



Before: Judge Eleanor Donaldson-Honeywell

Registry: Geneva

Registrar: René M. Vargas M.

BANAJ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Jérôme Blanchard, LPAS, UNOG

Patricia Ilie, LPAS, UNOG

Introduction

1. On 21 May 2019, the Applicant, a staff member of the United Nations Office on Drugs and Crime (“UNODC”), filed an application before the United Nations Dispute Tribunal to challenge the Respondent’s decision to temporarily reassign her functions as Head of the UNODC Office in Albania.

2. The Respondent filed his reply on 24 June 2019. It is the Respondent’s case that the application is not receivable and should be dismissed as such. He also argues that the impugned decision, as described by the Applicant, was lawfully made.

3. On 5 February 2021, the Tribunal issued Order No. 29 (GVA/2021) inviting the Applicant to make any submissions she might have in response to the Respondent’s reply. The Respondent was afforded the opportunity to make final submissions on the matter. Both parties filed their respective submissions as directed by the Tribunal.

Facts and submissions

4. The Applicant joined UNODC as a National Programme Officer in Tirana, Albania on 1 January 2000. At the time of the application, the Applicant held a permanent appointment, and was serving as a National Programme Assistant at the United Nations Office on Drugs and Crime (“UNODC”). Her contract was administered by the United Nations Development Programme (“UNDP”).

5. On 18 July 2018, the Regional Representative (“RR”) of UNODC for South Eastern Europe reported the Applicant to the Office of Audit and Investigations (“OAI”) UNDP for possible misconduct. There were “indications”, the Respondent says, of an active lobbying and misinformation campaign led by the Applicant against the appointment of an international expert at the P-4 level in UNODC Albania to her personal advantage. The RR also requested that the Applicant be placed on administrative leave to protect the integrity of the recruitment process and to deprive the Applicant of internal information pertaining to that selection exercise, ongoing funding negotiations and consultations with the Albanian authorities.

6. On 3 August 2018, OAI informed the RR that his report has been assessed and that a decision has been made to commence investigation into the allegations. The request to place the Applicant on administrative leave was also being considered.

7. Between August and October 2018, the RR made a number of follow-ups on the matter with the UNDP Legal Office, seeking advice on the appropriate course of action.

8. Separately, the Applicant had herself filed a report of possible misconduct by the RR and the Programme Officer for South Eastern Europe to the Office of Internal Oversight Services (“OIOS”).

9. On 16 October 2018, OIOS referred the Applicant’s report to UNODC, which office determined that this matter will be handled pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

10. On 26 October 2018, OAI, UNDP informed the RR that the Applicant had been informed that she was the subject of an investigation.

11. On 29 October 2018, the RR informed the Applicant that he had decided to reassign her functions pending completion of the investigation process. The Applicant was instructed as follows:

You shall focus your work exclusively on ongoing approved technical project activities linked to the Container Control Programme segment for Albania. You shall not engage nor commit UNODC in any other matter. You shall limit your consultations with national project partners at technical level and refrain from representing UNODC at senior level including with Embassies and international counterparts based in Albania. Functions linked to the representation of UNODC and management of our wider portfolio for Albania will fall under my direct responsibility. A message informing of these interim measures will be addressed accordingly to our national and international counterparts, including Embassies, in Tirana and Heads of UNODC Global Programmes in Vienna.

12. On 12 November 2018, the Director of Administration, UNODC wrote to the Applicant assuring her that complaints of abuse of authority and harassment are taken seriously, advised her to consider informal resolution of the dispute, and invited her to resubmit her complaint to comply with sec. 5.13 of ST/SGB/2008/5 should she decide to pursue the matter formally.

13. On 30 November 2018, the Applicant sought a review by management evaluation of the decision to temporarily reassign the functions previously performed by her.

14. On 3 December 2018, the Applicant submitted a formal complaint under ST/SGB/2008/5. She explained that the ongoing investigation on allegations against her had made amicable resolution impossible.

15. On 15 February 2019, the Under Secretary-General for Management informed the Applicant that the Secretary-General has decided to uphold the impugned decision, based on the findings and recommendations of the Management Evaluation Unit (“MEU”).

16. On 16 April 2019, UNODC informed the Applicant that a fact-finding panel was going to be established to investigate her allegations.

17. It is the Applicant’s submission that the RR’s decision to reassign her functions were not programmatically justified; it was a “disguised disciplinary measure” based on a “pre-determined conclusion” of the ongoing investigation into the allegations against the Applicant. She contends it is, in fact, evidence of a continuing pattern of harassment and abuse of authority that are also the subject of a formal investigation based on complaints by the Applicant. The RR, the Applicant argues, has used the reassignment of her functions to do what he has been unable to do legally – to get the Applicant out of the way.

18. The Applicant asserts that she holds a contract with UNDP and contends there is no evidence that the RR consulted with the latter before reassigning her functions. She further alleges that the MEU finding that there is no evidence to support the contention that the investigation is being conducted at the behest of the RR is

flawed, as there is ample and clear evidence as to what and who triggered the investigation.

