



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/022

Judgment No.: UNDT/2012/133

Date: 4 September 2012

English

Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

CZARAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Brian Gorlick, OSLA

Erol Arduç, OSLA

Counsel for Respondent:

Ingeborg Daamen-Mayerl, UNOV/UNODC

Introduction

1. The Applicant, who held a P-4 post in Bonn, Germany, challenges the decision to transfer him at the same level to Vienna, Austria.
2. He requests the Tribunal to rescind the decision and order that he be paid compensation for the moral injury he suffered.

Facts

3. The Applicant entered the service of the United Nations Secretariat in New York in 2002.
4. In April 2008, the position of Programme Officer at the P-4 level in the Office for Outer Space Affairs (“OOSA”) in Bonn, Germany, was advertised on Galaxy, the former online United Nations jobsite. The vacancy announcement stated, *inter alia*, that as Head of the United Nations Platform for Space-based Information for Disaster Management and Emergency Response (“UN-SPIDER”), the incumbent of the post would be responsible for all administrative activities related to the UN-SPIDER office in Bonn. The Applicant was appointed to that post on 30 October 2008 on a fixed-term contract.
5. During 2010, the Internal Audit Division of the United Nations Office of Internal Oversight Services carried out an audit to determine how to improve arrangements to support programme delivery in OOSA. In its report dated 11 February 2011, the Internal Audit Division recommended, in particular, that the organization structure should be reviewed to assess the merits of consolidating UN-SPIDER. In February 2011, OOSA also finalized a document setting out its strategic discretion and operational priorities for the medium-term 2011 to 2013.
6. In a memorandum dated 4 May 2011, the Deputy Director-General of the United Nations Office at Vienna (“UNOV”) and Director of OOSA requested the Director-General of UNOV to approve the reorganization of OOSA and, in particular, the introduction within the Office of a rotation system for staff members at the P-4 level on the two posts of Heads of the UN-SPIDER offices in

Bonn and Beijing. The Director-General of UNOV approved the reorganization of the aforementioned Office in late May 2011.

7. By memorandum dated 7 September 2011, the Deputy Director-General of UNOV and Director of OOSA informed the Applicant of the decision to transfer him to Vienna; in exchange, a Programme Officer based in Vienna would be transferred to Bonn. She explained that that course of action had been decided upon further to the report by the Internal Audit Division “with the aim of giving everyone an equal chance at getting experience in holding a leadership position and working in a duty station outside Vienna” and that it would take place within two months of notification of the decision.

8. On 4 November 2011, the Applicant requested a management evaluation of the aforementioned decision.

9. The Applicant was transferred on 5 December 2011.

10. By letter dated 15 December 2011, sent on 19 December 2011 by email, the Applicant was informed that the Secretary-General had decided to uphold the contested decision.

11. On 23 March 2012, the Applicant submitted an application challenging the decision to transfer him to Vienna. The Respondent submitted his reply on 26 April 2012.

12. By Order No. 122 (GVA/2012) dated 5 July 2012, the Tribunal ordered the Respondent to submit additional documents, which he did on 18 July. By Order No. 128 (GVA/2012) issued on 24 July, it ordered both parties to submit their observations on the admissibility of the application in respect of the deadlines. The Applicant and the Respondent submitted their observations on 6 and 7 August 2012, respectively. On 14 August 2012, the Respondent submitted comments on the Applicant’s observations.

13. By Order No.132 (GVA/2012) dated 22 August 2012, the Tribunal informed the parties that it considered that an oral hearing was not necessary and gave them one week to file any objections. On 29 August 2012, both parties

responded to Order No. 132. Counsel for the Respondent confirmed that she agreed with the Tribunal's position that a hearing was not necessary in the case. Counsel for the Applicant, however, requested that an oral hearing take place in order to explain the facts and the circumstances in which the Applicant had acknowledged receipt of the response to his request for a management evaluation.

Parties' submissions

14. The Applicant's contentions are:

a. With regard to receivability, he received the email on his mobile telephone on 19 December 2011. However, he was unable to open the attached letter. The same day, he had to prepare to travel to Romania for personal reasons. Thus, he was unable to read the letter until 23 December 2011 and he immediately acknowledged its receipt by email. Accordingly, by filing his application on 23 March 2012, he had indeed responded within the time limit established in article 8.1(d)(i)a of the Statute of the Tribunal;

b. On the merits, the contested decision was procedurally flawed. Staff regulation 1.2(c) provides that the Secretary-General may assign United Nations staff members to any of the activities or offices of the United Nations. Under annex II to administrative instruction ST/AI/234/Rev. 1 (Administration of the staff regulations and staff rules), it is the Assistant Secretary-General for Human Resources Management who has the authority to assign a staff member to another duty station. While annex IV of the aforementioned administrative instruction provides that heads of departments or offices may assign staff members to any activity within the department or office, that annex makes no mention of the duty station. Such an omission, which must be deliberate given the financial ramifications that transferring a staff member to another duty station can have, implies that heads of offices may not authorize the transfer of a staff member to another duty station, even if it is within the same department or office;

c. Staff regulation 1.2(c) does not allow for the imposition of a binding rotation scheme on a departmental level. Such a scheme exceeds the rationale for the promulgation of staff regulation 1.2(c), namely, the assignment of individual staff members. Moreover, there is no such scheme in other departments;

d. The staff rotation scheme on a departmental level constitutes a “major organizational change” within the meaning of Secretary-General’s bulletin ST/SGB/172 (Staff management relations: decentralization of consultation procedure), for which a consultation procedure should be initiated. However, that did not happen in this case;

e. The contested decision constituted a unilateral change in the Applicant’s terms of employment and the rotation scheme could not be imposed on him without his consent. Moreover, the Applicant had, on several occasions before the decision was implemented, clearly expressed his dismay at the decision to transfer him to Vienna and the fact that he reluctantly complied should not be held against him;

f. The decision to transfer him to Vienna was also unlawful from a substantive point of view. Although the two posts were at the same level, the contested decision constituted a *de facto* demotion since the Applicant would no longer have any managerial responsibilities even though it was those responsibilities that had led him to apply for the position of Head of the UN-SPIDER office and to his decision to move to Bonn, away from his family;

g. The contested decision and the decision to transfer the Programme Officer who encumbered the post in Vienna to Bonn were not in the interests of the United Nations. As Head of the UN-SPIDER office in Bonn, the Applicant had made considerable achievements and was uniquely qualified for that position. The contested decision not only affected the Applicant’s interests; it also harmed the reputation of OOSA. Moreover, the report by the Internal Audit Division did not recommend the adoption of a staff rotation scheme;

h. The decision to transfer him to Vienna was motivated solely by the desire to remove him from his position, in accordance with the recommendations of his first reporting officer, after a number of a disagreements and arguments which he had had with the Applicant and which had been witnessed by several of the Applicant's colleagues in Bonn. The Applicant was the victim of harassment and abuse of authority by his first reporting officer as evidenced by the latter's imposition, against the Applicant's wishes, of a performance improvement plan, and he had so informed the Deputy Director-General of UNOV and Director of OOSA as early as June 2010. His first reporting officer used the report of the Internal Audit Division as an opportunity to remove him from his position.

15. The Respondent's contentions are:

a. With regard to receivability, staff rule 11.4(a) and article 8.1(d)(i) of the Statute of the Tribunal provide that an application must be submitted within 90 days of the Applicant's receipt of the response by management to his or her request for a management evaluation or within 90 days of the expiry of the Administration's relevant response period for that evaluation. In this case, both dates coincided as the Administration's response was sent to the Applicant on the last day of the response period, namely 19 December 2011. There is nothing to suggest that the 90-day period should have started on the date when the Applicant acknowledged receipt of the Administration's response. Moreover, the Applicant should have been expecting to receive the response to his management evaluation request. Lastly, he himself admits that he received the email that had been sent to his official and private email addresses on 19 December 2011;

b. On the merits, it is clear from staff regulation 1.2(c) and from the case law of the Dispute Tribunal that the Secretary-General has broad discretionary powers with regard to the assignment of staff members to any of the activities or offices in the interests of the United Nations. The Administration also has broad powers to reorganize its departments;

c. The Applicant's reassignment was part of the reorganization of OOSA and the staff rotation scheme was adopted in good faith. Annex IV to ST/AI/234/Rev.1 vests the Director-General of UNOV with the authority to assign staff members to activities within his offices and the UN-SPIDER office in Bonn is an integral part of OOSA within UNOV;

d. In accordance with the Tribunal's findings in *Allen* UNDT/2010/212, the fact that the Administration consulted the staff members concerned did not mean that it was bound to obtain their consent. Since the beginning of the reorganization process in November 2010, staff have been duly informed and consulted, notably during monthly staff meetings and meetings of the Office's Programme Management Group. Furthermore, during a telephone conversation, the Deputy Director-General of UNOV and Director of OOSA and the Applicant discussed the proposal to open the post in Bonn for the staff rotation scheme. Lastly, the Administration proceeded in good faith and administrative action was taken in respect of the reassignment to proceed to effect the rotation of the Applicant and by the time it was informed that the Applicant had submitted a management evaluation request, the transfer process was already well under way;

e. The Applicant's transfer to Vienna was an opportunity for his professional development as he will be involved in supporting the implementation of the Programme on Space Applications, which covers the new and evolving area of geospatial information, as well as a wider range of thematic priority areas. The main differences between the posts in Bonn and Vienna are the functions attached to the two posts. However, the functions attributed to the position of Programme Officer in Vienna are fully in line with the Applicant's skills and qualifications and since his reassignment to Vienna, measurable progress has been made in developing the Office's strategy on geospatial data;

f. The Applicant's contention that his first reporting officer initiated the decision to transfer him to Vienna is not based on facts. That decision

was taken solely in the interests of the Organization. While there had been friction between the Applicant and his first reporting officer relating to the former's performance over the period 2010-2011, such disagreements had been addressed within the performance appraisal system pursuant to the provisions of administrative instruction ST/AI/2010/5 (Performance management and development system). However, the Applicant had refused to participate in the discussions that took place within that framework.

Consideration

16. Although, after the parties were informed that the Judge in charge of the case did not intend to hold an oral hearing because the case could be dealt with on the papers, the Applicant confirmed that he wished to be summoned to an oral hearing, the Tribunal considers that the explanations that the Applicant could give orally would not, in any event, provide any additional information needed to resolve the dispute.

17. The Tribunal must first rule on the question of whether the application is receivable with regard to the time limits.

18. Article 8 of the Statute of the Tribunal states:

1. An application shall be receivable if:

...

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to

the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices;

...

19. Furthermore, staff rules 11.2 and 11.4 provide:

Rule 11.2
Management evaluation

a) A staff member wishing to formally contest an administrative decision ... shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

Rule 11.4
United Nations Dispute Tribunal

a) A staff member may file an application against a contested administrative decision, whether or not it has been amended by any management evaluation, with the United Nations Dispute Tribunal within ninety calendar days from the date on which the staff member received the outcome of the management evaluation or from the date of expiration of the deadline specified under staff rule 11.2(d), whichever is earlier.

20. It is not disputed that the Applicant submitted his request for a management evaluation on 4 November 2011 and that the Secretary-General responded by letter dated 15 December 2011, sent by email to the Applicant's official and private email addresses on 19 December 2011. In order to rule on the admissibility of the application, the Tribunal assumes that the Applicant's statements are correct, namely that he received the aforementioned email on his mobile telephone on 19 December 2011; that he was unable to open the attached letter, which contained the response to his request for a management evaluation; and that, owing to his departure for Romania for personal reasons that same day, he was not able to read the letter until 23 December 2011.

21. Both the Appeals Tribunal and the Dispute Tribunal have stressed the importance of observing time limits (see, *inter alia*, *Mezoui* 2010-UNAT-043;

Ibrahim 2010-UNAT-069 and *Christensen* 2012-UNAT-218 of the former, and *Odio-Benito* UNDT/2011/019 and *Larkin* UNDT/2011/028 of the latter).

22. It follows from the foregoing that the Applicant knew, as from 19 December 2011, that the Secretary-General had responded to his request for a management evaluation but that he did not read the contents of that response until four days later. The Tribunal considers that it is the responsibility of the Applicant, as soon as he was informed that the Secretary-General had responded to his request, to read that response as soon as possible so that he could submit an administrative appeal, if necessary, within the relevant time limits.

23. Even assuming, as the Applicant maintains, that for four days, it was practically impossible for him to read the attachment to the email sent to him on 19 December 2011, he still had sufficient time as from 23 December 2011, i.e. 87 days, to submit his application to the Tribunal. Indeed, the 90-day time limit for staff members to submit an application after receiving a response to a request for a management evaluation is sufficiently long to allow them to address, as in this case, any technical problems with transmission of the letter and any difficulties that the staff member encounters in taking note of the Administration's response. Furthermore, even if the Applicant absolutely required 90 days in order to submit his application to the Tribunal, he could have applied for an extension of time, which he did not do. Therefore, the Tribunal can only conclude that the Applicant is solely responsible for the lateness of the application, which was submitted on 23 March 2012.

24. It should also be noted that, in any event, the Applicant did not submit his application until 91 days after he had read the letter dated 15 December 2011. Thus, the Tribunal can only find that the application was submitted after the time limit and therefore rejects it as not receivable.

Conclusion

25. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Jean-François Cousin

Dated this 4th day of September 2012

Entered in the Register on this 4th day of September 2012

(Signed)

René M. Vargas M., Registry, Geneva