



Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SCHWALM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:
Brandon Gardner, OSLA

Counsel for the Respondent:
Nicole Wynn, AAS/ALD/OHR
Rosangela Adamo, AAS/ALD/OHR

Introduction

1. The Applicant is a Joint Operations Officer (“JOO”) at the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (“MINUSCA”). She serves on a continuing appointment at the P-4 level.
2. On 8 February 2021, the Applicant filed an application for suspension of action (“SOA”) seeking to suspend the decision to temporarily re-assign her to a P-4 Programme Management Officer Supply Chain Management post in MINUSCA from “21 December 2021 to end on 26 February 2021”¹ (“the contested decision”).
3. The Respondent filed a reply on 11 February 2021 in which it is argued that the application is not receivable *ratione materiae* because the contested decision has been implemented and is no longer capable of being suspended.

Facts

4. On 25 September 2018, a former United Nations Police (“UNPOL”) staff member made a formal complaint of harassment against the Applicant. A fact-finding panel was convened by the Special Representative of the Secretary-General (“SRSG”) and Head of MINUSCA to establish the facts and details surrounding the allegations made against the Applicant.²
5. On 15, 16 and 30 November 2018, the Applicant submitted a management evaluation request (“MER”) concerning the decision to deprive her of her functions including her removal as Deputy Chief, Joint Operation Centre (“JOC”) and challenging how her first reporting officer (“FRO”) and second reporting officer (“SRO”) had managed her performance during the 2017-18 performance cycle, among other issues.³
6. On 8 August 2019, the Management Evaluation Unit (“MEU”) issued its

¹ Application, annex 9.

² Reply para. 5 referencing annex 5 of the application.

³ Application, annexes 1 and 2.

determination and recommended: upholding the decision not to assign her as Deputy Chief of JOC; redoing her 2017-2018 performance evaluation; and assigning her tasks and responsibilities commensurate to a P-4 JOO.⁴

7. On 18 March 2020, the SRSG/MINUSCA informed the Applicant of the outcome of the 25 September 2018 complaint, specifically, that the fact-finding panel had found that she had created an unhealthy working environment by engaging in abuse of authority and harassment against the UNPOL staff member within JOC and that her behavior was inappropriate and constituted a breach of the United Nations core values of respect for diversity.⁵ The SRSG concurred with the fact-finding panel and decided to take managerial action by immediately reassigning the Applicant to another section but in a non-supervisory or managerial capacity. He further instructed the Chief of Staff and/or Chief of JOC to immediately communicate and clarify to all JOC members the decision to retain a sole military Deputy in accordance with a JOC Organigram dated December 2018.⁶

8. On 7 January 2021, the Applicant received a letter from the SRSG dated 21 December 2020, informing her of the contested decision.⁷

9. On 5 February 2021, the Applicant filed a MER challenging the contested decision.

Submissions

Applicant's submissions

Receivability

10. The Applicant submits that her re-assignment to a new post is a completed administrative decision that impacts on the terms and conditions of her employment and that she has a right to be placed in a post commensurate with her skills,

⁴ Application, annex 2.

⁵ Application, annex 5.

⁶ Ibid.

⁷ Application, para. 11 and annex 9.

experience and competencies. The decision to transfer her to a post incompatible with her previous roles and responsibilities violates that right. Re-assigning a staff member to a new position is a reviewable decision.

Unlawfulness

11. The decision to temporarily re-assign her to a Supply Chain Management post, despite the position not being commensurate with her skills and competencies, violates the jurisprudence of the United Nations Tribunals and the Administration's obligation to treat staff justly, fairly and transparently.

12. For a transfer decision to be lawful, the reassigned post must correspond to the staff member's skills, qualifications and professional experience. The re-assignment decision is unlawful for two reasons: it is flawed by procedural irregularity; and the re-assigned post does not correspond to her skills, qualifications and professional experience.

i. The re-assignment is a procedural irregularity of the highest order, as normally, when a staff member is re-assigned to a new post, this information is provided in the same memorandum informing about the re-assignment decision. By contrast, she had to wait more than nine months until her re-assignment to nowhere was changed to a re-assignment to this ill-fitting post.

ii. The re-assignment decision must be seen in the context of her three-and-a-half-year dispute with the Administration regarding her constructive dismissal. Specifically, there has already been an established pattern of interpersonal conflict against her from her former supervisors, and it cannot be coincidental that her former SRO, against whom she has a pending sexual harassment complaint, is deeply enmeshed in this irregular and improper decision.

iii. From a review of the roles and responsibilities of the JOO post, the functions required are political in nature and correspond with the

competencies of a political analyst. However, the terms of reference for the temporarily re-assigned Supply Chain Management post are entirely different. It is obvious that the competencies required are widely divergent and the United Nations has classified these two jobs in different job networks: the JOO post is in the Political, Peace and Humanitarian job family and the Supply Chain management post is in the Logistics, Transportation and Supply Chain job network.

iv. Her new supervisor also informed her that her profile did not match the duties and responsibilities of the new post,

13. On 4 February 2021, MINUSCA Chief of Staff and her former SRO, e-mailed the Applicant's former FRO asking for an update on the Applicant's status as she had been away for almost one year. In the email, the former SRO stated that the Applicant had recently been temporary reassigned to a new Section but he was not aware that she had joined her new post. The Applicant submits that based on this veiled threatening e-mail, she had reasonable concerns that the Administration will commence procedures on abandonment of post, despite the fact that she has magnanimously started studying the Capstone Doctrine from home, as requested by her new supervisor.

Urgency

14. The Applicant submits that this matter is urgent because, if the contested decision is not suspended, she is likely to be forced to imminently report to Bangui and to the Supply Chain Management post or face proceedings commencing for abandonment of post. This gives rise to urgency and justifies the granting of an order staying the implementation of the administrative decision.

Irreparable harm

15. The Applicant avers that a suspension of action is the only remedy available to prevent the Administration from unlawfully re-assigning her to a post that is totally

incompatible with her previous roles and responsibilities. Whilst the current temporary re-assignment only runs through 21 February 2021, the Administration could choose to extend the re-assignment for a further period, irrespective of the fact that it is ill-suited for her.

16. As of 15 January 2021, the Applicant and the Administration have commenced settlement negotiations for three months per the Tribunal's Order suspending the proceedings in another case. The gravamen of that case involves her being placed in a post commensurate with her title, level and grade. As such, the Applicant avers that the *status quo ante* should be preserved to give both parties maximum flexibility to proceed in those settlement negotiations in good faith.

Respondent's submissions

17. The Respondent primarily contends that the Application is not receivable *ratione materiae* because the contested decision has been implemented and is no longer capable of being suspended. The Applicant has been on the temporary assignment for five weeks and the period of the reassignment is almost completed. Consequently, there is no decision to suspend. An order for suspension of action cannot restore or reverse an allegedly unlawful decision, which has already been implemented.

18. The Respondent therefore requests the Tribunal to reject the application.

19. Should the Tribunal, however, find the application receivable, the Respondent submits that the Applicant has not satisfied the three prerequisites for suspension of implementation of the decision.

Prima facie lawfulness

20. The Respondent submits that the reassignment of a staff member is proper where the new position is at the staff member's grade, the assigned functions correspond to the staff member's level, and the functions to be performed are

commensurate with the staff member's competence and skills. There is a presumption that official acts have been regularly performed. The Applicant bears the burden of proving that an administrative decision was arbitrary or tainted by improper motives.

21. The contested decision is lawful because the Applicant was temporarily reassigned to a position at the same grade and level commensurate with her skills and competencies for eight weeks while MINUSCA endeavors to find a permanent assignment for her in light of the outcome of the harassment complaint and the scarcity of P-4 non-supervisory positions in the mission. In the temporary assignment, the Applicant has maintained her current grade, level, and contract status. The Applicant does not contest that the Position is commensurate with her skills and competencies as evidenced by her Personal History Profile ("PHP").

Urgency

22. The Applicant has not demonstrated urgency. She has been performing on temporary assignment since 6 January 2021. However, she waited more than one month later, to seek suspension of the implementation of the temporary reassignment only a couple of weeks before the assignment ends on 26 February 2021. Any urgency is self-created.

Irreparable harm

23. The Applicant has not demonstrated irreparable harm. She has suffered no harm from the temporary reassignment. The Applicant's allegation that she suffers harm by performing these tasks is inconsistent with her case alleging constructive dismissal because she has been deprived of her right to work. The contested decision is reasonable and lawful. It provides the Applicant work consistent with her skills and abilities and the Organization the benefit of her work for which she is remunerated every month.

24. The Applicant's allegations of harm are unsupported and speculative at best. There has been no decision to initiate proceedings for abandonment of post.

MINUSCA is aware that the Applicant is performing work assigned to her by her supervisor. There has also been no decision to extend the temporary assignment, but such a decision would be lawful and reasonable.

25. Accordingly, the Respondent requests the Tribunal to reject the application.

Considerations

Receivability

26. This Tribunal has held that a reassignment may constitute an administrative decision subject to review and may be receivable⁸.

Has the contested decision been implemented or is it of a continuous nature?

27. The purpose of a remedy of SOA is to maintain the status quo by suspending the enforcement of an intended administrative action. Where the intended action has been implemented by either party the remedy of SOA is rendered superfluous and the application moot.

28. The Tribunal is not persuaded by the Applicant's "reasonable concerns that the Administration will commence procedures on abandonment of post, despite the fact that she has magnanimously started studying the Capstone Doctrine from home, as requested by her new supervisor". This assumption is not supported by facts but confirms that the Applicant has reported for work in her reassigned role and is in touch with her new Supervisor.

29. The Tribunal agrees with the Respondent that by reporting to the Chief, Supply Chain Management and studying the Capstone Doctrine in compliance of her new Chief's instruction constitute acceptance of the reassignment and that she has performed in that role from the date that she reported to the Chief on 26 January

⁸ *Chemingui* 2019-UNAT-930, para. 24.

2021.⁹

Conclusion

30. Based on these findings the application is adjudged moot and dismissed without recourse to making any further determinations regarding unlawfulness of the decision, whether it's urgent or whether its implementation may cause irreparable harm.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 16th day of February 2021

Entered in the Register on this 16th day of February 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

⁹ Application, para. 12 and annex 9.