



UNITED NATIONS DISPUTE
TRIBUNAL

Case No.: UNDT/NY/2010/005/
UNAT/1574
Judgment No.: UNDT/2012/078
Date: 30 May 2012
Original: English

Before: Judge Coral Shaw
Registry: New York
Registrar: Hafida Lahiouel

PEREZ-SOTO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. This case concerns the reassignment of the Applicant in October 2004 from his position in the Office of Human Resources Management (“OHRM”), Department of Management (“DM”), to the Contributions Service in the Office of Programme Planning, Budget and Accounts (“OPPBA”), DM. The Applicant alleges that this reassignment was unlawful.

2. Previously, in June 2003, the Applicant had been reassigned from his former post in the Programme Planning and Budget Division, OPPBA to a post in OHRM. The present proceeding arose after the Applicant was then transferred back to OPPBA from OHRM in October 2004, this time to the Contributions Service. He requested two administrative reviews. In the first, on 30 November 2004, the Applicant challenged the reassignment decision and in the second, on 10 December 2004, he claimed the right to be placed in the exact former position he had occupied in the Programme Planning and Budget Division, OPPBA along with “due explanations as to why [this] movement takes place outside the Staff Selection System and [reviewed] with transparency”. His requests for administrative review were declined.

3. The Applicant then commenced his present claim by appealing to the Joint Appeals Board (“JAB”). The appeal was dismissed by the JAB. The Applicant further appealed to the former United Nations Administrative Tribunal. After that body was abolished on 31 December 2009, the case was transferred to the Dispute Tribunal. Attempts to mediate a resolution to the long-standing employment dispute between the parties have not been successful. The last advice to that effect was received by the Tribunal on 24 November 2011.

Scope of the case

4. The principal issue to be determined in this case is whether the decision to reassign the Applicant from OHRM to the Contributions Service, OPPBA, was a lawful exercise of the Respondent's discretion. The Tribunal has identified the following four relevant questions to be considered, namely:

- a. Was the decision to reassign the Applicant to OPPBA made in bad faith?
- b. Was he reassigned to a proper position?
- c. Was the authority to reassign the Applicant properly delegated?
- d. Was the decision not taken in the best interests of the Organization?

5. Before and during the hearing, the Applicant was repeatedly advised that the Tribunal was limited to deciding only the issue of his reassignment to OPPBA as his appeal against the initial reassignment from OPPBA to OHRM had previously been adjudicated. However, in addition to the main issue, the Applicant raised a range of other matters, including that:

- a. The Applicant's prior Performance Appraisal System ("PAS") reports had not been completed;
- b. The proceedings were delayed for 8 years;
- c. The Respondent failed to implement his previous decisions and commitments;
- d. The Respondent did not properly engage in mediation negotiations under the auspice of the United Nations Ombudsman; and
- e. The Applicant was wrongly denied a promotion to the P-3 level and further career development.

6. The Tribunal notes that none of these alleged administrative decisions are properly before the Tribunal in the present case as the Applicant did not seek an administrative review of them in this context. Pursuant to arts. 2.1 and 8.1 of the

11. The Applicant also enclosed: an email from Mr. Lioneliti Berridge (title unknown) to Mr. Charamouli Ramanathan, Director of the Accounts Division,

Motion 3

15. The Applicant requested the Tribunal to “fully dismiss” the testimony of the Respondent’s second witness, Mr. Chandramouli Ramanathan, Director, Accounts Division, OPPBA, based on his proposed testimony being hearsay and which the

a 10-page synopsis which was compliant. The Respondent filed submissions in response and the Applicant made final submissions.

20. During the period for filing the submissions, the Respondent, in accordance with a request by the Tribunal, electronically filed some documents which had been referred to in the course of the hearing on the merits. The Applicant responded to this filing with a request for the Respondent to “complete his attempted submission of documents” before he passed “a formal and thorough reply on the production of these documents”.

21. The Tribunal rejects this request. The filing by the Respondent was a formality and is not an opportunity for the Applicant to introduce new issues or to re-open the issues that have already been comprehensively canvassed.

22. Finally, the Tribunal notes that the Applicant states in his closing submission that he believes that some other relevant documents still remain to be disclosed. However, the Tribunal is satisfied that all documents relevant to the Applicant’s claims that are receivable have been disclosed by the Respondent.

Facts

23. In response to orders of the Tribunal, the parties presented a statement of agreed facts which they derived from JAB Report No. 1839 dated 7 November 2006 (“the JAB report”). At the substantive hearing, evidence was taken from the Applicant and his witness, Mr. Claude Jumet, Information Technology Officer, OHRM, and two witnesses for the Respondent: Mr. Ramanathan and Mr. Krishnan. The following outline of the factual events derives from these sources as well as from the documents which the parties have submitted to the Tribunal.

24.

Case No.

information is confirmed by a “Note for the File” of 2 May 2003 by Mr. Vladimir Below, in which he states that:

[O]n 29 April 2003 I have discussed with [the Applicant] his work performance for the reporting period, advised him that his performance was overly unsatisfactory, provided him with specific examples of his performance and made suggestions for improvements. During the discussions, [the Applicant] agreed with me that his work performance was unsatisfactory, but he reiterated his previously stated position that the cause of his performance problem was attributed to the prolonged and unsolved seven-year old evaluation situation and to unfair, in his view, treatment that he received from his supervisor.

28. In the note, Mr. Below further explained that OHRM had given specific instructions, in interoffice memorandum dated 9 January 2003 from OHRM to OPPBA, to prepare such a note “[i]f the staff member persists in refusing to prepare his work plan for the current [appraisal] circle”.

29. The Applicant confirmed in his evidence that he had received an adverse PAS evaluation from his previous supervisor in OPPBA before he was reassigned to OHRM although he alleges it was fabricated. He accepted that there were a lot of tensions between him and that supervisor. His witness, Mr. Jumet, confirmed that the Applicant’s tenure at OPPBA was not “a happy one”.

30. While waiting for the outcome of his JAB case concerning the reassignment from OPPBA, early in 2003, the Applicant complained to the United Nations Ombudsman about the behaviour of the Administration towards him. Later in 2003, he requested the Respondent to reconsider the decision of the Ombudsman to refuse to open an investigation into alleged harassment against him. This was declined. He appealed that decision first to the JAB and then to the former United Nations Administrative Tribunal. The latter, on 6 February 2008, decided that neither a review of a decision by the Ombudsman not to investigate, nor a review of the investigation by the Respondent into the situation in which the Ombudsman had decided not to investigate, were receivable appeals (Judgment No. 1359, *Soto* (2007)).

31. On 5 August 2004, Ms. Catherine Bertini, Under-Secretary-General (“USG”) for Management, wrote to Mr. Jean-Pierre Halbwachs, then Assistant Secretary-

member received more information from Ms. McCreery about her reassignment than he had, Mr. Krishnan explained that, as Assistant-Secretary-General for Human Resources, Ms. McCreery was carrying out her responsibility to an incoming staff member to advise her of her supervisor.

36. On 11 October 2004, Mr. Halbwachs sent the Applicant a similarly detailed memorandum advising him that he was reassigned to the Contributions Service, OPPBA, where he would be assisting in “the elimination of the backlog of assessment documents issued pursuant to financial regulation 3.3” under the supervision of Mr. Gilpin. He was also told the location of his office, namely on the 27th floor of the United Nations Secretariat building. The Applicant alleged in his evidence to the Tribunal that he was not told who his first reporting officer was to be. The Tribunal rejects this latter evidence.

37. On 13 October 2004, the Applicant left Ms. McCreery a long memorandum, expressing surprise at the contents and timing of her 1 October 2004 memorandum to him. He asked for clarifications and documentation on several matters, including the legal basis for the decision to reassign him. He opposed “this strange decision” and asked her to reconsider it.

38. The Applicant met with Ms. McCreery the same day. According to a transcript made by the Applicant immediately after the meeting, they discussed several matters, including his long-held employment status at the P-2 level and that he had not had a PAS evaluation since 1991. He complained about the way Mr. Halbwachs had handled his previous reassignment. Ms. McCreery referred to an offer of a reassignment to Geneva that had been previously made to the Applicant, but he made it clear that it was his desire to return to the same position he had previously held in OPPBA. She noted that if he was transferred back to his former position in OPPBA, he would again have Mr. Halbwachs as his supervisor. He said he would only go there if Mr. Halbwachs wrote an apology to vindicate him and his PAS issues were regulated.

