



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/061

Judgment No.: UNDT/2023/039

Date: 29 May 2023

Original: English

Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MATHEW

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Manuel Calzada

Counsel for the Respondent:

Nicole Wynn, AS/ALD/OHR, UN Secretariat

Fatuma Mninde-Silungwe, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a Special Political Advisor, working with the United Nations Assistance Mission for Iraq (“UNAMI”), serving on a continuing appointment at the D-1 level. On 13 July 2022, he filed an application before the Dispute Tribunal challenging the decision to reassign him from Chief of Office post to the Special Political Advisor post, with changes in his functions. He also challenges the decision not to select him for the Temporary Job Opening (“TJO”) of Chief of Office, Political Affairs.

Factual and procedural background

2. The Applicant joined the Organization in 2007 at the P-2 level working with the United Nations Assistance Mission in Afghanistan (“UNAMA”), based in Kabul. Thereafter, he served with the United Nations Assistance Mission of Somalia (“UNSOM”) as a P-5 Political Affairs Officer before reassignment at that level to UNAMI in March 2016.

3. On 1 September 2017, the Applicant was promoted to the position of Director, Office of Political Affairs at the D-1 level in UNAMI, a post known as “Chief of Office, Political Affairs”, a position that the Applicant encumbered until 28 February 2021 before being selected on a temporary assignment with the United Nations Support Mission in Libya (“UNSMIL”).

4. While in UNSMIL, the Applicant maintained a lien on his UNAMI position, which was filled on a temporary assignment by Mr. Mohammed Al-Najjar, pending his return from the temporary assignment in UNSMIL.

5. Following the completion of his temporary assignment with UNSMIL, on 1 March 2022, the Applicant returned to UNAMI to occupy his post of Chief of Office, Political Affairs.

6. On 19 March 2022, the Head of Mission (“HoM”) informed the Applicant that he would no longer be performing the functions of Chief of Office, Political Affairs, but that instead he would perform the new role as Special Political Adviser. The HoM stated:

Following your return to the United Nations Assistance Mission for Iraq (UNAMI) in March 2022, after having completed your temporary assignment with the United Nations Support Mission in Libya (UNSMIL), I would like to inform you of the arrangements made in the management of the Office of Political Affairs (OPA) and its files. As you are aware, and given the exigencies of the OPA Director’s functions, notably at a time when preparations for Iraqi parliamentary elections were ongoing, the Mission filled the vacancy following your temporary assignment with UNSMIL.

In light of these developments, your return to the Mission coincides with a real need to strengthen UNAMI’s political role in the field and to ensure that progress is made on various priority files. As part of a lateral assignment, given your proven experience in engaging with a wide variety of stakeholders, I would like you to assume the role of Special Political Adviser, D-1.

7. On 24 March 2022, UNAMI advertised a TJO for the post of Chief of Office, Political Affairs D-1, with identical functions as the Applicant performed before his temporary assignment to UNSMIL.

8. Within the prescribed period, and on a without prejudice basis, the Applicant filed an application for the post of Chief of Office Political Affairs.

9. On 30 March 2022, the Applicant, submitted a management evaluation request and a suspension of action (“SOA”) request to the Management Evaluation Unit (“MEU”) challenging UNAMI’s decisions to: (i) advertise the position of Chief of Office, Political Affairs for which he held a lien, and, (ii) reassign him to a position of Senior Political Adviser, D-1.

10. On 7 April 2022, the Applicant filed an application for SOA with this Tribunal, which, on 12 April 2022, was found not receivable (043 (NBI/2022)).

11. On 8 June 2022, the MEU found the request for SOA not receivable and upheld the reassignment decision.

12. On 13 July 2022, the Applicant filed the present application. The Respondent filed the reply on 18 August 2022 in which it is argued that the application is not receivable and, in any case, lacks merit.

13. As of the date of the application, the TJO selection process had not been concluded by UNAMI.

14. On 6 February 2023, the case was assigned to the undersigned judge.

15. By Order No. 038 (NBI/2023), issued on 15 February 2023, the Tribunal observed that the contested decision was to be of a temporary nature and ought to have been reviewed effective 1 January 2023. By the same Order, the parties were directed to inform the Tribunal of the outcome of the said review. If any review took place, the Applicant was directed to inform the Tribunal if his concerns were addressed and whether or not he still wanted to pursue this case.

16. On 16 February 2023, in response to Order No. 038 (NBI/2023), the Respondent informed the Tribunal that the Applicant had resumed his functions as Chief of Office. Political Affairs, effective 16 January 2023.

17. On 20 February 2023, the Applicant confirmed that he had returned to his functions. He however, indicated that the resumption of his functions does not remedy the public humiliation and stress that he suffered, and the expenses incurred. The damage caused to him due to the contested decision needs to be addressed.

18. By Order No. 050 (NBI/2023), issued on 20 February 2023, the Tribunal noted that the issue of the contested decision had been addressed. The only outstanding matter was in relation to the damages as requested by the Applicant. The Tribunal, accordingly, directed the parties to; (i) file submissions addressing the issue of the damages as claimed by the Applicant; and (ii) file their closing submissions.

19. Both parties filed their submissions pursuant to Order No. 050 (NBI/2023) on 27 February 2023.

Submissions

Applicant's submissions

20. The Applicant submits that he is not making any claim in respect of pecuniary damages. He confirms that he retained his D-1 salary with related benefits and allowance throughout the period from 15 March 2022 to 16 January 2023. Accordingly, he suffered no pecuniary loss of salary or benefits. Damages claimed are moral and exemplary reputational and legal costs incurred from March 2022 to the conclusion of these proceedings. The Applicant seeks to rely on *Dia*,¹ where the Appeals Tribunal held that,

the identification of moral injury sustained can never be an exact science and ... will necessarily depend on the facts of each case. ... What can be stated by way of general principle, is that damages for a moral injury may arise from his contract of employment and/or breach of the procedural due process entitlements therein guaranteed.

21. In view of the above, the Applicant submits that the actions of UNAMI in clearly disregarding the interest of a highly dedicated and professional staff member, manipulating the recruitment system and the delegations of authority bestowed on the HoM for a capricious promotion at the expense of the Applicant also disregarded and corrupted the values of the Organization and blatant disregard for its rules and regulations. The highest possible standard is expected from the leaders of the Organization. Any moral compensation award needs also to confirm and disincentivize the unacceptability of blatant breaches of rules and regulations for ulterior motives.

22. The Applicant stresses that he is an experienced and highly regarded Senior Political Affairs Officer, who had also served with distinction in the most professionally and security challenging missions in the world, including UNAMA in Afghanistan, UNSOM in Somalia, and UNSMIL in Libya, at all times during extremely

¹*Dia* 2025-UNAT-553.

challenging security environments, all being classified as E-Category duty stations during his tours of duty, and subject to terrorist attacks and political violence, with the most challenging and unstable political environments, in most instances with ongoing violent conflicts. He adds that there have never been any concerns about his performance, achieving exceeding performance expectations.

23. The Applicant further states that given his status and the high profile of his position as Chief of Office, Political Affairs, that his exposure and embarrassment extended not only within the mission, but also to every other field mission and colleagues at the United Nations Headquarters. Colleagues wondered what he could have done to deserve such a public demotion and removal of responsibilities.

24. On the prong of costs, the Applicant submits that he has been required to engage legal counsel to represent and argue his case through a number of procedures with the Administration, two applications with the Management Evaluation Unit, two applications for suspension of action, and two Dispute Tribunal's proceedings to protect himself from clear abuses of authority by the Administration.

25. The Applicant thus requests the Tribunal to:

- a. Award him one-month base salary for every month during which he was separated from his functions. By his calculation, this would amount to 10 months and 13 days; and
- b. USD12,000 legal costs as agreed with his Counsel.

Respondent's submissions

26. The Respondent's position is that the application is moot and not receivable. UNAMI has rescinded the contested decision.

27. The Applicant's claim for financial compensation at the discretion of the Tribunal for *mala fides* by UNAMI, and the resulting loss of reputation, should be dismissed for lack of evidence. The Applicant has not demonstrated with evidence any harm suffered due to the alleged "mala fides by UNAMI". The Applicant bears the

burden of proof to establish that the harm is directly caused by the Administration's illegal act.

28. Under art. 10.5(b) of the Dispute Tribunal's Statute, as amended by General Assembly resolution 69/203, compensation for harm should be supported by evidence. It is not enough for the Applicant to allege that the contested decision affected his professional reputation, dignity and future professional opportunities without providing any evidence. The evidence should consist of three elements: the harm, an illegality and a nexus between them. The Applicant has not produced evidence of any of these three elements.

29. Further, the alleged *mala fides* have not been established pursuant to ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment and abuse of authority). There has been no investigation on the Applicant's allegations nor any associated administrative decision that the Dispute Tribunal may review. The Tribunal lacks the competence to adjudicate or award compensation for claims which have not been established.

30. The Respondent, therefore, requests the Tribunal to dismiss the Applicant's claim for damages. The Applicant has not demonstrated any procedural or substantive breach of his rights nor adduced any evidence of harm. Compensation for harm can only be awarded where there is a sufficient evidentiary basis establishing that harm has occurred.

Considerations

31. Article 10.5 (b) of the Dispute Tribunal's Statute stipulates that, as part of its judgment, the Dispute Tribunal may order:

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

32. Under art. 10.5(b) of the Dispute Tribunal's Statute, as amended by the General Assembly resolution 69/203, compensation for harm should be supported by evidence; the Applicant bears the burden of proof to establish that the harm is directly caused by the Administration's illegal act.

33. The evidence should consist of three elements: illegality, the harm, and a nexus between them. The Tribunal will assess these three elements in turn.

34. For damages to be awarded it is essential that a determination be made as to the lawfulness or otherwise of the decision made to reassign the Applicant from his functions as D-1 Chief of Office, Political Affairs, to the functions of Special Political Adviser.

35. The Tribunal is aware that the Secretary-General has wide discretion to reassign staff members and resources in the best interests of the organization. However, this discretion is not unfettered, and can be declared unlawful. In *Silva*², the United Nations Appeals Tribunal ("UNAT") pointed out that it was crucial to assess whether the reassignment was lawful or not, and that in this respect, and in line with settled jurisprudence, reassignment decisions need to be properly motivated, or not be tainted by improper motives, or not taken in violation of mandatory procedures. Reassignment can be impugned if found capricious, or arbitrary, or motivated by prejudice, or by extraneous factors, or flawed by procedural irregularities, or by error of law. It further recalled the standard method for assessing as per *Chemingui*³ and in *Rees*⁴ included but were not exclusive, whether a reassignment was at the staff member's grade, whether the responsibilities corresponded to his/her level, and whether the functions were commensurate with competence and skills.

36. As to the post the Applicant had before his reassignment, the Tribunal notes that the Applicant had been selected for the post through a full competitive selection

²*Silva* 2022-UNAT-1223, para. 70.

³*Chemingui* 2019-UNAT-930, Paras. 39-40.

⁴*Rees* 2012-UNAT-266, para. 58.

process.

37. The Tribunal recalls Resolution 2576 (2021), adopted by the Security Council at its 8780th meeting, on 27 May 2021, which stressed that the role of the Head of Office, Political Affairs, at this crucial period was to ensure smooth operations and support for the Iraqi election and government formation process through good offices and establishing confidence-building measures with host country counterparts (and this was crucial as the Mission anticipated that armed groups affiliated with political parties could cause political and violent unrest during and after the election, resulting in a volatile government formation process); after the election, the Security Council extended the mandate of the Mission to support the swift and peaceful formation of a new Government to deliver national priorities and in this matter, the Office of Political Affairs was seen as a key facilitator in the government formation process.

38. The functions inherent to the post were performed by the Applicant in a positive manner, as it results from the records that the Applicant was found fully competent in his performance evaluation and met the assigned goals with success.

39. With reference to the case at hand, the Tribunal notes that the Applicant was not ‘reassigned’ as such. Indeed, he would have been properly reassigned if he had been sent to fulfil the functions of an existing, budgeted post at the D-1 level.

40. In the case at hand, instead, on the one hand the assignment was temporary, although for a not specified time. The Respondent, indeed, argued that the reassignment had no impact on the Applicant’s job security as it was temporary and subject to revision in January 2023.

41. On the other hand, the terms of reference (“ToR”) of the new assignment remained undetermined (and the Respondent did not even produce the ToR of the new assignment) at the point that the Applicant claims he was not required to perform but nominal assignments and that he was side-lined to lesser functions.

42. In particular, the Applicant claimed that in the new position he was no longer authorized to participate in key meetings of senior managers and had no supervisory

responsibilities; he even added that UNAMI Standard Operating Procedures on Field Office Coordination signed by the HoM and dated 11 June 2022 makes no mention whatsoever of any role for the staff member under the reassigned functions.

43. The Tribunal notes that the Respondent did not contest these allegations and gave no evidence of the correspondence of the new functions to the previous one.

44. In this situation, despite the position already covered, the Administration assigned the same functions on a temporary basis to a different staff member (the staff member who had covered the functions whilst the Applicant was in Libya, having a P-5 level) and even advertised the post by a TJO.

45. The TJO was contrary to ST/AI/2010/4/Rev.1 (Administration of temporary appointments) and General Assembly resolution 63/250, which stated that “temporary appointments are to be used to appoint staff for seasonal or peak workloads and specific short-term requirements” and to temporarily fill a position whose incumbent is on special leave, sick leave, maternity or paternity leave or on assignment; or to temporarily fill a vacant position pending the finalization of the regular selection process. The TJO is not allowed to fill a post already occupied.⁵ In the case at hand the situation was so abnormal that the Applicant was forced to apply for his own functions taking part in the TJO procedure.

46. In essence, the Applicant was removed from his official functions, without cause or proper justification, offered to apply for his own previous functions, and the job pre-allocated to a subordinate holding one grade lower (P-5). This without any reference whatsoever to any failings of the Applicant, or any misconduct, or any indication that he had not successfully performed these functions in the past, or any indication as to why he would not be able to do so in this instance (the case is therefore totally different from *Khane* UNDT/2020/159).

47. In conclusion, although the Applicant kept on holding a continuing appointment at the D-1 level, he was stripped of his relevant functions without proper

⁵See *Chemingui* 2019-UNAT-930, para. 40.

reasons and with many flaws in the process.

48. The Tribunal also finds that in the situation, the contested decision objectively affected the Applicant's professional reputation (as he was sidelined notwithstanding his past satisfactory performance) and the Applicant's dignity (as he was forced to apply for TJO related to his own functions).

49. As UNAT stressed in *Kallon*⁶, the harm to *dignitas* or to reputation and career potential may thus be established on the totality of the evidence; the facts may also presumptively speak for themselves to a sufficient degree that it is permissible as a matter of evidence to infer logically and legitimately from the factual matrix, including the nature of the breach, the manner of treatment and the violation of the obligation under the contract to act fairly and reasonably, that harm to personality deserving of compensation has been sufficiently proved and is thus supported by the evidence as appropriately required by art. 10(5)(b) of the UNDT Statute:

The first kind of moral injury acknowledged in *Asariotis* takes the form of a fundamental breach of contract resulting in harm of an unascertainable patrimonial nature. Awards of moral damages in contractual suits by their nature are directed at compensating the harm arising from violations of personality rights which are not sufficiently remedied by awards of damages for actual patrimonial loss. The harm experienced by a blatant act of procedural unfairness may constitute an infringement of *dignitas*, not in all but especially in severe cases. Recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings. Human beings are entitled to be treated as worthy of respect and concern. The purpose of an award for infringement of the fundamental right to dignity is to assuage wounded feelings and to vindicate the complainant's claim that his personality has been illegitimately assailed by unacceptable conduct, especially by those who have abused administrative power in relation to him or her by acting illegally, unfairly or unreasonably.

It could be argued that the amendment to Article 10(5)(b) was aimed at precluding awards of moral damages of the first kind identified in *Asariotis*. But that would be too far-reaching an interpretation. The purpose of the amendment was merely to introduce an express requirement that compensation for harm can only be awarded where there is a sufficient evidentiary basis establishing that harm has in fact

⁶*Kallon* 2017-UNAT-742, para. 66-68.

occurred. As such, it is a prudent and legitimate reminder to judges that harm should not be too readily assumed on an insubstantial factual basis, whatever the nature of the harm and the damages in issue, be they patrimonial or non-patrimonial.

The evidence to prove moral injury of the first kind may take different forms. The harm to dignitas or to reputation and career potential may thus be established on the totality of the evidence;²¹ or it may consist of the applicant's own testimony or that of others, experts or otherwise, recounting the applicant's experience and the observed effects of the insult to dignity. And, as stated above, the facts may also presumptively speak for themselves to a sufficient degree that it is permissible as a matter of evidence to infer logically and legitimately from the factual matrix, including the nature of the breach, the manner of treatment and the violation of the obligation under the contract to act fairly and reasonably, that harm to personality deserving of compensation has been sufficiently proved and is thus supported by the evidence as appropriately required by Article 10(5)(b) of the UNDT Statute.

50. The Tribunal notes with satisfaction that the HoM/Special Representative of the Secretary-General ("SRSG") gave a partial remedy to the said illegality and decided to cancel the proposed temporary reassignment and approved the Applicant's return to the position of Chief of Office, Political Affairs, with effect from his return from annual leave on 16 January 2023. This reduced the negative impact of the previous administrative decision and limited the damage produced, restoring the professional image of the Applicant.

51. To quantify the damages to the Applicant for the moral harm suffered, in *Asariotis* 2013-UNAT-309, para. 36, UNAT held that:

The identification [of the moral injury sustained by the employee] can never be an exact science and such identification will necessarily depend on the facts of each case. What can be stated, by way of general principle, is that damages for a moral injury may arise [...] [f]rom a breach of the employee's substantive entitlements arising from his or her contract of employment and/or from a breach of the procedural due process entitlements therein guaranteed.

52. In applying this principle, the Tribunal finds necessary to refer to similar cases handled by UNAT. In *Rees*⁷, where the applicant challenged a decision of reassignment

⁷*Rees*2012-UNAT-266, para. 83.

with procedural irregularities and without previous consultation with the staff member concerned, the UNAT awarded six months base salary.

53. Considering that the unlawful situation lasted more than 10 months, during which the Applicant continued receiving his salary, and considering that a moral satisfaction for the damage suffered came from the Administration itself, who restored the Applicant's original position, and having in mind the UNAT caselaw, the Tribunal finds it fair to award the Applicant compensation for damages of three months' net base salary in total.

54. The Applicant also claims USD12,000 as agreed with legal counsel as legal costs in the cause at the rate of an average four hours per month over a period of 12 months dedicated to these cases from March 2022 to February 2023.

55. The Tribunal is aware that the United Nations staff members have in general recourse to the Office of Staff Legal Assistance ("OSLA").

56. Moreover, art. 10, para. 6 of the Dispute Tribunal's Statute provides that:

Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.

57. The UNAT in *Barbato*⁸ and *Delaunay*⁹ outlined that the Tribunal's power to award costs was limited to manifestly abused proceedings.

58. In the case at hand, there is no abuse by the Administration, but only an unlawful administrative decision to which the Administration itself gave partial remedy during the judicial proceedings. The Applicant's claim for legal costs is therefore dismissed.

Conclusion

59. The application succeeds in part.

⁸2021-UNAT-1150.

⁹2018-UNAT-864.

60. The Respondent shall pay to the Applicant damages equivalent to three months' net base salary at the D1 level.

61. The compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States of America prime rate 60 days from the date the Judgment becomes executable.

(Signed)

Judge Francesco Buffa

Dated this 29th day of May 2023

Entered in the Register on this 29th day of May 2023

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi