
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/050

Judgment No. UNDT/2019/115

Date: 24 June 2019

Original: English

Before: Judge Ebrahim Carstens

Registry: New York

Registrar: Nerea Suero Fontecha

GIZAW

v.

SECRETARY GENERAL
OF THE UNITED NATIONS

on 7 November 2014, the Applicant sent an email to the Director, OIST acknowledging receipt of the work plan and indicated her intent to *escalate the matter further until long term solution that removes the duplication is in place* .

on 1 December 2014, the Director, OIST emailed the Applicant, as follows: *[a]s previously conveyed to you in our meeting of 5 Nov, followed by your request of 06 Nov, this message provides a written documentation and confirmation of the management decision to use a work plan compact clearly outlining delineation of responsibilities and accountability lines between the positions of Quality Assurance Specialist and Change Release & Testing Specialist in order to avoid any possible overlap or duplication of functions. As such, please be assured that I will work closely with your supervisor in establishing this compact in consultation with all the concerned parties, and I sincerely hope that it will address your concerns and lead to a harmonious working arrangement within OIST* .

on 23 February 2015, the Applicant then wrote to the Deputy Director, OIST stating that *as per our discussion on 5 November 2014, the Annual Work Plan will be used to define and clarify the roles, responsibilities and accountabilities of the two positions to address my concerns* . She also requested that the work plan be finalized *as agreed ... and [to] close this long overdue case* . On 1 March 2015, the Applicant reiterated that *she agreed to the proposal by the management to use work plans of the two positions to remove these duplication, even though [her] request was to get a permanent solution by removing these activities already included in [her job description] from that of the newly created position, in the spirit of teamwork* . On 18 March 2015, she requested that the Director, OIST provide an official confirmation that the duplication of duties between the two Job Descriptions had been removed by using the work-plans. On 20 March 2015, the Director, OIST replied that *there were two distinct and separate work-plans* . On the same day, the Applicant stated in an email that the two work plans were distinct and separate but that the purposes of the work plan and job descriptions were different. Therefore, in the same email, she requested to amend the title and job description of the Quality Assurance Specialist position and requested that OHR make adjustments to the Quality Assurance Specialist's job description.

on 14 July 2015, following a Bureau specific exercise, the Applicant received a second no change letter, which she accepted.

on 23 July 2015, the Applicant reiterated her request to the Chief of Directorate, OHR to confirm *if this duplication has been permanently addressed by removing the activities listed under [her]*

Case No. UNDTNY/2016/050

Judgment NoUNDT/2019/115

on 24 June 2016, the Chief of Directorate, ~~BMS~~ informed the Applicant that the Assistant Administrator, and Director, ~~SM~~ had reassigned the case to her, and she had requested that a new job

parties filed a joint submission, in which they listed agreed and disputed facts together with the legal issues as defined by each party. The Applicant requested leave to submit project documents reflecting the role of the Applicant and an updated confidential medical record and both parties requested leave to submit closing submissions. The parties further confirmed that the case can be decided on the papers without a hearing. The Respondent produced the documents pursuant to Order No. 11 (NY/2019) (namely, the job descriptions of Quality Assurance Specialist and Change Release and Testing Specialist and all the relevant rules, regulations, policies, and procedures governing classification, job alignment, and structural change processes) that the functional review document was submitted by the Respondent on an *ex parte* basis.

6. On 21 February 2019, by case management Order No. 40 (NY/2019), the Applicant was directed to file the additional documentation as requested in the joint submission and both parties were directed to file closing statements. The *ex parte* submission of the functional review document because it contained a confidential business analysis was denied on the grounds *inter alia* that the Applicant could not without reviewing the document itself, verify or rebut that it did not result in a reorganization of the nor the realignment of the job responsibilities of the staff. The Tribunal ordered that the document be released to the Applicant on specific confidentiality conditions stated at para. 12 of Order No. 40 (NY/2019). On 22 February 2019, the Respondent filed a motion for leave to submit certain documentation, which motion was subsequently withdrawn.

7. On 26 February 2019, the Applicant submitted the additional documentation pursuant to Order No. 40 (NY/2019). In addition, the Applicant disclosed that the functional review document the Respondent attempted to file *ex parte* was not confidential nor privileged in any event as it was distributed to BMS staff for discussion.

8. The Tribunal notes that on 1 March 2019, the Respondent then acknowledged that the functional review document should not have been submitted on an *ex parte* basis and thereafter submitted the complete copy. The Tribunal notes that this does not augur well so far as the issue of full disclosure and good faith is concerned but is aware that Counsel may have acted in the instruction of client

9. On 7 March 2019, the parties filed closing statements on the matter to be dealt with on the papers

Consideration

Preliminary matter

10. Prior to consideration of the merits, the Tribunal will dispose of the

referred to in Order No. 166 (N/2018) dated 29 August 2018. Even though events may have overtaken the purport of the motion, it must be addressed for the sake of completeness.

11. In Order No. 66

As stated at para. 21 in *Adorna*
does not specify the time within which an application for interpretation
of a judgment may be made, it has to be made within a reasonable

Counsel on the part of the Respondent. Therefore, the Tribunal will say no more about it save that it does not bode well for good faith in dealing with workplace issues and raises contempt and accountability issues in the proceedings before the Tribunal.

21. The Tribunal will now turn to the consideration of the substance of this matter

Scope of the case

22. The Tribunal recalls that in *Gizaw* UNDT/2018/137, the Tribunal found that the impugned administrative decision was notified to the Applicant in the letter of 28 July 2016 from the Director of Office of Operations, Legal and Technology Services, BMS:

Multiple reviews of the two Job Descriptions, the Change Release and Testing Specialist [job description] and the Quality Assurance Specialist [job description] have determined that both Job Descriptions describe activities and duties that are appropriate and necessary. Both positions are currently encumbered, the staff in the positions fill duties and roles that are currently needed by OIMT. It is the management conclusion that the two Job Descriptions will remain and are not in need of revision. More specifically, neither the title nor the text of the Quality Assurance Specialist will be changed.

23. The Applicant challenges the above administrative decision on several grounds, which the Tribunal will consider in turn. It is recalled that the Applicant specifically challenges the duplication of job functions regarding the position of Quality Assurance Specialist newly created in August 2014 with that of her own primary functions, and as more particularly set out in para 70 and 71 of Judgment UNDT/2018/137

Applicable legal framework

24. The Tribunal stated in Judgment UNDT/2018/137 at para 72

Case No. UNDTNY/2016/050

Judgment NoUNDT/2019

The merits

The basis of the contested decision

26. As stated above by the Appeals Tribunal in *Sanwidi*, the Tribunal needs to decide if the impugned administrative decision is reasonable and fair, legally and procedurally correct, and proportionate. The Appeals Tribunal elaborated in *Belkhabbaz*, 2018-UNAT-873, the rational connection between the materials presented to the Tribunal and the contested decision.

27.

duplication of job functions and quality assurance functions were taken away from her, the Respondent submits that the crux of the case is a disagreement between

assurance is concerned with the analysis of documentation, the preparation of reports, and the identification of risks and mitigations for those risks, and the quality control is concerned with the testing of products prior to their release. The Respondent submits that the Quality Assurance Specialist conducts the quality assurance work while the Applicant conducts the quality control work, and these two functions are distinct and complementary. The Respondent submits that the Applicant was repeatedly assured that the existence of the Quality Assurance Specialist does not put

28. The Tribunal notes from the agreed facts that in 2013 the Executive Board approved a new Strategic Plan to improve its institutional effectiveness and the Structural Review exercise was conducted. As a result, in August 2014, the Structural Change Governance Group approved a new OIST

29. The Tribunal further notes that the job description from the outset for the change, release and test planning, and that the Quality Assurance Specialist job description provides that the services of the Quality Assurance Specialist with strong background and experience in project management, budgeting, quality analysis, monitoring and and [t]he incumbent will contribute substantially to the smooth functioning of the OIST portfolio of services and projects by analyzing documentation, preparing reports, and identifying risks and mitigations for those risks. The purpose for quality assurance is to ensure the positive outcomes that result. The Tribunal notes that quality assurance original job description.

30. The Tribunal also notes that year ending 2016 the Administration developed RACI tables, its own project management methodology, reflecting the roles of the Applicant and the Quality Assurance Specialist. The Respondent previously submitted excerpts from some books (including *Project Management for Dummies*, the import of which the Tribunal is unsure).

31. Based on the materials before the Tribunal, the Tribunal finds that the Administration provided some reasonable explanation for the contested decision which is supported by evidence. While the Administration created uncertainty and at times seemed to reconsider their decision not to change the title or the job description. In light of various inputs received from OIST management and management consulting team, the Administration in the end decided not to make any changes to the Quality Assurance processes are well documented and the Tribunal finds that there seems to be

rational connection between the materials before the decision maker and the contested decision. The Tribunal is constrained to exercise a measure of deference and in the absence of any oral testimony or other specific evidence showing the , or any procedural irregularities, the Tribunal cannot interfere with the contested decision.

(*Pérez-Soto, supra*), a question which the Tribunal will now review.

Was the contested decision based on improper motives or bad faith?

32. The Tribunal understands that the Applicant that the decision was unreasonable and was made based on improper motives or bad faith because she has conducted the quality assurance task for which the Quality Assurance Specialist takes deserved credit, and the decision was taken in order to deprive her of her functions and marginalize her so that the Administration could eventually replace her in the event of another downsizing. Indeed in her initial correspondence dated 26 October 2014, the Applicant expressed her concern that

redundancy and subsequent position abolish. In other words, the Applicant anticipates a breach of her conditions of service and or the applicable rules. The Tribunal cannot rule on an anticipatory breach

33.

36. To support her claim that the contested decision is based on improper motives or bad faith, the Applicant relies on, among other things, several internal communications. In particular, in the email requesting the management consulting he Chief of Directorate, BMS wrote, From what we understand the intention in the second JD (Quality Assurance) which is a new post was to develop a profile that is aligned more to portfolio management given that the first JD (Change Release and Testing) is aligned to the change, release and testing function.

37.

descriptions] is really not warranted but, I appreciate that bringing closure often in the job description. The Quality Assurance Specialist undertakes a broad, systematic support to quality assurance in OIMT, supporting project specific assurance support only when the Change Release and Testing Specialist is responsible for change, release, and test planning within OIMT in accordance with PRINCE2 practices for projects and IT practices for services. In this arena, the assurance function in each of the ICT products and/or services, which are prioritized for change release and testing support. Although not adopted, the Applicant claims that the proposed changes prove that the Applicant is the responsible official for performing the quality assurance functions, something she claims she always performed.

38.

39. Another witness who worked with the Applicant from November 2015 until June 2016 wrote in her statement assurance representative from the IT Department and able to respond to technical listed in the project document as the project quality assurance role, the witness never met or discussed any aspect of the test plan with the Quality Assurance Specialist, who did not make any material contribution to the test.

40. The Applicant also presented the Board of Auditor's report for the year ending 2016 as evidence to support her claim. The Applicant claims that the report emphasizes the need to comply with quality assurance standards at all stages, including the designation of an assessor (testers) and approver (project quality assurance) for each project, and that complying with quality assurance standards means that UNDP should follow Prince 2 standards and yet UNDP instead began using its own methodology called RACI tables.

41. The above described materials show that through the realignment of functions and the creation of the Quality Assurance Specialist post, some changes occurred to functions. The management acknowledged that the duplication of

Specialist, and she was no longer designated an official responsible for project quality assurance in project documents. However, the materials before the Tribunal also show that the Applicant continued to conduct her functions relating to testing after the creation of the Quality Assurance Specialist post yet the Respondent calls

while the Applicant calls her responsibilities . The Tribunal notes that at least two project managers who provided the witness statements seem to agree with the Applicant that the

One of the witnesses in support of the Applicant stated -level

Conclusion

52. In view of the foregoing, the application is dismissed

(Signed)

Judge Ebrahim Carstens

Dated this 24th day of June 2019

Entered in the Register on this 24th day of June 2019

(Signed)

Nerea Suero Fontecha, Registrar, New York