
Case No.: UNDT/GVA/2009/15

Judgment No.: UNDT/2010/009

Date: 22 January 2010

its regular incumbent was provisionally assigned to the Department of Peacekeeping Operations (DPKO). On 12 February 2008, the Applicant was granted a Special Post Allowance (SPA) to the P-4 level retroactively effective from 2 October 2007.

8. On 19 September 2008, the Acting Deputy Secretary-General of UNCTAD sent, by an all UNCTAD staff e-mail, a memorandum announcing “further staff redeployment” carried out on behalf of the Secretary-General of UNCTAD. Four staff members were concerned, among them, the Applicant, who was reassigned, with his P-3 post, to the position of Chief, GSU, UNCTAD, at the P-3 level, effective 6 October 2008. In the above-mentioned memorandum, reference was made to a series of previous staffing redeployments announced by memoranda dated 26 June, 16 July and 23 July 2008. It was specified that those redeployments were “designed to ensure the effective implementation of the Accra Accord”. It was also stated that the arrangements regarding the post of Chief, GSU, were “in line with audit observations and recommendations”.

9. By email dated 22 September 2008, the Director, Division of Management, UNCTAD, who was the Applicant’s supervisor until he retired on 30 September 2008, objected to the decision to reassign the Applicant, underlining that had never been consulted thereon. The Secretary-General of UNCTAD replied to tKLTiFí-bFYyLAiv-í,-HFHLDipízFHFML.ivK,bíHHrFFbbKLtivbíbKFKYL iv-L ivK

12. By memorandum dated 26 September 2008, the Chief, Office of the Secretary-General of UNCTAD, replied to the Applicant's memorandum dated 22

the contested decision was found to be in conformity with the Organization's rules.

19. On 21 November 2008, the Applicant filed an appeal before the JAB

it is noted that a town hall is neither appropriate nor sufficient as a means of informing the affected staff members of such measures;

- b. The reasons put forward by the Administration for the contested reassignment, i.e. that this measure is in line with the Accra Accord and with the recommendations of an OIOS audit, are disingenuous and misleading. The Accra Accord, reached at UNCTAD XII Conference, was mainly meant to strengthen areas of substantive

replacements on this position since the Applicant's departure. The above shows that he was removed for retaliatory reasons;

- e. Section 2.4 of ST/AI/2006/3, which has been repeatedly invoked by the Administration, is not applicable to his case, since he was not transferred to a vacant post at the same level. Instead, he was moved, along with his post, to functions performed until then by a staff member at the L-4 level. Accessorily, the history of this post has been highly irregular;
- f. Contrary to what the Administration claims, the Applicant's reassignment was not in the best interest of the Organization. It resulted in a weakening of the section, which was left with insufficient staff, particularly professional staff. Furthermore, the staff member who initially replaced the Applicant for one month as

decision. Furthermore, the argumentation that neither he nor his supervisor were available for prior consultation conflicts with the contention that the decision under review did not r

This does not change, however, the fact that the decision as such was properly motivated;

- h. With reference to the claim that the previous Chief, GSU, UNCTAD, served at the L-4 level, it must be noted that the functions of the post were classified at the P-3 level;
- i. In light of the foregoing, the Respondent requests that the present application be rejected and that no further action be taken on this case.

Considerations

26. At the outset, it is appropriate to recall that the scope of the present case is limited to the contested decision, i.e. the Applicant's reassignment. The Tribunal's considerations shall accordingly be confined to this issue. In particular, the Tribunal will not address the issue of the handling by OIOS of the Applicant's complaints.

27. It is widely recognized that the Organization enjoys broad discretion in assigning its employees to different functions as deemed appropriate. In accordance with former staff regulation 1.2 (c), former staff rule 101.2 (b) and section 2.4 of ST/AI/2006/3, Staff selection system, staff members are subject to the authority of the Secretary-General, who may assign them to any of the activities or offices of the Organization. There is no requirement to obtain the consent of the concerned staff member or his/her direct supervisor. The obligation of staff to accept such assignments in the interest of the Organization has been consistently upheld by UNAT, provided the decision was not improperly motivated. In general, it is for the Organization to determine whether a measure of this nature is in its interest or is not. Nonetheless, this broad discretion should not be abused, such as in cases where a decision is arbitrary or based on improper motives, or taken in violation of mandatory procedures.

28. While the Applicant holds that the challenged decis

proving such allegation (see UNDT/2009/083, Bye). In the present case, the Applicant describes a series of incidents and disagreements with UNCTAD management. However, this falls short of satisfying the standard of proof required to demonstrate that his hierarchy manifested bias or prejudice against the Applicant, and even more of establishing that the alleged bias or prejudice would have motivated the decision under review. The conclusion would be the same should the preponderance of evidence test be applied. In this case, the preponderance of evidence does not demonstrate bad faith with respect to the motivation for the contested redeployment (see UNDT/2009/95, Sefraoui).

29. Moreover, it appears that the Applicant was redeployed to a position

the High Commissioner for Human Rights had done when faced with a similar situation.

