



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NJOE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Maria Teresa Cirelli

Counsel for the Respondent:

Sandra Baffoe-Bonnie, ECA

Amboko Wameyo, ECA

Introduction

1. The Applicant has challenged a decision dated 12 November 2014 to “laterally reassign” him from the United Nations Economic Commission for Africa (ECA) in Addis Ababa, Ethiopia, to the African Institute for Economic Development and Planning (IDEP)¹ in Dakar, Senegal, effective 1 January 2015.

Procedural history

2. The Applicant filed this application with the United Nations Dispute Tribunal on 6 April 2015. The Respondent filed a reply on 8 May 2015. Pursuant to Order No. 355 (NBI/2015), the Applicant filed a response to the Reply on 10 November 2015.

3. In accordance with Order No.355 (NBI/2015), the parties filed a joint submission which included statements of agreed facts and issues.

4. In a motion dated 16 November 2015, the Applicant sought production of a number of documents. These were provided by the Respondent on 7 March 2016.

5. The Applicant submitted a full statement of his evidence dated 15 April 2016.

6. Following a case management discussion with the parties on 18 April 2016, the Tribunal was of the view that there was sufficient material on file to determine the issues in this case without the need for an oral hearing. Neither party objected to this course of action.

Facts

7. From 30 January 2010 the Applicant served as Chief, Information Technology and Umoja Support Section (ITUSS) at the P-5 level initially under

¹ IDEP was established and operates as a subsidiary body of ECA pursuant to E/RES/2013/2 (Refocusing and recalibrating the Economic Commission for Africa to support Africa’s structural transformation).

the ECA Division of Administration and, since 1 March 2013, under the Public Information and Knowledge Management Division at ECA headquarters in Addis Ababa.

8. The ECA ICT strategy was concluded on 11 April 2014. It referred to increasing the strategic value of IDEP by taking greater advantage of e-learning products and expansion of its on-line offerings to external clients with state-of-the-art curriculum and information modules.

9. On 25 April 2014, the Chief, Human Resources Services Section (Chief/HRSS) verbally informed the Applicant that he was to be assigned to IDEP. Pending finalization of administrative issues, such as approval of classification of the post, he was requested to go to Dakar on temporary assignment duty (TDY) in July 2014.

10. The ECA Director of Public Information and Knowledge Development Division (ECA PIK Director) reported to the ECA Executive Secretary on 28 April 2014 that he had spoken to the Applicant about the intention to post him to IDEP and had clarified that the position would entail managing the ECA e-learning Programme based at IDEP; that the Applicant would be responsible for creating and building up this area for ECA and, contrary to the concern of the Director of IDEP (Director/IDEP), the Applicant was not in the line of succession for his position.

11. The ECA PIK Director reported that the main concerns of the Applicant were administrative as he wished to start arrangements for moving out of his house and to start in the first week of July at the end of the school year.

12. The Applicant stated that during the months of May and June he had various conversations with the Director, Division of Administration regarding administrative requirements for the assignment. He said that as a result of some concerns she had expressed over the procedure he “became worried because the

procedure leading to the transfer did not seem to be straight forward and this could affect the stability of his employment”.²

13. The ECA PIK Director visited IDEP on 6 and 7 May 2014 to draft a proposal initiating the scaling up of IDEP’s e-learning Programme. The Director/IDEP requested time to consider “the weighty issues to be unbundled” in the draft report but made no comments on it.

14. On 20 May 2014, the ECA PIK Director reported that on his visit to IDEP he met with the Director/IDEP and the administrative and IT officers. He advised them that ECA would be providing an Adviser/Senior IT Specialist on a regular P-5 budget to manage the project and then continue to run the programme as it established sustainability. The particulars of the assignment intended for the Applicant were reviewed with the Director/IDEP. The ECA PIK Director stated: “Although objections were raised on the lack of consultation in the way the transfer has been carried out, my visit hopefully helped to clarify the rationale and ensure that his transfer becomes a ‘win-win’ situation”.

15. Between 28 and 30 May 2014, the Applicant participated in an e-Learning Africa Conference in preparation for his reassignment. The Applicant stated that after he attended this no one expressed any interest in discussing it with him: “I started to fear that in the absence of a follow up to the conference was a sign that there was no genuine interest at ECA in the activities I was expected to undertake at IDEP”.³

16. At a meeting of the Governing Council of IDEP chaired by the ECA Executive Secretary held between 19 and 20 June 2014, the Executive Secretary announced *inter alia* that IDEP would be the training arm of ECA, all courses conducted by ECA would be moved to IDEP and that all e-learning requirements of ECA would be absorbed by IDEP.

17. On 21 June, the ECA Executive Secretary wrote to the ECA PIK Director that he had announced to the Governing Council that ECA is going to make a

² Applicant’s statement of evidence dated 15 April 2016, paragraph 5.

³ Ibid, paragraph 6.

transfer of a P-5 plus additional resources to boost e-learning. He said he had had a chat with the Director/IDEP urging him to quickly move on e-learning. The ECA PIK Director was asked to proceed as soon as possible.

18. On 22 June 2014, the Chief/HRSS sent the classification document to the Director/IDEP for him to review and sign as the first reporting officer.

19. On 9 July, the Applicant was informed that his two-month TDY to IDEP would commence on 4 August 2014. On 11 July the Applicant emailed the Chief/HRSS copying this to *inter alia*, the Director/IDEP. He referred to ongoing discussions, including the meetings in April 2014 regarding his eventual reassignment to IDEP for a longer period. He listed what he said had been communicated to him and his understandings to date including that he would remain on a regular budget post; that the reassignment would constitute a lateral move and have the benefits and entitlements of a geographical move. For a variety of personal reasons he requested that the start date for the TDY be moved to 11 August 2014.

20. On 25 July 2014, ECA HRSS submitted a request for classification action to the Office of Human Resources Management (OHRM) on the post of Senior Information Technology Officer in the e-learning unit of ECA. The request stated that “the goals and objectives of the post of Adviser/IT specialist (e-learning) is for introducing the e-learning business line of IDEP, ECA’s training arm”.

21. On 31 July 2014, the Chief/HRSS responded to the Applicant’s 11 July email confirming the Applicant’s understandings about the implications of the transfer and noted that he had been waiting for the Director/IDEP’s visit to Addis to discuss some related issues.

22. The Director/IDEP wrote to the Chief/HRSS and the Applicant on 3 August 2014 saying that the Applicant did not feature on his agenda for his visit to Addis and that “all matters pertaining to (the Applicant) have, to say the least, been crafted and driven exclusively from the outset to date”.

23. The Applicant's TDY to IDEP, Dakar commenced on 11 August 2014. It was extended twice until 30 November 2014.
24. The Compensation and Classification section of OHRM confirmed to ECA on 11 November 2014 that the P-5 post was classifiable against the job description of Senior Information Technology Officer.
25. Pending the inclusion of a P-5 post in the budget proposal for the 2016-2017 programme budget biennium, ECA temporarily assigned a regular budget post to IDEP in order to ensure that there were no delays in implementing its mandate and that the Applicant was not prejudiced by the decision on his transfer.
26. On 21 November 2014, the Applicant received an inter-office memorandum (IOM) dated 12 November 2014, which contained the contested decision.

I refer to the meeting that the chief of HRSS had with you on 25 April 2014 and subsequently...the then Director, Public Information and Knowledge Management on 26 April 2014. During both the meetings you were advised of the decision of the Executive Secretary to laterally reassign you to IDEP, with Dakar, Senegal as the duty station.

I also refer to your current TDY to IDEP, which is aimed at preparing the initial ground work for ECA's e-Learning programme for your eventual lateral reassignment.