19. The Applicant says that the Respondent's actions have damaged the Applicant's professional reputation and standing in Albania.

20. The Respondent takes the position that the application should be dismissed on grounds of receivability. According to the Respondent, the decision to reassign the Applicant's functions pending the completion of the investigative process does not create any legal consequences regarding the Applicant's terms of employment; it was an interim measure that did not impede on her terms of appointment.

21. The Respondent submits that the application also lacks merit. He says that the decision the Applicant seeks to impugn was taken in proper exercise of his discretion to make decisions on the structure of the Organization and its workflow. It was thus a decision that was lawfully made, in the interest of both the Organization and the Applicant. The Applicant, according to the Respondent, has not adduced any evidence to show that the decision was tainted by improper motives or any other extraneous factors, so as to vitiate the presumption of propriety and regularity in the decision-making process.

22. The Respondent submits that the impugned decision was taken in accordance with staff rule 1.2(c). It was an interim measure to mitigate risk to the Organization with external partners and stakeholders. The measure was taken without any prejudice to the outcome of the investigation, and is less severe than the alternative of administrative leave.

Considerations

Receivability

23. Under art. 2.1(a) of its Statute, the Tribunal is only competent to hear and pass judgment on applications challenging an administrative decision by the Respondent. An application is not receivable if the subject matter is not an administrative decision. The said rule further stipulates that for the application to be receivable, the administrative decision contested must be in non-compliance

with the staff member's terms of appointment, which include applicable provisions in the regulatory framework.

24. The interpretation and application of this rule have been extensively addressed by this Tribunal and UNAT in their decisions.

25. The classical definition of what constitutes an "administrative decision" as set out in *Andronov* is worth restating:¹

It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. *Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences.* (emphasis added)

26. The Respondent contends that the re-assignment of the Applicant's duties did not cause any direct legal consequences in her terms of appointment. Thus, according to the Respondent, the application is not receivable *ratione materiae*.

27. However, as Counsel for the Applicant points out, the decision had an impact on her functions, which would have been part of the terms of reference of her specific position. The Tribunal finds that the decision did indeed limit her work, the direct consequence of which was that she was no longer performing the functions she was employed to do. The Tribunal's findings in *Wondimu* UNDT/2017/018 supports the point made. In *Wondimu*, the Tribunal explained that:

77. [W]hile there is no contest that staff regulation 1.2(c) confers authority on the Secretary-General to assign staff members to suitable duties and offices, the argument that he can also on the

¹ UNAdT Judgment No. 1157, *Andronov* (2003) para. V; as reaffirmed by the United Nations Appeals Tribunal (UNAT) *inter alia* in *Andati-Amwawi* 2010-UNAT-058, paras. 17-19; *Hamad* 2012-UNAT-269, para. 23; *Al Surkhi et al.* 2013-UNAT-304, para. 26; *Ngokeng* 2014-UNAT-460, para. 26; *Gehr* 2014-UNAT-475, paras. 16-17; *Lee* 2014-UNAT-481, para. 48; *Terragnolo* 2015-UNAT-517, para. 31; *Reid* 2015-UNAT-563, para. 32; *Staedtler* 2015-UNAT-578, para. 30.

strength of that authority alone simply and arbitrarily remove staff members from their duties is not unimpeachable. It has been well established by judicial pronouncements that any discretionary authority must be exercised judiciously and in the best interests of the Organization.

78. [I]t is imperative here to closely examine the circumstances surrounding the request and rationale for the removal of the Applicant ...

...

92. Where indeed the Organization acts without proper justification, as in this case, to remove a staff member from a position he had properly earned, the claim of an exercise of discretion will fail because discretion must be exercised judiciously...

...

106. It is certainly and properly the role of this Tribunal to determine whether the Respondent acted in good faith...

28. There is no merit to the Respondent's contention that a decision to re-assign the duties of a staff member has no legal consequences and cannot be challenged. It is a decision that is appropriately the subject of judicial review, involving a close examination of the circumstances to determine whether the decision was irregular or unlawful.

29. The Tribunal finds the application materially receivable and will proceed to consider it on the merits.

Merits

30. As explained in *Wondimu*, all the circumstances must be examined to determine whether the Respondent's discretion in re-assigning duties was properly exercised, so that the decision can be upheld.

31. A discretionary administrative decision, such as the one contested in this case, can be challenged on the grounds that the Respondent has not acted fairly, justly, or transparently or was motivated by bias, prejudice, or improper motives. UNAT jurisprudence recognizes a presumption of regularity in the performance of administrative functions and decision making. It is for the Applicant alleging any

of these grounds of challenge to bear the initial burden of proving it in his or her application.²

32. The Respondent in response to the allegations, has a minimal burden of proof to justify his administrative action or decision.³ Once that minimal burden is discharged, the burden remains with the staff member to prove that the actions of the Respondent were improper or unjustified. This must be done by clear and convincing evidence.⁴

33. In this case, the Applicant's challenge to the contested decision was made based primarily on a misperception as to the actual events that took place leading to the decision. The Applicant complained that the decision to temporarily re-assign her functions pending conclusion of the investigation into allegations against her was taken solely by the RR. This view was based on the communication of the decision by email of 29 October 2018 from the RR to the Applicant.

