



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MAHBOOB

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Robbie Leighton, OSLA

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Maureen Munyole, AAS/ALD/OHR, UN Secretariat

Introduction

1. On 9 September 2019, the Applicant filed an application challenging what he describes as an implicit decision to strip him of his functions.¹ At the relevant time, the Applicant was a Deputy Security Advisor (“DSA”), at the P-4 level, working with the United Nations Support Mission in Libya (“UNSMIL”).² The Applicant complained about having not been designated an Officer-in-Charge (“OiC”) during the absence of the Chief Security Advisor (“CSA”) and having been removed from several projects.³

2. On 10 October 2019, the Respondent filed a reply where it was argued that the application is not receivable *ratione materiae* because the Applicant had not been stripped of his functions of a security coordination officer, whereas assigning or not certain specific tasks to him by the superior did not constitute a decision violating the terms of reference of the Applicant’s appointment.

3. By Order No. 191 (NBI/2019), the Tribunal directed the Applicant to address in full the question of receivability indicating the date on which the contested decision was taken or when it was communicated to him. The Applicant filed the required submissions on 29 November 2019.

4. By Order No. 116 (NBI/2020), the Tribunal determined that the application was receivable given that, at minimum, the decision of 1 February 2019 regarding not designating the applicant as OiC was properly before the Tribunal, and, as to whether a series of decisions could be characterized as one of a continuous effect, the Tribunal would proceed on a *prima facie* determination in favour of receivability. The Tribunal accordingly directed the Respondent to file submissions on the merits. The Respondent complied and filed the submissions on 10 July 2020, arguing that there was no unlawful removal of functions.

¹ Application, section II.

² Application, section IV.

³ Application, section VII.

5. The Tribunal held a hearing on 10, 11 and 16 February 2022 and on 2 March 2022.
6. The parties filed their closing submissions on 11 April 2022.

Facts

7. The Applicant held the position of Deputy Security Adviser in UNSMIL since September 2016. During the time the Mission remained in evacuation status in Tunisia, he conducted risk assessments relevant for the decision on re-establishing the presence in Libya. Then, his First Reporting Officer (“FRO”) was Mr. Filippo Tarakinikini, the Chief Security Advisor.⁴ UNSMIL returned to Libya after evacuation status had been lifted in February 2018⁵. In May 2018, Mr. Mohamed Khafagi was appointed as the new CSA and he became the Applicant’s new FRO⁶, whereas Mr. Tarakinikini assumed a position of Chief of Middle East and North Africa (“MENA”) desk at New York Head Quarters and became the Applicant’s Second Reporting Officer.⁷ The CSA reported to the Deputy Director of Regional Operations (“D/DRO”), Mr. Igor Mitrokhin.⁸

8. At the relevant time, the CSA managed four principal pillars, that is: Operations which comprised Close Protection Unit (“CPU”); Security Information and Operations Centre (“SIOC”); Tripoli; and Chief Security Officer (“CSO”) for Mission-level security issues. There were two Deputy Security Adviser positions in the organigram, both at P-4 level, one attaching to the Operations Pillar and one to CSO.⁹ In practical terms, as the Mission was reviving after four years of functioning on evacuation status, many positions were vacant and the structure was not implemented fully. The Applicant was DSA and head of Operations, with responsibility, among other, for CPU. In June 2018, Ms. Rakhi arrived in Libya to join the Security Section as P-4 Field

⁴ Application, section VII, para 2.

⁵ Applicant’s testimony, 10 February 2022.

⁶ Application, annex 12.

⁷ Applicant’s testimony and Mr. Khafagi’s testimony.

⁸ Ibid.

⁹ Respondent’s exhibit 6.

