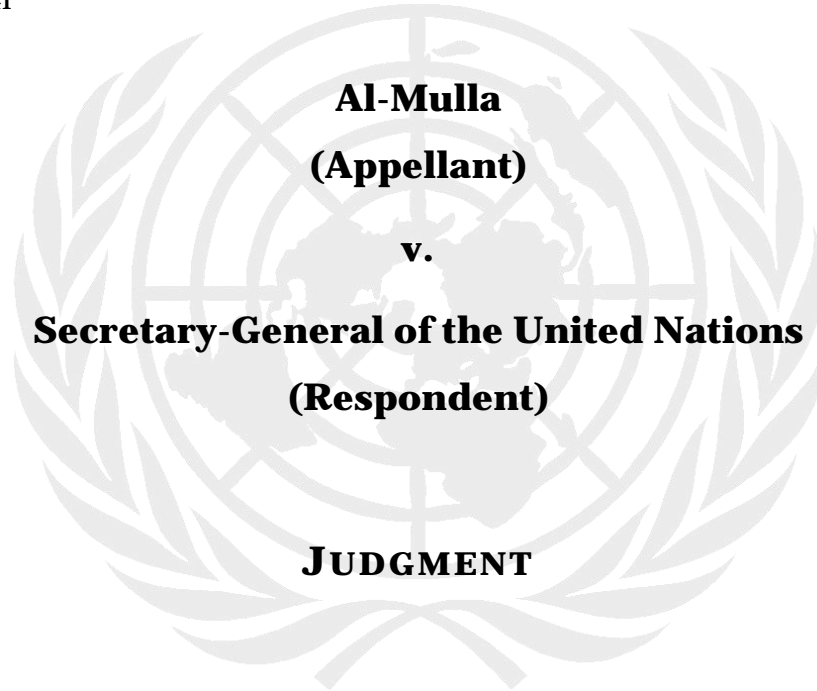




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2011-241



**Al-Mulla
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Inés Weinberg de Roca, Presiding Judge Sophia Adinyira Judge Mary Faherty
Judgment No.:	2012-UNAT-226
Date:	29 June 2012
Registrar:	Weicheng Lin

Counsel for Appellant: Winston Sims

Counsel for Respondent: Wambui Mwangi

JUDGE INÉS WEINBERG DE ROCA, Presiding.

1. The United Nations Appeals Tribunal (Appeals Tribunal) is seized of an appeal filed by Mr. Mohamed A. Al-Mulla on 9 August 2011 against Judgment No. UNDT/2011/105, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 22 June 2011. The Secretary-General filed an answer on 3 October 2011.

Synopsis

2. This Court has previously held that in order to succeed on appeal, an appellant has to prove an error of law or fact and not repeat arguments already considered and rejected by the UNDT.¹ The Appellant does not demonstrate that the UNDT erred in finding that his reassignment was contingent on the signature of the Host Country Agreement nor that the failure to create a L-5 position breached the Host Country Agreement. The appeal is dismissed.

Facts and Procedure

3. Mr. Al-Mulla joined the Organization in 1985 in Vienna, Austria. He was promoted to the P-3 level in September 1992 and his initial fixed-term appointment was converted to a permanent one in September 2006. On 1 July 2007, Mr. Al-Mulla was appointed to the L-4 project post of Regional Programme Coordinator for the Gulf Cooperation Council (GCC) countries, Division of Operations, United Nations Office on Drugs and Crime (UNODC), based in Vienna. In the offer letter dated 21 May 2007, he was informed that his permanent appointment status would be frozen for the duration of his L-4 assignment, and that, upon completion, he would revert to his P-3 contractual status and level.

4. On 15 October 2008, UNODC and the United Arab Emirates (UAE) signed a Host Country Agreement to establish a UNODC Sub-Regional Office in Abu Dhabi, which included the commitment by the UAE to fund, among other positions, one L-5 Representative and one L-4 Programme Manager.

5. Mr. Al-Mulla was charged with preparing a draft project document in accordance with the instructions issued on 15 December 2008 by the Chief of the Financial Resources Management Service, Division of Management, UNODC.

¹ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123, para. 36.

6. In January 2009, a vacancy announcement was issued for the L-5 position of Representative of UNODC in the Sub-Regional Office in Abu Dhabi. The Appellant applied for that post in February 2009 and was one of the three short-listed candidates. After consideration of the candidates, it was decided that none of them met all the necessary requirements of an L-5 post.

7. The Executive Director decided that rather than re-advertising the vacancy, the post would be reclassified at the L-4 level and he offered as lateral reassignment to the Appellant. By email dated 21 April 2009, the Appellant informed the Human Resources Management Service (HRMS) of UNODC that he declined the offer.

