



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

CHOCOBAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:

Miles Hastie, OSLA

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Sarahi Lim Baro, ALS/OHRM, UN Secretariat

Introduction

1. By incomplete application filed on 5 May 2015, and completed on 6 May 2015, the Applicant, an Administrative Officer (P-4) at the United Nations Logistics Base/United Nations Global Service Centre (“UNLB/UNGSC”) in Brindisi, requested suspension of action, pending management evaluation, of the “decision to breach terms and conditions of a Settlement Agreement ... and moving arbitrarily [her] post, function and responsibilities over to another section”.

Facts

2. Pursuant to the terms of a Settlement Agreement signed by the Applicant and the Under-Secretary-General (“USG”) for Field Support in June 2014, the Applicant was laterally reassigned, effective 29 August 2014, to vacant position No. 84272, Administrative Officer, P-4, in the Immediate Office of the Director of Mission Support (“ODMS”), UNLB/UNGSC. On 1 September 2014, her fixed-term contract was renewed for a period of one year and was subsequently converted into a continuing appointment effective 30 September 2014.

3. According to the Applicant, since the beginning of her assignment to UNLB/UNGSC she was “deprived to have the opportunity to perform agreed functions and responsibilities”.

4. By email of 12 November 2014, in response to an email from the Applicant with inquiries on her status, the Director of Mission Support (“DMS”), UNLB/UNGSC, sent to the Applicant her proposed Terms of Reference (“ToR”), while assuring her that she was “on the P4 Administrative Officer post in [his] office”. He informed her that ODMS had a number of projects, and that the Applicant’s ToR included two large projects. He also stated that the main task of the other P-4 staff member in his Office was to “see [Global Field Support Strategy (“GFSS”)] through to completion, a project she ha[d] been on from the beginning”:

5. By email of 21 November 2014, the Legal Officer, Office of the Director, UNLB/UNGSC, assured the Department of Peacekeeping Operations and Department of Field Support that “[i]ssues on [the Applicant] ha[ve] been finalised and case closed from this end”, since the latter had “agreed on the workplan and ... assumed her duties effectively”. However, as documented in email exchanges submitted by the parties, a number of issues arose between the Applicant and the DMS in the following months.

6. On 4 May 2015, the DMS met with the Applicant and, afterwards, the latter wrote an email to the former, confirming the content of their discussion in the following terms:

As per our discussion this afternoon, could you kindly confirm the “Administrative Decision” taken today that I should vacate my post, office and functions by Wednesday, 06 May 2015?

I am looking forward to your confirmation in order to get further advice regarding terms and conditions governing my Settlement Agreement with the United Nations signed in New York with the USG [Department of Field Support (“DFS”)].

7. On the same day, the DMS replied to the Applicant confirming that he was “exercising [his] prerogative to move [her] along with [her] post to Base Support Service”.

8. On 5 May 2015, the Applicant requested management evaluation of the contested decision, and filed her application for suspension of action with the Tribunal. Her initial submission was considered incomplete as, *inter alia*, the contested decision was missing; the Applicant filed missing documents on 6 May 2015 and, on the same day, the application was served on the Respondent.

9. On 8 May 2015, the Respondent submitted his reply. On that day, both parties sought leave to make further submissions and to file additional documents, which were already appended to their submissions.

10. The Applicant was placed on sick leave for ten days as of 8 May 2015.

Parties' contentions

11. The Applicant's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. The decision to move her to another post is not in line with the Settlement Agreement, pursuant to which she was affected to vacant position No. 84272, Administrative Officer, P-4, at ODMS. The DMS cannot breach the terms of that agreement by asserting that he made the decision to move her to other functions under his delegated authority; indeed, whilst recognizing that management has the discretion to reassign staff, this discretion is not unfettered and must be used judiciously and in good faith, which was not the case here; she was not even given any justifiable reason for the move;

b. The decision is also not in compliance with a "mission organization need", as the post should be classified; in fact, when she accepted the Settlement Agreement, the post offered to her was "the only approved post in the Office of the Director". In fact, the contested decision was made only to place on the post another ODMS staff member, who was already performing the functions of the Administrative Officer's post on a temporary basis before the Applicant's arrival, and continued to do so even after the Applicant's assignment to her post;

c. Since the discussion held on 4 May 2015 with the DMS, when she was requested to "vacate [her] post, functions and office by Wednesday, 6 May 2015", she was neither provided with any ToR for her new reassignment nor with a new office;

d. The statement by the Respondent that the Applicant was reassigned because she had failed to meet performance expectations is not supported by any evidence; no performance evaluation or performance improvement plan have been provided, and no explanation given as to why, if there were performance concerns, they were not addressed through the prescribed

mechanism under ST/AI/2010/5 (Performance management and development system);

Urgency

e. A mere two-day notice to vacate her “post, functions and office” renders her request for suspension of action of particular urgency as the implementation of the decision would cause her irreparable damage;

Irreparable damage

f. The decision, as well as the “hostile work environment, the stressful working conditions, the public humiliation and the lack of respect ... from other [s]taff [m]embers is causing [her] an irreparable emotional damage” that cannot be quantified in monetary terms only;

g. The sudden decision to reassign her has caused, and will continue to cause her, “medically-certified stress, sleeplessness and depression throughout any implementation”, as evidenced by a medical certificate.

12. The Respondent’s primary contentions may be summarized as follows:

Prima facie unlawfulness

a. Since the Applicant’s appointment in the position of Administrative Officer at ODMS, there have been significant issues with her performance; therefore, it is neither in her nor in the Organization’s interest that she continue to work in that position;

b. The move is not in breach of the Settlement Agreement and is not arbitrary; the *prima facie* unlawfulness of the decision has not been demonstrated by the Applicant. The Agreement does not compel the Organization to maintain the Applicant in the position of Administrative Officer at ODMS for any minimum duration, nor does it override or negate the Applicant’s obligation to fulfil performance expectations and to comply with her ToR;

c. A reassignment is proper, *inter alia*, if the new position is at the staff member's current grade, the responsibilities involved correspond to his or her level, the new functions are commensurate with his or her competencies and skills, and his or her due process rights, including the right to be consulted about the reassignment, were respected; in this case, all those elements were fulfilled;

d. It falls within the Administration's broad discretion to take into account a staff member's poor performance in managing the Organization, and there is no obligation to wait until the outcome of performance evaluation procedures to do so. In the present case, since joining ODMS, the Applicant failed to meet performance expectations, particularly by failing to demonstrate the "judgement and communication skills necessary for a role in the Office of the DMS", which is demonstrated by various examples and the evidence on file, in the form of emails expressing disapproval and tensions following some of her actions;

e. The continuing role—namely beyond the arrival of the Applicant at ODMS—of the other Administrative Officer in ODMS who has been there since June 2014, was critical to support ongoing GFSS activities, which is a completely separate task from the role and duties of the Administrative Officer post to which the Applicant had been appointed and for which she has ToR and a work plan;

f. The reassignment decision was made in order to address a situation of urgency, where the Applicant's continued presence in ODMS was undermining the work of her colleagues and the functions of the whole Office. Where the interpersonal relationships in an office have become unsustainable for all concerned, the decision to reassign a staff member is within the Administration's discretionary powers, and the mere fact that there are disagreements and friction between a staff member and his or her supervisor is an insufficient basis to infer an improper motive;

Urgency

g. The Applicant will continue to perform the role of an Administrative Officer in UNLB under her continuing appointment and, therefore, there is no demonstrated urgency in this case; both parties will benefit from the reassignment;

Irreparable damage

h. There is no evidence adduced by the Applicant that if she moves from ODMS to the Base Support Service she would suffer irreparable harm, or any harm at all; in view of the performance issues she faced in her position of Administrative Officer in ODMS, it is both in the Applicant's and in the Organization's interest that she move to the Base Support Service where she will have the opportunity to work with a different supervisor and improve her performance. It has to be recalled that she continues to be engaged on a continuing appointment.

Consideration

13. Pursuant to art. 2.2 of its Statute and art. 13.1 of its Rules of Procedure, the Tribunal is competent to hear and pass judgment on an application filed by an individual requesting the Tribunal:

[T]o suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage.

14. Based on the wording of those provisions and well-established jurisprudence (see e.g. *Ding* Order No. 88 (GVA/2014), *Essis* Order No. 89 (NBI/2015), *Carlton* Order No. 262 (NY/2014)), the Tribunal can order suspension of the contested decision only if all three cumulative conditions, namely *prima facie* unlawfulness, particular urgency and irreparable damage, are met. If one of them is missing, an application for suspension of action must be

rejected, and the Tribunal is not obliged to assess whether the other conditions are fulfilled.

15. In the case at hand, the Tribunal considers that the Applicant has not met the burden of proving that the implementation of the contested decision would cause her irreparable damage. The contested decision concerns the reassignment of a staff member, not a non-renewal of contract or a non-selection as is mainly the case for applications for suspension of action submitted to the Tribunal (see e.g. *Torkonoo* Order No. 168 (NBI/2014), *Baldini* Order No. 103 (NY/2013), *Zhuang* Order No. 165 (GVA/2013)), and in which the damage caused to the staff member might indeed be considered as irreparable since he or she loses employment with the United Nations or a career opportunity.

16. In the instant case, the Tribunal firstly notes that the Applicant's reassignment to other functions within the same duty station is not causing her any material harm or economic losses.

17. With respect to the Applicant's contention that she suffers from "irreparable emotional damage" due to the "hostile work environment, the stressful working conditions, the public humiliation and the lack of respect ... from other [s]taff [m]embers", and that this "kind of loss cannot be quantified by damages only", the Tribunal notes that her statement is very generic and she fails to provide any convincing evidence. Moreover, although based on the Tribunal's jurisprudence, a damage "to professional reputation and career prospects, harm to health, or sudden loss of employment" may constitute irreparable harm, the Tribunal has to consider the particular circumstances of each case (see *Moise* Order No. 208 (NY/2014)).

18. In the factual and legal circumstances of the present case, the Tribunal considers that the Applicant did not establish such irreparable damage. Even in case the contested decision would be considered unlawful, any harm from its implementation does not seem "irreparable", as legally required. If the Applicant's reassignment were deemed unlawful following a review of the merits of her case, order could be made by the Tribunal to rescind it, without setting an amount of compensation as an alternative to rescission, since a reassignment

decision is not a case of “appointment, promotion or termination” (see art. 10.5(a) of the Tribunal’s Statute as well as *Kaddoura* 2011-UNAT-151 and *Rantisi* 2015-UNAT-528). As a result of such an order, the Applicant would recover her *status quo ante*, with no outstanding damage. Under these particular circumstances, any damage cannot be considered “irreparable”.

19. With respect to the Applicant’s additional submission dated 8 May 2015, in which she explains that the reassignment has caused, and will continue to cause her, “medically-certified stress, sleeplessness and depression throughout any implementation”, the Tribunal observes that the submitted medical attestations do not include any “medical evidence” that they are supposed to provide. Neither the “cardiac information” nor the “recommendation of 10 days of rest” do refer to stress, sleeplessness or depression. None of those documents include any kind of diagnosis. The medication as such may be based on reasons which have nothing to do with the reassignment.

20. Finally, a reassignment can hardly be considered as generally damaging the reputation of a staff member. Unlike the refusal to promote a staff member, or the placement of a staff member on administrative leave (see *Kompass* Order No. 99 (GVA/2015)), a reassignment decision - a day-to-day practice in every Administration - does not necessarily include any kind of negative assessment of the concerned staff member.

21. Having concluded that no irreparable damage would be caused by the implementation of the contested decision, there is no need to ascertain whether the other two requisite conditions for granting a suspension of action are met in the present case. Therefore, the decision on this application for suspension of action does not entail any assessment with respect to the lawfulness of the contested decision.

Conclusion

22. In view of the foregoing, the application for suspension of action is rejected.

(Signed)

Judge Thomas Laker

Dated this 11th day of May 2015

Entered in the Register on this 11th day of May 2015

(Signed)

René M. Vargas M., Registrar, Geneva