



## The Application and Procedural History

1. The Applicant is the Chief of the Staff Counselling and Welfare Section at the African Union-United Nations Mission in Darfur (UNAMID). She serves on a fixed

term appointment for a period of 3 years, renewable for a further 2 years. She was appointed to this position on 12 September 2012.

2. On

Committee on Administrative and Budgetary Questions (ACABQ). In her previous decade of experience as a Section Chief, the Applicant has always been consulted on proposed Staffing Tables before their submission to the ACABQ.

7. No one had discussed the “redeployment” of her specific post, which is nothing more than a disguised and illegitimate reclassification exercise. Nor, to the Applicant’s knowledge, did the Organization conduct a reclassification exercise or classification reviews required by ST/AI/1998/9 (System for the Classification of Posts).

8. Since January 2015, the Applicant has engaged in prolonged discussions and negotiations with relevant parties concerning this proposed reclassification of her post. For example, on 28 January 2015, the Applicant wrote to Ms. Veine Stamp, Chief of Operations and Services and her First Reporting Officer, requesting that Senior Management review the decisions to: (1) move the Staff Counselling and Welfare Section from the Service of Operation and Services to the Human Resources Section; and (2) “redeploy” her position to the office of the Head of Office in Zalingei<sup>2</sup>

9. The Applicant stated she understood that the restructuring and reclassification exercise was “based on a facsimile from Ms. Ameerah Haq dated 9 December 2014 with the subject: Guidance on Mission Support Structures<sup>3</sup> and noted that “[t]here appears to be confusion as to who made the decision in question] and whether it was based on a strict interpretation of the organizational chart included in the Guidance facsimile”.

10. The Applicant made similar points in an email to Mr. Anthony Nweke (Officer-in-Charge, Division of Mission Support), Mr. Aggrey Kedogo (Chief, Human Resources), Ms. Sajjad Malik (Officer-in-Charge, Budget) and Ms. Stamp on

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<sup>2</sup> Applicant’s Annex C.

<sup>3</sup> Applicant’s Annex D.

22 March 2015<sup>4</sup> to which she received a reply from Mr. Kedogo that same day<sup>5</sup>. Mr. Kedogo stated that “UNAMID decided to move towards the proposed structural changes in full, and there is nothing wrong with taking that decision” and that she was not informed “of the potential downgrading of the position<sup>5</sup>. Because a decision had not been made by the time you were selected for the position”

11. Shortly thereafter, the Applicant was offered only a very short term extension to her fixed term appointment, starting on 9 April 2015 and due to expire on 30 June 2015<sup>6</sup>. Notably, this is precisely the date upon which the Applicant’s post is proposed to be reclassified and moved to the Human Resources Section. The Applicant accepted the new fixed term contract under protest, attaching her signed acceptance to an extensive email to numerous recipients reiterating her concerns with the entire structural and reclassification process<sup>7</sup>

12. The Applicant has also sought to have the present dispute resolved through the engagement of the Office of the Ombudsman

13. On 22 June 2015, the Applicant filed her first Request for Management Evaluation contesting the (then) imminent decision to separate her as of 30 June 2015 and an Application for Suspension of Action with the UNDT



21. The Applicant believes the MEU's reasoning in its letter of 24 June 2015 to be iniquitous and of great concern. It is well established that implied decisions are "decisions" for the purposes of the Organization's internal justice system. Indeed, this Tribunal, in Order No. 223 (NBI/2015), had no hesitation in suspending the impugned decision. The Applicant submits that exactly the same conclusion should be reached by this Tribunal in the present case.

22. ST/AI/1998/9 promulgates the "standards" and procedures for classifying posts (as its preamble notes).

23. It is clear that the reclassification of the Applicant's post is about to negatively affect the Applicant's contractual status. The Applicant is not even being offered the P4 "reclassified" post, as is her implied right as the incumbent pursuant to section 4.2 of ST/AI/1998/9. She is only being offered "the opportunity to participate in the process and be considered for the position" which is afforded to any other staff member (or staff member).

24. Further, to the Applicant's knowledge, no efforts have been made to reassign her to a post at her personal grade level.

25. The unlawfulness of the Respondent's actions in the present case is compounded by the fact that UNAMID has attempted to circumvent the clear process for reclassification outlined in ST/AI/1998/9. Instead of directly reclassifying the Applicant's post, UNAMID is "redeploying" that P5 post to another section and changed its functions, then "reassigned" a post from another section (see A/69/839/Add.6 – the proposed UNAMID budget and ACABQ consideration). This is a transparent and flawed attempt not to apply ST/AI/1998/9 and it must be rejected.

26. Indeed, such illegitimate "re-profiling" exercises were explicitly warned against only last year, when Mr Chhaya Kapilashrami (Director, Field Personnel Division, Department of Field Support (FPD/DFS)) wrote to all missions reminding

them of their obligations under ST/AI/1998/9. Mr Kapilashrami observed, inter alia, that “the UNDT emphasized the need for missions to follow the procedure for classification of posts established under ST/AI/1998/9 ... and held that the alternative approaches such as the “profiling” of posts have no basis in law”

27. The fact that the General Assembly has now apparently approved the reclassification of the Applicant's post does not cure or otherwise remedy the unlawfulness of the underlying decision. It is plainly inadequate and insufficient for the Administration to propose to the General Assembly an unlawful reclassification. The Administration has a duty to ensure that the reclassification is procedurally regular before submitting a reclassification proposal to the General Assembly. It did not do so in this case and cannot seek to benefit from its own wrong.

28. The Applicant is scheduled to be separated on 31 July 2015, well within the period for management evaluation. She is making this application now based on the apparent failure of informal resolution and the imminent date of her separation.

29. UMAMID has claimed that it “decided to move towards the proposed structural changes in full, and there is nothing wrong with taking that decision” and that “the UNAMID 2015/2016 budget proposal was based on the guidelines disseminated in USG Haq's cable, not any other source”

30. However, it did so without considering the logic of imposing identical structures across missions regardless of size or remit. It is irrational for there to be an imposition of structural uniformity or Staff Counselling and Welfare Chief responsibilities in missions as diverse as, say, the person United Nations Military (13-7(e)11(i)37(o)

irrational decision to implement a restructuring without consultation with key personnel, including the Applicant.

31. If UNAMID had taken the opportunity to consult with the Applicant as it should have, she would have explained the clear necessity for the Chief of Staff Counselling and Welfare at UNAMID, perhaps in the most hostile environment of any current mission in the world.



35.

pursuant to either Section 1.1 or Section 1.2 during the budget preparation. The fact that the mission requested classification under Section 1.1 following the General Assembly's approval of the 2015-2016 budget is not in breach of the Classification AI. As the Applicant was not the incumbent of the Post within the meaning of section 4 of the Classification AI, her involvement in the classification process was not required. Furthermore, the Applicant has no standing to challenge the classification process as it relates to the Post, as this is a new post which she does not encumber.

40. If the Dispute Tribunal finds that the Applicant does have the right to challenge the classification process, the Applicant has not shown that the process has been carried out in a flawed manner. The Classification AI does not require that her appointment be renewed beyond its expiration. Section 4.2 provides that the classification of a post shall not negatively affect the incumbent staff member's existing contractual status, salary or other entitlements. This provision grants the Applicant a right to continue to be paid her benefits and entitlements for the service rendered to the Organization during the term of her appointment.

41.

43. The Applicant has not adduced any evidence demonstrating that she will suffer irreparable harm as her appointment has been renewed, and she will remain a staff member.

*Applicant*

44. The Respondent's *sinterim* renewal of the Applicant's appointment is insufficient, and does not cure the procedural flaws and unlawfulness of the impugned decision.

45. The Administration intends to extend the Applicant's appointment for a period of 45 days. This period has presumably been selected by the Administration so as to coincide with the 45 day period in which MEU is required to render its evaluation. However, there is no guarantee MEU will do so within the required time. Indeed, it is not uncommon for the MEU to deliver its evaluation many days, or even weeks, after the stipulated time frame. The Applicant's short term extension does not in itself render moot or otherwise negate the need for a Suspension of Action – only this Tribunal can provide the Applicant with an assurance that she will not be unlawfully separate

47. Unlike in its submissions preceding Order No. 223 (NBI/15), however, the Respondent in this case has also sought to argue on the merits. In essence, those arguments are that “the P post encumbered by the Applicant was redeployed to another duty station to be used to support different functions” (para. 11) and “P-4 post [being] redeployed to the Staff Counselling and Welfare Section” (para. 11). Consequently, according to the Respondent, the Applicant essentially loses any rights she may have under ST/AI/1998/9 to be consulted about, or challenge, a reclassification exercise. Rather, “[a]s the Applicant was not the incumbent of the P post ... her involvement in the classification process was not required

48. It will not be lost on this Tribunal that this argument fails to address one of the central tenets of the Applicant’s case; namely, that the redeployment itself was unlawful and merely a transparent and flawed attempt not to apply ST/AI/1998/9. The Respondent cannot be allowed simply to redeploy the Applicant’s post and thereby avoid any and all obligations it has towards the Applicant under ST/AI/1998/9. Further, the General Assembly’s subsequent approval of UNAMID’s budget does not cure or otherwise remedy the Respondent’s fundamentally unlawful acts.

49. All the elements required for a Suspension of Action remain in place. The Applicant has demonstrated prima facie unlawfulness. The Respondent’s arguments against urgency and irreparable harm hinge only on the belated 45

## Deliberations

posts. But like any discretion, it may not be exercised in an arbitrary, capricious or illegal manner.

56. In Order No. 223 (NBI/2015), in the case of the same Applicant, the Tribunal stated the following

The Tribunal considers that by using the subterfuge of reclassification the Respondent is in fact ~~pro~~ profiling the post encumbered by the Applicant. This procedure was held to be unlawful in

59. In *Diallo v Secretary General of the International Civil Aviation Organization*,<sup>12</sup> the Appeals Tribunal held

The AJAB<sup>13</sup> rightly considered that the abolition of a post was always a traumatic experience for the incumbent, and therefore greater objectivity, care, good faith and transparency were required.

60. The Respondent has not rebutted the averment of the Applicant that she was kept in the dark about the decision to reclassify ~~post~~ The Respondent has not shown that she was alive to the need to exercise that “objectivity, care, good faith and transparency. It is all too easy to take a decision that taints legality and then rush to the General Assembly to obtain ~~the~~ *primatur* of legality. Such a strategy does eliminate the fruit of the poisoned tree.

#### *Irreparable Harm*

61. The Tribunal is also satisfied that allowing the decision to stand will cause the Applicant irreparable harm. That irreparable harm consists in the high likelihood of the Applicant being out of a job through an unlawful procedure or being downgraded.

62. This Tribunal recalls the position it espoused in previous ~~cases~~ *as a prima facie* unlawful decision<sup>14</sup>:

[S]hould not be allowed to continue simply because the wrongdoer is able and willing to compensate for the damage he may inflict. Monetary compensation should not be allowed to be used as a cloak to shield what may appear to be a blatant and unfair procedure in a decision-making process.

63. On the facts of the present case, the separation or downgrading of the Applicant could easily result in far reaching consequences for her career within the United Nations system. The Applicant has had a long unblemished career in the

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<sup>12</sup> 2014 UNAT-430

<sup>13</sup>

Organisation and the kind of treatment being meted out to her can seriously damage her reputation and future career prospects. The resulting harm to the Applicant should those consequences come to pass would, the Tribunal finds, be irreparable so as to satisfy this limb of the test.

*Urgency*

64. In Order No. 223 (NBI/2015), the Tribunal said

The remaining limb to be satisfied is that of urgency of the application, which is tied to the question of whether the Application can succeed in the face of the renewal of the Applicant's appointment. It is not lost on the Tribunal that the decision to renew her appointment was made after she filed the application to challenge her imminent separation.

The Applicant is correct in her assertion that the one month wait does not cure the defects in the impugned decision. It continues to be the case that the conditions precedent to a reclassification exercise have not been met in respect of the Applicant.

65. The Respondent appears to have adopted the same tactic this time. The fact that the Respondent has decided to defer the termination of the employment of the Applicant through the mechanism of the profiling of her post, cannot deprive the Applicant of the judicial protection she is entitled to.

66. The Respondents attempting to postpone its decision to terminate the employment of a staff member without addressing the core issue of whether it has followed the relevant rules. Simply defer



Observations

67. In *Cranfield*,<sup>15</sup> the Court held that

In situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation. The interests of justice require that the ~~Secret~~ General should retain the discretion to correct erroneous decisions, as to deny such an entitlement would be contrary to contrary to Q q BT de97(4.2w)-90(b)

70. As a result, the matter is once again before the Tribunal on the same set of facts and circumstances.

71. The Tribunal encourages the Parties to engage in meaningful consultations towards having this matter settled. In the interest of efficient use of the Tribunal's resources and the expeditious conduct of proceedings, the Tribunal pursuant to articles 10.3 of the UNDT Statute and 15.1 of the Rules of Procedure, ~~urges~~ urges the Parties in this matter to consult and deliberate, in good faith, on having this matter informally resolved.

72. It, of course, remains open to the Applicant to have this matter litigated on the merits should mediation be unsuccessful.

Order No. 247 of 2015 [E]

73. The Application for Suspension of Action is GRANTED pending management evaluation

*(Signed)*

Judge Vinod Boolell

Dated this 29<sup>th</sup> day of July 2015