



Before: Judge Memooda Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

ZHANG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for applicant:

Duke Danquah, OLSA
Bart Willemsen, OSLA

Counsel for respondent:

Steven Margetts, ALU
Josianne Muc, ALU

Introduction

1. The applicant in this case is contesting what she alleges to be a “reassignment” or “transfer” to the Department of General Assembly and Conference Management (DGACM), communicated to her on 9 February 2009 (2009 Return to DGACM), as well as a medical evaluation dated 13 March 2009 (MSD Evaluation), on the basis that both actions were motivated by management’s alleged retaliation against her over a number of years. She prays for: transfer to a post outside of DGACM at a level that recognizes her qualifications, or in the alternative a full salary until her retirement in October 2013; access to her medical file and a correction of the MSD Evaluation; disciplinary action to be taken against her current retaliators; and moral damages and legal costs. In order to attempt to prove her allegations, the applicant submitted a protracted narrative of events from 1997 to the present time.

2. As this is a case which turns primarily on the facts, of which there are many disputed over a long period, and because of the nature of the matter, I have been required to undertake a careful review of the applicant’s many allegations and to come to a conclusion on the merits, notwithstanding the concerns I have in relation to the receivability of the matter, as discussed below.

The facts

3. The applicant, a permanent appointee, joined the United Nations Department of Conference Services (now DGACM) on 21 October 1985 and worked in various sections of that department until 2006. She then undertook a number of *ad hoc* assignments via which she was “loaned” to other departments while continuing to occupy her permanent general service DGACM post, before returning to work at DGACM on 16 March 2009.

4. While occupying a G-6 post in DGACM, the applicant received a G-7 special post allowance from September 1996 through July 1997 (the SPA). On 10 September 1997, an incident took place involving the applicant and her (then) Section Chief, and

which the applicant alleges to have been a sexual assault. She states that on the advice of the medical officer to whom she reported the alleged assault, she also reported the matter on the same day to the Assistant Secretary-General (ASG) and the Director of the Department in two memoranda. It was also reported to the Chief of the Executive Office of the Department. The applicant's memoranda alleged that the Section Chief had shouted at her and pushed her in a violent manner. She thereafter requested the assistance of the department to "put your immediate attention on this matter and I do need a protection from a violence attempt from my Section Chief [sic]".

5. The (then) Administrative Officer testified at the hearing that the applicant and the accused Section Chief were both interviewed some days after the incident. A subsequently produced note to file suggests that the two were interviewed on 15 September 1997. This note also states that "[t]he details of what [the applicant] related to [the Administrative Officer] are all contained in the memoranda [of 10 September 1997]". The note then refers to a second meeting between the applicant, the Administrative Officer and the Chief on the same day, at which the same iterations were made by the applicant. In her testimony, the applicant however denied knowledge or recollection of any meeting or interview in relation to the incident.

6. The note of 15 September 1997 also states that, at the second meeting—

When asked what course she wanted taken concerning her allegation, [the applicant] replied that all she wanted was to bring the "facts" to the Executive Office's attention.

The note suggests that a further meeting was to be held with the applicant, the accused Section Chief, a staff representative and another Chief of the Executive Office the following week, though no evidence was tendered to either prove or disprove whether this occurred.

7. On the dates 11–12 and 15–16 September 1997, the applicant took sick leave which she says was due to the alleged assault. It was the reporting of this alleged assault that the applicant says motivated and generated a number of alleged retaliatory decisions taken against her, including those the subject of the present application.

8. From 27 July 1998 to May 1999, the applicant took special leave without pay (SLWOP) from DGACM during which time she undertook graduate studies. On 22 January 1999 (whilst on leave), the applicant was ordered to pay USD2,854.43 for an “SPA overpayment from 1 August 1997 through 31 July 1998” and “Salary overpayment from 28 through 31 July 1998” as well as for a “Mid-month advance for August 1998”.

9. The applicant returned to work at DGACM in May 1999 and was assigned to work in what she alleges was a “printing shop”, before being reassigned to work at the Office of Disarmament and Decolonization branch of DGACM on 1 July 1999. Her performance, respectively from 1 November 1997 to 27 July 1998 (excluding her study break between 27 July 1998 and 23 May 1999), and then from 1 July 1999 to 2 December 1999 was “appraised” via two separate one-page letters from the Chief of each section.

10. Between December 1999 and April 2001, the applicant applied for five UN jobs, but was not short-listed or interviewed for any of them.

11. From 2001 to 2006, the applicant was assigned to work on ECOSOC’s Repertory Report at a G-6 level. It was stated by her and uncontested that this was due to the exceptional intervention of the newly appointed Under-Secretary-General (USG) of DGACM in August 2001 in an effort to assist her.

12. In February 2006, through an *ad hoc* arrangement, the applicant worked for a period of one year with the UN System Influenza Coordinator (UNSIC), within the UN Development Group. By letter dated 8 February 2006, the Coordinator of UNSIC wrote to the USG of DGACM, referring to the “kind offer to loan this office

the services of [the applicant] for a period of one year starting in January 2006”. This letter requested that the applicant be physically based in DGACM “for the immediate future”, due to space limitations at UNSIC.

13. On 13 February 2006, the Officer-in-Charge, Executive Office, DGACM, prepared a “Clearance for Separating Staff Members” to be issued to the Clearance Officers for various administrative sections, noting that the applicant would be leaving the Organization on 28 February 2006, as she was assigned to UNSIC. It does not appear the applicant ever separated.

14. In an email of 24 March 2006 between UNDP managers (administering UNSIC) it was stated that “[the applicant] should be employed on ALD [an appointment of limited duration], but somehow we need to charge her G6 post [at DGACM]”.

15. Starting 1 March 2007, following another *ad hoc* arrangement from DGACM, the applicant was assigned to the Department of Economic and Social Affairs (DESA) on a non-reimbursable loaned basis for a period of six months, which was extended until 31 October 2007.

16. From 1 November 2007 to 6 April 2008, the applicant returned to the ECOSOC Affairs Branch of DGACM. On 7 November 2007, the Medical Services Division wrote to the Executive Officer, DGACM, stating that “[d]ue to an ongoing medical condition, [the applicant] cannot at present perform duties involving the use of a computer for more than a total of 2 hours a day. She also cannot lift anything heavier than 3lbs”. It was noted that the applicant’s injury to her hand and resulting condition would be reassessed three months from that time.

17. On 28 November 2007, the Administrative Officer, Executive Office, DGACM, wrote to the applicant, stating—

Further to your sick leave status, please note that we have contacted the Medical Services Division (MSD) regarding your absence on **full**

time sick leave. As you know, the MSD had written on **7 November 2007** informing of your **return to work** with limitations. However, to date, as you have not returned to work, we have been in contact with the MSD requesting information on your absence.

Regarding your functions in the ECOSOC Affairs Branch, I wish to confirm that you will assume **G-6** functions of a **Meeting Services Assistant** in the Branch. The specifics of those functions will be shared with you by the Chief of Branch...upon your return. Of course, should you wish to know in advance and should you have an idea of when you will return to work, you may contact [the Chief of Branch] directly for further info [emphases added].

It is unclear from the evidence whether the applicant responded to this email or contacted the Chief of Branch for further information.

18. On 8 February 2008, MSD wrote to the Executive Officer, DGACM, clearing the applicant to return to work from 12 February 2008, with restrictions on the type of tasks she could physically perform, which clearance would be in effect for 6 months before being reviewed. The request for special accommodation was subsequently renewed in August 2008.

19. On 29 February 2008, the applicant was advised by the Executive Officer that she was being assigned as a Digital Archives Implementer, and was provided a job description of the position. On the basis of the restrictions contained in the medical clearance of February 2008, the applicant objected to this position and as a result was again assigned to DESA pursuant to another *ad hoc* arrangement from 7 April 2008 to 15 March 2009.

20. On 9 February 2009, the Executive Officer of DGACM wrote to the applicant, stating—

As you are aware, your temporary assignment to DESA is set to expire this week. Both DGACM and DESA have made an extended accommodation for you during your recent period of illness, and we hope that you have had the chance to recover from your injury. This arrangement cannot continue indefinitely, and you will be expected to return to DGACM to resume your duties with GAEAD. Please proceed to the Medical Service prior to your return.

21. The applicant responded by email two days later, requesting a job description of the proposed position she would take at DGACM, and reminded the Executive Officer of her medical restrictions.

22. On 12 February 2009, the applicant attended a consultation at the Medical Services Division, at which she agreed to undergo a voluntary independent occupational medical evaluation for functional capability on 6 March 2009. The applicant's case was referred to a certified independent medical evaluator specialising in the medical condition afflicting the applicant (Independent External Doctor), from the Mount Sinai-Irving J. Selikof Center for Occupational and Environmental Medicine.

23. Also on 12 February 2009, the Executive Officer of DGACM asked the applicant to make an appointment to discuss her proposed assignment and job description, which she believed "is very much in line with the work you are interested in". From the subsequent exchange, the meeting with the Executive Officer appeared to take place that day, during which job descriptions for a Meeting Services Assistant and a Programme Assistant were discussed. On the same date, and apparently after the meeting, on 12 February 2009, the applicant reported what she alleged to be retaliation against her by the Executive Officer to the Ethics Office; this retaliation allegedly being motivated by her reporting the incident of 10 September 1997.

24. On 13 February 2009, the Executive Officer of DGACM wrote to the applicant confirming that she had provided a job description for “the same job description we gave you” (which from the correspondence appears to have been that of a Programme Assistant) to the Medical Services Division in order to ensure that the applicant could physically perform the tasks required by the job. It appeared that the applicant believed the Medical Services Division had been given a job description for the role of Meeting Services Assistant, which she was unable to perform. The applicant replied by email on the same date, stating that in relation to the job description for the role of Programme Assistant, she was already performing 11 of the 12 responsibilities in her (then) current role and that her medical condition did not prevent her from doing that job.

25. On 9 March 2009, the applicant called the Independent External Doctor to request a copy of his evaluation and was allegedly informed that the UN Medical Service told this Doctor that the report should go directly to the UN Medical Service. Based on the result received from the Independent External Doctor’s evaluation, the applicant was cleared by the Medical Services Division to return to work on 13 March 2009, with permanent activity restrictions as conveyed in the Independent External Doctor’s evaluation. The applicant emailed the Director of the Medical Services Division on the same date to question some of the restrictions, stating that there was no correlation between her injury and some of the recommendations. In a reply dated 16 March 2009, a Doctor of the Medical Services Division stated that “[the restriction] was part of the recommendation of the expert. Is related to the risk of falling and eventually further damage to your upper extremity, is another factor to protect you and allow you to work on the best possible conditions”.

26. On 16 March 2009, the applicant returned to work at DGACM. On 18 March 2009, she filed a case with the Panel on Discrimination and Other Grievances. On 20 March 2009, the applicant again reported allegations of retaliation (allegedly founded on the selfsame reporting of the 10 September 1997 incident) to the UN Ethics Office. On 10 April 2009 she sought administrative review of the MSD Evaluation

of 13 March 2009, and the 16 March 2009 Return to DGACM. By letter dated 21 May 2009, the applicant was advised of the outcome of her request for review. She filed an appeal with the JAB on 11 June 2009.

27. On 5 June 2009, the Chief of the applicant's current office allegedly informed her that her position at that time was only a three-month assignment which would end at the end of July 2009, although I note that the applicant still appeared to be working in that or another position in DGACM at the time of the hearing in January 2010.

28. On 5 October 2009, the Ethics Office found that there was no prima facie case of retaliation against the applicant. On 24 June 2009 the applicant submitted an appeal to the JAB, which was transferred to the Dispute Tribunal on 1 July 2009. The respondent's reply was submitted on 26 August 2009. A directions hearing was held on 12 November 2009 at which various procedural orders were made. These having been complied with, there was a hearing on the merits held over an entire day on 28 January 2010. The Tribunal heard 3 witnesses for the applicant, being herself, a former supervisor and a representative from the UN Focal Point for Women; together with three witnesses for the respondent, being the Administrative Officer at the time of the alleged 1997 assault, the relevant Doctor from the UN Medical Services Division and the Executive Officer from DGACM. At this hearing I granted the parties leave to file final written submissions on matters arising, which both parties did in compliance with deadlines which were extended on one occasion. In correspondence subsequent to the hearing, and without the sanction of her Counsel, the applicant sought to allege, ostensibly to introduce further documentation, that the hearing was a directions hearing and not a final hearing on the merits. The applicant's Counsel, apparently having spent two days consulting with the applicant prior to the hearing, correctly in my view, conceded in a follow-up e-mail to the Registry that the hearing of 28 January 2010 was indeed a final hearing on the merits.

Applicant's submissions

29. The applicant submits that the impugned decisions are retaliatory in their nature, are contrary to the Organization's rules and policies, are tainted by procedural and substantive defects, are an abuse of authority, are prejudicial and motivated by ill-will, and designed to harm the applicant's respect and dignity. The applicant says that each alleged decision over the years was improper and that events establishing a general pattern of retaliation are evident, which I will now outline.

2009 Return to DGACM

30. On 16 March 2009, the applicant was in her words "rushed" back to work at DGACM for no apparent reason and was not provided with a work station, telephone, computer, chair, valid pass, or job description. She was unsupervised and only given token tasks to perform without proper facilities; the space which she had been assigned to was filled with rubbish, and the existing chair was broken. She says she was not provided with a computer or telephone until 9 April 2009, when DGACM finally requested those things for her.

31. On 8 May 2009, a staff member from a different office who works on the same floor as the applicant was told to take the applicant's daily attendance, including her time in and out and other activities, and to report back to the head of another office. On 5 June 2009, the Chief of the applicant's office informed her that she was only occupying a three-month assignment which would end at the end of July 2009. The applicant says this double-dealing strategy was employed to make it appear as if DGACM was "facilitating" the applicant, when it is in fact using executive power to retaliate against her.

32. The applicant further alleges that generally, when she was given opportunity to transfer out of DGACM, the department stymied her chances, especially by keeping her in *ad hoc* temporary arrangements as a way to maintain control over her in order to continue subjecting her to retaliatory action. When the applicant approached the Executive Officer of DGACM to discuss her reasons for wanting to

transfer out of DGACM because of the ongoing retaliation and harassment, the Executive Officer's response was, "Why don't you quit the UN?" Thus, she alleges the 2009 Return to DGACM was further evidence of this pattern of retaliation.

MSD Evaluation

33. The applicant contends that arranging an independent medical assessment on 12 February 2009 was merely a pretext to force her into a marginalized position within the Organization. For this assessment, DGACM provided a job description of a Meeting Services Assistant, G-6, to the Medical Service to serve as a basis for the external medical evaluation, which was different to the job description for the position of Program Assistant provided to the applicant. She asserts that the medical evaluations and treatment overall sought to have her labeled as "disabled" in order to minimize her potential to transfer to another department.

34. The applicant alleges that the medical evaluation failed to take into account her actual condition and ordered unjustified restrictions that limit her career possibilities within the Organization and relegate her to menial and demeaning tasks which do not give due regard to her post-graduate qualifications and experience.

35. Further, the Medical Services Division's attempt to have her meet with a psychiatrist was unrelated to the issues the applicant has with her hand and was thus demeaning and an attempt to label her as mentally unstable in order to ensure that she is unable to obtain a position within another department.

36. In sum, the applicant states that the motivations of DGACM in ordering the medical assessment were retaliatory, that the external medical examiner was not independent and that the external medical examiner's conclusions were unsound.

Various acts of alleged retaliation

37. The applicant states that a number of events leading up to the impugned decisions provide evidence of a pattern of retaliation, stemming from the initial

assault in 1997 and the applicant's reporting of it. She states that no investigation or other action was taken in relation to the alleged sexual assault at any time. When the applicant reported the alleged attack and assault described above, it was to friends of the accused attacker, resulting in their developing a dislike toward the applicant. Her department was aware of the alleged assault but discouraged her from reporting it.

38. She states that the first instance of alleged retaliation occurred when she was reassigned within her Department on 16 October 1997 to the Office of Official Records Editing Section, where the Chief was a friend and compatriot of the accused. The applicant was given no telephone or computer in order that she could do her work. After she reported the alleged assault in September 1997, as part of the retaliation, management deducted what they alleged to be an SPA overpayment of USD2,854.43 when she returned to work from leave in 1999.

39. She contends that in May 1999 she was assigned to menial labor which she was not trained to do which was far beneath the training and skills of someone with a then-Master's degree in Macroeconomic Policy Management. Later assignments required her to perform tasks such as "pushing buttons and scanning documents", even in 2008 after her obtaining of a doctorate degree. She says this was simply a waste of the Organization's human resources and a retaliatory act meant to harm her.

40. In November and December 1999, performance appraisals were made in DGACM which only emphasized the applicant's secretarial and clerical skills, and not her substantive work. As a result, the applicant says she lost the chance to work for UNDP in a more complex role. On an occasion while the applicant worked for the Office of Disarmament and Decolonization Branch on the night shift, the Executive Office of DGACM unfairly denied her equal reimbursement of taxi fares after 10:55pm, when other team members had received reimbursement.

41. On 13 February 2006, without prior notice the applicant was issued a "Clearance for Separating Staff Members". Then, even though she was assigned to work for UNSIC, she had to work in an office where she was given no computer and

no telephone. Later, on 15 August 2006, the applicant says she was informed by “a staff member from the Avian Influenza Office” that an Executive Officer of DGACM ordered UNSIC to destroy all of the correspondence which could prove that the applicant worked for that office in order to harm her chances of returning there. As a result, UNSIC did not provide a performance report for the applicant for that assignment, destroying her chances for a possibility for a further contract with that office. The decision to assign her to work as a Digital Archives Implementer on 29 February 2008 conflicted with the medical assessment that was forwarded to the Executive Officer of DGACM on 8 February 2008, and was evidence of retaliation.

Respondent’s submissions

42. The respondent submits that generally, it is the applicant’s responsibility to establish the arbitrariness, discrimination or other improper motivation alleged, and that there is no evidence which the applicant adduces which does this. On the contrary, significant efforts have been made by DGACM to accommodate the applicant's physical limitations and to facilitate her career aspirations, which have afforded the applicant more favourable treatment than an average staff member.

Return to DGACM

43. In relation to the alleged transfer back to DGACM, the respondent contends that there was no “transfer” as the applicant’s assignments with DESA during the periods 1 March–31 October 2007 and 7 April 2008–15 March 2009 were *ad hoc* arrangements during which time the applicant remained occupying a DGACM post on DGACM’s payroll. Further, all parties (the applicant, DESA and DGACM) had acknowledged the temporary nature of these assignments, variously referring to them as a “special assignment to DESA for 6 months” (email from USG, DGACM, to Executive Office, DGACM of 26 February 2007) and “reassignment for the next six months back with DESA” (email from Executive Officer, DGACM, to applicant of 14 March 2008). Further, the applicant wrote to the USG of DESA on 17 June 2008, thanking him for hosting her for six months and asking him for an extension of her

assignment for another year at DESA, or consideration for any post in DESA. In his response the USG indicated that the—

[S]ix month assignment with the Secretariat of the Permanent Forum on Indigenous Issues was agreed for the purpose of providing [the applicant] an opportunity to work while receiving important medical treatment. The arrangement was based on a clear understanding that [she] would continue to be a staff member of the Department for General Assembly and Conference Management during the assignment which [was] on a non-reimbursable basis.

44. On 8 August 2008 the applicant wrote to the USG of DGACM, thanking him for “agreeing to [her] special assignment to DESA for the past six months” and seeking his support to extend the arrangement for a further year given that her medical condition prevented her from performing the duties of Meetings Services Assistant.

45. In conclusion on this point, the respondent relies on the jurisprudence of the former UN Administrative Tribunal which states that the Secretary-General has a power which he invests in his supervisory officers to relieve or invest the staff member with certain duties, according to the exigencies of service (Judgment No. 165, *Kahale* (1972)).

MSD Evaluation

46. In relation to the allegation that the March 2009 external medical evaluation was undertaken in order to force the applicant into a marginalising position as a Digital Archives Implementer, the respondent avers that discussions of this position took place almost a year prior to the medical examination, as evidenced by the job description provided to the applicant on 28 February 2008. Further, the applicant had had a record of long absences resulting from sick leave over a long period and regular medical assessments were required and recommended in order to monitor her condition.

47. The applicant's condition was evaluated in March 2009 by the Independent External Doctor, who made recommendations for restrictions to generally limit the risk posed to the applicant's injury in her day-to-day tasks. The respondent further contends that the medical evaluation was in line with ST/AI/2005/12 (Medical clearances and examinations) which provides in paragraph 1.3 that "[m]edical fitness of candidates for employment and staff members is determined by reference to their health status and occupation".

48. In response to the applicant's allegation that the Medical Services Division was not given the proper job description to evaluate the applicant against, the respondent notes that the Division was given two: that of Meeting Services Assistant and of Programme Assistant. The respondent says that once it was decided that the applicant would perform the duties of a Programme Assistant, the correct job description was clarified with the Medical Services Division and this was used as the basis for the external medical evaluation.

49. The Medical Services Division notified DGACM on 18 May 2009 that if the applicant wished to extend her physical activity beyond the recommended limitations, she would be able to do so by providing a written statement indicating that she was willing and able to undertake activities beyond those recommended by the independent evaluator.

Various acts of retaliation

50. In response to the various acts of alleged retaliation, the respondent submits that all allegations which concern the alleged sexual assault (and subsequent events of alleged retaliation) are inadmissible and should be struck out, as they are irrelevant and unfounded. The respondent contends that there is no connection between them and the issues in dispute as they relate to (a) separate administrative decisions; (b) taken at different times; (c) by different individuals; (d) on different subjects. Therefore, under cover of this objection regarding admissibility, the specific alleged

incidents which the applicant says constitute a pattern of retaliation do not in any event do so.

51. In relation to the alleged assault, the respondent points out that at the time it was reported, it was described by the applicant to more than one party as a physical (non-sexual) attack, and not a sexual assault. With regard to the allegation that the SPA payments were withdrawn in retaliation to the reporting of the alleged assault, the respondent says it was long agreed in January 1997 (before the alleged assault), that the SPA would be for a temporary period. Therefore, as the alleged assault was not until September 1997, the two could not be connected. Further, the reclamation of the SPA was a result of this amount being overpaid, an accounting error, the calculations in relation to which have been shown to be correct.

52. The respondent points out that the performance reports of 24 November and 2 December 1999 gave favorable assessments of the applicant's performance. Regarding the taxi fare claim, the respondent says it was approved and signed by the relevant Administrative Officer and Chief of Section, and that only the Controller's signature is missing. As these amounts were authorised to be paid to the applicant, it can be presumed that she was paid them. It was for the applicant to take this matter up if no such payment was made.

53. In relation to the allegation that DGACM prevented her from applying for other posts and attempted to block her transfer to DESA (which, being unsuccessful, resulted in her returning to DGACM), the applicant was precluded from transferring to DESA as she did not qualify as an internal DESA candidate, as required by the position and noted in the response from DESA dated 11 July 2008. DGACM was supportive of the candidate applying for non-DGACM positions, as evidenced by its willingness to send her on special assignments. Further, she would have been eligible to apply for other DESA positions if she had taken the statistical examination, which many DESA positions require, and which she did not. In relation to the allegation that DGACM attempted to keep a "stranglehold" on the applicant by physically placing her in DGACM, despite her being on assignment at UNSIC, it was at

UNSIIC's request that the applicant remain physically at DGACM during this assignment. In this regard, in her memorandum of 8 August 2008 to the USG of DGACM, the applicant requested an extension of the *ad hoc* arrangement with DESA on the basis that her medical condition prevented her from performing the duties of a Meetings Services Assistant. In order to comply with her medical restrictions, since her return to DGACM on 16 March 2009, she has been assigned to the position of Programme Assistant.

Considerations and findings

54. In this matter I have had the benefit of substantial submissions prior to the hearing on the merits. At the hearing, I then had the further benefit of the appearance of three witnesses from either side, including the applicant herself. Thereafter, as noted above, the parties filed further submissions with my leave, which I have considered, including the subsequent documents filed by the applicant.

Receivability

55. Although I was not addressed specifically on the question of receivability, I do find it to be an issue for the applicant. Recent jurisprudence of the Tribunal has tended towards a wider definition of what constitutes an "administrative decision" for the purposes of art 2.1(a) of the Statute of the Tribunal than that previously applied by the UN Administrative Tribunal, as outlined in *Andronov* (2004) UN Administrative Tribunal 1157—cf. *Luvai* UNDT/2009/074; *Wasserstrom* UNDT Order No. 19 (NY/2010). Without deciding what the appropriate test is, an administrative decision must clearly at the very least require a decision to be taken by or on behalf of the Organization in the course of managing its affairs and it is not apparent that the matters the applicant contests satisfy even an expanded definition of what constitutes an administrative decision. The first alleged decision, involving the 2009 Return to DGACM communicated on 9 February 2009, seems to me to be a confirmation of an existing arrangement, coupled with a request that the applicant undergo a medical evaluation. While arguably administrative in nature, the said

communication does not, aside from perhaps the requirement that the applicant undergo an evaluation (which is not challenged) result in a determination or new action and to my mind does not contain a decision over which the Tribunal has jurisdiction. In any event, if the applicant had wished to challenge the decision which preceded the 2009 Return to DGACM, she should have done so at the time she was informed that her second *ad hoc* assignment was only temporary in nature. She failed to do so and indeed, accepted the temporary nature of the assignment. In any event, she would have been well out of time (at the time of filing her application) to challenge the original decision and has not put forth any exceptional case warranting extension or waiver of the Tribunal's time limits.

56. It is also doubtful that the MSD Evaluation constituted an administrative decision. This evaluation which was voluntarily attended by the applicant resulted in a series of recommendations which the applicant was entitled to waive in writing. If she was dissatisfied with the outcomes, she could have sought review of them via other avenues. Again, were there to have been any administrative decision, it would have been subsequent to the MSD Evaluation (such as, for example, finding that the applicant was unable to perform a specific task or role), but this is not the nature of the application before me. The various events which occurred prior to 2009 certainly contained a number of administrative decisions, but as I have described, these are not presently before me except insofar as they inform the impugned decisions.

57. Accordingly, I find that the application is not receivable. However, in the interests of justice, as indicated earlier in this judgment, I have decided to undertake a final review of the applicant's complete allegations in this matter.

Consideration of merits

58. The respondent at all times objected to the introduction of evidence or claims which it considered irrelevant or otherwise inadmissible, on the basis that they related to events which were peripherally related, at best, to the impugned administrative decisions. Indeed, prior to the commencement of the hearing, the respondent moved

a Motion to Strike based on grounds (a) to (d) in paragraph 50 above. Whilst I found that the respondent's motion was not entirely devoid of merit, it was my view that the allegations of retaliation in relation to the alleged sexual assault may be prima facie relevant as they go to the heart of the applicant's case on its merits; i.e. that the alleged improper motivation taints the administrative decisions. As the matter had been set down for one day only, I preferred not to deal with the issue piecemeal. I therefore placed on record the respondent's objections and submissions on admissibility for my consideration, and found that it was for the applicant during the proceedings to persuade the Tribunal of the relevancy or otherwise of the matters in dispute. While noting the respondent's objections, I entertained to take the applicant's case at its best—that is, to assume that the impugned decisions might have had motivations of retaliation, which retaliation had been continuing for some twelve or more years—and to examine the evidence relating to allegations which might otherwise be found inadmissible on various grounds.

59. I was not addressed expressly at the hearing of the matter on the standard or burden of proof in relation to any of the allegations, although in its reply the respondent stated that, in accordance with the jurisprudence of the UN Administrative Tribunal, the burden was the applicant's to bear. This case would be required to be determined upon a balance of probabilities, each party proving that which it has asserted—see *Parmar* UNDT/2010/006 and *Sefraoui* UNDT/2009/095.

60. In the submissions and at the hearing, in addition to the impugned decisions, the applicant also sought to challenge the correctness of many other events, which might be classified as administrative decisions, which have occurred since 1997. I do not believe that such events are necessarily irrelevant, as contended by the respondent, but note that they are relevant for present purposes only insofar as they bear on the actual administrative decisions challenged. In any event, aside from the fact that many of the decisions would be time-barred, requests for administrative review and management evaluation are necessary steps in the appeal process, neither of which were sought in relation to any of these decisions (cf. *Crichlow*

UNDT/2009/028; *Parmar* UNDT/2010/006), being additional reasons why a request for their review would be irreceivable under the current application.

61. I will first consider the 2009 Return to DGACM and the MSD Evaluation to determine whether they appear to have been motivated by retaliation, as alleged.

2009 Return to DGACM

62. I do not consider that the return to DGACM was a “transfer”, as contended by the applicant; she did not at any stage change posts and was acknowledged by all to have been on loan from DGACM to DESA while she completed a temporary assignment at the latter. Prior to her second and final assignment at DESA, the applicant was informed, by way of email dated 8 April 2008, that:

noting [her] stated expression of interest to continue [her] work in DESA, arrangements have been finalized with DESA to continue [her] *temporary* assignment *there...*[a]s you know, this *temporary* assignment is our endeavour to facilitate your return to work in line with the 8 February 2008 memorandum from the Medical Services Division. Therefore, the period of this assignment is effective asap and remains in effect through 15 August 2008 [emphases added].

I do not see how it could reasonably be construed that the applicant would have done anything other than return to her DGACM position at the expiration of this period (the end date of which was extended), or that the parties believed or represented otherwise. Other subsequent emails also refer to the temporary nature of the assignment, including that of 24 June 2008 and the applicant’s own email of 8 August 2008, which acknowledged the temporary nature of the assignment. At the hearing, the applicant’s Executive Officer from DGACM testified that the applicant was made aware, prior to and during each *ad hoc* arrangement of its temporary nature, and I found this testimony credible. Further, the applicant stated during her cross-examination that during the time of her assignments, she had applied for a large number of advertised positions, at DESA and otherwise. This appears to me

consistent with the behaviour one might expect of an applicant who was aware that she was required to return to a department where she did not want to work. It does not strike me that any party was under a misconception that the applicant was not required to return to DGACM at the end of her DESA assignments and I am not satisfied that the “transfer” was motivated by retaliation, but rather was a predictable and linear outcome of which the applicant ought to have been aware.

63. I was not addressed specifically by the respondent in relation to the applicant’s allegations that she returned in March 2009 to a position where she did not have proper functions or facilities; as the applicant puts it, that she was “rushed” back. However, I am mindful of the evidence of the applicant and her Executive Officer which seemed to agree that prior to the replacement of the applicant in a position within DGACM, the functions which she was able to perform (taking into account her at that stage uncertain medical limitations) needed to be assessed. It seems to me reasonable that this uncertain capacity may have contributed to the Department being unable to organize the exact functions she would undertake upon her return. I also note in passing that while I was informed in her application and testimony that the applicant had evidence of the unreasonably untidy state of the work station she returned to, this was not tendered to me, and even if it had been, I do not suggest it would have been decisive. I was also not addressed specifically at the hearing on the issue of whether a staff member was made to keep notes on the applicant’s attendance upon her 2009 Return to DGACM. The applicant, despite making this allegation, did not lead evidence to prove that the motivations were anything other than legitimate. This is despite the fact that she was given the opportunity to call any witnesses she wished to, or to cross-examine those of the respondent.

MSD Evaluation

64. The applicant complains that the MSD Evaluation was retaliatory and infers that it was done with intent to label her as disabled, so that it would be difficult for her to obtain employment other than in DGACM. She does not point to any

particular rules or regulations having been breached by the Medical Services Division or those who referred her to them, but rather alleges the motivation for the referral was improper, and thus the entire process is tainted.

65. It appears to have been reasonable, and it was not argued otherwise, that the applicant was required in February 2009 to be subjected to a medical assessment prior to her return to her functions, taking note of what all parties acknowledged as an existing medical condition. Her previous medical assessments had recommended ongoing testing and she was returning to a new role. The applicant's Executive Officer testified that DGACM, despite its size, had relatively similar functional requirements across its positions, many of which would have been difficult for the applicant, given her restrictions. It was stated that the applicant was first suggested a position on a scanning operation, but that after the applicant inspected the machine and station, this was not considered appropriate. Accordingly, another role was proposed (that of Programme Assistant) and the applicant stated that she was already performing eleven of the twelve functions of that role. Making an assessment on the basis of tasks the majority of which the applicant was already performing does not appear to have been an unreasonable course of action.

66. The Doctor (from the Medical Services Division) testified, which testimony I found to be credible, that she decided to refer the applicant to an external specialist as there seemed to be little improvement in the applicant's condition over the preceding fifteen months, despite intensive treatment, and because the Doctor's own investigations had caused her to be uncertain as to the quality of the medical treatment the applicant had received. Accordingly, the Doctor made enquiries of physicians with greater specialised knowledge and referred the applicant to an independent specialist. The Doctor found the specialist's conclusions reasonable and transmitted the recommendations to DGACM in the same language as she received them. This seems to me to have been an entirely reasonable course of action, and there is no suggestion it did not comply with the Organization's rules and regulations. Further, as the Medical Services Division and the expert to whom they referred the

matter were independent from the applicant's Executive Officer (and, indeed, other parties within the Organization), I envisage little scope for the Medical Services Division's assessments to have been tainted by a desire to retaliate against the applicant, and I was not led any evidence to dissuade me from this view.

67. The applicant also raised an argument that an attempt to "force" her to see an internal psychiatric physician was evidence of retaliation as the Doctor from the Medical Services Division tried to "frame" her as having a mental health problem. This incident was put to the Doctor from the Medical Services Division, who testified that on a particular assessment in March 2008, the applicant had become emotional such that the Doctor was unable to calm her. Accordingly the Doctor, together with the applicant, called upon the original Doctor's supervisor, a more senior Doctor. Noticing the applicant's anxious behaviour, which included pacing about the room and discussing personal problems unrelated to her injury, the senior Doctor suggested that it might be useful for the applicant to speak with a counselor. After this suggestion, the applicant raised her voice shouting repeatedly that she was a US citizen, thereafter leaving abruptly and slamming the door shut. Save to deny slamming the door during her cross-examination, the applicant did not challenge the respondent's witness regarding the latter's version of events.

68. It was clear from the applicant's testimony generally that she was genuinely upset by events, real or perceived, the subject of her application. She was visibly emotional while giving evidence, and the witnesses she called also testified to her having been emotional on the occasions they met with her several years after the 1997 incident and the alleged retaliatory acts. Whilst the Tribunal cannot comment on the conclusions arrived at by the doctors, the evidence led did not establish any improper motive behind the suggestion that the applicant might benefit from counseling. Accordingly, I do not find that there is any link to any improper motivation against the applicant in relation to the suggestion that counseling may have benefited her.

69. Furthermore, the applicant was advised on 18 May 2009 that she could extend her activities beyond the recommended limitations, if she provided a written statement that she was willing and able to. Therefore, the MSD Evaluation was not necessarily binding on the applicant in the range of functions she could perform. The applicant seemingly failed to follow the suggestion.

70. In light of the above, I do not find any satisfactory evidence that the impugned administrative decisions were motivated by retaliation. That, on the face of it, is sufficient to find that her application should be rejected. However, in the interests of finality in adjudicating a long-spanning history of events that appear to the applicant unjust, I will examine the specific matters she raised at the hearing in order to determine whether any more subtle pattern of retaliation may be found.

Sexual assault

71. This is a matter alleged to have occurred over twelve years ago, and which from the applicant's own description appeared to be an unpleasant violent attack, but not a sexual attack. As previously noted however, I am not tasked, or, indeed able, in present proceedings to examine the conduct of either party in relation to it. Despite the substantial amount of evidence I allowed to be led by the applicant, considerations of what actually happened on 10 September 1997 and the manner in which the Organization handled the complaint are not the subject of present review and the alleged incident is only relevant insofar as it may inform whether the alleged contested administrative decisions were tainted by improper motives or considerations. That is, taking the applicant's case as she puts it, it must be established that the applicant's reporting of the incident in 1997 caused her supervisors to develop an animosity towards her that has both continued since this time and spread to other supervisors, such as her current Executive Officer, and that this animosity has motivated the alleged administrative actions taken in relation to her.

72. The applicant did not put forward a case that the alleged assaulter himself continued to harass or retaliate against her. In fact, it appeared that he left the Organization a considerable time ago. The applicant stated rather that it was others who were sympathetic to him that had caused the retaliation to continue. During her testimony, the applicant stated that she believed at least one person who had remained with the Organization was a friend of the alleged assaulter as they were from the same country, and it was from this basis that she inferred retaliation. She did not express any other basis for this belief or allegation. Further, the applicant stated that her current Executive Officer, who testified not having known any of the other alleged retaliators prior to joining the Organization in 2006 (more than eight years after the initial incident of alleged assault) had “adopted” the retaliation from her previous superior. No evidence was provided for this and all witnesses accused of taking part in or having knowledge of retaliation, including the current Executive Officer, denied these accusations. In the circumstances and having considered the body of evidence, I feel the balance of probabilities favours the version put forward by the respondent’s witnesses, that is, that they did not have retaliatory motivations.

Other acts of retaliation

73. I am not minded to go into great detail in relation to these alleged acts, noting again that they are only relevant insofar as they may inform the motives behind the impugned decisions. When the applicant has been reassigned at various times, reasonable procedures appear to have been followed. In relation to the SPA overpayments, the respondent’s calculations appear to me to be correct, and the applicant did not advance any rebuttal to disprove that they resulted from anything other than an oversight. In relation to the taxi fare reimbursement, the applicant tendered a paper which was signed authorising reimbursement, but only gave oral testimony that she did not receive this reimbursement, without identifying why she did not object or chase the matter up at the time. The 1999 performance appraisals appear to be positive in the applicant’s favour. In relation to the allegation that the performance reports of 24 November and 2 December 1999 were designed to

marginalize her, I note that these reports respectively described her as “conscientious and highly reliable in all the assignments she undertook”, that her “performance in ORES was fully satisfactory” and that she was “highly reliable in accomplish[ing] all assigned tasks successfully”. These duties appear to me to be more than clerical in nature, as they would generally involve the exercise of discretion, analysis and autonomy. As they are mentioned in a separate paragraph to the “secretarial functions”, I am not convinced that the evaluation attempted to marginalize the applicant by describing her functions as purely clerical or secretarial.

74. In relation to the physical placing of the applicant in DGACM, despite her being on assignment at UNSIC, I note that in a letter of 8 February 2008, the Coordinator of UNSIC stated that “the space we have is very limited and I would be most grateful if [the applicant] could continue to be based in [DGACM] for the immediate future”. She also claimed that UNSIC were ordered by DGACM to destroy all records relating to her tenure in order to ensure her good performance there remained undocumented. Although the applicant stated she was so informed by a specific individual, she failed to call this witness and I find the evidence unsatisfactory to come to any specific finding in this regard. In relation to the allegation that DGACM prevented her from applying for other posts and attempted to block her transfer to DESA, it appears that the applicant was informed in the email from DESA of 11 July 2008 that the “vacancy is internal – to DESA staff only, at this time”. There is no indication that the DGACM management played a part in this application of objective criteria, which the applicant did not meet. Further, I note that in email exchanges of April–June 2008, corroborated by the applicant’s Executive Officer’s testimony, the Executive Officer appeared to have wanted to assist the applicant with her applications. For example, in an email of 15 April 2008, the Executive Officer stated, in response to a query for advice as to how to properly apply for a temporary vacancy with OIOS, “[B]est of luck! You can send a hardcopy of your PAS [with your application], that would be fine”. Although the applicant referred to the existence of documents which she claimed established DGACM

ordering DESA not to allow the applicant to apply for internal jobs, I did not find this to have been established.

75. The applicant's claims that the Organization has not properly used its human resources, nor promoted gender equality, were premised as vague and general comments, including by the witness apparently called for establishing this evidence. These claims remain unsupported by evidence and do not impugn any specified administrative decision and therefore do not warrant further comment.

Ethics Office Report

76. Although I have already made a determination of the case independently, for the purposes of completeness I mention the report prepared by the Ethics Office after making an analysis of the same, or substantially similar, facts. ST/SGB/2005/21 deals with retaliation and the protection extended to staff members who report it. An investigation was made by the Ethics Office pursuant to this bulletin at the applicant's behest on 12 February 2009. The Ethics Office prepared a report dated 3 October 2009 based on a number of meetings with the applicant and the consideration of material relating to at least 14 alleged retaliatory acts taken by the respondent against her over approximately 12 years in the period of October 1997 to May 2009. This report found that the applicant undertook a "protected activity", that is, that she reported the failure of her former Section Chief to comply with his obligations to the Organization. I do note that the Ethics Office considered the applicant's complaint in spite of the fact that it was, on a strict interpretation of the bulletin, not obliged to, both because of the date that the bulletin came into operation, and because the act the applicant alleged the retaliation was based on had occurred more than six years before her referral of the matter to the Ethics Office (sec 2.1(a), ST/SBG/2005/21).

77. The Ethics Office found that the applicant did not provide information or evidence to support a reasonable belief that her reporting of the 10 September 1997 incident had caused retaliatory action to be taken against her. I am of course not bound by the report of the Ethics Office, nor would I have been persuaded if it had

reached a different conclusion to that which I have. I do, however, note for the record that the Ethics Office was also unable to conclude that there was even a prima facie case of retaliation.

Conclusion

78. The applicant's case is however an unfortunate one. Without judging the nature of the incident, it is clear that an incident which occurred many years ago continues to trouble her greatly. It appears to me that it would have been beneficial for all parties had this incident been dealt with more thoroughly in the past, although that is not a matter on which I can make any binding conclusion in the circumstances. While appearing before me, the applicant seemed an intelligent and articulate person who has made great efforts to advance her personal skills in order to provide service to the Organization. It is again unfortunate that she seems to feel that she is not able to meet her full potential to provide service in the position she is in. Even in her prayer for relief she seeks a post "taking into account her skills, advanced training and education and experience". However, this is clearly not the appropriate forum for such requests or relief.

79. I have not found any evidence that the impugned alleged decisions were improper, as a result of being motivated by retaliation or otherwise. Accordingly, I find that the application, even if it had been at all receivable, would be rejected in its entirety.

Case No. UNDT/NY/2009/094

Judgment No. UNDT/2010/033

(Signed)

Judge Memooda Ebrahim-Carstens

Dated this 25th day of February 2010

Entered in the Register on this 25th day of February 2010

(Signed)

Hafida Lahiouel, Registrar, New York