



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2010/094

Judgment No.: UNDT/2010/208

Date: 02 December 2010

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

ZNAMENSKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Muhammad Mohi-us Sunnah, OSLA

Counsel for Respondent:
Linda Starodub, UNOV

Introduction

1. On 30 July 2010, the Applicant, a staff member of the United Nations Office on Drugs and Crime (“UNODC”), filed with the United Nations Dispute Tribunal an application against the decision to reassign him laterally from the UNODC Regional Office in Cairo, Egypt, to the UNODC Sub-Regional Office in Abu Dhabi, United Arab Emirates.

2. With the consent of the parties, this case was decided on the papers before the Tribunal.

Facts

3. The Applicant entered the service of the United Nations Office in Vienna (“UNOV”) on 17 April 1991, on a fixed-term appointment (100 series of the former Staff Rules) as Protocol and NGO Liaison Officer (P-3) in the Office of the Director-General (the Director-General of UNOV also being the Executive Director of UNODC). On 1 December 1998, he was promoted to the P-4 level, further to the reclassification of his post.

4. In the course of 2002 and 2003, the Respondent attempted to reassign the Applicant first to Algiers, then Bangkok, then Tashkent, to do programme work. The Respondent, however, did not go through with either reassignment.

5. In September 2003, at the instructions of the UNODC Executive Director, the Applicant was temporarily assigned to the Eastern Europe and West/Central Asia Section, Division of Operations, UNODC, as Programme Management Officer (P-4).

6. In February 2004, the Applicant was transferred laterally from Vienna to Cairo, Egypt, to serve as Programme Management Officer in the UNODC Regional Office for the Middle East and North Africa.

7. On 10 February 2009, the UNODC Executive Director issued an all-staff message regarding the continuous reduction in General Purpose (“GP”) income since the 1990s. He stressed that “[f]orced by necessity, [he was] taking steps to

cut GP-funded costs by USD2.2 million while also preparing for the very real possibility that further measures will be needed if the funding of UNODC is further affected by the global economic crisis”.

8. At a meeting held on 4 March 2009, the Executive Committee of UNODC decided that six field office posts would be slated for abolition, including the Applicant’s post.

9. While on 25 March 2009 the Applicant was informed that his contract would be extended until 31 December 2009, on 30 March 2009, the Director, Division of Operations, UNODC, verbally informed him of the decision to abolish his post as of 30 June 2009 due to “shortfalls in GP fund income”. On the same day, a letter with the same content was sent to the Applicant by the Human Resources Management Service (“HRMS”). He was informed that the Division of Operations would explore the possibility to absorb in other offices some of the staff affected by the cuts and he was also encouraged “to undertake an active search for other employment possibilities”. Finally, he was given notice that if he did not succeed in finding another position within UNODC, he would be separated from service effective 30 June 2009.

10. On 11 May 2009, the Applicant filed with the Joint Appeals Board (“JAB”) a request for suspension of action on the decision to separate him with effect from 30 June 2009.

11. By email dated 28 May 2009, the Director, Division of Operations, informed the Applicant that arrangements were made to reassign him temporarily to the UNODC Sub-Regional Office in Abu Dhabi, United Arab Emirates.

12. By letter dated 29 May 2009 addressed to the Applicant, HRMS noted that “arrangements [were] underway to temporarily assign [him] to ... Abu Dhabi, pending the appointment of a Coordinator there” and that they would “confirm the details to [him] shortly”. However, the letter also reminded the Applicant that “should [he] not identify a placement by the end of the extended search period, [HRMS] would need to implement [his] separation from service at that time,

noting that [he] would have already served the notice specified in [HRMS] letter of 30 March 2009”.

13. On 11 June 2009, the JAB issued a recommendation in favour of the suspension of action on the decision to separate the Applicant effective 30 June 2009.

14. By letter dated 23 June 2009, the Deputy Secretary-General took note of UNODC decision to temporarily reassign the Applicant to “the position of L-4/P-4 Project Coordinator of the UNODC Sub-Regional Programme Office in Abu Dhabi” effective 1 July 2009 and informed the Applicant that such decision rendered moot the JAB recommendation for the suspension of action on the decision to separate him with effect from 30 June 2009.

15. By email dated 25 June 2009, the Chief, HRMS, confirmed to the Applicant that effective 1 July 2009, he would be reassigned temporarily to the L-4/P-4 position of Programme Manager in Abu Dhabi, for an initial period of four months until the position could be filled through normal procedures. During his temporary reassignment, he would remain stationed in Cairo. Some time before, the Applicant had been selected to fill the post of Director of the UN Information Centre in Sana’a, Yemen, with the Department of Public Information (“DPI”). The Chief, HRMS, thus explained in her email to the Applicant that “while awaiting formal advice from DPI ... [his temporary reassignment would] serve to bridge the transition period until [he could] take up [his] expected appointment with DPI in Yemen”. However, the Applicant’s appointment with DPI never materialized as the Government of Yemen did not give its clearance and UNODC subsequently extended his temporary reassignment until 31 December 2009.

16. By email dated 15 December 2009, HRMS informed the Applicant that his fixed-term appointment [which was due to expire on 31 December 2009] had been extended through 31 December 2010. The letter of appointment attached to the email was for a fixed term of “11 months 30 days”, i.e., from 2 January 2010 to 31 December 2010, as Programme Management Officer in Abu Dhabi, and the email explained that “there [had been] an interim extension of [his]

appointment by one day [i.e., on 1 January 2010] for IMIS purposes”, as supported by a Personnel Action form (“PA”) also attached. This PA was subsequently superseded by another PA issued on 3 February 2010 and extending the Applicant’s appointment for a year from 1 January to 31 December 2010.

17. By email dated 21 December 2009, the Chief, HRMS, notified the Applicant of his lateral transfer to Abu Dhabi as follows:

Further to my e-mail of 25 June 2009, this is to advise that in accordance with the provisions of Section 2.4 of the Staff Selection System (ST/AI/2006/3) the Executive Director [of UNODC] has approved your reassignment to the post of P-4 Programme Management Officer of the UNODC Sub-Regional Programme Office in Abu Dhabi.

For the time being you will remain stationed in Cairo and perform your new functions from there. The actual relocation date to Abu Dhabi will be communicated to you in the course of 2010, following consultation with your managers.

A copy of your reassignment PA will be sent to you shortly.

18. On 13 February 2010, the Applicant filed a request for management evaluation of the decision to transfer him laterally to Abu Dhabi, and on 10 March 2010, he provided the Management Evaluation Unit, UN Secretariat, with additional comments.

19. By email dated 22 February 2010, HRMS confirmed to the Applicant that his appointment had been extended for one year from 1 January 2010 to 31 December 2010 and provided the relevant PA superseding the PA sent in December 2009.

20. By letter dated 1 April 2010, the Under-Secretary-General for Management informed the Applicant that, further to the management evaluation, the Secretary-General had decided to uphold the contested decision on the basis that it had been properly taken and did not violate his terms of appointment or conditions of employment.

21. On 3 May 2010, the Applicant relocated from Cairo to Abu Dhabi.

22. On 30 June 2010, the Applicant filed an incomplete application with the Tribunal against the decision to reassign him to Abu Dhabi and requested a one-

month extension to complete his application, which was granted by the Tribunal. On 30 July 2010, the Applicant filed a full application.

23. The Respondent submitted his reply on 30 September 2010, after seeking and obtaining an extension of time from the Tribunal.

24. On 25 October 2010, the Applicant submitted observations on the Respondent's reply.

25. By letter dated 24 November 2010, the parties were informed that the Judge hearing the case considered that an oral hearing was not necessary and were given until 1 December 2010 to take position thereon.

26. On 29 November 2010, both parties informed the Tribunal that they agreed that an oral hearing was not necessary.

Parties' contentions

27. The Applicant's principal contentions are:

a. In 2003, the Applicant was removed from his post as Chief of Protocol, in which he had an excellent performance record and 14 years of experience, in an arbitrary and humiliating manner and under a promise that he would keep return rights to UNOV. Therefore the Applicant has the right to be placed against a regular post in UNOV;

b. The subsequent decisions to reassign the Applicant, without his consent, to five different positions in areas totally alien to his qualifications and experience as Chief of Protocol, and the cancellation within a short period of time of three of these decisions are an indication that they were made arbitrarily, i.e., to remove the Applicant from his previous position as Chief of Protocol according to the wish of the Executive Director, rather than dictated by operational or organizational needs;

c. The pattern of abuse continued by attempting to separate the Applicant from the Organization by offering him mutually agreed separation twice and by sending him a separation letter in 2009;

d. The above-mentioned decisions violated the Applicant's due process rights and inflicted on him emotional distress and hardship. Furthermore, by moving the Applicant from a regular budget post to temporary positions with uncertain sources of funding and for which the Applicant did not have the required qualifications and/or experience, the Respondent has paved the way for an easier separation;

e. The last of these decisions, i.e., the Applicant's reassignment to Abu Dhabi, is part of the continuous exercise of arbitrariness and harassment that commenced in 2003. It is an abuse of discretion and it is based on improper motives, including discrimination and harassment. Intention of harassment is further reflected in the issuance of a PA for one day, followed by another PA for 11 months and 30 days;

f. As per the Respondent's reply, within a few months only, multiple actions or decisions were taken regarding the Applicant's appointment status: review of his appointment on 2 February 2009, decision to extend his appointment through 31 December 2009 on 17 March 2009, decision to separate him effective 30 June 2009 on 30 March 2009, automatic implementation of the extension through 31 December 2009 on 17 April 2009, temporary reassignment to Abu Dhabi notified on 28 May 2009, etc. This reflects the kind of mental pressure the Applicant was subjected to;

g. Furthermore, by laterally reassigning the Applicant to Abu Dhabi without his consent, the Administration violated section 3.2(h) of ST/AI/2006/3 (Staff selection system), which provides that the staff selection system shall not apply to movement of staff who, like the Applicant, were previously appointed under the 100 series in accordance with staff rule 104.14 and who have agreed to participate in voluntary reassignment programmes;

h. The lateral transfer to Abu Dhabi is also in breach of the Organization's promise made to the Applicant six years before that his assignment to the field with UNODC would only be temporary and that he would subsequently return to UNOV;

i. The Administration abused its authority by abolishing the Applicant's post in Cairo, only to re-advertise it after the Applicant was reassigned to Abu Dhabi. The Respondent's assertion that the Applicant's post in Cairo was abolished due to the difficult financial situation of UNODC does not have any basis: the programme in which the Applicant was serving grew from USD250 000 to USD8 million, it was self-sustainable and even sending overhead money to Vienna.

28. The Applicant requests:

- a. His transfer to UNOV against a regular budget post commensurate with his background and qualifications;
- b. Compensation for the moral injury and material damage suffered;
- c. Protection from further professional and personal harassment.

29. The Respondent's principal contentions are:

- a. The Applicant's reassignment to Cairo in 2004 was part of a pilot rotational exercise. The Applicant did not appeal that decision at the time and therefore his claims in this respect are not properly before the Tribunal;
- b. The abolition of several field positions, including the Applicant's post in Cairo, was dictated by the Organization's operational needs and arrived at after a thorough analysis of the UNODC field office structure. GP funds for UNODC shrunk from an average of USD21 million annually between 1992 and 1998 to USD15 million in 2008 and were reduced by another USD2 million in 2009. In light of this critical financial situation, the Executive Committee of UNODC decided on a series of cost-cutting measures, including the abolition of a total of 28 posts;

c. The functions of the post established in the Cairo Regional Office under the 2010-2011 biennium budget, subsequent to the abolition of the Applicant's post, were substantively different from those previously carried out by the Applicant. This post was also funded from a different source;

d. The Applicant's temporary reassignment to the post of Programme Management Officer in Abu Dhabi from July to December 2009 was a good faith effort on the part of the Administration to retain the Applicant in active service after it had been decided to abolish his post in Cairo and pending his appointment by DPI, which however did not materialize given that the Government of Yemen did not clear the Applicant;

e. As regards the actual contested decision, i.e., the Applicant's lateral transfer to the post of Programme Management Officer in Abu Dhabi effective 1 January 2010, the decision falls within the discretionary authority of the Executive Director pursuant to staff regulation 1.2(c) and section 2.4 of ST/AI/2006/3. It was also part of the good faith effort made by the Administration to retain the Applicant in active service and will allow him to be considered for conversion to permanent. It was not vitiated by improper motives;

