



Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

AL-MULLA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON SUSPENSION OF ACTION

Counsel for Applicant:
Winston Sims

Counsel for Respondent:
Linda Starodub, HRMS/UNODC

Introduction

1. On 23 December 2009, the Applicant filed with the United Nations Dispute Tribunal (UNDT) an application requesting the Tribunal to suspend, during the pendency of the management evaluation, the implementation of the decision “to no longer re-assign [him] to the [United Nations Office on Drugs and Crime (UNODC)] Sub-Regional Office in Abu Dhabi, [United Arab Emirates (UAE)]”.

Facts

2. Since September 2006, the Applicant holds a permanent appointment with UNODC, in Vienna, Austria, under the 100 series of the former Staff Rules, at the P-3 level.

3. Effective 1 July 2007, the Applicant was selected for the post of Regional Programme Coordinator for the Gulf Cooperation Council (GCC) countries, Division of Operations (DO), at the L-4 level (200 series of the former Staff Rules). In the letter of offer dated 21 May 2007, he was informed that:

“Your permanent appointment status will be frozen for the duration of this assignment. Upon completion of this assignment, you would revert to your current P-3 contractual status and level, and would be required to apply for and be selected for positions for promotion to the P-4 level.”

4. In late 2008, an agreement was signed between UNODC and the Ministry of Interior, UAE, to open a UNODC Sub-Regional Office in Abu Dhabi and to establish L-5, L-4 and L-3 positions. The Applicant applied to the L-5 post of Head of the Sub-Regional Office, but was not selected. UNODC could not identify a suitable candidate for the L-5 post and it was proposed to laterally reassign the Applicant to Abu Dhabi.

5. By letter dated 6 April 2009, the Applicant was informed of the decision of the Executive Director of UNODC to laterally reassign him effective 4 May 2009 from Vienna to Abu Dhabi to the L-4 post of Programme Coordinator, UNODC Sub-Regional Office in Abu Dhabi.

6. At a meeting held on 9 April 2009, the Applicant was encouraged to accept the lateral reassignment but indicated that he would rather not.

7. By email dated 21 April 2009, the Applicant informed the Human Resources Management Service (HRMS) of UNODC of his decision to decline the offer of a lateral transfer to the Sub-Regional Office in Abu Dhabi, on the grounds, inter alia, that he had applied to the L-5 position and expected to take up that position.

8. At a meeting held on 4 May 2009, the Applicant was informed that in view of the fact that he had declined to be laterally reassigned, a new vacancy announcement would be issued at the L-4 level and he was asked, pending recruitment of a candidate, to temporarily relocate to Abu Dhabi to set up the Sub-Regional Office. The Applicant declined to comply with the request. He was also informed that once the L-4 post of Programme Coordinator would be filled in the Sub-Regional Office, his own position as Regional Programme Coordinator in Vienna would become redundant.

9. According to the Respondent, on 15 June 2009, the Applicant agreed to a reassignment to the Sub-Regional Office in Abu Dhabi at the L-4 level but requested a different title and a higher step-in-grade, which HRMS refused to grant. However, the post title was changed from Programme Coordinator to Representative to the UAE and UNODC Special Representative to all Gulf countries and established at the P-4 instead of L-4 level.

10. By letter dated 17 June 2009, the Executive Director of UNODC informed the Ministry of Interior of the State of Qatar that the position of the Regional Programme Coordinator for the GCC countries in Vienna would be abolished and that given the fact that UNODC would soon open a Sub-Regional Office in Abu Dhabi, UAE, he had appointed the Applicant as UNODC Representative to the UAE and Special Representative to all Gulf countries.

11. By letter dated 19 June 2009, in response to a letter dated 29 April 2009 not available to the Tribunal, the Executive Director of UNODC informed the Ministry of Interior of the UAE that he had appointed the Applicant as UNODC Representative to the UAE and Special Representative to all Gulf countries and

that he would “be taking up his appointment in the [newly established] Sub-Regional Office [in Abu Dhabi] within a week”.

12. By email dated 29 July 2009, the Chief, HRMS, informed the Applicant “about the administrative procedures and entitlements related to [his] reassignment”, including travel and relocation entitlements from Vienna to Abu Dhabi.

13. On 7 August 2009, the Applicant met with his supervisor, the Chief, Technical Cooperation Section 1, DO, who asked him when he would relocate to Abu Dhabi. In response, the Applicant apparently noted that he had not received a “letter of offer” from HRMS. In an email sent later on the same day, the Applicant’s supervisor asked him to give immediate and urgent attention to the administrative aspects of his relocation, as communicated *inter alia* to him in the above-mentioned email of 29 July 2009, so that he could take up his new functions in Abu Dhabi at the earliest possible date.

14. In a letter dated 20 August 2009 addressed to the Ministry of Interior, UAE, in response to a letter dated 13 July 2009 not available to the Tribunal, the Executive Director of UNODC described what the Applicant’s functions would be “upon taking up his assignment” as the UNODC Representative to the UAE and concluded that, as indicated in his previous letter of 19 June 2009, UNODC “anticipate[d] the official opening of the Sub-regional Office in the very near future”.

15. In an email dated 11 September 2009, the Director, DO, informed HRMS that at a meeting held a few days before with the Applicant and the Executive Director, the latter had expressed displeasure at the lack of progress for the opening of the Sub-Regional Office in Abu Dhabi and had obtained a “firm commitment” from the Applicant that he would take up his assignment by the end of September. He added that the Applicant had told him that he expected “to finalize the paper work” related to his relocation within the next week and requested HRMS to ensure that the Applicant met his commitment to relocate by the end of September.

16. By email dated 14 September 2009, HRMS requested the Applicant to urgently identify a travel date to Abu Dhabi so that they could finalize his travel arrangements.

17. By email dated 16 September 2009, HRMS again requested the Applicant to urgently choose a date to travel to Abu Dhabi, so that all administrative arrangements could be finalized and his relocation take place by the end of September.

18. By email dated 17 September 2009, the Applicant responded that the most suitable travel date would be 19 October 2009. He also requested additional information from HRMS regarding the classification of his post, his salary and allowances.

19. By email dated 17 September 2009, the Director, DO, brought to the attention of the Applicant that the date he had chosen to relocate was not in line with his verbal commitment to the Executive Director. He further expressed concerns that the Applicant kept raising new issues with HRMS since the end of July and postponing the date of his relocation and asked him to “do [his] very best to establish the office in Abu Dhabi, get it operational and the basis for an expanded programme of UNODC in the Gulf States”.

20. The Applicant responded on 28 September 2009, stating that he was only requesting standard information from HRMS and was still awaiting responses.

21. By email dated 1 October 2009, HRMS responded to some of the Applicant’s queries and asked him to provide information requested previously, as well as to confirm his travel date.

22. By email dated 28 October 2009, the Director, DO, asked the Applicant – who apparently was away from the Office for family reasons - when he would travel to Abu Dhabi, “based on [his] last indication of moving there by the end of this month”, stressing that his departure should not be delayed any further.

23. On 29 October 2009, a meeting was held with the Applicant, the Applicant’s supervisor, the Director, DO, and the Chief of Recruitment, HRMS. It was agreed, inter alia, that the Applicant would take up his assignment in Abu Dhabi on 9 November 2009.

24. By email dated 11 November 2009, copied to several addressees including the Executive Director, the Director, DO, informed the Applicant, who still had not relocated to Abu Dhabi, that he was required to take up his functions effective 23 November 2009 and reminded him that his failure to undertake the functions assigned to him could lead to disciplinary action. He also noted that the Executive Director “was greatly disappointed in what he called [the Applicant’s] inertia” with respect to his reassignment.

25. The Applicant responded by email dated 13 November 2009 that while he would be “more than happy” to travel on 23 November 2009, he still had not received responses from HRMS to some of his queries. He also raised a number of issues which, in his view, were “de facto preventing [his] move to UAE” and should be addressed by senior management.

26. By email dated 18 November 2009, the Director, DO, informed the Applicant, inter alia, that “in view of the very long delays involved in [his] implementing the lateral re-assignment to Abu Dhabi ... and given that the same issues concerning the Abu Dhabi Sub-Regional Office are continuously being raised by the UAE authorities in their various letters to the [Executive Director], it [had] been decided to review the entire scenario related to the Abu Dhabi Sub-Regional Office with the [Executive Director] upon his return to Vienna...”.

27. The Applicant responded on the same day, stating inter alia that he was “pleased to hear that the UNODC [had] decided to ‘review the entire scenario’”.

28. In a meeting held on 1 December 2009 with the Applicant, the Applicant’s supervisor and the Chief of Recruitment, HRMS, the Applicant was informed of the Executive Director’s decision taken on 25 November 2009 to no longer laterally reassign him to the UNODC Sub-Regional Office in Abu Dhabi as Representative to the UAE and Special Representative to all Gulf countries. The Applicant was also informed that he would remain the Regional Programme Coordinator for the GCC countries in Vienna until such time as a new “Head” of the Sub-Regional Office would be appointed and that “he would thereafter be re-assigned to yet-to-be identified other P-3 level functions at UNODC HQs” and revert to his permanent appointment status. The discussions held during the

meeting were reflected in a note for the file, which was reviewed and cleared by the Applicant.

29. By letter dated 2 December 2009, the Executive Director of UNODC informed the Ministry of Interior, UAE, in response to a letter dated 8 October 2009 not available to the Tribunal, that “upon further careful consideration, and in order to provide a new impetus to the delivery of UNODC’s programme in the Gulf States”, the Applicant would “remain here at UNODC Headquarters and [would] be tasked with new functions” while “a senior UNODC officer with the requisite qualifications and experience” had been appointed as Head of the Abu Dhabi Sub-Regional Office.

30. By email dated 4 December 2009, the Chief, HRMS, informed the Applicant that in light of the decision to no longer reassign him: (i) HRMS was “formally retracting [the] email of ... 29 July 2009”; (ii) the Applicant would continue performing his “current functions as Regional Programme Coordinator for the GCC countries until such time as the new Head of the UNODC Sub-Regional Office in Abu Dhabi is appointed”; and (iii) “Thereafter, UNODC will try to identify a suitable position for you, in accordance with the provision of your latest letters of assignment dated 21 May 2007 and 6 April 2009...”

31. On 21 December 2009, the Applicant requested a management evaluation of the decision to no longer reassign him to Abu Dhabi.

32. By email dated 23 December 2009, the Applicant filed with the New York Registry of the UNDT an application requesting the Tribunal to suspend the implementation of the contested decision during the pendency of the management evaluation.

33. Pursuant to article 6 of the UNDT rules of procedure, the Tribunal decided to assign the case to the Geneva Registry. Thus, on 23 December 2009, the case was transferred to the Geneva Registry for registration and processing. The Applicant was notified accordingly.

34. On 4 January 2010, Counsel for Respondent submitted the Respondent’s reply to the application for suspension of action.

Parties' contentions

35. The Applicant's principal contentions are:

- a. The contested decision is unlawful because:
 - i. "There is no policy basis for no longer reassigning or for the retraction of the reassignment five months after its implementation";
 - ii. "The Applicant has been denied due process in that any and all reasons for the action have been concealed from the Applicant".
- b. The case is of particular urgency because:
 - i. "The best interests of the Organization would be served by having the Applicant continue ... with the development of the Sub-Regional Office...";
 - ii. "The Applicant has been replaced by another officer, more junior, and with no experience.... This was undertaken in the complete absence of any criticisms, any issues, any problems with the Applicant. The action also had a very deleterious impact on the Applicant's professional and career development..."
- c. Irreparable damage will be caused:
 - i. To the Applicant because the Executive Director's decision "has resulted in a high level of destruction of the Applicant's professional and personal life";
 - ii. To the Organization because the "step undertaken by the [Executive Director] enjoys a very significant potential for effectively destroying the prospects for the Sub-Regional Office".

36. The Respondent's principal contentions are:

- a. The contested decision was lawful. In accordance with section 10.4 of ST/AI/2006/3, *Staff selection system*, staff are expected to take

up assignments within two months of notification. Furthermore, in accordance with provisional staff rule 1.2 (a), “staff members shall follow the directions and instructions properly issued by the Secretary-General and by their supervisors”. Finally, the decision to retract the offer of lateral reassignment was within the authority of the Executive Director in accordance with section 3.2 of ST/SGB/2004/6, *Organization of the United Nations Office on Drugs and Crime*, and section 10.4 of ST/AI/2006/3. Despite many reminders over several months and numerous efforts to accommodate the Applicant, he failed to relocate and take up his new functions. Eventually, given pressing operational needs and delays already incurred, it was decided to retract the offer of lateral reassignment made to the Applicant and to laterally reassign another candidate;

- b. The Applicant has not established any particular urgency, nor that the implementation of the decision would cause him irreparable damage;
- c. The application for suspension of action is moot since the Applicant did not, in fact, take up the lateral reassignment within a reasonable period of time. It is not possible to suspend the implementation of the contested decision since another staff member has already been reassigned to the position and is in the process of relocating.

Considerations

37. The Applicant requests the Tribunal to suspend the implementation of the decision to no longer reassign him to the UNODC Sub-Regional Office in Abu Dhabi, UAE.

38. The application was filed shortly after the Applicant wrote to the Management Evaluation Unit of the UN Secretariat to request a management evaluation of the contested decision. At the date of issuance of this order, the time limit for the Secretary-General’s response to the request for management

evaluation was still running and no such response had been made to the Applicant. Thus, the application for suspension of action must be examined in the light of article 2, paragraph 2, of the Tribunal's statute, which provides that:

“The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage...”

39. The Tribunal will examine first whether the decision appears *prima facie* to be unlawful.

40. Staff regulation 1.2 (c) provides that “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” and provisional staff rule 1.2 (a) that “staff members shall follow the directions and instructions properly issued by the Secretary-General and by their supervisors”.

41. Paragraph 2.4 of ST/AI/2006/3, *Staff selection system*, provides that: “Heads of departments/offices retain the authority to transfer staff members within their departments or offices to vacant posts at the same level.” A similar provision is contained in paragraph 1 of annex I, *Responsibilities of the head of department/office*, to ST/AI/2006/3, which stipulates that: “The head of department/office has the authority ... [t]o transfer staff laterally within his or her department/office.”

42. ST/AI/2006/3 makes a clear distinction between a selection under the provisions of this instruction and a lateral transfer¹. It results from such distinction that a head of department/office has the authority to transfer staff laterally within his or her department/office notwithstanding the procedures applicable under the new staff selection system. Put differently, in order to laterally reassign a staff member within a department/office, the head of that department or office does not have to apply the new staff selection system.

¹ See for example: section 4.2(c); paragraph 1 of annex I; paragraph 1 of annex II.

43. In light of the above-mentioned staff regulation, staff rule and administrative instruction, it appears that it was within the discretionary authority of the Executive Director to decide to laterally reassign the Applicant within UNODC and also, consequently, to decide to no longer reassign him.

44. Of course, the Executive Director's authority in this respect is not without limits and must not be tainted by abuse of discretion.

45. In the present case, the Applicant claims that the contested decision was vitiated by a violation of his due process rights since "any and all reasons for the action have been concealed from [him]".

46. The Tribunal finds, on the contrary, that the Applicant was not denied due process. He was informed on several occasions of what was expected of him and of the urgency of his reassignment to Abu Dhabi to set up the new Sub-Regional Office.

47. For example, on 14 September 2009, he was asked to complete travel arrangements urgently and, on 17 September 2009, "to establish the office in Abu Dhabi, get it operational and the basis for an expanded programme of UNODC in the Gulf States". The Applicant did not do so. At that time, seven weeks (as per the Applicant's statement in his application, but three months as per the Respondent's reply) had already passed since he had finally agreed to be laterally reassigned to Abu Dhabi. In an email dated 17 September 2009, the Applicant, who had previously committed to travel by the end of September, stated that a "most suitable travel date" for him was 19 October 2009. Yet again, he did not travel. It was subsequently agreed that he would travel on 9 November 2009, which also did not happen. According to his email dated 18 November 2009, the Applicant was not only aware of a possible change but was "pleased to hear that UNODC [had] decided to 'review the whole scenario'".

48. Thus, the contested decision could not have been a surprise to the Applicant. It is quite clear from the records of the case that the reasons for the decision to no longer reassign the Applicant to Abu Dhabi were "the long delays in the Sub-Regional Office's opening and operationalization", which in turn were due to the Applicant repeatedly postponing his departure, as indicated in the note

for the file dated 1 December 2009, but also in the emails dated 17 September and 18 November 2009 from the Director, DO, to the Applicant.

49. The Applicant does not offer any explanation for these delays. On the contrary, the presentation of the facts in his application to the Tribunal is incomplete, not to say misleading.

50. These delays are, without any doubt, significant. For selections under the provision of ST/AI/2006/3, section 10.4 of the administrative instruction provides that “if the selected candidate fails to take up the functions within the specified time frames [i.e. two months if the move involves a change of duty station] for personal reasons ... the head of department/office may select another candidate...”. Although this provision is not directly applicable to cases of lateral transfer, it reflects the Organisation’s legitimate expectation that, irrespective of the mode of selection, staff members should take up their functions within a reasonable period of time, i.e. two months when a change of duty station is involved. If they do not do so, the Organisation is entitled, and perhaps even obliged, to fill the vacancy. This may lead to the selection of another staff member, which necessarily includes the withdrawal of the selection of the former candidate. In the case at hand, the Applicant was aware that he was expected to travel to his new duty station and set up the new office as soon as possible at least since 29 July 2009, when he received the written confirmation of his reassignment. He failed to relocate and take up his new functions for a period of at least four months until the decision to no longer reassign him was communicated to him, thus by far exceeding the above-mentioned time frame.

51. In view of the foregoing, the Tribunal finds that the decision to no longer reassign the Applicant to Abu Dhabi was a reasonable exercise of the Executive Director’s discretion. Thus, the decision does not appear *prima facie* to be unlawful.

52. A request for suspension of action can only be granted where all the requirements of article 2.2 of the Tribunal’s statute have been satisfied. It results from the wording of the above-mentioned article that the three conditions for suspension – *prima facie* unlawfulness, urgency and irreparable damage - are cumulative. Therefore, an application has to be rejected if only one of the

conditions is not met (see for example UNDT/2009/003 *Hepworth*, UNDT/2009/033 *Onana*, UNDT/2009/071 *Corcoran*, UNDT/2009/94 *Bernard*).

Conclusion

53. The application to suspend the implementation of the contested decision during the pendency of the management evaluation is rejected.

(Signed)

Judge Thomas Laker

Dated this 6th day of January 2010

Entered in the Register on this 6th day of January 2010

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva