



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KANBAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Rosangela Adamo, AAS/ALD/OHR

Introduction

1. The Applicant is a Language Assistant at the GS-4 level, working with the United Nations Interim Force in Lebanon (“UNIFIL”), attached to the Indonesian Battalion (“INDOBATT-7-1”).¹

2. By an application filed on 6 April 2018, the Applicant challenges a decision to redeploy her from the Chinese Constructing Engineering Unit (“CHINCEU 2-31”) (“Sector West”) to INDOBATT 7-1 (“Sector East”).²

3. The Respondent filed a reply on 11 May 2018 in which it is argued that the claim is not receivable *ratione materiae* and, if found receivable, the contested decision was lawful.³

4. In August 2019, the Tribunal held a case management discussion (CMD) to explore the possibility of informally settling the case. On 15 October 2019, the Applicant informed the Tribunal that the parties had failed in their attempts to resolve the case informally.⁴ By Order Nos. 165 (NBI/2019) and 018 (NBI/2020) the Tribunal sought to solicit from the Applicant, at the time represented by two professional counsel, what circumstances she intended to prove and how these circumstances were relevant to the illegality of the impugned decision. The filings made by the Applicant were late⁵ and did not demonstrate the need for a hearing, whereupon the Tribunal decided the case based on documents before it.

Facts

5. The Applicant has served as a Language Assistant at the Language Support Unit (“LSU”) at UNIFIL since August 2016. The LSU provides support services to the

¹ Application, section I.

² Application, section V.

³ Reply, sections C and D.

⁴ Applicant’s submission in response to Order No. 116 (NBI/2019), filed on 15 October 2019.

⁵ Applicant’s submissions in response to Order No. 018 (NBI/2020), filed on 21 February 2020.

military units in relation to UNIFIL mandated activities.⁶ The duty station of the LSU is the entire area of operation of the force.⁷ The Applicant was assigned to a unit CHINCEU 2-31 in Shamaa, Sector West in Lebanon.⁸

6. On 6 September 2017, the Applicant received a phone call from Ms. Bahaa El-Hage, the Officer-in-Charge of LSU and her Second Reporting Officer (SRO), informing her that she would be redeployed from CHINCEU 2-31 to the Italian Battalion (ITALBATT) due to a shortage of language assistants in that sector.⁹ However, on 22 September 2017, through an Inter-Office Memorandum, Ms. El-Hage, notified the Applicant that due to operational requirements, she was instead redeployed from the CHINCEU 2-31 to INDOBATT effective 2 October 2017.¹⁰

7. On 26 September 2017, Ms. El Hague issued redeployment letters to eight other language assistants who were also re-assigned to different stations.¹¹

8. On 27 September 2017, the Applicant, by way of an email, contacted Ms. El-Hage, announcing that she would contest her redeployment. On the same day, Ms. El-Hage responded by inviting the Applicant and Mr. Kamal Shaaban, the Sector West Coordinator, to a meeting to discuss her concerns.¹² The discussion took place on the next day.¹³

9. On 2 October 2017, the Applicant started working for INDOBATT 7-1, where she remains to date.¹⁴ This placement involves for the Applicant an additional commute of 17km.¹⁵

10. On 24 November 2017, the Applicant requested management evaluation

⁶ Reply, annex 1.

⁷ Reply, R/6.

⁸ Application, section VII, para 2., Reply, annex 1

⁹ Application, section VII, para 7.

¹⁰ Reply R/2 and R/3; Application, section VII, para 7.

¹¹ Reply R/9.

¹² Reply, R/4.

¹³ Reply, R/5.

¹⁴ Application, section I and section VII, para 9.

¹⁵ Reply, para 13; Reply R/12, fact admitted at Case Management Conference.

challenging the redeployment decision.¹⁶ On 23 March 2018, the Management Evaluation Unit informed the Applicant that the Secretary-General had decided to uphold the contested decision.¹⁷

Receivability

Respondent's submissions on receivability

11. The Respondent contends that for an application to be receivable, the decision being challenged must be an “administrative decision” which has produced direct legal consequences affecting a staff member’s employment contract or terms of appointment. The decision to redeploy the Applicant to perform language assistant services from one military unit to another did not have direct legal consequences to her contract of employment or the terms of her appointment. The contested decision did not adversely affect the Applicant’s employment contract or terms of appointment. She remained at the same grade and level performing the same functions in the same duty station, UNIFIL. Therefore, the application is not receivable.¹⁸

Applicant's submissions on receivability

12. The Applicant did not specifically address the issue of receivability.

Considerations

13. Article 2(1)(a) of the UNDT Statute provides that:

The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual...(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

¹⁶ Application, annex 3.

¹⁷ Application, annex 4.

¹⁸ Reply, section C.

14. To be reviewable, an administrative decision must have the key characteristic in that it must “produce direct legal consequences” affecting a staff member’s terms or conditions of appointment.¹⁹ The Tribunal recalls that there is settled jurisprudence that the reassignment and redeployment of a staff member is a reviewable decision.²⁰ Moreover, viewing the matter through the prism of the right to be free from discrimination and harassment at the workplace confirms that safeguards for it are implicit to the terms of United Nations staff employment. As such, a decision taken for an improper purpose of harassment would automatically violate a staff member’s terms of appointment.

15. Therefore, on the question of receivability the Tribunal concludes that the application is directed against a decision within the scope of art. 2(1)(a) of the UNDT Statute.

Merits

Applicant’s submissions

16. The Applicant submits that the decision to redeploy her was based on improper considerations. It was to inconvenience her due to the distance between her permanent residence and her new job’s location. She would be required to spend an additional 20 minutes daily on the commute. At the same time, another colleague of hers, who is equally competent and lives near the new station, would have been ideal for redeployment. Her complaint was not taken into account although her other colleagues were given the choice to accept or refuse redeployment proposals.

17. The Applicant further cites some prior incidences she had with her supervisors. She claims that from November 2016 until April 2017, she received constant threats from Mr. Shaaban, her First Reporting Officer (FRO).²¹ Among other, the FRO ordered Mr. Ibrahim Jaafar, the Applicant’s colleague, to report to him all the Applicant’s

¹⁹ See former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

²⁰ *Gehr* 2012-UNAT-236; *Kamunyi* 2012-UNAT-194; *Allen* 2011-UNAT-187; *Kaddoura* 2011-UNAT-151; *Hepworth* 2015-UNAT-503.

²¹ Application, section VII, para 3.

activities and movements. The Applicant further states that during her service in CHINCEU 2-31 in Sector West, she was a target of Mr. Jaafar's constant and unsavory behavior.²² On 21 May 2017, an incident happened where another United Nations staff member parked his car in the parking lot of the Applicant's family. In the process of trying to resolve the parking issue, the other United Nations staff member became abusive and belittled the Applicant, showing her that he has more power over her due to his senior position at the United Nations. On 22 May 2017, the Applicant informed Ms. El Hage of the parking incident, but the latter just ignored her, and no consideration was given to her case.²³ The Applicant also cites events post-dating the impugned decision, such as communication problems at work at INDOBATT 7-1.

18. The Applicant maintains that prior to filing her application with the United Nations Dispute Tribunal, she reported incidences of intimidation, humiliation, threats, sexual harassment and abuse of authority to the UNIFIL Staff Counsellor and to the UNIFIL Conduct and Discipline Office; but they did not help her.²⁴ After filing her application, she was informed that the UNIFIL Conduct and Discipline Unit had finally assessed her complaint and established that it was about gossiping, rumors and harassment in the workplace, which would be better managed by the Chief, Language Support Unit.²⁵

19. The Applicant further submits that all the above-mentioned incidents created a lot of stress for her, which resulted in various ailments.²⁶

20. The Applicant thus requests the Tribunal by way of remedy to:

- a. Compensate her for both moral and material damages she suffered; and
- b. Annul the redeployment decision.

²² Applicant's submissions pursuant to Order No. 018 (NBI/2020), para 3.

²³ Ibid, para 6.

²⁴ ibid para 7.

²⁵ Ibid.

²⁶ ibid

Respondent's submissions

21. The Respondent maintains that the contested decision was lawful. The Applicant was hired to perform language assistant functions in UNIFIL and the office was not required to obtain her consent before taking the contested decision. UNIFIL deploys language assistants based on operational priorities as determined by the Head of Mission, taking into account particular language skills, gender balance, maintenance of fully balanced teams, relative hardship, career development and training.²⁷ There was shortage of language assistants, necessitating their deployment on rotation among UNIFIL battalions. Several language assistants needed to be transferred from INDOBATT to the Chinese Level 1 Hospital, which, in turn, caused a shortage of language assistants at INDOBATT.²⁸

22. With regard to whether the decision was tainted by improper motives, the Applicant has not produced evidence that the contested decision was ill-motivated. The decision was taken based on the operational needs of UNIFIL.

23. The Applicant is not entitled to moral or economic damages. She has not produced any evidence to support her claim for compensation for harm as required under art. 10(5)(b) of the UNDT Statute.

Considerations

24. The Tribunal recalls that according to staff regulation 1.2(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.

25. There is well settled jurisprudence that the reassignment of a staff member's functions comes within the broad discretion of the Organization to use its resources

²⁷ Reply, section D.

²⁸ Management Evaluation, p. 3.

and personnel as it deems appropriate.²⁹ This discretion is not unfettered and is subject to examination pursuant to the *Sanwidi* test, *i.e.*, “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.”³⁰ Otherwise, it is, however, not for the Tribunal to replace the discretionary decision with its own determination of what would have been a better, or alternative, course of action.

26. On the score of formal legality, the decision is not challenged. It is, in any event, demonstrated that the Applicant was hired to perform language assistant functions in UNIFIL’s entire area of operation. Her job description specifically states: “Accompany the military members of the contingent on patrols, which may entail travelling in civilian and/or military pattern vehicles (APCs etc.), and attending meeting (sic) related to their daily tasks and day-to-day activities in the area(s) of operation and provide interpretation services.”³¹ In light of staff regulation 1.2(c) and this job description, reassigning the Applicant from one work station to another within UNIFIL was legitimate.

27. On the procedural side, there is no requirement in the relevant legal instruments for the Respondent to consult a staff member about a proposed reassignment.³² Such consultation may be desirable, as it allows a discussion of different opinions and concerns, and in this way fosters rationality of the decision; the latter, however, ultimately belongs to the manager. The utility of a prior consultation, moreover, depends on the complexity and gravity of the matter at hand. In the present case, such consultations do not appear indispensable. In any event, the Applicant was invited to discuss the assignment after the decision was announced. She, however, as illustrated

²⁹ *Gehr* 2012-UNAT-236; *Kamunyi* 2012-UNAT-194; *Allen* 2011-UNAT-187; *Kaddoura* 2011-UNAT-151; *Hepworth* 2015-UNAT-503.

³⁰ 2010-UNAT-084.

³¹ R/6.

³² See *Perez-Soto* UNDT/2012/078; *Rees* UNDT/2011/156, and Order No. 186 (NY/2010) cited in Case No. UNDT/NY/2010/061.

by her email, had formed the intent of turning to the Tribunal even before the discussion took place.

28. As concerns rationality, it is also uncontested that due to budget constraints a continual redeployment of language assistants occurs in order to meet the requirements of the military force and that the Applicant's redeployment was part of a wider redeployment exercise within UNIFIL, involving several language assistants. As admitted by the Applicant, the exercise was in place already in September. Moreover, various considerations were taken into account, as demonstrated by the initial idea to have the Applicant moved to ITALBATT instead of INDOBATT 7-1. As such, there were operational reasons for moving the language assistants around, and the Applicant was not "targeted".

29. Regarding the averment of improper purpose, i.e., that the decision was taken to harass the Applicant, the Tribunal recalls that the staff member has the burden of proving that improper factors played a role in the administrative decision.³³ In this respect, the Tribunal finds that the events cited by the Applicant, even if taken as true, are incapable of proving a harassment intent on the part of the author of the impugned decision. They either do not at all concern the decision-maker or concern incidents unrelated to the reassignment. If anything, they document that the Applicant did not enjoy good workplace relations either in CHINCEU 2-31 or INDOBATT 7-1. To the extent the Applicant complains of having suffered harassment, including of a sexual nature, from other United Nations staff members, she remains to have in her disposal avenues provided under ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority). These allegations however, have no relevance for the matter at hand. Therefore, evidence proposed to support them, apart from being submitted late, was rejected as irrelevant.

30. In conclusion, the impugned decision is not irrational or perverse.

³³ *Liu* 2016-UNAT-659; *Assale* 2015-UNAT-534; *Said* 2015-UNAT-500; *Pirnea* 2013-UNAT-311.

31. As concerns proportionality, the Tribunal agrees with the Respondent that Applicant's additional commuting distance of 17 kilometers to INDOBATT does not present onerousness that would render the contested decision disproportionate. Commute and associated investment of time is commonplace. Undisputedly, many from among the language assistants have to spend time commuting to work. The Tribunal understands, moreover, that the rotation of language assistants is ongoing and the Applicant, having served at INDOBATT for more than two years, will be well positioned to have her work station changed when opportunity arises. In this vein, when directing the parties to seek informal resolution, the Tribunal noted that an amicable solution was within the parties' reach through determining a reasonable prospect of rotation out of INDOBATT. The Tribunal recalls that the Applicant's response was that she would not be satisfied unless a finding of liability is made against her co-workers and she receives compensation. The Tribunal finds no basis for satisfying these demands.

32. The impugned decision being a lawful exercise of discretion, there is no basis for rescinding it nor for awarding compensation.

JUDGMENT

33. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 1st day April 2020

Entered in the Register on this 1st day of April 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi