



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2010/061

Order No.: 186 (NY/2010)

Date: 28 July 2010

Original: English

Introduction

1. On 20 January 2010, the Secretary-General of the United Nations Conference of Trade and Development (UNCTAD) formally reassigned the applicant, an economist working at the P-3 level for UNCTAD in New York, to Geneva on a lateral transfer. The applicant appealed this decision, which was upheld at the level of management evaluation. Subsequently the implementation of the impugned decision was suspended until 1 August 2010, but subject to future medical clearance since the applicant is recovering from surgery to his wrist. The applicant then moved an application requesting that the decision be suspended under art. 10.2 of the Statute until his case on the merits is determined.

2. Following the hearing of the application for interim relief, I made a brief order dismissing the application with reasons to follow. These are my reasons for denying the relief.

Facts

3. In 2000, the applicant joined UNCTAD in Geneva at the P-2 level. In February 2005, he was promoted to the P-3 level and transferred to New York to the position which he currently holds. On 1 July 2009, the applicant was placed on a roster for pre-approved candidates for a

As already agreed with you, the P3 trickle-down vacancy will be earmarked for the lateral assignment to DITC of [first name of the applicant] with target EOD date 1 March 2010. The OSG is in the process of identifying a suitably-qualified replacement for NYO [the New York Office].

Meantime, you may use the P3 post temporarily for 3 months (1 Dec 2009 - 28 Feb 2010).

In order not to undermine the objectivity of the lateral assignments (mentioned above), knowing that this mad house thrives on false and self-serving gossips worse than infantile chatting fish vendors, pls do not make the proposed lateral arrangements public. This is to allow us to do proper notification to staff members concerned and to initiate the related administrative actions.

6. On 4 January 2010, the OIC called the applicant by telephone informing him that he was being considered for reassignment to Geneva. The applicant advised the OIC of the medical condition of his mother who required imminent surgery. Furthermore, he explained that he would also need surgery in early 2010. Thereafter, on the same day, the OIC wrote an email to the applicant in which the OIC stated that:

... I would like to let you know that you are considered for the lateral move as P3, Economic Affairs Officer in Trade and Analysis Branch in DITC under the supervision of, [name]. Your qualifications and experience were taken into account when considering this move. The targeted date for this lateral move would be 1 April 2010. The post is a regular vacant position.

7. By email of 12 January 2010, the applicant reiterated that he was regrettably “unable to accept the offer of a lateral move from New York to Geneva” due to his mother’s medical situation since “both the operation and ensuing period of recovery will take several months” and a move to Geneva would adversely affect the well-being of his mother. He added that he had “never made any application for such or any other lateral move”.

8. By email of 15 January 2010, the OIC wrote the applicant:

Dear [first name of the applicant],

I am very sorry about the health situation of your mother. I hope that everything will go well and she will recover quickly.

As promised, I will convey your message to the senior management and will get back to you.

9. In a memorandum of 20 January 2010 to the applicant, the OIC stated that:

1. On behalf of the Secretary-General of UNCTAD, I would like to convey officially the decision on your forthcoming lateral move within UNCTAD and re-assignment from New York Office to the position of Economic Affairs Officer, P3 in Trade Analysis Branch, Division on International Trade in Goods and Services, and Commodities, Geneva. This decision had been taken within the Secretary-General's authority as Head of department per section 2.4 of ST/AI/2006/3 on "Staff Selection System".

2. Please be informed that the Secretary-General has been apprised of your personal situation and it has been carefully considered. As mentioned earlier, your qualifications and experience were primary factors in reaching this decision.

3. The effective date of your lateral transfer to Geneva will be 1 April 2010 ...

10. On 24 February 2010, the applicant wrote to the OIC that:

I write to inform you that it has been confirmed that I will need to undergo surgery on my wrist. As you are aware, I broke my wrist in September of 2009 but unfortunately it did not heal as hoped and therefore the treating doctor, [name] (one of the most renowned hand surgeons in the world), has now scheduled surgery for 11 March 2010 (see attached Medical Report). Doctor [name] has also confirmed that in addition to post-operative visits I am expected to be casted for a period of 6 weeks after which I will require occupational therapy for a further period of 6 - 8 weeks.

As a result of the above I will not be able to move to Geneva on 1 April 2010 and I would be grateful if you could confirm that the reassignment will therefore be suspended at your earliest convenience.

11. Also on 24 February 2010, the applicant's supervisor in the UNCTAD New York office wrote to the OIC complaining about not being consulted on the applicant's transfer to Geneva and stating that it was "in the best interest of both Geneva and the NYO to keep [the applicant] here in New York".

12. By email dated 1 March 2010, the OIC enquired from the UN Medical Services Section whether it was advisable to postpone the applicant's move to Geneva. This email was forwarded to the applicant later the same day.

