

UNITED NATIONS DISPUTE TRIBUNAL

noting that the present Judgment solely concerns legal matters and that it appears as if the Respondent does not contest this presentation:

... The Applicant is a Human Rights Officer, P-3, with the Office of the United Nations High Commissioner for Human Rights (“OHCHR”). From 4 April 2008 until 31 October 2011, the Applicant worked in the Asia-Pacific Section (“APS”) within the Field Operations and Technical Cooperation Division of OHCHR on successive 100-series appointments governed by the UN Staff Rules in effect at that time, against various P-3 posts. On 3 December 2011, the Applicant was granted a fixed-term appointment under the current UN Staff Rules, against a regular budget P-3 post in APS.

...

opportunity to express preferences for available posts/duty stations, including the posts of staff in other locations who opt in to the process that will be

The Steering Group will review the recommendations and the High Commissioner will take decisions on lateral reassignments by the end of November, although the implementation/moves will not occur until the first half of 2016, in consultation with the staff involved.”
[footnote: emphasis added]

The terms of the arrangement underscored in the above-cited quotation, which the Applicant ultimately elected to pursue, are informally referred to within the OHCHR employment environment as a “post matching exercise/process”.

... On 9 December 2015, [the Applicant] received a Memorandum from [name redacted] the Chief of the Programme Support and Management Services (“PSMS”) of OHCHR, titled “Lateral movements under OHCHR Change Initiative”. [reference to annex omitted] In that Memorandum, [the PSMS Chief] stated:

“I am writing with reference to the internal post matching process conducted in the context of the Change Initiative, in which you agreed to participate by declining a proposed move with your post to the field

ultimately promised to and accepted by the Applicant in correspondence to be addressed later in the procedural history of the present Application. For the avoidance of any confusion, the Applicant simply wishes to inform this Honourable Tribunal that despite this change in nomenclature, at all relevant times the Division in which she was promised she would receive a regular budget post appointment pursuant to the post-matching exercise is identical.

... On 15 January 2016, the Applicant received another memorandum from [the PSMS Chief], entitled “Proposed lateral movements under OHCHR Change Initiative”. [reference to annex omitted] In this Memorandum [the PSMS Chief] recalled that:

“[A]s you are by now aware, the General Assembly has decided to delay action on the approval of OHCHR’s proposals in the context of the Change Initiative, pending consideration of a final report]

... From her on-boarding in New York until December 2016, the Applicant performed functions that were not commensurate with the Terms of Reference agreed upon as part of her post-matching exercise. She covered functions related to the UN General Assembly's Third Committee.

... On or about 23 December 2016, the "initial period of three months," referred to immediately above, elapsed. From that time the Applicant has not received any memorandum or other official communication from the Administration related to her Terms of Reference.

... From late December 2016 to the time of the filing of the present Application, the Applicant has been performing functions related to Asia-Pacific issues in the "Country Situations" Section and occasionally has been performing programme support functions where

14. On 22 February 2018, the Tribunal conducted the scheduled CMD, at which counsel for the Applicant and counsel for the Respondent participated by telephone. The Applicant was present in person in the courtroom in New York. At the CMD, the Tribunal noted, *inter alia*, that the instant case appears to raise a preliminary issue of receivability *ratione materiae*. Both parties agreed that receivability can be dealt with on the papers as a preliminary issue.

15. By Order No. 45 (NY/2018) dated 26 February 2018, the Tribunal made the following orders (emphasis omitted):

... The Respondent shall file a reply to the Applicant's submissions on the receivability of the application by 5:00 p.m. on Monday, 5 March 2018. In particular, the Respondent is to provide a detailed explanation in support of his contention that the "[t]he funding source of a staff members post is purely operational and does not impact the Applicant's terms of appointment", together with supporting documentation (including copies of the Applicant's terms of appointment before and after the contested decision).

... The Applicant can file additional particulars and supporting evidence, if any, in relation to her claim that the contested decision has caused her "economic prejudice" by 5:00 p.m. on Monday, 5 March 2018.

... Closing submissions, if any, on the issue of receivability are due by 5:00 p.m. on Wednesday, 14 March 2018.

16. Pursuant to Order No. 45 (NY/2018), on 2 March 2018, the Applicant filed a submission on the "economic prejudice suffered due to [the] administrative decision" and appended a signed "Solemn affirmation" from the Applicant thereon.

17. On 5 March 2018, the Respondent filed his reply to the Applicant's submissions on the receivability as per Order No. 45 (NY/2018).

