the positive outcomes that result from complete and optimal services and deliverables". The Tribunal notes that quality assurance is not mentioned in the Applicant's original job description.

30. The Tribunal also notes that following the Board of Auditors' report for the year ending 2016, the Administration developed RACI ("Responsible, Accountable, Consulted and Informed") tables, its own project management methodology, reflecting the roles of the Applicant and the Quality Assurance Specialist. The Respondent previously submitted excerpts from some books (including "Prince2 for Dummies", the import of which the Tribunal is unsure) on project management and Prince 2 standards to support its position that the Applicant conducts 'quality control' work and the Quality Assurance Specialist does 'quality assurance' work.

31. Based on the materials before the Tribunal, the Tribunal finds that the Administration provided some reasonable explanation for the contested decision, which is supported by evidence. While the Administration created uncertainty and at times seemed to reconsider their decision not to change the title or the job description of the Quality Assurance Specialist following the Applicant's repeated requests, in light of various inputs received from OIST management and management consulting team, the Administration in the end decided not to make any changes to the Quality Assurance Specialist's job description. The Administration's internal review processes are well-documented and the Tribunal finds that there seems to be a

rational connection between the materials before the decision maker and the contested decision. The Tribunal is constrained to exercise a measure of deference and in the absence of any oral testimony or other specific evidence showing the Administration's improper motives or bad faith in reaching its decision, or any procedural irregularities, the Tribunal cannot interfere with the contested decision. What the Applicant needs to prove is that "the decision was arbitrary or taken in violation of mandatory procedures or based on improper motives or bad faith" (*Pérez-Soto, supra*), a question which the Tribunal will now review.

Was the contested decision based on improper motives or bad faith?

32. The Tribunal understands that the Applicant's claim is, in essence, that the decision was unreasonable and/or was made based on improper motives or bad faith because she has conducted the quality assurance task, for which the Quality Assurance Specialist takes undeserved credit, and the decision was taken in order to deprive her of her functions and marginalize her so that the Administration could eventually replace her in the event of another downsizing. Indeed, in her initial correspondence dated 26 October 2014, the Applicant expressed her concern that "this duplication of duties, if not formally corrected, may result in confusion, redundancy and subsequent position abolishment". In other words, the Applicant anticipates a breach of her conditions of service and or the applicable rules. The Tribunal cannot rule on an anticipatory breach.

33. The Tribunal understands the tenor of the Applicant's argument to be that the duplication and removal of her functions are simply manipulations which will in the final analysis result in the abolishment of her post and her separation from the Organization.

34. In the matter of *Karmel* Judgment No. 879 where a staff member challenged the abolishment of her post and the Administration's failure to place her in another core post, the former United Nations Administrative Tribunal ("UNAdT") found:

...her post was abolished without any justification. In this case, the Applicant's post was abolished, and a practically equivalent post was created, with a different name and a slightly different job description at one grade lower in the hierarchy. The Applicant could not apply for the newly created post in question because she was at the G-5 level. Without advertisements or open competition, another staff member who had been placed against the post was appointed to the "new" post. A year later, the post was upgraded to G-5. The Tribunal can only conclude that the Applicant's post was not abolished and that the process just described constituted a subterfuge for removing the Applicant and replacing her with another staff member.

The UNAdT found that such manipulations were becoming a habit in the Administration at that particular time where by a simple device staff members were dismissed and others placed in their stead. However, in this instance, whilst the Applicant may well suspect a 'subterfuge' or 'device' to remove her, Respondent Counsel has confirmed that the Applicant has been assured by the Administration that her position is not under threat. This assurance is welcome as the Tribunal notes that the Applicant is 56 years of age and has served the United Nations for almost 32 years and is on a permanent appointment.

35. The Tribunal recalls that, as stated at para. 24 of Judgment UNDT/2018/137, in January 2016 the Chief of Directorate of BMS stated that "all parties have agreed that there is overlap in the job descriptions". In the Judgment at para. 71, the Tribunal stated that "it is of some significance that the quality assurance role has been removed from the Applicant's performance management documents. Surely, this has impacted the Applicant's terms and conditions." The Tribunal also recalls that the removal of the Applicant's name as an official responsible for project quality assurance from project initiation documents in 2017 was the subject of Interim Measures Order No. 151 (NY/2017). The Tribunal further recalls that at para. 81 of the Judgment, the Tribunal noted that the Quality Assurance Specialist position was originally cleared at the P-4/P-5 level and yet the post was created at the P-3 level, the same level as the Applicant's post. The Respondent has not provided any explanation for this.

