

UNITED NATIONS DISPUTE TRIBUNAL

1. On 9 September 2019, the Applicant filed an application challenging what he describes as an implicit decision to strip him of his functions.¹ At the relevant time, the Applicant was a Deputy Security Advisor (“DSA”), at the P4 level, working with the

5 The Tribunal held a hearing on 10, 11 and 16 February 2022 and on 2 March 2022.

6 The parties filed their closing submissions on 11 April 2022.

7 The Applicant held the position of Deputy Security Adviser in UNSMIL since September 2016. During the time the Mission remained in evacuation status in Tunis, he conducted risk assessments relevant for the decision on re-establishing the presence in Libya. Then, his First Reporting Officer (“FRO”) was Mr. Filippo Taakinikini, the Chief Security Advisor.⁴ UNSMIL returned to Libya after evacuation status had been lifted in February 2018.⁵ In May 2018, Mr. Mohamed Khafagi was appointed as the new CSA and he became the Applicant’s new FRO⁶, whereas Mr. Taakinikini assumed a position of Chief of Middle East and North Africa (“MENA”) desk at New York Head Quarters and became the Applicant’s Second Reporting Officer.⁷ The CSA reported to the Deputy Director of Regional Operations (“DDRO”), Mr. Igor Mitikhin⁸.

8 At the relevant time, the CSA managed four principal pillars, that is Operations which comprised Close Protection Unit (“CPU”); Security Information and Operations Centre (“SIOC”); Tripoli; and Chief Security Officer (“CSO”) for Mission level security issues. There were two Deputy Security Adviser positions in the organigram, both at P-4 level, one attaching to the Operations Pillar and one to CSO.⁹ In practical terms, as the Mission was reviving after four years of functioning in evacuation status, many positions were vacant and the structure was not implemented fully. The Applicant was DSA and head of Operations, with responsibility, among other, for CPU. In June 2018, Ms. Rakhi arrived in Libya to join the Security Section as P-4 Field

⁴ Application, section VII, para 2

⁵ Applicant’s testimony, 10 February 2022

⁶ Application, annex 12

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Security Coordination Officer (“FSCO”) and was assigned the function of head of the Tripoli pillar and OIC for the vacant CSO pillar.¹⁰

9 The relationship between the new CSA and the Applicant deteriorated within weeks

10 The CSA maintains that immediately after he had joined the Mission in May 2018, the Special Representative for the Secretary General (“SRSG”) complained to him about the Applicant repeatedly not being truthful in professional matters and stated that he had no confidence in him. He further maintains that the Under Secretary-General, Department of Safety and Security (“USG/DSS”) was made aware of the issue during his visit to UNSMIL in August 2018 and expressly instructed not to appoint the Applicant as OIC and to appoint Ms Raki instead.¹¹

11 In August 2018, the CSA appointed Ms Raki rather than the Applicant, to act as OIC in his absence.¹² The Applicant intervened with the SRSG, DSRSG, DDRO and Mr. Taakinikiri, which entailed Mr. Khafagi’s responses.¹³ While Mr. Taakinikiri expressed a conviction that, in accordance with an inter-office memo and from the Headquarters, the Applicant should be designated as OIC, the DSRSG instructed the Applicant to respect the CSA’s decision and follow the established chain of command.¹⁴ Thereafter, during his absence in October, November, December 2018 and February 2019, the CSA appointed Ms Raki or another staff member to act as OIC, but not the Applicant.¹⁵ Email exchanges accompanying these decisions and annotations in the Applicant’s work plan confirm that the decision either originated from, or was approved by, the USG/DSS and the Mission leadership.¹⁶ Based on this record, it was on 21 October 2018, at the latest, that the Applicant was expressly informed of the fact that the decision had come from

¹⁰ Mr. Khafagi testimony; Respondent’s exhibit 9

¹¹ Mr. Khafagi’s testimony, 16 February 2022; Respondent’s exhibit 13

¹² Application, annex 1, p 4

¹³ Application, annexes 2, 3, 4 and 9

¹⁴ Application, annex 4, p 6; Respondent’s exhibit 15

¹⁵ Application, Annexes 6, 9 and 10

¹⁶ Application, annexes 2, 3, 4, 6 and 12; Exhibit 14

the USG/DSS and that it was a standing arrangement rather than an ad hoc choice¹⁷. The same correspondence illustrates that, purportedly, this decision was a result of complaints against the Applicant, including sexual harassment. Mr. Khafagi collected statements of two UNSMIL female staff who were displeased with the Applicant's behavior.¹⁸ The details of these complaints remained undisclosed to the Applicant.

12 The Applicant, moreover, argues that the CSA sought to limit the scope of his functions by removing him from various projects. For example, despite him having been heavily involved in the finalization of the Minimum Operational Security System ("MOSS") compliance for accommodation in Palm City, a large compound outside the main United Nations headquarters housing some offices of the Mission, the United States, European Union and some of Libyan authorities, the CSA removed him from the project and ensured that he was not copied on communications with the effect of impeding the progress of the task.

13 In this respect, it is undisputed that the overall responsibility for Palm City was assigned to Ms. Rakhi. The Applicant's role regarding Palm City was to oversee crisis management, for the event of a crisis within the Palm City, and as a contingency for the eventuality of an incident at the main compound. For this purpose, the Applicant had to overnight in Palm City, an arrangement precluding Mr. Khafagi's arrival as CSA.

14 There is evidence that on one occasion the Applicant may have not been copied on a document concerning the work of the CPU, which he supervised in accordance with the four-pillar structure, regarding assignment of a Close Protection Officer to Palm City.¹⁹ The Tribunal, moreover, heard testimony of Mr. Lasausi Velawa, the CPU Team Leader, according to which Mr. Khafagi had told him about his lack of trust in the Applicant and instructed not to copy Mr. Khafagi on related correspondence.

that he had maintained an “open door policy”, encouraging staff to come to him directly with their concerns and complaints. The correspondence submitted by the Respondent indicates that Mr. Veilava apparently embraced the open door opportunity and was actively complaining against the Applicant behind his back²⁰. Also Mr. Ale, who deputized for the Team Leader in his absence, testified about having been queried about problems with the Applicant and instructed by Mr. Khafagi that “everything related to CPU had to come from him”, which made Mr. Ale uncomfortable²¹.

15 The Tribunal notes that the record does not show that a failure to copy the Applicant on pertinent documents extended over the one instance referenced above, that the Respondent has demonstrated that the Applicant had been put on the updated mailing list and should have received all pertinent communication²²; and that there is no record of any complaints about the Applicant’s name missing from the general mailing list. While the Tribunal appreciates that there may have been other correspondences of which the Applicant was not aware, it is, however, not convinced that Mr. Khafagi would have instructed not to copy the Applicant on operational matters. Rather, the Tribunal is inclined to accept that Mr. Veilava over interpreted Mr. Khafagi’s encouragement to use the open door policy on complaints.

16 Mr. Veilava testified, moreover, that the Applicant had not been involved in the risk assessment during the visit of the Secretary General in Libya, and that Mr. Khafagi would not recognize assessment documents submitted by the Applicant and assign those tasks to other offices causing duplication of work²³. The Applicant, in turn, admits that he had been assigned to do the risk assessment for the DSRSG²⁴, which presented a lot of work, and which was appreciated by Mr. Khafagi. He, however, complains that it was Mr. Khafagi alone who briefed the DSRSG, and only

²⁰ Respondent’s exhibit 3 (email exchanges of 11 November 2018).

²¹ Testimony of Mr. Ale on 11 February 2022.

²² Respondent’s exhibit 10.

²³ Testimony of Mr. Lasusi Veilava on 11 February 2022.

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took him along to meet her after his complaint had been filed²⁵

17 The Applicant further submits that despite being the second in the chain of command and even being a P4 managerial post, he had nearly no supervisory responsibilities. Despite the Headquarters' specific guidance to the CSA, indicating that the Applicant should have supervisory responsibilities in the Inspira system, he remained a FRO of two staff members and SRO of none. On this score, the Applicant admitted that prior to having Mr. Khafagi as CSA he had had no SRO functions either. He however believed that under the guidelines he should have been assigned an SRO role²⁶

18 Another complaint of the Applicant concerns removing his role in the Local Security Cost Shared Budget ("LCSSB"), which was not exclusive for the Mission but also concerned other participating entities. From these funds, which were administered by the United Nations Development Programme ("UNDP"), there were certain procurements done for security and certain recruitments for local staff positions. It is undisputed that the Applicant had prepared the 2018 LCSSB budget which, at the time of the dispute, was being implemented by the Applicant, Ms Rakhi and Mr. Khafagi. Regarding the preparation of the 2019 budget, a greater role was given to Ms Rakhi, in particular, preparation of the entire budget document for submission to the Security Management Team ("SMT") for its endorsement due to her responsibility for the Tripoli pillar.²⁷ The Tribunal was also provided with email evidence that, when being asked about the update on LCSSB by the Applicant, Ms Rakhi had brushed him off by saying that he would see it when it would be ready²⁸, moreover, that an external coordinator of disbursement of LCSSB at Palm City, Mr. Byashkinov, had intervened to be allowed to continue working with the Applicant on a component of the project, the Cluster MOSS, rather than having a new person introduced in the task force (i.e., Ms Rakhi)²⁹. Mr. Khafagi explains that the Applicant had not been removed from the

²⁵ Applicant's testimony.

²⁶ Ibid.

²⁷ Testimony of Khafagi, 2 March 2022.

²⁸ Application annex 15.

²⁹ Application annex 21.

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evidence to substantiate the concerns, and the DRO believed that the Ombudsman's role in October 2018 appeared to have resolved the matter.⁴²

26 On 4 February 2019 the Applicant requested management evaluation of the decision to strip him of his functions.⁴³ On 18 June 2019 the Applicant received the response. Regarding the issue of refusing the function of OIC of the Security Section, the management evaluation found the decision lawful. It further found that there had been no decision to deprive the Applicant of his functions.⁴⁴

27 The Report demonstrates that the Applicant was always fully engaged in core security functions. They involved, in addition to responsibility for crisis management in Palm City and the tasks mentioned supra, supervising two teams of more than 40 personnel⁴⁵; managing one of the main offices in Tunis and supervising the security team there as their FRO⁴⁶; attending Security Cell meetings⁴⁷; obtaining invitation to a town hall meeting with the USG/DSS in his capacity of unit head⁴⁸; participation in the preparation for the Secretary-General's visit in Libya⁴⁹; participating— as observer— in ad hoc security management team meetings⁵⁰; preparing the larger mission budget along his lines of responsibility for Operations⁵¹ and specifically, preparing the Central Emergency Response (“CERF”) budget⁵²; developing Mass Casualty Incident Plan (“MCIP”)⁵³; developing Electronic Travel Advisory (“ETA”) for(es Mast 9

35 Regarding when the contested decision was taken and when it was communicated, the Applicant avers that he was not subject to one, clearly communicated, administrative decision to remove his functions. Rather, he was subject to an implied unilateral decision to deprive him of core functions and authority to act as a Deputy Security Advisor, which had a continuing effect.

Applicant's case on the merits

36 The Applicant's case is that there was a decision to strip him of his functions and which was in non-compliance with his terms of reference, and, he appointed fit of junior staff to act as CSA ad interim ("ai"), limiting the scope of his work, removal from projects and denial of managerial responsibilities, all done based on covert allegations.

37 On the first point, the Applicant contends that pursuant to the Inter-Office Memorandum dated 21 April 2018, from the Officer in Charge, Division of Regional Operations, Department of Safety and Security, to all security advisors, a deputy should be appointed to perform a

informed that the USG/DSS had found insufficient grounds to warrant a formal fact finding investigation and that his complaint had been closed. The Applicant did not contest that finding and cannot be awarded damages related to those allegations.

47. After consultations, the Applicant was offered a reassignment to Syria, which he accepted. The Applicant also cannot now seek damages due to the reassignment decision to which he agreed and did not contest.

Receivability

48. Article 2(1)(a) of the UNDT Statute provides that

The Dispute Tribunal shall be competent to hear and pass judgment on an application filed by an individual... (a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

49. To be reviewable, an administrative decision must have the key characteristic in that it must "produce direct legal consequences" affecting a staff member's terms or conditions of appointment.

50. The Tribunal finds that there was a discrete decision not to appoint the Applicant as OIC, which, as it is admitted, would ordinarily have fallen in his portfolio. On 21 October 2018, the Applicant was expressly informed on email of the fact that the decision had come from the USG/DSS and that it was a standing arrangement rather than an ad hoc choice. He acknowledged it and responded⁷³. Contrary to the Respondent's submission, the email exchanges from August 2018 did not convey the permanence of the OIC arrangement whereas unilateral statements of Mr. Khafagi about his conversation with the Applicant do not suffice as proof of a formal

⁷³Application annex 6

and hierarchically inferior given that she had held a field post as opposed to a DSS post.⁷⁴ The Applicant expressed before the Tribunal that he saw no reason to have had any task previously performed removed from him. On this point the Tribunal agrees with the Respondent that expanding both the tasks and staffing of the Security Section

subordinate over a relatively short period working together. However, the Applicant activated mechanisms available to him, including a harassment complaint, the result of which he accepted without appeal. The hierarchy was responsive. Among other, the Applicant was repeatedly offered reassignment to another Mission on equal terms, to which he eventually agreed, and which happened after he had nearly exhausted his usual three-year rotation period. The allegations of sexual harassment against the Applicant were found unsubstantiated. Mr. Khafagi's managerial shortcomings were acknowledged. That there is conflict between staff members, does not per se amount to tort, even though it causes distress and necessitates interventions. Importantly for the matter at hand, the system worked and effectively resolved the Applicant's grievances.

58 In conclusion, there is no basis to award moral damages.

59 The application is dismissed.