



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Abena Kwakye-Berko, Acting Registrar

OKUDA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**REASONED RULING ON A
SUSPENSION OF ACTION
APPLICATION**

Counsel for the Applicant:

George G. Irving

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Elizabeth Gall, ALS/OHRM

Introduction

1. The Applicant is a permanent staff member with the United Nations Economic and Social Commission for Western Asia (“ESCWA”) in Beirut, Lebanon. She has occupied the post of Chief Programme Planning and Coordination Section (“Post”) since 27 December 2012.¹

2. The Applicant is contesting a decision made by the Executive Secretary of ESCWA, Ms. Rima Khalaf, to reassign her to an unidentified position within the Organization (“Contested Decision”). The Applicant sought a suspension of action to prevent the Contested Decision being implemented pending the outcome of management evaluation.

3. By Order No. 202 (NBI/2013) dated 5 September 2013, the Tribunal granted the Applicant’s request for suspension of action ordering that:

The suspension of the implementation of the Contested Decision shall remain in force until the Applicant has received a response to her request for management evaluation or, if no response is received, until the expiry of the relevant response period for the management evaluation under art. 8, paragraph 1 (d)(i) of the Statute of the United Nations Dispute Tribunal.

The Order noted that written reasons for the decision to grant the suspension of action request would follow. This ruling constitutes those written reasons.

Facts

4. On 26 August 2013, the Applicant was informed by her supervisor, Mr. Roberto Laurenti, Director of the Planning, Partnerships and Technical Cooperation Division, of the Contested Decision. Mr. Laurenti was informed of the Contested Decision by a letter from Mr. David Iyamah, Director of the Administrative Services Division of ESCWA. The letter stated that the “decision

¹ The Applicant’s job title is not uniform in the documents on record. In her Application, the Applicant states her functional title as “Chief, Strategic Planning and Monitoring Section” and in his Reply the Respondent refers to the Applicant’s position as “Chief, Planning, Partnerships and Technical Cooperation Division”. Nothing appears to turn on these discrepancies so the Tribunal has adopted the job title as stated in the Vacancy Announcement for the position, namely “Chief Programme Planning and Coordination Section”.

of the Executive Secretary is in accordance with ST/AI/2013/3, paragraph 2.5 whereby Heads of Department/offices retain the authority to transfer staff members within their departments or offices.” Mr. Iyamah subsequently confirmed the Contested Decision to the Applicant in a meeting with the Applicant held on the same day.

5. The reason for the reassignment of the Applicant was stated as being the return to service of the staff member who had occupied the Post before the Applicant. That staff member had left the post to go on Special Leave without Pay (“SLWOP”), for the initial period of 26 October 2012 to 15 April 2013, which was then extended to 31 August 2013.

6. On 26 August 2013, the Applicant filed a request for protection against retaliation with the Ethics Office. In her covering email she states: “I consider [the Contested Decision] as retaliation against my reporting to [the Executive Secretary] yet another conflict of interest on 16 August in relation to [questionable consultancy activities]”.

7. On 28 August 2013, the Applicant requested management evaluation of the Contested Decision. The outcome of this request is still pending.

8. The Applicant filed her application for suspension of action at 10.57pm on 28 August 2013. The Registry received the Application on 29 August 2013 and served it on the Respondent on 30 August 2013.

9. The other staff member was to resume the Post on 3 September 2013. However, by Interim Order dated 30 August 2013, the Tribunal suspended the Contested Decision until Thursday 5 September 2013.

10. By Order No. 202 (NBI/2013) dated 5 September 2013, the Tribunal granted the Applicant’s request for suspension of action of the Contested Decision.

Applicant’s submissions

11. The Applicant submits as follows:

- a. The Contested Decision violates a mutual contractual obligation undertaken in good faith; had the Applicant known that the assignment to the Post would be for the duration of one year and that she would then have to move to another position she would have re-considered taking up the Post.
- b. She was appointed to the Post through a normal recruitment process and there was no lien on the Post. She received no notification when applying for the Post that the duration of post occupancy was in any way limited or conditional.
- c. The Contested Decision is not in the best interests of the Organization: her immediate supervisor contests the programmatic justification for the Contested Decision and, at least at the time when she was notified of the reassignment on 26 August 2013, there was no decision as to whether she would be reassigned, thus effectively rendering her unassigned. No reasons were provided to the Applicant as to why the reassignment was in the best interests of the Organization.
- d. Mr. Iyamah and Ms. Khalaf failed to consider other more suitable vacancies in the Organization which the returning staff member could fill.
- e. Neither the Applicant nor her supervisor, Mr. Laurenti, was consulted about the Contested Decision.
- f. There is a link between the Contested Decision and a formal complaint she made to the Office of Internal Oversight Services about a possible conflict of interest within the Organization.
- g. She would suffer irreparable harm because:
 - i. She moved to Beirut from New York only eight months ago and another move in such a short period of time would have

a negative impact on her career and personal life, which she did not anticipate.

- ii. There is a lack of current vacant posts which fit her profile so the post is retaliatory in nature and designed to penalise her for having challenged management authority.

Respondent's submissions

12. The Respondent submits as follows:

- a. The Applicant has not discharged her burden of proving that the Contested Decision is *prima facie* unlawful, one of the three prerequisites for the granting of the discretionary relief of suspension of action under art. 2.2 of the Statute of the United Nations Dispute Tribunal:
 - i. The Executive Secretary lawfully exercised her discretion to reassign the Applicant to another post within ESCWA under staff regulation 1.2(c) and sec. 2.5 of ST/AI/2010/3 (Staff selection system).
 - ii. The Applicant is being reassigned to facilitate the return from SLWOP of the staff member who previously occupied the Post. The Executive Secretary's decision to assign the returning staff member to the Post is based on his past performance in that position over the 2010-2011 and 2011-2012 cycles.
 - iii. The Executive Secretary has decided to reassign the Applicant to the P-5 position of Chief, Governance, Stability and Development Section in Emerging Conflict and Related Issues Division in ESCWA. The position is commensurate with the Applicant's current grade, skills, qualifications and experience.

- iv. The Applicant has no entitlement to serve in the Post for a minimum period of time.
 - v. The evidence submitted that Mr. Laurenti apparently questioned the Applicant's reassignment does not form the basis for a finding of *prima facie* unlawfulness as it is the Executive Secretary who is responsible for determining the organization of work in ESCWA and the suitability of staff to perform the functions of positions within ESCWA.
 - vi. The Applicant has failed to establish that the Contested Decision was motivated by improper purpose.
- b. The Applicant has not discharged her burden of proving that she would suffer irreparable harm if the Contested Decision was implemented, which is another of the three prerequisites for the granting of discretionary relief under art. 22 of the Tribunal's Statute. The Contested Decision does not render the Applicant unassigned and subject to potential termination as she alleges. No decision has been taken to terminate her employment. She will be reassigned to another position and continue to remain employed by the Organization in a new position within ESCWA.

Consideration

13. Art. 2.2 of the Tribunal's Statute sets out a three limb test which must be satisfied in order for the Tribunal to be able to grant a suspension of action request. The three limbs of this test are: (a) that the Contested Decision appears *prima facie* to be unlawful; (b) that the matter is of particular urgency; and (c) that implementation of the Contested Decision would cause irreparable harm.

14. The Respondent does not contest that the requirement of urgency has been met. The question then is whether the Applicant has satisfied the tests of *prima facie* unlawfulness and irreparable harm.

Is the Contested Decision prima facie unlawful?

15. The test of *prima facie* unlawfulness requires that an applicant establish that there are serious and reasonable doubts about the lawfulness of the contested decision (see *Ullah* UNDT/2012/140). It has also been held that when considering an application for suspension of action, “the Tribunal is only required to determine, based on a review of the evidence presented, whether the contested decision “appears” to be *prima facie* unlawful. This means that the Tribunal need not find that the decision is incontrovertibly unlawful” (*Mills-Aryee* UNDT/2011/051).

16. The Secretary-General has discretion to reassign staff members pursuant to staff regulation 1.2(c) which provides that “[s]taff 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”. However, this discretion is not unfettered; the decision must not be arbitrary, tainted by improper motives or in violation of mandatory procedures (*Rees* 2012-UNAT-266).

Correspondence between the Post and the new post

17. There is no requirement for a staff member to consent to reassignment but the position to which the staff member is reassigned must correspond with his or her grade and be commensurate with his or her skills, qualifications and experience (*Rees*). In *Rees*, the United Nations Appeals Tribunal held:

An accepted method for determining whether the reassignment of a staff member to another position was proper is to assess whether the new post was at the staff member’s grade; whether the responsibilities involved corresponded to his or her level; whether the functions to be performed were commensurate with the staff member’s competence and skills; and, whether he or she had substantial experience in the field.

18. There is very little evidence before the Tribunal about the position to which the Applicant is to be reassigned. Indeed, when the Applicant was notified of her reassignment, no new position was identified. The Respondent’s Reply states that the Applicant is to be reassigned to the P-5 position of Chief, Governance, Stability and Development Section in the Emerging Conflict and

Related Issues Division but does not provide any further details of the new post such as would confirm that it is commensurate with the Post. In her Motion to Submit Additional Evidence dated 3 September 2013, the Applicant confirms that the proposed reassignment to the new post “has never been discussed with [her] and appears unsuited to her background and qualifications.”

19. The commensurability of the new post with the Post is a key factor to the validity of the Contested Decision, yet the Respondent has failed to provide any details of the new post apart from its title. This leads the Tribunal to draw an inference that the functions to be performed in the new post would not be commensurate with the staff member’s competence and skills and thus not meet the test set out in *Rees*. The Respondent actually quoted the *Rees* test in his Reply but did not specifically apply it to the facts of the case, thus reinforcing this inference. Accordingly, the Tribunal is satisfied that there are serious and reasonableness doubts about the lawfulness of the Contested Decision and that the test of *prima facie* unlawfulness is therefore met in this regard.

Lack of consultation

20. The Administration has a duty to consult a staff member in good faith prior to reassigning that staff member (see Order No. 186 (NY/2010) *Fernandez de Cordoba Briz*). In *Rees* UNDT/2011/156, the Tribunal stated the following in relation to the Administration’s consultation obligation:

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.

21. It is clear from the evidence before the Tribunal that neither the Applicant nor her immediate supervisor was consulted about the proposed reassignment. She was simply notified of the Contested Decision a week before she was supposed to move. No consultation, let alone good faith consultation, took place prior to the Contested Decision. The test of *prima facie* unlawfulness is clearly satisfied.

Reason for Contested Decision

22. The Respondent submits that the reason for the Contested Decision was the facilitation of the return from SLWOP of the staff member who had previously occupied the Post. The Tribunal considers that there are serious and reasonable doubts that this is a lawful reason for the Contested Decision, in particular because it does not appear to be in the best interests of the Organization and may be inconsistent with the terms of the Applicant's employment contract.

23. The Respondent possesses broad discretion to reassign staff members to different functions and locations but this discretion is not unfettered. It must, among other requirements, be exercised in the best interests of the Organization (see *Rees* UNDT/2012/078). The "best interests" requirement corresponds to staff regulation 4.2 which provides "[t]he paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity." Staff regulation 4.2 reflects art. 101, paragraph 3 of the Charter of the United Nations, which states that the "paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity". It is trite law that an organization must comply with its own rules so the question is whether the Respondent complied with his own rules in treating the Applicant as he did in this case.

24. In an email to Mr. Iyamah the Applicant's supervisor, Mr. Laurenti, conveyed his view that the returning staff member was no longer suited to the Post as the functions of the Post had changed, and that the Applicant was more suitable for the Post. He stated, *inter alia*, that:

- the post in question might have the same IMIS number 400009 yet the functions are not. Actually they became more complex as they encompass the work of two P5s or two previous sections into one;
- the returning SM has no experience in programme planning other than the short one with ESCWA & even less in TC which is now required as a result of the restructuring of the division that took place early this year in conjunction with the EOD of the present incumbent;
- ...

- instead of a double disruption & domino effect (placing 1SM to replace an incumbent one who in turn has to be placed) wouldn't it be more practical to simply replace the returning SM directly into a vacant position?
- ...
- [The Applicant's] performance has...been outstanding in managing what used to be the work of two sections headed by two P5s... Indeed, replacing her would pose a serious challenge to the impressive achievements made so far in terms of staff cohesiveness, team spirit, productivity...

25. No programmatic reasons were provided for the Contested Decision by the Respondent. Whilst the Respondent retains broad discretion to determine what actions are in the best interest of the Organization, this discretion is not absolute. Based on the information available to the Tribunal, there are serious doubts as to whether the Contested Decision would secure the "highest standards of efficiency, competence and integrity". Indeed, on the face of it, the Contested Decision would cause considerable disruption and inefficiency in at least one Division of ESCWA and there are also doubts about whether it would result in the most competent staff member occupying the Post.

26. In the light of the provisions of the Staff Regulations, , and the available evidence, the Tribunal finds that the Applicant was reassigned not so much in the interest of the Organization, or in the pursuit of using the best resources of the Organization for the achievement of the purposes under the Charter, and Rules and Regulations, but rather in the interest of the returning staff member or some other interest.

27. The Applicant submitted that the Contested Decision violates a mutual contractual obligation undertaken in good faith and that the Applicant would have reconsidered taking the Post if she had known it would be for such a short duration. The Applicant's Letter of Appointment relevantly provides: "Please be advised that a transfer is a movement for an indefinite period, with or without a change of duty station." It contains no mention of, or reference to, any limitations or conditions attaching to the duration of the Post. It does not mention the possibility of the incumbent staff member returning to the Post. The Vacancy Announcement for the Post also makes no reference to any time limitations or conditions attaching to the Post. The Applicant went through the normal

recruitment process which, according to the Vacancy Announcement, included a written assessment and a competency-based interview. There was no lien on the Post nor was it otherwise encumbered.

28. Sec. 9.1 of ST/AI/2010/3 (Staff selection system) provides:

Staff members holding a permanent, continuing, probationary or fixed-term appointment should normally serve in a position for at least one year before being eligible to be appointed to another position.

When sec. 9.1 of ST/AI/2010/3 and the Letter of Appointment are read together, a strong argument could be made that the Applicant's contract of employment contained an implied term that she would be employed in the Post for at least one year. However, as other grounds of *prima facie* illegality have already been identified, the Tribunal does not need to reach a conclusion on whether or not such an implied term existed.

29. The Applicant also submits that there is a link between the Contested Decision and a formal complaint she made to the Office of Internal Oversight Services about a possible conflict of interest within the Organization. While there is not enough evidence before the Tribunal for it to make a ruling on this point, the Tribunal observes that it is a noteworthy coincidence that the decision to reassign the Applicant followed her complaint so closely in time.

Would implementation of the Contested Decision cause irreparable harm to the Applicant?

30. In general, harm will be considered to be irreparable if it cannot fully be compensated by a monetary award (see *McLetchie* UNDT/2012/032), or if it can be shown that suspension of the action is the only way to ensure that the Applicant's rights are observed (see *Fradin de Bellabre* UNDT/2009/004). In *McLetchie* the Tribunal stated:

It is generally accepted that financial loss only is not enough to satisfy the requirement of irreparable damage. Depending on the circumstances of the case, harm to professional reputation and career prospects, harm to health, or sudden loss of employment may constitute irreparable damage.

31. The Applicant moved to Beirut from New York only eight months ago. While her employment is not being terminated, the Tribunal considers that another move in such a short period of time would have a negative impact on her career, the more so because, as the Applicant submits, there are no vacant posts suited to her profile.

32. As noted above, sec. 9.1 of ST/AI/2010/3 (Staff selection system) recognises the value of staff members occupying a position for at least one year. It takes time for a staff member to settle into a new position and become familiar with the functions of that position and develop the skills suited to the particular role. To require a staff member to move after only a few months to an unnamed or allegedly unsuitable post is disruptive to the staff member's career in terms of skill development, productivity and reputation. Questions may be raised by other supervisors or employers in the future as to why the staff member remained in the post for such a short period of time and it is not unlikely that negative inferences about the staff member's performance may be drawn as a result. Such negative impressions are often difficult, if not impossible, to avoid and the impact they may have on the staff member's career cannot be rectified by monetary compensation.

33. The Applicant has submitted evidence, in the form of an email from her supervisor, Mr. Laurenti, in which he states:

[The Applicant's] performance has...been outstanding in managing what used to be the work of two sections headed by two P5s. Furthermore, she managed to turn around a dysfunctional team in [sic] an amazingly hard working & productive one (a SM even came back 10 days before AL ends to take up assignments in advance). The positive changes in terms of the quality of PPTCD support have been commended unanimously by division directors. Indeed, replacing her would pose a serious challenge to the impressive achievements made so far in terms of staff cohesiveness, team spirit, productivity...

It is clear to the Tribunal from this evidence that the Applicant has made a significant positive impact during her time in the Post and has received glowing reports from her immediate supervisor. From this, it is reasonable to infer that she would continue to thrive in the Post and build her career and reputation. For her to

be reassigned now, after only eight months, to another position which she is arguably not suited for would cause irreparable damage to her career development as it would cut short the positive momentum she has been building while in the Post and would therefore be akin to taking a step back, career-wise.

34. The Tribunal endorses the comments in *McLetchie* and finds that in the present case, the Contested Decision would cause harm to the Applicant's career prospects and professional reputation. The third limb of the test set out in art. 2.2 of the Statute is therefore satisfied.

Conclusion

35. The application for suspension of action is granted.



Judge Vinod Boolell

Dated this 19th day of September 2013

Entered in the Register on this 19th day of September 2013



Abena Kwakye-Berko, Acting Registrar, Nairobi