



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:

Self-represented

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. By application filed on 22 July 2015, the Applicant, a staff member of the United Nations Logistics Base/United Nations Global Service Centre (“UNLB/UNGSC”), in Brindisi, requested suspension of action, pending management evaluation, of:

- a. “abuse of discretionary authority, retaliation, obstruction of opportunities for career advancement”;
- b. “the decision to open the [Temporary Job Opening (“TJO”)] TJO-GSC-15-16 (001) for Administrative Officer in order to hire unlawfully another staff to perform [the Applicant’s] my agreed roles and responsibilities”;
- c. “the continued unfair and incomplete consideration as Staff Member by not assigning duties to perform after [she] contested the [Director of Mission Support (“DMS”), UNGSC] decision” by request of management evaluation dated 5 May 2015.

Facts

2. Pursuant to the terms of a Settlement Agreement signed by the Applicant and the Under-Secretary-General for Field Support (“USG/DFS”) 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.

3. The Applicant’s fixed-term contract was renewed, on 1 September 2014, for a period of one year and subsequently converted into a continuing appointment effective 30 September 2014.

4. According to the Applicant, since the beginning of her assignment to UNLB/UNGSC she was deprived of the opportunity to perform the functions and responsibilities of the post.

5. By email of 12 November 2014, in response to inquiries from the Applicant, the Director of Mission Support (“DMS”), UNLB/UNGSC, sent to the Applicant her proposed Terms of Reference . He assured her that she was on the P-4 Administrative Officer post in his office, while confirming that there was another P-4 staff member in the office, and provided some explanations about the roles of each of them.

6. 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, it is documented that a number of issues arose between the Applicant and the DMS in the following months.

7. On 4 May 2015, the DMS announced to the Applicant his decision to reassign her, along with her post, to the Base Support Service (“BSS”) of UNLB/UNGSC effective 6 May 2015.

8. On 5 May 2015, after requesting management evaluation, the Applicant filed an application for suspension of action with the Tribunal, which was rejected by Order. No. 102 (GVA/2015) of 11 May 2015.

9. The Applicant was placed on sick leave from 8 to 27 May 2015.

10. On 26 May 2015, the Applicant’s husband went to the UNGSC parking, where he encountered the DMS and another staff member. According to the DMS, the Applicant’s spouse followed him by car from UNGSC premises to his home and from there to the venue of an official function and displayed a threatening behaviour. The Applicant denies that her husband followed or in any manner threatened the DMS.

11. On the next day, 27 May 2015, the Applicant’s husband entered UNGSC premises and asked to meet the Chief, BSS, who was meant to be the Applicant’s direct supervisor following her reassignment. Reportedly, he told the Chief, BSS,

that if he cooperated with the Applicant's reassignment his minor son would be "taken care of". The Applicant denies that her husband proffered these alleged threats.

12. Following these episodes, the Italian Airforce personnel responsible for the security at the UNGSC base were advised not to allow access to the base to the Applicant and her husband.

13. On the first day upon her return from sick leave, the Applicant was stopped from entering UNGSC to report to work.

14. On 28 May 2015, the Chief, BSS, filed an official complaint for threats against the Applicant's husband with the local police, and the DMS and the other staff member present reported the 26 May 2015 incident to the national police.

15. On 29 May 2015, the DMS informed the Applicant that her access to UNGSC had been suspended pending advice on safety implications and requested her to work from home until 4 June 2015. On that day the Applicant's access to the UNGSC base was restored on the basis of a determination by the Safety and Security Section that she did not represent a safety and security risk.

16. From 4 to 18 June 2015, the DMS, the Applicant and the Chief, BSS, maintained exchanges aimed at effecting the reassignment.

17. On or about 11 June 2015, the Applicant brought a complaint of misconduct against the Chief, BSS, concerning his allegations against her husband.

18. On 12 June 2015, the Applicant requested to the Office of Internal Overview Services to conduct an investigation for abuse of power regarding the use of the Italian forces against her and her family, and to the USG/DFS to investigate managerial irregularities by the DMS. On 16 June 2015, she made complaint for retaliation and sought protection by the Ethics Office under the Secretary-General's bulletin ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperation with duly authorized audits or investigations).

19. At the beginning of July 2015, a TJO announcement was issued, under reference TJO-GSC-15-16 (001), with 16 July 2015 as deadline for candidacies, for a P-3 post of Administrative Officer with UNGSC/Management and Operations Support.

20. On 9 July 2015, the USG/DFS answered negatively to the Applicant's complaint pursuant to Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) and the related request for investigation dated 12 June 2015.

21. On 22 July 2015, the Applicant requested management evaluation of the decisions mentioned in para. 1 and filed the present application for suspension of action.

22. The Respondent filed his reply to the instant application on 24 July 2015, submitting *inter alia* that TJO GSC-15-16 (001) had been cancelled on or about 23 July 2015, TJO-GSC-15-16 (001).

23. Pursuant to Order No. 144 (GVA/2015) of 27 July 2015, the Respondent filed additional comments on 28 July 2015, stating that, further to the recent developments in the situation, including several misconduct complaints lodged by the Applicant against her supervisors, no new duties had been assigned to her. On the same day, the Applicant filed unsolicited further submissions on the Respondent's pleadings.

Parties' contentions

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

Prima facie unlawfulness

- a. Only one Administrative Officer post (P-4), which the Applicant encumbered until her reassignment in early May 2015, in the ODMS is approved in the 2014-2015 budget, and there are no realignments proposed or approved for the 2015-2016 budget. Hence, the approved mission's operational mandate is not being followed. No restructuring proposal was

submitted to the Secretary-General for consideration or approved by the General Assembly;

b. There is a strong *prima facie* case of retaliation by the DMS;

c. The Applicant was given a legitimate expectation that her appointment would be renewed and she was verbally promised that, subject to good performance, she would be provided an opportunity to have her appointment extended;

d. The course of conduct of the Applicant's hierarchy, particularly that of DMS, is not a proper exercise of the Organization's discretionary power. Such discretion is not unfettered and must be exercised judiciously and in good faith;

Urgency

e. Urgency exists when an applicant may be denied the chance of regaining the position he or she was occupying or should be occupying despite being successful on the substantive case, especially if the position is filled;

f. In this case, if the Administration is allowed to implement the decisions, another candidate will be selected;

Irreparable damage

g. The condition of irreparable harm is satisfied if the suspension of action is the only way to ensure that an applicant's rights are observed. The present suspension of action is the only remedy available to suspend the recruitment process and the selection of another staff;

h. The decisions, 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;

i. The overall situation has caused the Applicant—and is likely to continue causing her—medically-certified stress, sleeplessness and depression, as well as damage to career prospects and to professional and social reputation.

25. The Respondent's primary contentions may be summarized as follows:

Receivability

a. The application is not receivable *ratione materiae*. The conduct of another staff member is not an appealable administrative decision, and the Tribunal has no jurisdiction to investigate complaints of prohibited conduct *de novo*. A staff member willing to complain of prohibited conduct must follow the established procedures to address such conduct;

b. While the Applicant asserts that the DMS subjected her to retaliation and unfair treatment and states having requested “a fact-finding” on her allegations, she has not been notified of the outcome of her complaint. Therefore, there is no administrative decision identified in this respect that may be the subject of the Tribunal's review;

c. The Applicant has no standing under art. 2 of the Tribunal's Statute to contest the issuance of the litigious TJO. For that, a staff member must show that he or she has a right or interest at stake. Whilst a staff member's right to full and fair consideration arises only if he or she applies for a given position, the Applicant has not applied to the TJO;

d. Further, the issuance of a TJO is a preliminary or preparatory step in a selection process, not a final administrative decision. As such, it can only be disputed in the context of a challenge to a final selection decision;

e. Finally, the application is moot, as the TJO in question was cancelled for administrative reasons unrelated to these proceedings and/or the Applicant's allegations.

Prima facie unlawfulness

f. The Applicant has not shown that there are “serious and reasonable doubts” about the lawfulness of the decision she seeks to suspend. She has presented no basis to find that the DMS retaliated against her or treated her unfairly, nor to challenge the issuance of the TJO;

g. The TJO was issued as part of staff preparations for the implementations of Umoja Extension 1. It was lawful for the Administration—which has wide discretion to structure its services—to respond to this urgent need and seek additional resources for this project;

h. As a result of the alleged threatening behaviour of the Applicant’s husband, and her erratic behaviour, it has not been possible to assign any new duties to the Applicant since her proposed reassignment to BSS. Since the Applicant filed a complaint for misconduct against the person who should have become her direct supervisor, her reassignment to BSS became untenable. Further, it is not possible either for her to resume her duties in ODMS, due to the previous breakdown in trust between her and the DMS, who would be her supervisor in ODMS;

Urgency

i. There is no urgency in the instant matter. The Applicant was reassigned to a new role on 6 May 2015 and, should she wish to take action under ST/SGB/2008/5, she must undertake the procedures prescribed therein and await the outcome;

Irreparable damage

j. It is not established that the Applicant may suffer irreparable harm. She may pursue a complaint under ST/SGB/2008/5. The issuance of the TJO had no impact on her and it has been withdrawn.

Consideration

Receivability

26. The subject-matter of the present application is three-folded, as it is aimed against, in the Applicant's own words:

- a. "abuse of discretionary authority, retaliation, obstruction of opportunities for career advancement";
- b. "the decision to open ... TJO-GSC-15-16 (001) for Administrative Officer in order to hire unlawfully another staff to perform [the Applicant's] agreed roles and responsibilities";
- c. "the continued unfair and incomplete consideration as Staff Member by not assigning duties to perform after [she] contested the [Director of Mission Support ("DMS"), UNGSC] decision" by request of management evaluation dated 5 May 2015.

27. The Tribunal will address these three issues in turn.

28. The first of them does not constitute an administrative decision within the meaning of art. 2 of the Tribunal's Statute (see e.g., *Tabari* 2010-UNAT-030, *Schook* 2010-UNAT-013, *Tintukasiri* 2015-UNAT-526). Instead, the alleged "abuse of discretionary authority, retaliation, obstruction of opportunities for career advancement" consists of a course of conduct by one or several officials of the Organization. As such, it is not appealable before the Tribunal, as held in *Bajnoci* UNDT/2012/028.

29. The Organization has promulgated specific procedures to address and seek remedy with respect to such prohibited conduct, notably through the Secretary-General's bulletin ST/SGB/2008/5. The Applicant submits that she has availed herself of said mechanisms, and has already received a response to one of her complaints.

30. Yet, what the Applicant is presently putting to the Tribunal is not any decision further her resorting to the mechanisms prescribed in case of harassment,

abuse of authority or retaliation, but the allegations of prohibited conduct by the DMS. To this extent, for the reasons explained above, the application is irreceivable as far as it concerns the Applicant's first claim.

31. The second decision impugned is the issuance of TJO-GSC-15-16 (001). The Respondent informed that this TJO has been cancelled and not yet re-advertised. As a result, its challenge has become moot (see e.g., *Oummih* Order No. 105 (GVA/2013), *Gehr* 2013-UNAT-328, *Masykkanova* UNDT/2013/022, *Castelli* UNDT/2015/057).

32. The third decision at issue is the alleged failure to assign to the Applicant duties to discharge. Generally speaking, the latter can amount to an administrative decision capable of judicial review under art. 2 of the Tribunal's Statute. Indeed, it is an act—or, in this case, an omission—emanating from the Administration of individual application with direct legal consequences and affecting the Applicant's terms of appointment. In this last respect, this Tribunal ruled in *Parker* UNDT/2009/066 that:

Deprivation of substantive work, where substantiated, constitutes indeed a regrettable departure from regular supervisor-supervisee relations which might cause injury to the Applicant's career. As a matter of principle, every staff member is entitled to be given the opportunity to discharge the duties incumbent on him or her, and this includes being allocated sufficient and appropriate tasks.

Conditions for granting suspension of action

33. 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.

34. 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.

35. The first test that must be satisfied for a suspension of action application to succeed is that of *prima facie* illegality of the concerned decision. This condition implies that there have to be “serious and reasonable doubts” about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Wu* Order No. 188 (GVA/2013)).

36. As stressed above, every staff member has in principle the right to be assigned tasks to carry out. In this case, the very fact that the Applicant has effectively not been allocated work to perform since 6 May 2015 is uncontroversial and it has been expressly conceded by the Respondent.

37. With respect to the legality of this situation, the sequence of events shows that, after her reassignment, the Applicant was on sick leave for twenty days until 27 May 2015, and then barred from entering her workplace and requested to work from home until 4 June 2015. From 4 to 11 June 2015, arrangements were being made to give effect to her reassignment, but they were interrupted after the Applicant brought a misconduct complaint against her prospective supervisor. In other words, until 11 June 2015, it had not been viable for various practical reasons to allocate work to the Applicant, although it was apparent that, at the beginning of June 2015, concrete steps were being made to this end.

38. In contrast, since 11 June 2015 to date, that is, for over a month and a half already, the situation reached a deadlock, which each party blames on the other. The Tribunal finds it neither appropriate nor possible to make a determination as

to the veracity of one position or the other within the framework of an application for suspension of action, given the limited scope of this kind of proceedings. Moreover, the Tribunal notes that the relevant events are still under investigation. However, there is no doubt that certain incidents indeed occurred, involving the Applicant's spouse and three UNLB/UNGSC staff members, including her potential new supervisor, that unavoidably affect the work relationship between the parties. Given the exceptional circumstances of this case, the Tribunal finds it tolerable that the assignment of duties takes longer as it normally should. Therefore, the undisputed delay in assigning duties to the Applicant does not amount to an illegal omission.

39. Having concluded that no *prima facie* illegality is established, and since the three conditions set out in art. 2.2 of the Tribunal's Statute are cumulative, it is not necessary to ascertain whether the other two requisite conditions for granting a suspension of action—to wit, urgency and irreparable damage—are fulfilled.

40. Notwithstanding this, the Tribunal is concerned that for nearly two months the Applicant has been reporting to the office but unable to effectively work as she has not been allocated any tasks. This situation is certainly not in the interest of the Organization, and it is even more detrimental to the Applicant, especially since she has no tangible prospect of improvement. In the Tribunal's view, sustaining the unsatisfactory *status quo* is not an option, and action must be undertaken to bring same to an end.

Conclusion

41. Nevertheless, in view of the foregoing, the application for suspension of action is rejected.

(Signed)

Judge Thomas Laker

Dated this 29th day of July 2015

Entered in the Register on this 29th day of July 2015

(Signed)

René M. Vargas M., Registrar, Geneva