

UNITED NATIONS DISPUTE TRIBUNAL

Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DIENG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Background

1. The Applicant joined the Organization as a Human Rights Officer at the P-2 level on 14 July 2000. He was later appointed to several positions in the United Nations

6. By letter dated 7 November 2018, the Applicant was informed that his fixed-term appointment would not be renewed beyond 31 December 2018. That same day, he filed his application before the UNDT challenging the decision to remove him from his position as Senior Child Protection Advisor and to reassign him as a Senior Political Affairs Officer within UNAMID. On 14 December 2018, the Respondent filed his reply to the application.

7. On 30 January 2019, the UNDT issued Judgment No. UNDT/2019/014

UNICEF Representative and the United Nations Resident/Humanitarian Coordinator (“RC/HC”) who had told him that they did not want to work with the Applicant.⁸

12. On 13 March 2018, Mr. Mamabolo disbanded the fact-finding panel convened to review the allegations against the Applicant.⁹

13. On 18 March 2018, Mr. Mamabolo informed the Applicant that his decision to disband the fact-finding panel was partly due to the death of the complainant who had made allegations of misconduct against the Applicant.¹⁰

14. In an email dated 22 March 2018, Mr. Mamabolo informed the Under-Secretaries-General (“USGs”) of the Department of Peacekeeping Operations and the Department of Field Service that he had decided to reassign the Applicant to perform alternative duties within the Mission for the following reasons:

- a. the Applicant had poor behavioral and interpersonal skills which undermined his capacity to discharge the responsibilities assigned to him effectively;
- b. the Applicant engaged in constant, overly assertive and never ending public and private conflict with the United Nations Country Team (“UNCT”) partners;
- c. the Applicant’s behavior had alienated him from most of the other Mission Managers and Mission components which had seriously hampered their efforts to work collaboratively with him and his section;
- d. the Applicant had consistently and over an extended period of time displayed inappropriate, unacceptable and unprofessional behavior towards colleagues and senior managers characterized by bitter and

⁸ Application, annex 3.

⁹ Application, annex 2.

¹⁰ Application, annex 4.

personal attacks; and that

e. the Applicant took actions that undermined decisions, guidance and instructions of the senior leadership and senior managers on the need for cooperation.

Considerations

19. The issues for determination are:

a.

difficulties failed to yield positive results. The Applicant's conduct had allegedly impaired the normal flow of work and so the reassignment was in the best interests of the mission. The new position was moreover at the Applicant's grade and the responsibilities involved corresponded to his level. The functions were commensurate with his competence and skills, and he had substantial experience in the field. The reassignment was therefore a purely administrative decision which was taken to restore a level of functionality to the CPU.

27. It is common cause that the Applicant's reassignment was effected against the background of complaints which had been raised over his alleged poor interpersonal skills, and after a failed attempt to investigate the complaints. According to the Respondent, the effort to investigate the complaints having failed for reasons beyond their control (death of the complainant), administrative action was taken to bring order to the mission. The question is whether the option adopted by the Respondent passes the multipronged tests of arbitrariness, bias, non-discrimination, or non-violation of the rights of the Applicant.

28. The evidence on record shows that the impugned decision was indeed based on the complaints levied against the Applicant. Such evidence includes the contents of an email from Mr. Mamabolo to the USGs of the Department of Peacekeeping Operations and the Department of Field Service informing them that the Applicant had poor behavioural and interpersonal skills which undermined his capacity to discharge the responsibilities assigned to him in an effective manner.¹⁷ Further, that he operated as an isolated entity unto itself, and engaged in constant, overly assertive and never ending public and private conflict with UNCT partners, including the Office of the SRSG on Children and Armed Conflict, and with colleagues within UNAMID. Also, that the unit the Applicant was leading was dysfunctional, incapable of working in a coordinated manner with key UNCT partners, and unable to effectively and successfully implement UNAMID's Child Protection Mandate. The above evidence answers the question of

¹⁷ Application, annex 5.

whether the decision was performance related in the affirmative. The only issue is whether the proper procedures were followed in arriving at the decision.

29. The relevant law in the context of performance is ST/AI/2010/5 (Performance Management and Development System) which in section 10.1 requires continuous performance evaluation by the First Reporting Officer (“FRO”) during the performance cycle, and that when a performance shortcoming is identified during the performance cycle, “the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s) (emphasis added). The remedial measures may include transfer to more suitable functions.

30. The Tribunal notes that in the Applicant’s 2016-2017 performance evaluation, his FRO gave him an overall rating of “Exceeds expectations.” The Second Reporting Officer, (“SRO”) however stated that;

I approve with the grading ‘Fully meets expectations’. There have been continuing issues with regard to the staff member’s challenging of existing UNAMID reporting lines, and his professional relations with the Mission’s partners in the UN Country Team.

31. In the Applicant’s 2017-2018 performance evaluation, his FRO gave him an

33. The Tribunal also notes the egregious and damning nature of the allegations in issue. Their nature was such as would put into question the Applicant's credentials as an international service servant and yet even when the attempt to investigate them failed, nothing was done to bring them to his attention and to meaningfully remedy the situation in accordance with section 10.1 of ST/AI/2010/5.

34. The mere reassignment of the Applicant to another office under circumstances of undisclosed, un-investigated and unresolved egregious and damning allegations such as these can only be ruled to have been arbitrary, and a violation of the Applic.95 17. 0 1 275.1sc

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been separated from the Organization and so the question of reinstatement is moot. The Applicant's challenge of the decision to separate him from the Organization is the subject matter in other proceedings before the UNDT and will be adjudicated in due course.

42. Turning to the request for compensation for economic loss, the Tribunal agrees with the Respondent that as the Applicant was reassigned within the Mission at the same P-5 grade and level, he suffered no economic harm as a result of the contested decision.

43. The Applicant seeks compensation for the reputational harm caused by the 22 March 2018 letter. He states that since the JSR had sent the disparaging email to senior officials in sections where his work was most relevant and where4(t)-2192 reW*(n 12 Tare1 0 0 1 440.81

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