



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MELBIKSIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for Applicant:

Robbie Leighton

Counsel for Respondent:

Marisa MacLennan, UNHCR

Jan Schrankel, UNHCR

Introduction

1. By application filed on 4 October 2019, the Applicant, a staff member of the United Nations High Commissioner for Refugees (“UNHCR”), requested suspension of action pending management evaluation of the “[d]ecision not to laterally transfer [him] to [the] soon to be vacant post performing identical functions to those of the Applicant’s”.
2. The application was served on the Respondent on 7 October 2019 with a deadline of 9 October 2019 to file his reply.
3. On 9 October 2019, the Respondent filed his reply.

Facts

4. The Applicant first joined UNHCR on a temporary appointment in March 2016 as an Associate Communication/Public Information Officer at the P-2 level in Stockholm, Sweden. On 1 February 2017, he was granted a fixed-term appointment and continues to serve on the same post. His current contract expires on 31 December 2019.
5. There are two posts of Associate Communication/Public Information Officer at the P-2 level in the UNHCR Regional Representation for Northern Europe Office (“RRNE”). One of them is encumbered by the Applicant and the other one was encumbered by his colleague who performed similar functions.
6. By letter dated 25 March 2019, the UNHCR Regional Representative, RRNE, informed the Applicant of the intent to reclassify the post that he encumbers to an Associate Legal Officer post with proposed effect from 1 January 2020. The Applicant was also informed that this proposal was subject to the approval of the Budget Committee.
7. By letter dated 18 June 2019, the UNHCR Regional Representative, RRNE, informed the Applicant that the proposal to reclassify the post he encumbered and, thus, discontinue the position of Associate Communication/PI Officer had been approved effective 31 December 2019.

8. On 9 August 2019, the High Commissioner's decisions for Summary No. 15/2019 concerning positions advertised in the Addendum 1 and Addendum 3 to the March 2019 Compendium – Special Vacancy Announcement – Decentralization and Regionalization were announced. This document included the selection of the Applicant's above-mentioned colleague to a P-3 post in Geneva.

9. On 6 September 2019, the Regional Representative, RRNE, met with the Applicant to discuss his career and the options available to him. However, according to the Respondent, the Applicant's lateral transfer to the soon to be vacant post was not discussed.

10. On 19 September 2019, the post of Associate Communication/Public Information Officer at the P-2 level, previously encumbered by the Applicant's colleague, was advertised. The Applicant subsequently applied.

11. On 4 October 2019, the Applicant filed a request for management evaluation of the "decision not to laterally transfer him to a post performing identical functions to his own".

12. On the same day, the Applicant filed his application for suspension of action.

Parties' contentions

13. The Applicant's primary contentions may be summarized as follows:

Receivability

- a. The Appeals Tribunal held in *Tabari* 2010-UNAT-030 that the failure to take a decision can represent a reviewable decision. In the instant case, the decision not to laterally transfer the Applicant to the now vacant P-2 post performing identical functions to his own represents such a reviewable decision. Furthermore, in *Chahrour* 2014-UNAT-157, the Appeals Tribunal considered that the advertising of a post for competitive recruitment was, in fact, an implied decision not to laterally transfer a staff member to that post;

Prima facie unlawfulness

- b. The decision to reclassify his current post as a Legal Officer post is unlawful. Indeed, a Communications and Public Information Officer post is not in the same functional group as a Legal Officer post. This represents a procedural error vitiating the decision;
- c. The functions performed by the Applicant will now accrue to the advertised post;
- d. A decision was taken to reduce the number of P-2 Associate Communications/Public Information Officer posts in RRNE from two to one. However, no comparative review or other transparent process was done, and this renders the decision unlawful;
- e. The decision to conduct a competitive internal recruitment process impacts on the Applicant's right to be retained against the vacant post;
- f. Even absent irregularity in failing to comparatively review the P-2 incumbents, the Applicant has a right to be retained against the vacant post;

Urgency

- g. The selection of a candidate for the post will create contractual rights for the selected candidate in relation to that post, which will frustrate the remedy sought by the Applicant to be laterally transferred to the post;
- h. Recruitment against the vacant post is ongoing with applications continuing to be received. Once closed, a selection decision can be made relatively quickly, especially since the post is advertised internally;
- i. Since a selection decision can be made prior to the determination of his request for interim measures, the Applicant seeks an order suspending the recruitment process until such time as a decision on this application be made;

Irreparable damage

j. Monetary compensation is insufficient to compensate the frustration, unhappiness and loss of chance of career development associated with the non-renewal of a fixed-term contract; and

k. Should the contested decision be implemented, the likelihood that the Applicant will be separated is increased exponentially.

14. The Respondent's primary contentions may be summarized as follows:

Receivability

a. The application is not receivable *ratione materiae*. The Applicant wrongly refers to the Appeals Tribunal's ruling in *Chahrour* to challenge a purported implied decision not to laterally transfer him to the vacant post. However, the situation in *Chahrour* was fundamentally different;

b. By asserting a right to be transferred to the vacant post and claiming that the Regional Representative failed to act in this respect, the Applicant essentially attempts to create an implicit administrative decision that he now tries to contest;

Prima facie unlawfulness

c. While a procedural error occurred in relation to the decision to reclassify his post to a post in a different functional group, this error has no material effect on the outcome of the contested decision. In fact, instead of reclassifying the Applicant's post, the Office should have discontinued his post and created a new post. Therefore, the result to the Applicant would have been the same;

d. While it is true that the Applicant's functions accrued to the other P-2 post, it does not give rise to the expectation that he should be laterally transferred to that post. The Administration is not obliged to laterally transfer the Applicant to the vacant post;

e. Comparative reviews are not foreseen for international staff in UNHCR, who are subject to mandatory rotation and, unlike locally recruited staff, do not face termination of their appointment should their encumbered position be discontinued or reclassified. In fact, staff members holding indefinite appointments or fixed-term appointments expiring after the effective date the position changes are placed on Special Leave with Full Pay for a maximum of nine cumulative months or the remainder of their contractual length;

Urgency

f. The frustration of a possible remedy is not a basis to declare an application as urgent;

g. The Applicant is not imminently facing separation because his contract is valid until the end of 2019. The matter before the Tribunal is the alleged failure to laterally transfer the Applicant to a vacant post. This matter is not urgent as he has applied to the vacant post and can await the selection outcome; and

Irreparable damage

h. The Applicant is not facing imminent separation and mere financial loss is not enough to satisfy this requirement.

Consideration

15. Applications for suspension of action are governed by art. 2.2 of this Tribunal's Statute and art. 13 of its Rules of Procedure. They both provide that the Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation "where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage". These three requirements are cumulative and must all be met for a suspension of action to be granted (*Ding* Order No. 88 (GVA/2014), *Essis* Order No. 89 (NBI/2015), *Carlton* Order No. 262 (NY/2014)).

16. The parties have made submissions on the receivability of the Applicant's application for suspension of action pending management evaluation. Therefore, before discussing whether the application meets the above requirements, the Tribunal must first determine whether or not the impugned decision can be properly stayed.

Receivability

17. Art. 2.6 of the Tribunal's Statute provides that "in the event of a dispute as to whether the Dispute Tribunal has competence under the present statute, the Dispute Tribunal shall decide on the matter". The Appeals Tribunal has also held in *Christensen* 2013-UNAT-335 that the Tribunal "is competent to review its own competence or jurisdiction".

18. The Applicant contests the "[d]ecision not to laterally transfer [him] to [the] soon to be vacant post performing identical functions to [his current ones]". The Applicant considers that an implied decision arose on 19 September 2019, when the vacant post was advertised for competitive recruitment.

19. The Appeals Tribunal has constantly referred to the concept of "administrative decision" developed by the former United Nations Administrative Tribunal in its Judgment No. 1157, *Andronov* (2003), which provides as follows:

There is no dispute as to what an "administrative decision" is. It is acceptable by all administrative law systems, that an "administrative decision" is a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. Thus, the administrative decision is distinguished from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences. Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct legal consequences. They are not necessarily written, as otherwise the legal protection of the employees would risk being weakened in instances where the Administration takes decisions without resorting to written formalities. These unwritten decisions are commonly referred to, within administrative law systems, as *implied* administrative decisions (emphasis in the original).

20. The Appeals Tribunal has endorsed the above-mentioned reasoning in its jurisprudence, notably in its Judgement *Tabari* 2010-UNAT-030 holding that “not taking a decision is also a decision”.

21. To determine whether an implied administrative decision exists in the present case, the Tribunal will examine the facts and the evidence presented by the parties.

22. First, there is no evidence to establish that the Applicant has ever requested to be laterally transferred to the vacant post. While the parties note that the Regional Representative met with the Applicant on 6 September 2019 to discuss his career options, including the possibility to keep working on a temporary appointment, the Respondent claims that the Applicant’s lateral transfer to the vacant post was not discussed.

23. Second, the Applicant asserts to have a right to be transferred to the vacant post, claims that the Regional Representative failed to act in this respect and that the advertisement of the vacant post was, in fact, an implied decision not to transfer him to the vacant post. The Applicant refers to staff rule 9.6. However, this rule is applicable in cases of termination of appointment as a result of the abolition of a post or the reduction of staff. Therefore, the Applicant does not have a right to be automatically transferred to the vacant post. Also, the Applicant has a valid contract until 31 December 2019, and he has applied to the vacant post. It follows that he still has the possibility to be selected for the vacant post and there is no evidence, at this stage, suggesting that his contract might be terminated prior to its expiry date.

24. Third, the advertisement of the vacant post is not an implied administrative decision in terms of *Andronov* because it is not of individual application and does not carry direct legal consequences to the Applicant, i.e., it does not affect the Applicant’s terms of appointment.

25. The Applicant refers to the Appeals Tribunal’s Judgment *Chahrour* 2014-UNAT-157 to support his argument about an implied decision. However, the situation considered by the Appeals Tribunal in *Chahrour* is fundamentally different. Mr. Chahrour applied for the post of Registrar and took part in a selection process. Once the selection process was completed, the Administration informed

him in writing that he had been recommended as second choice among those interviewed and that, should the first candidate recommended decline the offer or vacate the position within six months, he would be considered for employment. Despite these assurances, the Administration did not give Mr. Chahrour written notice of the selected candidate's resignation, which took place within the relevant six-month period and did not consider him for the vacant post. Instead, the Administration re-advertised the post.

26. The Appeals Tribunal found in *Chahrour* that “[b]ased on the undisputed fact that the Agency did not afford [him] written notice at the time of its decision not to consider him for the post of Registrar when the incumbent resigned ... the UNRWA Dispute Tribunal properly characterized the [Administration]’s decision as an implied decision”. The Appeals Tribunal then found that Mr. Chahrour “knew or reasonably should have known of the decision not to consider him for the post of Registrar” when the post was advertised.

27. The Applicant’s situation is different as he does not have a right to be automatically transferred to the vacant post, and there is no evidence that he ever requested to be transferred to the vacant post prior to its advertisement.

28. Considering the above, the Tribunal finds that in his application, the Applicant has attempted to create an implied decision based on a right that he does not have, which makes his application not receivable *ratione materiae*. Consequently, there is no need to examine whether the requirements for the granting of a suspension of action are met.

Conclusion

29. In view of the foregoing, the application for suspension of action is rejected.

(Signed)

Judge Teresa Bravo

Dated this 11th day of October 2019

Entered in the Register on this 11th day of October 2019

(Signed)

René M. Vargas M., Registrar, Geneva