



the Applicant irreparable harm. The Dispute Tribunal ordered suspension of the decision “pending informal consultation and resolution between the parties or the determination of the substantive application in the event that mediation fails.”

7. On 24 August 2015, the Respondent filed an appeal against Order No. 245 to the United Nations Appeals Tribunal (UNAT/Appeals Tribunal) on the basis that the reassignment or transfer of a staff member is a form of appointment and therefore subject to the exemption in art. 14 of the UNDT Rules of Procedure.

8. On 21 August 2015, the Respondent filed his reply to the substantive application.

9. The Appeals Tribunal, by its Judgment No. 2016-UNAT-641 dated 24 March 2016, held that the Dispute Tribunal had not exceeded its competence or jurisdiction when it ordered the suspension of the reassignment decision until the determination of the merits of the case of the Applicant. Accordingly, the Respondent’s appeal was deemed not to be receivable.

10. The Tribunal held a case management discussion with the parties on 4 October 2016 to identify the core issues for determination and discuss the necessity for a hearing. The Respondent’s counsel submitted that there was no need for a hearing but the Applicant’s counsel requested a hearing so that the Tribunal could properly assess the motivation behind the contested decision. The Tribunal ordered the Applicant to file an amended application by 25 October 2016 and the Respondent to file an amended reply by 8 November 2016. A hearing was scheduled for 29-30 November 2016.¹

11. On 18 October 2016, the Applicant’s counsel informed the Registry that the Applicant did not find it necessary to amend his pleadings and no longer sought a hearing in his case. In light of the request by the Applicant’s counsel for the matter to be decided on the papers, the Tribunal vacated the order for a hearing on 29-30 November 2016.²

¹ Order No. 447 (NBI/2016).

² Order No. 458 (NBI/2016).

18. Mr. Iyamah responded to the Applicant on the same day as follows:

Thank you very much for your email. Your concerns are noted. However, the Regional Adviser post on Trade is being created as we speak and will have a post number like any other post in ESCWA. It will be a classified post at the P5 level and we will let you know the post number once it is established. While this particular post is not specifically approved by the General Assembly, it is still a regular budget post funded by the Regular Programme of Technical Cooperation (RPTC), which is approved by the General Assembly. This programme has been in existence for many years and, in terms of predictability or security, it is as safe or unsafe as all posts in ESCWA, which are all also subject to biennial General Assembly approval.

Let me also reiterate that your reassignment to the Regional Adviser post in no way affects your contractual arrangement. You will remain a fixed term staff member and your benefits and entitlements will not be affected. The same applies to your eligibility for consideration for a continuing appointment, which will also not be affected.

19. On 13 May 2015, the Applicant requested management evaluation of the decision to laterally reassign him to the Regional Adviser post.

20. On 16 July 2015, the Applicant received a response from the Under-Secretary-General for Management that the Secretary-General had decided to endorse the findings and recommendations of the Management Evaluation Unit (MEU) to uphold the impugned decision.

Submissions

Applicant

21. The Applicant's case is summarized as follows:

a. The Regional Adviser post does not have a post number and therefore does not exist in the form that ESCWA represented it to him. Although staff members are subject to lateral reassignments, they cannot be moved to posts that have not been established beforehand. Thus, the Applicant's reassignment was premature.

- b. Regional Adviser posts are not subject to General Assembly approval and are not funded by regular budgets.

ST/AI/2010/3, the Executive Secretary is vested with the discretionary authority to laterally reassign staff.

f. The Applicant failed to make a positive averment that the contested decision was tainted by improper motives. He merely makes vague

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

be created or scrapped at the discretion of the Commission's administration according to its determination of the needs of the Commission. It is a post which is meant to be temporary in nature and therefore time bound and in comparison with the post currently encumbered by the Applicant is less secure.

38. The Applicant correctly referred this Tribunal to the arguments of the Respondent in the case of *Toure*.⁴ In defending his decision in that case to abolish Ms. Toure's Regional Adviser post midway through the budget cycle at the Economic Commission for Africa (ECA), the Respondent submitted, *inter alia*, that the Applicant's post was part of the ECA's RPTC which is complementary to the core activities of the ECA and was not established by the General Assembly. The Respondent continued that the post did not form part of the staffing table but was temporary in nature and had only a limited duration. According to him, the post was paid for by funds approved by the General Assembly but in accordance with specific and time-bound priorities and mandates of the ECA.

39. The Tribunal is of the view that the Respondent cannot blow hot and cold on the same issue merely because it suits him to do so. This Tribunal refers with approval to the observations of the Appeals Tribunal in the case of *Wu*,⁵ where the Appeals Tribunal condemned the Respondent's inclination to argue a different position when he appealed the decision of the lower court. The Appeals Tribunal declared that the Respondent must act as an ideal litigant and display a clear and consistent stand on all important issues and must be above reproach in doing so.

Are there are any risks or disadvantages to the Applicant in the decision of the

Tribunal that when staff regulation 1.2(c) provides that in exercising his authority to assign staff members to activities or offices of the United Nations, the Secretary-General shall seek to ensure that “all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them,” such arrangements are not, in all circumstances, merely limited to physical safety and security.

41. In its judgment in the case of *Rees*,⁶ UNAT established a test for determining whether a reassignment is proper. Part of that test is to assess whether the new post is at the staff member’s grade. The satisfaction of this requirement does not merely lie in reassigning a staff member from one P-5 position to another P-5 position. It is simple logic that reassigning a staff member from a core P-5 post established by the General Assembly to a GTA-funded P-5 post established by ESCWA does not satisfy the test of a reassignment that is properly made.

42. Even though operational needs and restructurings may dictate that General Assembly-established core posts be abolished, this does not detract from the fact that GTA posts which are administratively created and are time-bound, are profoundly less secure. If therefore a head of office is allowed to routinely reassign staff members from core posts to GTA-funded posts, this would fly in the face of fairness and the condition provided for in section 2.5 of ST/AI/2010/3 that reassignments are to be made to job openings at the same level would have been breached and flouted.

43. The Applicant argued also that as Regional Adviser, he would be stripped of leadership and managerial responsibilities such as supervision which he carries out in his current position as Chief of section. The Respondent argued that there is no merit in the Applicant’s position that for the reassignment to be lawful, it must have equivalent managerial and supervisory functions.

44. It is absurd for the Respondent to submit that taking an Applicant away from a position in which he performed managerial functions and reassigning him to a new position with no leadership

Clearly, the career prospects of the Applicant would likely be enhanced by managerial responsibility. The Tribunal finds that the reassignment to the post of Regional Adviser carries significant risks and disadvantages for the Applicant.

Is the impugned decision to reassign the Applicant a retaliatory measure for previously challenging an administrative decision of ESCWA in 2014?

45. Part of the Applicant's case is that the impugned decision to reassign him is a retaliatory measure for previously challenging an administrative decision of the Commission in 2014. The Applicant did not provide the details of the decision which he allegedly challenged in 2014 and why he believes his reassignment in 2015 is based on that challenge.

46. In *Toure* 2016-UNAT-660, the Appeals Tribunal further clarified the scope of the Dispute Tribunal's judicial review 0 0.0 0.0 rg 0.99s22(e)1.0 170.0 0.0 1.0 237.6 621.1

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