39. In his oral evidence, the Applicant stated he had consistently maintained his wish to return to his former job in OPPBA, although he also noted that after 15 months in OHRM he felt he was integrating into the group there; he therefore either wanted to return to his former job in the Programme Planning and Budget Division, OPPBA or to remain in OHRM.

40. By memorandum dated 14 October 2004, Ms. McCreery confirmed the decision to reassign the Applicant to the Contributions Service in OPPBA. On 18 October 2004, the Applicant reported to his new post, although he actually did not move before the end of the month. Mr. Krishnan implemented the decision in IMIS after the actual date of reassignment on 18 October 2004. He said he had had no prior knowledge of the arrangements.

41. Since the time of his reassignment, the Applicant has complained about his situation. Successive supervisors have made attempts to work out solutions to his dissatisfaction about his assignments and work functions. Mr. Krishnan sat in on one of these meetings between a former supervisor and the Applicant in an attempt to get them to come together. He said it was not a constructive process and that the Applicant and his supervisors were never able to find agreement.

42. Mr. Ramanathan took up his position at OPPBA as Deputy Controller and Director of the Accounts Division, OPPBA, in 2010. He told the Tribunal that at that time he tried to reach out to the Applicant when he learned that there were continuous issues between him and his supervisors. The Applicant agreed they had an intense but sincere meeting in 2010. Mr. Ramanathan wanted to find a position for the Applicant in which he would feel comfortable and asked a staff member to relook at the classification of the Applicant's post in Contribution Services, OPPBA. However, nothing came of that and the Applicant remains to this day in that post at the P-2 level.

43. In his evidence to the Tribunal, the Applicant said that there was no programmatic need for the post in the Contributions Service, OPPBA, to which he

had been reassigned other than a temporary need to clear a backlog of work. It had no job description, no generic job profile and no specific functions. He said no work or development plan was discussed with him and that there was no departmental plan to which the service work plan would be connected. He alleged that he never learned who his first reporting officer was. He said he was required to do accounting work whereas his skills were as a budget officer. He alleged his predecessor in the post stayed where she was and continued her functions after he assumed the position. He was not given access to IMIS until 22 July 2005.

44. Mr. Krishnan told the Tribunal that the decision to reassign the Applicant to OPPBA had been done on Ms. Bertini's instructions. There was no requirement to issue a vacancy announcement in advance of the reassignment since this was a lateral swap of two internal staff members. He denied that it was a false vacancy, which was supported by Mr. Ramanathan, who confirmed in his evidence to the Tribunal that the Applicant had been placed on a regular budget post. Mr. Krishnan explained that the Applicant's post in the Contributions Service was an established core post and that he continued to receive the same salary and entitlements as before the reassignment.

45. Mr. Krishnan further observed that the position selected for the Applicant with the Contributions Service was in the same job family as his previous position in the Programme Planning and Budget Division and was within his skill set. In Mr. Krishnan's view, the new position gave him the opportunity to develop new expertise under a different set of supervisors and colleagues. There was no risk to his career as a result of being assigned to this established core post. Although the functions found for the Applicant may have initially been temporary, a career could have been made out of it. He said that other staff members, who has previously been placed against this post, have had normal career progressions.

46. Mr. Krishnan also said that due to the problems that the Applicant had had in his previous position in the Programme Planning and Budget Division, OPPBA, the Controller decided, within his authority, that it was not in the best interests of the

Applicant to return him to that position and instead to place him in the Contributions Service. If there had been any irregularities in the process, this would have been caught in an audit.

47. In his evidence, the Applicant was critical of the fact that, on his reassignment, he was deliberately accommodated on the 27th

their departments or offices to vacant posts at the same level”. From sec. 2.2, it further followed that “[a]ll staff, up to and including those at the D-2 level, are expected to move periodically to new functions throughout their careers”. As for lateral moves, ST/AI/2002/4 stated in sec. 1 that “[t]here will be a lateral move when a staff member assumes a new position in another department or office, in another duty station, in another occupational group or in another organisation of the United Nations common system”.

Applicant’s submissions

51. Excluding those submissions which relate to issues raised by the Applicant but which are not properly before the Tribunal as discussed above, the following is a summary of the Applicant’s contentions which he made in his application, in the jointly-signed submission dated 30 June 2011, as well as in his opening and closing statements for the substantive hearing.

The decision to reassign the Applicant to OPPBA was made in bad faith

- a. The reassignment of the Applicant from OHRM to Contribution Services, OPPBA, was “illegitimate, capricious, ill-motivated and a smokescreen to give the perception of rectifying the previous illegitimate reassignment of 27 June 2003” from the Programme Planning and Budget Division, OPPBA, to OHRM;
- b. The Respondent harassed and obstructed the Applicant in retaliation for his whistle-blowing activities in 2003 concerning matters relating to his PAS, post classification, job description and work plan as well as management’s abuse of power;
- c. The genuine reason for the reassignment was to return another staff member (the one who the Applicant exchanged post with in Contribution Services, OPPBA) to her original position in OHRM;

- d. The Applicant was denied the right to just and favorable working

Case No. UNDT/NY/2010/005/UNAT/1574

Judgment No. UNDT/2012/078

Tribunal has no evidence upon which to base a finding of ill-motivation by the decision-makers in this case.

56. The Applicant's specific allegation that the choice of the 27th floor was an example of ill motivation as it was done deliberately to cause him harm is not credible. Many other staff members were also located there and there was no evidence to show a causative link between the unfortunate problems suffered by other members of his family and his presence in this location. The Tribunal finds that the evidence does not show on the balance of probabilities that the placement of the Applicant on the 27th floor of the Secretariat building was done as a deliberate threat to his health or that of his family.

57. In this case, there was no consultation before the decision to transfer him and the Applicant was simply told that the reassignment would happen. As a matter of good staff relations and courtesy, it would be usual for a manager to discuss the possibility of reassignment with a staff member before making the final decision; however, there is no requirement in the relevant legal instruments for the Respondent to consult a staff member about a proposed reassignment. See *Rees* UNDT/2011/156, and the Dispute Tribunal's Order No. 186 (NY/2010) dated 28 July 2010, Case No. UNDT/NY/2010/061. The Applicant's objections after the event were heard by management but did not cause a change of decision. In any event, given the history between the parties, the Tribunal finds that it is extremely likely that the Administration would not have changed its view even if further consultation were held.

58. The lack of consultation with the Applicant was not a breach of the rules and caused no prejudice to him.

59. Having heard the evidence of Mr. Krishnan, the Tribunal finds that, that there were no ulterior motives behind the decision to transfer the Applicant. It was a matter of operational necessity caused in large part by the Applicant's intractable attitude to any decision made about him by management.

Was he reassigned to a proper position?

60. The Tribunal accepts the evidence of Mr. Krishnan and Mr. Ramanathan and finds, as a matter of fact, that the Applicant was reassigned to a valid vacant post, for which reason the Applicant's submission regarding it lacking a work plan and a proper job description is redundant. Furthermore, it was a lateral transfer, or exchange, of two staff members and there was no need for a vacancy announcement to be issued for either of the positions. Although the work initially assigned to the Applicant was of a temporary nature, the post itself was not temporary and, with the right attitude, could have been developed into a worthwhile and stable job. There is no rule preventing a staff member in a permanent position from being required to undertake tasks that are of provisional character. However, the Applicant's stubborn refusal to accept the very fact of reassignment prevented him for accepting the opportunities that were potentially available.

Was the authority to reassign the Applicant properly delegated?

61. The Tribunal finds, on the basis of the evidence given at the hearing by the Respondent's witnesses, that the decision to transfer the Applicant was taken by the appropriate person, namely Ms. Bertini. It was implemented by the Controller, Mr. Halbwachs. The fact that other people were consulted in the course of the decision does not change the delegated authority or the legality of the decision.

Was the decision not taken in the best interests of the Organization?

62. Under former regulation 1.2(c), the Respondent ha36 7sM1 (17.875nuby tent Tw -1u(Tc 0.1

63. In this case, the Applicant had repeatedly protested against his original transfer to OHRM. The Respondent accepted and acted on the recommendations of the JAB about that transfer. The reasons for the original transfer to OHRM no longer existed. The purpose of the transfer of the Applicant back to OPPBA was to restore him to the office he had not wanted to leave in the first place albeit in a different position. The Tribunal finds that the decision to transfer the Applicant back to OPPBA in 2004 was made in the best interests of the Organization.

Relief

64. Each of the Applicant's substantive claims is rejected. The Tribunal does not need to consider the Applicant's submissions on relief.

Conclusion

65. The application is rejected in its entirety.

(Signed)

Judge Coral Shaw

Dated this 30

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