35. The Tribunal has already emphasized the Respondent's general obligation to abide by all pertinent legal instruments (see judgment UNDT/2009/084, Wu; UNDT/2009/095, Sefraoui).

valid criteria with regard to the concept of legality implied by the statute, which is, of course, binding for the Tribunal.

40. According to article 10.5 (a) of the UNDT statute, the Tribunal may order the rescission of the contested decision or the award of compensation or both, if the illegality of the concerned administrative decision has been established. The Tribunal has already held that, in general, illegal administrative decisions cannot stand. “To allow a decision to stand in spite of it being shown to be unlawful turns the law on its head” (UNDT/2009/033, Onana). Therefore, as a general rule it is necessary to rescind the contested decision once the Tribunal has established its illegality. There is no reason in the case at hand that may justify making an exception to this rule.

41. Article 10.5 (a) of the UNDT statute prescribes the obligation of the Tribunal to set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested administrative decision, where the latter “concerns appointment, promotion or termination”. The Applicant’s case, however, does not relate to any of these categories. The memorandum dated 19 September 2009 characterizes the decision in question as part of “further staff redeployment”. It is clear that a redeployment or reassignment is neither a promotion nor a termination.

42. The redeployment of the Applicant cannot be considered as an appointment either. This term has both a broad and a narrow meaning. On the one hand, it may include any movement to a new position. On the other hand, a narrow interpretation of the term would refer exclusively to the initial conclusion of a contract between the employee and the Organization under the UN Staff Regulations and Rules. Notwithstanding the lack of a legal definition of appointment, it should be noted that Article IV of the Staff Regulations, Appointment and Promotions, and more specifically staff regulation 4.2, makes a clear distinction between “appointment”, “transfer” and “promotion”, thereby indicating that the terms of “appointment” and “transfer” cover distinct notions. The Applicant’s redeployment in the present case may thus very well be considered as a “transfer” as opposed to an “appointment”.

43. In addition, article 10.5 (a) of the UNDT statute is to be read restrictively, in keeping with a well-known principle which requires that exceptions shall be interpreted in a restrictive manner. The main purpose of article 10.5 (a) of the statute is to allow the Tribunal to order the rescission of a contested administrative decision. Offering the Administration the choice to pay compensation in lieu of implementing such order constitutes an exception to the Tribunal's prerogative to rescind a decision.

44. According to article 10.5 (b) of the UNDT statute, the Tribunal may order "compensation, which shall normally not exceed the equivalent of two years' net base salary of the applicant ..." Article 10.7 of the UNDT statute further provides that the Dispute Tribunal shall not award exemplary or punitive damages. In the Applicant's case, compensation has to cover two different kinds of damages, i.e. the financial loss resulting from the Applicant's reassignment and the moral damage resulting from the violation of his due process rights.

45. The Applicant, whose personal grade is P-3, had been granted a SPA to the P-4 level while serving as O-i-C, HRMS, a position classified at the P-5 level. After his redeployment to a position at the P-3 level, the SPA was discontinued effective October 2008. Considering that the Applicant's temporary assignment to the position of Chief, HRMS, had been approved only until 1 January 2009, the Applicant's financial loss resulting from his redeployment is equivalent to the amount of SPA he would have received from October to December 2008.

46. The Tribunal has already pointed out that the provisions of the statute cited above mainly rely on the idea of "compensation" rather than that of "material damage". Whenever an infringement of a person's rights has been established, compensation for this breach has to be considered. Otherwise judicial remedy carries the risk of becoming ineffective (see UNDT/2009/084, Wu). Also, the former UNAT held that "failure of the Respondent to adhere to its own rules represents an irregularity which amounts to a violation of the Applicant's right to due process, for which the Applicant should be compensated" (judgement No. 1122, Lopes Braga (2003), quoting judgement No. 1047, Helke (2002)). There are no indications that the new system of administratio

exemplary or punitive damages are not crossed, in accordance with by article 10.7 of the UNDT statute.

47. Since the quantification of moral damages is an “inexact science”, the

must be recalled that those decisions pertained to non-promotion cases, whereas the Applicant's case concerns a mere reassignment. The foregoing notwithstanding, it has to be noted that the Organization committed a breach of procedural law and did not act in good faith in conveying the contested decision. With respect to these circumstances, the Tribunal finds that two months' net base salary (P-3 level, step 2), i.e. approximately USD 9,000, would be an appropriate amount to compensate the moral injury suffered by the Applicant.

51. Putting together both the financial loss and the moral damage suffered by the Applicant, the Tribunal is convinced that - considering all relevant circumstances of this case - a sum of USD 12,000 is adequate to compensate the Applicant.

Conclusion

52. In view of the foregoing, the Tribunal ORDERS that:

- 1) The decision to redeploy the Applicant as per the memorandum of the Acting Deputy Secretary-General of UNCTAD dated 19 September 2008 be rescinded.
- 2) The Applicant be paid a sum of USD 12,000 within 45 calendar days of receipt of this judgment.

53. All other pleas are rejected.

(Signed)

Judge Thomas Laker

Dated this 22nd day of January 2010