



Judgment No. 2019-UNAT-930



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which had three sections: “Organizational Setting and Reporting Relationships”, “Responsibilities” and “Competencies”. They were identical to the corresponding sections in the TJO that Mr. El Hacene had shared with Mr. Chemingui in April 2015.

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

6. Mr. Iyamah responded to Mr. Chemingui 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.

7. On 13 May 2015, Mr. Chemingui requested a management evaluation of the decision to laterally reassign him to the Regional Adviser post. On 16 July 2015, he received a response from the Under-Secretary-General for Management that the Secretary-General had decided to uphold the impugned decision.

8. By Order No. 240 (NBI/2015) dated 21 July 2015, the Dispute Tribunal suspended the 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. In its Order No. 245 (NBI/2015) dated 28 July 2015, the Dispute Tribunal concluded that the decision to reassign Mr. Chemingui to a general temporary assistance (GTA) funded post was *prima facie* unlawful; that his application for suspension of action was urgent; and that the implementation of the impugned decision would cause Mr. Chemingui irreparable harm. It therefore 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”.

9. Also on 21 July 2015, Mr. Chemingui filed an application on the merits with the Dispute Tribunal against the decision to laterally reassign him to the TJO post of Regional Adviser on Trade, in which he contended *inter alia* that the decision could be tainted by improper motives. In the Respondent’s Reply filed on 21 August 2015, the Secretary-General submitted *inter alia* that there was no evidence that the contested decision was tainted by improper motives.

10. On 24 August 2015, the Secretary-General appealed the UNDT Order No. 245 (NBI/2015) to the Appeals Tribunal on the basis that the reassignment or transfer of a staff member was a form of appointment and therefore subject to the exemption prescribed in Article 10(2) of the UNDT Statute and Article 14 of the UNDT Rules of Procedure, meaning that a reassignment decision was not amenable to suspension.

11. The Appeals Tribunal, by its Judgment No. 2016-UNAT-641 dated 24 March 2016, rejected the Secretary-General’s appeal as not *receivable*. It 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 Mr. Chemingui’s case.

12. The UNDT proceedings on the merits of the case continued and resulted in the issuance of the impugned Judgment on 21 November 2018. It is not clear whether, in the interim, Mr. Chemingui still functioned as the Chief of the RIS/EDID, but it is clear that the TJO post for the Regional Adviser on Trade remained vacant.

13. In its Judgment now under appeal, the Dispute Tribunal found that the reassignment decision was unlawful and ordered its revocation. The UNDT rejected the Secretary-General’s argument that the reassignment decision would not affect Mr. Chemingui’s contractual situation as he would still be paid at the P-5 level and would be eligible for consideration for a continuing appointment. It determined that the reassignment to the TJO post of Regional Adviser on Trade carried significant risks and disadvantages for Mr. Chemingui, and the reassignment did not satisfy the Rees test as a proper reassignment¹. In its view, the words “all necessary safety and security arrangements” in Staff Regulation 1.2(c) were not

¹ Rees v. Secretary-General of the United Nations, Judgment No. 2012-UNAT-266.

“merely limited to physical safety and security”.² However, the Dispute Tribunal rejected, for lack of evidence, Mr. Chemingui’s claim that the reassignment decision was a retaliatory measure and was tainted by improper motives.

14.

17. The Secretary-General requests that the Appeals Tribunal vacate the Dispute Tribunal's findings in relation to the lawfulness of the reassignment, but leave intact the Dispute Tribunal's conclusion that the contested decision was not tainted by improper motives.

Mr. Chemingui's Answer

18. The Dispute Tribunal correctly concluded that the decision to reassign Mr. Chemingui from a regular budgeted post to a GTA-funded post without his express consent and without a lien on his original post was unlawful. Prudent staff members, such as Mr. Chemingui, attach considerable weight to the funding source of the position when deciding to accept a particular appointment, as posts budgeted outside of the regular process have a ~~le~~ndapsc-3.4.63me,agued rg

ESCWA Administration to reassign a staff member who dared to question the authority of the ES/ESCWA.

21. The Dispute Tribunal correctly determined that it was consequential to Mr. Chemingui that he was being reassigned from a position with managerial functions to a post without a leadership or managerial role, and that such a reassignment would likely reduce his career prospects.

22. Mr. Chemingui requests that the Appeals Tribunal dismiss the appeal in its entirety.

Mr. Chemingui's Cross-Appeal

23. The Dispute Tribunal erred in concluding that the reassignment decision was not tainted by improper motives. The Administration's improper motives are evident on their face, demonstrated by its unwillingness to either transfer or recruit any other person to fill the TJO post or provide a lien for Mr. Chemingui to return after the completion of the TJO reassignment, and by the fact that the Administration has not actually needed a staff member to perform the functions of the TJO position, which has remained vacant for the past four years.

The Secretary-General's Answer to Cross-Appeal

24. Mr. Chemingui's cross-appeal

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additional evidence is not new and was availa

35. Specifically, the UNDT found that: i) the ES/ESCWA had discretion to reassign Mr. Chemingui to another post within the Commission under Section 2.5 of ST/AI/2010/3, but this discretion had to be exercised in accordance with Staff Regulation 1.2(c); ii) the post to which Mr. Chemingui had been reassigned was meant to be temporary in nature and therefore time bound, and thus, less stable when compared with the post he was encumbering; iii) the reassignment to the post of Regional Adviser carried significant risks and disadvantages for Mr. Chemingui, contrary to the requirement of safety and security established by Staff Regulation 1.2(c), which was not limited to physical safety and security, but also involved operational needs and restructurings, particularly related to the funding, duration and stability of the new post; and iv) Mr. Chemingui would be relieved of his managerial and leadership functions in the new position, and this could arguably result in negative consequences for his career prospects.

36. The applicable law is as follows:

Staff Regulation 1.2

Basic rights and obligations of staff

General rights and obligations

(c) 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;

ST/AI/2010/3 “Staff selection system” (21 April 2010)

Section 2 General provisions

2.5 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.

37. In his appeal, the Secretary-General claims that Mr. Chemingui’s reassignment was consistent with the statutory framework and the Appeals Tribunal jurisprudence, since there was broad discretion in assigning employees to different functions, particularly for operational or

power of reassigning Mr. Chemingui to the post of Regional Adviser was not exercised in a reasonable manner.

42. Firstly, the funding source of a temporary post to which a staff member is being assigned is part of the legitimate considerations by which it is possible to evaluate the lawfulness of a reassignment decision.⁷ In *Teo*, it was settled that a post with GTA-funding had less secure funding on a long-term basis when compared to a regular post, and the difference between the two was consequential to an individual who was trying to secure a position within the Organization.⁸ Although we agree that there can be no expectancy of renewal, it is undeniable that a TJO post carries in itself the certainty of an end, while a post funded by the regular budget is less precarious by nature.⁹

43. The TJO to which Mr. Chemingui was reassigned was temporary in terms of duration and funding source. As governed by ST/AI/2010/4/Rev.1 (Administration of temporary appointments), and stated in General Assembly resolution 63/250, “temporary appointments are to be used to appoint staff for seasonal or peak workloads and specific short-term requirements for less than one year but could be renewed for up to one additional year when warranted by surge requirements and operational needs related to field operations and special projects with finite mandates”. Temporary assignments are normally 364 days in duration and 729 days at the maximum. These short-term opportunities can be drawn on (a) to respond to an unexpected and/or temporary emergency or surge demand involving, for example, a natural disaster, conflict, violence or similar circumstances; (b) to meet a seasonal or peak work requirement of limited duration that cannot be carried out by existing staff members; (c) to temporarily fill a position whose incumbent is on special leave, sick leave, maternity or paternity leave or on assignment; (d) to temporarily fill a vacant position pending the finalization of the regular selection process; and (e) to work on a special project with a finite mandate.

⁷ *Teo v. Secretary-General of the United Nations*, Judgment No. UNDT/2018/107, not appealed.

⁸ See *ibid.*, para. 55.

⁹ In this regard, it is true that Mr. Chemingui appears to confuse between the concepts of appointment and assignment. His appointment was undisputedly a fixed-term one. However, for each appointment there might be various assignments, as established by Staff Regulation 1.2(c) and Section 2.5 of ST/AI/2010/3. The type of contract may remain the same, although the assignments can be of a different nature.

44. According to Section 2.7 of ST/AI/2010/4/Rev.1, upon reaching the limit of service under one or several successive temporary appointments as set out in the section, or,

47. Regarding the claim of improper motives in the reassignment, the UNDT dismissed this specific ground of appeal because the claim was both vague and unsupported by any evidence. We partially disagree. In his UNDT application, Mr. Chemingui submitted that the contested decision had been tainted by improper motives and taken in response to his challenge of an administrative decision of ESCWA in 2014 and that the impugned decision was used to disadvantage him so that his eventual non-renewal would be legitimized.¹² This is not a vague argument. Rather, it is a clear and precise statement. On the other hand, we find no evidence of the alleged improper motives that could justify an award of compensation for harm in the present case.

48. Considering the foregoing, we find that the UNDT did not err in its finding that the decision to reassign Mr. Chemingui was unlawful and should be rescinded.