13. On 4 March 2010, the applicant filed a request for management evaluation contesting the decision to transfer him. On the same day, he submitted an application for suspension of action.

14. By memorandum of 5 March 2010, the OIC wrote to the applicant as follows:

1. I refer to your correspondence of 25 February 2010 informing me of your wrist surgery and my reply to you on 1 March 2010 informing you that the matter was referred to the UN Medical Service for their opinion.

2. Please be informed that I have obtained such opinion from Dr. [name], stating that "it seems to be prudent that [name of the applicant] should be considered for a lateral transfer upon he would completely finish his treatment, which has already been started in New York". He further mentioned that the expected time for the move would be around the end of May 2010.

3. Given the above medical opinion, the effective date of your lateral transfer to Geneva is postponed until end of May 2010. We will request medical clearance for your travel to Geneva on lateral transfer as appropriate.

15. Subsequently on 5 March 2010, the applicant withdrew his application for suspension of action, since the respondent "has indicated to suspend the implementation of the Impugned Decision until after expiration of the time limit for management evaluation".

16. On 16 March 2010, the Head of the Trade Analysis Branch (the TAB Head, not the would-be supervisor in para. 5), where the applicant was assumedly to be transferred to, wrote to another UNCTAD staff member in Geneva as follows:

Dear [first name of the UNCTAD staff member],

Do you know if anyone in the Trade Analysis Branch was consulted by the UNCTAD management on the decision to place [first name of the applicant] in the branch?

As Head of TAB, I was not aware of the decision, and the concerned memo was not even copied to me. I came to know about it through

1. For medical reasons it is recommended that [name of the applicant] should be allowed to work light duties effective 01 June 2010 until 01 August 2010.
 2. During this time, [name of the applicant] ... should also refrain from travel until further notice.
 3. At that time, he will be re-evaluated by his treating physician.
20. In a memorandum of 26 May 2010, the OIC informed the applicant that the transfer would be postponed until 1 August 2010 subject to his medical clearance.

Relevant legal provisions

21. The following provisions are applicable and/or have been relied on by the parties:

Article 10.2 of the Statute

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

ST/SGB/2009/9 (Staff Regulations of the United Nations and provisional Staff Rules)

Provisional staff rule 1.2(a)

Staff members shall follow the directions and instructions properly issued by the Secretary-General and by their supervisors.

Staff regulation 1.2(c)

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. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all

ST/AI/2006/3/Rev.1 (Staff Selection System)

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.

ST/AI/2010/3 (Staff Selection System)

[Section 1] (p). Job opening vacancy announcement issued for one particular position or for a set of job openings;

2.5. Heads of departments/offices retain the authority to transfer staff members within their departments or offices, including to another unit of the same department in a different location, to job openings at the same level without advertisement of the job opening or further review by a central review body.

13.1. The present administrative instruction shall enter into force on 22 April 2010.

ST/SGB/172 (Staff Management Relations: Decentralization of Consultation Procedure)

2. Under staff regulation 8.1, the Staff Council is established as the staff representative body with which the Secretary-General shall consult on questions relating to staff welfare and administration ... [T]he staff management consultation procedure will be decentralized so that issues of particular concern to the staff of an organizational unit may be resolved expeditiously at the departmental level, without necessarily being referred to the Joint Advisory Committee.

3. To this end, the heads of departments or offices at Headquarters, or their designated officials, will hold consultations with the appropriate unit representative regarding matters that affect the conditions of work or interests of the particular unit. The unit representatives, on their part, may initiate consultations by taking up such matters with the head of the department or office concerned or his/her designated officials and may be assisted, if necessary, by a member of the Staff Committee. Consultation at the departmental level may include such questions as the administrative arrangements in implementation of decisions involving major organizational changes or relocation of groups of staff. If issues involve ma

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Particular urgency

30. I must point out from the outset, that there appears to be an overlap between the applicant's contentions regarding urgency and irreparable harm.

31. Firstly, the applicant refers to **Tadonki** Order No. 16 (NBI/2009), in which the Tribunal held:

... if the decision contested [i.e., the non-renewal of the applicant's appointment] is implemented before consideration of the substantive appeal on the merits, the Applicant might be denied the chance of regaining the position he was occupying or should be occupying in the event that he or she is successful on the substantive case especially if the position were to be filled.

32. Secondly, the applicant refers to **Calvani** Order No. 92 (NY//2009), in which the Tribunal concluded that the decision to place the applicant on administrative leave without pay would deprive the applicant "of his salaries in such a sudden and unexpected way [that would] obviously [place] him and his family in a situation of particular urgency, which the respondent cannot seriously contest". In **Omondi** the Tribunal found that the requirement of irreparable harm is satisfied if the applicant can establish that "unless [the Tribunal] intervenes ... the Respondent's action or decision would irreparably alter the status quo". The applicant argues that a transfer from New York to Geneva would, without prejudice to staff regulation 1.2(c), have significant and protracted impact on his personal and professional life, which cannot be compensated by monetary means. Although the communication from UN Medical Services of 20 July 2010 appears to defer the implementation of the applicant's physical transfer "until further notice", at present undetermined, it cannot be excluded that the applicant will be cleared to travel at any time. Considering **Tadonkj** if the applicant prevails in the substantive case, the position he presently encumbers in New York will be filled with another staff member, precluding specific performance and arguably resulting in irreparable harm.

Irreparable damage

33. The applicant contends that irreparable harm is established if it can be shown that a suspension of action is the only way to ensure that the applicant's rights are observed – see *Fradin de Bellabre* UNDT/2009/004; an approach confirmed in *Utkina* UNDT/2009/096.

34. The applicant says that if the decision to transfer him to Geneva is implemented, he will have to abandon a personal life he has built in New York over the last six years and will be required to start up a new personal life in Geneva. This damage that is the value of his social life (well-being, friends, etc), cannot be compensated by monetary means. Implementation would also entail that another staff member poised for the applicant's present position will be appointed to it, thus precluding his return to New York should he succeed on the merits.

Respondent's submissions

Prima facie unlawfulness

35. The decision is not prima facie unlawful and it is the applicant who must demonstrate this. He must establish a sufficient likelihood of ultimate success (see *Modeste* Order No. 62 (NY/2010)). The applicant must establish a serious and reasonable doubt about the lawfulness of the contested decision (see *Corcoran* UNDT/2009/071).

36. The Organisation enjoys a broad discretion in assigning its employees to different functions as deemed appropriate. According to staff regulation 1.2(c) and provisional staff rule 1.2(a) it falls within the Administration's discretionary power to assign every staff member where he or she is more needed, provided that the functions attributed are not at odds with his skills and qualifications, not being bound by the preferences of the employee. Otherwise, the effective functioning of the Organisation could not possibly be ensured (see *Bye* UNDT/2009/083 and *Allen*).

37. The respondent points out that when assigning a staff member to a different function, there is no provision that requires obtaining the consent of a staff member or of his direct supervisor. Provided that the decision was not improperly motivated, there is an obligation on the staff member to accept a reassignment in the interests of the Organisation. Furthermore, it is for the Organisation to determine whether a decision to transfer a staff member is in its interest or not, provided that there is no abuse of this broad discretionary power, or a violation of procedures (see Allen).

38. With reference to sec. 3 of ST/SGB/172 the case at hand only concerns the reassignment of one staff member. Furthermore, there is no provision in the staff regulations and rules that require that a staff member is consulted before a decision such as this is taken or which defines the term “consultation”. However, in **Brewster** the UN Administrative Tribunal stated that:

... an essential element of consultation is that each party to the consultation must have the opportunity to make the other party aware of its views so they can be taken into account in good faith.

39. Consultation with the staff member **before** the decision is officially communicated can therefore be considered as good managerial practice, but not essential. If a staff member disagrees with the decision to transfer him or her, the decision can nevertheless be implemented as there is no requirement to obtain the consent of the staff member or his supervisor.

40. In the present case, the applicant had several opportunities to share his views with UNCTAD senior management and he had in fact been consulted prior to the official communication of the decision to him. The applicant and the OIC had several telephone conversations and email exchanges before 20 January 2010 (the date the decision was officially communicated to the applicant) and the applicant was encouraged to submit his views and concerns in writing and he did so by e-mail dated 12 January 2010. The OIC had no reason to enquire further as the applicant had had the opportunity to put forth his concerns, and the OIC communicated these concerns to the senior management who duly took them into account. However, senior management decided that the interests of the Organisation should prevail over the

applicant's concerns. The UNCTAD management has subsequently taken into consideration the health constraints of the applicant with regard to the transfer date which has already been postponed twice.

41. UNCTAD would satisfy its obligations when a staff member is laterally transferred by providing the staff member with work at the same level and ensuring that the newly attributed functions match the qualifications and skills of the staff member concerned. The position in Geneva is a P-3 post, Economic Affairs Officer in the TAB, Division of International Trade in Goods and Services and Commodities, and the applicant's current level is P-3 and he works as an Economic Affairs Officer. The applicant is not overqualified for the post.

42. Furthermore, the respondent contends that the transfer would be in the interests of UNCTAD, and the decision was

decision to reassign the applicant to Geneva was based on his qualifications and experience, which TAB in the past had regularly requested and utilised during his current assignment in New York. The UNCTAD management considered that assigning the applicant to the post in Geneva would be an excellent use of his skills and qualifications and would be in the best interest of the Organisation.

45. Concerning the allegation that the applicant had been approached by the Special Assistant to report on the conduct and contacts of his supervisor, the respondent refutes this contention and notes that the applicant does not provide any evidence for it. UNAT has consistently held that where the appellant avers illegal motives, the burden of proof in such matters rests upon him (see UN Administrative Judgments No. 312 Roberts(1983) and No. 1118 Khuzam(2003), as endorsed by the UNDT in Bye).

46. As to the applicant's supervisor not being consulted before the decision was taken, the respondent explains that the OIC had unsuccessfully tried to reach the supervisor at beginning of January 2010 as he was on home leave until mid-February 2010. Furthermore, the decision not to involy[(200involyiaver)33(-.0004 Tct44 Tw3 Tw[(on 0t3Gdr

Irreparable damage

48. With reference to *Fradin de Bellabre* the respondent submits that harm is irreparable if only it can be shown that there are no other ways to ensure that the applicant's rights are observed. The respondent contends that there is no cogent evidence of this in the present case, even though the "status quo" of the applicant would change as he would be working in Geneva (although at the same level) and executing different functions, which, however, would match his skills and qualifications. The applicant's abandonment of his social life in New York cannot be considered as irreparable as there is no acquired right to continuously work in one duty station. As an international civil servant, the applicant is obliged to carry out his duties in any duty station the Secretary-General assigns him to, bearing in mind, that the Organisation puts a strong emphasis on the mobility of its staff. The alleged immaterial damage could be compensated financially if the applicant should win the case on the merits.

Considerations

The jurisdiction of the Tribunal

49. The applicant contends that the contested decision is that of 20 January 2010, which was encompassed by the management evaluation of 7 April 2010 and that the decisions following thereafter regarding postponement of his reassignment were merely implementations of this underlying decision. I agree with this submission and find that this application is receivable.

50. To grant the interim relief sought, the Tribunal must be satisfied that all three conditions specified in art. 10.2 of the Statute, echoed by art. 14 of the Rules of Procedure, are met. Furthermore, parties approaching the Tribunal in matters of this nature must do so urgently and with sufficiency of information for the Tribunal to preferably decide on the papers before it. The proceedings are not meant to turn into a

full hearing. The application must not be frivolous or an abuse of process or else an applicant may well be mulcted in costs (see Applicant Order No. 164 (NY/2010)).

Prima facie unlawfulness

51. The first of the three criteria is that the contested decision “appears prima facie to be unlawful”. If indeed the applicant has an arguable case of unlawfulness a legal rule must therefore have been broken or not followed. I find that none of the three arguments the applicant outlines in his submissions render the decision to transfer him prima facie unlawful under the relevant legal instruments, namely staff regulation 1.2(c), provisional staff rule 1.2(c) and art. 2.4 of

staff regulation 1.2(c)). Even though the staff member may therefore be entitled to make representations to the Administration, the latter is not bound by these and needs, at most, to take them into meaningful consideration, conducting the consultation in good faith and taking the interests of the staff member into account without prejudice to its own interests.

55. In this case, the Administration considered the applicant's representations, but the applicant alleges there was no meaningful consultation. Having indicated the ill-health of his mother and his expressed need and desire to be as geographically close to her as possible, he argues that the respondent made no further enquiries as to the further particulars of same. He alleges that any reasonable official would have made further enquiries as to the particulars e.g. the period of time the applicant would need to remain within traveling distance of hi

current supervisor and the Head of the TAB in the selection processes for the New

61. The circumstances which the applicant refers to do not constitute a conspiracy to remove him from New York on account of his alleged failure to provide the information on his supervisor.

62. Accordingly, the applicant has not established a prima facie case for unlawfulness.

Particular urgency

63. The applicant's submissions in this regard appear to address the notion of irreparable damage rather than that of urgency. The only relevant contention under this heading is that if another individual is appointed to his post in New York before the conclusion of the case on the merits, this would deny the applicant his rights to the position.

64. To my mind, the alleged urgency of this postulation is self-inflicted and unsustainable as the applicant did not apply for the New York position when it was advertised. Had the applicant applied for the position and if the applicant is qualified as he submits, his candidacy for the position would appear very strong, and if selected, the main issue of the case on the merits, namely his transfer, would become

intents and purposes, it seems that he has accepted the inevitable in this communication.

Irreparable harm

66. The applicant submits that the respondent misunderstood the concept of art. 10.2 of the Statute, since it is a non-sequit~~ur~~to state that the applicant has no acquired right to continue to work in New York. Ha

he would be suffering a loss of social life which he alleges he built up over six years in New York.

68. Since the prerequisites for granting an interim measures under art. 10.2 of the Statute are not satisfied, I need not decide the applicant's contention that the Tribunal is competent to order the respondent not to make the appointment of a third party under art. 10.2.

Conclusion

69. In light of the above findings, the application was dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 28th day of July 2010