



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

REILLY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Bettina Gerber, HRLU

Introduction

1. The Applicant, a Human Rights Officer, Office of the United Nations High Commissioner for Human Rights (“OHCHR”), requests suspension of action, pending management evaluation, of the decision to “forcibly [transfer her] from a post with extreme budgetary stability ... to a post with no stability” and the “removal of [her] lien” against the post of Human Rights Officer (P-3) in the Human Rights Council Branch (“HRCB”), OHCHR.
2. The Application was served on the Respondent who filed his reply as ordered.

Preliminary Procedural matters

Applicant’s Motion to exceed page limit

3. The Applicant has requested leave to exceed the 10-page limit for applications for suspension of action arguing that it is essential to explain the circumstances and background of her case, and to “demonstrate the reassurances that have been provided to her over a number of years”.
4. The Respondent has objected arguing that the voluminous documentation filed is partly irrelevant to the issue at stake, and that the submission attempts to “reopen matters currently pending before the UNDT”, referring to cases UNDT/GVA/2017/052 and UNDT/GVA/2018/099 currently suspended pending an appeal before the UNAT.
5. The Tribunal is mindful that the application has, by far, exceeded the page limit in cases such as this, which are subjected to a statutory speedy processing. However, bearing in mind the specific context alleged by the Applicant, the circumstances of the case and the fact that most of the material refers to issues known to the Respondent in the context of other cases filed by the Applicant (closed and pending), the Tribunal grants the requested leave.

Ex parte filings

6. Annexes 1, 7 and 8 to the Respondent's reply were filed *ex-parte*. The Tribunal finds that these documents are not determinant to the merits of the application for suspension of action. Consequently, they are to remain *ex parte* and shall not be disclosed, at this time, to the Applicant.

Facts

7. The Applicant joined HRCB, OHCHR in Geneva, on 6 January 2012 as a Human Rights Officer against a P-3 position funded by the regular budget.

8. Although in her application for suspension of action the Applicant has recounted at length the circumstances of her situation, it is enough to retain the following for the examination of her current application.

9. In February 2013, the Applicant reported potential acts of misconduct by her First Reporting Officer, the Chief, HRCB, OHCHR. Subsequently, a series of events/matters—some of which have been adjudicated by this Tribunal or are currently in its docket—arose and brought the Applicant to seek positions outside HRCB to, in her words, “escape the harassment, abuse of authority and retaliation to which she asserts she was subjected by [the Chief, HRCB, OHCHR] as a result of her reports of apparent misconduct”.

10. In time, OHCHR and the United Nations Office of Human Resources Management (“OHRM”) became involved in finding a suitable position for the Applicant who has repeatedly requested to be transferred to a mutually agreeable position “away from the direct supervision of those whose conduct [she] reported”.

11. The Applicant's latest assignment, a temporary one against a P-4 position with the Rule of Law and Democracy Section, OHCHR, started on 1 May 2018 and ended on 30 September 2019. During this period, numerous communications between the Applicant and OHCHR and/or OHRM took place in connection with the search for a new position.

12. The Tribunal notes that the most relevant exchanges concerning the identification of a suitable position for the Applicant started as of 21 September 2019. The Applicant was offered two Human Rights Officer positions at the P-3 level in OHCHR: one in the Special Procedures Branch/Sustainable Human Development Section and another in the Human Rights and Economic and Social Issues Section.

13. The exchanges concerning the identification of a suitable position for the Applicant led to an email of 7 October 2019 from the Chief, Human Resources, OHCHR, to the Applicant informing her of the decision to transfer her. It relevantly reads as follows:

We have taken note of your email and noted that you have not expressed any preference regarding the two offers. The two offers were suitable and commensurate to your grade and skills.

Therefore, we will proceed to your lateral transfer to the P-3 position in the Human Rights and Economic and Social issues section, Thematic Engagement, Special Procedures and Right to Development Division (see TOR attached), effective 7 October 2019. This is a transfer under the authority of the [High Commissioner], in an effort to find a viable, long-term solution to a situation of longstanding concerns. (emphasis in the original)

14. On 9 October 2019, the Applicant requested management evaluation of the “decision to forcibly laterally transfer her to a post with less secure funding source, the decision to remove her lien to [her] post in [the] Human Rights Council and the decision to renege on assurances of [a] transfer to a P-4 post”.

15. The same day, the Applicant filed her application for suspension of action.

Parties’ contentions

16. The Applicant’s primary contentions may be summarized as follows:

Prima facie unlawfulness

- a. The Applicant has been subject of harassment and retaliation since she reported, through the appropriate internal channels, the potential misconduct of her supervisor, the Chief, HRCB, OHCHR;

- b. She has been promised consultations on a suitable placement by the Assistant Secretary-General, OHRM, but, so far, she has not been assigned to any of the positions for which she has applied;
- c. Her requests to go back to her original post have been refused;
- d. She has not applied for the posts that were offered to her and she has no interest in them; and
- e. Said posts are precarious and she has not agreed to be transferred to any of them;

Urgency

- f. The implementation of the contested decision, i.e., her transfer, is imminent;

Irreparable damage

- g. The discontinuation of the Applicant's lien to her stable, regular budget P-3 post with HRCB, OHCHR, gives rise to an irreparable damage.

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

Prima facie unlawfulness

- a. The Applicant has been consulted and required to make comments regarding her transfer to other positions;
- b. She has requested to be placed against a post for which she has applied but a review of her applications since 2017 shows that all of them concern P-4 positions. No staff member can be laterally transferred to a position at a higher grade as this would circumvent the staff selection's system;
- c. The Applicant's transfer is not "an interim measure" for which her consent is required pursuant to section 6.10 of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority);

d. The two positions proposed to the Applicant for her transfer were published in Inspira, are regular Job Openings—not Temporary Job Openings—and are commensurate to her grade and skills. Although only one of these positions is funded from the regular budget, they are both deemed stable; and

e. The funding source of a post encumbered by a staff member does not impact the staff member's terms of appointment or contract of employment;

Irreparable damage

f. It is the Applicant's refusal to be transferred to either of the proposed posts that may cause irreparable harm. She would remain in a limbo, albeit special leave with full pay, which will exacerbate the situation.

Consideration

18. Art. 2.2 of the Tribunal's Statute provides that the Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. These three requirements are cumulative and must all be met for a suspension of action to be granted.

19. In her application, as well as in her request for management evaluation, the Applicant indicates that she is contesting the decision to transfer her outside HRCB, OHCHR, and to terminate her lien against the P-3 position at the HRCB, OHCHR. This matter is therefore properly before the Tribunal and it will consider it below.

20. Additionally, in para. 89 of her application, the Applicant also puts forward that

Should the Administration successfully argue that the lateral transfer to a different post has already been implemented the Applicant respectfully seeks suspension and a Villamorán type order regarding the regular filling of her parent post in the Human Rights Council. (emphasis in the original; footnote omitted)

21. In his reply, the Respondent confirmed that the contested decision (lateral transfer) is not yet implemented. Moreover, the Tribunal has no record of the Applicant requesting management evaluation of the decision to regularly fill the Applicant's parent post at the HRCB, OHCHR. This matter is therefore not properly before the Tribunal and it will not consider it.

Prima facie unlawfulness

22. The Tribunal recalls that the threshold required in assessing this condition is that of "serious and reasonable doubts" about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

23. In this case, the examination of *prima facie* unlawfulness focuses on assessing whether the lateral transfer at stake constitutes a proper exercise by the Organization of its administrative discretion and if the consent of the Applicant is an essential requirement to ensure the lawfulness of the contested decision.

24. It is well established within the Organization's legal framework that lateral transfers fall within the Organization's administrative discretion. Staff Regulation 1.2(c) provides 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."

25. Similar authority is vested on Heads of departments/offices, such as the High Commissioner for Human Rights, who, pursuant to section 2.5 of ST/AI/2010/3 (Staff selection system):

retain the authority to transfer staff members within their departments or offices, including to another unit of the same department in a different location, to job openings at the same level without advertisement of the job opening or further review by a central review body.

26. The Appeals Tribunal has consistently held that the Secretary-General has broad discretion to reassign staff members provided that lateral movements follow the proper procedure and meet the legal requirements, i.e., the new post corresponds to the staff member's level, the new functions are commensurate with the staff member's competencies and skills and the staff member has substantial professional experience in the respective field (see *Rees* 2012-UNAT-266).

27. Based on the evidence on file, the Tribunal is of the view that, in the Applicant's case, properly exercising the above administrative discretion necessitated prior consultation with the Applicant about potential positions for her transfer. It is worth recalling that consultation does not mean to have the agreement of the staff member concerned. In its Judgment *Rees* UNDT/2011/156, this Tribunal stated that:

74. Consultation does not necessarily include negotiation and certainly does not guarantee agreement, but it must be carried out in good faith. Consultation should occur before a final decision has been made so that the staff member has a proper opportunity to be heard without the matter having been pre-determined.

28. Good faith when consulting could be called into question if it were demonstrated that the funding of the proposed positions is less stable than the one for the P-3 post against which the Applicant has a lien. Funding of the proposed positions is a concern that the Applicant raised, particularly given that the post selected for her transfer in the contested decision was funded by extra budgetary funds.

29. The record demonstrates that the Organization did its due diligence and confirmed, in writing, to the Applicant that the funding for the positions offered was “stable and reliable”. Moreover, the Applicant was offered the option to be placed against an existing regular budget post in the same section where the post selected for her transfer is located.

30. Having examined the exchanges between the Applicant and the Organization, particularly those as from September 2019, the Tribunal is satisfied that the Applicant was consulted, prior to taking the decision to transfer her, about potential suitable positions for her—commensurate with her skills and experience—and that the Organization did review P-3 Job Openings to which she had applied. Also, it is undisputed that the Applicant has commented on different proposals made to her.

31. Turning to the issue of the necessity for the Applicant’s consent to effect the transfer, the Applicant argues that the lateral transfer is to be implemented under the provisions of ST/SGB/2019/8 and should be considered as an “interim measure” pursuant to section 6.10 of the bulletin, which makes of consent a mandatory requirement to effect a reassignment.

32. The extensive chronology of events presented by the Applicant in her application, confirms that her situation within OHCHR is neither recent nor contemporary to the lateral transfer she contests and that she seeks to suspend. In fact, it started at least in 2013, following the reports of potential misconduct she made and a request for protection against retaliation before the United Nations Ethics Office. This was considerably before the Applicant’s filing of a complaint against the Chief, HRCB, OHCHR, under ST/SGB/2019/8.

33. Both from a factual and legal point of view, the proposed lateral transfer of the Applicant cannot be understood as an “interim measure” pending the outcome of an investigation or of a harassment complaint. It is an attempt to put an end to a long-standing matter that has kept the Applicant in constant professional movement within OHCHR and that is detrimental for her and for the Organization.

34. The Tribunal finds that the Applicant's consent to effect the transfer is clearly not a condition *sine qua non* for a lateral transfer, and that the applicable legal framework for this application is not ST/SGB/2019/8 but rather Staff Regulation 1.2(c) and Section 2.5 of ST/AI/2010/3.

35. Consequently, the Tribunal finds that the contested decision is not *prima facie* unlawful, and there is no need to undertake an assessment of the two other cumulative requirements to grant a suspension of action.

Conclusion

36. In view of the foregoing, the application for suspension of action pending management evaluation is rejected.

(Signed)

Judge Teresa Bravo

Dated this 16th day of October 2019

Entered in the Register on this 16th day of October 2019

(Signed)

René M. Vargas M., Registrar, Geneva