As the administrative procedures have been completed, this is to formally advise you that the decision of the Executive Secretary to laterally reassign you to IDEP, at your current level of P5, will now be implemented, effective 1 January 2015. Please find attached herewith a copy of your terms of reference. While the Director of IDEP will be your first reporting officer, Director, Public Information and Knowledge Management will be the second reporting officer. I ask you to discuss with them and develop your work plan and resource requirements. I am confident that they will provide you with all support that you need in delivering the outputs in your new functions.

Your reassignment to IDEP Dakar will be for an initial period of one year. The Executive Secretary will decide in due course whether your services will be required at IDEP beyond 31 December 2015 or to reassign you to another position in accordance with the programme budget for 2016-2017 biennium. I will discuss with you on this issue at the appropriate time.

The Executive Secretary has taken the above decision in the context of the recently developed ICT Strategy and his continued efforts to strengthen the implementation of the reformed agenda of the Commission and exercised his authority on lateral transfers as provided in ST/AI/2010/3 on Staff Selection System.

You will be charged against a regular budget post and you will maintain your permanent appointment. Your entitlements will be administered by ECA HQs. Should you require further information, please contact HRSS.

In light of the above, I request you to conclude your TDY at the end of the currently approved period of 30 November 2014 and return to Addis Ababa. HRSS will support you with the administrative aspects of your movement to Dakar on reassignment as above.

I wish you success in your new functions with IDEP.

27. The TOR for the new post stated *inter alia* that an Adviser/Senior IT Specialist was required to lead the design work for the new e-learning business. The summary of duties included conceptualizing and developing the initial business plan for establishing the e-learning Business line; overseeing and managing the implementation of the project, providing authoritative technical advice roll out and testing of initial courses; scaling up, continuing to operate and grow the e-learning business line; managing the operation and representing ECA as spokesperson for e-learning at regional and international events.

28. The Applicant stated that from the 12 November 2014 letter, which said that his assignment was for an initial period of one year after which the ES would decide on his assignment, “[he] learned that this was not a lateral transfer as had been announced but a temporary assignment”. He also found the statement that he would maintain his permanent appointment to be in conflict with the affirmation that the assignment was for the initial duration of one year and was subject to verification of the continued need for his services at IDEP.⁴

29. The Applicant sought management evaluation of this decision on 25 November 2014 and applied to the Dispute Tribunal for suspension of action pending the MEU response, on 2 December 2014. The alleged unlawfulness relied on was that the decision was arbitrary, was not based on adequate consultation

⁴ Applicant’s statement of evidence dated 15 April 2016, paragraphs 22 & 23.

and was unsubstantiated as he had never been informed of the reasons for his reassignment.

30. On 8 December 2014, the Applicant requested to withdraw his application for suspension of action on the grounds that the Respondent had decided to defer the implementation of the contested decision until 1 February 2015. On 9 December, the Tribunal ordered that the Application for suspension of action be struck off the Court's Docket.

31. On 30 January 2015, MEU upheld the contested decision.

32. The Applicant was sent his classified job description on 11 February 2015. On 1 March he was laterally reassigned to IDEP where, as at the date of this judgment, he has continued to serve as Senior Information Technology Office at the P-5 level. He was informed on 23 December 2015 that his lateral reassignment to IDEP will continue on a permanent basis⁵.

33. In his statement of evidence the Applicant raised a number of concerns following his transfer to IDEP. In summary these are:

a. There was not a genuine need for his services at IDEP; there was no confirmation that the post had been transferred; the IDEP Governing Council referred to his assignment as secondment; the UNECA ICT strategy was inadequate to justify the transfer; there were flaws in the classification document; UNECA neglected to seek his medical clearance; it took 5 months to obtain his Personnel Action form after he arrived in Dakar; he has not had a performance appraisal for 2014/2015; his new position is completely different from his earlier one in terms of responsibility and leadership.

b. The Applicant states that "the facts I have described have caused me anxiety and distress. They have caused me embarrassment in front of my colleagues...They have also caused my family anxiety and distress.

