



**Before:** Judge Nkemdilim Izuako

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

CHEMINGUI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Michael Brazao, OSLA

**Counsel for the Respondent:**

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

## **Introduction**

1. The Applicant is a staff member of the Economic and Social Commission for Western Asia (ESCWA). At the time of his application, he was serving as a Senior Economist (P-5) and Chief of the Regional Integration Section (RIS) in the Economic Development and Integration Division (EDID), ESCWA.

## **Procedural history**

2. On 21 July 2015, the Applicant filed: (i) an application with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi challenging the decision to laterally reassign him to the position of “Regional Adviser on Trade” in EDID; and (ii) an application for suspension of action pursuant to art. 14 of the UNDT Rules of Procedure.

3. Both applications were served on the Respondent on 21 July 2015 with a deadline of 22 July 2015 to file a reply to the application for suspension of action and a deadline of 21 August to file a reply to the substantive application.

4. By Order No. 240 (NBI/2015), dated 21 July 2015, the Tribunal suspended implementation of the impugned decision for a preliminary five days, until 28 July 2015, to allow time for it to properly hear and decide on the application for suspension of action.

5. In his reply to the application for suspension of action, dated 22 July 2015, the Respondent asserted that the application was not receivable and that the Tribunal did not have jurisdiction to suspend implementation of the impugned decision because the decision to reassign the Applicant fell under the term “appointment” in art. 10.2 of the UNDT Statute, which expressly excludes implementation of appointment related

6. The Tribunal concluded in its Order No. 245 (NBI/2015), dated 28 July 2015, that: the decision to reassign the Applicant to a general temporary assistance (GTA) funded post was *prima facie* unlawful; his application for suspension of action was urgent; and that implementation of the impugned decision would cause

the Applicant irreparable harm. The Dispute Tribunal ordered suspension of the decision “pending informal consultation and resolution between the parties or the determination of the substantive application in the event that mediation fails.”

7. On 24 August 2015, the Respondent filed an appeal against Order No. 245 to the United Nations Appeals Tribunal (UNAT/Appeals Tribunal) on the basis that the reassignment or transfer of a staff member is a form of appointment and therefore subject to the exemption in art. 14 of the UNDT Rules of Procedure.

8. On 21 August 2015, the Respondent filed his reply to the substantive application.

9. The Appeals Tribunal, by its Judgment No. 2016-UNAT-641 dated 24 March 2016, held that the Dispute Tribunal had not exceeded its competence or jurisdiction when it ordered the suspension of the reassignment decision until the determination of the merits of the case of the Applicant. Accordingly, the Respondent’s appeal was deemed not to be receivable.

10. The Tribunal held a case management discussion with the parties on 4 October 2016 to identify the core issues for determination and discuss the necessity for a hearing. The Respondent’s counsel submitted that there was no need for a hearing but the Applicant’s counsel requested a hearing so that the Tribunal could properly assess the motivation behind the contested decision. The Tribunal ordered the Applicant to file an amended application by 25 October 2016 and the Respondent to file an amended reply by 8 November 2016. A hearing was scheduled for 29-30 November 2016.<sup>1</sup>

11. On 18 October 2016, the Applicant’s counsel informed the Registry that the Applicant did not find it necessary to amend his pleadings and no longer sought a hearing in his case. In light of the request by the Applicant’s counsel for the matter to be decided on the papers, the Tribunal vacated the order for a hearing on 29-30 November 2016.<sup>2</sup>

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<sup>1</sup> Order No. 447 (NBI/2016).

<sup>2</sup> Order No. 458 (NBI/2016).

12. The Tribunal held case management discussions with the parties on 4 and 24 September 2018 to clarify ESCWA's position vis-à-vis implementation of the contested decision. Counsel for the Respondent clarified that ESCWA has no intention to rescind the decision. Consequently, it was decided that the matter was still live and that the Tribunal would make a final determination based on the documentary evidence submitted previously by the parties.

### **Facts**

13. When the Applicant filed his application on 21 July 2015, he was on an established/regular budget funded post. His fixed-term appointment (FTA) was due to expire on 29 August 2016.

14. In April 2015, Mr. Moctar Mohamed El Hacene, Director of EDID, mentioned to the Applicant informally that there was a possibility of him being moved. Subsequently, Mr. El Hacene sent the Applicant a temporary job opening (TJO) for the post of Regional Adviser on Trade (P-5) within EDID. The TJO stated that the duration of need was 364 days.

15. By memorandum dated 5 May 2015, Mr. David Iyamah, Director of the ESCWA Administrative Services Division, informed the Applicant of the decision of the Executive Secretary, ESCWA (ES/ESCWA) to laterally reassign him from his position in the Regional Integration Section to the post of Regional Adviser on Trade with effect from 1 June 2015. Mr. Iyamah further informed the Applicant that his benefits, entitlements, seniority, contractual modality and eligibility for consideration for a continuing appointment would not be affected by his reassignment.

16. The terms of reference for the lateral reassignment were identical to the TJO that had been shared with the Applicant in April 2015 by Mr. El Hacene. The new document did not include the qualifications, duration of need or type of appointment.

17. On 7 May 2015, the Applicant wrote to Mr. Iyamah to express his concerns and seek clarification on the contractual status and funding source for the Regional Adviser post that he was being laterally reassigned to.

18. Mr. Iyamah responded to the Applicant on the same day as follows:

Thank you very much for your email. Your concerns are noted. However, the Regional Adviser post on Trade is being created as we speak and will have a post number like any other post in ESCWA. It will be a classified post at the P5 level and we will let you know the post number once it is established. While this particular post is not specifically approved by the General Assembly, it is still a regular budget post funded by the Regular Programme of Technical Cooperation (RPTC), which is approved by the General Assembly. This programme has been in existence for many years and, in terms of predictability or security, it is as safe or unsafe as all posts in ESCWA, which are all also subject to biennial General Assembly approval.

Let me also reiterate that your reassignment to the Regional Adviser post in no way affects your contractual arrangement. You will remain a fixed term staff member and your benefits and entitlements will not be affected. The same applies to your eligibility for consideration for a continuing appointment, which will also not be affected.

19. On 13 May 2015, the Applicant requested management evaluation of the decision to laterally reassign him to the Regional Adviser post.

20. On 16 July 2015, the Applicant received a response from the Under-Secretary-General for Management that the Secretary-General had decided to endorse the findings and recommendations of the Management Evaluation Unit (MEU) to uphold the impugned decision.

## **Submissions**

### ***Applicant***

21. The Applicant's case is summarized as follows:

a. The Regional Adviser post does not have a post number and therefore does not exist in the form that ESCWA represented it to him. Although staff members are subject to lateral reassignments, they cannot be moved to posts that have not been established beforehand. Thus, the Applicant's reassignment was premature.

b. Regional Adviser posts are not subject to General Assembly approval and are not funded by regular budgets. The Regional Adviser post is RPTC/GTA funded and therefore time bound. Renewal of an RPTC/GTA post will not be parallel to a two-year or five-year renewal. If he is reassigned to a Regional Adviser post that is temporary and whose term typically is renewed yearly, he runs the risk that at the end of his current term, his contract would only be renewed for one year or less although his last two contract renewals have been for a period of two years each.

c. Due to the temporary nature of regional adviser posts at ESCWA, they historically have little to no leadership and managerial responsibilities. The Applicant's career would be affected adversely because he would lose his managerial and substantive duties within EDID. He would no longer be able to serve as officer-in-charge and would lose his international duties because the regional adviser posts are primarily local in character.

d. The impugned decision is tainted by improper motives because he previously challenged an administrative decision of ESCWA in 2014. This is not the first time he has been subjected to an adverse administrative decision. He believes that the impugned decision is being used to disadvantage him so that his eventual non-renewal would be legitimized.

22. The Applicant requests that the Tribunal order the Respondent to produce all evidence of the post number for the regional adviser post and related documentation relating to when and how it was created.

23. The Applicant seeks rescission of the contested decision as a remedy.

***Respondent***

24. The Respondent's case is that the application should be dismissed because:

a. Pursuant to section 7 and Annex IV of ST/AI/234/Rev.1 (Administration of the Staff Regulations and Rules) and section 2.5 of

ST/AI/2010/3, the Executive Secretary is vested with the discretionary authority to laterally reassign staff. In the Applicant's case, the Executive Secretary deemed it necessary to reassign him to the Regional Adviser position for operational reasons, especially since the position was at the Applicant's grade, the responsibilities involved corresponded to his level and the new functions were commensurate with his competencies and skills.

b. The Regional Adviser post is a regular budget post that was established on 16 July 2015 under post number 402034. Regional adviser posts are not dependent on extra-budgetary funding but are created as GTA posts solely for administrative reasons. The funding for these posts is provided by the General Assembly to carry out technical co-operation activities.

c. The Applicant's contractual position is not affected by his reassignment because he will remain on his fixed-term appointment at the P-5 level; he will remain eligible for consideration for a continuing appointment; and his name has been submitted to the Office of Human Resources Management (OHRM) as a staff member eligible for consideration for a continuing appointment.

d. The Applicant does not have a right to be appointed against a specific post. The source of funding for any position is a matter within the discretion of the Administration which is entitled to determine how a staff member's position will be financed.

e. The Applicant's career prospects are not affected by the reassignment because the Regional Adviser post requires an eminently qualified incumbent with a profile similar to the Applicant's. Further, the number of staff supervised is not a criterion for career advancement. Additionally, the fact that there are different functions for the Regional Adviser post is not sufficient to establish that the contested decision is unlawful. Thus, the Applicant's suggestion that a reassignment is only lawful if the new position has equivalent managerial functions lacks merit.

f. The Applicant failed to make a positive averment that the contested decision was tainted by improper motives. He merely makes vague allegations with no evidence. The Applicant bears the burden of proving the allegation of abuse of power but relies solely on his “concerns” and “fears”, which are not evidence.

### **Issues for determination**

25. The principal issues that arises for determination by the Tribunal are whether the ES/ESCWA has the prerogative to laterally reassign the Applicant from his position of Senior Economist and Chief of the Regional Integration Section within the EDID to the newly created post of Regional Adviser on Trade, also in the EDID of the Commission and whether that prerogative, if it exists, was lawfully exercised.

26. In making this determination, the Tribunal will examine: (i) the limits, if any, of the ES/ESCWA’s authority to laterally reassign a staff member of ESCWA; (ii) whether there are any risks or disadvantages to the Applicant in the decision of the ES/ESCWA to laterally reassign him to the post of Regional Adviser effective 1 June 2015; and (iii) whether the impugned decision to reassign the Applicant is a retaliatory measure for previously challenging an administrative decision of ESCWA in 2014.

### ***Are there any limits to the authority of the ES/ESCWA to reassign a staff member of the Commission?***

27. In interrogating this issue, regard must be had to the relevant legal framework. 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. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them;

28. Also, Section 2.5 of ST/AI/2010/3 (Staff selection system) governs transfers of staff members. It states:



Heads of departments/offices retain the authority to transfer staff members within their departments or offices, including to another unit of the same department in a different location, to job openings at the same level without advertisement of the job opening or further review by a central review body. Heads of mission retain the authority to transfer staff members, under conditions established by the Department of Field Support, within the same mission, to job openings at the same level without advertisement of the job opening or further review by a central review body.

29. It is settled from the foregoing provisions that the SG/ECSWA has the authority, prerogative or discretion to laterally reassign a staff member of ESCWA within the Commission. There are however conditions that must be fulfilled for him to exercise that discretion. While Staff Regulation 1.2(c) provides for this authority, it provides also that in exercising it, arrangements for the safety and security of the affected staff must be ensured. Are the physical safety and security of the staff member the only factors that may limit a manager's discretion to reassign him or her?

30. In *Rees* 2012-UNAT-266, the Appeals Tribunal reaffirmed<sup>3</sup> the parameters for determining whether a reassignment is proper. The Appeals Tribunal stated:

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...

31. The Applicant here is a P-5 level officer and was being reassigned to the P-5 position of Regional Adviser on Trade. The reassignment memorandum dated 5 May 2015 stated that his current benefits and entitlements would remain unchanged. The same memorandum assured him that his seniority, contractual modality and eligibility for consideration for continuing appointment would not be affected by the reassignment.

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<sup>3</sup> See *Allen* 2011-UNAT-187, affirming UNDT Judgment No. 2010/212.

32. Attached to this memorandum was a document showing the terms of reference for the reassignment which were identical to the job opening shared with the Applicant in April by the Director of his Division but did not show the duration of need for the position or a post number nor mention that it was a temporary job assignment.

33. On further inquiry in which the Applicant expressed reservations about the job security of the newly created post, he was informed by the Director of Administrative Services Division (ASD) that he would be told the post number as soon as it was established. He admitted that the post was not specifically approved by the GA; it was funded by the RPTC and claimed that it is as safe or unsafe as all posts in the Commission.

34. The Respondent's case is that the decision to reassign the Applicant is lawful because while the SG/ESCWA had the discretion to do so, he reassigned the Applicant to the Regional Adviser position for operational reasons since the Applicant was found to have the necessary skills, experience and qualifications.

35. The Respondent argued also that reassignments must not always lead to the staff member being placed on a position of equal job security with the post from which he is reassigned. He submitted that Regional Adviser posts are created administratively as General Temporary Assistance (GTA) posts because it is the only post category that can be used for RPTC and created by ESCWA. The post was established on 16 July 2015 as post number 402034.

36. The Respondent further argued that there is no merit in the assertion that the Applicant's contractual position would become less secure as a result of the reassignment and that his contract is not affected in any way because he will be paid at the same P-5 level and will be eligible for consideration for a continuing appointment. His career prospects are not affected by the reassignment because the new post requires an incumbent with similar qualifications as the Applicant.

37. In considering the arguments and submissions placed before it, the Tribunal is not in any doubt that the newly created post of Regional Adviser to which the ES/ESCWA sought to reassign the Applicant is a GTA post which may

be created or scrapped at the discretion of the Commission's administration according to its determination of the needs of the Commission. It is a post which is meant to be temporary in nature and therefore time bound and in comparison with the post currently encumbered by the Applicant is less secure.

38. The Applicant correctly referred this Tribunal to the arguments of the Respondent in the case of *Toure*.<sup>4</sup> In defending his decision in that case to abolish Ms. Toure's Regional Adviser post midway through the budget cycle at the Economic Commission for Africa (ECA), the Respondent submitted, *inter alia*, that the Applicant's post was part of the ECA's RPTC which is complementary to the core activities of the ECA and was not established by the General Assembly. The Respondent continued that the post did not form part of the staffing table but was temporary in nature and had only a limited duration. According to him, the post was paid for by funds approved by the General Assembly but in accordance with specific and time-bound priorities and mandates of the ECA.

39. The Tribunal is of the view that the Respondent cannot blow hot and cold on the same issue merely because it suits him to do so. This Tribunal refers with approval to the observations of the Appeals Tribunal in the case of *Wu*,<sup>5</sup> where the Appeals Tribunal condemned the Respondent's inclination to argue a different position when he appealed the decision of the lower court. The Appeals Tribunal declared that the Respondent must act as an ideal litigant and display a clear and consistent stand on all important issues and must be above reproach in doing so.

***Are there are any risks or disadvantages to the Applicant in the decision of the ES/ESCWA to laterally reassign him to the post of Regional Adviser effective 1 June 2015?***

40. The Tribunal has not been told that in reassigning the Applicant from his General Assembly-established post which forms part of the ESCWA staffing table to the less secure position of Regional Adviser created by ESCWA with GTA funds for a limited period although for operational reasons, the said Applicant will be granted a lien on the post he currently encumbers. Further, it is the view of this

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<sup>4</sup> UNDT/2013/036.

<sup>5</sup> 2010-UNAT-042.

Tribunal that when staff regulation 1.2(c) provides that in exercising his authority to assign staff members to activities or offices of the United Nations, the Secretary-General shall seek to ensure that “all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them,” such arrangements are not, in all circumstances, merely limited to physical safety and security.

41. In its judgment in the case of *Rees*,<sup>6</sup> UNAT established a test for determining whether a reassignment is proper. Part of that test is to assess whether the new post is at the staff member’s grade. The satisfaction of this requirement does not merely lie in reassigning a staff member from one P-5 position to another P-5 position. It is simple logic that reassigning a staff member from a core P-5 post established by the General Assembly to a GTA-funded P-5 post established by ESCWA does not satisfy the test of a reassignment that is properly made.

42. Even though operational needs and restructurings may dictate that General Assembly-established core posts be abolished, this does not detract from the fact that GTA posts which are administratively created and are time-bound, are profoundly less secure. If therefore a head of office is allowed to routinely reassign staff members from core posts to GTA-funded posts, this would fly in the face of fairness and the condition provided for in section 2.5 of ST/AI/2010/3 that reassignments are to be made to job openings at the same level would have been breached and flouted.

43. The Applicant argued also that as Regional Adviser, he would be stripped of leadership and managerial responsibilities such as supervision which he carries out in his current position as Chief of section. The Respondent argued that there is no merit in the Applicant’s position that for the reassignment to be lawful, it must have equivalent managerial and supervisory functions.

44. It is absurd for the Respondent to submit that taking an Applicant away from a position in which he performed managerial functions and reassigning him to a new position with no leadership or managerial role is of no consequence.

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<sup>6</sup> Op.cit

Clearly, the career prospects of the Applicant would likely be enhanced by managerial responsibility. The Tribunal finds that the reassignment to the post of Regional Adviser carries significant risks and disadvantages for the Applicant.

***Is the impugned decision to reassign the Applicant a retaliatory measure for previously challenging an administrative decision of ESCWA in 2014?***

45. Part of the Applicant's case is that the impugned decision to reassign him is a retaliatory measure for previously challenging an administrative decision of the Commission in 2014. The Applicant did not provide the details of the decision which he allegedly challenged in 2014 and why he believes his reassignment in 2015 is based on that challenge.

46. In *Toure* 2016-UNAT-660, the Appeals Tribunal further clarified the scope of the Dispute Tribunal's judicial review of an administrative decision as follows:

As part of its judicial review, it is necessary to determine whether the decision was vitiated by bias or bad faith, that is, if it was taken for an improper purpose. A decision taken for an improper purpose is an abuse of authority. It follows that when a complainant challenges a discretionary decision, he or she by necessary implication also challenges the validity of the reasons underpinning that decision.

47. The Appeals Tribunal has consistently held that "[t]he burden of proving improper motives, such as abuse of authority, discrimination, retaliation or harassment rests with the person making the allegation".<sup>7</sup> In *Lewis* UNDT/2017/086, this Tribunal clarified that the burden of proving improper motives is not satisfied by mere claims and assertions. The Tribunal enunciated that:

The Applicant's application, which contains his pleadings, should set out clearly the facts upon which he is relying when he claims that there was "animus", "bad faith maneuvers" and a "hostile working environment". Seeing that he is making allegations that would ordinarily fall under the dominion of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), he cannot, at this stage, bring

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<sup>7</sup> *Obdeijn* 2012-UNAT-201; *Nwuke* 2015-UNAT-506.

in witnesses during a hearing to speak to facts that he has not pled in his application. Since the Applicant has not provided any facts in his application that support his allegation of a hostile working environment, this claim must fail

48. The Respondent correctly attacked this claim and pointed out that it is both vague and unsupported by any evidence. As the party alleging abuse of power and retaliation, the Applicant indeed bears the burden of satisfactorily adducing evidence in support of his claim. This he has not done.

49. The Tribunal finds therefore that the allegation that the impugned decision is tainted by improper motives is not borne out by any evidence and therefore not proven.

### **Conclusion and Orders**

50. The Application succeeds.

51. While the Executive Secretary of ESCWA has the discretion to reassign the Applicant to another post within the Commission, he must meet the conditions for doing so as set out in staff regulation 1.2(c) and section 2.5 of ST/AI/2010/3. These conditions have not been fully met by the Executive Secretary as shown in the text of the judgment and therefore the proposed reassignment is unlawful and accordingly revoked.

*(signed)*

Judge Nkemdilim Izuako

Dated this 21<sup>st</sup> day of November 2018

Entered in the Register on this 21<sup>st</sup> day of November 2018

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi