



Before: Judge Joelle Adda
Registry: New York
Registrar: Nerea Suero Fontecha

MACHOKA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

ON CASE MANAGEMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Esther Shamash, UNDP

Introduction

1. The present case was initially assigned to Judge Alessandra Greceanu.
2. After having first been granted an extension of time to file the application, the Applicant, a Chief of the Directorate in the Bureau for Management Service at the United Nations Development Programme (“BMS/UNDP”), filed the application on 31 October 2018. She contests the alleged “[c]onstructive dismissal, harassment and abuse of authority” by the Assistant Secretary-General of BMS/UNDP (“the ASG”), which she defines as the decision “to divest her of her core functions as Chief of the Directorate”.
3. As remedies, the Applicant requests that “the Administration[’s] decision to divest her of her functions as Chief of Directorate be rescinded/declared unlawful” and that she be “granted compensatory moral, punitive and exemplary damages”.
4. On 6 December 2018, the Respondent filed his reply in which he contends that the application is not receivable and, in any event, without merit.
5. Following the expiry of Judge Greceanu’s tenure on 31 December 2018, the case was reassigned to the undersigned Judge on 20 February 2020.

Consideration

Scope of the judicial review of the present case

6. The Appeals Tribunal has consistently held that the Dispute Tribunal’s judicial review is limited and often refers to its seminal judgment in *Sanwidi* 2010-UNAT-084 (para. 42) in which it defined the scope of review as that “the role of the Dispute Tribunal is to determine if the administrative decision under challenge is reasonable and fair, legally and procedurally correct, and proportionate”. The

Appeals Tribunal further held that “the Dispute Tribunal is not conducting a “merit-based review, but a judicial review” explaining that a “[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision”.

7. Also, it is trite law that “[t]he Administration has broad discretion to reorganize its operations and departments to meet changing needs and economic realities” (see *Timothy* 2018-UNAT-847, para. 25). This discretion, however, is not unfettered as, “When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse” (see *Sanwidi*, para. 40). In this regard, “There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion” (see *Sanwidi*, para. 38).

8. Regarding how to define the issues at stake, the Appeals Tribunal has held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review”. When defining the issues of a case, the Appeals Tribunal further held that “the Dispute Tribunal may consider the application as a whole”. See *Fasanella* 2017-UNAT-765, para. 20, as also affirmed in *Cardwell* 2018-UNAT-876, para. 23.

9. In the application and the appended annexes, the Applicant lists a range of administrative decisions, which she, in essence, claims to prove that she has unlawfully been divested of her core functions as Chief of the Directorate in BMS/UNDP as certain of her previous responsibilities were transferred to others. The

parties appear to agree that the Applicant, at least at the relevant time, continued to occupy the relevant post.

10. In light thereof, it appears to the Tribunal that the basic issues of the case can be defined as follows:

- a. Whether the cumulation of certain decisions regarding the Applicant amounted to an unlawful divestiture of her core functions as Chief of the Directorate?
- b. If so, as remedies, is the Applicant entitled to any or all of these decisions to be rescinded and/or compensation according to art. 10.5 of the Dispute Tribunal's Statute?

Receivability

11. The Respondent claims that the application is not receivable. As a matter of judicial economy and transparency, the Tribunal will—on a preliminary basis and without prejudice to any substantive findings made in the final determination of the merits of the present case—address and makes its determination thereon in this Order.

12. The Respondent's submissions on receivability may be summarized as follows:

- a. In accordance with *Dalgamouni* Order No. 224 (NBI/2014), for an application to be receivable on the basis of a continuum of decisions, the staff member must demonstrate that the “most recent decision” in that continuum was receivable, both *ratione temporis* and *ratione materiae*;
- b. In the present case, the “most recent decision”, which was communicated on 15 November 2017, pertained to a decision that the

Applicant should no longer attend a committee of which she was not, and had never been, a member, namely the 2018 Budget Steering Committee, which is comprised of Deputy Directors at the D-2 level;

c. The Applicant was at the P-5 level and never a member of this Committee;

d. The previous ASG of BMS/UNDP had requested the Applicant to attend these meetings on his behalf, but this exercise of managerial discretion did not create an entitlement that the Applicant would continue to attend these meeting in the future, nor did it make attendance at those meetings part of the Applicant's core functions;

e. Also, the Applicant cannot claim a contractual right to attend a Committee comprised of Deputy Directors at the D-2 level;

f. As such, the decision that she should no longer attend the relevant meetings did not breach the Applicant's rights or her terms of employment, nor did it divest her of a core function;

g. In conclusion, as the most recent decision was not a reviewable administrative decision, it follows that this application is not receivable *ratione materiae* or *ratione temporis*, because the Applicant's request for management evaluation of the previous decision would have been filed too late.

13. The Tribunal agrees with the basic principles outlined by the Respondent with reference to *Dalgamouni* Order No. 224 (NBI/2014). The Respondent's submissions regarding the Applicant not being allowed to attend certain 2018 Budget Steering Committee meetings, however, essentially all relate to the merits of this decision and not its appealability—they do not concern whether as a matter of competence and

jurisdiction, such a matter can be appealed to the Dispute Tribunal in accordance with art. 2.1(a) of its Statute in the given context.

14. In the present case, the basic claim of the Applicant is that by various decisions of the ASG, she was unlawfully divested of the core functions of her position, which include, among other decisions, the decision to exclude her attendance from the relevant Committee meetings. Rather than questioning the Tribunal's competence to review this type of decision, the Respondent merely argues that she did not have any such right in the specific circumstances. The Respondent thereby confuses the receivability of the claim with its substantive merits.

15. The general issue, namely alleged unlawful divestiture of functions, is indeed a matter within the Tribunal's purview (see, for instance, *Kallon* 2017-UNAT-742), and the decision rejecting her attendance at the relevant Committee meetings could, as such, possibly be relevant in this regard. As the Applicant became aware of this decision on 15 November 2017 and filed her request for management evaluation on 12 January 2018, it was also submitted within the 60-day deadline as per staff rule 11.2(c).

16. Accordingly—on a preliminary basis and without prejudice to any substantive findings made in the final determination of the merits of the present case—the Respondent's claim on receivability is rejected.

Case management

17. The Tribunal notes that the Respondent in his reply indicates that he “does not accept the facts as presented by the Applicant, unless explicitly expressed in this Reply”.

18. Such general statements are unhelpful for the Tribunal's efficient and timely disposal of a case. It does not allow the Tribunal to understand what facts presented

by the Applicant, which the Respondent actually agrees or disagrees on—nowhere in the reply does he “explicitly express” that he accepts any of the facts presented by the Applicant, even though many of these facts are repeated or directly corroborated by written evidence, whose veracity, however, the Respondent does not contest.

19. The Tribunal will therefore order the parties to compile a consolidated list of agreed facts and a consolidated list of disputed facts to be able to comprehend what the factual allegations actually are.

20. Subsequently, as the Tribunal observes that neither party requests production of any further evidence and the Tribunal finds that the case is appropriately briefed, it will proceed directly to the closing state of the case. The Tribunal will, consequently, allow the parties to file their final submissions, which shall be solely based on the submissions and evidence already on file. The Tribunal will thereafter determine the case on the papers before it.

21. In light of the above, for the fair and expeditious disposal of the case and to do justice to the parties in accordance with art. 19 of the Rules of Procedure of the Dispute Tribunal,

IT IS ORDERED THAT:

22. On a preliminary basis and without prejudice to any substantive findings made in the final determination of the merits of the present case, the Respondent’s claim on receivability is rejected;

23. By **4:00 p.m. on Monday, 13 April 2020**, the parties are to file a jointly-signed statement providing, under separate headings, the following information:

- a. A consolidated list of agreed facts. In chronological order, this list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning;

b. A consolidated list of disputed facts. In chronological order, the list is to make specific reference to each individual event in one paragraph in which the relevant date is stated at the beginning. If any documentary and/or oral evidence is relied upon to support a disputed fact, clear reference is to be made to the appropriate annex in the application or reply, as applicable. At the end of the disputed paragraph in square brackets, the party contesting the disputed fact shall set out the reason(s);

24. By **4:00 p.m. on Monday, 20 April 2020**, the Applicant is to file her closing statement that is solely to be based on the submissions and evidence already on record. The statement is to be five pages maximum, using Times New Roman, font 12 and 1.5 line spacing;

25. By **4:00 p.m. on Monday, 4 May 2020**, the Respondent is to file his closing statement as a response to the Applicant's closing statement. The statement is to be five pages maximum, using Times New Roman, font 12 and 1.5 line spacing;

26. By **4:00 p.m. on Monday, 11 May 2020**, the Applicant is to file her final observations responding to the Respondent's closing statement. The statement is to be two pages maximum, using Times New Roman, font 12 and 1.5 line spacing.

(Signed)

Judge Joelle Adda

Dated this 23rd day of March 2020