

UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/045

Judgment No.: UNDT/2015/102

Date: 30 October 2015

Original: English

Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

COX

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Michael Shanahan

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Alistair Cumming, ALS/OHRM

Introduction

1. The Applicant, a Fire Officer at the Security Section, United Nations Mission in the Republic of South Sudan (UNMISS), contests a decision dated 27 November 2013 described in his Application as the “restructuring of the department resulting in the removal of [his] assigned responsibilities and their subsequent transfer to (another staff member)”.

Procedural history

2. In Judgment No. UNDT/2015/096, the Tribunal found the Application dated 11 June 2014 was receivable.

3. In his Application, the Applicant requested that the Tribunal interview a named witness for further information regarding his claims. However, in his response dated 18 September 2015 to Order No. 287 (NBI/2015), the Applicant requested the Tribunal to decide the matter on the papers. The Respondent advised that the matter was amenable to being decided on the papers.

4. In a later joint response the Parties submitted facts agreed by both of them as well as facts submitted by the Applicant which are not accepted by the Respondent.

5. The Tribunal has examined all of the facts, both agreed and alleged and is of the view that the case may be decided on the papers without the need for an oral hearing.

Facts

6. While on a career break from the Greater Manchester Fire Service in the United Kingdom, the Applicant served as a United Nations Volunteer with the United Nations Mission in the Democratic Republic of Congo from 19 April 2006 to 30 June 2007. He was appointed as a Fire Service Officer with the United

closure of UNMIS on 9 July 2011, he joined UNMISS as a Fire Service Officer at the FS-6 level. His appointment was renewed on a number of occasions.

7. Prior to April 2012, the Fire Safety Unit (FSU) of UNMISS was organized as one unit. The Officer-in-Charge (OiC) of the Fire Safety Unit is a senior staff member who is responsible for managing the unit effectively but does not hold a substantive position. Fire Safety Officer, NF, was OiC until April 2012 when he was reassigned to Syria. Following NF's departure, the Applicant was appointed to FSU from the Mission's Aviation Section.

8. The Applicant says, but this is not accepted by the Respondent, that he was advised that he was to take charge of all functions across the Mission
i

Case No. UNDT/NBI/2014/045

Judgment No. UNDT/201 ET Q q BT /F1 9.4751

considering that NF is the senior most and highly experienced Fire Safety Officer in the team, the following restructuring is done with immediate effect:

1. Mr. NF will be the OiC of Fire Safety Unit effective immediately. The Fire Safety Unit will be working as one unit including operations and prevention wings. Thus, MB, [the Applicant], JI and IM and any new arrivals will report to NF in this one single unit.
2. All international staff members working in the Fire Safety Unit will thus report to NF as their FRO.
3. DCSA Operations RW will be the FRO of NF and he will be the SRO for all other international staff in the Fire Safety Unit.

culminated in the blatantly irregular administrative decision that failed to comport with obvious and simple procedures ensuring due process, and the need to prohibit personal prejudice and bias from influencing administrative decisions. This is also not accepted by the Respondent.

25. The effects of the restructuring was to alter the reporting lines within the unit but otherwise had no impact on the duties or conditions of employment of the Applicant save that he no longer had managerial responsibilities.

Applicant's submissions

26.

Case No. UNDT/NBI/2014/045

Judgment No. UNDT/2015/102

43. There is no basis to award legal fees. There has been no manifest abuse of the proceeding before the UNDT.

Issues

44. Did the Administration breach any lawful obligation it had to the Applicant when it made the organizational changes in the Fire Safety Unit?

Considerations

45. Staff regulation 1.2(c) provides: “Staff members are subject to the authority of the Secretary-General and assignment by him or her to any activities or offices of the United Nations”.

46. In *Perez-Soto* 2013-UNAT-329, the United Nations Appeals Tribunal (Appeal Tribunal) stated that:

Staff Regulation 1.2(c) thus gives the Secretary-General broad discretionary powers when it comes to organization of work. It is well established that, notwithstanding the width of the discretion conferred by this Regulation, it is not unfettered and can be challenged on the basis that the decision was arbitrary or taken in violation of mandatory procedures or based on improper motives or bad faith.

47. The Applicant alleged that the decision was unlawful for three reasons: lack of consultation with him; lack of reasons for the decision; and improper

motiv13(u)-32((F1 11.23(r)-8(7/F1 11.28 Tf 0 0 1 11.28 Tf 0 0 0 rg 0.9981 0 0 1 119.04 282.24 Tm [(

49. Sec. 5(c) provides that in cases where managerial decisions are taken that may have substantial implications on the career, welfare and working conditions of the staff in the department or office, the staff affected should be informed of any such changes in advance and provided an opportunity for consultations on such matters at the departmental or office level.

50. It was an agreed fact that the position of OiC of the FSU is not a substantive position. The Tribunal finds that the Applicant's position and core responsibilities did not change as a result of the decision to reintegrate the Unit into one. He was to continue to perform the same duties, albeit he was no longer required to perform the additional task of acting as the supervising officer of staff in the Operations Section of the Unit.

51. Although the impugned decision involved some changes for some staff members including the Applicant, these did not have substantial implications for the careers, welfare and working conditions of the staff. They were not reassigned or transferred. There were no alterations to their conditions of service.

52. The case of *Morsy* can be distinguished. In that case, the Tribunal found that the changes made to the applicant's functional and reporting arrangements significantly and adversely altered his working conditions and level of responsibility. In the present case the changes were not of the same magnitude and did not alter the Applicant's substantive position.

53. For these reasons the Administration was not strictly obliged under section 5(c) to inform the staff in advance and provide an opportunity for consultation but in spite of that the CSA consulted with staff present at the duty station.

54. As the Applicant was on medical leave at that time it was not possible for him to be included in the staff meeting. While this was undoubtedly a disappointment to him it was not in breach of any of the obligations of the Administration. As he did not return to the Mission to take up his functions again due to ill health he could not be said to have been adversely affected by the decision.

Reasons for the decision

55. The Applicant's allegation that no reasons were given for the decision is factually incorrect. The first paragraph of the 27 November 2013 email to all affected staff members stated that the restructuring was important for productivity and accurate/prompt response in any emergency situation. The choice of the new OiC was based on his seniority and experience.

56. There is no merit in this submission.

Improper motives

57. The Applicant alleges that the decision to remove his responsibilities was motivated by bias, prejudice and a pattern of harassment against him by one of his colleagues. The Applicant maintains that this colleague's behaviour affected the CSA's managerial decisions because there were no other valid reasons for the removal of his responsibilities.

58. In *Messinger* 2011-UNAT-123, the Appeals Tribunal held:

It is clear that the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute. However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of harassment. This is different from a *de novo* investigation into a complaint of harassment.

59. A staff member who claims that he or she is being harassed has the right to

Entered in the Register on this 30th day of October 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi