



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in Charge

KATAYE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Sètondji Roland Adjovi

Counsel for Respondent:
Steven Dietrich

Introduction

1. On 6 September 2016, the Applicant, a Personal Assistant at the FS-5 level with the United Nations Interim Security Force for Abyei (“UNISFA”), filed an application before the Dispute Tribunal in Nairobi, contesting the 27 December 2015 and 23 March 2016 decisions to reassign her to other functions in UNISFA.

2. In the application,

31. On 17 March 2017, the parties filed their closing submissions.

and unproductive and as a result, her career growth and development will be compromised, as is already being compromised by the unlawful decision by the organisation. The Tribunal has ruled that

... The Respondent has raised the receivability in a way that portrayed a case different from the one submitted to the Tribunal. For the sake of clarity, the Applicant made her case on the reassignment of 23 March 2016. That reassignment was used by MEU to reject the request for management evaluation against the reassignment of December 2015. It [is] therefore logical to consider those two, and that was the submission of the Applicant (Section V of the Application). The only date which should matter for the determination of the receivability here is therefore the date relevant to the reassignment of 23 March 2016. However, the situation started with the reassignment of 17 June 2015 and the Applicant has provided information about that decision to allow a full picture for the Tribunal, and it is wrong for the Respondent to allege here that the Applicant has challenged that decision and should be considered time-barred. But the chain of events hence the continuity between those three decisions cannot be ignored: it is a fact that has adversely affected the health and career of the Applicant.

... Having considered the response from MEU on 8 June 2016 and discussed with her legal team, the Applicant got sick again and communication with her legal team was not easy. Despite that challenge the application was filed on 6 September 2016, Nairobi time. If one considers that the Applicant was only able to discuss the response on 8 June 2016, the application was still filed within the 90 days. Notwithstanding, the Applicant will hope that the Tribunal will bear with her, considering the exceptional circumstances that she has been going through becau59(the)emc()-4-477(Applica)6(nt

receivable, because it is moot. The 27 December 2015 decision was never implemented.

... The challenge to the 23 March 2016 decision to reassign the

the Applicant of her reassignment stated that she and the post she encumbered would be loaned to the Training Unit in accordance with

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and;

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

...

3. The Dispute Tribunal may decide in writing, upon written request by the applicant, to suspend or waive the deadlines for a limited period of time and only in exceptional cases. The Dispute Tribunal shall not suspend or waive the deadlines for management evaluation.

36. Articles 7, 34 and 35 of the Tribunal's Rules of Procedure state in relevant parts:

Article 7 Time limits for filing applications

1. Applications shall be submitted to the Dispute Tribunal through the Registrar within:

(a) 90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;

(b) 90 calendar days of the relevant deadline for the communication of a response to a management evaluation, namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; or

(c) 90 calendar days of the receipt by the applicant of the administrative decision in cases where a management evaluation of the contested decision is not required.

2. Any person making claims on behalf of an incapacitated or deceased staff member of the United Nations, including the Secretariat and separately administered funds and programmes, shall have one calendar year to submit an application.

3. Where the parties have sought mediation of their dispute, the application shall be receivable if filed within 90 calendar days after mediation has broken down.

...

5. In exceptional cases, an applicant may submit a written request to the Dispute Tribunal seeking suspension, waiver or extension of the

Case No. UNDT/NY/2016/064

Judgment No. UNDT/2017/072

Receivability *ratione materiae*

45. In her application, the Applicant challenges the 27 December 2015 and 23

therefore on 21 June 2016. The present application was filed late on 6 September 2016. The Applicant was required to file her application by 21 June 2016 in respect of her challenge to the 27 December 2015 decision. As she did not do so, the Applicant's

62. The recent jurisprudence of the Appeals Tribunal reconfirms that the reassignment of staff members' functions comes within the broad discretion of the Organization (*Awe* 2016-UNAT-667, para. 25). In *Beidas* 2016-UNAT-685,

69. In her closing submission filed on 17 March 2017, the Applicant clarified that she requested compensation for “loss in terms of her earning because she was not in duty station for the hardship allowance”. The Tribunal notes that the Applicant states that she undertook trips abroad in relation to her medical condition and, therefore, was not at the duty station during the relevant period. Staff rules 3.14 and 6.2 states in relevant parts that:

Rule 3.16

Hardship allowance

(a) Staff in the Professional and higher categories and in the Field Service category, and staff in the General Service category considered internationally recruited pursuant to staff rule 4.5 (c) who are appointed or reassigned to a new duty station may be paid a non-pensionable hardship allowance.

(b) The amount of this allowance, if any, and the conditions under which it will be paid shall be determined by the Secretary-General taking into account the degree of difficulty of life and work at each duty

71. In regard to the compensation for moral harm, the Tribunal notes that the implementation of the 23 March 2016 decision to reassign her to the Training Unit was suspended by the Administration pending the outcome of the management evaluation following the Applicant's filing of an application for suspension of action with the Tribunal. On 7 June 2016, the MEU informed the Applicant that the

imminent risk of the Applicant losing her continuing contract of employment, the lack of clarity on the reasons and terms of the change to her job to two different departments within a period of one year after being internally transferred from her initial post caused considerable stress. The Tribunal notes that, in both situations, the only justification for the decisions was a general statement in relation to “operational requirements”.

76. It is clear that the change in the Applicant’s job as Personal Assistant with the OHoM to Administrative Assistant to the Training Unit created significant uncertainty and insecurity for the Applicant’s future career, and the Administration was aware of the Applicant’s distress.

the present judgment together with USD2,250 in compensation to the Applicant represents a reasonable and sufficient relief for the four months and two weeks' emotional stress identified above (in comparison, in *Benf0 0 1 36i*

90. Section 1(q) of ST/AI/2010/3 defines a lateral move, to which ST/AI/2010/3 does not apply in accordance with sec. 3.2(1), as: “movement of a staff member to a different position at the same level for the duration of at least one year. ... Temporary assignments of at least three months but less than one year, with or without post allowance shall also qualify as a lateral move when the cumulative duration of such assignments reaches one year”. Lateral movements of staff by heads of department/office/mission can be taken in accordance with sec. 2.5.

91. It results that, in all situations which involve recruitment, placement,

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taking into consideration the elements included in the definitions for “vacant position” and “temporary vacant position” in ST/AI/2010/3.

period of time during which the staff member will normally be paid by, and be subject to, the staff regulations and rules of the receiving organization. ...

41. ... A loan is a movement of a staff member from one organization to another for a limited period, during which he will be subject to the administrative supervision of the receiving organization, but will continue to be subject to the staff regulations and rules of the releasing organization.

101. It appears from sec. 1(q) of ST/AI/2010/3 that they are to be considered as lateral moves and ST/AI/2010/3 is also not applicable to these important changes of the employment contract.

102. The Tribunal observes that secs. 1(q) and 3.2(1) of ST/AI/2010/3, according to which a lateral move, and implicitly a temporary assignment, can be taken based on sec. 2.5, are exceeding sec. 2.5. As presented above, a transfer is a permanent modification of a contract, while a lateral move and temporary assignment are temporary changes. The Tribunal underlines that a lateral move cannot be at the same time a temporary and permanent modification of the employment contract. In this sense, staff rule 4.8 (ST/SGB/2013/3) makes a clear and mandatory distinction between assignment and transfer and states: “a change of official duty station shall take place when a staff member is assigned from one duty station to another for a period exceeding six months or when a staff member is transferred for an indefinite period”.

103. The head of department retains discretion only to transfer a staff member to a vacant post, at the same level as the one of the transferred staff member as clearly stated by

in the area of lateral moves and transfers as soon as possible, including for temporary appointments.

(Signed)

Judge Alessandra Greceanu

Dated this 6th day of September 2017

Entered in the Register on this 6th day of September 2017

(Signed)

Morten Albert Michelsen, Registrar, New York, Officer-in-Charge