18. On 13 and 14 March 2018, the Applicant and the Respondent, respectively, filed their closing submissions on receivability.

final submissions on receivability

19. The Respondent's contentions on receivability may be summarized as follows:

a. The Applicant has not demonstrated why, and how, her transfer to New York in December 2016 would have been different had she been placed on a "regular budget" post. The Applicant has not indicated how this has affected her rights;

b. In *Andronov*, as affirmed by the UNAT in Judgment No. 2013-UNAT-304 (*Al Surkhi et. al.*), the UN Administrative Tribunal ("UNADT") held that "[a]dministrative decisions are ... characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences" (former Administrative Tribunal Judgment No. 1157 (2003)). In *Lee* 2014-UNAT-481, the Appeals Tribunal held that a "key characteristic of an administrative decision subject to judicial review is that the decision must 'produce...direct legal consequences' affecting a staff member's terms and conditions of appointment". A contested decision which has no adverse legal consequences or impact is

d. The Applicant's assertion that the contested decision is an administrative decision because it has allegedly caused "significant disruption to her career progression" is too speculative, and stresses that the Applicant's claim relates to a 17-month period. During that period, the Applicant received, and

b. In *Chemingui* Order No. 245 (NBI/2015), the Dispute Tribunal expressly stated that the involuntary removal of a staff member from a regular budget post appeared *prima facie* unlawful. Like the present case, the respondent in *Chemingui* contended that the decision to reassign the applicant was made for “operational reasons” and that the post he was being reassigned to was at the applicant’s current grade and carries responsibilities that corresponded to his level, skills and competencies. In finding the decision to reassign the staff member from a regular budget post to a general temporary assistance post *prima facie* unlawful, the Dispute Tribunal held that it was “clear... that the post is of limited duration and is funded by general temporary assistance (GTA) funds, so that it does not have the security of the post currently encumbered by the Applicant”. The Tribunal further

demonstrable economic prejudice, and the Respondent's receivability argument must therefore fail;

d. In a typical job opening on Inspira (the online United Nations jobsite), the job reference number of the advertised position is generated based on the relevant position's attributes. This number consists of abbreviations of the calendar year, the job family, the department, a system generated number, the position type and the duty station or multiple duty stations in addition to a letter indicating the post nature. The indicator for the post is marked "R" if it is funded as a regular budget post and "X" if the position is funded by voluntary contributions or extra-budgetary resources, including general temporary assistance. Often, the funding source might also be cited in the text of the job opening. Hence, the source of funding for United Nations posts, which is publicized, is equally a determining factor for a candidate to apply or accept a post;

e. Such was the case for the conscious prioritization of the Applicant's choice of posts in the post-matching exercise in which she participated in 2015. It is clear from the Applicant's submission on economic prejudice that differences in funding sources of posts are not "purely operational" as perceived by the Administration and do translate into concrete consequences

arbitrary or taken in violation of mandatory procedures or based on improper motives or bad faith” (see *Lauritzen* 2013-UNAT-282, para. 28, and, similarly, *Rees* 2012-UNAT-266 and *Awe* 2016-UNAT-667).

27. With reference to *Warintarawat* 2012-UNAT-208, in his reply, the Respondent states that this, however, is not the case, if the relevant decision did not “negatively affect” the applicant’s right and it is for the Applicant to demonstrate this. The Appeals Tribunal provided as follows in *Warintarawat* (official translation):

11. For the sake of completeness, it should be added that the Appellant has not proven that the contested decision adversely affected his terms of appointment or his contract of employment, specifically his medical insurance entitlements and benefits. Even if the Administration were not to have complied with provisional staff rule 8.1 in taking the decision to outsource medical claims processing, the Appellant does not prove that this resulted in a change in his medical insurance entitlements and benefits. He makes no serious argument challenging the judgment of the Dispute Tribunal that the then contested decision was not an “administrative decision” within its scope of jurisdiction.

28. In the present case—without entering into the merits of the case and therefore also the specifics of the substantive issues—the basic question regarding receivability is, therefore, whether being reassigned to a general temporary assistance post instead of a regular-budget post is an appealable decision that negatively affects the terms and conditions of the Applicant’s employment contract

29. The parties agree that, when moving from Geneva to New York, the Applicant was placed on a general temporary assistance post instead of a regular-budget post and that the funding sources of the two posts are different.

30. In this regard, the Applicant submits that being placed on a general temporary assistance post instead of a regular-budget post has a diminishing effect on her job security in that such funding source per definition is more uncertain. The Respondent, in his reply, contends that “[t]he funding source of a staff members [*sic*] post is purely operational and does not impact the Applicant’s contract of employment or terms of appointment” but nowhere contests the Applicant’s submissions that being on a general temporary assistance post as compared to a regular-

could be terminated for reason of abolition of post or reduction of staff pursuant to staff rule 9.6(c)(i), which provides that:

(c) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of the appointment or on any of the following grounds:

(i) Abolition of posts or reduction of staff

33. It is trite law that a typical, and generally accepted, reason for abolition of post is that the relevant post has lost its funding. In this regard, based on the parties' submissions, the Tribunal can only conclude that while a regular-budget post generates its financing through the regular budget, the funding source for a general temporary assistance post is different and of provisional, unstable and insecure nature. Accordingly, depending on the funding source, the risk of her fixed-term appointment being terminated due to lack of such funding will therefore necessarily vary—and it is only reasonable to presume that, from a perspective of funding, a regular budgeted post is more secure than a general temporary assistance post. In line herewith, in *Toure* 2016-UNAT-660, the Appeals Tribunal found that the applicant in that case “did not hold a regular-budget established post but one of a temporary nature that could be discontinued without the need for [the relevant Executive Secretary] to seek prior approval” (see para. 36).

34. In conclusion, by placing the Applicant on a general temporary assistance post instead of a regular-budget post necessarily had a negative impact on her level of job security and, by implication, also on the terms and conditions of her employment contract.

35. In light of the above, ~~D~~SSURYDO’

Conclusion

36. The application is receivable.