f. Contrary to the Applicant's allegations, the contested decision did not change his contractual status and did not form part of a pattern of harassment. The issuance of two PAs and of a letter of appointment for 11 months and 30 days was merely the result of technical difficulties due to the fact that the Applicant was temporarily charged against the Abu Dhabi post but physically working in Cairo. A revised PA covering the whole year and rescinding the previous one was sent to the Applicant on 3 February 2010;

g. As regards section 3.2 (h) of ST/AI/2006/3, which is relied upon by the Applicant, it should be noted first that "the authority to reassign is clearly stated in [s]taff [r]egulation 1.2(c) and [the] Staff Regulations take precedent [sic] over [a]dministrative [i]nstructions", and second, "the

reassignment in 2009 was not an action within the realm of a voluntary reassignment programme”.

30. The Respondent requests that the application be rejected in its entirety.

Considerations

31. The present Tribunal has consistently held that requests for administrative review or management evaluation are mandatory first steps in the appeal process. This has also been upheld on several occasions by the Appeals Tribunal. In *Crichlow* 2010-UNAT-035, for example, the Appeals Tribunal stated that: “Because Crichlow failed to request an administrative review on the matters, the UNDT had no jurisdiction *ratione materiae* to consider these matters and rightfully declined to do so.” (See also *Planas* 2010-UNAT-049).

32. In the case at hand, the only decision that was the subject of a request for management evaluation, and that is therefore properly before the Tribunal, is the decision to transfer the Applicant laterally from Cairo to Abu Dhabi, which was notified to him in writing on 21 December 2009. Accordingly, the Tribunal is only allowed to decide on the legality of such decision.

33. It follows from the foregoing that the Applicant’s arguments regarding the unlawfulness of (i) the decision to abolish his post, of which he was informed on 30 March 2009, and (ii) previous reassignment decisions, must fail since he did not formally contest these decisions through the appropriate procedure, i.e., a request for administrative review to the Secretary-General within two months of being notified thereof, followed by an application to the Tribunal.

34. It may be noted that the Administrative Tribunal of the International Labour Organization recently took the same position in Judgement No. 2933 (2010), concerning a case similar to the one at hand:

7. In support of his complaint [against the decision to terminate his appointment of which he was notified on 26 October 2006], the complainant first disputes the lawfulness of the Director-General’s decision to abolish his post, of which he was informed on 13 October 2005. In particular, he submits that there was no real justification for this measure with regard to the Organization’s interests.

8. However, as WHO rightly contends, the complainant failed to submit an appeal against the decision in question to the Headquarters Board of Appeal within sixty days of being notified thereof, this being the time limit stipulated by Staff Rule 1230.8.3. This decision [to abolish the complainant's post] has therefore become final, with the result that the complainant may not challenge its legality in these proceedings in order to impugn the subsequent decision to terminate his appointment.

35. The scope of the present case is therefore limited to the decision to transfer the Applicant laterally from Cairo to Abu Dhabi, of which he was notified on 21 December 2009.

36. The relevant provisions in this respect are the following:

Staff regulation 1.2(c) provides that:

Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations.

ST/AI/2006/3 (Staff Selection System) dated 15 November 2006 stipulates that, notwithstanding the procedures applicable to the staff selection process:

2.4. Heads of departments/offices retain the authority to transfer staff members within their departments or offices to vacant posts at the same level.

Annex I (Responsibilities of the head of department/office):

1. The head of department/office has the authority ... [t]o transfer staff laterally within his or her department/office.

37. Staff regulation 1.2(c) gives the Secretary-General broad discretion in making reassignment decisions. Section 2.4 of ST/AI/2006/3 does not impose restrictions on such discretion in case of a lateral transfer. Notwithstanding, it has been consistently held that the Secretary-General's discretionary authority is not unfettered and must not be arbitrary and/or tainted by improper motives.

38. The former UN Administrative Tribunal stated for example in Judgment No. 1408 (2008):

Staff regulation 1.2(c) provides that "[s]taff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations". The case law of the Tribunal has emphasized that the Secretary-General "generally enjoys broad discretion in making

decisions of this kind. Only where the Respondent's discretion is tainted by extraneous factors, such as prejudice, arbitrariness, improper motive, discrimination, for example, is such discretion subject to limitation." (Judgement No. 1163, *Seaforth* (2003))

39. Similarly, the UN Appeals Tribunal recently held in *Asaad* 2010-UNAT-021:

[A]s the former United Nations Administrative Tribunal ruled on many occasions, the Administration's discretionary authority is not unfettered. The jurisprudence of the former Tribunal provides that the Administration must act in good faith and respect procedural rules. Its decisions must not be arbitrary or motivated by factors inconsistent with proper administration (see, for example, Judgement No. 952, *Hamad* (2000)). We would add that its decisions must not be based on erroneous, fallacious or improper motivation.

40. In the present case, the Tribunal considers that the Applicant has not adduced evidence to support his claim that the decision to transfer him laterally to Abu Dhabi was arbitrary or based on improper motives. On the contrary, the Tribunal finds that in taking the contested decision, and thus retaining the Applicant's services when he could have decided to separate him, the Respondent acted in good faith. This is not to say that the previous decisions to reassign the Applicant and to abolish his post were taken in good faith: as already explained, the Tribunal does not have jurisdiction *ratione materiae* to review the justifications for such decisions.

41. Additionally, the Applicant claims that his lateral transfer to Abu Dhabi is in breach of the Organization's promise that his assignment to the field with UNODC would only be temporary and that he would subsequently return to UNOV. Such "promises" are contained in an email, a note for the file and a memorandum from the then Chief, HRMS, dated respectively 31 July 2002, 24 October 2002 and 20 May 2003. The first one states that the Applicant "will maintain return rights to UNOV/ODCCP upon completion of [his forthcoming] field assignment"; the second, which relates to a reassignment to Bangkok that never took place, that the Applicant "would continue to be a Secretariat staff member and consequently an internal candidate for UN Secretariat vacancies. He would maintain general return rights to UNOV/ODC at Headquarters"; the last one, which also relates to a reassignment in the field that never took place, this

one in Uzbekistan, stipulates that: “Following your reassignment you will retain your current appointment status, as well as corresponding return rights to the Secretariat, and you will be considered as an internal candidate for Secretariat vacancies.”

42. First, the Tribunal considers that these promises were not applicable to the Applicant’s subsequent reassignment to Cairo in 2004 since they were indissolubly connected to earlier and unsuccessful attempts to reassign him to other duty stations. Second, even assuming that they were applicable, the Tribunal notes that the Applicant would not have maintained return rights to his post in Vienna but only general return rights, which means that in order to return to Vienna, he would have to apply to a vacant post and be selected.

43. Finally, the Applicant states that by transferring him to Abu Dhabi without his consent, the Respondent violated section 3.2(h) of ST/AI/2006/3, which provides that:

The [staff selection] system shall not apply to ... [m]ovement of staff previously appointed under the 100 series in accordance with staff rules 104.14 or 104.15 who have agreed to participate in voluntary reassignment programmes. The Assistant Secretary-General for Human Resources Management shall decide on the reassignment of each staff member, without reference to a central review body. The programmes, aiming to stimulate mobility of staff, are strictly voluntary. Such movement shall be limited to incumbents of posts approved for inclusion in a voluntary lateral reassignment programme and shall not affect the application of the normal rules governing promotion or selection of staff for vacant posts.

44. Both the Applicant’s and the Respondent’s arguments in this respect are misguided and based on a misreading of the administrative instruction. ST/AI/2006/3 makes a clear distinction between a selection under the provisions of this instruction and an executive decision of lateral transfer (see for example section 4.2(c); paragraph 1 of annex I; and paragraph 1 of annex II). It results from such distinction that a head of department/office has the authority to transfer staff laterally within his or her department/office notwithstanding the procedures applicable under the new staff selection system. Put differently, in order to

laterally transfer a staff member within a department/office, the head of that department or office does not have to apply the new staff selection system.

Conclusion

45. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 2nd day of December 2010

Entered in the Register on this 2nd day of December 2010

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva