



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2011/045

Judgment No.: UNDT/2011/147

Date: 24 August 2011

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

JOCONDO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Steven Dietrich, Nairobi Appeals Unit, ALS/OHRM, UN Secretariat

This Judgment has been corrected in accordance with Article 31 of the Rules of Procedure of the United Nations Dispute Tribunal.

Introduction

1. On 16 August 2011, the Applicant, a D-1 staff member of the Office for the Coordination of Humanitarian Affairs (“OCHA”) filed an Application for suspension of action contesting the decision by the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator (“USG/ERC”) to abolish the post he encumbered in Haiti and reassign him to Dakar, Senegal on a position at the P-5 level. His contract is expiring on 24 August 2011.

Employment History

2. In 2001, the Applicant joined OCHA as Humanitarian Affairs Officer and Head of OCHA in Rwanda, at the P-3 level, on an intermediate contract under the 200-series of the former Staff Rules. Since his recruitment, the Applicant has served OCHA in different senior positions as Head of Office and Deputy Head of Office in nine different field locations in Africa and in Latin America. In 2008, the Applicant was appointed as Representative to the African Union Commission, at the P-5 level in OCHA’s African Union Liaison Office. On 1 July 2009, the Applicant’s appointment was converted from an intermediate contract under the 200-series to a fixed-term appointment.

3. In August 2009, a roster vacancy announcement was advertised on Galaxy for the function of Head of Office, at the D-1 level, for multiple duty stations in OCHA. The Applicant applied for that position. In April 2010, he was placed on a roster of candidates endorsed by the Central Review Board (“CRB”), for a period of two years, from 1 May 2010 until 30 April 2012.

Relevant Facts

4. Following the earthquake in Haiti on 12 January 2010, OCHA determined that the size of the OCHA field office in Haiti, combined with the complex relief and

recovery context in Haiti, made it crucial to ensure leadership of the office at a sufficiently senior level.

5. On 3 June 2010, the Controller wrote to the Chairman of the Advisory Committee on Administrative and Budgetary Questions (“ACABQ”) requesting the establishment of a D-1 extra-budgetary post (“D-1 Post”) to serve as Head of Office in Haiti.

6. On 16 June 2010, the Chairman of the ACABQ wrote to the Secretary-General advising that the Advisory Committee concurred with the establishment of the D-1 Post in Haiti.

7. In June 2010, a vacancy for the D-1 Haiti Post was circulated within OCHA. The Applicant was the sole applicant for the vacancy. On 30 June 2010, the Applicant was selected for the Post for a period of one year.

8. Following his selection, on 9 July 2010, the Applicant accepted an offer of reassignment as Head of Office in Port-au-Prince, Haiti. The offer was made at the D-1 level, step 1.

9. On 11 November 2010, the Applicant was medically evacuated from Haiti to the Dominican Republic. The Applicant returned to Haiti after two days, on 13 November, and left Haiti again on 15 November, to take a rest and recuperation break and annual leave.

10. Following his medical evaluation from Haiti, the Applicant applied for the vacancies for the D-1 Head of Office posts in the Democratic Republic of the Congo (“DRC”) and Sudan. The closing date for the vacancies was 13 November 2010.

11. While the Applicant was on leave, OCHA undertook a mission in Haiti, from 16 to 19 November 2010, to review the existing humanitarian coordination structures and recommend improvements. The Applicant was informed of the mission to Haiti before he left on annual leave. The Applicant later submitted comments to the

mission report, which were communicated to the members of the Senior Management Team of OCHA (“SMT”) on 24 November 2010.

12. In November 2010, the Director of Coordination Response Division (“CRD”) telephoned the Applicant and proposed that he be reassigned to Dakar, Senegal as Head of OCHA Regional Office for West and Central Africa at the P-5 level, for the remaining period of his fixed-term appointment. In order to accommodate the Applicant, it was agreed that OCHA would seek to upgrade the post to the D-1 level.

13. By memorandum dated 6 December 2010, the USG/ERC requested the Controller to approve the upgrade of the post of Head of Office, Regional Office for West and Central Africa (“ROWCA”), from the P-5 to D-1 level to honor the Applicant’s assignment at the D-1 level. The USG/ERC noted that the request was made “in order to accommodate a staff member [the Applicant] who has a valid contract at D-1 level through August 2011 but has had to leave his current post due to health reasons.”

14. On 10 December 2010 the Applicant sent an email to the senior management of the Haiti Office and announced his departure from Haiti to Senegal. The Applicant stated as follows:

... I am writing today to update all of you on my health situation and to share with you my future carrier (sic) plans. As some of you may be aware, I took advantage of being in Nairobi on R&R and leave the [sic] undergo additional medical tests in order to get a second opinion. The results were good and reassuring, however, to avoid being subjected to similar conditions, which may affect my health, OCHA, SMT, accepted to reassign me from Haiti to Senegal, taking advantage of a suitable opening in Dakar (Head of Regional Office for West Africa).

15. From 13 December 2010 to 7 January 2011, the Applicant was deployed to Côte d’Ivoire as head of a surge mission for two weeks.

16. On 28 December 2010, the Controller rejected the request made by OCHA to upgrade the post of Head of Office, ROWCA, from the P-5 to the D-1 level.
17. At a meeting on 7 February 2011, the Applicant met with the USG/ERC to discuss his reassignment to Senegal. The USG/ERC informed the Applicant of the difficulties encountered by OCHA to upgrade the position in Dakar from P-5 to D-1. The USG/ERC however asked the Applicant to consider taking up the post at the P-5 level, with financial benefits equivalent to those he was receiving at the D-1 level.
18. By email dated 8 February 2011 to the USG/ERC, the Applicant stated that he would rather return to Haiti until at the D-1 level position available.
19. On 9 February 2011, the USG/ERC met with the Applicant again. She informed him that OCHA could not send him back to Haiti in view of his health. The USG/ERC agreed to reassign the Applicant to the post of Head of Office, ROWCA, at the D-1 level, for the remainder of his fixed-term appointment, i.e. until 24 August 2011. The USG/OCHA made it clear to the Applicant that any further appointment to serve as Head of Office, ROWCA, would have to be at the level of post, which is P-5.
20. On 9 February 2011, the Applicant accepted the extension of his D-1 Haiti contract, effective 1 January to 24 August 2011.
21. On 23 February 2011, the Applicant was offered a temporary assignment on fixed-term appointment until 24 August 2011 at the D-1 level (limited to service) as Head of Office with the OCHA in Dakar, Senegal. The Applicant accepted the offer on 25 February 2011.
22. On 9 March 2011, the Applicant was interviewed for the D-1 Head of Office posts in DRC and Sudan. The Applicant was also interviewed for the D-1 Head of Office post in Geneva, but the selection process has not been finalized.
23. On 23 March 2011, the USG/ERC approved the reassignment of the Head of Office, Uganda, to serve temporarily as Head of Office, Haiti, ad interim, at the P-5 level.

24. While on mission in New York in April 2011, the Applicant met with the Director of CRD to discuss his future with OCHA after the expiry of his fixed-term appointment at the D-1 level. On 24 April 2011 the Director, CRD, wrote to the Applicant confirming that the Applicant would be offered the post of Head of Office, at the P-5 level.

25. On 15 July 2011, OCHA's SMT approved the Mid-Year Review of the cost plans for the Haiti Office, which included the abolition of the extra-budgetary D-1 Post in Haiti effective August 2011.

26. By email dated 21 July 2011, the Deputy Director of the Coordination and Response Division informed the Applicant that the D-1 Head of Office in Haiti post he encumbered was to be abolished and confirmed the offer of appointment of Head of Office, ROWCA, at the P-5 level.

27. The Applicant submitted a request for management evaluation on 24 June 2011 and filed an Application for suspension of action with the UN Dispute Tribunal on 15 August 2011. On 18 August 2011, the Application was served on the Respondent. The latter was requested to file a reply, if any, by Monday 22 August 2011.

Parties' Contentions

28. Whereas the Applicant's principal contentions are as follows:

- a. First, the Applicant submits that the decision to move him from Haiti to Dakar, from a D-1 level to a P-5 level position represents a demotion without due process and violates his rights to be maintained at his current level with the rights and privileges associated to this current position.
- b. Secondly, the Applicant argues that this is a case of particular urgency, as the decision will be implemented on 24 August 2011.

- c. Thirdly, the Applicant submits that if implemented the decision would cause him irreparable damage in his career development and create a hostile environment which is not conducive to his work and ability to effectively contribute to the work of the Organization. He further argues that his appointment at the P-5 level and a break-in-service would not allow him to be considered for a D-1 level permanent/continuous contract. The Applicant is of the view that the non-extension of his contract at the current level will impact adversely on his professional integrity, career prospects and his future.
- d. As remedy, the Applicant seeks a reversal of the decision to downgrade him to the P-5 level. He also seeks to receive an offer at the D-1 level at the expiry of his contract on 24 August 2011 elsewhere with OCHA.

29. The Respondent's reply is as follows:

- a. The Respondent submits that the Applicant's request for suspension of action with respect to the reassignment from Haiti to Head of Office, ROWCA, is time-barred. The Applicant's reassignment became effective on 18 February 2011, the date upon which he arrived at his new duty station in Dakar, Senegal. Not only the Applicant did not contest this reassignment under Article 2 (2) of the Statute but the decision has already been implemented.
- b. Secondly, with respect to the requirements to grant suspension of action as provided for in Article 13 of the Rules of Procedure, the Respondent submits that the Applicant has failed to demonstrate that the decision is *prima facie* unlawful; that this is a matter of urgency and that if implemented the decision would cause him irreparable damage.

- c. Regarding the issue of *prima facie* unlawfulness, the Respondent argues that the decision to abolish the extra-budgetary D-1 Post in Haiti was the result of a managerial decision in line with OCHA's mandate and exigencies of service. OCHA's mandate often requires rapid scaling up and down of field deployment. In the case of Haiti, the cost plan was revised to reflect a significant downsizing of the office and a reduction of its budget and staff. OCHA did propose to retain the D-1 Post for the first eight months in 2011, however, the decision to abolish it was taken by the SMT on 15 July 2011. The Respondent therefore submits that the decision was not made on the ground of improper motives and was lawful.
- d. The Respondent further submits that the decision to offer a staff member a new appointment does not constitute an administrative decision under Article 2 (1) (a) of the Dispute Tribunal's Statute. Further, there is no evidence that OCHA was motivated by an improper motive to demote the Applicant to the P-5 level. In fact OCHA unsuccessfully sought to upgrade the P-5 post of Head of Office, ROWCA, to the D-1 level. Nevertheless, OCHA allowed the Applicant to be placed against the D-1 level until the expiry of his fixed-term appointment. The Applicant cannot be transferred back to Haiti as the Post is due to be abolished. Further, in March 2011, another staff member was appointed as Head of Office in Haiti at the P-5 level. Therefore, it is not possible for the Applicant's appointment to be extended under the same terms.
- e. The Respondent submits that OCHA has shown good faith in order to accommodate the Applicant, having offered him a P-5 level post as Head of Office in ROWCA, at the salary level equivalent to the D-1 level, step 1. This offer was made in order to continue the Applicant's career within OCHA. OCHA also offered financial support to the

Applicant to enable him to take the Resident Coordinator Assessment again and if successful, would enable him to apply for other posts within the UN system.

- f. In view of this, the Respondent submits that the decision is *prima facie* lawful, being the result of a managerial decision, and the Applicant has failed to prove improper motives or bias against him on the part of OCHA.
- g. In regard to irreparable harm, it was the view of the Respondent that the Applicant has not submitted any evidence to prove that his career prospects or reputation in the Organization will be negatively affected by the subject decisions. The Respondent argues that permanent appointments no longer exist since July 2009 with the introduction of the new Staff Regulations and Rules. Further, the Applicant has not accrued any entitlement to a continuous appointment at the D-1 level. Conversion to a continuous appointment can only take place against an identified post. Such conversion is all the more within the discretion of the Secretary-General and taken following a competitive process. For these reasons, the Respondent argues that the Applicant's arguments have no merits. The Respondent further submits that the Applicant's integrity and reputation have never been challenged by OCHA and is inconsistent with OCHA's decision to offer him the post of Head of Office in ROWCA, with no financial loss.
- h. Concerning the third element, i.e. urgency, the Respondent submits that the Applicant has failed to satisfy this test but has not elaborated further on this.
- i. In view of the above, the Respondent requests the Tribunal to reject this application in its entirety.

Considerations

30. For the purpose of the present application, The Tribunal considers that the written submissions of the Parties are thorough and comprehensive and therefore there is no need for a hearing.

31. In his pleadings the Applicant contends (1) the decision to move him from Haiti to Dakar in November 2010, (2) the abolition of his D-1 Post in Haiti at the expiry of his contract, i.e. 24 August 2011 and (3) the offer of appointment as Head of Office, ROWCA, Dakar at the P-5 level after the expiry of his contract on 24 August 2011. The Applicant is of the view that the decision was taken on the ground of improper motives and in breach of due process.

32. In considering applications for suspension of action, the Tribunal is guided by the provisions of Article 10 of the Statute and Article 13 of the Rules of Procedure. It will first and foremost consider whether the impugned decisions are *prima facie* unlawful.

33. With regard to the first decision, i.e. the decision to move the Applicant from Haiti to Dakar, the Tribunal notes that the Applicant was reassigned in November 2010 and did not request management evaluation of the impugned decision. The Tribunal is therefore not competent to examine this decision pursuant to Article 8 of the Statute.

34. Secondly, with respect to the issue of abolition of post, the Tribunal recalls the longstanding jurisprudence of the former United Nations Administrative Tribunal ("UNAT") that, in cases of abolition of post due to budgetary necessities, the Administration must act in good faith. In Judgment No. 117, *Van der Valk*, the former United Nations Administrative Tribunal stated:

"The Tribunal notes that this post was not singled out for abolition but was one of a number declared redundant owing to budgetary necessities. There is nothing on record to show that the abolition of post and notice of termination

of the Applicant in 1965 was influenced by prejudice or extraneous circumstances.”

35. Furthermore in Judgment No. 1389, the United Nations Administrative Tribunal recalled:

- a. “...the Administration is bound by certain fundamental obligations towards all staff members, whether or not they have a permanent appointment¹. It is thus beyond question that the Administration must observe the principle of good faith in managing its staff. It must act in good faith in negotiations; it must act in good faith where it terminates a staff member; it must act in good faith in the placement of staff against appropriate posts, etc. This principle of good faith is particularly important upon abolition of post.”

36. Unlike in the case of *Abosedra* Order No. 010 (NBI/2010) the Tribunal finds, based on the evidence in the file, that the abolition of the D-1 Post in Haiti and the offer of appointment as Head of Office in Dakar, ROWCA do not appear *prima facie* unlawful. First, the decision was made by a group of senior managers who took into consideration the budgetary challenges OCHA is currently facing. In fact, the Post of Head of Office in Haiti was downgraded to the P-5 level when another OCHA Head of Office from the Philippines was appointed to the Post in Haiti. Secondly, OCHA has made repeated efforts to accommodate the Applicant, by reassigning him to Dakar due to health reasons and to upgrade temporarily the post in Dakar to the D-1 level, and finally to offer him alternative placement with no financial loss. The Tribunal also notes that the Applicant was interviewed for several D-1 positions and he is currently placed against a roster of candidates for D-1 positions. OCHA has finally offered financial assistance for the Applicant to take the Resident Coordinator examination.

37. The Tribunal recalls that the burden of proof lies on the Applicant and there is nothing on record to show that the decision was made on the ground of improper

37. The Tribunal recalls that the burden of proof lies on the Applicant and there is nothing on record to show that the decision was made on the ground of improper motives against the Applicant. On the contrary, it finds that OCHA has acted in good faith.

38. In the light of the above, the Tribunal finds that the impugned administrative decision is not *prima facie* unlawful. Having reached this conclusion, there is no need to address the other issues.

39. The application is dismissed.

Signed

Judge Vinod Boolell
Dated this 24th day of August 2011

Entered in the Register on this 24th day of August 2011

Signed

Jean-Pelé Fomété, Registrar, UNDT, Nairobi