



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

DETTORI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Omar Josef Shehabi, OSLA

Counsel for Respondent:

Matthias Schuster, UNICEF

Alister Cumming, UNICEF

Introduction

1. The Applicant, a former staff member of the United Nations Children’s Fund (“UNICEF”), contests “(1) the decision to reassign [her] through UNICEF’s staff mobility and rotation policy while [she] was constructively unassigned, was on medical leave, and had a pending request for deferment of rotation on medical grounds” (“assignment decision”) and “(2) [the] decision to separate [her] for abandonment of post for declining the assignment” (“separation decision”).

2. The Respondent replies that the application is without merit.

3. For the reasons stated below, the application is rejected.

Facts

4. On 4 July 2018, the Applicant filed a report of misconduct against a senior official of UNICEF.

5. On 21 December 2020, the Tribunal issued judgment UNDT/2020/213 in which it rejected in part the Applicant’s appeal against UNICEF’s decision not to take any action following her 4 July 2018 report of misconduct. The Tribunal found that the appeal against the contested administrative decision not to take any action on the Applicant’s complaint was not receivable given that the decision had been rescinded by UNICEF and the complaint had been remanded to UNICEF’s Office of Internal Audit and Investigation (“OIAI”) for further consideration.

6. The Tribunal further referred the Chief of Investigations of OIAI for accountability.

7. On 30 August 2019, the Applicant was officially notified of her inclusion in the 2019 Mobility Exercise.

8. On 29 May 2020, after several periods of sick leave, the Division of Healthcare Management and Occupational Safety and Health (“DHMOSH”) informed both the

Applicant and UNICEF that “based on [DHMOSH’s] assessment, [the Applicant] is fit to work full-time in any family duty station EXCEPT New York”.

9. On 16 July 2020, UNICEF’s Division of Human Resources contacted the Applicant to offer her a lateral reassignment to the position of Programme Manager in the Private Fundraising and Partnership Office at the P-4 level, located in Geneva (“the post”).

10. On the same day, the Applicant replied that the post did not meet any of the criteria that she had previously discussed with the Division of Human Resources. The Applicant inquired if there were any alternative options as she did not find that the post was “at all an appropriate fit”.

11. On 17 July 2020, the Division of Human Resources replied that the pool of available positions was limited and that the Hiring Manager for the post considered that the Applicant was a suitable candidate. The Division of Human Resources further confirmed that while they continued to search for alternatives, at that time, there was nothing else that they could offer and gave the Applicant a deadline of 10 working days to confirm her acceptance of the post.

12. On 30 July 2020, the Applicant informed UNICEF’s Chief of Staff that she did not believe the post was an appropriate placement for her and that she would like to explore other options.

13. On 6 August 2020, the Chief of Staff responded that in UNICEF’s opinion, the post was “a good match” for the Applicant, that she had been medically cleared for duty, and that there were “very few options left”.

14. On 17 August 2020, the Officer-in-Charge of the Division of Human Resources informed the Applicant that all other placement options had been exhausted and reiterated the offer for the post. He further notified the Applicant that, as she was currently occupying a temporary post until 31 August 2020, should she not accept the post, further steps would be taken in application of Executive Directive CF/EXD/2015-

002 on Mobility and Rotation (“Directive”), in particular, her placement on special leave without pay or separation from service under sec. 7 of the Directive.

15. On 24 September 2020, the Deputy Director of the Division of Human Resources notified the Applicant that the Deputy Executive Director for Management had made an executive staffing decision in accordance with sec. 7 of the Directive to reassign the Applicant to the post, effective 1 October 2020, with an initial remote working arrangement until 31 December 2020.

16. The Applicant was requested to confirm her acceptance of the reassignment no later than 29 September 2020.

17. On 24 December 2020, OIAI informed the Applicant that it would not take any further action with respect to her 4 July 2018 complaint of misconduct.

18. On 25 September 2020, DHMOSH informed UNICEF that the Applicant’s request for special accommodation was under assessment by the Special Constraints Panel and further confirmed its previous conclusion that the Applicant was medically cleared for duty at a duty station other than New York.

19. On 29 September 2020, the Applicant informed UNICEF that she did not accept the reassignment to the post.

20. On the same date, 29 September 2020, the Special Constraints Panel did not endorse the Applicant’s request for deferment of her inclusion in the 2020 Mobility Exercise.

21. By letter dated 1 October 2020, the Director of the Division of Human Resources notified the Applicant that following her refusal to accept the reassignment, she would be separated for abandonment of post pursuant to sec. 13 and following of the Directive and as per staff rule 9.3, effective 31 December 2020.

Consideration

Assignment decision

22. The Applicant's arguments against the assignment decision can be summarized as follows: (1) UNICEF unlawfully placed the Applicant in its mobility scheme; (2) UNICEF violated the applicable procedure by not waiting for the final decision on her request for deferment; (3) the assignment to a position outside of New York was made in retaliation for the Applicant's report of misconduct; (4) UNICEF unlawfully influenced DHMOSH to clear her for duty in retaliation for her report of misconduct.

23. The Respondent responds that the assignment decision was lawful and procedurally correct.

24. The Tribunal recalls that under staff regulation 1.2(c), staff members are subject to the authority of the Secretary-General and to assignment by him or her to any activities or offices of the United Nations.

25. With respect to the Tribunal's review of the Administration's discretionary power in general, the Appeals Tribunal's well settled jurisprudence, enunciated in *Sanwidi* 2010-UNAT-082, provides as follows:

40. 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. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

26. With respect to the Administration's discretion to reassign staff members, the Appeals Tribunal has recently summarized its long-standing jurisprudence in *Dieng* 2021-UNAT-1118, where it held:

54. Undoubtedly, as per our jurisprudence, cited to about, it is within the Administration's discretion to reassign a staff member to a different post at the same level. We have also stated that, 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. In this respect, it falls squarely within the management's discretion to assign a staff member to a different place of work, or assign him or her to different functions as deemed appropriate, taking into account the Organization's best interests, the staff member's adaptability and skills as well as other factors.

55. However, our jurisprudence does not provide a blanket endorsement for the reassignment of staff members by the Administration. As pointed out, the exercise of the discretionary authority of the Administration to reassign staff members has to pass all of the relevant tests governing it, namely such a reassignment is lawful if it is reasonable in the particular circumstances of each case and causes no economic prejudice to the staff member. It must also respect the procedural and substantive rules of law and must not be arbitrary.

27. The Applicant was officially notified of her placement in the mobility exercise on 30 August 2019. She argues that she was ineligible for placement in the mobility scheme and that she was unlawfully displaced from the post she occupied prior to her departure on sick leave. However, there is no evidence that the Applicant contested this decision and, therefore, the Tribunal is now unable to review it.

28. Further, the Applicant contests that both her placement in the mobility exercises of 2019 and 2020 were retaliatory measures for her having reported misconduct against a senior UNICEF official in July 2018.

29. The Applicant further argues that DHMOSH's decision to clear her for duty in Geneva and the rejection of her request for deferment are the result of UNICEF's undue pressure intended to penalize her for her report of misconduct.

30. The Tribunal notes that the Applicant infers undue motive from the sequence of events that led to her reassignment. She, however, brings no evidence to support the existence of a link between her report of misconduct and DHMOSH's decision to clear

her for duty outside of New York or the Constraint's panel's rejection of her request for deferment.

31. More importantly, there is no evidence on the record, nor is it alleged by the Applicant, that there was a finding of retaliation under UNICEF's Policy on whistleblower protection against retaliation DHR/POLICY/2018/001 of 21 June 2018.

32. It is also noteworthy that the Applicant did not show or even allege that she contested OIAI's 24 December 2020 final decision not to take any further action with respect to her report of misconduct.

33. In these circumstances, the Tribunal is unable to review the Applicant's contentions of the contested decision being tainted by retaliatory motives.

34. The Applicant further alleges that she had been left "constructively unassigned" for a period of time before she was assigned to the post. She also seems to contest her post being "bumped in favor of a newly-selected executive manager".

35. However, no such decisions were challenged either and therefore, the review of their lawfulness falls outside the remit of this case.

36. In sum, the Tribunal recalls that there is a procedure to challenge administrative decisions which a staff member deems to be in violation of his or her contractual rights. The Applicant, who is represented by professional counsel, cannot bypass the applicable procedures to indirectly introduce decisions, which were not timely challenged, into these proceedings to argue that they form part of a pattern of abuse against her. To allow this tactic would result in an upset of the administrative legal order of the Organization.

37. With respect to procedure applicable to the assignment decision, the Applicant alleges that the post was not a good fit for her. The record shows, as described above, that she indeed rejected the assignment on this basis.

38. The exchange of correspondence between the Applicant and the Division of Human Resources illustrates the discussion around the Applicant's suitability for the post.

39. On 16 July 2020, the Applicant wrote to the Division of Human Resources that she had had a conversation with the Senior Leadership Support Team of the Division of Human Resources concerning the post. She stated that the post "does not meet any of the criteria that we discussed – technical, in the field of social policy, gender, child protection in line with the career progression of all of my [Office of the Executive Director] counterparts etc. I have only been a staff member in a programme function, and I am not a partnership, funding, or communication professional".

40. On 17 July 2020, the Senior Leadership Support Team responded:

During the past period, we made every effort to identify the next career opportunity taking into consideration your skillset, recommendations from UN Joint Medical Services, and also your status following the results of the 2019 Mobility Exercise. We initially identified a temporary assignment as an interim measure which unfortunately did not work well. As part of our efforts to find a suitable position, we have also asked you to update your profile and advise us of any applications with UNICEF and other agencies.

As we discussed, and given the above restrictions, the pool of available positions is limited. Nevertheless, we have identified a position in PFP that matches your profile and allows for a lateral re-assignment against that post. It also provides an excellent opportunity to leverage your transferable skills and gain knowledge in a new business area that is of critical importance to the organization. We feel that your prior experience as an Executive Manager in the Office of the Executive Director is closely related to the main functions of this post. Your communication, planning, and presentation skills as well as strategic thinking are required competencies for this post. The post is located in Geneva, a [headquarters] duty station, which meets the recommendation of UN Joint Medical Services, and the hiring office considers you a suitable candidate for the post.

41. The Tribunal notes that Applicant disagrees with UNICEF's evaluation of her suitability for the post. However, she has not shown that the post is not commensurate with her competence and skills. In her email correspondence, she objects that the post does not fall within her current technical field and does not fulfill her career aspirations

and in her submissions, she expresses a clear preference to remain in the New York duty station.

42. While these criteria are perfectly understandable from the Applicant's point of view, they are not sufficient to show that the reassignment was unlawful in light of the jurisprudence. The Tribunal recalls that the Administration retains the discretion to reassign staff in the interest of the Organization, within certain parameters. In the present case, the Applicant fails to show that these parameters were not respected in the selection of the post.

43. The Applicant further argues that the fact that UNICEF made its final decision even before the decision on her request of deferment shows that the decision was a "*fait accompli*".

44. Even if the Applicant were correct in that UNICEF should have waited to hear from the Special Constraints Panel before finalizing the assignment decision, given that the deferment decision intervened before the assignment decision become applicable, this potential procedural error had no impact on the final decision.

45. In light of the above, the Applicant has failed to show that the assignment decision was unlawful.

Separation decision

46. Staff rule 9.3 provides "Abandonment of post is a separation initiated by the staff member other than by way of resignation. Separation as a result of abandonment of post shall not be regarded as a termination within the meaning of the Staff Rules."

47. In the application, the Applicant states that because UNICEF acted unlawfully in the assignment decision, the decision to separate her is also unlawful.

48. The Respondent argues that the separation decision was taken in accordance with the applicable legal framework after the Applicant refused to take up her newly assigned duties.

49. The Tribunal notes that the Applicant admits that she refused to accept her assignment. Given that the Tribunal did not find any unlawfulness in the assignment decision, the Applicant's refusal to report for duty in the new assigned position was unjustified.

50. The evidence shows that UNICEF warned the Applicant of the consequence of not accepting the assignment. Given that the Applicant was cleared for duty and her deferment request was denied, her decision not to take up her duty constituted abandonment of post, pursuant to staff rule 9.3.

51. The Tribunal recalls that the Staff Regulations and Rules, as well as other applicable norms, provide staff members with avenues to contest administrative decisions that they believe are in violation of their rights as staff members. Staff members do not, however, have the right to unilaterally choose which decisions they abide by and which they do not. This would, as the Respondent points out, give the staff member a veto right which would have the effect of paralyzing the administration.

52. In the present case, the Applicant chose not to report for duty before the procedures to challenge the assignment decision had been exhausted. There is no justification for this course of action and, therefore, the application must fail.

Request for a hearing

53. At the end of her submission in response to the reply, the Applicant states: "This case presents dispute issues of material fact galore. It cries out for an oral hearing. The Applicant urges the Tribunal to hold one".

54. In Order No. 65 (NY/2021) of 16 July 2021, the Tribunal found that, in principle, the matter may be adjudicated on the record and afforded the Applicant three weeks to file a response to the Respondent's reply. At the Applicant's request, this deadline was extended by another week.

55. Despite being represented by professional counsel, however, the Applicant did not, in either of her submissions, indicate which of the relevant facts were insufficiently

supported by the documentary evidence on record and therefore required the submission of oral evidence.

56. A blank statement that the case contains disputed facts “galore” and that it “cries out for an oral hearing”, when the parties are both represented by experienced professional counsel and have had ample chance to be heard, is not enough reason for the Tribunal to call a hearing.

57. Moreover, as already stated, the Tribunal finds that the relevant facts at stake in this case are clearly borne by the documentary evidence on file. It is not, therefore, in the interest of an efficient administration of justice, to hold a hearing in this matter.

Conclusion

58. In light of the foregoing, the Tribunal rejects the application.

(Signed)

Judge Joelle Adda

Dated this 24th day of August 2021

Entered in the Register on this 24th day of August 2021

(Signed)

Nerea Suero Fontecha, Registrar, New York