36. To support her claim that the contested decision is based on improper motives or bad faith, the Applicant relies on, among other things, several internal communications. In particular, in the email requesting the management consulting team's review for alignment of two job descriptions, the Chief of Directorate, BMS wrote, "From what we understand the intention in the second JD (Quality Assurance) which is a new post was to develop a profile that is aligned more to portfolio management given that the first JD (Change Release and Testing) is aligned to the change, release and testing function".

37. The management consulting team responded that "a revision of both [job descriptions] is really not warranted – but, I appreciate that bringing closure often requires something tangible" and proposed changes in the job descriptions that "the Quality Assurance Specialist undertakes a broad, systematic support to quality assurance in OIMT, supporting project-specific assurance support only when prioritized by the Chief of the PMO" and "the Change Release and Testing Specialist is responsible for change, release, and test planning within OIMT in accordance with PRINCE2 practices for projects and ITIL practices for services. In this arena, the incumbent will engage with client units to implement OIMT's quality assurance function in each of the ICT products and/or services, which are prioritized for change release and testing support". Although not adopted, the Applicant claims that the proposed changes prove that the Applicant is the responsible official for performing the quality assurance functions, something she claims she always performed.

38. The Applicant also submitted two supporting witness statements from project managers whom she worked with. One project manager who worked with the Applicant in 2017 wrote that the Applicant "was the person who represented UNDP for Quality Assurance and Testing" for the projects and the Quality Assurance Specialist's role was a "higher-level overall monitor of the projects" who "attended some of the meetings for [quality assurance] but was not the person with whom I communicated on these issues on a regular basis".

39. Another witness who worked with the Applicant from November 2015 until June 2016 wrote in her statement that the Applicant was “the responsible quality assurance representative from the IT Department and able to respond to technical questions” and while the Quality Assurance Specialist was listed in the project document as the project quality assurance role, the witness never met or discussed any aspect of the test plan with the Quality Assurance Specialist, who did not make any material contribution to the test.

40. The Applicant also presented the Board of Auditors’ report for the year ending 2016 as evidence to support her claim. The Applicant claims that the report emphasizes the need to comply with quality assurance standards at all stages, including the designation of an assessor (testers) and approver (project quality assurance) for each project, and that complying with quality assurance standards means that UNDP should follow Prince 2 standards and yet UNDP instead began using its own methodology called RACI tables.

41. The above described materials show that through the realignment of functions and the creation of the Quality Assurance Specialist post, some changes occurred to the Applicant’s functions. The management acknowledged that the duplication of functions existed between the Applicant’s post and that of the Quality Assurance Specialist, and she was no longer designated as an official responsible for project quality assurance in project documents. However, the materials before the Tribunal also show that the Applicant continued to conduct her functions relating to testing after the creation of the Quality Assurance Specialist post and yet the Respondent calls her functions as ‘quality control’ and her colleague’s functions as ‘quality control’ while the Applicant calls her responsibilities ‘quality assurance’. The Tribunal notes that at least two project managers who provided the witness statements seem to agree with the Applicant that the Applicant’s functions are considered ‘quality assurance’ relating to the testing. One of the witnesses in support of the Applicant stated that the Quality Assurance Specialist conducted “higher-level overall monitor of the projects”.

42. Whether it is called a higher-level monitoring of the projects or quality assurance, it is clear that the Quality Assurance Specialist's role is distinct from that of the Applicant in that the Quality Assurance Specialist is not involved in the testing related functions, which are the responsibilities of the Applicant. The dispute comes down to what to call the Quality Assurance Specialist's work. While the Applicant claims that it is wrong to call her work 'quality control' and call her colleague's work 'quality assurance' on the grounds that her work was previously considered quality assurance and this is in line with Prince 2 standards, the Tribunal's role is not to decide what is right or wrong or what is a better business decision. The Tribunal's role is to decide if the contested decision is one which a reasonable person might have reached and whether there is a rational connection between the materials presented to the Tribunal and the decision. However, if the Applicant has been deprived of her functions without legitimate justification or as a reprisal or retaliation, that is another matter.

43. All the above discussed evidence shows that the realignment of functions and positions in the Applicant's office caused some confusion and disagreements, but the Tribunal's role is not to decide what is the best way to conduct project management and quality assurance and under which methodology. Although the Applicant presented extensive evidence to support the claim that quality assurance functions were removed from her after the realignment of functions and specifically following the creation of the Quality Assurance Specialist post, she failed to present sufficient evidence to show that such decision was based on retaliation, reprisal, or other improper motives or bad faith. Having stated at one stage that the changes in her functions were attributable to discrimination, the Applicant, although having the right to call and to provide testimony, chose not to do so.

Was the contested decision procedurally irregular?

44. The Applicant also challenges the decision not to change the title and the responsibilities of the Quality Assurance Specialist on the grounds that the decision violated UNDP's People Realignment Policy and Processes, part B, sec. 1.1, which

provides that “[t]here will be no HR process for staff members who have no change in their job description”.

45. The Tribunal notes that the UNDP’s People Realignment Policy and Processes was temporarily adopted at the time for realignment processes, and there were four possible HR actions: lateral move, position matching, relocation and no change. The policy provided that if a staff member does not agree to the offer of a No Change, he/she would be separated and the position would be advertised in the relevant job fair.

46. Considering that the People Realignment Policy and Processes only applied at the time of realignment and the Applicant accepted no change letters issued in 2014 and 2015, any challenge to the contested decision on the grounds that it violated this particular policy is time-barred. Since the Applicant did not point out any other mandatory rules, regulations, policies or procedures that have been violated, the Tribunal cannot find that the contested decision was procedurally irregular.

Was the contested decision *de facto* demotion or constructive dismissal?

47. The Applicant also submits that she was *de facto* demoted as her functions were limited to ‘quality control’, as opposed to ‘quality assurance’. She also claims that the Administration constructively dismissed her systematically by creating an overlapping position, removing the quality assurance role from the Applicant on various documents including project initiation documents, her work plan, and her performance evaluation and permitting the Quality Assurance Specialist to assume credit for her work, forcing her to work invisibly.

48. With respect to a constructive dismissal, the Appeals Tribunal held in *Koda* 2011-UNAT-130 that “in a case of alleged constructive termination, the actions of the *employer* must be such that a reasonable person would believe that the employer was “marching them to the door”” (para. 36) (emphasis original). Also, this Tribunal stated that the term constructive dismissal is predicated upon a resignation”

(*Cardwell* UNDT/2018/030, para. 14). The Tribunal notes that the Applicant has not resigned, her services have not been terminated, and she is still in service.

49. Considering that the Applicant remains employed at the same level and conducts her responsibilities relating to testing, albeit under a different term (i.e. quality control as opposed to quality assurance), and having found that the Applicant has not satisfied the burden of proof to show that there was anything other than lawful justification for the contested decision, the Tribunal finds that the Applicant's claims of *de facto* demotion and constructive dismissal are without merit. While the Applicant argues that her post could be abolished, in the event of another downsizing, due to the contested decision, this is a pure speculation at the moment and there is no evidence that the Administration has been taking any such steps; indeed, the Applicant has been assured that her position is secure. As stated above, the Tribunal cannot rule on an anticipatory breach.

50. As a final note, the Tribunal notes that there are several matters in the conduct of this case and the manner in which the Applicant's concerns were handled that are troublesome and raise questions regarding good faith. One particular matter that concerns the Tribunal and has been the subject of discussion at the various case management discussions is that of non-compliance of the interim measures order.

51. The Tribunal also would like to underline that by this Judgment, the Tribunal has not made any ruling on a breach that the Applicant anticipates, namely, the abolishment of her post based on redundancy due to loss of functions, since the Tribunal cannot rule on an anticipatory breach and what the Applicant fears is speculation at the moment. However, if the Applicant's fear materializes, all the evidence leading up to such decision, including the materials reviewed in this judgment, will be subject to judicial review at that time. Nevertheless, it appears to the Tribunal that matters have been resolved to some extent and that the Applicant is secure in her employment in light of her many years of service.

Conclusion

52. In view of the foregoing, the application is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 24th day of June 2019

Entered in the Register on this 24th day of June 2019

(Signed)

Nerea Suero Fontecha, Registrar, New York