⁵ Memorandum to the Applicant from the ECA Director of the Division of Administration dated 23 December 2015 and filed with the Tribunal on 18 April 2016.

[They] have had to share my concerns that our financial situation might become at risk due to the fact that my position had become unstable”. He says that as his daughters were sitting exams any anxiety should have been avoided.

c. Finally he states that as OSLA could not have been expected to prepare a request for management evaluation and an application for suspension of action well in advance of time limits he had to resort to private counsel and he has had to pay a considerable amount of money in legal costs. He does not specify any quantum of these costs.

Issues

34. The principle issues in this case are:

- a. Was the 12 November 2014 decision to laterally reassign the Applicant a lawful exercise of the discretion conferred by staff regulation 1.2(c) and ST/AI/2010/3 (Staff selection system).
- b. Was the Applicant treated with due care and good faith in the process of the adoption and implementation of the decision;
- c. Whether the Applicant has suffered harm as a result of the decision.

Summary of Applicant’s submissions

35. This summary of the Applicant’s submissions, relating to the impugned decision and the issues, is extracted from the submissions made in the Application and in the Applicant’s arguments in response to the reply submitted by the Applicant on 10 November 2015. It is limited to those.

36. The Applicant does not contest the applicability of staff regulation 1.2(c) and ST/AI/2010/3 para 2.5 and recognises the authority of the Secretary-General and heads of offices to assign and transfer staff to any duty station.

37. The Applicant's transfer was unlawful because it was driven by improper motives in a desire to move him away from ECA HQ rather than to contribute to any operational needs at IDEP. The unlawfulness is indicated by:

a. Lack of reasons: The decision is not adequately substantiated, as the reasons alleged by ECA are unclear, insufficient and belated; there are no reasons to deploy the Applicant at IDEP; his concerns have remained unanswered. In particular, the Applicant does not accept the reasons conveyed to him in the 12 November 2014 decision namely that it was "in the context of the recently developed ICT Strategy and [the Executive Secretary's] continued efforts to strengthen the implementation of the reformed agenda of the Commission". He queries whether the two recommendations regarding IDEP and e-learning have any relation to his transfer. He considers ECA's policy to be flawed. He questions whether the Governing Council considered and approved the plan for IDEP to become the e-learning arm of ECA; he points out there is no agreement between ECA and IDEP about the latter becoming a virtual university.

b. Absence of consultation: There has been no proper consultation regarding the transfer with the Applicant, his new supervisor or with the Chief IT Officer of the United Nations Secretariat.

i. Whatever consultation allegedly took place with him regarding the role he was to play in his new position at IDEP, omitted an essential element in conversations and correspondence, such as the fact that the position he was to occupy would be for an initial period of one year only and subject to verification that his services would still be needed at IDEP. This critical piece of information was never conveyed to him until he received the contested decision.

ii. The Commission has failed to adequately involve the Director/IDEP with respect to the transfer of the Applicant and has imposed unsolicited assistance to the IDEP with the resultant

purposeless transfer of the Applicant. There are disagreements between the Director/IDEP and ECA as regards the announcements made at the meeting of IDEPs Governing Council on 19 -20 June 2014.

c. There was no need for the urgency of his transfer.

d. He has not been treated with due care and good faith. The stability of his career has been put at risk; the transfer hampers his career prospects; in his earlier position at ECA he supervised almost 60 staff alone and indirectly another five in other African countries. In the new position he is expected to supervise only one professional and one general service staff; there is no adequate classification for his new post and a series of personnel and administrative failures demonstrate a lack of consideration for him. ECA failed to timely provide him with relevant, necessary documentation such as the applicable Personnel Action form.

Summary of Respondent's submissions

38. The decision to reassign the Applicant to IDEP is lawful and necessitated by operational reasons which were not only approved by the IDEP Governing Council but were communicated and known to the Applicant.