8. On 12 June 2009, the Appellant agreed to a reassignment to the Sub-Regional Office in Abu Dhabi at the L-4 level. He however requested a different title and higher in-grade step. It was agreed that the title of the P-4 post would be changed from "Programme Coordinator" to "UNODC Representative to the UAE and Special Representative to All Gulf Countries" (UNODC Representative). HRMS however refused to grant the Appellant a higher step-in-grade.

9. From June to November 2009, the Appellant frequently communicated with the Executive Director and other senior managers, stating that he was ready to take up his appointment, but continuously raised concerns in his correspondence, which prevented him from transferring to Abu Dhabi.

10. On 9 September 2009, the Executive Director sought a firm commitment from the Appellant that he would take up his reassignment by the end of September. The Appellant indicated that he would be able to take up his reassignment on 19 October 2009, but continued to raise questions regarding administrative details of the reassignment, which had previously been answered.

11. On 29 October 2009, the Appellant met with his supervisors and officials from HRMS to discuss the urgent need for the project document that would implement the provisions of the Host Country Agreement and account for the use of UAE's contributions to the Abu Dhabi Office. Based on the understanding that the project document would be completed over the following days, it was agreed that the Appellant would take up his reassignment on 9 November 2009. It was clarified that the Appellant would be reassigned at the P-4 level, charged against the P-5 level post in the staffing table of the new Office. Once the Abu Dhabi Office was operational, UNODC intended to review the level of the Representative post.

12. Notwithstanding that the project document had not yet been completed, on 11 November 2009, the Appellant's supervisor informed the Appellant that he would be required to take up his reassignment by 23 November 2009, and that he would be officially released of his duties with UNODC in Vienna as of that date. The Appellant responded that he was ready to travel on 23 November 2009, but continued to raise concerns preventing him from travelling.

13. In a meeting held on 1 December 2009, the Appellant's supervisor and the Chief of the Recruitment and Placement Unit, HRMS, informed the Appellant that, in view of the delays in the opening of the Sub-Regional Office in Abu Dhabi, the Executive Director had decided to no longer reassign him. He was also informed that he would remain the Regional Programme Coordinator for the GCC countries in Vienna until a new head of the Sub-Regional Office was appointed; and that subsequently, he would revert to his permanent appointment status, and be assigned to a P-3 post, yet to be determined.

14. On 21 December 2009, the Appellant requested management evaluation of the decision to no longer reassign him to Abu Dhabi. On 23 December 2009, the Appellant filed an application requesting that the Dispute Tribunal suspend the contested decision. The Dispute Tribunal dismissed that request. On 4 May 2010, the Appellant filed an application with the UNDT, challenging the decision to no longer reassign him laterally to the UNODC Sub-Regional Office in Abu Dhabi.

15. The UNDT issued Judgment No. UNDT/2011/105 on 22 June 2011. It found that, contrary to the Appellant's assertion, he was not prevented from taking up the post because the project document had not been finalized. It found that first, there was no legal requirement that a project document be completed prior to the assumption of a project-related post; second, the agreement that once the project document was approved, the Appellant would take up his post on 9 November 2009 was implicitly conditional on his completion of the project document by that date; and the Appellant failed to do so; and third, contrary to the Appellant's assertion, the reasons given by the Appellant throughout 2009 for not taking up the post as and when agreed, did not include the lack of the finalized project document. The Dispute Tribunal found that the Appellant's reassignment to the Abu Dhabi Office was not contingent on the completion of the project document.

16. The UNDT also rejected the Appellant's argument that UNODC's attempts violated the Host Country Agreement establishing the new Sub-Regional Office in Abu Dhabi whereby the

chief of office should be at the L-5 level. The creation of an L-5 post was not a binding condition, and the discretion to classify posts lies with the Administration which is responsible for the administration of the projects established under the Host Country Agreement.

17. Finally, the UNDT found that the Secretary-General did not breach ST/AI/2006/3 in relation to the withdrawal of the Appellant's lateral reassignment. The UNDT dismissed Mr. Al-Mulla's application in its entirety.

Submissions

Mr. Al-Mulla's Appeal

18. Mr. Al-Mulla appeals the UNDT Judgment on the grounds that the UNDT erred in law and fact in examining the legality of the decision to withdraw the lateral reassignment offer. Mr. Al-Mulla seeks the rescission of the contested decision, one year's net base salary as compensation for "emotional and actual" damages, as well as the nominal sum of one US Dollar for "injustices suffered".

19. Mr. Al-Mulla submits that the UNDT erred in finding that his reassignment to the Abu Dhabi office was not contingent on the completion of the project document. He submits that the UNDT erred in law in finding that he was responsible for the preparation and completion of the project document, when the final approval and signing of the final document was the responsibility of the Field Representative. He further submits that the UNDT erred in finding that there is no legal requirement for a project document to be completed prior to the assumption of a project-related post.

20. Mr. Al-Mulla submits that the UNDT erred in finding that the reclassification of the UNODC Representative post did not breach the Host Country Agreement. The UNDT failed to provide any basis in policy or jurisprudence for determining that the creation of a P-5 post was not a binding condition of the Host Country Agreement. The UNDT erred by concluding that it was within the Administration's discretion to classify posts. The reclassification of the position of UNODC Representative constituted a unilateral amendment to the Host Country Agreement.

21. Finally, Mr. Al-Mulla submits that the UNDT erred in concluding that the decision to withdraw the lateral reassignment offer did not breach ST/AI/2006/3.

Secretary-General's Answer

22. The Secretary-General requests that the Appeals Tribunal dismiss Mr. Al-Mulla's appeal in its entirety.

23. The Secretary-General requests the Appeals Tribunal to find that the UNDT correctly found that the reassignment of Mr. Al-Mulla to the Abu Dhabi Office was not contingent on the completion of the project document; that the UNDT correctly found that the reclassification of the UNODC Representative post did not breach the Host Country Agreement; and that the UNDT correctly found that there was no improper motive in the decisions to laterally reassign the Appellant and to subsequently withdraw the lateral reassignment offer.

Considerations

24. The UNDT Judge found that the Appellant had not been prevented from taking up the post in Abu Dhabi and did not accept the reasons the Appellant had given throughout 2009 for not relocating as agreed.

25. The Appellant submits that he could not take up the post before the project had been finalized and signed by his supervisor. He adds that the reclassification of his post in Abu Dhabi was a binding condition of the Host Country Agreement.

26. Although the Appellant indicated that he was ready to travel on 23 November 2009, he actually continued to raise concerns preventing him from travelling. The Appellant acknowledged that the project document had been approved on 21 December 2009.² But he did not relocate to take up his post and insisted on a reclassification. He considered a lateral reassignment a demotion and that the downgrading of the post was contrary to the requirements of the Host Country Agreement.

27. On the standard of judicial review of classification decisions, this Court has held in *Fuentes* that it endorses, in principle, the jurisprudence of the Administrative Tribunal of the International Labour Organization (ILOAT), which repeatedly held:

It will not undertake an exercise to classify or reclassify posts in an organisation's structure ..., since decisions in this sphere lie within the discretion of the organisation and may be

² Appeal Brief, p. 4.

set aside only on limited grounds. Such is the case, for example, if the competent bodies breached procedural rules, or if they acted on some wrong principle, overlooked some material fact or reached a clearly wrong conclusion In the absence of such grounds, the Tribunal will not remit the case to the organisation, nor will it substitute its own post evaluation for that of the competent bodies...³

28. The UNDT found that the Organization made good faith efforts to accommodate the Appellant's numerous requests in connection with his reassignment, which was dictated entirely by operational requirements. It held that the delays in finalizing the project document were largely attributable to the Appellant, and not an obstacle to the lateral reassignment and that there was no breach of the Host Country Agreement as alleged by the Appellant.

29. Heads of departments/offices retain the authority to transfer staff members within their departments or offices to vacant posts at the same level (para. 2.4 of ST/AI/2006/3 applicable at the time), and the UNDT held that the decision to reassign the Appellant was not tainted by improper motives, bias or bad faith.

30. This Court has previously held that an appellant has to prove an error of law or fact and should not repeat arguments already considered and rejected by the UNDT.⁴ The Appellant does not demonstrate that the UNDT erred in finding that his reassignment was not contingent on the signature of the Host Country Agreement or that the failure to create an L-5 position breached the Host Country Agreement.

31. The Appellant merely voices his disagreement with the UNDT's conclusions and resubmits the arguments made before the UNDT. He has not met the burden of demonstrating how the UNDT erred in making the impugned findings.

Judgment

32. The appeal is dismissed.

³ *Fuentes v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-105, para. 26, quoting ILOAT Judgment No. 2807, 4 February 2009, "Consideration 5".

⁴ *Messinger v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-123, para. 36.

Original and Authoritative Version: English

Dated this 29th day of June 2012 in Geneva, Switzerland.

(Signed)

Judge Weinberg de Roca, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Faherty

Entered in the Register on this 12th day of September 2012 in New York, United States.

(Signed)

Weicheng Lin, Registrar