



## UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2021/049  
Judgment No.: UNDT/2022/084  
Date: 21 September 2022  
Original: English

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**Before:** Judge Margaret Tibulya.

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

HAYDAR

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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### JUDGMENT

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**Counsel for the Applicant:**

Kalaycia Clarke, OSLA

**Counsel for the Respondent:**

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Maureen Munyolo, AAS/ALD/OHR, UN Secretariat

## **Introduction and Procedural History**

1. On 30 June 2021, the Applicant, a Supply Officer, at the P-3 level, working with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (“MINUSCA”) in Bangui, Central African Republic, filed an application contesting what she terms as a continued improper stripping of her managerial and other substantive duties.<sup>1</sup>
2. On 2 August 2021, the Respondent filed a reply arguing that the contested decision is legal and rational, and that the Secretary-General properly exercised his discretion to organize the work of the General Supply Unit (“GSU”) in the interest of the Organization.
3. The Tribunal held a case management discussion (“CMD”) on 13 April 2022. During the discussion, the parties declared readiness to informally settle the case.
4. On 26 April 2022, the Applicant filed a motion to strike out “irrelevant events and annexes from Respondent’s Reply”.
5. On 9 May 2022, the Respondent moved the Tribunal to reject said motion.
6. On the same day, the Respondent sought leave to produce additional documents which, he submits, were “relevant and necessary” for the determination of this matter.
7. On 16 May 2022, the Applicant filed another motion seeking leave to comment on the Respondent’s response to the motion to strike. On the same day, the Applicant also responded to the Respondent’s motion to produce additional documents.
8. On 25 May 2022, the parties informed the Tribunal of their respective views in respect of the adjudication of this matter. The Applicant took the position that an oral hearing may be necessary, whereas the Respondent was of the view that this case was

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<sup>1</sup> Application, section V.

suitable for adjudication on the papers.

9. On 13 June 2022, the Tribunal set this matter down for hearing on 5 and 6 July 2022 and, on 20 June 2022, the parties filed their list of witnesses with the Registry.

### **Facts and Submissions**

10. While she served as Chief of the Supply Unit, the Applicant's First Reporting Officer ("FRO") was Mr. Okay Mabhena, Chief Life Support Section, and her Second Reporting Officer ("SRO") was Mr. Braima Jamanca, Chief Service Delivery.

11. On 3 September 2020, the Applicant raised concerns about the improper recruitment of a United Nations Volunteer ("UNV") into her Unit. She went on leave and was away from the duty station from 12 October 2020 to 14 December 2020.

12. On 19 October 2020, she sent hand over notes to staff in which she stated that all recruitment matters concerning the Unit were to be handled by her and were not delegated.

13. On 5 November 2020, on learning that the UNV was nonetheless being recruited, the Applicant sent an email to some members of her team explaining that she was not involved in the recruitment.

14. Between 5 November and 3 December 2020, the Applicant sent several emails to her team of staff.

15. On 4 December 2020, the Applicant's FRO and SRO sent an email stripping her of all managerial duties and all other substantive responsibilities.

16. On 7 December 2020, the Applicant learnt that she had also been excluded from the invitation to participate in the Leadership Dialogue, despite her being Chief of her Unit and it being mandatory for her to attend and lead her team through the dialogue.

17. On 8 December 2020, while the Applicant was still away on leave, she was copied in on an email which communicated that "following recent events that have the

potential to create hostile work environment” her FRO was stripping of the Applicant of her function. Her team was to now report to someone else while the Applicant alone was to report to her FRO. On 9 December 2020, the Applicant wrote to her SRO inquiring what “following recent events that have the potential to create hostile work environment” meant. A meeting was held but no clarification was provided, and the SRO endorsed the FRO’s decision. The SRO however promised to send the emails that allegedly implicated the Applicant.

18. On 15 December 2020, the Applicant notified her first and second reporting officers of her imminent return to the duty station. She asked to be assigned substantive tasks. None were assigned.

19. On 5 January 2021, the Applicant filed a complaint against her first and second reporting officers with the Conduct and Discipline team. She also copied the Office of Internal Oversight Services (“OIOS”).

20. On 8 January 2021, the Applicant was informed by the Conduct and Discipline team that her complaint was managerial in nature and “[did] not amount to misconduct.”

21. On 14 January 2021, the Applicant wrote to her FRO on the resumption of her functions.

22. On 15 January 2021, she wrote to her SRO reminding him that he had said that he would furnish evidence which implicated her in creating the hostile work environment.

23. On 16 January 2021, the Applicant wrote to both the SRO and FRO detailing a list of allegations being made against her.