39. The Applicant has not demonstrated that the decision is unlawful, or otherwise tainted by ulterior motives. The Applicant makes only bare allegations that the decision to transfer him lacks substantiated reasons, despite the evidence confirming the operational necessities justifying the decision.

40. All required consultations were undertaken prior to the transfer. There is no obligation for ECA management to obtain the Applicant's consent to the transfer or the approval of the Chief IT Officer in New York.

41. The Respondent disputes that ECA has not treated the Applicant with due care and good faith. He has not proffered any evidence on how the manner in

which the Respondent has treated him demonstrates lack of due care and good faith and how his career prospects have been put at risk.

42. The Respondent disputes that the TOR provided to the Applicant for the assumption of new duties cannot be achieved. They are realistic and capable of realistic implementation.

43. In regard to the adequacy of the classification of the new post, ECA management consulted OHRM and obtained guidance to the effect that the post to which the Applicant was being moved and its related functions were “classifiable against the job description of a Senior Information Technology Officer, P5”.

44. The Applicant has not presented evidence confirming that he suffers any damages, pecuniary or otherwise as a result of the Respondent’s decision and his claim for compensation is without merit.

45. The TOR of the IDEP position and the nature of the tasks outlined in it show that leadership and professionalism, including in the IT field are measured less by numbers and levels of staff one supervises and more by initiation of work and achievements.

46. In his new function at IDEP the Applicant will lead in the development, implementation and analysis of a key and strategic programme in IT for ECA and IDEP.

47. The Applicant continues to receive all his benefits and statutory entitlements as a permanent staff member of the United Nations.

Considerations

48. Staff regulation 1.2(c) 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”.

49. Section 2.5 of ST/AI/2010/3 provides heads of offices with discretionary authority to laterally transfer staff members within their departments or offices,

including transferring to other units in different locations without advertising for a job opening or the need for further review by a central review body.

50. The principles and methodology for reviewing a decision to laterally transfer a staff member were stated in *Rees* 2012-UNAT-266:

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 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.²

Was the 12 November 2014 decision to laterally reassign the Applicant a lawful exercise of the discretion conferred by staff regulation 1.2 and ST/AI/2010/3?

51. The Tribunal makes the following findings of fact:

a. The transfer of the Applicant was internal as the IDEP is the Training arm of ECA. The functions of the post of Senior Information Technology Officer at the P-5 level did not appear in the IDEP staffing table for the 2014-2015 Programme budget and needed to be formally established through the classification process.

b. The post to which the Applicant was being moved and its related functions were "classifiable against the job description of a Senior Information Technology Officer, P-5".

c. ECA temporarily assigned a budget post at the P-5 level from the Office of the Executive Secretary to IDEP pending the provision of a P-5 post in the budget proposal for the 2016/2017 biennium.

52. In light of these facts, the Tribunal finds that the lateral transfer of the Applicant from ECA to IDEP was well within the discretion of the Executive Secretary of ECA as provided for in section 2.5 of ST/AI/2010/3. The question is whether the Applicant has been able to rebut the presumption that this discretion was regularly performed⁶.

53. The Tribunal holds that the Applicant's complaints about the delay in providing his Personnel Action form; that he has no work plan for his position at IDEP; and has been forced to remain idle, all relate to events that allegedly occurred since the Applicant encumbered the new post to which he was assigned. They are not within the purview of the Tribunal which is limited to reviewing the lawfulness of the contested decision.

54. In relation to the contested decision, the Applicant has alleged that the IDEP post will not afford him the same level of responsibility and leadership as in his previous post at ECA.

55. The Tribunal finds that the new post at IDEP is at the staff member's P-5 grade and that he retains his status as a permanent staff member. The functions of the Senior Technology Officer are different from those he was engaged in as Chief, Information Technology at ECA, but the duties and responsibilities as outlined in the TOR indicate a high level of autonomy and responsibility for setting up and managing a new business venture based on IT, a field in which the Applicant has considerable skill and expertise by virtue of his previous post as Chief, Information Technology at ECA.

56. Consequently, the Tribunal holds that the decision to laterally transfer the Applicant was lawful as it fulfilled the conditions for such a transfer as set out in *Rees*. The new post was at the staff member's grade; the responsibilities involved corresponded to his level; the functions to be performed were commensurate with the Applicant's competence and skills; and the Applicant had substantial experience in the field.

⁶ *Rolland* 2011-UNAT-122.

57. As to the Applicant's allegation that the decision was ill motivated, the United Nations Appeals Tribunal (the Appeals Tribunal) stated in *Asaad* 2010-UNAT-021 that:

The burden of proving improper motivation lies with the staff member contesting the decision. The Administration must act in good faith and respect procedural rules. Its decisions must not be arbitrary or motivated by factors inconsistent with proper administration...its decisions must not be based on erroneous, fallacious or improper motivation.

58. The Applicant has not met this burden. He has adduced no factual basis for this serious allegation and has failed to show by clear and convincing evidence that the decision was tainted by bias or discrimination against him or that it was motivated by any reason other than what was in the best interests of the organization.

59. The Applicant's complaints about the lack of or the adequacy of reasons for the decision are similarly unsubstantiated. He was given reasons in the decision letter. They were based on the policy of the ECA to move IDEP in the direction of a virtual e-learning institution. The Applicant may not have agreed with the policy that underpinned the decision but as a staff member acting professionally it was a policy decision that he was bound by.

Was the Applicant treated with due care and good faith in the process of the adoption and implementation of the decision?

60. The Applicant alleged that he was not treated with due care and good faith by reason of two factors, failure to properly consult and urgency of implementation.

Consultation

61. In *Rees* UNDT/2011/156⁷ this Tribunal stated that:

Consultation does not necessarily include negotiation and certainly does not guarantee agreement, but it must be carried out in good faith.

⁷ See also *Rees* 2012-UNAT-266.

Consultation should occur before a final decision has been made so that the staff member has a proper opportunity to be heard without the matter having been pre-determined.

62. As noted in *Pérez-Soto* UNDT/2012/078⁸ there is no requirement in the relevant legal instruments for the Administration to consult with a staff member about a proposed reassignment and a failure to consult on such a matter does not of itself render the decision unlawful.

63. In fact, from 25 April 2014, the Applicant was consulted about the lateral transfer. The final decision to laterally reassign him was dated 12 November 2014. Between those dates the Applicant had discussions about the administrative arrangements for the temporary transfer as well as discussions about the implications for his career arising from the proposed lateral assignment. His summary of the understandings reached about those matters in his letter of 11 July 2014 confirms that the consultations with him were full and substantive.

64. The Tribunal finds that the nature and degree of the consultations afforded to the Applicant were reasonable and fair to him.

65. The Applicant's allegations of lack of consultation between ECA and the IDEP Director and his complaints about lack of consultation over the postponement of his TDY are not relevant to the review of the contested decision.

66. The advice to the Applicant that his assignment would be for one year and that a decision would be made in due course as to whether his services would be required at IDEP from 31 December 2015 was not unlawful. In any event since 23 December 2015 the Applicant has known that his lateral assignment to IEP will continue on a permanent basis.

Urgency

67. The Applicant's complaints about undue urgency of his transfer are without foundation. In large part they relate to the dates of commencement of his

⁸ Affirmed in *Pérez-Soto* 2013-UNAT-329.

TDY which were extended at his request. Although the initial decision was that he would take up his new post on 1 January 2015, again at his request, the commencement date was postponed to March 2015.

Conclusion

68. The decision dated 12 November 2014 to laterally assign the Applicant to the P-5 post in IDEP was a lawful, properly motivated exercise of the discretion afforded to the Secretary-General by staff regulation 1.2(c). The question of remedies does not arise.

Decision

69. The Application is dismissed in its entirety.

(Signed)

Judge Coral Shaw

Dated this 27th day of May 2016

Entered in the Register on this 27th day of May 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi