

Judgment No. 2022-UNAT-1223



JUDGE SABINE KNIERIM , PRESIDING .

1. The Secretary-General appeals Judgment No. UNDT/2021/006 (the Impugned Judgment), dated 2 February 2021, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) . In addition, Ms. Silva has submitted a crossappeal of the Impugned Judgment. Both of these matters are before the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) for consideration.

2. Before UNDT, Ms. Silva had contested

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preventing the relevant person from access to the pertinent information, using an information barrier or “ethics wall”.⁶ UNDT took judicial note of the fact that it was common for staff members working in the internal justice system to change jobs, even representing opposite parties, and that issues of conflict of interest are typically resolved without any noteworthy operational problems.⁷

14. Concerning pending disciplinary investigation into some affairs related to the Applicant’s tenure with the

Procedure before the Appeals Tribunal

18. On 5 April 2021, the Secretary-General submitted an appeal of the Impugned Judgment to UNAT. On 31 May 2021, Ms. Silva filed her answer.

19. On 31 May 2021, Ms. Silva submitted a crossappeal of the Impugned Judgment to UNAT. On 2 August 2021, the Secretary-General submitted a response to the crossappeal.

Submissions

The Secretary-General's Appeal

20. The Secretary-General submits that the UNDT exceeded its competence when it held that the Secretary-General did not have the authority to transfer Ms. Silva. The Secretary-General submits that although the UNDT held that it had the authority to intercede in the discretionary assignment of staff members in cases of bad faith or improper motivation, it proceeded to rescind the contested decision in the absence of either. The Secretary-General submits that there were no safety or security concerns evident which may have limited the Secretary-General's discretion to assign staff members as per Staff Regulation 1.2(c). Similarly, the Secretary-General submits that there was no evidence that the reassignment was arbitrary or capricious, motivated by prejudice or extraneous facts or flawed by procedural irregularity or error of law. The Secretary-General submits that, on the contrary, the evidence supports that the motivation for the assignment was solely concerns about Ms. Silva "being placed in situations in which performing her duties could lead to conflicts of interest". Further, the Secretary-General submits that the UNDT erroneously usurped the authority of the Secretary-General by failing to give deference to that motivation for the lateral transfer of Ms. Silva.

21. The Secretary-General submits that the reassignment fulfilled the requirements set forth in *Rees*¹⁰ and *Chemingui*¹¹, namely that the accepted method for determining whether the reassignment was proper, absent bias or bad faith, is to assess whether the new post is at the staff member's grade, whether the responsibilities involved corresponded to his or her level, whether the functions to be performed were commensurate with the staff member's competence and skills, and whether he or she had substantial experience in the field. Accordingly, the

¹⁰ *Rees v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-266.

¹¹ *Chemingui v. Secretary General of the United Nations*, Judgment No. 2019-UNAT-930.

Secretary-General submitted that the UNDT did not apply the standard set forth in *Sanwidi*¹², *Rees* or *Chemingui*.

22. The Secretary-General submits that the UNDT erred in law and in fact by holding that no proper reason was given for Ms. Silva's transfer, rendering the contested decision unreasonable.

23. The Secretary-General submits that the UNDT erred by substituting its judgment for the authority of the Secretary-General under Staff Regulation 1.2(c) when it held that, contrary to his own determination, Ms. Silva's return to AAS would not raise potential conflicts of interest. Specifically, the Secretary-General submits that, while there was neither a specific policy

36. Ms. Silva.7 (2)0.7 (2)0.1

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that this does not entitle him to claim the existence of exceptional circumstances before UNAT to make such a submission at this stage of the proceedings.

68. Ms. Silva submits that the outcome of the investigation is not a circumstance relevant to the case at hand hc (e)-10.i(s)3.1 ca96.5 (4-1.5 (nt)4.1n (4-30.1 (c)-6.r)]TJ ns(o)-8.5 hc)-6.5 (o)-8.5(e)-10

Whether the Secretary-General followed proper procedure before reassigning Ms. Silva

71. The UNDT held that the process surrounding the transfer decision was flawed. Relying on our judgment in *Chemingui* (paras. 39 and 45), the UNDT noted that the general principle of good faith and fair dealings dictates that a staff member should typically—and at a minimum —be consulted about such transfer before the final decision is made and priorly be provided with a genuine opportunity to comment thereon. From the Secretary-General's own submissions, it follows that Ms. Silva was not provided with any information about her transfer away from AAS before the 28 March 2019 meeting with the Chief of AAS, and rather than a meaningful consultation about the decision, she was presented with a *fait accompli* about the transfer away from AAS. The fact that Ms. Silva

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76. Further, the UNDT erred when it held that the reassignment decision should have been notified in formal writing as the terms and conditions of Ms. Silva's employment were significantly altered. Neither the applicable legal and administrative framework nor the jurisprudence of the Appeals Tribunal contains such a requirement. Additionally, there is no evidence that Ms. Silva's terms and conditions of employment were significantly altered. Contrary to the UNDT's findings, she was not reassigned to another post located in another entity. Rather, she remained on her previous post in the same department (DMSPC) and the same office (OHR).

77. Finally, the UNDT erred in holding that Ms. Silva was not consulted before the reassignment. The UNDT has an incorrect understanding of a consultation before an administrative decision is issued. Consultation means the provision of information about the intended administrative decision and an opportunity for the staff member to comment thereon. Ms. Silva was informed about the intended reassignment on 28 March 2019, more than a month before her tenure as Second Vice President of UNSU expired. According to her statement in the 6 October 2020 joint submission she was informed on that day that she could not return to AAS due to the conflict of interest resulting from her tenure as Second Vice President of UNSU, and the operational challenges those conflicts would pose to AAS. By a 30 March 2019 telephone text message she was asked to think about where in OHR she would have an interest in working. Thus, Ms. Silva was informed more than a month before the transfer decision was taken. This period of time gave Ms. Silva ample opportunity to comment on the transfer. The UNDT's holding that there was "no meaningful consultation" as Ms. Silva was presented with a "fait accompli" is erroneous. It is not necessary that, during the consultation, the Administration discuss the reasons for the intended administrative decision in d.5 ((t,)1 (f08 (t)-1)717 Td (f)3.6 ((r)-10.97e)-8 (

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Whether there was bias and/or improper motives on the part of the Administration

83. The UNDT, relying on and applying the jurisprudence of the Appeals Tribunal, found that based on the case record there was not sufficient evidence to substantiate any findings that the reassignment decision was tainted by any ulterior improper motivation .

84. In her cross-appeal, Ms. Silva submits that the circumstances around her reassignment show that the Administration did not have any valid reason to reassign her, apart from its own bias towards a staff member who is subject of an investigation. The UNDT should have applied *Chemingui*, para. 47, where a UNDT finding on this issue was corrected by the UNAT.

85. This argument is without merit, and the UNDT' s finding is correct. Ms. Silva has misunderstood our Judgment in *Chemingui*, which reads, in the relevant parts (footnotes omitted) :

47. Regarding the claim of improper motives in the reassignment, the UNDT dismissed this specific ground of appeal because the claim was both vague and unsupported by any evidence. We partially disagree. In his UNDT application, Mr. Chemingui submitted that the contested decision had been tainted by improper motives and taken in response to his challenge of an administrative decision of [the Economic and Social Commission for Western Asia] in 2014 and that the impugned decision was used to disadvantage him so that his eventual nonrenewal would be legitimized. This is not a vague argument. Rather, it is a clear and precise statement. On the other hand, we find no evidence of the alleged improper motives that could justify an award of compensation for harm in the present case.

86. The UNDT's finding that there is not sufficient evidence for bias or improper motive is in complete accord with our Judgment in *Chemingui*.

87. The fact that the UNDT did not accept the Secretary-General's contention (that Ms. Silva's return to AAS would result in a conflict of interest) does not in itself prove that the Administration acted with bias or improper motive.

Compensation

88. As the reassignment decision has been found lawful, Ms. Silva is not entitled to receive any compensation.

Secretary-General's motion to admit new evidence and pleading

89. As set out above, the Secretary-General has filed a Motion requesting the Appeals Tribunal to allow new evidence and arguments on appeal.

90.

Judgment

92. The Secretary-General's appeal is hereby granted and Ms. Silva's cross-appeal is dismissed. The Impugned Judgment is reversed and Ms. Silva's application is dismissed in its entirety.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

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