24. On 21 January 2021, the Applicant wrote to her FRO about the resumption of her functions. He had indicated that he would respond to her by 25 January 2021.

25. On 26 January 2021, OIOS informed the Applicant that her complaint had been referred to the Special Representative of the Secretary-General (“SRSG”) and that the Department of Management Strategy, Policy and Compliance (“DMSPC”) had been informed.

26. On 29 January 2021, she again asked her FRO why her “approver role” was being removed.

27. On 31 January 2021, her FRO responded as follows:

[I]n your email of 9 December 2020 you requested an investigation of a number of serious allegations you made against me. While I am waiting for that investigation to be concluded, it is not appropriate for me to engage in discussions of a matter that is under investigation. I can only discuss after the results of the investigation have been communicated to me.

28. The Applicant submitted a request for management evaluation to the Management Evaluation Unit (“MEU”) on 2 February 2021.

29. On 1 April 2021, MEU “strongly recommended” that the Applicant and her two reporting officers engage “in good faith efforts” to resolve the dispute between them.

30. On 9 April 2021, the Applicant wrote to her FRO, copying her SRO, seeking to resolve the issues.

31. On 20 April 2021, the FRO replied stating among others that it would be inappropriate to discuss the matter until the MEU and OIOS processes were concluded.

32. On 20 May 2021, Counsel for the Applicant wrote to the FRO, copying the SRO, about the reinstatement of the Applicant’s supervisory functions. Up until 5 May 2021, her supervisory functions had not been reinstated nor were the FRO and SRO willing to engage with her to resolve the hostile work environment in the General Supply Unit.

33. On 23 June 2021, the Applicant sought further intervention from the MEU. The Applicant has also sought the intervention of the Office of Mediation Services to no avail.

34. The Applicant submits that the Respondent's actions constitute an implied administrative measure against her. These actions were arbitrary and violated her due process rights since she was not afforded an opportunity to explain her actions. The Applicant's FRO and SRO have not followed any of the procedures set out in ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority), ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process), or ST/AI/2010/5 (Performance Management and Development System). If it was a performance issue, no assistance/support from her supervisors was provided nor was she given an opportunity to improve on her performance.

35. The reporting officers have also refused to engage in any consultative process towards resolving the dispute between them and the Applicant despite the express MEU recommendation.

36. The Applicant submits that the removal of her core functions creates a legitimate fear that unless the impugned decisions are rescinded, her performance evaluations will be adversely affected. Poor performance evaluations will substantially impact on the future of her employment within the Organization.

37. The Respondent maintains that the impugned decision was legal and rational. The Secretary-General properly exercised his discretion to organize the work of GSU in the interest of the Organization. The Applicant was relieved of her supervisory responsibilities because she refused to perform key managerial functions. She refused to complete performance evaluations, and to supervise a newly recruited UNV assigned to her Unit. The Secretary-General did what he needed to do to promote a harmonious work environment within the GSU, while the Mission attempted to address her grievances.

## **Deliberations**

### *Ruling on the Applicant's Motion*

38. The Applicant filed a motion in which she sought orders that the allegations appearing in paragraphs 2, 9 and 10 and corresponding annexes R/1 – R/10 of the reply be struck out.

39. The allegations in issue are that:

- a. she refused to allocate work to a staff member whom she supervised;
- b. she refused to complete that staff member's performance evaluation and delayed the process for extending the staff member's contract for 29 days without justification;<sup>2</sup> and that
- c. she disregarded her FRO, SRO and the Human Resources Service's ("HRS") instructions and refused to release her supervisee to participate in a Mission taskforce.<sup>3</sup>

40. The motion is premised on the argument that these events were not part of the basis for the impugned decision as they occurred before the impugned decision was made. It is also argued that the materials in issue were not part of the management evaluation and were not cited in the letter which communicated the impugned decision to the Applicant as having been the basis for the impugned decision. Further, that the MEU letter bore only the issue of the irregular recruitment of the UNV and that this is the issue to which the Respondent responded. She maintains that the materials are irrelevant to the case at bar and will only serve to paint her in a negative light and thereby prejudice her case.

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<sup>2</sup> See Annexes R/1-R/8, and paragraphs 2 and 9 Respondent's reply.

<sup>3</sup> See Annexes R/8-R/10; Reply, para. 10.

41. The Respondent maintains that the materials in issue are relevant and probative because they establish the factual background leading to the Secretary-General's impugned decision. Further, that the evidence is necessary for completeness of the record, since it produces the complete correspondence between the Applicant, her FRO, SRO and HRS regarding her delay in completing performance evaluations of the staff members whom she supervised, which among other reasons, resulted in the contested decision.

