



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TEKLIE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Yuki Daijo, ECA
Amboko Wameyo, ECA

Introduction

1. The Applicant is a Senior Geoinformation Assistant at the United Nations Economic Commission for Africa (ECA). On 24 January 2019, she filed an application with the United Nations Dispute Tribunal (UNDT) contesting a decision which she describes as follows:

The director had decided to transfer me back to my old section where the section head (Mr. Andre Nonguierma) was a staff against whom I had previously filed a complaint for prohibited conduct. The director also made Ms. Aster Deneke as my First Reporting Officer (with my consent) but decided to appoint Mr. Nonguierma as my Second Reporting Officer instead of himself (I was against).

2. The Applicant states that the decision was made on 1 August 2018, but she was only notified of it on 7 December 2018.¹

3. The Applicant requested management evaluation of the contested decision on 7 November 2018.²

4. The Respondent filed a reply on 14 March 2019 arguing that the application is irreceivable *ratione materiae* and *ratione temporis*.

5. On 28 May 2019, the Tribunal issued Order No. 061 (NBI/2019) inviting the parties to declare whether they wished to adduce any further evidence. The parties were also directed to submit their views on whether this matter would require an oral hearing, and, should a hearing be considered necessary, to provide the Tribunal with a list of witnesses they intend to call.

6. The Respondent filed his submissions in response to Order No. 061 (NBI/2019) on 30 May 2019, as directed.

7. The Applicant did not respond to Order No. 061 (NBI/2019).

8. On 22 January 2020, the Tribunal issued Order No. 015 (NBI/2020) giving the parties time to file any submissions they may wish, and indicating that the

¹ Application at paras. V (4) and (5).

² Management Evaluation, Annex 4 to application.

Tribunal will then proceed to adjudicate the matter on the basis of the written submissions before it.

9. The Applicant filed her submissions on 31 January 2020. The Applicant stated that she agrees to this matter being adjudicated on the papers and without an oral hearing. Whereas the Applicant cites to attachments, no attachments were originally filed. The Tribunal granted additional time to submit those.

10. There were no further submissions from the Respondent.

Facts

11. The facts as described below are undisputed or result unambiguously from the submitted documents. It falls to be noted that, in large part, the documents refer to the Applicant as Meron Kinfemichael, which in the application she indicates as her middle name.

12. The Applicant joined ECA on 7 March 2005 as a Cartographic Assistant, G-7, in the Development Information Services Division. In 2007, her functional title changed to Geographic Information System Assistant.

13. In June 2010, she filed a complaint of harassment against her then supervisor, the Senior Information Systems Officer in the Statistics Division, which resulted in negotiated informal settlement in October 2012.³

14. In 2012, she filed a harassment complaint with the ECA Executive Secretary against her then first (FRO) and second (SRO) reporting officers. This complaint apparently had no follow up.⁴

15. On 29 May 2015, she filed an ST/SGB/2008/5 (Prohibition of Discrimination, Harassment, including Sexual Harassment and Abuse of Authority) complaint against several current and former staff members of ECA.⁵ On 15 February 2016, she was informed of the then Executive Secretary's

³ Application, Summary of Facts – paras 1-2.

⁴ Application, Summary of Facts – paras 3-6.

⁵ As cited in an Ethics Office Memorandum dated 20 December 2016.

decision not to form a fact-finding investigation because there were insufficient grounds.⁶

16. On 29 November 2016, the Applicant submitted to the Ethics Office a request for protection from retaliation referring to complaints of harassment, discrimination, abuse of authority and unethical behaviour against five individuals. These did not refer to the current SRO, Mr. Andre Nonguierma.

17. On 20 December 2016, the Applicant's complaint was reviewed by the Ethics Office. The Ethics Office found that the Applicant had not provided sufficient information to support a reasonable belief that misconduct may have occurred.⁷

18. On 20 June 2017, the Applicant wrote to the Director, ECA's African Centre for Statistic (ACS) requesting a change in section within the Division, citing professional disagreement with the Chief of GISS and, her then FRO, Mr. Nonguierma.⁸

19. On 26 June 2017, she followed up mounting allegations of discrimination and corruption against Mr. Nonguierma.⁹

20. On 1 August 2017, the Applicant was reassigned from GISS to the Demographic & Social Statistics Section (DSSS) of ACS under a different supervisor.¹⁰

21. In January 2018, the Applicant filed a complaint against three supervisors, alleging harassment and abuse of authority, and, in relation to Mr. Nonguierma – retaliation.¹¹

22. In March 2018, the Applicant's complaint was reviewed by the Ethics Office. The Ethics Office found that the Applicant had not provided sufficient

⁶ Application, Summary of Facts – paras 5-6.

⁷ Ethics Office Memorandum, 20 December 2016.

⁸ Respondent's response to Order No. 061 (NB0/2019) annex 2 and 3.

⁹ Application, email to director ACS, dated 26 June 2017; cited by Ethics Office Memorandum 26 March 2018, paras 12 and 15.

¹⁰ Application, Summary of Facts – para 20-23.

¹¹ Application, Summary of Facts – para 33.

information to support “a reasonable belief that misconduct may have occurred.” The Ethics Office remarked on serious and unsubstantiated allegations raised by the Applicant, and warned that they may amount to misconduct. It also advised the Applicant to engage the United Nations Ombudsman to “iron out her long-standing issues with the Chief GISS”.¹²

23. On 1 August 2018, the Director/ACS informed the Applicant that, as of 6 August 2018, following the completion of the mapping talent profiling, she would be redeployed to GISS where she was expected to report to the section head. As a result of ensuing discussion on the person of the Applicant’s supervisor, on 2 August 2018 the Director replied as follows:

[...] I however mentioned that we will explore the possibility of you reporting to someone else other than the section Chief. In this case, the Chief will have to be your SRO and this will depend on the guidance of HR.[...] The decision who will be your FRO will be made through consultation with the head of section and whoever will be your proposed FRO. For now, you should report upon your return to the head of GiSS.¹³

24. On 7 September 2018, the Applicant wrote to the Director/ACS, complaining that she had not been given work and still had no information on her FRO and SRO.¹⁴

25. On 19 October 2018, the Applicant’s FRO wrote to inform her that the Chief/GISS, her SRO, had not received her work plan. The Applicant insisted that the Director/ACS was her SRO, but the Director/ACS confirmed by email that her SRO would be the Chief/GISS.¹⁵

26. On 2 November 2018, the Applicant wrote to the Director/ACS stating *inter alia*, that she had agreed to move to GISS on the condition that Ms. Deneke would be her FRO and that the Director/ACS would be her SRO.¹⁶

¹² Respondent’s response to Order 061 (NBI/2019); Annex 1, Ethics Office Memorandum 26 March 2018.

¹³ Application, Summary of Facts – para 45.

¹⁴ Application, Summary of Facts – para 49.

¹⁵ Application, Summary of Facts – para 50-51; Email from Director ACS of 19 October 2018.

¹⁶ Application, Summary of Facts – para 52.

27. On 6 November 2018, the Director/ACS indicated that his emails never suggested that he would be her SRO.¹⁷

28. On 7 November 2018, the Applicant filed a management evaluation request (MER) of the decision which she describes as follows:

Change of Second Reporting Officer (SRO) to a former FRO whom I had complained against – Mr. Andre Nonguierma. I was transferred back to the section GISS on the condition that Ms. Aster Denekew would be my FRO and the director to continue to be the SRO.

29. On 7 December 2018, the Director/ACS issued a memorandum to the Chief of Human Resources confirming, retroactively, the reassignment of two staff members, including the Applicant, with effect from 8 September 2018.

30. On 21 December 2018, the Management Evaluation Unit determined that the MER was not receivable.

Receivability

Respondent's case

31. The Respondent submits that the Applicant filed a MER concerning a decision which she described as change of SRO to a former FRO against whom she had previously complained. The Applicant, however, has never requested a management evaluation of the decision of 1 August 2018 to move her back to GISS. Consequently, to the extent the application might be viewed as a challenge of the decision of 1 August 2018 to return her to GISS, it is irreceivable *ratione materiae*.

32. The Applicant's appeal against the Chief/GISS being her SRO as a result of her move to GISS is not an appealable administrative decision and is thus irreceivable *ratione materiae* in accordance with art. 2.1(a) of the Tribunal's Statute. Having the Chief of GISS as the Applicant's SRO produces no direct legal consequences affecting the Applicant's terms and conditions of appointment. The fact that Chief/GISS is the Applicant's SRO emanates naturally from the

¹⁷ Application, Summary of Facts – para 53.

decision that the Applicant was moved back to GISS, and that the Applicant's FRO reports directly to the Chief of GISS.

Applicant's case

33. The Applicant submits that the Director had a duty to provide a harmonious work environment and take preventive measures to prevent exposure of the Applicant to prohibited conduct. The designation of the chief of section as her second reporting officer is an adverse administrative decision given their history of a difficult professional relationship, and it exposed the Applicant to harassment and retaliation. These safeguards are implicit to the terms of the Applicant's contract so that any violation of that safeguard should be considered an appealable administrative decision.

34. The Applicant further submits that the decision to reassign her is also appealable. Formal communication of the reassignment was on 7 December 2018; taking the date of 8 September 2018 as the effective date of reassignment and therefore receivability, is without basis. The decision to reassign the Applicant was only known to her when she received the formal memo from Human Resources in December.

Considerations

35. The Tribunal observes that the Applicant, who is self-represented, exhibits difficulty in articulating her case in the prescribed standardized forms. In her MER, she states that the contested decision was made on 19 October 2018; whereas in her application, she states that the contested decision was made on 1 August 2018. She contradicts herself as to the date of communication of the impugned decision; in the MER indicating 19 October 2018, whereas in the application, 7 December 2018. The latter post-dates the management evaluation request and is thus untenable. She also intertwines facts of her move to GISS with the fact of designating her SRO. Clearly, however, the Applicant's grievance in her management evaluation request was related not to the change of sections as such, but to the designation of her SRO, which she describes as "condition upon which she agreed to be moved".

36. Thus, the decision to move the Applicant to GISS is not properly before the Tribunal both *ratione materiae*, having not been submitted for management evaluation, and *ratione temporis*, having been communicated, in no uncertain terms, on 1 August 2018, even though the date of the move taking effect would be subsequently changed. Only the claim regarding the person of SRO has been submitted for management evaluation, and qualifies, therefore, to be further reviewed for receivability.

37. Regarding the Respondent's claim that the designation of the Chief/GISS as SRO "emanated naturally from the decision that the Applicant was moved back to GISS and that the Applicant's FRO reports directly to the Chief of GISS", the Tribunal recalls section 5.3 of ST/AI/2010/5 (Performance Management and Development System) which states:

The second reporting officer, who shall be the first reporting officer's supervisor *or equivalent*, is responsible for [...] (emphasis added).

As seen from the above, the Chief/GISS being the Applicant's FRO's supervisor would regularly be the Applicant's SRO. The language of section 5.3 is, however, not entirely restrictive as it gives discretion for the designation of someone of equivalent designation as FRO's supervisor to be the SRO. The Respondent, therefore, is not bound to designate the supervisor of the FRO to act as a staff member's SRO.

37. On the facts of the present case, the person of the SRO was not a matter of course. It appears that the Chief/GISS had previously been the Applicant's FRO, not SRO. Moreover, undisputedly, in the discussion on her reassignment back to GISS, the Applicant made reservation concerning the person of her SRO. The Director's response on 2 August 2018 is not categorical; rather, the Director defers to Human Resources, and announces that the arrangement would be "for now". The date of the effective reassignment from DSSS back to GISS was varied, from 6 August to 8 September 2018, and the Applicant submits that "the system" continued to indicate the DSSS Section Chief as her FRO until "mid-December".

38. All things considered, the Tribunal concedes that the relevant administrative decision may well have been made earlier, in proximity with the decision on the reassignment to GISS. However, the fact triggering the time limits for requesting management evaluation was the decision communicated to the Applicant on 19 October 2018 by the Director/ACS, which was the first one unequivocally informing her that the Chief/GISS would be her SRO. The Tribunal has no basis to accept that a firm decision was communicated at any earlier time. The 60-day deadline set out in staff rule 11.2(c) for the Applicant to request management evaluation of that decision ended on 18 December 2018. The Applicant's MER of 7 November 2018 was submitted well within time.

39. On the issue of whether the application adheres to the statutory time-limits, the Tribunal finds that it does.

40. On the question of whether the substantive issue before it is materially receivable, the legal issue arising for determination is whether the decision of who would act as the Applicant's SRO qualifies as an administrative decision under art. 2.1(a) of the UNDT Statute.

41. 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.¹⁸ What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made and the consequences of the decision.¹⁹

42. As correctly argued by Counsel for the Respondent, the designation of a SRO arises formally as a matter of law under ST/AI/2010/5. On the substance, the assignment of a SRO, who plays a significant role in a staff member's performance appraisal - the legal consequences of which are obvious - does affect the terms and conditions of the Applicant's appointment. Moreover, as correctly argued by the Applicant, viewing the matter through the prism of the right to be

¹⁸ See former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003).

¹⁹ *Andati-Amwayi* 2010-UNAT-058. See also *Ngokeng* 2014-UNAT-460, *Bauza Mercere* 2014-UNAT-404, *Wasserstrom* 2014-UNAT-457.

free from discrimination and abuse at the workplace, confirms that safeguards against it are implicit to the terms of United Nations staff employment; thus, the choice of reporting lines must take them under consideration.

43. In conclusion, decisions on the designation of reporting officers falls under the Tribunal's jurisdiction in accordance with art 2.2 of the UNDT Statute. The application is receivable.

Merits

44. The Applicant submits that she was exposed to retaliation and suffered damage to her reputation. She submits that her SRO unduly questioned and probed her claim for overtime work, in support of which she filed relevant email correspondence.²⁰ She requests to be transferred to another division so that she can work without being subjected to discrimination and harassment

45. The Respondent submits that staff members are not entitled to select their supervisors. They must be able to carry out their assigned functions within the structure established by the Organisation. The complaint that had been filed by the Applicant against her present SRO has been dismissed for lack of evidence of misconduct. As such, there is no basis for honouring the Applicant's wishes.

Considerations

46. The Tribunal recalls that according to 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 of the activities or offices of the United Nations.

Traditionally, the reassignment of a staff member's functions comes within the broad discretion of the Organization to use its resources and personnel as it deems appropriate.²¹ The General Assembly "emphasizes the requirement of mobility of all internationally recruited staff of the Organization as an integral part of their

²⁰ Applicant's response to Order No. 015 (NBI/2020), attachments OT 1-4.

²¹ *Gehr* 2012-UNAT-236; *Kamunyi* 2012-UNAT-194; *Allen* 2011-UNAT-187; *Kaddoura* 2011-UNAT-151; *Hepworth* 2015 UNAT-503

obligation.²² This implies that the Respondent had broad discretion in assigning supervisors and reporting officers.

47. More closely on point, as held by the Appeals Tribunal in *Rees*²³, no staff member has the right to select his or her own supervisor. An organization is not compelled to retain a staff member who insists on staying in his or her post while refusing to report to a supervisor who he or she claims had discriminated against him or her or created a hostile work environment. The Appeals Tribunal noted that a staff member reserves the right to seek redress through the informal or formal complaint procedures pursuant to ST/SGB/2008/5; having failed to do so, her insistence on different reporting lines was without merit.

48. The Tribunal considers that the argument applies *a fortiori* to a situation where, as in this case, staff member's allegations of harassment and discrimination have indeed been subject to scrutiny under ST/SGB/2008/5 and found unsubstantiated. As noted by the Ethics Office in their decision on the Applicant's claim, a staff member is expected to put effort into creating a productive and harmonious environment, and this includes resolving conflicts and dealing with its aftermath. The Tribunal recalls, moreover, that the applicable instruments, ST/SGB/2008/5 and the subsequent issuance, ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority), provide for protective and preventive mechanisms against retaliation. Staff member, however, may not expect that by resorting to the complaints mechanism, she or he will eliminate from the reporting lines any person with whom he or she does not agree as to the management style or concrete decisions. Yielding to such demands by the Respondent would effectively paralyse the Organization, notwithstanding the fact that lightly using complaints as *modus operandi* amounts to abuse of the right to redress.

49. The Tribunal recalls that the complaints against the Applicant's SRO were found unsubstantiated. The Tribunal finds that the presently advanced claim of harassment/retaliation based on the fact that the SRO had requested substantiation

²² E.g., Resolution 53/221, paragraph 7.

²³ *Rees* 2012-UNAT-266.

of the claim for overtime work is also unsubstantiated. A review of the relevant correspondence discloses that the SRO merely requested provision to the FRO of substantiation for some of the claimed overtime days of work, of which he had had no prior knowledge, while he signaled readiness to approve them all. This demand was not unreasonable and the tone of his emails is measured and on point; conversely, the tone of the Applicant's emails is acrimonious. The Tribunal does not find basis to impugn the SRO's action. In conclusion, the application fails. Just as it was the case in *Rees*, the Applicant cannot insist on a restructuring of the Organization to suit her wishes.

Conclusion

50. The application is dismissed in its entirety.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 27th day of February 2020

Entered in the Register on this 27th day of February 2020

(Signed)

Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi