



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

BANAJ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George G. Irving

Counsel for Respondent:

Esther Saabel, LPAS, UNOG

Jérôme Blanchard, LPAS, UNOG

Introduction

1. The Applicant, a staff member of the United Nations Office on Drugs and Crime (“UNODC”), contests the Administration’s decision to temporarily reassign a certain number of her functions pending an investigation against her (“contested decision”).

Facts and procedural history

2. On 1 January 2000, the Applicant joined UNODC in Tirana on a fixed-term appointment as a National Programme Officer at the NO-B level. Since the Applicant’s appointment, her service is limited to UNODC, whereas her contract is administered by the United Nations Development Programme (“UNDP”).

3. On 1 January 2008, the Applicant was promoted to the NO-C level. On 23 November 2012, the Applicant’s appointment was retroactively converted to a permanent appointment effective 30 June 2009. As a consequence of disciplinary proceedings and her resulting demotion, the Applicant is currently serving in the same position at the NO-B level.

4. On 18 July 2018, the Regional Representative for South-eastern Europe (“RR”) at UNODC, reported the Applicant to the Office of Audit and Investigations (“OAI”) of UNDP for possible misconduct, alleging that to secure support for preserving her personal situation as the sole UNODC representative in Albania, the Applicant may have lobbied government officials against the recruitment of a newly created P-4 Advisor Post in the UNODC Albania Office.

5. Having conducted a preliminary assessment, OAI also obtained information that the Applicant may have also communicated internal information, which she became aware of as a result of her official position with UNODC, to officials of the Albanian Government and the U.S. Embassy in Albania.

6. On 25 October 2018, the Applicant was informed by OAI that she was the subject of an investigation and was interviewed on 26 October 2018.

7. On 29 October 2018, the RR informed the Applicant that “pending the completion of the investigative process and resultant communication informing [her] of the outcome thereof, it [had] been decided to effect a temporary reassignment of [her] functions” and instructed her as follows:

With immediate effect you shall focus your work exclusively on ongoing approved technical project activities linked to the Container Control Programme segment for Albania. You shall not engage [or] commit UNODC in any other matter. You shall limit your consultations with national project partners at technical level and refrain [from] representing UNODC at senior level including with Embassies and international counterparts based in Albania. Functions linked to the representation of UNODC and management of our wider portfolio for Albania will fall under my direct responsibility. A message informing of these interim measures will be addressed accordingly to our national and international counterparts, including Embassies, in Tirana and Heads of UNODC Global Programmes in Vienna.

8. On 30 November 2018, the Applicant requested management evaluation of the contested decision mentioned in para. 1 above.

9. By letter dated 15 February 2019, the Under-Secretary-General for Management Strategy, Policy and Compliance, informed the Applicant of the Secretary-General’s decision to uphold the contested decision based on the findings and recommendations of the Management Evaluation Unit.

10. On 1 May 2019, OAI sent the Applicant a draft investigation report and requested her to provide comments and any countervailing evidence, which she provided on 20 May 2019.

11. On 21 May 2019, the Applicant filed the application mentioned in para. 1 above.

12. On 23 July 2019, OAI issued its investigation report.

13. By charge letter dated 21 May 2020, the Assistant Administrator, UNDP, charged the Applicant with misconduct for intentionally disclosing internal information to officials of both the Albanian Government and the U.S. Embassy in Albania without authorization, and for sharing criticism of UNODC's activities and policy decisions with government officials against the interest of UNODC.

14. On 30 June and 1 July 2020, the Applicant submitted her response to the charge letter.

15. By letter of 22 October 2020, the UNDP Associate Administrator informed the Applicant of his decision to demote her from NO-C to NO-B level with deferment, for one year, of eligibility for consideration for promotion.

16. On 16 December 2020, the Applicant was informed that, as a result of her demotion, the reassignment of her functions was now permanent.

17. On 15 January 2021, the Applicant filed an application contesting the 22 October 2020 disciplinary measure, which was registered under Case No. UNDT/GVA/2021/006.

18. On 26 March 2021, the Tribunal issued Judgment *Banaj* UNDT/2021/030 dismissing the Applicant's application referenced in para. 1 above.

19. Further to the Applicant's appeal, by Judgment *Banaj* 2022-UNAT-1202, dated 18 March 2022, the Appeals Tribunal set aside the above-mentioned UNDT Judgment and remanded the case to this Tribunal to determine remedies in conjunction with its judgment on the Applicant's substantive challenge to the Administration's conclusion of misconduct by her and the sanctions imposed on her for this (Case No. UNDT/GVA/2021/006).

20. On 21 June 2022, the Tribunal issued Judgment *Banaj* UNDT/2022/060 in Case No. UNDT/GVA/2021/006 dismissing the application referenced in para. 17 above.

21. The remanded case was registered under Case No. UNDT/GVA/2019/031/R1 and assigned to the undersigned Judge on 30 June 2022.

22. By Order No. 69 (GVA/2022) of 1 July 2022, the Tribunal ordered the Respondent to file his comments on remedies arising out of the unlawful temporary reassignment decision by 14 July 2022 and directed the Applicant to file her response to the Respondent's comments by 28 July 2022.

23. On 14 July 2022, the Respondent filed his comments pursuant to Order No. 69 (GVA/2022).

24. On 26 July 2022, the Applicant filed a motion requesting an extension of time until 5 August 2022 to file her response.

25. By Order No. 75 (GVA/2022) of 27 July 2022, the Tribunal granted the above-mentioned Applicant's motion.

26. On 5 August 2022, the Applicant filed her response to the Respondent's submission on remedies dated 14 July 2022.

27. By Order No. 84 (GVA/2022) of 29 August 2022, the Tribunal instructed the Respondent to file his comments on the Applicant's 5 August 2022, submission and invited the Applicant to file her response, if any.

28. On 5 September 2022, the Respondent filed his comments on the Applicant's 5 August 2022 submission.

29. On 12 September 2022, the Applicant filed her response to the Respondent's 5 September 2022 submission.

Consideration

Scope of judicial review

30. The Tribunal notes that in its Judgment *Banaj* 2022-UNAT-1202, the Appeals Tribunal concluded that the contested decision must be set aside. However, as to remedies, it stated as follows:

59. ... the position is complicated by the pending decision by the UNDT on the substantive justification for the Respondent's conclusion of misconduct by [the Applicant] and the sanctions imposed upon her for that. [The Applicant] may or may not be successful in that case. This question before us now of remedies for the wrongful imposition of the interim measures is closely linked to any remedies to which she may be entitled if she is successful in the substantive proceedings. We consider that the most just course is to remand the matter of remedies to be decided by the UNDT in light of its substantive decision on the sanctions for misconduct.

31. In its Judgment *Banaj* UNDT/2022/060, this Tribunal upheld the disciplinary measure imposed on the Applicant, dismissed her claim for damages on grounds that she did not provide any evidence supporting that she suffered harm, and reserved the remedies for the unlawful temporary reassignment of certain of her functions to the present case.

32. Moreover, the Tribunal is mindful that in a remanded case, the Applicant may not expand the scope of claim for remedies contained in her original application and, as such, it will not consider her new claims or arguments unless they are essentially related to her original claim in the application.

33. For example, the Tribunal fails to see how the RR's contribution to an offensive working environment, which was addressed separately in *Banaj* UNDT/2022/043, could have been essentially related to the temporary reassignment decision, which is an interim measure pending an investigation against the Applicant. As such, it will not consider the Applicant's claim in that respect. The same could be said for actions taken by certain national authorities on grounds that the Applicant was the subject of an investigation.

34. Similarly, the Applicant's claim that the reduction of her responsibilities led to a limitation of funding at the end of 2021, when she was informed of the abolition of her post, falls out of the scope of judicial review in the present case. The same holds true for the Applicant's claim related to the UNODC's decision dated 19 July 2021 to reclassify and issue new terms of reference for the post the Applicant encumbered, which was rejected by UNDP in November 2021.

35. Indeed, the evidence on record shows that, on 16 December 2020, the Applicant was informed that because of her demotion, resulting from the disciplinary measure imposed on her, the reassignment of her functions was permanent as of that date. As such, the events that occurred after 16 December 2020 are no longer related to the temporary reassignment at issue, which is an interim measure pending the investigation and the outcome of the disciplinary process.

36. In light of the foregoing, the Tribunal will examine whether and to what extent the Applicant is entitled to remedies in the present case. Before examining these issues, the Tribunal will first elaborate upon the legal framework on remedies.

The legal framework on remedies

37. Art. 10 of the Tribunal's Statute confers upon it remedial powers as follows:

...

5. As part of its judgement, the Dispute Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

...

7. The Dispute Tribunal shall not award exemplary or punitive damages.

38. Art. 10.5(a) authorizes orders for rescission, specific performance and, in certain cases, compensation *in lieu* of rescission or specific performance.

39. Moreover, it is well-settled case law that “the very purpose of compensation is to place the staff member in the same position he or she would have been in had the Organization complied with its contractual obligations” (see, e.g., *Applicant* 2015-UNAT-590, para. 61; *Warren* 2010-UNAT-059, para. 10).

40. In this respect, the Tribunal “may award compensation for actual pecuniary or economic loss, including loss of earnings, as well as non-pecuniary damage, procedural violations, stress, and moral injury” (see, e.g., *Faraj* 2015-UNAT-587, para. 26; *Antaki* 2010-UNAT-095, para. 21).

41. Also, the Appeals Tribunal has consistently held that “compensation must be set by the [Tribunal] following a principled approach and on a case-by-case basis”, and that “[t]he Dispute Tribunal is in the best position to decide on the level of compensation given its appreciation of the case” (see, e.g., *Rantisi* 2015-UNAT-528, para. 71; *Solanki* 2010-UNAT-044, para. 20).

Whether and to what extent the Applicant is entitled to remedies

42. In her application, the Applicant requested the rescission of the contested decision and sought payment of compensation in the amount of USD 50,000.

Rescission of the contested decision

43. The Appeals Tribunal found in *Banaj* that the temporary removal from the Applicant, and reassignment to others, of certain of her functions as Head of UNODC in Albania was an unlawful exercise of administrative power (see *Banaj* 2022-UNAT-1202, para. 1). It thus concluded that the contested decision must be set aside (see *Banaj*, paras. 52 and 58).

44. Accordingly, the Tribunal decides to rescind the contested decision.

Compensation *in lieu*

45. Under art. 10.5(a) of the Tribunal's Statute, where the contested administrative decision concerns appointment, promotion or termination, the Tribunal shall set an amount that the Respondent can chose to pay as an alternative to the rescission of the contested administrative decision.

46. In this respect, the Appeals Tribunal has consistently held that an unlawful reassignment or transfer decision does not come within the inclusionary clause of art. 10.5(a) of the Tribunal's Statute and does not require an order of compensation in lieu of rescission (see *Chemingui* 2016-UNAT-641, para. 24; see also *Kaddoura* 2011- UNAT-151, para. 41; *Rantisi* 2015-UNAT-528, para. 65).

47. Notably, in *Kaddoura*, the Appeals Tribunal rejected the Appellant's argument that the Tribunal erred by rescinding the original decision on her reassignment without specifying an amount of compensation *in lieu*, and held that:

This Court points out that the order of a specific performance is an alternative to the rescission of an administrative decision, depending on the circumstances of each case and subject to the reasoned discretion of the Judge. Under Article 10(5)(a) of the UNDT Statute, an order for compensation in lieu of a specific performance is only required when the administrative decision which is rescinded concerns appointment, promotion, or termination, which is not the case here (see *Kaddoura* 2011-UNAT-151, para. 41).

48. In the present case, the contested decision concerns temporary reassignment of some of the Applicant's functions pending an investigation and the outcome of disciplinary proceedings. As such, the contested decision does not fall under the inclusionary clause of art. 10.5(a) of the Tribunal's Statute.

49. Accordingly, the Tribunal finds that there is no legal basis to determine an amount of compensation *in lieu* in the present case.

Compensation for harm

50. Under art. 10.5(b) of the Tribunal's Statute, the Applicant may be awarded compensation for (a) pecuniary damages, such as income loss, and (b) non-pecuniary damages, such as stress, anxiety, and reputational harm.

51. In this respect, the Tribunal recalls that art. 10.5(b) of its Statute requires that harm be supported by evidence. Specifically, the Appeals Tribunal has consistently held that “it is not enough to demonstrate an illegality to obtain compensation: the claimant bears the burden of proof to establish the existence of negative consequences, able to be considered damages, resulting from the illegality on a cause-effect lien” and requires that “the harm be directly caused by the administrative decision in question” (see *Ashour* 2019-UNAT-899, para. 31; see also *Kebede* 2018- UNAT-874, para. 20).

Pecuniary damages

52. In the present case, the Applicant does not specify what kind of pecuniary damages she suffered due to the contested decision, nor does she present any evidence for such harm. Rather, the evidence on record shows that during the temporary reassignment, the Applicant continued to receive full salary at the same level and step as before the reassignment. Accordingly, the Applicant is not entitled to pecuniary damages.

Non-pecuniary damages

53. Turning to non-pecuniary damages, the Applicant claimed compensation in the amount of USD50,000. In support of her claim, the Applicant specially submitted that the effective suspension of her primary duties “adversely affected her *dignitas*, as [it had] been widely reported without explanation and appear[ed] to have predetermined her guilt”. She further argued that through the reassignment, she was “effectively reduced to a project manager status, without the status or recognition needed to carry out her function”, leaving her and her family “vulnerable to retribution and without the recognition and protection she had in her former capacity”. According to the Applicant, this compromised her professional standing in the country and her reputation and produced extreme stress and emotional trauma.

54. The Respondent argues that the claim that the contested decision compromised the Applicant's professional standing in the country and her reputation, is neither substantiated nor supported by any evidence. The Respondent submits that, rather, the contested decision was taken after having given due regard to the Applicant's interests and balanced those against the interests of the Organization. While the Respondent acknowledged that the overall circumstances created by the investigation and the reassignment may have provoked stress and anxiety, he underlines that any such harm would represent the mere result of the Applicant's own deliberate wrongful conduct and as such was self-created.

Harm to professional standing and reputation

55. The Tribunal is not convinced by the Applicant's argument that the contested decision predetermined her guilt. Indeed, in this respect, the Appeals Tribunal found in its judgment *Banaj* 2022-UNAT-1202 that:

36. It does not necessarily follow that because the sanctions ultimately imposed against [the Applicant] for misconduct (the amendments to her ToRs) reflect those temporary measures imposed pending the completion of the investigation of the misconduct, that the interim measures were thereby disciplinary and so were therefore wrongfully pre-determinative of the outcome of the investigation. If there is a case of sufficient seriousness that warrants interim measures which reduce or preclude misconduct from happening (irrespective of the outcome of the investigation to determine whether such misconduct has occurred), that the sanctions imposed (where severance of service is not affected) may similarly prevent future misconduct is not itself indicative of predetermination of these. Each such case must be examined closely on its merits. We reiterate that the foregoing is not an expression of view about whether [the Applicant] did commit misconduct as the Agency found and the UNDT is yet to determine.

56. The Tribunal also notes the Respondent's contention that it would have been manifestly contrary to the Organization's interests to let the Applicant carry out any representative functions in the country pending the investigation against her, after having received information to the effect that the Applicant had disclosed, without authorization, internal information of the Organization to external governmental representatives.

57. Nevertheless, the Appeals Tribunal found in its judgment *Banaj* 2022--UNAT-1202 that:

45. This analysis of the Framework which was applicable and was otherwise applied to the investigation of the complaints of misconduct against the Appellant confirms that the option of temporarily changing her functions which was taken in respect of [the Applicant] did not meet the Framework's preconditions relating to the adequacy or inadequacy of an initial period of administrative leave. It follows that the function change was imposed erroneously and without regulatory authority. It also strengthens the conclusion that purporting to re-assign her functions pursuant to Staff Rule 10.4 was an impermissible mechanism to avoid the requirements of the Framework and so an administrative decision made without authority and at least arguably also with wrong motivation.

...

52. ... we conclude that the power purportedly invoked by the UNODC to re-assign [the Applicant]'s duties was neither the specific, conditional and limited power available under the Framework, nor a proper exercise of the general power under Staff Regulation 1.2(c) of the Staff Rules and Regulations. The decision effecting that re-assignment of duties must be set aside as having been made without jurisdiction to do so.

...

57. Even if, therefore, the decision taken to reduce and reassign [the Applicant]'s duties had been supportable under Staff Rule 10.4 and the Framework, it was not made by a person or body authorised to make it and so was, for this reason also, an unlawful administrative act.

58. In the Tribunal's view, the contested decision compromised the Applicant's professional standing in the country and her reputation. Specifically, the Appeals Tribunal in *Banaj* 2022-UNAT-1202 found that:

51. ... On its face, to deprive the Appellant of all her public and high-level governmental functions (and to so advise those with whom she dealt) leaving her with narrowly prescribed duties in relation to container inspections would seem arguably to be as significant for her as putting her on administrative leave (presumably on pay) for that same period and having to advise those she dealt with that she was on leave from her job.

59. Moreover, while the Administration indicated that the Applicant's reassignment had been a temporary measure, without any reference to the ongoing investigation, when communicating the diminution of the Applicant's functions, the Tribunal notes that such information was broadly communicated to UNODC field office staff in South-eastern Europe, relevant Heads of Global Programme in Headquarters who implement segments in that region, all embassies, national authorities, and international organizations. Worse still, the evidence on record shows that the temporary reassignment *de facto* amounted to a demotion in terms of functions. Indeed, the Applicant was advised on 16 December 2020, that because of her demotion, the reassignment of her functions was as of this date permanent.

60. Therefore, the Tribunal finds that there is a legal basis to award the Applicant compensation for her reputational and professional harm. Considering that the Applicant's claim for compensation for her reputational and professional harm is intertwined with her claim for harm in the form of pain and suffering she has experienced in this regard, which is evident, the Tribunal finds it appropriate to calculate the appropriate award of damages for all harm in the subsequent section.

Compensation for stress and emotional trauma

61. In support of her claim that the contested decision affected her physical and mental health, the Applicant submitted various medical reports indicating that she was affected by a stress-related health issue. The Medical Report dated 21 May 2019 states, in its relevant part, that:

Since September 2018 and on, a number of assessment/diagnosing meetings and pharmacological treatment have been undertaken with [the Applicant] as regards her problems and current status of anxiety and panic disorders.

62. The Medical Report dated 25 June 2020 states, in its relevant part, as follows:

During the sessions, it is quite obvious that her anxiety, panic disorders and stress are work related and deriving to her working environment.

...

It is recommended that [the Applicant] detached herself from the working environment and related factors that are the main factors contributing to her anxiety and panic disorders. [The Applicant] needs rest and recuperation.

63. While it is true that the onset of the symptoms dates to September 2018, which is prior to the date of the contested decision, i.e., 29 October 2018, there is no doubt that the contested decision further aggravated the Applicant's health issues. The Tribunal thus finds a causal link between the Applicant's medical condition and the contested decision. Accordingly, the stress and emotional trauma merit a compensatory award.

64. Turning to the level of compensation, the Tribunal recalls that it is best placed to calculate, based on the evidence, the appropriate award of moral damages (see, e.g., *Finniss* 2014-UNAT-397, para. 36; *Fiala* 2015-UNAT-516, para. 48).

65. Having reviewed the evidence on record, the Tribunal finds that the total award of compensation for damages to the Applicant because of the professional and reputational harm, as well as stress and anxiety she suffered because of the unlawful temporary reassignment decision, amounts to two months' net base salary at the grade she encumbered at the time of the contested decision (see, e.g., *Dieng* 2021- UNAT-1118, para. 87).

Conclusion

66. In view of the foregoing, the Tribunal DECIDES:

- a. The contested decision is rescinded;
- b. As compensation for moral damages, the Respondent is to pay the Applicant two months' net base salary at the grade that she encumbered at the time of the contested decision;

- c. The aforementioned compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable; and
- d. All other claims are rejected.

(Signed)

Judge Teresa Bravo

Dated this 19th day of October 2022

Entered in the Register on this 19th day of October 2022

(Signed)

René M. Vargas M., Registrar, Geneva