



Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DIENG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Evelyn Kamau, OSLA

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Rosangela Adamo, AAS/ALD/OHR

Background

1. The Applicant joined the Organization as a Human Rights Officer at the P-2 level on 14 July 2000. He was later appointed to several positions in the United Nations Mission in Sierra Leone and the United Nations Operations in Côte d'Ivoire. On 23 February 2009, he was appointed as Senior Child Protection Advisor at the P-5 level in the Child Protection Unit ("CPU") in the United Nations-African Union Mission in Darfur ("UNAMID").

2. By memorandum dated 4 April 2018, Jeremiah Mamabolo, the Joint Special Representative ("JSR"), UNAMID, informed the Applicant that he would be reassigned from CPU/UNAMID to the Office of the Joint Special Representative ("OJSR") as a Senior Political Affairs Officer. The Applicant was informed that his reassignment was effective 8 April 2018 and that he would maintain his current grade and level, as well as his contractual status.¹

3. On 1 June 2018, the Applicant requested management evaluation of the reassignment decision and on 2, 3 and 7 June 2018, he submitted supplementary information to the Management Evaluation Unit ("MEU").²

4. On 8 June 2018, the Applicant received a letter from the MEU confirming receipt of his correspondences dated 1, 2, 3 and 7 June 2018 and received by the MEU on 1, 4 and 8 June 2018, respectively.³

5. On 17 October 2018, the Applicant received the MEU's response to his request for management evaluation which advised him that the contested decision had been upheld.⁴

¹ Application, annex 6.

² Application, annex 10 and reply, annex 2.

³ Application, annex 11.

⁴ Application, annex 12.

6. By letter dated 7 November 2018, the Applicant was informed that his fixed-term appointment would not be renewed beyond 31 December 2018. That same day, he filed his application before the UNDT challenging the decision to remove him from his position as Senior Child Protection Advisor and to reassign him as a Senior Political Affairs Officer within UNAMID. On 14 December 2018, the Respondent filed his reply to the application.

7. On 30 January 2019, the UNDT issued Judgment No. UNDT/2019/014 dismissing the application as not receivable. The Applicant appealed the Judgment and, on 28 June 2019, the United Nations Appeals Tribunal (“UNAT”) granted the appeal and remanded the case to the UNDT for a trial on the merits.⁵

8. The Tribunal finds that the Applicant’s reassignment was unlawful and awards him one month’s net base salary at the grade he encumbered at the time of the contested decision as compensation for stress and anxiety.

Relevant facts

9. Between February and March 2017, complaints were made to Mr. Mamabolo, about the Applicant’s communication style by UNICEF Sudan staff members.⁶

10. On 5 June 2017, upon receiving the complaints, Mr. Mamabolo convened a fact-finding panel to review the allegations against the Applicant.⁷

11. On 13 November 2017, the Applicant met with Mr. Mamabolo. At the meeting, Mr. Mamabolo informed him that he had nominated Aisha Dyfan “as the focal point with the co-chairs of the Country Task Force on Monitoring and Reporting Mechanism (RC/HC and UNICEF) over planned Security Council Working Group visit to Sudan/Darfur”. The decision to nominate Ms. Dyfan was upon a request by the

⁵ Judgment No. 2019-UNAT-941.

⁶ Application, annex 1, page 1 and reply, annex 6.

⁷ Reply, annex 7.

UNICEF Representative and the United Nations Resident/Humanitarian Coordinator (“RC/HC”) who had told him that they did not want to work with the Applicant.⁸

12. On 13 March 2018, Mr. Mamabolo disbanded the fact-finding panel convened to review the allegations against the Applicant.⁹

13. On 18 March 2018, Mr. Mamabolo informed the Applicant that his decision to disband the fact-finding panel was partly due to the death of the complainant who had made allegations of misconduct against the Applicant.¹⁰

14. In an email dated 22 March 2018, Mr. Mamabolo informed the Under-Secretaries-General (“USGs”) of the Department of Peacekeeping Operations and the Department of Field Service that he had decided to reassign the Applicant to perform alternative duties within the Mission for the following reasons:

- a. the Applicant had poor behavioral and interpersonal skills which undermined his capacity to discharge the responsibilities assigned to him effectively;
- b. the Applicant engaged in constant, overly assertive and never ending public and private conflict with the United Nations Country Team (“UNCT”) partners;
- c. the Applicant’s behavior had alienated him from most of the other Mission Managers and Mission components which had seriously hampered their efforts to work collaboratively with him and his section;
- d. the Applicant had consistently and over an extended period of time displayed inappropriate, unacceptable and unprofessional behavior towards colleagues and senior managers characterized by bitter and

⁸ Application, annex 3.

⁹ Application, annex 2.

¹⁰ Application, annex 4.

personal attacks; and that

- e. the Applicant took actions that undermined decisions, guidance and instructions of the senior leadership and senior managers on the need for cooperation.

Mr. Mamabolo further stated that the Applicant's actions would be of interest to the Office of Internal Oversight Services ("OIOS") but that the "inordinate procedural timelines required by official investigations through those channels would likely result in irreparable damage to the Mission's child protection mandate and to the otherwise excellent working relationship that the Mission enjoyed with UNCT and other partners".¹¹

15. On 4 April 2018, the Applicant received a letter from Mr. Mamabolo with instructions that he would be reassigned from the CPU to the Office of the Joint Special Representative as a Senior Political Affairs Officer to work on mediation issues effective 8 April 2018.¹²

16. In response to the Applicant's email objecting to his reassignment, Mr. Mamabolo informed the Applicant, on 13 April 2018, that his reassignment was "purely an exercise of his authority as Head of Mission of UNAMID to ensure effective programme delivery as [he] deem[ed] it necessary".¹³

17. On 26 May 2018, the Applicant sought medical treatment and his attending Physician advised that he take 16 days of home rest and absence from work because of stress-induced symptoms.¹⁴

18. On 21 October 2018, the Applicant received advance notice of the non-renewal of his fixed-term appointment beyond 31 December 2018.¹⁵

¹¹ Application, annex 5.

¹² Application, annex 6.

¹³ Application, annex 8.

¹⁴ Applicant's submissions on damages, annex 5.

¹⁵ Application, annex 13.

Considerations

19. The issues for determination are:

- a. Whether the Applicant's reassignment was lawful and
- b. Whether the Applicant is entitled to any of the remedies he seeks.

Whether the Applicant's reassignment was lawful

20. The resolution of the question of the legality of the reassignment must be preceded by the determination of two sub issues:

- a. Whether the Respondent had the discretion to effect the reassignment; and
- b. Whether that discretion, if at all, was exercised properly. This will in turn entail discussing whether the reassignment was a veiled disciplinary measure, whether it was performance related and, if so, whether the proper procedures were followed.

Whether the Respondent had the discretion to reassign the Applicant from CPU to OJSR.

21. Staff regulation 1.2(c) provides that staff members can be assigned by the Secretary-General to any activities of the Office. Section 2.5 of ST/AI/2010/3 (Staff selection system) provides that Heads of departments/offices ("HODs/HOs") and Heads of mission ("HOM") can transfer staff within their offices, departments or missions. *Kaddoura* 2011-UNAT-151 and *Kamunyi* 2012-UNAT-194 crystalize the position 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.

22. The facts of this case fall squarely within the ambit of the above laws and jurisprudence. The Tribunal therefore finds that the Respondent had discretion to

reassign the Applicant.

Whether that discretion was exercised properly.

23. The exercise of discretion to reassign a staff member is not unfettered.¹⁶ The propriety of exercise of discretion is to be assessed along parameters of arbitrariness, bias, non-discrimination and non-violation of rights of the staff member. The reassignment of a member of staff must be reasonable in the particular circumstances of each case and should not cause economic prejudice to the staff member.

24. The Applicant, while linking the decision to reassign him to complaints which were only brought to his attention after they had been forwarded to the United Nations Headquarters, maintains that the decision was arbitrary and in bad faith, and that it was an unlawful exercise of discretion which was only used to circumvent the disciplinary process. In this regard, he pointed to the establishment of a fact-finding panel, an indication that it had been deemed that the complaints were made in good faith and formed sufficient grounds to warrant a formal investigation pursuant to ST/AI/371 (Revised disciplinary measures and procedures), as amended.

25. He argues that when the case was closed with no further action, meaning that there were no longer sufficient grounds to warrant a formal fact finding investigation, a decision was taken to reassign him to another office instead of engaging the process under ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) to forward the complaint to OIOS for its consideration on whether to consider and investigate the case. He argues that the failure to investigate the allegations denied him an opportunity to rebut them and to clear his record, and yet an adverse decision was taken on the basis of those unproven allegations.

26. The Respondent, however, maintains that the reassignment was lawful and done in exercise of authority by the HOM of UNAMID to ensure effective program delivery, being that continued discussions with the Applicant about his communication

¹⁶ *Kaddoura and Kamunyi*, op. cit.

difficulties failed to yield positive results. The Applicant's conduct had allegedly impaired the normal flow of work and so the reassignment was in the best interests of the mission. The new position was moreover at the Applicant's grade and the responsibilities involved corresponded to his level. The functions were commensurate with his competence and skills, and he had substantial experience in the field. The reassignment was therefore a purely administrative decision which was taken to restore a level of functionality to the CPU.

27. It is common cause that the Applicant's reassignment was effected against the background of complaints which had been raised over his alleged poor interpersonal skills, and after a failed attempt to investigate the complaints. According to the Respondent, the effort to investigate the complaints having failed for reasons beyond their control (death of the complainant), administrative action was taken to bring order to the mission. The question is whether the option adopted by the Respondent passes the multipronged tests of arbitrariness, bias, non-discrimination, or non-violation of the rights of the Applicant.

28. The evidence on record shows that the impugned decision was indeed based on the complaints levied against the Applicant. Such evidence includes the contents of an email from Mr. Mamabolo to the USGs of the Department of Peacekeeping Operations and the Department of Field Service informing them that the Applicant had poor behavioural and interpersonal skills which undermined his capacity to discharge the responsibilities assigned to him in an effective manner.¹⁷ Further, that he operated as an isolated entity unto itself, and engaged in constant, overly assertive and never ending public and private conflict with UNCT partners, including the Office of the SRSG on Children and Armed Conflict, and with colleagues within UNAMID. Also, that the unit the Applicant was leading was dysfunctional, incapable of working in a coordinated manner with key UNCT partners, and unable to effectively and successfully implement UNAMID's Child Protection Mandate. The above evidence answers the question of

¹⁷ Application, annex 5.

whether the decision was performance related in the affirmative. The only issue is whether the proper procedures were followed in arriving at the decision.

29. The relevant law in the context of performance is ST/AI/2010/5 (Performance Management and Development System) which in section 10.1 requires continuous performance evaluation by the First Reporting Officer (“FRO”) during the performance cycle, and that when a performance shortcoming is identified during the performance cycle, “the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s) (emphasis added). The remedial measures may include transfer to more suitable functions.

30. The Tribunal notes that in the Applicant’s 2016-2017 performance evaluation, his FRO gave him an overall rating of “Exceeds expectations.” The Second Reporting Officer, (“SRO”) however stated that;

I approve with the grading ‘Fully meets expectations’. There have been continuing issues with regard to the staff member’s challenging of existing UNAMID reporting lines, and his professional relations with the Mission’s partners in the UN Country Team.

31. In the Applicant’s 2017-2018 performance evaluation, his FRO gave him an overall rating of “Successfully meets expectations.”, and commented thus:

I have absolutely no doubt that Mr. Dieng is committed to his work, holds highly the values of the UN. He must however work towards improving his interpersonal skills, and improve his working relations with other role players.

32. The Tribunal notes that the allegations of poor behaviour and the fact that those behaviours undermined the Applicant’s capacity to discharge the responsibilities assigned to him in an effective manner were not included in those performance evaluations. The fact that the allegations later became the subject of the email to the USGs of the Department of Peacekeeping Operations and the Department of Field Service and formed the basis for the decision to reassign the Applicant to another office shows that there was no transparency on the part of the Respondent in this matter.

33. The Tribunal also notes the egregious and damning nature of the allegations in issue. Their nature was such as would put into question the Applicant's credentials as an international service servant and yet even when the attempt to investigate them failed, nothing was done to bring them to his attention and to meaningfully remedy the situation in accordance with section 10.1 of ST/AI/2010/5.

34. The mere reassignment of the Applicant to another office under circumstances of undisclosed, un-investigated and unresolved egregious and damning allegations such as these can only be ruled to have been arbitrary, and a violation of the Applicants due process rights since he was denied an opportunity to rebut them and clear his record.

35. The Respondent's argument, based on the general authority of Heads of mission to reassign staff members within the mission is unsustainable. The reassignment in this case was done in the context of a number of contentious issues including a failed investigation. It was therefore wrong for the Respondent to act in a business-as-usual manner on the basis of general authority to reassign the Applicant to another office.

36. Since the information that the JSR/UNAMID had decided to reassign the Applicant to another office instead of referring the complaints to the OIOS was given by the JSR himself, the Tribunal can only agree with the Applicant that the reassignment was a remedial measure and that it was taken without any *performance shortcomings* expressly identified. This violated section 10.1 of ST/AI/2010/5 which provides that:

During the performance cycle, the first reporting officer should continually evaluate performance. When a performance shortcoming is identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s). Remedial measures may include...transfer to more suitable functions...

37. Regarding the complaint that the reassignment was a veiled disciplinary measure which was used to evade an investigation into alleged misconduct, the contents of the JSR's email to the USGs communicated the decisions not to forward

the matter to the OIOS for investigation and to instead reassign the Applicant to another office. The Tribunal again agrees with the Applicant, on the basis of that evidence, that the decision to reassign him was indeed geared at evading an investigation into alleged misconduct and that it was a veiled disciplinary measure.

38. The Tribunal finds that the Applicant's reassignment was done in violation of the applicable law (ST/AI/2010/5) and it was therefore arbitrary. It was made in bad faith and in violation of the Applicant's due process rights since the complaints which formed the basis for the decisions were not brought to his attention in a timely manner, and through the right process. The complaints were never investigated and so he had no opportunity to rebut them, yet they remain on the record. On the whole, there was unlawful exercise of discretion.

Remedies

39. The Applicant argued that his reputation has been damaged due to the publicizing of allegations about his alleged misconduct and poor performance which he had no chance to respond to. He maintains that the damage done to his reputation built over almost two decades with the United Nations is irreparable. He requests that he be reinstated as the Senior Child Protection Adviser and that he be awarded compensation for the breach, and moral damages.

40. In response, the Respondent argues that the Applicant has not provided evidence of any harm. Article 10.5(b) of the Dispute Tribunal's Statute, as amended by General Assembly Resolution 69/203, provides that compensation for harm may only be awarded where supported by evidence. The Applicant does not provide any evidence to show that he has suffered any financial loss or moral harm as a result of the contested decision.

41. The question of reinstatement is out of the equation since even if it were circumstantially possible to do so, the Tribunal would not be amenable to issue such an order, since that would be tantamount to replacing its decision for that of the Respondent. In this case, however, the Tribunal is aware that the Applicant has since

been separated from the Organization and so the question of reinstatement is moot. The Applicant's challenge of the decision to separate him from the Organization is the subject matter in other proceedings before the UNDT and will be adjudicated in due course.

42. Turning to the request for compensation for economic loss, the Tribunal agrees with the Respondent that as the Applicant was reassigned within the Mission at the same P-5 grade and level, he suffered no economic harm as a result of the contested decision.

43. The Applicant seeks compensation for the reputational harm caused by the 22 March 2018 letter. He states that since the JSR had sent the disparaging email to senior officials in sections where his work was most relevant and where he was known, his reputation and professionalism was already tainted. He was thus unable to apply for any job within these areas, since the email recipients would be the hiring managers or remain influential. Also, until the false allegations in the JSR's email are properly addressed and corrected, his chances of obtaining recruitment within the United Nations remain limited if not effectively blocked. At best, however, the Applicant's concerns are speculative and do not amount to evidence as required by the UNDT Statute and applicable jurisprudence.

44. Turning to his request for compensation for stress and anxiety caused by the contested decision, the Applicant submitted a medical report dated 26 May 2018. Given the proximity of the Applicant's visit to the Physician to the date of the contested decision and the events leading up to the contested decision, the Tribunal finds a causal link between the Applicant's medical condition and the contested decision. The stress and anxiety caused to the Applicant by the contested decision merits a compensatory award. In the instant case the stress and anxiety occasioned to the Applicant by the contested decision resulted in the Physician recommending 16 days of home rest and absence from work.

45. Following the identification of the moral injury and its supporting evidence, it

falls to the Tribunal to assess the quantum of damages.¹⁸ The Tribunal awards the Applicant one month's net base salary as compensation for the stress and anxiety caused by the contested decision.

Conclusion

46. In conclusion, the Tribunal finds that the Applicant's reassignment was unlawful and awards him one month's net base salary at the grade he encumbered at the time of the contested decision as compensation for stress and anxiety. All other pleas are rejected.

(Signed)

Judge Margaret Tibulya

Dated this 22nd day of June 2020

Entered in the Register on this 22nd day of June 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

¹⁸ See for example in *Ross* 2019-UNAT-926.