



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/040

Judgment No.: UNDT/2020/159

Date: 31 August 2020

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

KHANE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Brandon Gardner, OSLA

Counsel for Respondent:
Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. On 18 June 2019, the Applicant, a former Senior Political Affairs Officer and Secretary of the Third Committee in the United Nations Secretariat, filed the application in which he contests the decision to transfer him “from his post of Senior Political Affairs Officer/Secretary of a Main Committee of the General Assembly to Senior Programme Management Officer, Central Planning and Coordination Division/[Department of General Assembly and Conference Management (“DGACM”)]”.

2. On 18 July 2019, the Respondent duly filed the reply in which he contends that the application is without merit.

3. On 1 June 2020, the case was assigned to the undersigned Judge.

4. By Order No. 95 (NY/2020) dated 2 June 2020, the Tribunal ordered the parties to file: (a) additional submissions with, as relevant, documentation on the post of Senior Programme Management Officer and how this post is commensurate with his skills, competencies and experiences and their comments on the other party’s submission by 16 and 23 June 2020, respectively; and (b) a jointly-signed statement outlining the agreed and disputed facts by 30 June 2020.

5. By Order No. 122 (NY/2020) dated 29 July 2020, in light of the parties’ submissions as per Order No. 95 (NY/2020), the Tribunal ordered the parties to file their closing statements by 24 August 2020, noting that neither party had requested any further evidence to be produced and finding that the case was now fully informed and ready for adjudication. The parties duly filed their closing statements.

6. For the reasons stated below, the Tribunal rejects the application.

Facts

7. The parties set out the agreed facts in response to Order No. 95 (NY/2020) as follows:

... On 13 November 2018, during the 47th meeting of the Third Committee, the Permanent Representative [“the PR”] of [a Member State] to the United Nations made a statement on a point of order, alleging that the Secretary of the Committee, the Applicant, had advised the Chair of the Committee to act in a manner that had violated the Rules and Procedures of the General Assembly.

... On 21 November 2018, the Applicant was called into a meeting with [the Under-Secretary-General of DGACM, “the USG/DGACM”]. During this meeting, the Applicant was notified that the PR of [a Member State] had addressed a formal complaint letter against the Applicant to the Secretary-General, in relation to the 14 November 2018 Third Committee proceedings. The USG/DGACM informed the Applicant that she would undertake a review to decide on an appropriate course of action, including his possible reassignment.

... On 5 December 2018, the Applicant had a second meeting with the USG/DGACM, in which she informed him that she was going to laterally reassign him to a new position.

... On 11 December 2018, the Applicant received an e-mail from the USG/DGACM stating that “based on our discussions, and in accordance with staff regulation 1.2(c) and para 2.5 of ST/AI/2010/3, I have decided to transfer you to the Senior Programme Management Officer (p-5) in the Central Planning and Coordination Division, effective 1 January 2019” [reference to annex omitted]. Enclosed with the e-mail, (11 December 2018), [the Applicant] was provided with (undated) Terms of Reference (ToR) for the post of Senior Programme Management Officer (SPMO) [reference to annex omitted].

... Since 1 January 2019—the effective date of the transfer—the Applicant has not reported to the SPMO position. During this period, the Applicant was on sick leave and then Special Leave without Pay (SLWOP).

... On 7 February 2019, the Applicant submitted a request for management evaluation of the decision to transfer him to a new post [reference to annex omitted].

... On 8 April 2019, the Management Evaluation Unit (MEU) upheld the Administration's decision to reassign the Applicant to the SPMO position [reference to annex omitted].

... On 11 June 2019, the Administration issued a vacancy announcement for temporary job opening (TJO) to fill the SPMO position [reference to annex omitted], but the recruitment exercise did not result in the selection of a candidate to fill the post.

Consideration

Issues of the case

8. Based on the parties' submissions, in Order No. 122 (NY/2020), the Tribunal held that the issues of the present case could be defined on a preliminary basis as set out below. The Tribunal notes that neither party has objected thereto and therefore identifies the issues accordingly:

- a. Was the decision to transfer the Applicant to the post of Senior Programme Management Officer properly motivated?
- b. Was the post of Senior Programme Management Officer commensurate with the Applicant's skills, competencies and experiences?

Was the decision to transfer the Applicant to the post of Senior Programme Management Officer properly motivated?

Parties' submissions

9. The Applicant's submissions may be summarized as follows:

- a. The Applicant "acknowledged that the Secretary-General has authority to transfer staff laterally". However, the Tribunals have repeatedly held that the authority to transfer is not unfettered, as any transfer decision "must be properly motivated, and not tainted by improper motive, or taken in violation of mandatory procedures" (*Chemingui* 2019-UNAT-930);
- b. The "primary justification for the transfer decision was a complaint lodged by the [PR ... of a Member State] against him as Secretary of the Third

Committee”. Specifically, “the PR of [a Member State] alleged that both the Chair and [the Applicant] had deliberately disregarded his request for the floor on a point of order at the very end of the [47th] meeting of the Committee on 13 November 2018 and had violated multiple Rules of [P]rocedure of the General Assembly”. The Applicant’s “interpretations of the Rules of Procedure on the day in question were blameless, and [the] USG/DGACM ... after consulting with the Office of Legal Affairs, informed him of the same during the meeting of 21 November 2018”;

c. The rationale that the Applicant was “provided regarding the transfer decision came from [the USG/DGACM’s] pronouncement at their two meetings—that the complaint of the PR of [a Member State] presented ‘a political problem’ in a ‘political Organization’. No “further details have ever been provided to [the Applicant]”. This “attempt to find a solution to a so-called political problem and placate the PR of [a Member State]—[the USG/DGACM] had told [the Applicant] that the PR of [a Member State] ‘had felt humiliated[’]—[she] decided to transfer him out of the Third Committee, a possibility she had indeed already mentioned during her first meeting with [the Applicant]”;

d. Under art. 100 of the United Nations Charter, which provides that “[i]n the performance of their duties, the Secretary-General and the staff shall not seek or receive instructions from any government”, [the USG/DGACM’s] decision in response to the complaint from the representative of a government appears to have contravened this critical tenet of the Charter;

e. The transfer decision is “a *de facto* disciplinary action to remedy a nonexistent “political problem” and has shown that effectively, [the Applicant] has been sanctioned without due process, which is contrary to the requisite procedure expected whenever allegations of impropriety and *ad hominem* attacks have been made against a staff member”;

f. While the Applicant “accepts the PR of [a Member State’s] right to lodge a complaint ... prior to [the USG/DGACM] acting on this complaint, the Administration should have: (i) conducted a formal investigation; (ii) provided [the Applicant] a copy of all relevant documents; and (iii) afforded [the Applicant] a right to respond to the allegations in writing. In such a case, it would also have been prudent to afford the Chair of the Committee an opportunity to respond to the allegations in writing as well, because in that capacity, he was ultimately responsible for the conduct of the proceedings and any alleged improprieties”. Instead, the USG/DGACM “conducted a very limited review of the complaint herself”. Specifically, besides a first meeting with the Applicant, the USG/DGACM “met with the Chair of the Third Committee and two other unnamed ambassadors/Permanent Representatives (out of 193) before concluding that [the Applicant] had lost the confidence of Member States and could, therefore, no longer serve as Secretary of the Third Committee”;

g. The Administration’s “established conduct ran afoul of its obligations to provide him due process”. The USG/DGACM “neither divested herself of the matter nor appointed an independent fact-finder to establish the facts to inform her decision”. Rather, the USG/DGACM “chose to herself conduct a cursory review of the allegations and then, in effect, relieved [the Applicant] of his Secretary function”. Until now, the Applicant “has not been provided the opportunity to review and comment on the relevant communications”. The Applicant’s “due process rights were sacrificed at the altar of political expediency to dispense of a so-called ‘political problem’, which violated the Administration’s obligation to treat its staff fairly, justly and transparently”. For this reason alone, “the improper motivations behind the transfer should vitiate the impugned decision to reassign the Applicant” to the new post.

10. The Respondent, in essence, contends that the “decision to reassign the Applicant was a lawful exercise of the USG/DGACM’s discretion” and that the “USG/DGACM reassigned the Applicant for operational reasons”.

The lawfulness of the rationale for transferring the Applicant

11. The Tribunal notes that the Secretary-General enjoys a broad discretion in assigning, as well as reassigning (or transferring), staff members to undertake certain functions under staff rule 1.2(c), which provides that “[s]taff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations”.

12. The Secretary-General’s authority to transfer staff members is, however, not unfettered. In the seminal judgment of *Sanwidi* 2010-UNAT-084, the Appeals Tribunal, for instance, ruled that (see para. 40):

... When judging the validity of the exercise of discretionary authority in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

13. In line herewith, specifically regarding a transfer decision, in *Chemingui* 2019-UNAT-930, the Appeals Tribunal held that (see para. 39):

... It is undeniable that the Secretary-General ... has broad discretion in staff management, including reassignment or transfer. However, such discretion is not unfettered. The principle of good faith and fair dealings still applies. A reassignment decision must be properly motivated, and not tainted by improper motive, or taken in violation of mandatory procedures. It can then be impugned if it is found to be arbitrary or capricious, motivated by prejudice or extraneous factors, or was flawed by procedural irregularity or error of law.

14. In the present case, the parties agree that the USG/DGACM decided to transfer the Applicant from the post of Senior Political Affairs Officer/Secretary of the Third Committee to the post of Senior Programme Management Officer, Central Planning and Coordination Division/DGACM, in response to a complaint from the PR of a Member State regarding an issue related to the Applicant's handling of a situation that occurred at the 47th meeting of the Third Committee of the General Assembly (although the Respondent in his closing statement also refers to some other matters). As such, the Applicant does not argue that the USG/DGACM herself held any improper prejudice, resentment or bias against him, but rather that under the circumstances, transferring the Applicant to another post was an inappropriate course of action in violation of art. 100 of United Nations Charter and a disguised disciplinary sanction.

15. Under *Sanwidi*, it is not for the Tribunal to review the wisdom of the USG/DGACM's decision among other all viable options, but rather to assess the legality by which the decision was reached. In the given circumstances, the Tribunal finds that the decision to transfer the Applicant was not "arbitrary or capricious, motivated by prejudice or extraneous factors" with reference to *Chemingui*, or that "relevant matters [were] ignored and irrelevant matters considered" or the decision was "absurd or perverse" as per *Sanwidi*. By itself, the Tribunal therefore finds no issue in the transfer decision.

16. The Tribunal further observes that nothing in the case file suggests that by transferring the Applicant away from his previous post of Senior Political Affairs Officer/Secretary of the Third Committee, the USG/DGACM in any possible manner was acting upon instruction from the PR of a Member State. Rather, the reassignment was the exclusive decision of the USG/DGACM as she evidently found that transferring the Applicant to another post was the most appropriate manner for her to resolve the situation regarding the PR's complaint.

17. Also, the Tribunal finds that the transfer decision is not a disguised disciplinary sanction, which would typically require that misconduct, or allegations or suspicions

thereof, was somehow involved (see, for instance, *Kallon* 2017-UNAT-742). Nowhere is it stated or implied that the Applicant was suspected of any type of misconduct, or even indicated that his performance was considered to be substandard. Rather, as convincingly argued by the Respondent in the closing statement, the transfer decision was solely grounded in operational circumstances (or described in other places as “political” considerations), and the fact that the Applicant clearly disapproved of the transfer decision does not by itself make it a disguised disciplinary sanction.

18. In terms of due process, the Tribunal finally notes that as follows from the agreed facts, the USG/DGACM actually informed the Applicant about the possibility of a reassignment at a meeting of 21 November 2018 before she decided to do so on 5 December 2018. The Applicant was therefore, in principle, consulted about the decision before it was taken.

19. Accordingly, the Tribunal finds that the rationale for the transfer decision was lawful.

Was the post of Senior Programme Management Officer commensurate with the Applicant’s skills, competencies and experiences?

The parties’ submissions

20. The Applicant’s submissions may be summarized as follows:

a. It is “trite law that for a transfer decision to be lawful, the reassigned post must correspond to the staff member’s skills, qualifications and professional experience”;

b. The Applicant has “provided evidence that the [Senior Programme Management Officer] clearly did not match his professional expertise and abilities”. Specifically, “the principal functions of the [Senior Programme Management Officer] post are to service the mandate of the Central Planning and Coordination Division, whose functions are technical and

managerial”. These roles are “in sharp contrast to the political and substantive functions that [the Applicant] undertook both as Senior Political Affairs Officer/Secretary of the Third Committee and in earlier posts he held”;

c. The “roles and responsibilities of the [Senior Programme Management Officer] post bear no relation to his previous levels of responsibilities, nature of work, experience, skills, or educational background”. The Applicant was “re-assigned from an active post—where he was required to make decisions in real time amid charged political debates within the Third Committee (and other forums)—to one of a passive nature, relating to document processing, where neither his experience nor his political and legal expertise are valued”;

d. The fact that the Senior Programme Management Officer post “has not been encumbered for more than 19 months exposes that there was nothing critical or urgent that [the Applicant] needed to accomplish” in this post. In *Chemingui*, “the Appeals Tribunal found that a transfer decision was unlawful (in part) because, although the Administration claimed there was an urgent operational need to fill the impugned post, it sat vacant for four years because the Dispute Tribunal had suspended the transfer and during this period the Administration had decided not to fill it”. The Applicant’s case “is similarly unlawful: despite the alleged operational need, the post has already sat vacant for over 19 months, calling into question the true purpose and motivation behind the transfer”. The facts in the present case are “analogous to *Chemingui* in other key respects as well”. For instance, in *Chemingui*, “the Tribunals found it suspects that the post that Mr. Chemingui was to be transferred to had not been created at the time of the initial transfer decision, nor had [terms of reference] been issued”;

e. In the present case, while the Senior Programme Manager Officer post “existed at the date of the transfer decision, the Terms of Reference (ToR) for the post appear to have been amended posthaste, and without the requisite vetting by [the Office of Human Resources Management], possibly to try to render the post more commensurate to [the Applicant’s] competencies”. Specifically, in the terms

of reference that the Applicant received from the USG/DGACM on 11 December 2018, “the qualifier ‘political’ is used repeatedly”, but it does not appear in the functions of the Senior Programme Management Officer post “listed in the Temporary Job Opening [“TJO”] of 11-21 June 2019”. Additionally, “the TJO contains a description of fewer functions with a lesser substantive role, and are hence at variance” with the terms of reference transmitted to the Applicant;

f. In *Chemingui*, the Appeals Tribunal “held that, when a staff member is transferred to a post with a lack of managerial functions after having held managerial functions previously, this lack of higher functions may be evidence of an improper transfer”. Similarly, in the present case, while in the Applicant’s “previous post he supervised both Professional Staff (P-4 and P-3 levels) and General Service Staff (G-4-7), no supervisory role is mentioned” in the ToR of the Senior Programme Manager Officer post, which “again evidencing that the new post is not commensurate to his previous post and therefore, the transfer decision is unlawful”.

21. The Respondent essentially contends that the post of Senior Programme Management Officer “corresponded with the Applicant’s grade, level, skills, and experience”.

Was the post of Senior Programme Manager Officer appropriate for the Applicant?

22. The Tribunal notes that the Appeals Tribunal in *Chemingui* 2019-UNAT-930 held that “an accepted method for determining whether the reassignment of a staff member to another position was proper” is to assess “whether the new post was 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” (see para. 40).

23. In the present case, with reference to *Sanwidi*, the Tribunal observes that, as also stated in the above, its judicial review is limited in that it is not to assess the

correctness of the transfer decision among other relevant options, but rather to appraise how the decision was reached.

24. The Respondent, in this regard, submits that “the USG/DGACM considered that the Applicant’s extensive experience in inter-governmental processes, conference management, and the improvement of the Organization’s working methods would allow him to successfully fulfill the requirements of the Programme Management Officer position, but would also assist DGACM in completing two critical and high profile projects, i.e., the e-Journal and one-stop-shop”. In support thereof, the Respondent refers to the Applicant’s personal history profile.

25. The Tribunal is convinced by the Respondent’s arguments and that the transfer of the Applicant to the post of Senior Programme Management Officer was appropriate with the standards set by the Appeals Tribunal in *Chemingui*, as quoted in the above.

26. Also, there is no indication that by doing so, the USG/DGACM improperly intended to set the Applicant up to failure or otherwise did not have the best interest of the Organization in mind. Instead, the Tribunal finds that similar to the decision to transfer the Applicant away from the post of Senior Political Officer, reassigning him to the Senior Programme Management Officer post was not “arbitrary or capricious, motivated by prejudice or extraneous factors” (see *Chemingui*) or that when taking the decision, “relevant matters [were] ignored and irrelevant matters considered” or the decision was “absurd or perverse” (see *Sanwidi*).

27. The fact that no one has worked in the Senior Programme Management Officer post for a long period of time does not by itself render the transfer decision unlawful under *Chemingui*. The inactivity of the post rather appears to be a result of the Applicant’s absence from the post ever since he was transferred for more than 18 months ago. In this regard, the issuance of a TJO for the post on 11 June 2019 indicates that the Administration believed that the functions of the post were of, at least some, importance, although no candidate was eventually selected.

28. Consequently, the Tribunal finds that the post of Senior Programme Management Officer was properly commensurate with the Applicant's skills, competencies and experiences.

Conclusion

29. The application is rejected.

(Signed)

Judge Joelle Adda

Dated this 31st day of August 2020

Entered in the Register on this 31st day of August 2020

(Signed)

Nerea Suero Fontecha, Registrar