



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

Judgment No. 2021-UNAT-1179

**Moncef Khane
(Appellant)**

v.

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

JUDGMENT

Before:	Judge Jean-François Neven, Presiding Judge Kanwaldeep Sandhu Judge Sabine Knierim
Case No.:	2020-1481
Date:	29 October 2021
Registrar:	Weicheng Lin

Counsel for Appellant:	George G. Irving
Counsel for Respondent:	Maryam Kamali

JUDGE JEAN-FRANÇOIS NEVEN, PRESIDING.

1. Moncef Khane (Mr. Khane) previously occupied the post of a P-5 Senior Political Affairs Officer in the Department for General Assembly and Conference Management (DGACM), where he provided services to the General Assembly as Secretary of the Social, Humanitarian & Cultural Issues Committee (Third Committee). On 18 June 2019, Mr. Khane filed an application with the United Nations Dispute Tribunal (Dispute Tribunal or UNDT) challenging the Administration's decision to reassign him to the post of Senior Programme Management Officer (SPMO), which was at the same P-5 level but located in the Central Planning and Coordination Division within DGACM. On 31 August 2020, the UNDT issued Judgment No. UNDT/2020/159,¹ finding that the rationale advanced by the Under-Secretary-General, DGACM, (USG/DGACM) for the transfer decision lawful and that the post to which Mr. Khane was transferred to was commensurate with his skills, competencies and experiences. Mr. Khane filed an appeal.

2. For the reasons set out below, we grant the appeal in part. We rescind the reassignment decision but dismiss the claim for compensation.

Facts and Procedure

3. Mr. Khane, an international civil servant with a permanent appointment, had served as Secretary of the Third Committee from 2003 until December 2018 when the USG/DGACM reassigned him to the SPMO post.

4. On 18 June 2019, Mr. Khane challenged his reassignment with the UNDT, and by Order No. 95 (NY/2020),² the tribunal directed the parties to file a Joint Submission on agreed facts. In relevant part, the parties stipulated to the following:³

... 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.

¹ *Khane v. Secretary-General of the United Nations*, Judgment No. UNDT/2020/159 dated 31 August 2020 (Impugned Judgment).

² *Khane v. Secretary-General of the United Nations*, Order No. 95 (NY/2020).

³ Impugned Judgment, para. 7. PR is Permanent Representative.

... 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.

The UNDT Judgment

5. On 31 August 2020, the UNDT issued the Impugned Judgment, finding that the rationale advanced by the USG/DGACM for the transfer decision lawful and that the post Mr. Khane was transferred to was properly commensurate with his skills, competencies and experiences.

6. Additionally, the UNDT also found the transfer decision was not a disguised disciplinary sanction. The Dispute Tribunal highlighted that nowhere in the record was it implied that there were issues of misconduct or performance with Mr. Khane.

7. Regarding the allegation that Mr. Khane was deprived of his due process rights, the tribunal noted that the USG/DGACM actually informed Mr. Khane in advance of the possibility of his reassignment. Therefore, in principle, he was consulted before the final decision was reached.

8. Finally, the tribunal credited the Secretary-General's arguments that the transfer to the new post was commensurate with Mr. Khane's skills and competencies, to wit:⁴

[T]he 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[. (...)

... 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.

Procedure before the Appeals Tribunal

9. On 28 October 2020, Mr. Khane filed an appeal against Judgment No. UNDT/2020/159, and the appeal was registered with the Appeals Tribunal as Case No. 2020-1481. On 6 January 2021, the Secretary-General filed a timely answer.

Submissions

Mr. Khane's Appeal

10. Mr. Khane first submits that the Dispute Tribunal failed to exercise the jurisdiction vested in it by declining to hold a case management or substantive hearing on the issues. As a result, he argues the tribunal made serious errors of fact and law. Specifically, Mr. Khane states the UNDT committed an error of law when it declined to hold a hearing, which consequently deprived him

⁴ Impugned Judgment, paras. 24 – 25.

of the opportunity to call witnesses. He therefore requests as an exceptional measure and in accordance with Article 10 of the Appeals Tribunal Rules of Procedure (Rules) that the Tribunal admit a witness statement from the former Chair of the Third Committee.

11. Second, Mr. Khane argues the UNDT ignored the requirements set forth in Article 100 of the Charter of the United Nations and Staff Rules 1.2 (d) and (e), which relate to non-interference from any government and that staff members must regulate their conduct in the interests of the Organization only. It is Mr. Khane's contention that the UNDT made an error of fact and law when it determined the decision to reassign him was not made upon the instruction from a Member State.

12. Furthermore, Mr. Khane also argues the lack of transparency in the decision-making process and the arbitrariness of the choice of the USG/DGACM in removing him from his post of Senior Political Affairs Officer is evidenced by the clear refusal of the latter to allow him the opportunity to address the complaint from the Member State. This, Mr. Khane contends, resulted in a denial of his due process rights.

13. To rebut any challenges to his performance, Mr. Khane requests as an exceptional measure and in accordance with Article 10 of the Rules that the Tribunal admit his performance evaluations.

14. Finally, Mr. Khane submits that his reassignment represented a significant professional dislocation and appears to be equivalent to a constructive dismissal because his new post had no relation to his previous levels of responsibilities, nature of work, experience, skills, or educational background. In the same vein, he also argues his previous role as Secretary of the Third Committee was a secure regular budget post in comparison to the SPMO "dead-end job [that] can be seen as the first step on the train to separation from service ...".

The Secretary-General's Answer

15. The Secretary-General submits the UNDT was correct to conclude that the reassignment of Mr. Khane was a lawful exercise of discretion and that the SPMO post corresponded to Mr. Khane's grade, level, skills and experience. In addition, the Secretary-General also notes that the SPMO post was a regular budget post classified at the P-5 level.

16. Regarding Mr. Khane's contention that the UNDT erred when it failed to hold a hearing, the Secretary-General argues the case was fully informed and ready for adjudication. The UNDT had issued Order No. 95 (NY/2020) in which it gave the parties an opportunity to file additional submissions and responses. At the conclusion of this process, neither party sought any further production of evidence.

17. Finally, the Secretary-General also highlights that Mr. Khane was never accused of misconduct, and as such, the Organization was not obligated to initiate a disciplinary process. The Respondent maintains the reassignment was based on operational considerations and not misconduct.

18. In response to Mr. Khane's motions to introduce new documents, which had not been submitted before, the Secretary-General notes Mr. Khane's performance is not at issue here and that the documents in question were available to the appellant at the time of his application. Therefore, the appellant's motions should be denied on these grounds.

Considerations

Motions

19. Mr. Khane files motions seeking to introduce two sets of documents, one pertaining to a witness statement of the former Chair of the Third Committee and one pertaining to his performance evaluations.

20. Article 10(1) of the Rules states:

A party may seek to submit to the Appeals Tribunal, with an appeal or an answer, documentary evidence, including written testimony, in addition to that contained in the written record. In exceptional circumstances and where the Appeals Tribunal determines that the facts are likely to be established with such additional documentary evidence, it may receive the additional evidence from a party. On its own volition, the Tribunal may order the production of evidence if it is in the interest of justice and the efficient and expeditious resolution of the case, provided that the Appeals Tribunal shall not receive additional written evidence if it was known to the party seeking to submit the evidence and should have been presented to the Dispute Tribunal.

21. This evidence, i.e. both sets of documents, was known to the appellant and should have been presented to the Dispute Tribunal. The motions are therefore denied.

Grounds

22. Article 2 of the Appeals Tribunal Statute (Statute) states:

The Appeals Tribunal shall be competent to hear and pass judgement on an appeal filed against a judgement rendered by the United Nations Dispute Tribunal in which it is asserted that the Dispute Tribunal has:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

We recall that the appeals procedure is of a corrective nature and is not an opportunity for a dissatisfied party to reargue his or her case: “A party cannot merely repeat on appeal arguments that did not succeed in the lower court. Rather, he or she must demonstrate that the court below has committed an error of fact or law warranting intervention by the Appeals Tribunal.”⁵

Did the UNDT err when it declined to hold a case management or substantive hearing on the issues?

23. The Dispute Tribunal Rules of Procedure (UNDT Rules) state, in relevant part:

Article 16 Hearing

... The judge hearing a case may hold oral hearing (...) A hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure.

...

⁵ *Al-Moued v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2014-UNAT-458, para. 23, citing *Dannan v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2013-UNAT-340, para. 14, quoting *Crichlow v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-035.

Article 19 Case management

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

24. This Tribunal has consistently held:⁶ “As the court of first instance, the UNDT is in the best position to decide what is appropriate for the fair and expeditious disposal of a case and do justice to the parties. The Appeals Tribunal will not interfere lightly with the broad discretion of the UNDT in the management of cases.”

25. By Order No. 95 (NY/2020) dated 2 June 2020,⁷ the UNDT ordered:

... the parties [] to file 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;

... each party is to file a response to the other party’s submission ...

... the parties to file a jointly-signed statement providing [a list of the agreed and disputed facts by 30 June 2020.]

26. By Order No. 122 (NY/2020) dated 29 July 2020, the UNDT also 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 then fully informed and ready for adjudication. The parties then duly filed their closing statements. They did not seek to produce further evidence and none of them were precluded to do so.

27. Hence, Mr. Khane has failed to establish that the UNDT failed to exercise the jurisdiction vested in it by declining to hold a case management or substantive hearing on the issues.

⁶ *Bertucci v. Secretary-General of the United Nations*, Judgment. No.2010-UNAT-062, para. 23.

⁷ *Khane Order, op. cit.*, paras. 9 – 11.

Did the UNDT err in concluding that the transfer was lawful?

28. The Secretary-General enjoys a broad discretion in assigning, as well as reassigning (or transferring), staff members to undertake certain functions under Staff Regulation 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”.

29. The Secretary-General’s authority to transfer staff members is, however, not unfettered. In *Sanwidi*,⁸ the Appeals Tribunal ruled that:

... 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.

In line herewith, specifically regarding a transfer decision, the Appeals Tribunal ruled that:⁹

... Traditionally, the reassignment of staff members’ functions comes within the broad discretion of the Organization to use its resources and personnel as it deems appropriate.[]

...

... It is for the Administration to determine whether a measure of such a nature is in its interest or not. However, the decision must be properly motivated, and not tainted by an improper motive, or taken in violation of mandatory procedures. 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.

⁸ *Sanwidi v. Secretary-General of the United Nations*, 2010-UNAT-08, para. 40.

⁹ *Awe v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-667, paras. 25 and 27 (internal footnotes omitted). See also *Chemingui v. Secretary-General of the United Nations*, 2019- UNAT-930, paras. 39-40

30. In the present case, the tribunal stated:¹⁰

[T]he 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).

The appellant argues that by finding no issue in the transfer decision and qualifying this decision as “the most appropriate”, the UNDT violated Article 100 of United Nations Charter and ignored that the decision was a disguised disciplinary sanction.

31. Article 100 of the United Nations Charter provides that “[i]n the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government”. In this case, the tribunal acknowledged that the transfer decision was related to the complaint of a Permanent Representative, but it did not decide that the USG/DGACM had acted upon instructions from the Permanent Representative of a government. The mere fact that in his letter to the Secretary-General the Permanent Representative said “action must be taken” does not establish that the Permanent Representative was giving specific instructions to the Secretary-General to transfer Mr. Khane, and more importantly, it does not establish that the Secretary-General actually complied with such instructions. There can be a myriad of reasons why the Secretary-General effected such transfer. Therefore, the tribunal did not err on a question of fact, resulting in a manifestly unreasonable decision, when it decided that there was nothing in the case file to suggest that in transferring the appellant, the USG/DGACM was acting upon a specific instruction from the Permanent Representative of a Member State.

32. Furthermore, in the context of the political relationship between the United Nations and a Member State regarding the functioning of the Third Committee, the tribunal did not err in law or in fact in deciding that the reassignment was at the discretion of the USG/DGACM, who had the vested authority to transfer the appellant to another post, as an

¹⁰ Impugned Judgment, para. 14.

appropriate way to resolve the situation regarding the Permanent Representative's political complaint.

33. Finally, Mr. Khane does not provide evidence that he was actually suspected of any type of misconduct or that the transfer decision was motivated because of performance issues. As such, the Organization was never required to institute a formal disciplinary process, and consequently, the tribunal did not err in finding that the transfer decision was not a disguised disciplinary sanction.

Did the UNDT err in deciding that the post of Senior Programme Management Officer was commensurate with the appellant's skills, competencies and experiences?

34. We recall that Staff Regulation 1.2 (c) provides: "Staff 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." And as mentioned in the preceding section:¹¹

[A]n 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.

35. The UNDT stated that it was convinced the transfer of Mr. Khane to the SPMO post was consistent with the standards set by the Appeals Tribunal. The UNDT was satisfied 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".¹² We do not agree.

¹¹ *Chemingui* Judgment, *op. cit.* para. 40 (internal footnotes omitted). See also *Rees v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-266, para. 58.

¹² *Impugned* Judgment, para. 24.

36. It is undisputed that the grade of the SPMO post is also P-5 and thus corresponds to the appellant's previous grade. Also, the fact that the previous post was "political" in nature whereas the new post appears to be more "technical" does not necessarily raise an issue either.

37. However, the UNDT did not consider whether the SPMO post was real, although there are indications that it is a nonexistent job. First, the post was not offered at the meeting on 5 December 2018, but a week later through an e-mail from the USG/DGACM. Second, there was no job description provided for the SPMO post. Third, the Terms of Reference attached to the e-mail were undated and appeared very general in nature. Fourth, on 11 June 2019, since the appellant did not occupy the new post as he was on sick leave and subsequently on special leave without pay, the Administration issued a vacancy announcement for a Temporary Job Opening (TJO) to fill the SPMO post, but that recruitment exercise never culminated in the selection of a candidate to fill the role.

38. As such, we find that the reassignment was improper, given that the SPMO post was not commensurate with the appellant's skills, competencies and experiences.

Remedies

39. The decision dated 11 December 2018 to transfer the appellant to the SPMO post in the Central Planning and Coordination Division, effective 1 January 2019, is hereby rescinded.

40. The appellant, who asked for special leave without pay, however did not hold on to the post to which he was reassigned. Therefore, Mr. Khane's claim for loss of salary and entitlements, due to dislocation, damage to career and reputation, and violation of right to due process is not supported by any of the evidence submitted and is accordingly dismissed.

Judgment

41. Mr. Khane's appeal is partially granted. The decision to transfer Mr. Khane to the SPMO post in the Central Planning and Coordination Division, effective 1 January 2019, is rescinded.
42. The appeal is dismissed in all other respects.

Original and Authoritative Version: English

Dated this 29th day of October 2021.

(Signed)

Judge Neven, Presiding
Brussels, Belgium

(Signed)

Judge Sandhu
Vancouver, Canada

(Signed)

Judge Knierim
Hamburg, Germany

Entered in the Register on this 5th day of January 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar