



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

FOSSE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Aleksandra Jurkiewicz, OSLA

Counsel for Respondent:

Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. On 22 February 2018, the Applicant, a Senior Officer at the P-5 level in the Office of Information and Communications Technology (“OICT”) of the former Department of Management (“DM”) in New York, filed an application to contest the Administration’s decision not to return her to her original functions as Chief of Operation Support Section (“OSS”) following a temporary change of responsibilities to the launching of two information technology (“IT”) projects. The Applicant also contests the alleged implicit decision not to recognize her two temporary assignments in her official status file. As remedies, the Applicant requests the Tribunal to order the Administration to issue two Personnel Action forms reflecting the temporary assignments, and to return her responsibilities as Chief of OSS or, in the alternative, to reassign her to a vacant position at the same level within DM in New York.

2. In response, the Respondent contends that the Applicant’s claims with respect to the Personnel Action forms are moot as they have already been issued after the filing of the present application. The Respondent also contends that the Applicant presents no viable cause of action with respect to her request for reassignment as she has accepted a new position with the Secretariat of the Convention on Biological Diversity (“SCBD”).

Factual and procedural background

3. The Applicant was selected as a Special Assistant to the Assistant Secretary-General for OICT (“ASG/OICT”) at the P-5 level on 1 May 2009.

4. In February 2014, ASG/OICT asked the Applicant to lead a newly established project called global help desk, and she agreed.

5. In March 2014, OICT announced a temporary job opening for the Senior Officer with OSS at the P-5 level. In the memorandum dated 14 July 2014, which

announced the selection for this position, ASG/OICT noted that this position was “against the blocked P-5 post for [the Applicant] during her temporary assignment”.

6. In 2016, the Applicant took on a new role as the Coordinator of the Digital Blue Helmets program in OICT.

7. On 1 June 2017, the Applicant wrote to ASG/OICT requesting that the Personnel Action forms be issued to reflect her temporary assignments as the Coordinator of the Unite Service Desk and the Coordinator of the Digital Blue Helmets program and that she be returned to her previous position as Chief of OSS.

8. On 28 July 2017, the Applicant submitted a management evaluation request.

9. On 24 November 2017, the Applicant received the management evaluation upholding the decision not to return her to the position of Chief of OSS on the grounds, *inter alia*, that there is no evidence that she had a lien on this post and that the Administration has broad discretion to reassign staff members. In addition, the management evaluation recommended the issuance of Personnel Action forms to reflect the Applicant’s assignments.

10. On 22 February 2018, the Applicant filed the present application.

11. On 28 February 2018, the Applicant was informed that two Personnel Action forms were processed to reflect her assignments. The Applicant’s two assignments in 2014 and 2016 were reflected as “Reassignment”.

12. The Applicant was selected as Chief of Section, Programme Budget at the P-5 level with SCBD in Montreal, Canada. The Applicant was released to SCBD on 16 April 2018.

Consideration

13. In the present case, the Respondent claims that the application is not receivable for two reasons. First, the Respondent claims that since the Organization issued the Personnel Action forms, this claim is moot. Second, the Respondent claims that the Applicant waived her claim with respect to her request for reassignment within the United Nations Secretariat since she accepted a new position with SCBD and her last day with the United Nations Secretariat was 15 April 2018. The Respondent submits that the acceptance of the new position precludes the Applicant from seeking a reassignment as a remedy.

14. In response, the Applicant submits that her claim relating to Personnel Action forms is not moot since the issued Personnel Action forms erroneously reflect her temporary assignments as permanent assignments. Regarding her request for reassignment, the Applicant requests that she be allowed to amend her initial request to seek compensation in lieu of specific performance with regard to her claim of constructive dismissal.

15. In light of the Respondent's challenge to the receivability of the application, the Tribunal will first address this issue.

16. In *Kallon* 2017-UNAT-742, the Appeals Tribunal explained the mootness doctrine:

44. A judicial decision will be moot if any remedy issued would have no concrete effect because it would be purely academic or events subsequent to joining issue have deprived the proposed resolution of the dispute of practical significance; thus placing the matter beyond the law, there no longer being an actual controversy between the parties or the possibility of any ruling having an actual, real effect. The mootness doctrine is a logical corollary to the court's refusal to entertain suits for advisory or speculative opinions. Just as a person may not bring a case about an already resolved controversy (*res judicata*) so too he should not be able to continue a case when the controversy is resolved during its pendency. The doctrine accordingly

recognizes that when a matter is resolved before judgment, judicial economy dictates that the courts abjure decision.

45. Since a finding of mootness results in the drastic action of dismissal of the case, the doctrine should be applied with caution. The defendant or respondent may seek to “moot out” a case against him, as in this case, by temporarily or expediently discontinuing or formalistically reversing the practice or conduct alleged to be illegal. And a court should be astute to reject a claim of mootness in order to ensure effective judicial review, where it is warranted, particularly if the challenged conduct has continuing collateral consequences. It is of valid judicial concern in the determination of mootness that injurious consequences may continue to flow from wrongful, unfair or unreasonable conduct. ...

17. In the present case, the Applicant defines the contested decision as “[t]he Administration’s decision to not return [the Applicant]’s original functions as Chief of Unit OSS following her temporary change of responsibilities when she was assigned, together with her post, to the launching of two IT projects” and “[t]he implicit decision not to recognize [the Applicant]’s two temporary assignments she held during the period of 2014-2017 in her official status file”. As remedies, the Applicant seeks the return to her functions as Chief of OSS or assignment to a suitable vacant position within DM in New York.

18. The Tribunal notes that soon after filing the present application, the Applicant was selected as Chief of Section, Programme Budget at the P-5 level with SCBD in Montreal, Canada, and according to the email communication between the United Nations Secretariat and SCBD, she was released to SCBD “on Transfer”. The Respondent submits that SCBD requested the release and transfer of the Applicant through the Interagency Agreement and the Organization agreed to the transfer. The Applicant does not dispute this submission.

19. Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the UN Common System of Salaries and Allowances dated 1 January 2012 (“Inter-Organization Agreement”) defines the transfer as “the movement of a staff member from one organization to another under

conditions which give the staff member no right to return to the releasing organization". The Inter-Organization Agreement further provides as follows with regard to transfer:

Transfer

8. (a) A staff member who is transferred will cease as from the date of transfer to have any contractual relationship with the releasing organization, which will therefore be under no obligation to re-employ him or her should the staff member leave the receiving organization.

(b) As from the date of transfer, the entitlements of the staff member will be governed by his or her contractual relationship with the receiving organization.

(c) Subject to satisfactory completion by the staff member of any period of probation which it may require, the receiving organization will, if it is possible to do so in accordance with its normal policies, grant the staff member an appointment of duration not less than that of his or her appointment in the releasing organization.

20. Since the Applicant was transferred to SCBD according to the Inter-Organization Agreement, she no longer has any contractual relationship, and therefore any lien to a post, with the United Nations Secretariat from the date of the transfer. The only remedy that the Applicant seeks is the return to her functions as Chief of OSS or assignment to a suitable vacant position in New York, and the Tribunal cannot order such remedy due to the cessation of the Applicant's contractual relationship with the United Nations Secretariat. The Applicant did not seek any other remedies and the Tribunal may not award compensation without a party having first requested it (see *Debebe* 2013-UNAT-288, para. 21). Therefore, under the jurisprudence of the Appeals Tribunal in *Kallon*, a judicial decision will be moot since any remedy that can be issued in this case would have no concrete effect.

21. With respect to her claim regarding Personnel Action forms, the Tribunal notes that the Administration issued Personnel Action forms to recognize her two assignments. Hence, the Respondent submits that this matter is moot. However, the

Applicant claims that her claim in this regard is not moot as she disagrees with the Administration's characterization of her assignments.

22. The Tribunal notes that it is undisputed that the Applicant completed her assignments as the Coordinator of the Unite Service Desk and the Coordinator of the Digital Blue Helmets program. As these assignments are recorded in the Personnel Action forms, to the extent that she challenges the alleged implicit decision not to recognize her assignments, this matter is moot. What is unresolved is the nature of these assignments, that is, whether they were temporary assignments or permanent reassignments. This matter is directly tied to the question whether the Applicant is entitled to the return to her functions as Chief of OSS. Since the Tribunal cannot order the return to her functions as Chief of OSS or any post in the United Nations Secretariat, as explained above, this question is also moot for the absence of any possible remedy that could have concrete effect.

23. Furthermore, even assuming that this matter is not moot, the Tribunal finds no merit in the Applicant's claim. Staff regulation 1.2(c) provides that "[s]taff members are subject to ... assignment by [the Secretary-General] to any of the activities or offices of the United Nations". Such discretionary power is not unfettered, and it 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). However, while there is some evidence that the Administration may have considered, at least initially, the Applicant's assignment to an IT project as temporary, the Administration has at all times a discretion to reassign staff members and the Tribunal finds no evidence that the Administration abused its discretion by considering her two assignments as reassignments, as opposed to temporary assignments.

24. The Tribunal notes that the Applicant also raises a claim that she was constructively dismissed, and in response to the Respondent's argument on the receivability issue, she requests that she be allowed to amend her initial request to

seek compensation in lieu of specific performance with regard to her claim of constructive dismissal. The Tribunal notes that this claim has been raised for the first time in the present application and was not subject to management evaluation, which is mandatory under art. 8.1(c) of the Dispute Tribunal's Statute read together with staff rule 11.2. Since the Applicant did not submit her claim of constructive dismissal for management evaluation, this claim is not receivable *ratione materiae* (see *Crichlow* 2010-UNAT-035).

Conclusion

25. In light of the foregoing, the Tribunal rejects the present application.

(Signed)

Judge Joelle Adda

Dated this 20th day of August 2019

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

(Signed)

Nerea Suero Fontecha, Registrar, New York