



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

MACHOKA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Esther Shamash, UNDP

Introduction

1. The Applicant, a former Chief of the Directorate in the Bureau for Management Service at the United Nations Development Programme (“BMS/UNDP”) at the P-5 level, filed the application on 31 October 2018. She contests the alleged “[c]onstructive dismissal, harassment and abuse of authority” by the Assistant Secretary-General of BMS/UNDP (“the ASG”), which she defines as the decision “to divest her of her core functions as Chief of the Directorate”.

2. As remedies, the Applicant requests that “the Administration[’s] decision to divest her of her functions as Chief of Directorate be rescinded/declared unlawful” and that she be “granted compensatory moral, punitive and exemplary damages”.

3. The present case was initially assigned to Judge Alessandra Greceanu.

4. On 6 December 2018, the Respondent filed his reply in which he contends that the application is not receivable and, in any event, without merit.

5. Following the expiry of Judge Greceanu’s tenure on 31 December 2018, the case was reassigned to the undersigned Judge on 20 February 2020.

6. By Order No. 54 (NY/2020) dated 23 March 2020, the Tribunal held that the application was receivable on a preliminary basis and without prejudice to any substantive findings made in the final determination of the merits of the present case. The Tribunal also ordered the parties to file (a) a jointly-signed statement setting out the agreed and contested facts by 28 April 2020, and (b) their closing statements in the following order of sequence, after having granted an extension of time due to issues related to the Covid-19 pandemic: the Applicant (4 May 2020), the Respondent (18 May 2020), and the Applicant (25 May 2020). The parties duly filed their submissions as ordered.

7. Appended to the jointly-signed statement, the Applicant filed some documents *ex parte*. Considering the particular content and the circumstances of the present case, the Tribunal decides to maintain this status and not share them with the Respondent.

8. For the reasons set out below, the application is rejected.

Facts

9. In the parties' jointly-signed statement of 28 April 2020, they set out the agreed facts as follows (emphasis in the original):

Employment history

... On 11 January 2004, the Applicant was granted an initial Fixed-Term Appointment as a Legal Officer with the Office of Legal Affairs at the UN Secretariat, at the P3 level, step 6 in Vienna, Austria. On 11 December 2006, she was competitively selected and seconded from the UN to the then Legal Support Office (LSO) at UNDP, New York on a Fixed-Term Appointment as a Legal Specialist at the P4 level, step 2 for an initial period of 2 years. On 10 December 2008, based on her good performance as set out in her 2008 performance assessment, her secondment to UNDP was extended for a maximum of another two years.

... In 12 March 2009, in recognition of her exceptional work record, the Applicant was promoted to the P5 level, step 1 as a Legal Advisor in UNDP.

... On 12 May 2010, the Applicant, in view of the upcoming expiry of her secondment from the UN, applied for a transfer into UNDP on or before 10 December 2010 as set out in an email to [name redacted, Ms. LL], Senior Advisor, Bureau of Management/Office of Human Resources (BOM/OHR).

... On 2 March 2010, UNDP initiated a One-Time Review to convert staff who had served in UNDP for five or more years as permanent staff members. On 24 August 2010 by a memorandum from [name redacted, Ms. FN], Officer-in-Charge, BOM/OHR, the Applicant was required by UNDP to either return to the UN or to resign from the UN and be reappointed to UNDP.

... On 10 December 2010, the Applicant's secondment came to an end and her Fixed-Term Appointment with the UN expired. On 11 December 2010, the Applicant was appointed to UNDP as a Legal Advisor with the

Legal Office (LO) (then-LSO) on a new Fixed-Term Appointment at the P5 level, step 2.

... On 14 January 2011, the Applicant was advised that she would retroactively be deemed to have had no break-in-service between the end of her secondment from the UN and effectively transferring her to UNDP.

... On 1 December 2012, the Applicant was reassigned to the position of Management Advisor, Business Solutions in the Bureau of Management (BoM, now Bureau for Management Services (BMS)) at the P5 level, step 4 to head a corporate project (POPP [unknown abbreviation] Project) on behalf of the Bureau of Management Services. On 21 May 2014, following a UNDP-wide Structural Review Process, a new UNDP structure and change process was launched. On 1 October 2014, the Applicant was selected and appointed to the position of Chief of Directorate, BoM (now BMS) after an internal competitive selection process replacing the previous Head of the Directorate. The Applicant served as Chief of Directorate from 1 October 2014 to 21 August 2018.

... On 14 June 2018, the Applicant was placed on medical leave for 23 working days [reference to footnote omitted]. On 29 June 2018, a memorandum from [name redacted, Dr. CH], Senior Medical Officer, UN Medical Division to [name redacted, Mr. DB], Director of the Office of Human Resources, directed that before the Applicant could return to her work, alternate working arrangements conducive to the Applicant's recovery be put in place.

... On 22 August 2018, pursuant to Dr. CH's report the Applicant was reassigned to a temporary position of Special Advisor at the P5 level in the Office of Human Resources (OHR), which was to be funded for a period of one year, although this was later extended until December 2019.

... On 1 October 2019, the Applicant was again reassigned by UNDP to the position of Customer Relationship and Quality Manager, at the P5 level in Malaysia. She took up her duties up on 1 January 2020.

Background

... On 1 February 2017, [name redacted, Ms. SM], then Deputy Director, Regional Bureau for Latin America and the Caribbean, D2, who had previously served as Resident Coordinator in Cuba and Uruguay, was selected to the position of Assistant Administrator and Director, Bureau of Management Services (BMS), at the Assistant Secretary-General (ASG) level, with effect from 1 May 2017, replacing the previous incumbent, [name redacted, Mr. JW], who had served as

Assistant Administrator and Director, BMS, at the Assistant Secretary-General (ASG) level from 22 February 2012 to 31 March 2017. At the time of [Ms. SM's] appointment, the Applicant supervised several BMS Directorate staff, including a Management Specialist at P3 level, [name redacted, Ms. EZ].

... On 16 March 2017, the Director-designate, BMS informed the Applicant by email that she was interested in having a Special Assistant at the P3 level to support her, although she deferred the final decision on this until after taking office [reference to annex omitted].

... On 18 May 2017, in a meeting with the Applicant, the Director, BMS informed the Applicant that the P3 Management Specialist on Temporary Appointment would be reporting to her and would serve as her Special Assistant [reference to the application omitted].

... On 22 May 2017, [Ms. EZ's] change in functions was announced in the monthly newsletter from the Director, BMS. By email of 22 May 2017, the Director, BMS also informed all the D2 level Directors and their Special Assistants in the Bureau and the Senior Manager in the Executive Office of the Administrator that the coordination process of OPG items, both corporate and BMS-specific would henceforth be channeled through her Special Assistant [reference to the application omitted].

.. On 1 June 2017, [Ms. EZ], a Management Specialist at the P3 level, had her reporting line changed so that until her separation at the end of her temporary contract at the end of February 2018, she reported to the Director, BMS, although her Terms of Reference remained unchanged.

... As of 1 June 2017, [name redacted, Mr. FM] joined the Directorate as a Management Specialist (Finance).

... On 2 June 2017, the Director, BMS attended a joint session on Internal Audit and Oversight at the Executive Board to which the Management Directors of three agencies, UNDP, the United Nations Office for Project Services (UNOPS), and the United Nations Population Fund (UNFPA), presented corporate responses to the UN Board of Auditors' (UNBOA) audit findings. The Director, BMS was accompanied by [name redacted, Mr. DS], Deputy Director and Chief Financial Officer, BMS and by several members of the Office of Financial Resources Management (OFRM) who deal with UNBOA.

... On 13 June 2017, the Director, BMS requested that the Applicant consult her on any finance and Human Resources (HR) related matters.

... On 15 June 2017, the Applicant at her request met with the Director, BMS.

... On 18 July 2017, by a memorandum to the Deputy Director of OHR, the Director, BMS advised him that as of 1 June 2017, [Ms. EZ] would no longer report to the Applicant.

... On 10 November 2017, [name redacted, Mr. TG], then-Associate Administrator emailed the Deputy Directors of the Bureaus to advise them of the 2018 Budget Steering Committee's weekly schedule. This corporate planning process was included in the Terms of Reference for the Applicant's post. On 13 November 2017, during the Senior Management meeting, the Director, BMS stated that the Deputy Director, BMS/UNDP Chief Financial Officer would represent BMS on the committee.

... On 4 October 2017, by an email to [name redacted, Ms. MG], Assistant to [the] Chief of Staff, Executive Office, the Applicant requested to meet with [name redacted, Mr. MC], Chief of Staff, Executive Office to seek his assistance in addressing the predicament of the Applicant's position. The Applicant was granted an appointment and met with [Mr. MC] on 27 October 2017.

... On 21 November 2017, the Director, BMS sent a vacancy announcement for the position of D1 Deputy Director, Regional Centre, Addis Ababa to the Applicant, indicating that the Director, BMS would be willing to advocate on the Applicant's behalf, if the Applicant wished her to, as it might be a good fit for the Applicant. The Applicant was on leave at the time. On 15 December 2017, the Applicant responded and confirmed that she was interested in the position and had already applied for it. The Director, BMS responded on the same day to let the Applicant know that it appeared that the vacancy in Ethiopia had been withdrawn, but that, should the Applicant be interested in any other vacancies, she should let the Director, BMS know so that she could advocate on the Applicant's behalf.

... On 28 November 2017, the Applicant sought an appointment to meet with the UNDP Administrator, [name redacted Mr. S].

... On 12 January 2018, the Applicant requested a management evaluation.

... On 29 January 2018 and 1 February 2018, the Applicant completed the performance appraisal of the five staff members she supervised.

... On 9 February 2018, the Associate Administrator replied to the Applicant's request for Management Evaluation.

... Starting in February 2018, the Parties engaged in informal resolution efforts.

... On 13 March 2018, the Applicant submitted a complaint of workplace harassment, abuse of authority and retaliation against the Director, BMS to UNDP's Office of Audit and Investigation (OAI).

... On 17 April 2018, the Applicant wrote to the Administrator copying the Office of Audit and Investigations and the Ethics Office.

... From 11 May 2018 until 17 June 2018, the Applicant was on sick leave. She returned to work on 18 June 2018 but had to leave again on 19 June 2018, and was on sick leave until the end of her tenure as Chief of Directorate[.]

... On 13 June 2018, OAI completed its assessment, declining to open a formal investigation on the grounds that there was insufficient evidence to warrant an investigation.

... On 29 June 2018, a memorandum from [Dr. CH], Senior Medical Officer, UN Medical Division to [Mr. DB], Director of the Office of Human Resources, advised that before the Applicant could be returned to her work, alternate working arrangements conducive to the Applicant's recovery be put in place.

... On 1 August 2018, the then counsel for the Applicant wrote to the Respondent to inform it that the Applicant considered that mediation had failed.

... The Applicant was offered the position of Special Advisor to the Director, OHR with the expectation that this would enable her to continue with her career which she accepted.

10. The Tribunal notes that in the jointly-signed statement, the parties also included a long list of facts on which they disagreed. Those relevant for the present Judgment have been reflected in consideration where applicable.

Consideration

Receivability

11. In the Respondent's reply, he claims that the application is not receivable. As a matter of judicial economy and transparency, in Order No. 54 (NY/2020), the Tribunal

rejected the Respondent's claim and found the application receivable on a preliminary basis and without prejudice to any substantive findings made in this Judgment. The Tribunal now fully endorses all findings made in Order No. 54 (NY/2020), which is published on the Dispute Tribunal's website.

The issues

12. Regarding how to define the issues at stake, the Appeals Tribunal has held that "the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review". When defining the issues of a case, the Appeals Tribunal further held that "the Dispute Tribunal may consider the application as a whole". See *Fasanella* 2017-UNAT-765, para. 20, as also affirmed in *Cardwell* 2018-UNAT-876, para. 23.

13. In the application and the appended annexes, the Applicant lists a range of administrative decisions, which she, in essence, claims prove that she has unlawfully been divested of her core functions as Chief of the Directorate in BMS/UNDP as certain of her previous responsibilities were transferred to others.

14. In light thereof, and as neither party has objected to the definition of the issues set out in Order No. 54 (NY/2020), this is maintained as follows:

- a. Whether the cumulation of certain decisions regarding the Applicant amounted to an unlawful divestiture of her core functions as Chief of the Directorate?
- b. If so, as remedies, is the Applicant entitled to any or all of these decisions to be rescinded and/or compensation according to art. 10.5 of the Dispute Tribunal's Statute?

Did the cumulation of certain decisions regarding the Applicant amount to an unlawful divestiture of her core functions as Chief of the Directorate?

Applicable law

15. Staff regulation 1.2(c) bestows upon the Secretary-General, as the Chief Administrative Officer of the Organization under art. 97 of the United Nations Charter, a broad latitude of discretion in how to organize and plan the work of its staff as “[s]taff 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”. This discretion is complemented, in accordance with staff rule 1.2(a), by the duty of staff to adhere to their supervisors’ “directions and instructions”, which, however, must be “properly issued”.

16. The Appeals Tribunal has consistently held that the Dispute Tribunal’s judicial review is limited and often refers to its seminal judgment in *Sanwidi* 2010-UNAT-084 (para. 42) in which it defined the scope of review as that “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”. The Appeals Tribunal further held that “the Dispute Tribunal is not conducting a “merit-based review, but a judicial review” explaining that a “[j]udicial review is more concerned with examining how the decision-maker reached the impugned decision and not the merits of the decision-maker’s decision”.

17. Also, it is trite law that “[t]he Administration has broad discretion to reorganize its operations and departments to meet changing needs and economic realities” (see *Timothy* 2018-UNAT-847, para. 25). This discretion, however, is not unfettered as, “When judging the validity of the Secretary-General’s exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether

relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse” (see *Sanwidi*, para. 40). In this regard, “There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion” (see *Sanwidi*, para. 38).

18. Within the limits of the Administration’s managerial authority, the assignments of a staff member, who encumbers a specific post, may, therefore, be changed, and also divested—the question is where to draw the line before such change/divestiture becomes an inappropriate administrative act in the given circumstances (in line herewith, see the Appeals Tribunal in *Kallon* 2017-UNAT-742). When claiming ulterior motives, the onus of proof is on the Applicant in accordance with the consistent jurisprudence of the Appeals Tribunal (see, for instance, *Ross* 2019-UNAT-944, para. 25).

19. In the present case, in the final observations, the Applicant contends that “[t]o the extent that the new Director of BMS wanted to redesign or even eliminate her job, there is a mandated procedure for doing so which requires a programmatic justification and that also ensures certain protections for staff who are affected”. The Applicant further submits that, “The use of the term ‘constructive dismissal’ is usually reserved for forced resignations, whereas in this case, it applies to the elimination of a job forcing professional dislocation. This was the intention and the consequence of what preceded it”.

20. In this regard, the Applicant in her closing statement submits that the “core functions” of her post included the following assignments: (a) “Coordination”, (b) “Policy and Management Advisory Services”, (c) “Partnerships and Communication”, (d) “Management of the Unit” and (e) “Knowledge Management”,

and presents a range of circumstances, which she contends amount to an inappropriate divesture of these task, primarily that:

- a. Ms. SM's allegedly reassigned various responsibilities to Ms. EZ, who initially worked for the Applicant, but then changed Ms. EZ's reporting line, so she would instead work under Ms. SM's supervision. The Applicant takes particular issue with Ms. EZ's new role and submits that in consequence, the Applicant was deprived of her tasks in the areas of (a) "Strategy and Policy Development, Corporate Management Oversight", (b) "BMS Services to Corporate Clients", and (c) "BMS Directorate Partnership Functions". Also, some of the Applicant's work was incorrectly presented as the work of others, in particular Ms. EZ;
- b. The Applicant was excluded from attending, or her role was limited, at various meetings and forums in which she had previously participated, including "the joint session on Internal Audit and Oversight at the Executive Board", "Executive Board sessions", "[United Nations] Development Group ... business working group", and "the Integrated Resources and Results Framework strategic plan";
- c. The Applicant's role in the financial management of BMS was changed upon the recruitment of a "Financial Specialist" to the Directorate;
- d. All "human resources and finance decisions" were to be taken in consultation with Ms. SM;
- e. Ms. SM requested the Applicant to apply for another post, which was subsequently "withdrawn", as well as other P-4 and P-5 level posts. The Applicant was also offered a "strategic replacement" to a field duty station that was also withdrawn;

f. The only genuine task remaining was in the area of “communication”.

21. At the same time, in the jointly-signed statement under the list of disputed facts, the Applicant submits that she “served as Chief of Directorate from 1 October 2014 to 21 August 2018, carrying functions at the D-1 level”. In this context, the Applicant describes her “duties” as: (a) “Overseeing Delivery of Work Streams: Managing Staff and Directorate Budget”; (b) “Coordination of Bureau and Unit Work Plans: Supporting the Director in integration of BMS Service Delivery Model and Launch of new ERP [unknown abbreviation] set up and ICF [unknown abbreviation] for BMS”; (c) “Overseeing integration of policy initiatives, adjustments including POPP Coordination of BMS papers to the OPG [unknown abbreviation] and EG [unknown abbreviation] and into POPP”; (d) “Initiating and overseeing special projects and initiatives”; (e) “Integrating and analyzing multi-year resource management including income, expenditures, budgets integrated with the human capital side of BMS work”; and (f) “Integrating and analyzing multi-year resource management including income, expenditures, budgets integrated with the human capital side of BMS work”. Later in the same list, she instead presents her functions in line with those stated in her closing statement, as quoted above.

22. In her final observations, the Applicant submits that, “the functions of her position were not limited to the generic Terms of Reference for the position but were more specifically set out and agreed upon through the elaboration of tasks consistent with and derived from the Job Description”. The Applicant further notes that “while the Applicant was specifically directed to cease participating in a number of meetings or groups in which she had previously represented the Bureau, there were no new duties assigned to her by the Director; consequently, she was largely left acting as first reporting officer for a number of subordinates but progressively denied any say in their management and left out of representing the Bureau in areas within her functions in spite of holding the position of Chief of the Directorate”. The Applicant submits that, “There was no programmatic review of her post or functions in the context of what was

operationally justified. The decision was purely the result of the fact that the Applicant had been strongly identified by the new Director [Ms. SM] with her predecessor and she did not want to retain her. This is reflected in the unsolicited efforts to find her another posting”.

23. Based on the Applicant’s own account of the facts, the Tribunal notes that the Applicant developed a troublesome and difficult relationship with her new supervisor, Ms. SM, after the previous ASG left. Most importantly, the Tribunal takes note of the Applicant’s submission in the jointly-signed statement that albeit serving on the P-5 level, she undertook functions at the superior D-1 level and that she had successfully climbed the ranks within UNDP until landing the job as Chief of the BMS Directorate. In line herewith, the Respondent submits that while the Applicant reported to the previous ASG, she “exercised responsibilities beyond her Terms of Reference”, but that when Ms. SM arrived, she instead “encouraged staff to communicate with her directly”.

24. Regarding Ms. EZ’s assignments, the Respondent contends that her reporting line was simply changed from the Applicant to Ms. SM after Ms. EZ, due to her previous working experience as a Special Assistant, took on this role for Ms. SM and that the Applicant had never undertaken any of such functions. The additional “particular responsibilities which had been given to [the Applicant] by the previous [ASG] were not part of her core functions”. Concerning the other areas highlighted by the Applicant, the Respondent submits that the functions were “performed by colleagues who were in fact under [the Applicant’s] supervision, such as the Management Specialist (Finance), the Management Specialist (Communications), and the Management Specialist (Risk)”.

25. With reference to *Sanwidi*, the Tribunal notes that its role is not to replace the decisionmaker, but rather to assess how the contested decisions were taken. The incoherent and imprecise way in which the Applicant describes her work assignments

makes it very difficult, if not impossible, for the Tribunal to properly appraise the extent of which the Applicant was possibly divested of some, or many of, these assignments, and in the affirmative, if this was done in an inappropriate manner.

26. Rather, the Tribunal is convinced by the Respondent's submissions that any changes to the Applicant's functions were simply a result of a change in management style by which the new ASG, namely Ms. SM, put herself more in center of BMS's work and that the Applicant's responsibilities were accordingly more aligned with her P-5 level and her job description rather than undertaking tasks at the D-1 level. While the Applicant was obviously unhappy with this change, nothing in the case record indicates that it was improper or done in bad faith.

27. At the same time, according to the Applicant's own evidence filed *ex parte*, she was experiencing other very serious issues, which dated back to before she assumed her position as Chief of the BMS Directorate. According to the agreed facts, the Applicant was on medical leave for extended periods of time during the second half of 2018. Even if Ms. SM had actually relieved the Applicant of some, or most of her challenging tasks at the P-5 level, if this was done in light of the described situation, this would not have been overstepping the limits of her managerial authority and/or acting with ulterior motives.

28. As the Applicant, finally, continues to work for UNDP at the P-5 level, although in a new job, the Tribunal finds that while the Applicant felt that working with Ms. SM was unpleasant, any divestiture of assignments has only had limited, if any, negative impact on her career. Also, pursuant to the Applicant's own submissions, Ms. SM no longer works for UNDP.

29. Consequently, the Tribunal finds that the Applicant has failed to substantiate her claim of illegality. As the Applicant does not prevail on the merits of her claim, it is not necessary for the Tribunal to review the issue of remedies.

Conclusion

30. The application is rejected.

(Signed)

Judge Joelle Adda

Dated this 29th day of May 2020

Entered in the Register on this 29th day of May 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York