34. The Applicant contended that the RR had no authority to make such a decision, staff regulation 10.1 vests this authority only in the Secretary-General or officials with delegated authority to make decisions in disciplinary matters. The officials with delegated authority, the Applicant submits, are from the OAI, UNDP. This authority has not been delegated to UNODC or to the RR as a manager therein. Furthermore, the Applicant holds a UNDP contract and as such she argued that the decision to reassign her functions should have been made in consultation with UNDP.

35. The Respondent clarified the factual context of the decision. The impugned decision was made following lengthy consultations with OAI and UNDP. The content of the decision letter informing the Applicant of the re-assignment of her duties, was drafted based on the advice and approval of OAI. The fact that OAI and UNDP advised on this decision is evidenced by a stream of communications between OAI and UNDP up to the date of the decision. The paper trail of communication was annexed *ex parte* to the reply. There is therefore no merit to

² *Kule Kongba* 2018-UNAT-849.

³ *Rolland* 2011-UNAT-122.

⁴ *Ibekwe* 2011-UNAT-179.

this primary aspect of the Applicant's case, namely that the RR acted unilaterally, improperly and without authority in re-assigning her duties.

36. More substantively, the Applicant's submissions that the decision is unlawful because it falls outside the regulatory scope of interim measures to be taken during an investigation, and cannot be justified as falling within the broad discretion of the Organization in reassigning staff members, are also without merit.

37. Firstly, the Applicant's reading of staff rule 10.4 (a) is misconceived. There is nothing in the rule to support the contention that no interim administrative measure other than administrative leave can be implemented pursuant to staff rule 10.4 (a). The rule grants the Respondent the discretion to decide whether to place a staff member on administrative leave while an investigation is in progress. There is nothing in the rule that indicates that all the Respondent's other administrative discretions, including re-assignment of duties, are to be curtailed during an investigation.

38. Secondly, the Applicant in submitting that the re-assignment of duties is not justified, has not rebutted the presumption of regularity in the exercise of the Respondent's discretion in the use of resources and personnel.⁵ Staff regulation 1.2(c) provides that staff members are subject to assignment by the Secretary-General to any of the activities or offices of the Organization.

39. The jurisprudence of the United Nations Tribunals (both first and second instance) clearly underscores that that re-assignment of staff and duty assignments falls within the Organization's discretion. It is only where decisions made in exercise of this discretion are shown to have been improperly motivated or taken in breach of mandatory provisions that the presumption of regularity is rebutted.⁶ It is for the Organization to determine whether a reassignment is in its interest.⁷

⁵ *Awe* 2016-UNAT-667.

⁶ *Awe ibid*; *Perez-Solo*, 2013-UNAT-329.

⁷ *Allen* UNDT/2010/009.

40. According to the Applicant, the re-assignment decision in this case was not “programmatically justified” but was instead a disguised disciplinary measure used as part of alleged ongoing harassment by the RR against her.

41. The Tribunal finds that the Respondent has fully explained the basis for the measure. It was intended to distance the Applicant from the type of duties she was carrying out and contacts being made with stakeholders, that were subject to investigation.

42. The Applicant’s prior duties, as the sole UNODC staff member at her duty station, involved representative functions and communications with national and diplomatic stakeholders. It was in this context that the investigation arose into unauthorized disclosure of internal UNODC information to external parties.

43. Pending the completion of the investigation, it was necessary to mitigate the risk to the Organization from unauthorized disclosure of information, which could impact adversely on the work of the Organization. The Respondent considered a continuation of the Applicant’s representative functions as potentially harmful to the regular operations of the Organization, hence the decision to re-assign her duties. Additionally, it was necessary to inform the stakeholders that the Applicant had been re-assigned. This was done without indicating that she was being investigated for misconduct.

44. None of these actions by the Respondent can be said to indicate improper motives. On the contrary, the record indicates that the Respondent considered more severe interim administrative measures such as administrative leave with or even without pay. After a full consideration, commencing with the report of allegations of misconduct to the OAI by the RR on 18 July 2018, and consultations with OAI and UNDP for several weeks, the decision was made. It was based on the thinking that a re-assignment of duties would be “the least invasive” interim administrative measure.

45. Thus, as opposed to improperly seeking to harass the Applicant, the decision to reassign her rather than place her on administrative leave, was taken balancing

her best interests with those of the Organization. These reasons are supported by the evidence.

46. The Tribunal finds that the Applicant has failed to meet her burden of proving any improper motive, irregularity or unlawfulness on the part of the Respondent in the decision to re-assign her duties. Therefore, the presumption of regularity stands.

Conclusion

47. In view of the foregoing, the Tribunal DECIDES:

Whilst the application is receivable it fails on the merits and is dismissed.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 26th day of March 2021

Entered in the Register on this 26th day of March 2021

(Signed)

René M. Vargas M., Registrar, Geneva