



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2009/109

Judgment No.: UNDT/2011/105

Date: 22 June 2011

Original: English

Before: Judge Coral Shaw

Introduction

1. The Applicant, a staff member of the United Nations Office on Drugs and Crime (“UNODC”), has filed an application with the United Nations Dispute Tribunal challenging the decision made on 4 December 2009 to no longer reassign him laterally to the UNODC Sub-Regional Office in Abu Dhabi, United Arab Emirates (“UAE”), as UNODC Representative to the UAE and Special Representative to all Gulf countries.

2. In his application, the Applicant sought a number of remedies. At the hearing these were revised and stated as follows:

- a. Rescission of the decision to return him to a post at the P-3 level;
- b. Payment of one year’s net salary as compensation for the emotional and actual damages suffered;
- c. Award of a nominal sum of one USD for the various injustices suffered.

Hearing

3. The Tribunal held an oral hearing of this matter. The Applicant and two witnesses for the Respondent gave evidence and the parties presented oral and written submissions.

4. Following the oral hearing, a further short written submission was filed by the Applicant without notice or direction. As it had no influence on the eventual outcome of this case it was not referred to the Respondent for comments.

The issues

5. The issues properly before the Tribunal were narrowed down at a directions hearing. This was particularly necessary in this case in view of the Applicant’s reprehensibly long and confusing pleadings and submissions in the original application. This application contained details of a number of different

factual and legal subjects which were not strictly relevant to the single receivable issue in this case. One of these concerned the selection process for an L-5 post to which the Applicant had unsuccessfully applied. The Applicant accepted that as he had not requested management evaluation of this decision it was not a receivable claim before the Tribunal.

6. The Applicant was also critical of the fact that after the withdrawal of his lateral reassignment he was required to return to a post at his original P-3 level. Again that decision has not been the subject of a management evaluation and is not receivable by the Tribunal.

7. The Applicant is unable to seek any rulings or relief for either of these matters. The events surrounding them are part of the factual matrix of the application but they are peripheral at best.

8. The central issue before the Tribunal is the legality of the decision not to laterally reassign him to the post in Abu Dhabi. It was agreed with the parties at the directions hearing that this issue could be expressed as follows:

Was the decision to no longer laterally assign the Applicant to the P-4 position of UNODC Representative to the UAE and Special Representative to all Gulf countries in the UNODC Sub-Regional Office in Abu Dhabi unlawful by reason of:

- a. The lack of a project document for the post;
- b. That it was in breach of the Host Country Agreement; and
- c. That the process adopted was in breach of ST/AI/2006/3?

9. To this agreed issue the Tribunal adds the following:

Was the assignment of the Applicant to the post in Abu Dhabi subject to any conditions to be fulfilled by the Organization and/or the Applicant? If so were these conditions fulfilled?

document. The former Chief of the Africa and Middle East Section, Division of Operations, UNODC who was at the time the direct supervisor of the Applicant explained to the Tribunal that this was normal procedure and was only a preliminary measure. In early 2009, steps were taken to move the project forward.

14. In January 2009 the Programme and Project Committee (“PPC”) of UNODC was officially requested to include the project in the next agenda for the PPC meeting on 15 January.

15. Also in January 2009 a vacancy announcement was issued for the L-5 position of Representative of UNODC in the Sub-Regional Office in Abu Dhabi. The Applicant applied for that post in February 2009. He was one of three short-listed candidates but after an in-depth analysis of the candidates, it was decided that none of them met all the necessary requirements of an L-5 post.

16. In the absence of a successful candidate the L-5 vacancy was cancelled on 17 March 2009. The Executive Director decided that rather than re-advertising the

reassign him as from 4 May 2009 to the Sub-Regional Office in Abu Dhabi as

all Gulf countries but HRMS refused to grant the Applicant a higher step-in-grade. The post was established at the P-4 instead of L-4 level because of the introduction of the new, provisional Staff Rules.

22. The UNODC Executive Director then informed the UAE on 19 June 2009 that the Applicant had been appointed as the UNODC Representative to the UAE and Special Representative to all Gulf countries. In his letter, he told the UAE that the Applicant would “be taking up his appointment in the Sub-Regional Office within a week”. This never happened.

23. From June until mid-November 2009, the Applicant met and regularly corresponded with the Executive Director and other senior managers about his deployment.

24. The Applicant consistently said that he was ready to take up the appointment. In his correspondence, however, he continued to raise issues. He was concerned about the UNODC fulfilling its obligations under the Host Country Agreement; he was concerned that HRMS had not sent a formal offer of appointment; he wanted information about the classification of his post and his salary and allowances; he had questions about the way the Abu Dhabi office would operate. All of these questions were answered in a timely manner.

25. During this time the Chief of the Africa and Middle East Section made repeated requests of the Applicant to produce and finalise a fully fledged project document. The first one he had prepared in December 2008 had been only preliminary. The Applicant provided a draft in May 2009 but it was not considered to be up to standard and therefore unable to be submitted to the PPC.

26. At a meeting with the Applicant on 15 July 2009, he was requested to come up with a mechanism whereby all future envisaged activities and outputs could be delivered.

27. On 29 July 2009, the Chief of HRMS sent an email to the Applicant informing him of the administrative procedures and entitlements relating to his reassignment.

28. On 3 August 2009, the Cairo Regional Office for the Middle East and North Africa (“ROMENA”), to which the sub-Regional Office in Abu Dhabi was to have a direct reporting line, was asked to provide assistance to finalise the project document. That office provided suggestions to improve the document on 12 August.

29. The Executive Director wrote to the UAE on 20 August 2009 reiterating that the Applicant had been appointed as Representative to the UAE Sub-Regional

Recruitment and Placement Unit, HRMS. It was agreed, *inter alia*, that the Applicant would take up his assignment in Abu Dhabi on 9 November 2009. The Applicant told the Tribunal that it was agreed at that meeting that once the project document is approved he would take up his new assignment. In fact the minutes of the meeting record that the Director of Operations had made the decision that:

The project ... must be finalised over the next few days in order to cover the salaries and operational costs of the new office. It was emphasised that the project document be very concise as per [the Chief of FRMS' instructions] of 15 December 2008. Once the document is approved it was agreed that [the Applicant] ... will take up his new appointment as of 9 November 2009.

The minutes of the meeting further record the following:

The Director of [Operations] confirmed to [the Applicant] that in line with the [Executive Director]'s decision he will be reassigned at the P-4 level ... and charged against the P-5 of the staffing table of the new Office in UAE ... The Director also agreed that once the Office is operational and the GCC programme is expanding, UNODC intends to review the level of the position of Representative with a view to refl

38. Two days later the Applicant responded by email dated 13 November

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 were appointed and that "he would thereafter be reassigned 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.

43. By letter dated 2 December 2009, the Executive Director informed the UAE 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.

44. On 4 December 2009, the Chief of HRMS informed the Applicant by email 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) "[t]hereafter, 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 ...".

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

46. The Applicant filed an application requesting the Tribunal to suspend, during the pendency of the management evaluation, the implementation of the contested decision. This application was rejected.

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Applicant did not adduce any evidence that the contested decision was

November. That agreement was implicitly conditional on his completion of the project document by that date. He did not do so.

58. Third, contrary to his evidence and submission at the oral hearing, the reasons given by the Applicant throughout 2009 for not taking up the post as and when agreed did not include the lack of the finalised project document. They concerned his requirement for a change of functional title for the post, repeated requests for clarification of the level of the post and requests for information of an administrative nature which he either already had or was capable of finding online.

59. The Tribunal finds that the obligation to finalise the project document to the required standard and within the time frames set for him lay with the Applicant, but the completion of such a document was not a binding precondition for his taking up of the post.

Breach of Host Country Agreement

60. If the creation of an L-5 post were a binding condition of the Host Country Agreement between UNODC and the UAE, then the reclassification to L-4 of that post would have been in breach of that agreement. However it was not a binding condition. The Host Country Agreement was a commitment by the UAE to provide funding for posts that were to be created. The discretion to classify posts lies with the Administration which is responsible for the administration of the projects -9.hthe ponwa

reassignment. One of these was the selection process for the L-5 post. Recognizing that he had no receivable claim for this, the Applicant nevertheless raised his concerns about the selection process as a demonstration of an alleged pattern of conduct by the Respondent that supported his claim that the decision in dispute was not lawful.

68. For the avoidance of doubt the Tribunal observes that the Applicant produced no evidence that demonstrated such a pattern. On the contrary the Respondent's conduct towards the Applicant during 2009 as demonstrated by the evidence of the Director of Operations