Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

TEO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Michael Brazao, OSLA

Counsel for Respondent:
Jérôme Blanchard, HRLU/UNOG

Introduction

1. The Applicant, a Human Rights Officer at the P-3 level, step 8, with the Office of the United Nations High Commissioner for Human Rights ("OHCHR") in New York, filed an application in which she describes the impugned decision as follows (emphasis omitted):

> As the present Application will make clear, the contested decision consists of two inextricably intertwined components.
>
> Component "A": The Applicant's assignment by her employer, OHCHR, to a General Temporary Assistance ["GTA"] … post contrary to the express terms of a post-matching exercise whereby she was informed in writing that she would be laterally transferred from her former post in the Asia-Pacific Section … at the Geneva duty station of OHCHR to a regular-budgeted ["RB"] post in the Sustainable Development Goals ["SDG"] Section … at the New York duty station of OHCHR.
>
> Component "B": Failure of the Applicant's employer to assign her appropriate functions commensurate with the SDG position she accepted in good faith pursuant to the above-referenced post-matching exercise.

2. In response, the Respondent contends that the application is not receivable *ratione materiae* and, in any event, without merit.

3. By Judgment No. UNDT/2018/044 dated 23 March 2018, the Tribunal held that the application is indeed receivable as the impugned administrative decision is one that is appealable under art. 2.1(a) of the Statute of the Dispute Tribunal (see this Judgment for the reasoning). The present Judgment therefore concerns the merits of the application.

Factual background

4. From 4 April 2008 until 31 October 2011, the Applicant worked in the Asia-Pacific Section ("APS") within the Field Operations and Technical Cooperation Division of OHCHR on various P-3 level posts.

5. On 3 December 2011, the Applicant was granted a fixed-

7. The Applicant elected to opt-in to this process, which was titled a "post-matching exercise".

8. On 9 December 2015, the Applicant received a memorandum, "Lateral

this year. Given this outcome, it will not be possible to proceed with the implementation of those decisions.

13. On 14 September 2016, only nine days before the Applicant was expected to relocate to New York, she learned that the incumbent of the SDHt0b7Gsi55.71q0.00000912 0 612 79- 0

position in Geneva that had secured temporary funding for at least 15 months, with the possibility of an extension of said funding. The Applicant stated that for the sake of her professional security and that of her family, she would not accept being placed against a temporarily funded post in the long term and asked to be transferred to another RB-post at the P-3 level similar to the SDG-post.

16. By email of 21 September 2016, the PSMS Chief responded to the Applicant and expressed his understanding that she had participated in the post-matching process in good faith, and was committed to making arrangements to proceed with her deployment to New York pending resolution of the issue surrounding the unavailability of her post. He further stated that, as a transitional measure, the Applicant would have to take up a different assignment involving different functions than originally planned, for an unspecified period of time. While the PSMS Chief hoped that the case involving the incumbent of the SDG-post would soon be resolved so that the Applicant could assume the SDG-post that the incumbent was occupying, he stated that he could not make any guarantees to that effect as the matter was now pending before the Dispute Tribunal. Moreover, the PSMS Chief could not confirm that the Applicant would be transferred to a RB-post at the completion of this process, nor could he guarantee that she would be able to cover any particular portfolio. He did promise to work with the Applicant in the event that a long-term alternative solution was needed and would be supportive if the Applicant were to reconsider her move to New York.

17. By email of 22 September 2016, the Applicant responded to the PSMS Chief that it would not be feasible to reconsider her move to New York at the last minute, as all the necessary preparations to wind-up her life in Geneva h(o)-9m0 o0 0( )(q0.024 23916(e)4(ptT/9

18. On 23 September 2016, the PSMS Chief issued a Memorandum to the Applicant, "Your move to New York Office". The PSMS Chief reiterated the situation regarding suspending the administrative decision to transfer the incumbent of the SDG post from the very same post the Applicant was expected to occupy, and sympathized with the hardship this situation had engendered for her and her family. He further reassured the Applicant that "we will make every effort to honour th[e] commitment" to transfer her to the SDG post that was "based on the decision of the High Commissioner for Human Rights of 9 December 2015". He then proceeded to instruct the Applicant that "your move to the New York takes effect as of today, i.e. 23 September 2016". The PSMS Chief

and occasionally has been performing programme support functions where there have been staffing gaps.

21. On 18 November 2016, the Applicant sought management evaluation of the contested administrative decision. In the Respondent's reply, it is stated that on 6 March 2017, the Management Evaluation Unit issued its evaluation letter in the case of the other staff member, whereby it determined that the case was not receivable *ratione temporis*.

22. As requested by the incumbent of the SDG-post, by Order No. 70 (GVA/2017) of 15 March 2017, the Dispute Tribunal in Geneva granted, as an interim measure, the suspension of action pending the Dispute Tribunal's consideration of the application on the merits (the case was subsequently closed by an order on withdrawal, namely Order No. 107 (GVA/2017) of 9 May 2017).

Procedural history

23. On 15 March 2017, the Applicant filed the application.

24. On 17 March 2017, the Registry acknowledged receipt of the application on 15 March 2017 and, pursuant to art. 8.4 of the Rules of Procedure, transmitted it to the Respondent, instructing him to file a reply by 17 April 2017 in accordance with art. 10 of the Rules of Procedure.

25. On 17 April 2017, the Respondent filed his reply.

26. The present case was reassigned to Judge Alexander W. Hunter, Jr. on 8 January 2018.

27f the Rules of Procedure, rules P

submissions on non-receivability, by 2 February 2018.

28. On 29 January 2018, the Applicant filed a motion for extension of time to file a response to the Respondent's reply. The Applicant informed the Tribunal that Applicant's counsel went on leave on 18 January 2018 and returned on 29 January 2018, learning of the Tribunal's instructions in Order No. 10 (NY/2018) for the first time upon his return. Given these circumstances, the Applicant requested a one-week extension to the 2 February 2018 deadline so that the Applicant could benefit from the assistance of her counsel.

29. By Order No. 22 (NY/2018) issued on 31 January 2018, the Tribunal granted the Applicant's request for an extension of time and instructed the Applicant to file a response to the

submissions

43. The Applicant's principal contentions may be summarized as follows:

a. The Applicant's assignment to a GTA-post was contrary to the express terms of a post

impugned administrative decision of 27 September 2016, in which a memorandum from HRMS/UNOG stated in material part,

[…]". The Tribunal further expounded that "[s]imilarly, negligence is defined as 'the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation' … the elements of negligence generally constituting duty of care, breach of the duty of care, causation and damage";

j. The facts of this case abundantly prove: the existence of this duty of care on behalf of OHCHR; the breach of said duty through the management's collective failure to show the skill of an average member of that profession; and the causation of numerous professional, pecuniary and moral damages to the Applicant;

k. The Applicant recalls that pursuant to the protracted post-matching exercise commenced on 10 September 2015 to which she opted-in when a compendium of posts was made available between 5 and 16 November 2015,

m. On or about 29 August 2016, after the contract between the parties had been concluded and memorialized, the Applicant came to learn of a potential threat to her ability to assume the RB-post in New York that she had been promised, through the refusal of her colleague Mr. RPR, the incumbent of the post in New York, to relinquish said post. The documentary evidence before

to the competitive nature of this recruitment process, it would bp(tughl9((tuy)20 G[( )] TJET(

on 1 April 2017 and continues to date, and for which she receives a Special

Geneva. This again demonstrates the Organization's commitment vis-à-vis the Applicant;

i. With respect to the Applicant's claims of cumulative financial impact, she suffered no financial harm due to the changes in the decision. The Applicant indeed was placed on a P-3 level post as initially planned, received the full relocation benefits, and the same amount of salary she would have received had she been placed on the regular budget post as initially planned. The Applicant therefore cannot argue financial loss because of the last-minute changes;

j. With respect to the Applicant's allegations that the decision affected her spouse's ability to secure employment in New-York or her ability to negotiate rental leases, these alleged damages are too speculative and cannot be directly attributable to the contested decision. Further, these claims are not supported by evidence. Any request for compensation based on the Applicant's spouse's situation should therefore be rejected;

k. T

49. As for the staff member's duty in a restructuring exercise, s/he has a duty to "cooperate fully" in the process (see, for instance, *Hassanin* 2017-UNAT-759, *Smith* 2017-UNAT-768 and *Timothy* 2018-UNAT-847).

The merits

50. As follows from the factual background set out above that, as part of a restructuring exercise in OHCHR, the Applicant's original RB-post in Geneva was to be moved to the field but, as an alternative to moving along with her post, she was offered the opportunity to participate in a post-matching exercise by which she would be assigned to another post at her grade and level. The Applicant opted to participate in the post-matching exercise and OHCHR eventually offered the Applicant a reassignment to a specific RB-post at the P-3 level in the SDG section in New York. The Applicant accepted this offer and made preparations for her family and herself to move to New York. However, shortly before the Applicant and her family were to move from Geneva to New York, the incumbent of the RB-0.002792 reW8pn4w4 TJETQ0.0000091

54. The fact that the Applicant also expected that the move to New York to be more than temporary follows from the email exchange of 14 to 16 September 2018 between the Applicant and the OHCHR Administration. On 14 September 2016, the Applicant stated that it was no longer an option for her to remain in Geneva as she had made long-lasting arrangements to relocate to New York as: (a) she had terminated her lease in Geneva; (b) the shipping company had already collected her family's personal effects; (c) her spouse had resigned from his job in Geneva; (d) her child's place in school in Geneva had been given to someone else; (e) she had made deposits for a school application in New York; and (f) her relocation costs had already come up to USD25,000.

55. Considering her personal circumstances, it therefore appears obvious that the Applicant would not have accepted a post with GTA-funding rather than a RB-post in order to secure her position since the RB-post had more secure funding on a long-term basis and she was aware of this. In response, in an email on 14 September 2016, OHCHR admitted that a mistake had been made placing the Applicant in a very difficult position and that she had fully cooperated with the post-matching exercise, as it was indicated that:

> Without prejudice to the possibility of a more precise answer from us, the human reality of what you are facing obliges me to respond immediately! As management we see things very much as you do. And further we are working hard to avoid the scenario that you fear. We have taken action already in this regard. And I hope we will be able to confirm soon the

OHCHR and the Applicant had concluded a proper agreement according to which the Applicant was to be placed on a RB-post and, relying on OHCRC's undertaking, the Applicant had also organized her personal life in order to do so (on the doctrine of legitimate expectations, see *Sina* 2010-UNAT-094, affirming the liability definition of *Sina* UNDT/2010/060). The Applicant, therefore, had a legitimate right and expectation that she would be placed on a RB-post. Furthermore, the Respondent has failed to demonstrate that no other RB-posts were available when reassigning her, or that, at least, other alternative options were considered such as, for instance, placing her on a XB-post, which would also have offered a more secure and solid funding source than a GTA-post. The Tribunal is therefore not convinced that OHCHR acted with the appropriate duty of care and the appropriate level of due diligence by fairly, justly and transparently dealing with the Applicant when placing and subsequently keeping her on a GTA-post in New York, particularly when being fully apprised of her precarious personal situation.

57. In the Respondent's closing submissions, as a new fact, his counsel states that the Applicant has kept a lien on her previous Geneva post and can always return to it. The Tribunal notes that it is trite procedural law that new facts are not to be introduced at the closing state of the proceedings, that the Respondent has not asked for permission from the Tribunal to introduce this new fact, and that nothing appears to have impeded his counsel in introducing this fact earlier in the proceedings.

58. Nevertheless, the Tribunal notes that, even if this new fact is accepted, it does not change the fact that the Applicant's employment in New York is less secure on a GTA-post than on a RB-post, or, for that matter, on a XB-post. The alternative, namely moving back to Geneva, as she already made clear in 2016, was an00000912 5d57 Tm0 g0

Remedies

Scope of assessment and relevant law

67. Under the consistent jurisprudence of the Appeals Tribunal, compensation may only be awarded insofar as an illegality has been established (see for instance, *Kucherov* 2016-UNAT-669, referring to *Wishah* 2015-UNAT-537 and *Bastet* 2015-UNAT-511). In the present case, it is therefore only relevant for the Tribunal to consider the question of remedies in relation to the first issue, namely OHCHR's inappropriate placement of the Applicant to a GTA-post.

68. Article 10.5 (b) of the Dispute Tribunal's Statute limits the remedies that the Tribunal may order as follows:

> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

Specific performance

69. The Applicant primarily, in effect, requests that the Dispute Tribunal should give specific performance to her right to be placed on a comparable RB-post, or, failing that, place her on an XB-post at the P-3 level in the New York as this would provide her with a parent post with a more secure funding stream and a more stable

72. As for the pecuniary damages, the Appeals Tribunal held in in *Krioutchkov* 2017-UNAT-712, para. 16, held that (footnotes omitted):

> … [The Dispute Tribunal] may award compensation for actual pecuniary or economic loss, including loss of earnings. We have consistently held t] t]

Conclusion

76. Based on the above, the Tribunal finds that:

a. The application is granted in part;

b. As to the Applicant's parent post and with all deliberate speed, OHCHR is to place her on a P-3 level RB-post as Human Rights Officer in New York commensurate with her skills and expertise. In the interim, if a P-3 level RB-post as noted above is not immediately available, OHCHR is to place her on a similar XB-post forthwith until such time that a P-3 level RB-post as aforesaid becomes available;

c. All other claims are rejected.

(*Signed*)

Judge Alexander W. Hunter, Jr.

Dated this 26th day of October 2018

Entered in the Register on this 26th day of October 2018

(*Signed*)

Nerea Suero Fontecha, Registrar, New York