Security Coordination Officer (“FSCO”) and was assigned the function of head of the Tripoli pillar and OiC for the vacant CSO pillar.¹⁰

9. The relationship between the new CSA and the Applicant deteriorated within weeks.

10. The CSA maintains that immediately after he had joined the Mission in May 2018, the Special Representative for the Secretary General (“SRSG”) complained to him about the Applicant repeatedly not being truthful in professional matters and stated that he had no confidence in him. He further maintains that the Under Secretary-General, Department of Safety and Security (“USG/DSS”) was made aware of the issue during his visit to UNSMIL in August 2018 and expressly instructed not to appoint the Applicant as OiC and to appoint Ms. Rakhi instead.¹¹

11. In August 2018, the CSA appointed Ms. Rakhi rather than the Applicant, to act as OiC in his absence.¹² The Applicant intervened with the SRSG, D/SRSG, D/DRO and Mr. Tarakinikini, which entailed Mr. Khafagi’s responses.¹³ While Mr. Tarakinikini expressed a conviction that, in accordance with an inter-office memorandum from the Headquarters, the Applicant should be designated as OiC, the D/SRSG instructed the Applicant to respect the CSA’s decision and follow the established chain of command.¹⁴ Thereafter, during his absences in October, November, December 2018 and February 2019, the CSA appointed Ms. Rakhi or another staff member to act as OiC, but not the Applicant.¹⁵ Email exchanges accompanying these decisions and annotations in the Applicant’s work plan confirm that the decision either originated from, or was approved by, the USG/DSS and the Mission leadership.¹⁶ Based on this record, it was on 21 October 2018, at the latest, that the Applicant was expressly informed of the fact that the decision had come from

¹⁰ Mr. Khafagi testimony; Respondent’s exhibit 9.

¹¹ Mr. Khafagi’s testimony, 16 February 2022, Respondent’s exhibit 13.

¹² Application, annex 1, p. 4.

¹³ Application, annexes 2, 3, 4 and 9.

¹⁴ Application, annex 4, p.6, Respondent’s exhibit 15.

¹⁵ Application, Annexes 6, 9 and 10.

¹⁶ Application, annexes 2, 3, 4, 6 and 12; Exhibit 14.

the USG/DSS and that it was a standing arrangement rather than an *ad hoc* choice.¹⁷ The same correspondence illustrates that, purportedly, this decision was a result of complaints against the Applicant, including sexual harassment. Mr. Khafagi collected statements of two UNSMIL female staff who were displeased with the Applicant's behaviour.¹⁸ The details of these complaints remained undisclosed to the Applicant.

12. The Applicant, moreover, argues that the CSA sought to limit the scope of his functions by removing him from various projects. For example, despite him having been heavily involved in the finalization of the Minimum Operational Security System ("MOSS") compliance for accommodation in Palm City, a large compound outside the main United Nations headquarters housing some offices of the Mission, the United States, European Union and some of Libyan authorities, the CSA removed him from the project and ensured that he was not copied on communications with the effect of impeding the progress of the task.

13. In this respect, it is undisputed that the overall responsibility for Palm City was assigned to Ms. Rakhi. The Applicant's role regarding Palm City was to oversee crisis management, for the event of a crisis within the Palm City, and as a contingency for the eventuality of an incident at the main compound. For this purpose, the Applicant had to overnight in Palm City, an arrangement pre-dating Mr. Khafagi's arrival as CSA.

14. There is evidence that on one occasion the Applicant may have not been copied on a document concerning the work of the CPU, which he supervised in accordance with the four-pillar structure, regarding assignment of a Close Protection Officer to Palm City.¹⁹ The Tribunal, moreover, heard testimony of Mr. Lasarusi Veilawa, the CPU Team Leader, according to which Mr. Khafagi had told him about his lack of trust in the Applicant and instructed not to copy the Applicant on the correspondence. Mr. Khafagi denies issuing such instruction, arguing that it would have been counterproductive, if not dangerous, given the nature of the duty. He admitted however,

¹⁷ Application, annex 6.

¹⁸ Respondent's exhibit 13; Kafagi testimony, 16 February 2022.

¹⁹ Application, annex 16 (email exchanges of December 2018).

that he had maintained an “open door policy”, encouraging staff to come to him directly with their concerns and complaints. The correspondence submitted by the Respondent indicates that Mr Veilawa apparently embraced the open-door opportunity and was actively complaining against the Applicant behind his back.²⁰ Also Mr. Ale, who deputized for the Team Leader in his absence, testified about having been queried about problems with the Applicant and instructed by Mr. Khafagi that “everything related to CPU had to come from him”, which made Mr. Ale uncomfortable.²¹

15. The Tribunal notes that the record does not show that a failure to copy the Applicant on pertinent documents extended over the one instance referenced above; that the Respondent has demonstrated that the Applicant had been put on the updated mailing list and should have received all pertinent communication²²; and that there is no record of any complaints about the Applicant’s name missing from the general mailing list. While the Tribunal appreciates that there may have been other correspondences of which the Applicant was not aware, it is, however, not convinced that Mr. Khafagi would have instructed not to copy the Applicant on operational matters. Rather, the Tribunal is inclined to accept that Mr. Veilawa over-interpreted Mr. Khafagi’s encouragement to use the open-door policy on complaints.

16. Mr. Veilawa testified, moreover, that the Applicant had not been involved in the risk assessment during the visit of the Secretary-General in Libya, and that Mr. Khafagi would not recognize assessment documents submitted by the Applicant and assign those tasks to other officers causing duplication of work.²³ The Applicant, in turn, admits that he had been assigned to do the risk assessment for the D/SRSG²⁴, which presented a lot of work, and which was appreciated by Mr. Khafagi. He, however, complains that it was Mr. Khafagi alone who briefed the D/SRSG, and only

²⁰ Respondent’s exhibit 3 (email exchanges of 11 November 2018).

²¹ Testimony of Mr. Ale on 11 February 2022.

²² Respondent’s exhibit 10.

²³ Testimony of Mr. Lasarusi Veilawa on 11 February 2022.

²⁴ Document filed in the hearing email from 2 July 2018.

took him along to meet her after his complaint had been filed.²⁵

17. The Applicant further submits that despite being the second in the chain of command and encumbering a P-4 managerial post, he had nearly no supervisory responsibilities. Despite the Headquarters' specific guidance to the CSA, indicating that the Applicant should have supervisory responsibilities, in the *Inspira* system, he remained a FRO of two staff members and SRO of none. On this score, the Applicant admitted that prior to having Mr. Khafagi as CSA he had had no SRO functions either. He however believed that under the guidelines he should have been assigned an SRO role.²⁶

18. Another complaint of the Applicant concerns removing his role in the Local Security Cost Shared Budget ("LCSSB"), which was not exclusive for the Mission but also concerned other participating entities. From these funds, which were administered by the United Nations Development Programme ("UNDP"), there were certain procurements done for security and certain recruitments for local staff positions. It is undisputed that the Applicant had prepared the 2018 LCSSB budget which, at the time of the dispute, was being implemented by the Applicant, Ms. Rakhi and Mr. Khafagi. Regarding the preparation of the 2019 budget, a greater role was given to Ms. Rakhi, in particular, preparation of the entire budget document for submission to the Security Management Team ("SMT") for its endorsement due to her responsibility for the Tripoli pillar.²⁷ The Tribunal was also provided with email evidence that, when being asked about the update on LCSSB by the Applicant, Ms. Rakhi had brushed him off by saying that he would see it when it would be ready²⁸; moreover, that an external coordinator of disbursement of LCSSB at Palm City, Mr. Byashkimov, had intervened to be allowed to continue working with the Applicant on a component of the project, the Cluster MOSS, rather than having a new person introduced in the task force (i.e., Ms. Rakhi)²⁹. Mr. Khafagi explains that the Applicant had not been removed from the

²⁵ Applicant's testimony.

²⁶ Ibid.

²⁷ Testimony of Kafagi, 2 March 2022.

²⁸ Application, annex 15.

²⁹ Application, annex 21.

preparation of the budget but that the budget had become a far greater and more complex exercise with the reactivation of the Mission in Libya, entailing the need for the redistribution of the tasks related to it.

19. On 7 October 2018, the Applicant raised his concerns with Mr. Mitrokhin, the Deputy Director of DRO/DSS, copying the Director, DRO, Mr. Tarakinini, the USG, UNDSS, and the SRSG, complaining, among other of the CSA acting upon unspecified allegations against him.³⁰ Not being satisfied by Mr. Mitrokhin's response in which the latter confirmed that there were complaints pending but suggested that he saw no grounds for accusing Mr. Khafagi of harassment, and such accusations would call for a formal process³¹, on 23 October 2018, the Applicant escalated his concerns to the USG/DSS, Mr. Drennan, where he requested explanation of the decision on his ineligibility to act as OiC and any alleged complaints pending.³²

20. The working relationship between the Applicant and his FRO continued to deteriorate despite formal mediation efforts in October 2018. On 12 November 2018, the Applicant filed a complaint with the Office of Internal Oversight Services ("OIOS") of workplace harassment and abuse of authority against the CSA.³³

21. On 10 December 2018, the Applicant forwarded his workplan³⁴ to the CSA in line with the goals set out in a memo from the DRO³⁵. The work plan was subsequently edited by the CSA³⁶. The Applicant maintains that the manner the CSA edited his workplan demonstrates his intent to limit the scope of his work.³⁷

22. Among the Applicant's concerns, the major one was Goal 1, Success Criteria, where on the Applicant's description of working as "*a.i. in the absence of CSA*", the

³⁰ Application, annex 5.

³¹ Ibid.

³² Application, annex 7.

³³ Application, annex 8.

³⁴ Application, annex 20; Trial bundle, p. 109.

³⁵ Application, annex 19.

³⁶ Applicant's testimony, 10 February 2022; Mr. Kafagi testimony, 16 February 2022 and on 2 March 2022.

³⁷ Application, section VIII, para. 34; Applicant's testimony, 10 February 2022.

CSA added the words: “*once permitted by the USG DSS/DO*”. His other concern was deletion of numerous references to UNDP, as deletion of reference to UNDP meant that responsibilities related to personnel and assets supported through LCSSB had been taken away from him. Other contentious areas included additions that the Applicant needed to act through supporting the CSA, instead of having the goals and actions determined as his autonomous ones, and that his responsibilities in the areas of personnel, budget, and finance were restricted to the Operations pillar. Finally, the CSA stroke out the claimed supervisory role over FCSO in Palm City, that is, Ms. Rakhi.³⁸

23. The Applicant did not agree with the CSA’s changes. Thereafter, after consultations between the Applicant, CSA and some of their supervisors, many of the deleted items, including reference to UNDP, were restored in the final e-PAS that was signed by both the Applicant and the CSA in July 2019.³⁹

24. In December 2018, OIOS referred the Applicant’s complaint to the USG/DSS. In April 2019. The Director/DRO travelled to Libya to discuss the Applicant’s complaint with him, conduct DSS’s preliminary assessment of whether the establishment of a fact-finding panel was warranted, and to prepare a recommendation to the USG/DSS. During this trip to Libya, it became apparent that the relationship between the Applicant and the CSA was no longer viable and posed a danger to affect the delivery of the UNDSS mandate in Libya. Thus, UNDSS, in consultation with the Applicant, focused on finding an alternative assignment for him.⁴⁰ During this trip, the Director/DRO explained to the Applicant that USG/DSS had decided that the Applicant should not be designated as OiC while DSS assessed the misconduct allegations.⁴¹

25. As concerns the complaints of sexual harassment against the Applicant, they have never been formalized and no allegations of misconduct have ever been issued. The Respondent informed the Tribunal that preliminary assessment did not find any

³⁸ Trial bundle, p. 109; Applicant, testimony 10 February 2022, Mr. Kafagi testimony, 2 March 2022.

³⁹ Applicant’s testimony, 10 February 2022; Mr. Kafagi, testimony, 2 March 2022.

⁴⁰ Respondent’s response to Order No. 015 (NBI/2022), filed on 24 February 2022.

⁴¹ Respondent’s reply on the merits, 10 July 2020.

evidence to substantiate the concerns, and the DRO believed that the Ombudsman's role in October 2018 appeared to have resolved the matter.⁴²

26. On 4 February 2019, the Applicant requested management evaluation of the decision to strip him of his functions.⁴³ On 18 June 2019, the Applicant received the response. Regarding the issue of refusing the function of OiC of the Security Section, the management evaluation found the decision lawful. It further found that there had been no decision to deprive the Applicant of his functions.⁴⁴

27. The Respondent demonstrates that the Applicant was always fully engaged in core security functions. They involved, in addition to responsibility for crisis management in Palm City and the tasks mentioned *supra*: supervising two teams of more than 40 personnel⁴⁵; managing one of the main offices in Tunis and supervising the security team there as their FRO⁴⁶; attending Security Cell meetings⁴⁷; obtaining invitation to a townhall meeting with the USG/DSS in his capacity of unit head⁴⁸; participation in the preparation for the Secretary-General's visit in Libya⁴⁹; participating – as observer - in *ad hoc* security management team meetings⁵⁰; preparing the larger mission budget along his lines of responsibility for Operations⁵¹ and, specifically, preparing the Central Emergency Response (“CERF”) budget⁵²; developing Mass Casualty Incident Plan (“MCIP”)⁵³; developing Electronic Travel Advisory (“ETA”) for Libya⁵⁴; developing Security Risk Measures (“SRM”)⁵⁵; developing Standard Operating Procedures (“SOPs”)⁵⁶; developing workplans for both

⁴² Respondent response to Order No. 015 (NBI/2022).

⁴³ Application, annex 11.

⁴⁴ Application, annex 12.

⁴⁵ Management evaluation, p.2.

⁴⁶ Ibid.

⁴⁷ Respondent's exhibit 35.

⁴⁸ Respondent's exhibit 31.

⁴⁹ Respondent's exhibit 40, point 6 and 8.

⁵⁰ Respondent's exhibit 33.

⁵¹ Application, annex 26.

⁵² Testimony of Mr. Kafagi, 16 February 2022; Respondent's closing submissions, para. 10.

⁵³ Undisputed testimony of Mr. Khafagi on 16 February 2022 and Respondent's exhibit 42.

⁵⁴ Ibid., undisputed.

⁵⁵ Ibid., undisputed.

⁵⁶ Ibid., undisputed.

Libya and Tunis, which included maintaining liaison with host government security organs, undertaking general administrative tasks, among others⁵⁷; engaging in recruitment exercises⁵⁸; conducting an assessment for General Intelligence Department (“GID”) of Libya⁵⁹; supervising development of Area Security Plan (“ASP”) in Tripoli⁶⁰; input in a paper on Package of Security Measures for Long-range Missions⁶¹. The Applicant had a role in updating the Security Country Plan⁶² and he had, at least initially, before the relationship deteriorated, broad access to the CSA.⁶³

28. Effective 16 June 2019, the Applicant, with his consent, was laterally reassigned to a post as Deputy Security Advisor in Damascus, Syria.⁶⁴

29. In October 2019, USG/DSS reviewed the Applicant’s complaint under ST/SGB/2008/5(Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) and did not find sufficient grounds to warrant a formal fact-finding investigation.⁶⁵ The Applicant has not contested the outcome of this complaint nor his reassignment.

SUBMISSIONS

Respondent’s case on receivability

30. The Respondent submits that the Applicant has not met his burden to identify an administrative decision under art. 2.1(a) of the Dispute Tribunal’s Statute. The Applicant challenges the FRO’s conduct, namely the FRO’s instructions and assignment of tasks, which took place from May 2018 to February 2019. The Respondent further contends that jurisprudence relied upon by the Applicant,

⁵⁷ Respondent’s exhibit 41.

⁵⁸ Respondent’s exhibit 23.

⁵⁹ Respondent’s exhibit 43.

⁶⁰ Respondent’s exhibit 44.

⁶¹ Respondent’s exhibit 47.

⁶² Respondent’s exhibit 32.

⁶³ Ibid.

⁶⁴ Application, section VII, para 16.; Reply, annex 2.

⁶⁵ Reply, annex 4.

Lauritzen,⁶⁶ where the staff member did not perform any functions at all, and *Applicant* UNDT/2011/187 and *El-Awar* Order No 59 (GVA/2017) where there were specific decisions directing them not to exercise specific functions, is inapposite. In this case, the Applicant performed the functions of his position, though he did not agree with certain management decisions.

31. Moreover, the Respondent submits that the Applicant first became aware of the USG's decision from Mr. Khafagi on 11 August 2018.⁶⁷ The only decision taken in the 60-day period to the submission of the management evaluation request (between 6 December 2018 and 4 February 2019) was the FRO's decision on 1 February to designate another staff member to serve as OiC in the FRO's absence from Tripoli from 1 to 16 February 2019.

32. Accordingly, the application is not receivable *ratione materiae*.

Applicant's case on receivability

33. The Applicant submits that he does not contest the conduct of his supervisor but a breach of his right to work, through stripping him of his functions. That a reviewable administrative decision has been taken as part of a course of misconduct does not preclude review of the same.⁶⁸

34. The issue of receivability is tied to consideration of the merits. While individual decisions might be considered to relate to the organization of work, a combination of such decisions which have the purpose and effect of depriving a staff member of their functions, will constitute a reviewable decision. Relying on *Lauritzen*⁶⁹, the Applicant contends that for senior staff members, withdrawal of core functions and "authority" have been deemed to represent a reviewable decision. It has been held that the right to work relates to the specific post to which the staff member was hired.

⁶⁶ *Lauritzen* 2013-UNAT-282.

⁶⁷ Trial bundle, pages 16 - 18; Respondent's exhibit 12.

⁶⁸ Applicant's submissions filed pursuant to Order No. 191 (NBI/2019).

⁶⁹ *Lauritzen*, op. cit..

35. Regarding when the contested decision was taken and when it was communicated, the Applicant avers that he was not subject to one, clearly communicated, administrative decision to remove his functions. Rather, he was subject to an implied unilateral decision to deprive him of core functions and authority to act as a Deputy Security Advisor, which had a continuing effect.

Applicant's case on the merits

36. The Applicant's case is that there was a decision to strip him of his functions and which was in non-compliance with his terms of reference, namely, the appointment of junior staff to act as CSA *ad interim* (“*a.i*”), limiting the scope of his work, removal from projects and denial of managerial responsibilities; all done based on covert allegations.

37. On the first point, the Applicant contends that pursuant to the Inter-Office Memorandum, dated 24 April 2018, from the Officer-in-Charge, Division of Regional Operations, Department of Safety and Security, to all security advisors, a deputy should be appointed to perform *a.i* functions of CSA when the chief is out of the duty station.⁷⁰ Further, pursuant to generic Terms of Reference (“ToR”), applicable to all Deputy Security Advisers, one of their key results is to “supervise effectively security personnel and act as CSA *a.i* in the absence of the CSA”.⁷¹ Finally, the Applicant's ToRs indicate that the Applicant should be the CSA *a.i* when the CSA is out of the mission area.

38. The effect of appointing junior staff members as OiC is significant. It means the Applicant does not represent the UNDSS position at the Security Cell, Security Management Team meetings or meetings of the United Nations Country Team. It justifies the decision not to copy the Applicant on significant communications which would allow him to carry out this representative role. It subverts the chain of command in a fashion designed to undermine his authority in relation to other security staff.

⁷⁰ Application, annex 13.

⁷¹ Application, annex 24, p. 3(g).

39. On the second prong, the Applicant argues that his ToRs suggest involvement in risk assessment, the development of country/area security plans and implementation of the same. The manner in which the CSA edited his workplan demonstrates his intent to limit the scope of the Applicant's work.

40. Finally, the Applicant avers that the decision to strip him his functions was based on a covert and unsubstantiated allegation. He learnt from the Management Evaluation Unit that he had been subjected to a covert allegation of sexual misconduct, but he was never offered the opportunity to respond to it. No legitimate justification for altering his role has been advanced.

41. As a remedy, the Applicant requests for damages arising from reputational harm and stress suffered as a result of the contested decision.

Respondent's case on the merits

42. The designation of another P-4 staff member as OiC instead of the Applicant had no direct and adverse legal effect on his terms of appointment. The Applicant has no right under his terms of appointment to be appointed as OiC in the FRO's absence from the duty station. Acting as OiC is not one of the Applicant's core functions or his terms of reference. Contrary to the Applicant's claims, the United Nations Department of Safety and Security Management System and the internal DSS Memorandum dated 24 April 2018 are not part of the Applicant's terms of appointment. These documents are not binding instruments within the Organization's legislative hierarchy, but rather guidance. Insofar as the documents state that a Deputy Security Advisor may be designated as OiC, they neither mandate that designation, nor do they state that it is a core function. The overarching consideration in the designation of an OiC is operational needs.

43. In the present case, as the Deputy Security Advisor, the Applicant would have normally been the first choice to serve as the OiC during the absence of CSA. However, in August 2018, the USG/DSS was informed of the allegations of improper conduct concerning the Applicant. Out of an abundance of caution, the USG/DSS decided that

it would be inappropriate for the Applicant to act as OiC while DSS conducted a preliminary assessment.

44. Further, when taken holistically, the FRO's conduct was not unlawful. The Respondent demonstrates that the job profile for all P-4 positions in the field under the Division of Regional Operations are standardized and generally covered with the ToR for P-4 Field Security Coordination Officer, with some variations for the post location and operational setup, reporting lines, functional titles, responsibilities, etc. There are no specific ToR for the functional title of P-4, Deputy Security Adviser, Libya.⁷²

45. The Respondent maintains that none of the alleged decisions, as to which it is claimed that stripped the Applicant of his functions over a ten-month period, constituted removal of a core function outlined in his ToR or workplan. For example, the Palm City project was not the exclusive and long-term responsibility of any one person. The CSA had the discretion to delegate or rotate responsibilities to other staff members. This is critical to ensuring the expeditious completion of projects where there is frequent rest and recuperation leave ("R&R") and personnel changes. The Applicant also had no right to serve as a second reporting officer and does not allege that reporting lines or the organization of work would merit him serving in that capacity. There is no evidence that the FRO "removed" this managerial function, given that the Applicant's position was administered by the Secretariat only since June 2018 and previously administered by the UNDP.

46. The Director, Division of Regional Operations, who examined the Applicant's harassment complaint, determined that both parties were equally intransigent, and thus equally responsible for the toxic work environment and the potential negative impact on the delivery of the DSS mandate. Following the Director's recommendation, the newly appointed USG/DSS concluded that the FRO had not always demonstrated the desired level of leadership or management maturity with the Applicant, but that his conduct did not rise to the level of harassment. On 25 October 2019, the Applicant was

⁷² Reply, annex1.

informed that the USG/DSS had found insufficient grounds to warrant a formal fact-finding investigation and that his complaint had been closed. The Applicant did not contest that finding and cannot be awarded damages related to those allegations.

47. After consultations, the Applicant was offered a reassignment to Syria, which he accepted. The Applicant also cannot now seek damages due to the reassignment decision to which he agreed and did not contest.

Considerations

Receivability

48. 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.

49. 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.

50. The Tribunal finds that there was a discrete decision not to appoint the Applicant as OiC, which, as it is admitted, would ordinarily have fallen in his portfolio. On 21 October 2018, the Applicant was expressly informed on email of the fact that the decision had come from the USG/DSS and that it was a standing arrangement rather than an *ad hoc* choice. He acknowledged it and responded.⁷³ Contrary to the Respondent’s submission, the email exchanges from August 2018 did not convey the permanence of the OiC arrangement whereas unilateral statements of Mr. Khafagi about his conversation with the Applicant do not suffice as proof of a formal

⁷³ Application, annex 6.

communication of the decision and its content. However, accepting that OiC decision was communicated in October 2018, the Applicant's request for management evaluation is still placed outside the temporal framework determined by art. 8.1(c) of the UNDT Statute. This decision, therefore, no matter how problematic on many levels: merits, notification, shifting yet unsubstantiated justifications supplied, is outside the Tribunal's jurisdiction *ratione materiae*.

51. The OiC decision is distinct, in the terms of its authorship, scope, time of issuance and manner of notification, from actions of Mr. Khafagi in the assignment of work to the Applicant. It was, notably, the only one based in covert allegations of improper conduct. However, it is final. It cannot, therefore, be revived for review by advancing a claim of an overarching and unspecified in time decision to strip the Applicant of his function. The only question that remains, thus, is whether these other actions of Mr. Khafagi amounted to such a decision.

52. The Tribunal considers that tasks recited by the Respondent - information that was only provided during the hearing - and described in para. 27 *supra*, clearly show that the Applicant had not been deprived of the core functions foreseen by the terms of reference for his post. The Applicant did not dispute that he had performed these tasks, his major grievance being that because he had not acted as OiC, he had had no visibility. This aspect is neither decisive for the issue nor relevant, given the non-receivability of the OiC decision. The Tribunal considers, moreover, that although the duties and tasks assigned to the Applicant may have been more mundane than acting as OiC, they apparently fully took up the Applicant's time: Mr. Khafagi testified, and it was not disputed, that the Applicant had even requested additional administrative support, and the correspondence between them conveys that the Applicant had been overworked. As such, the Applicant was fully employed on his post, qualitatively and quantitatively speaking. The case is incomparable with *Lauritzen*, where the applicant was not allowed to render any work.

53. Another of the Applicant's complaint was that certain tasks had been removed from him and assigned to Ms. Rakhi, whom the Applicant considered less qualified

and hierarchically inferior given that she had held a field post as opposed to a DSS post.⁷⁴ The Applicant expressed before the Tribunal that he saw no reason to have had any task previously performed removed from him. On this point the Tribunal agrees with the Respondent that expanding both the tasks and staffing of the Security Section due to the Mission's return from evacuation status and the CSA's duty to empower women justified shifting some responsibilities to Ms. Rakhi as well as creating new ones, including that, plausibly, there could have been a need to bring her up to speed in the UNSMIL setting. Considering staff regulation 1.2(c), which establishes, broadly, that "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", the Tribunal finds no assignments for Ms. Rakhi that would have been essentially and *prima facie* unreasonable at the expense of the Applicant's portfolio.

54. To the extent the Applicant impugns the CSA's edits to his workplan that sought to eliminate his interactions with UNDP and other external actors, the Tribunal recalls that this decision has never been implemented, as the Applicant's interventions caused that ultimately the disputed items in the workplan were restored. Other edits are not *prima facie* unreasonable, such as the removal the Applicant's claim to supervise Ms. Rakhi or introducing a requirement of consultation with the CSA.

55. Finally, questionable actions of Mr. Khafagi, such as undermining the Applicant's working relation with his subordinates at the CPU and apparent zeal in collecting complaints against him, did not constitute administrative decisions. These, presumably, were examined in the course of the harassment/abuse authority complaint filed by the Applicant.

56. In summing up, the Tribunal finds no reviewable administrative decision amounting to stripping of the functions.

57. For completeness, the Tribunal notes, moreover, that the case involves an unfortunate, but not uncommon, situation of conflict between a manager and a

⁷⁴ Applicant's testimony on 10 February 2022 and Respondent's exhibit 32.

subordinate over a relatively short period working together. However, the Applicant activated mechanisms available to him, including a harassment complaint, the result of which he accepted without appeal. The hierarchy was responsive. Among other, the Applicant was repeatedly offered reassignment to another Mission on equal terms, to which he eventually agreed, and which happened after he had nearly exhausted his usual three-year rotation period. The allegations of sexual harassment against the Applicant were found unsubstantiated. Mr. Khafagi's managerial shortcomings were acknowledged. That there is conflict between staff members, does not *per se* amount to tort, even though it causes distress and necessitates interventions. Importantly for the matter at hand, the system worked and effectively resolved the Applicant's grievances.

58. In conclusion, there is no basis to award moral damages.

JUDGMENT

59. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart
Dated this 25th day of April 2022

Entered in the Register on this 25th day of April 2022

(Signed)

Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi