



Before: Judge Alexander W. Hunter, Jr.

Registry: Geneva

Registrar: René M. Vargas M.

HARVEY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Jérôme Blanchard, LPAS, UNOG

Miriana Belhadj, LPAS, UNOG

Introduction

1. On 20 December 2019, the Applicant, a staff member of the United Nations Office of the High Commissioner for Human Rights (“OHCHR”), filed an application to contest the decision to replace her as Departmental Focal Point for Women.

2. On 22 January 2020, the Respondent filed his reply. He argues that the application is not receivable because the decision to replace the Applicant as Focal Point for Women was the result of a policy disagreement between the Administration and “staff representation” on the appropriate nomination process for this function. Accordingly, this decision did not have a direct impact on the Applicant’s employment or terms of appointment. Alternatively, the Respondent argued that the application was without merit.

3. For the reasons stated below, the Tribunal finds that the contested decision does have a direct impact on the Applicant’s terms of employment and the application is therefore receivable. Moreover, the Tribunal finds that the reasons upon which the Applicant was removed from her functions as Focal Point for Women are not supported by the applicable legal framework. The contested decision is therefore unlawful.

4. Consequently, the Tribunal rescinds the decision.

Relevant facts

5. On 6 December 2018, the OHCHR Staff Committee announced that the Applicant had been elected as Focal Point for Women with a two-year mandate.

6. In August 2019, the Applicant was informed that the role of the Departmental Focal Point for Women would be assigned to the Chief, Women’s Human Rights and Gender Section.

7. On 9 September 2019, after the Applicant had raised her concerns, the Deputy High Commissioner reiterated the decision. The Deputy High Commissioner explained that the decision to replace the Applicant was also prompted by the global revision and updating of ST/SGB/2008/12 (Departmental focal points for women in the Secretariat) which would contain the following new text:

Gender Focal Points cannot be involved in any matter in which there reasonably could be a conflict of interest or the appearance of a conflict of interests. Therefore, staff representatives, staff of the Executive Office and staff in the immediate office of the head of entity shall not be eligible to serve as Gender Focal Points. Gender Focal Points who are also voting members of the relevant central review bodies shall recuse themselves from meetings of the central review bodies that are considering cases that have been reviewed by the Gender Focal Points at earlier states in the process.

Consideration

Receivability

8. Given the Respondent's objection to the receivability of the application, the Tribunal will address this as a preliminary matter.

9. The Respondent avers that the decision to reassign the functions of the Departmental Focal Point for Women is not an administrative decision but rather a managerial one, taken within the lawful discretion of the High Commissioner.

10. In the Respondent's view, this role is voluntarily held by a staff member in addition to his or her actual functions to assist the head of department. Therefore, any decision regarding the assignment or re-assignment of that role cannot be considered as affecting the staff member's terms of employment.

11. The Applicant argues that she was appointed to the role of Focal Point for Women following the elections which were called under sec. 6.5 of ST/SGB/2008/12. She avers that the establishment of, and appointment to, this office was promulgated as a condition of service of staff by ST/SGB/2008/12. Therefore, her removal from this

function is a violation of the Applicant's rights as a staff member as well as a unilateral decision by the Administration.

12. The Tribunal concurs with the Applicant on this point. The role of Focal Point for Women, while voluntary, is enshrined in ST/SGB/2008/12. There is no dispute that the Applicant was validly elected to this role in December 2019 for a period of two years.

13. The Tribunal finds that the decision to remove the Applicant from this role did have a direct impact on her rights as a staff member of the United Nations recognized under ST/SGB/2008/12. The lawfulness or unlawfulness of such decision is therefore a matter to be decided on the merits.

14. In light of the above, the Tribunal finds that the application is receivable.

Merits

15. The Applicant avers that she was elected as Departmental Focal Point for Women in the election that was organized in 2018 pursuant to ST/SGB/2008/12. She claims that the position of Staff Committee Focal Point for Women as the Administration called it when it relieved her of her functions, does not exist. She clarifies further that she was never elected as staff representative.

16. The Applicant further argues that the current legal framework does not confer on the High Commissioner or her Deputy the ability to remove her from her functions prior to the expiry of her mandate.

17. The Applicant states that her removal from her functions as Focal Point for Women interferes with the independent oversight function this post was meant to provide and represents a violation of her rights.

18. With respect to the authority to appoint the Focal Point for Women, the Applicant recalls that sec. 6.5 of ST/SGB/2008/12 provides for the possibility of having this post elected by secret ballot.

19. The Applicant further states that the Administration's justification that her removal from her function is prompted by the new version of the policy on Focal Point for Women is irrelevant because the new policy has not yet been promulgated. Moreover, she states that even after the promulgation of the new policy, her removal from her post would be in violation of the principle of non-retroactivity. The Administration should have simply waited until the expiration of her mandate.

20. The Respondent argues that the reason relied on to reach the contested decision is that the Focal Point for Women had been elected within the context of the Staff Committee elections and serves as member of the Staff Committee, which represents a conflict of interests.

21. The Respondent states that in application of sec. 1 of ST/SGB/2008/12, the Departmental Focal Point for Women is appointed by the Department Head to support her in fulfilling her mission. He further points out that under sec. 6.2 of this Bulletin, Departmental Focal Points for Women cannot be involved in any matter in which there reasonably could be a conflict of interest and that staff representatives are not eligible for this post.

22. The Respondent is of the view that pursuant to sec. 6.5 of ST/SGB/2008/12, it was for the High Commissioner to decide whether the Focal Point for Women in OHCHR should be elected or directly appointed by her. He avers that this authority also includes the right to re-evaluate past practices.

23. The Respondent claims that the Applicant is considered a staff representative because she was elected to her function within the context of Staff Committee elections and serves as a member of the Staff Committee. Her membership in the Staff Committee proved incompatible with the discharge of her functions as representative of the Head of Department and to support her in her mission with respect to ensuring gender equality.

24. In light of these arguments, the Tribunal will first address the question of whether the Applicant was, in effect, a staff representative and thereafter assess whether her position at the Staff Committee was incompatible with her functions under ST/SGB/2008/12.

Was the Applicant a staff representative?

25. In its relevant parts, ST/SGB/2008/12 provides the following:

6.5 Departmental focal points for women shall be selected by the head of the department/office/mission following staff-management consultations at the departmental/office/mission level, in accordance with the provisions of Secretary-General's bulletin ST/SGB/274 of 28 September 1994, entitled "Procedures and terms of reference of the staff-management consultation machinery at the departmental or office level", or by a secret-ballot election held at the request of either the head of the department/office/mission or the staff representatives of that department/office/ mission. The election shall be organized under the supervision of representatives of both the staff and the management of the department/office/mission concerned.

26. It is undisputed that the Applicant was elected by secret ballot, as appears to have been the practice in OHCHR previously. It is also undisputed that her election was organized jointly with that of the other members of OHCHR's Staff Committee.

27. The Tribunal further notes that the Terms of Reference ("ToR") of the OHCHR Staff Committee provide that the Committee shall be composed of staff representatives, OHCHR Focal Point for Women and one alternate and three E-Performance rebuttal panel members. It further provides separate roles for each of these members.

28. The Tribunal also reviewed the evidence pertaining to the election of the Applicant to the post of Focal Point for Women and observes that the election took place, indeed, within the context of the election for members of the Staff Committee. However, it is clear that the Applicant was elected for the distinct post of Focal Point for Women and not for that of staff representative.

29. Contrary to the Respondent's assertions, ST/SGB/2008/12 does not provide that the selection of the Focal Point for Women is the exclusive prerogative of the Head of Department. Section 6.5 of the Bulletin provides that the Focal Point can be selected by the Head of Department or by secret ballot. It further specifies that the secret ballot election can be called by the Head of Department or by staff representatives of that department.

30. In sum, the Tribunal concludes that the Applicant's election as Focal Point for Women in December 2018 complied with ST/SGB/2008/12 and that her membership in the Staff Committee does not make her a staff representative.

Was the Applicant's role within the Staff Committee incompatible with ST/SGB/2008/12

31. OHCHR's main argument for replacing the Applicant as Focal Point for Women may be summarized as follows: the Applicant being a member of the Staff Committee placed her in a conflict of interest which rendered her role incompatible with ST/SGB/2008/12.

32. To determine what are the functions of the Departmental Focal Point for Women within the Staff Committee, the Tribunal reviewed art. 12 of the ToR which reads as follows:

1. In accordance with the Secretary-General's bulletin ST/SGB/2008/12 of 1 August 2008, entitled "Departmental focal points for women in the Secretariat," the OHCHR focal point for women:

- a) Provides support to the High Commissioner in fulfilling her or his responsibilities for the achievement of gender equality and gender parity at OHCHR by:
 - i. Promoting greater awareness of gender issues and a gender-sensitive work environment;
 - ii. Promoting the implementation of UN and OHCHR gender policies, including work/life balance policies such as those set out in Secretary-General's bulletin ST/SGB/2003/4 of 24 January 2003 on "Flexible working arrangements;"
 - iii. Monitoring and evaluating the implementation of policies related to gender equality and gender parity, in cooperation with Human Resources and other relevant entities;
 - iv. Contributing to the development and realization of gender targets as set out in the human resources and OHCHR's action plans and the High Commissioner's compact with the Secretary-General.
- b) Contributes to and advise on the Staff selection process by:
 - i. Assisting programme managers in promoting gender balance on the interview panels;
 - ii. Observing, where feasible, interviews of candidates and expressing their views to the programme manager and senior management on questions related to gender;
 - iii. Reviewing the list of applications and recommended candidates prior to its submission to the High Commissioner and central review bodies to ensure that women candidates have been duly considered and that the objective of reaching gender targets has been taken into account, and providing comments to the High Commissioner, as appropriate. This function is further detailed in the OHCHR 2018 Strategy and Implementation Plan of the UN System-Wide Strategy on Gender Parity, which does not distinguish between temporary and non-

temporary recruitments. “OHCHR Focal Points for Women, in line with their mandate, will continue to be consulted on recruitments for P-5 and D-1 levels to ensure that women are given due consideration in the process, prior to submission of the file to the High Commissioner/ Deputy High Commissioner.”

- c) Provide advice and assistance to OHCHR female Staff on:
 - i. Issues affecting their career development (e.g., career planning, work/life balance) or conditions of service, bringing their concerns, as necessary, to the attention of the High Commissioner, the Office of Human Resources Management (OHRM) and/or the Focal Point for Women in the UN system;
 - ii. Internal systems for raising gender-related concerns and complaints, including on situations involving harassment, including sexual harassment, discrimination or abuse.
- d) Provide advice and support training initiatives by OHCHR and external partners on gender sensitivity, women leadership, career development, and work/life balance, and encourage greater participation of women in training opportunities.
- e) Assist the Focal Point for Women in the UN system with the development or revision of policies and programmes for gender equality, gender sensitivity and gender parity.
- f) Any other functions expressly delegated by the Staff Committee within the committee’s mandate.

2. The OHCHR 2018 Strategy and Implementation Plan of the UN System-Wide Strategy on Gender Parity further stipulates that the “OHCHR Department Focal Points for Women have played an important role in the elaboration of the strategy and have been collaborating in the development of this current Action Plan. In line with their mandate, the Departmental Focal Point for Women will support the implementation of the Strategy. In particular:

- a) Monitor the targets and temporary special measures;

- b) Continue advocating for gender sensitive working environment, talent management plans;
- c) Follow-up on compliance with leadership and accountability measures.”

3. The Alternate Focal Point for Women works in close coordination with the OHCHR Focal Point in performing his or her duties and represents the focal point in her or his absence or upon delegation.

33. The Respondent alleges that the above-described role is incompatible with the Focal Point’s functions as representative of the High-Commissioner on certain gender-related matters and with the role of the Focal Point as adviser to the High Commissioner in her mission to achieve gender equality. However, the Respondent has not specified how the above-described functions would impact such tasks.

34. The Tribunal finds that art. 12 of the ToR reflects the functions of the Focal Point for Women detailed in secs. 1-5 of ST/SGB/2008/12 and that, in principle, there is no incompatibility.

35. The Tribunal further notes that, to avoid conflicts of interest, sec. 6.2 of ST/SGB/2008/12 provides an exhaustive list of staff ineligible for selection as Focal Point for Women, staff representatives, staff of the Executive Office and staff in the immediate office of the head of department. The Tribunal notes that this provision does not bar other members of staff committees from serving as Focal Point for Women. Moreover, the Respondent has not explained why any specific potential conflict of interest could not be resolved by the Focal Point for Women recusing herself from discussions on the concerned matter.

36. Finally, the Tribunal finds no provision in ST/SGB/2008/12 or elsewhere in the applicable framework authorizing the Head of Department to remove a lawfully elected Focal Point for Women from her functions before the end of her statutory mandate.

37. In light of these considerations, the Tribunal finds that the decision to remove the Applicant's functions as Focal Point for Women was unlawful.

Remedies

38. Having concluded that the contested administrative decision was unlawful, the Tribunal decides to rescind it.

39. The Tribunal notes that the Applicant was elected in December 2018 for a period of two years. Her reinstatement at this point is therefore impossible as her term has since expired. Accordingly, the Tribunal sets an amount of compensation of USD3,000 as compensation in lieu of her reinstatement.

40. The Applicant also seeks compensation for harm. The Tribunal recalls that under art. 10.5(b) of its Statute, compensation for harm must be supported by evidence. In this case, the Applicant did not properly define her claim for compensation, nor did she submit or even seek to submit evidence to support her claim. The Tribunal is therefore unable to award any amount of compensation for harm.

Conclusion

41. In view of the foregoing, the Tribunal DECIDES:

- a. The application is granted in part;
- b. The contested decision is rescinded;
- c. The Respondent shall pay the Applicant the amount of USD3,000 as compensation in lieu of the rescission of the contested decision;

- d. If payment of the above amount is not made within 60 days of the date at which this judgment becomes executable, five per cent shall be added to the United States Prime Rate from the date of expiry of the 60-day period to the date of payment. An additional five per cent shall be applied to the United States Prime Rate 60 days from the date this Judgment becomes executable; and
- e. The Applicant's claim for other remedies is rejected.



Judge Alexander W. Hunter, Jr.

Dated this 19th day of February 2021

Entered in the Register on this 19th day of February 2021



René M. Vargas M., Registrar, Geneva