



Before: Judge Agnieszka Klonowiecka-Milart
Registry: Nairobi
Registrar: Abena Kwakye-Berko

GAVAZZO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for the Applicant:

Monika Ona Bileris

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR
Rosangela Adamo, AAS/ALD/OHR

Introduction

1. The Applicant serves on a continuing appointment at the P-5, step 7 level, but is currently on a temporary position at the D-1 level with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”), in Kinshasa, as Chief, Operations Resource Management.¹

2. On 31 August 2020, she filed an application for suspension of action pending management evaluation against a decision to reassign her to the position of Chief of Section, Logistics and Movement Integrated Control Centre (“TMICC”), Regional Service Centre at Entebbe (“RSCE”), P-5.²

3. On 1 September 2020, the application was served on the Respondent, who filed his reply on the same day.

Facts

4. The Applicant joined the Organization on 20 February 2007 as a Logistics Officer, P-3. She subsequently served in different missions and rose through the ranks. As of 1 October 2016, the Applicant became Chief Central Service, United Nations Global Service Centre (“UNGSC”), Brindisi.³

5. In 2017, the Applicant and some other management-level staff received threatening messages, including an envelope containing a bullet; the threats allegedly related to the transformational changes at Brindisi involving the Civilian Staffing Review (“CSR”).⁴ The United Nations Department of Safety and Security (“UNDSS”) undertook a Personal Security Risk Assessment (“PSRA”) and produced a report dated 29 August 2018.⁵ Due to the perceived heightened security risk, a decision was made to temporarily assign the Applicant to MONUSCO, Kinshasa, as

¹ Application, section I.

² Application, annexes 2 and 2a.

³ Application, section VII, para 1.

⁴ Application, section VII, para 2, Application, annex 5.

⁵ Ibid.

Chief, Operations Resource Management, D-1, on Temporary Duty (“TDY”) for three months effective 1 October 2018.⁶ On 15 January 2019, the Applicant, through a competitive process, was appointed temporarily to the position of Chief, Operations Resource Management, D-1. Her contract which was initially to run until 30 June 2020, was extended to until 31 August 2020.⁷ Through all this time she retained a lien to her position in Brindisi.

6. In 2020, a second PSRA was conducted. In the report, it is indicated that no perpetrators of the threats were identified and that the Applicant’s risk remains high. The PSRA, therefore discusses two options: reassigning the Applicant from Brindisi which appears “more practicable” or allowing her return if measures are implemented to attenuate the risk.⁸

7. In May and July 2020, the Applicant contacted the Director, UNGSC and the Office of Internal Oversight Services (“OIOS”) over the lack of information on her return to her post in Brindisi at the end of her temporary assignment with MONUSCO.⁹ In reply, the Director, UNGSC informed the Applicant that her return was contingent upon the completion of the second PSRA. The Deputy Director of OIOS informed the Applicant, among others, that the “OIOS investigation should not have any bearing on her return to her duty station, and that her return was purely a matter of management and United Nations Department of Safety and Security (“UNDSS”), both of whom are responsible for ensuring her personal safety and security and in providing her with a safe working environment”.¹⁰

8. On 3 August 2020, via a video conference the Applicant met with Mr. Christian Saunders, the Assistant Secretary-General for Supply Chain Management (“ASG-SCM”) and Ms. Giovanna Ceglie, Director, UNGSC to discuss her return to Brindisi following her temporary assignment in MONUSCO. During the meeting, the

⁶ Application, section V11, para 4.

⁷ Application, annexes 5 and 6.

⁸ Reply, annex R/2.

⁹ Application, annexes 9, 10 and 11.

¹⁰ Application, annex 9.

ASG informed the Applicant of his plan to place her in the position of Chief of Section, TMICC, RSCE.¹¹

9. On 10 August 2020, the Applicant sent an email to both the ASG and the Director, UNGSC protesting the proposed reassignment. She indicated that the proposed position is not commensurate with her skills, training, qualifications and experience.¹²

10. On 11 August 2020, the ASG replied to the Applicant's email insisting that "I can see how you will bring added value to the post of Chief TMICC in Entebbe, and it reinforces my view this is the right fit for you".¹³

11. On 27 August 2020, the Chief Human Resources Officer ("CHRO"), UNGSC informed the Applicant that her reassignment to RSCE will be effective 1 September 2020.¹⁴ The Applicant has since received her Personnel Action indicating that her reassignment is permanent and is due to commence on 1 September 2020.¹⁵

12. On 31 August 2020, the Applicant requested management evaluation of the contested decision.¹⁶ The Management Evaluation Unit ("MEU") is yet to respond.¹⁷

Submissions

Applicant's submissions

Prima facie unlawfulness

13. The Applicant submits the decision to transfer her to the TMICC post is tainted by procedural and substantive irregularities; the Organization abused its

¹¹ Application, annex 12.

¹² Ibid.

¹³ Ibid.

¹⁴ Application, annex 2.

¹⁵ Application, annex 2a.

¹⁶ Application, annex 19.

¹⁷ Application, Section VI.

discretionary authority and the transfer to the TMICC post is tainted by personal prejudice, malice, ill-will, bias and discrimination by UNGSC officials.

14. On the point of substantive and procedural irregularities, the Applicant contends that while she would have accepted a return to her P-5 level post in Brindisi, to assign her to a new position at a lower grade after serving for two years at chief of service level is necessarily a demotion.

15. The Applicant further submits that the new post is completely unrelated to anything she has done in the past. The TMICC post requires technical work and experience she simply does not possess. It is, therefore, impossible to assess whether the functions to be performed are commensurate with her competencies and skills.

16. The Applicant maintains that the Organization notified her on 31 August 2020 that as of 1 September 2020, one day's notice, that she would be moved out of her Brindisi post on a permanent basis, meaning that she would no longer hold a lien on her post and return when the security issue is resolved.

17. On the point of abuse of discretion, the Applicant takes issue with the proffered reason for the refusal to return her to Brindisi due to security. The Applicant admits that she had received several threatening messages from an anonymous sender. Those messages had, however, been received well in advance of the investigation that eventually took place. It took the Organization two years to finally investigate the threats and it did not find the perpetrator. At that point the case was already stale and it could not be shown that the Applicant was in any imminent harm. In any case, other staff had likewise received threatening messages but were not moved out of Brindisi. The motivations, therefore, for moving the Applicant are suspect.

18. In addition, UNGSC issued a Temporary Job Opening for her post in Brindisi without informing her of the same. Importantly, the staff member who is replacing her was telecommuting from Valencia, Spain, until recently. One of the PSRA

recommendations was to allow her to telecommute, especially during the COVID-19 pandemic, so it is unclear why she would not be allowed to do so.

Urgency

19. The Applicant submits that the matter is urgent as she will be transferred to the TMICC post effective 1 September 2020.

Irreparable harm

20. If the contested decision is not suspended, the damage to the Applicant's reputation and career will be severe. She will be forced to work in a position for which she is not qualified and in which she is guaranteed to fail. This will affect her future performance evaluations and ability to find other employment in her field and will result in unavoidable termination of appointment due to unsatisfactory performance.

Respondent's submissions

21. The Respondent submits that the Applicant has not fulfilled the three prerequisites for suspension of implementation of the decision. With regard to *prima facie* lawfulness, the Respondent contends that the Secretary-General has broad discretion to reassign staff under staff regulation 1.2(c). The Applicant was reassigned to a position at the same grade and level commensurate with her skills and competencies and for legitimate reasons. Specifically, the decision was based on the UNDSS 19 June 2020 security assessment, which has confirmed that the security risk for the Applicant to work in Brindisi remains high.

22. With regard to urgency of the matter, the Respondent maintains that the Applicant has not demonstrated that suspension of the contested decision is urgent. The record shows that since 3 August 2020, the Applicant was informed of the reassignment decision. However, she waited until 31 August 2020, more than three weeks later to file this application. Any urgency is self-created.

23. Finally, the Applicant has not demonstrated irreparable harm. The Applicant has been reassigned to a position at the same grade and level commensurate with her skills and competencies.

24. In view of the foregoing, the Respondent requests the Tribunal to dismiss the application.

Considerations

25. Pursuant to art. 2.2 of the Tribunal's Statute the Dispute Tribunal may suspend the implementation of an administrative decision during the pendency of the management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage to the concerned staff member. These are cumulative conditions. The Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is for a *prima facie* case to be made out by an applicant to show that there is a judiciable issue before the court.¹⁸

26. On the prong of unlawfulness, the Tribunal recalls that whereas there is no dispute that the Respondent manages the posts and reassigns staff with wide discretion¹⁹, this discretion is not unfettered and is subject to examination pursuant to the *Sanwidi* test, i.e., "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."²⁰

27. On the facts before it, the Tribunal is satisfied that the decision is *prima facie* unlawful. In particular, the stated reason for not returning the Applicant to her post in Brindisi, i.e., security, given the threats she had received three years earlier, appears

¹⁸ See *Hepworth* UNDT/2009/003 at para. 10, *Corcoran* UNDT/2009/071 at para. 45, *Berger* UNDT/2011/134 at para. 10, *Chattopadhyay* UNDT/2011/198 at para. 31; *Wang* UNDT/2012/080 at para. 18.

¹⁹ E.g., *Gehr* 2012-UNAT-236; *Kamunyi* 2012-UNAT-194; *Allen* 2011-UNAT-187; *Kaddoura* 2011-UNAT-151; *Hepworth* 2015-UNAT-501.

²⁰*Sanwidi* 2010-UNAT-084.

based on UNDSS assessment that the risk remains high. No fact, however, was offered to support any ongoing, current threat to her safety. More importantly, according to the UNDSS assessment, the measures which are capable of attenuating this risk to medium or low, are neither difficult to implement nor costly.²¹ In this regard, moreover, the Administration apparently gave no consideration to the fact that the function of the post in Brindisi, at least to some extent, could be performed remotely, as is currently the case world-wide at the United Nations.

28. As such, the choice to follow the UNDSS-proposed “more practicable” option of not returning the Applicant to Brindisi, appears motivated merely by the Administration’s convenience rather than by proper consideration of the interests involved. Further, the fact that the Applicant was informed that the reassignment was to be permanent on 31 August 2020, the day before the effective date of reassignment, and without consulting her on the permanence of such reassignment²², signifies a rushed decision-making or acting to impede the Applicant in a potential legal action before the Tribunal, or both. This is not a substantively and procedurally appropriate way of deciding reassignment, especially at a senior level. Altogether, the impugned decision is *prima facie* arbitrary and unreasonable.

29. On the prongs of urgency and irreparable damage, the Tribunal concedes that the matter is urgent as the Applicant’s assignment has expired and she is to be transferred to the TMICC post with immediate effect today. In this context, the Tribunal reiterates its holding that the term “implementation” in art 2.2 of the UNDT statute must not be interpreted to the effect that the Respondent’s unilateral determination of an immediate or even retroactive effect of the decision bars *a limine* request for suspension of action. Rather, an obstacle against such a suspension could be the occurrence of further legal consequences, in the sense that the Respondent cannot reverse them without incurring liability toward third persons, bearing costs,

²¹ Except a suggestion of retaining private security guard at residence, which is only proposed for consideration, and which, in any event, would apply to the Applicant in Entebbe (Annex R 2).

²² See *Lauritzen* 2013-UNAT-282 para. 37, endorsing the UNDT in that “the said decision was taken based on the personal circumstances of the Applicant and could only have been lawfully taken if she had had an opportunity to submit her views.”

obtaining consent of a third person; or where an applicant had accepted the consequences either expressly or, most often, implicitly by, e.g., not acting during the appropriate notice period, and then tries to retract. In any event, “implementation” does not follow from a mere announcement of the decision, or, for that matter, from the Respondent having processed the relevant data in Umoja.²³

30. As demonstrated by the last moment filing by the Respondent²⁴, he once again resorts to the claim of “implementation” in reference to a stroke of pen. To prevent such races that, as previously noted²⁵, border on absurdity, the suspension of the impugned decision is urgent and necessary. Moreover, the purported reassignment of the Applicant could entail burdening consequences: financial, logistical and legal, both at the Brindisi and the Entebbe end. Whereas they may be reversible, they may incur unnecessary financial and logistical costs.

31. In conclusion, the requirements of art 2.2. of the UNDT statute are met.

ORDER

32. The application is granted and the decision to reassign the Applicant to Regional Service Centre at Entebbe is suspended pending management evaluation.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 1st day of September 2020

Entered in the Register on this 1st day of September 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

²³ See *Cox* Order No. 150 (NBI/2018) and jurisprudence cited therein.

²⁴ Respondent’s supplemental reply to the application for suspension of action, filed on 1 September 2020.

²⁵ *Harris* Order No. 135 (NBI/2017).