42. The assertion that the Respondent did not include the contested materials in the submission to the MEU is incorrect, since there is evidence that they were indeed included in the Respondent's response, and Mr. Mabena's testimony confirms this.<sup>4</sup> The assertion that the allegations in issue did not form part of the basis for the impugned decision is not sustainable.

43. Secondly, available evidence is that the contested materials relate to actions which formed part of a series of events relating to the same issue, the recruitment of the UNV. It is for example alleged that after the UNV was recruited amidst the Applicant's protestations, she refused to task her and to complete her performance evaluation thereby delaying the process of extending her contract for 29 days without justification. It is also alleged that the Applicant refused to release the UNV to participate in a Mission taskforce against her FRO, SRO and the HRS's instructions.

44. Focusing on the UNV recruitment aspect of the dispute alone under these circumstances would amount to adopting a narrow view of the dispute which would not serve the ends of justice. Since all the contested materials/actions relate to and emanate from the issue of recruitment of the UNV, they are relevant to the determination of the application.

45. The Tribunal is entitled to have an exhaustive examination of all relevant materials for it to have full appreciation of all issues surrounding the impugned decision. The materials in paragraphs 2, 9 and 10 of the reply, and in the corresponding

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<sup>4</sup> Respondent's annexes 24 and 25.

annexes R1 to R10 are relevant to the determination of the dispute. The motion to strike out these materials is rejected.

46. The Respondent sought leave to produce three documents:

- a. the Applicant's finalized 2020-2021 offline performance evaluation which is said to detail her current roles and confirm that she has not been stripped of her substantive functions;<sup>5</sup>
- b. a memorandum dated 30 August 2021 from the Applicant's SRO to her FRO regarding reporting lines in the Supply Unit confirming that the reporting lines in the Supply Unit were changed to improve the Unit's productivity and performance monitoring, to realign staff reporting lines and staff performance management;<sup>6</sup> and
- c. correspondence between the Applicant and her FRO regarding her continued refusal to follow his instructions and her continued hostility towards him and other colleagues.<sup>7</sup>

47. The Respondent argues that these documents are relevant and necessary for the determination of the issues in the case, that it justifies the Secretary-General's decision to relieve the Applicant of supervisory responsibilities and the continued implementation of that decision.

48. The Applicant does not object to the admission of annex 19 as it confirms that her supervisory roles were withdrawn from her. She, however, objects to the admission of annexes 18 and 20, which she maintains are neither relevant nor probative to the case.

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<sup>5</sup> Annex 18.

<sup>6</sup> Annex 19.

<sup>7</sup> Annex 20.

49. The Tribunal upholds the objection to the admission of annex 18 since it is still under challenge. annex 18 is therefore struck off the record.

50. The Tribunal finds that annex 20 gives context to the impugned decision and is therefore relevant.

51. The Respondent's motion to produce additional document is therefore partially granted. Annexes 19 and 20 are admitted.

#### *Merits of the Application*

52. In terms of judicial review of administrative discretion, consistent Tribunal jurisprudence establishes that:<sup>8</sup>

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. 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.

[...]

In exercising judicial review, 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. As a result of judicial review, the Tribunal may find the impugned administrative decision to be unreasonable, unfair, illegal, irrational, procedurally incorrect, or disproportionate. During this process the Dispute Tribunal is not conducting a merit-based review, but a judicial review. Judicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker's decision. This process may give an impression to a lay person that the Tribunal has acted as an appellate authority over the decision-maker's administrative decision. This is a misunderstanding of the delicate task of conducting a judicial review because due deference is always shown to the decision-maker, who in this case is the Secretary-General.

53. The Respondent contends that the Applicant refused to perform key managerial

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<sup>8</sup> *Sanwidi* 2010-UNAT-084, paras. 40 and 42.

functions to the detriment of the operations of the Organization, the staff members whom she supervised and the general work environment in the unit. The specifics of the above claim include:

- a. her refusal to allocate work to a staff member that she supervised;
- b. her refusal to complete that staff member's performance evaluation and delay of the contract extension process of that staff member for 29 days without justification;<sup>9</sup>
- c. her refusal to release her supervisee to participate in a Mission taskforce thereby disregarding her supervisors' instructions;<sup>10</sup>
- d. her disregarding of directions and instructions of her supervisors' selection of the UNV and threat not to work with the UNV<sup>11</sup>; and
- e. her incitement of her supervisees in the Unit not to work with the incoming UNV.<sup>12</sup>

54. The issues for determination in this case are:

- a. Whether the Applicant refused to perform key managerial functions as alleged.
- b. Whether the decision to relieve the Applicant of her supervisory functions is lawful.
- c. Whether the decision to relieve the Applicant of her supervisory functions is rational.

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<sup>9</sup> Respondent's Annex 1-10

<sup>10</sup> Respondent's Annex 8-10.

<sup>11</sup> Applicant's Annex F. Respondent's Annex 12-16.

<sup>12</sup> Applicant's Annex F.

d. Whether the decision to relieve the Applicant of her supervisory functions is procedurally correct.

e. Whether the decision to relieve the Applicant of her supervisory functions is proportionate.

**Whether the Applicant refused to perform key managerial functions as alleged.**

*The alleged refusal to allocate work to a supervisee.*

55. The Applicant does not deny that she did not allocate work to her supervisee. She however maintains that she did not have tasks to assign her since it was at the height of the COVID-19 pandemic and operations had reduced.<sup>13</sup>

56. The Applicant is however not forthcoming when she claims that she did not have work to assign to her supervisee. The reason she gave to her FRO (Okay Mabena) for her actions was that he and the SRO (Braima Jamanca) should be the ones to task the supervisee. In the Applicant's email to Mr. Mabena and to the Chief fuel Unit, MINUSCA (Mr. Ibrahim Kasule),<sup>14</sup> she informed them that "Please at the moment I have nothing", but when Mr. Kasule asked her "What do you mean by this? Please clarify", the Applicant replied that "The decision lies either with Okay or Fabio." This supports the conclusion that the reason she is now advancing for her refusal to allocate work to her supervisee is incorrect.

57. In her testimony relating to her threat not to work with the UNV after she had been recruited, the Applicant is on record stating that "We were completely short staffed and what I was looking for someone who comes in already with the experience... also we are so busy working even outside working hours, we did not even have time to train someone [...]."<sup>15</sup>

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<sup>13</sup> The Applicant's testimony at 5:14:56.640 - 5:15:26.450.

<sup>14</sup> Respondent's annex 2.

<sup>15</sup> Applicant's testimony at 0:34:34.120; 0:34:43.910 and at 0:34:44.560 - 0:34:51.550.

58. In her testimony in response to the question about the staffing situation in the supply unit, she stated that the supply unit “is still very busy (extremely) busy and understaffed” and that she is “once in a while busy.”<sup>16</sup>

59. This evidence contradicts her assertion that she did not have work to assign her supervisee and supports a finding that she simply did not want to assign work to the UNV. The allegation that the Applicant refused to assign work to her supervisee has therefore been proved.

*The refusal to complete her supervisees' performance evaluation and delay of the contract extension process of her supervisee by 29 days.*

60. The Applicant’s FRO testified that he asked the Applicant to provide a performance report for her supervisee because she approved the work plan which had been submitted to him. The Applicant refused to provide it until, after consultation with her SRO, he gave her a deadline of 23 December 2020 by which to complete it.

61. The Applicant does not dispute the above evidence. She however explains that “I never meant it. ... I’ve never had any issue with any staff member.<sup>17</sup> “I never refused it. It was just a delay because, you know, I just wanted to be fair to this staff member”.<sup>18</sup> “She was being tasked by the ... SRO and Mabena. And I thought that... I will be additional supervisor ... and it dragged on [...].”<sup>19</sup>

62. In cross examination, however, she admitted that the staff member in issue was assigned to the supply unit and that she (the Applicant) was her First Reporting Officer in the cycle for 2019-2020,<sup>20</sup> and she had reviewed her performance appraisal for the previous performance cycle.<sup>21</sup> This contradicts the Applicant’s explanation that the

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<sup>16</sup> Applicant’s testimony 1:48:27.410 - 1:48:32.550.

<sup>17</sup> Applicant’s testimony 2:5:41.750 - 2:5:51.230

<sup>18</sup> Applicant’s testimony 2:5:53.760 - 2:6:0.500

<sup>19</sup> Applicant’s testimony 2:6:1.200 - 2:6:29.610

<sup>20</sup> Applicant’s testimony 5:6:21.440 - 5:6:22.180

<sup>21</sup> Applicant’s testimony 4:58:26.690 - 4:58:31.20.

refusal to complete her supervisees' performance evaluation and delay of the contract extension process for 29 days was because the supervisee had other FROs.

63. There is sufficient basis for concluding as the Tribunal does, that the Applicant refused to complete her supervisees' performance evaluation and delayed the contract extension process by 29 days.

*The failure to follow supervisors' instructions by refusing to release a supervisee to participate in a working group.*

64. The Applicant admits that she learnt of her supervisees' selection to be part of a Mission task force on 11 February 2021. She concedes that by 18 February 2021 she had not released her to participate in that activity.<sup>22</sup> The Applicant explains that since the decision had been taken on 4 February 2021, there was nothing to release.<sup>23</sup> She however maintains that she did not stop the supervisee from going and that all she said was the staff member was busy.<sup>24</sup> These are clearly contradictory positions. Her explanation to her FRO which was that she had not been consulted by her SRO during the selection process adds another twist to this issue.

65. Mr. Mabena testified that he spoke and wrote to the Applicant imploring her to release the staff member but that she steadfastly refused and in the end the staff member never participated in the activity. Since the evidence that the Applicant refused to release her supervisee to participate in an activity is corroborated in material particulars by the Applicant's own evidence, there is sufficient ground for the conclusion that the Applicant failed to follow her supervisors' instructions by refusing to release her supervisee to participate in a working group activity.

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<sup>22</sup> Applicant's testimony 5:8:50.250 - 5:8:58.760

<sup>23</sup> Applicant's testimony 5:9:3.70 - 5:9:17.650

<sup>24</sup> Applicant's testimony 5:10:17.230 - 5:10:31.840

*Disregarding supervisors' directions and instructions in the selection of the UNV, threats not to work with that UNV and instructing members of staff not to accept the UNV.*

66. The undisputed background to this allegation is that in September 2019, Mr. Mabena temporarily allocated the Applicant's unit a vacant UNV position which he took from one of his other units. On 25 September 2019 he sent an e-mail to the Applicant requesting her for terms of reference or job description for the UNV. The Director of Mission Support ("DMS") approved the loan of the post on 17 October 2019 and Mr. Mabena notified the Applicant about this. He indicated to her that the post now belonged to her unit until the end of the budget year and that she should expedite completing the terms of reference. The terms of reference were however only submitted to him on 13 December 2020, 79 days after he first asked her to write them and after numerous reminders. The Applicant never indicated that she had any difficulties in coming up with terms of reference.

67. The Applicant does not contest the evidence that after the UNV arrived in the Mission she sent an e-mail<sup>25</sup> to her entire team in the Supply Unit on 5 November 2020, informing them that she had not recruited anyone for the Unit. Neither does she deny that even before that she had consistently indicated that she would not work with the UNV. In June for example she told the Chief of Human Resources that she would not accept to work with the selected candidate. She repeated this to the DMS. She does not deny that she even informed the UNV International Officer in Bonn that the UNV would not be accepted in her Unit.

68. While the Applicant maintains that her managerial roles were withdrawn only because she raised concerns about the recruitment of the UNV outside the short list, she does not deny her FRO's evidence that her stated reason for rejecting the UNV was that she neither recruited nor participated in her recruitment. She said that the UNV should not be imposed her.

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<sup>25</sup> Respondent's annex 16.

69. The Applicant's own evidence is that she channelled her complaint through the chain of command. On 3 September 2020, she raised her concerns with the DMS and later escalated the issue to the UNV office among other call centres. She testified that the UNV office's response to her complaint was that they had reviewed the matter but that they would go ahead with the recruitment.<sup>26</sup>

70. The DMS informed her that the issue had been settled. They considered her concerns but still went ahead with the recruitment.<sup>27</sup>

71. The Applicant's assertion that when the job was advertised, the terms of reference had the requirement of five-year supply experience but that the selected candidate did not meet the criteria and was not the most suitable terms of the experience, is overcome by her own evidence that all the offices to which she addressed her concerns responded that there was no problem with the recruitment.

72. The Applicant suggests that the email<sup>28</sup> she sent to staff members of her Unit was taken out of context, and that she did not state that she would not work with the UNV but only said that the UNV should not be imposed on her.

73. Even if it is accepted that the Applicant only sought to convey the above message, viewed in the context of all the other communications; for example, the ones to the Chief of Human Resources, the DMS and to the UNV International office, which were clear that the Applicant would not work with the UNV, there can be no doubt about the message the email was intended to convey.

74. The extent to which the Applicant went to block the recruitment of the UNV is strange given that she had no hiring authority. She does not contest the fact that the FRO, who was the hiring manager, assessed the 19 profiles submitted by the UNV office and determined that the selected candidate met the job requirements. She does not contest the evidence that the HRS reviewed the recruitment and determined that it

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<sup>26</sup> Applicant's testimony 4:11:33.690 - 4:11:40.460; 4:11:48.750 - 4:11:55.100

<sup>27</sup> Applicant's testimony 4:12:34.290 - 4:12:48.350

<sup>28</sup> Respondent's annex 16.

had been conducted properly.<sup>29</sup> It is in evidence that the DMS, who had the final selection authority, determined that the selected candidate was suitable.

75. That the Applicant disregarded all responses from the above call centers to which she had directed her complaint and went ahead to write to her staff in the way she did supports the assertion that she disregarded directions and instructions of her supervisor's selection of the UNV, threatened not to work with the UNV and incited the GSU staff members not to work with the UNV.<sup>30</sup>

76. The Tribunal finds that the allegation that the Applicant refused to perform key managerial functions has been proved.

*Whether the decision to relieve the Applicant of her supervisory functions is lawful*

77. The letter which communicated the impugned decision alleges that the Applicant was trying to create a hostile working environment by destroying unity and harmony in the Unit. Mr. Mabena testified that by instructing members of staff not to accept the UNV, the Applicant was trying to spread her hostility to the rest of the Unit, which was against the rules of the Organization. Further, that all the (now established) actions amounted to insubordination and disobedience to the instructions of the Applicant's supervisors. The Respondent contends that all these actions negatively impacted the operations and created discord among the GSU team, yet the Applicant was charged with doing the opposite. Also, that given the Applicant's refusal to perform key supervisory functions and to follow her supervisors' instructions, and her failure to create a harmonious work environment, the contested decision is rational and in line with section 3.2(a) of ST/SGB/2019/8.

78. The Appeals Tribunal has held that as a matter of general principle, in exercising its judicial review, the Dispute Tribunal will not lightly interfere with the exercise of managerial discretion.<sup>31</sup> Nevertheless, a discretionary administrative decision can be

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<sup>29</sup> Respondent's annex 12-14.

<sup>30</sup> Applicant's annex F.

<sup>31</sup> Hassanin 2017-UNAT-759, para 45.

challenged on the grounds that the Organization has not acted fairly, justly, or transparently.<sup>32</sup> The staff member has the burden of proving that such factors played a role in the administrative decision.<sup>33</sup>

79. The Applicant, citing *Parker*,<sup>34</sup> maintains that the impugned decision is unlawful, since it deprived her of her supervisory duties and all substantive responsibilities which as a staff member, she has a duty and right to perform.

80. It is recognised that the Applicant has a duty and a right to perform her roles<sup>35</sup> but as a staff member she also has a responsibility to exercise and enjoy that duty and right within the confines of the law. This is necessary for ensuring that there is institutional order and to avoid anarchy which could arise if only the side of rights and duties were emphasised.

81. In this regard staff rule 1.2(a) provides that staff members shall follow the directions and instructions properly issued by the Secretary-General and by their supervisors. Staff regulation 1.2(c) provides that the Secretary-General has broad discretion to assign staff to different functions as he deems appropriate

82. As has been established, the Applicant refused to allocate work to a staff member that she supervised, she refused to complete that staff member's performance evaluation and delayed her contract extension process by 29 days without justification. She refused to release her supervisee to participate in a Mission taskforce and therefore failed to follow her supervisors' instructions. She disregarded directions and instructions of her supervisor's selection of the UNV and threatened not to work with the UNV. She incited her supervisees (GSU staff members) not to work with the incoming UNV.

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<sup>32</sup> *Kule Kongba* 2018-UNAT-849, para. 26; *Pirnea* 2013-UNAT-311, para. 32, citing *Assad* 2010-UNAT-021.

<sup>33</sup> *Pirnea* 2013-UNAT-311, para. 32, citing *Assad* 2010-UNAT-021.

<sup>34</sup> UNDT/2009/066.

<sup>35</sup> *Applicant* UNDT/2011/187.

83. The Respondent submitted that the above acts which amounted to insubordination and disobedience to the instructions of supervisors, negatively impacted operations by creating discord among the GSU team. It was pointed out that the Applicant as a supervisor was responsible for creating harmony in the institution, but by her conduct she instead created disharmony.

84. The Tribunal agrees with the Respondent that the established facts amounted to insubordination and disobedience of the instructions of supervisors. The Applicant indeed created discord in her unit. She therefore failed in the responsibility to perform her duties and enjoy her right to work, within the law. The *Parker* principles were therefore not properly evoked in this case.

85. The Respondent seeks to justify the contested decision on the ground that it is an appropriate preventive measure for the promotion of a harmonious work environment and protection of personnel from prohibited conduct *per* staff rule 1.2 and ST/SGB/2019/8, sec. 3.2(a).

86. Given the nature of the established facts that formed the basis for the contested decision and considering that the contested decision was to be in place only until the matters concerning the hostile work environment are resolved, the contested decision which was taken within the confines of the cited legal provisions constituted proper exercise of discretion to organize work of the GSU in the interest of the Organization and was therefore lawful.

*Whether the decision to relieve the Applicant of her supervisory functions is rational.*

87. While the Applicant was in order when she raised concerns over the recruitment of the UNV, and while it was her prerogative to escalate her concerns to the various call centres, her continued disobedience of her supervisors' instructions and instigation of her supervisees against them after reviews had been conducted and feedback given to her was improper.

88. The Applicant was consistent in her belligerence towards her supervisors which presented management challenges to them. It is in evidence that when she represented her Unit at meetings of all Mission support sections, she would remain silent at the meetings and would refuse to share information with her supervisor after such meetings.

89. She does not deny that when her supervisor invited her for a meeting, she arrived late, and she disconnected the recorder. Her explanation that she joined the meeting late and that she was not aware that the meeting was being recorded is not true. She does not dispute evidence that participants in Teams meetings get automatic notification of the recording of such meetings at the time of their joining the meeting. She does not claim that she did not see the notification. More importantly, Mr. Mabena's evidence was that when she first switched off the recorder, he asked her why she had done so and she told him not to be sensitive. He testified that she even switched it off again after he had switched it on. This left no doubt that her actions were deliberate.

90. She also refused to cooperate in efforts aimed at addressing her concerns. She does not deny that when a mediation meeting was convened on 21 December 2020, she refused to say anything in her FRO's presence. Mr. Mabena and Mr. Jamanca testified that their good faith efforts at reaching a mediated settlement were frustrated by her refusal to put her concerns in writing.

91. The Applicant maintains that she tried to reach an amicable settlement with her supervisor, and cites her message to them that:

I have reflected further on the issue below and I'm willing and available to work with all staff in the supply unit including Ms. Fatoumata Sissoko. I will endeavour to create a conducive work environment for the entire team. I have also completed the task given to me for 19 March and collected the data remotely due to the spike of COVID and in line with the quote, it broadcasts. I look forward to assuming full responsibilities as Chief Supply unit and look forward to hearing from you in this regard.

92. Mr. Mabena's explanation that he could not discuss or resolve the matter at that point in time since the Applicant had escalated issues to the MEU and OIOS and that he could not interfere with an investigation which was being handled by the head of Mission is plausible.

93. To demonstrate that the decision to relieve her of her supervisory roles was irrational, the Applicant maintains that the decision had the effect of relieving her of all her duties, managerial and substantive. The Respondent maintains that the letter which conveyed the decision only changed the reporting lines with the result that she was relieved of her supervisory role. The Applicant however points to the fact that the letter also indicated that she is to be tasked by her FRO and argues that since her substantive duties bear aspects of supervision, she cannot execute those substantive roles as well. The Respondent however asserts that the Applicant was only relieved of her supervisory functions whose execution by her is not even mandatory.

94. The letter which conveyed the contested decision in relevant parts states thus:

[W]ith immediate effect all General Supply Unit staff will report directly to Adiel who shall report to me and this will remain like this until the matters concerning the hostile work environment are resolved. You shall continue reporting to me and being tasked by me. Upon your return from leave I shall provide you with details of tasks that you will perform.

95. The above letter only changed reporting lines in such a way that the Applicant was relieved of supervisory authority which was attached to her position as a unit supervisor. The assertion that her substantive duties were also affected since they bear aspects of supervision is not reasonable. The decision makers' clear intention was to only change reporting lines, as he confirms in his evidence.

96. The Applicant also points to the fact that the letter which conveyed the decision mentioned that she was to be tasked by her FRO. She interprets this to mean that the only work she could do was what she would be tasked by her FRO. Mr. Mabena however clarified that the tasks he was to specifically assign the Applicant are those which fall outside her substantive duties. These duties would be additional to her terms

of reference. She is to perform her substantive duties as she has always done. The Applicant's admission that she gets work from clients, and that client orientation is part of her substantive work is instructive, since it galvanises the position that her substantive duties were not affected by the contested decision.<sup>36</sup>

97. Mr. Mabena testified that he has since assigned the Applicant specific duties including the collection of data across the Mission, costing of items on excel sheets and visiting of sector offices to distribute items to staff, which the Applicant confirms. The assertion that the contested decision rendered the Applicant redundant is clearly incorrect.

98. All factors considered including that the Applicant failed to operate within her limits as a unit supervisor, rather than continue supervising others which is not even a mandatory function (her terms of reference state that the Applicant "may provide guidance to or supervise new/junior staff"), the Applicant must be supervised if harmony is to be restored in the Unit. The decision to relieve her of the supervisory function is rational.

*Whether the decision to relieve the Applicant of her supervisory functions is procedurally correct.*

99. The Applicant maintains that her supervisors' actions are arbitrary and violated her due process rights. Further that the contested decision is procedurally incorrect since her supervisors did not follow the procedures set out in ST/AI/2010/5, ST/SGB/2019/8 and ST/AI/2017/1. Further, that she was not availed an opportunity to improve on her performance.

100. Section 10.1 of ST/AI/2010/5 provides thus:

During the performance cycle, the first reporting officer should continually evaluate performance. When a performance shortcoming is identified during the performance cycle, the first reporting officer, in

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<sup>36</sup> Applicant's testimony 4:41:39.230 --> 4:41:44.500; 4:46:46.460 --> 4:46:49.850; 4:47:50.790 --> 4:47:53.620.

consultation with the second reporting officer, **should proactively assist the staff member to remedy the shortcoming(s). Remedial measures may include counselling, transfer to more suitable functions, additional training and/or the institution of a time-bound performance improvement plan**, which should include clear targets for improvement, provision for coaching and supervision by the first reporting officer in conjunction with performance discussions, which should be held on a regular basis. [Emphasis Added]

101. The Tribunal determines that the above provisions only list examples of remedies, including the institution of a Performance Improvement Plan (“PIP”), which may be instituted. The list is neither exhaustive nor mandatory. Institution of a PIP is therefore only one of the available, but not mandatory options.

102. The Applicant’s supervisors decided to temporarily relieve her of supervisory powers until matters concerning the hostile work environment are resolved. While it might be difficult to imagine how such a decision would assist the Applicant in terms of ST/AI/2010/5, evidence that the Applicant failed to create harmony in the Unit and failed to execute the supervisory functions supports the view that she would benefit from the contested decision, since it would lighten her workload and enable her to only focus on her substantive duties. Relieving her of the functions which she failed to execute with a view to allowing the Respondent to sort out her concerns was a reasonable remedy. Thus far, the law was complied with.

103. The Applicant further asserts that her supervisors did not follow the procedures set out in ST/SGB/2019/8 and ST/AI/2017/1. She, however, did not cite any specific sections of law which the Respondent failed to comply with. Suffice it to say that all relevant provisions were complied with. The Applicant’s assertion that the contested decision is procedurally incorrect is without merit.

104. She maintains that her supervisors’ actions are arbitrary and violated her due process rights since she was not given an opportunity to respond to the allegations on which the impugned decision was based or to explain her actions.

105. While it may be true that she was not given an opportunity to explain her actions, the remedies under section 10.1 ST/AI/2010/5 are only aimed at rectifying performance short comings and are not punitive. It was therefore not necessary to conduct some form of investigation in which a staff member would be required to explain her actions. That the Applicant does not dispute any of the five incidents but only tries to rationalize them is instructive. The assertion that she was not given an opportunity to respond to the allegations is misconceived. All factors considered, the Tribunal finds that decision was procedurally correct.

*Whether the decision to relieve the Applicant of her supervisory functions is proportionate.*

106. The legal principle is that the proportionality principle limits discretion by requiring an administrative action not to be more excessive than is necessary for obtaining the desired result. The purpose of proportionality is to avoid an imbalance between the adverse and beneficial effects of an administrative decision and to encourage the administrator to consider both the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end. The essential elements of proportionality are balance, necessity and suitability.<sup>37</sup>

107. The Applicant maintains that the decision is not proportionate since any performance related issues should have been addressed in the context of the performance management system with a PIP. She added that while the Secretary-General has a wide range of options, his power to choose is not unfettered and it must still be exercised reasonably.

108. Tribunal jurisprudence is replete and firm that the Respondent has broad

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<sup>37</sup> Samandarov 2018-UNAT-859.

discretion in relation to the internal organization of its units and departments. The Respondent has the power to restructure and reorganize its units and its departments to lead to greater efficiency.<sup>38</sup> It is therefore not within the remit of the UNDT to pronounce itself on the exercise of this discretion.

109. The Tribunal has determined that institution of a PIP was only one of the many available options. The facts of this case including that the Applicant refused to perform the contested functions to the detriment of the operations of the Organization, the staff members whom she supervised and the general work environment in the GSU, support the conclusion that the decision to relieve her of those functions was proportionate.

110. In conclusion, the Tribunal finds that the Secretary-General properly exercised his broad discretion to relieve the Applicant of supervisory responsibilities after her supervisors determined that it was in the best interest of the Organization. The remedies she seeks are therefore not tenable.

## **ORDER**

111. The application is dismissed.

*(Signed)*

Judge Margaret Tibulya

Dated this 21<sup>st</sup> day of September 2022

Entered in the Register on this 21<sup>st</sup> day of September 2022

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi

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<sup>38</sup> *Simmons* 2016-UNAT-624, para. 12.