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Case No.: AUAT/2020/004
Judgment No.: AUAT/2021/007

IN THE MATTER OF:

J.M., Applicant

v.

Chairperson of the African Union Commission, Respondent

FOR APPLICANT: Steven Kayuni, Esq.

FOR RESPONDENT: Namira Negm, Legal Counsel, African Union Commission

BEFORE: S. MAINGA, President, J. SEDQI, and P. COMOANE

HEARD ON: 27 May, 22 July, 6 August 2021

JUDGMENT

Procedural and Factual History

1. On 9 February 2020, Applicant, Intelligence and Security Committee (ISC) Advisor within the Office of the Chairperson, filed an application contesting the administrative decision which removed him from his post as Head of Security and Safety (P-5) and transferred him to a lower-graded post located outside the Organization's headquarters. He also challenges the Organization's refusal to reinstate him in a post commensurate with his title and salary grade.
2. Respondent filed his written answer on 16 April 2020. Following Applicant's submission of his written observations on 18 May 2020, the written pleadings were closed.
3. Following a preliminary examination of the application during the May 2021 session, the Tribunal adjourned the hearing until the session of the Tribunal which began on 19 July 2021.
4. **The material facts of the case are summarized as follows:**
5. On 15 March 2010, Applicant was offered the post of Head of the Security and Safety Services Division (P-5). Applicant entered on duty on 5 July 2010, moving his family members from his home country of Rwanda to the duty station in Addis Ababa.
6. On 19 April 2011, the Director of Administration and Human Resources Management (AHRM) notified Applicant that the Organization had decided to transfer him effective immediately to the African Union Liaison Office in Guinea-Bissau to serve in the post of Senior Security Advisor and Security Coordinator for African Union Liaison Offices.
7. The memorandum informed Applicant that he would retain his salary grade and step. Enclosed with the memorandum was a document describing the terms of reference of Applicant's new role. It was later clarified that the transfer was to a non-regular post graded P-4.
8. On 29 April 2011, the Director, AHRM, wrote to the Deputy Chairperson in relation to another staff member's grievances, wherein he stated Applicant's "redeployment" was due to "political interest" in the post of Head of Security and Safety.
9. On 6 September 2011, the Director, AHRM, wrote to the Deputy Chairperson again expressing his concern about Applicant's transfer. He explained that Applicant did not speak Portuguese – the official language of Guinea-Bissau – and transferring Applicant from a regular-budgeted post to a short-term post was "an anomaly." The Director proposed,

instead, to reassign Applicant to a regular-budgeted P-5 post as Head of Conflict Management within the Peace and Security Department in the headquarters.

10. While Applicant's transfer was being administratively processed and as Applicant prepared to transfer, he received a memorandum from AHRM dated 21 September 2011 advising him that he had successfully completed his probation and that the Chairperson had confirmed him as the Head of Security and Safety.
11. On 21 September 2011, Applicant asked the Director, AHRM, to reconsider the decision to transfer him. He also sought a change in his travel date to the new duty station from 1 October 2011 to 16 October 2011. Applicant followed up this request with his supervisor on 25 February 2012. Referencing a prior discussion and correspondence by memorandum, Applicant described the practical challenges he faced in his new role and seeking a new posting where he "would be more productive and particularly close to the headquarters for purposes pursuing effectively the security liaison offices assignment."
12. On 25 June 2012, the Director, AHRM wrote to the Deputy Chairperson again asking for Applicant's re-assignment to the post of head of division within the Peace and Security Department in the headquarters. The Deputy Chairperson positively annotated the memorandum with a direction to consult the Peace and Security Commissioner. On 10 December 2012, AHRM requested the Commissioner's approval, but the proposed reassignment never materialized.
13. On or about 27 February 2013, Applicant was transferred back to the headquarters and reassigned to the post of Principal Officer (P-4), ISC, within the Bureau of the Chairperson, while maintaining his salary grade of P-5.
14. On 25 April 2013, Applicant wrote to AHRM seeking payment of salary arrears and pension contributions that were not remitted to the Credit Union and the fund management company, ALICO, during the period Applicant was based in Guinea-Bissau. His request was positively annotated by an unnamed official for the claimed amounts to be processed.
15. On 5 March 2018, Applicant sought permanent as opposed to acting appointment as Head, ISC (P-5), explaining that he was recruited as head of division (P-5), a salary level equivalent to that of ISC Head. He wrote: "[when] I was redeployed back to headquarters, instead of being given back my position that I had been recruited for and signed contract for its level, I was transferred to sit on Principal Officer P4 within ISC...until the Coordinator of ISC retired and was appointed acting Head of ISC."
16. Applicant's request referenced numerous prior discussions regarding his request to be reinstated in a post commensurate with his P-5 salary grade. AHRM did not address his request. His last appeal to the Chairperson was made on 10 December 2019, asking the Chairperson to reinstate him in the post of head of division and requested compensation for the harm that resulting from his unfair and unlawful transfer. The Chairperson did not respond. This application followed on 9 February 2020.
17. In addition seeking his transfer decision to be declared unlawful on various grounds, Applicant asks the Tribunal to: (a) order compensation for moral damages in the amount of \$450,000; (b) order Respondent to sanction future violations by holding officials personally accountable; (b) order reimbursement of all interest on deductions not timely remitted to the Credit Union and ALICO in the amount of \$5,000; (c) order refund for transportation and subsistence expenses for trips taken to Addis Ababa in the amount of \$8,400; and (e) order for costs.
18. Respondent resists the application preliminarily on grounds of receivability under Staff rule 62.1, art. 13 of the Statute as well as rule 11(7) of the Rules of Procedure. On the merits, Respondent maintains Applicant's transfer was made in accordance with the Staff Regulations and Rules, and the Chairperson's general authority as the appointing official under Staff reg. 6.1. Respondent also claims that the African Union is "a political organization and in accordance with Staff rule 6.1... it is for the consideration of the Chairperson to transfer staff for reasons he or she deems it valid..."
19. In relation to Applicant's claim of reimbursement for travel expenses, Respondent dismisses the claim as baseless as Applicant failed to prove the trips were authorized by the Organization. On the loss of interest claimed by Applicant, Respondent similarly rejects the claim for lack of proof. Finally, Respondent finally maintains that Applicant's transfer back to the headquarters was not unilateral and did not breach any rule.
20. The Tribunal concludes the facts and issues have been presented adequately in the pleadings and determines this matter without the need to invite the parties for an oral hearing.

Discussion

Receivability of application

21. This application emanates from the 19 April 2011 decision to remove Applicant from the post of Head of Security and Safety, to replace him with a national of the host government, and to transfer him to the African Union Liaison Office in Guinea-Bissau. Applicant also challenges subsequent decisions related to the conditions of his transfer back to the headquarters in February 2013.
22. In opposition, Respondent asks the Tribunal to dismiss the application entirely without reaching the substantive claims presented by Applicant. Respondent argues Applicant filed his application out of time. The Tribunal can not accept the argument for reasons discussed below.
23. Except for applications challenging a disciplinary action, requesting administrative review of the contested decision by the Chairperson or other appropriate authority is a mandatory first step.¹ The Tribunal cannot review a non-disciplinary administrative decision that has not been the subject of a prior administrative review under Staff rule 62.1.²
24. A staff member must seek such review within thirty days of the contested administrative decision.³ The reviewing official has thirty days to complete the review, failing which the request will be deemed constructively denied.⁴ The staff member then has additional thirty days to file an application with the Tribunal, reckoned thirty days after the filing of administrative review request or from the date of receipt of a decision on the administrative review request, whichever comes first.⁵ Staff members must strictly comply with these mandatory rules.⁶
25. However, the Tribunal has previously recognized an exception to the mandatory filing timelines where the Organization failed to provide a staff member with a decision or continued to make undertakings to resolve their grievance.⁷ Likewise, the Tribunal has precluded Respondent from challenging the receivability of an application where it neglected the staff member's multiple written requests to resolve their grievance. Other tribunals generally recognize and apply, on a case by case basis, these narrow exceptions as valid.⁸
26. It is clear to the Tribunal that Applicant took various steps, verbally and in writing, to contest his transfer and the subsequent reassignment decision. There are various communications in the record, not responded to by the Organization, by which Applicant sought for his transfer to be reconsidered, later for the transfer decision to be reversed and ultimately for his functional title of head of division to be restored consistent with his title and salary grade of P-5.
27. In his last correspondence to the Chairperson, Applicant explained "... I continued engaging [AHRM] in order to have the anomaly rectified and be given back my level as Head of Division. Though there were *assurances*, up to date the Directorate has not resolved my issue." [our emphasis]. Moreover, the memorandums by the Director of AHRM addressed to the Deputy Chairperson, several in number, could be construed as representations to Applicant that the Organization was making efforts to identify a suitable alternative post.
28. Applicant experienced manifest neglect and a series of adverse decisions spanning many years, interspersed with idle assurances, based on which the Tribunal finds that Applicant was continuously victimized by the Organization while being led to retain the impression that his requests were being considered. The Tribunal thus concludes, on exceptional basis, it was understandable for Applicant to lose all hope in administrative resolution of his grievance after his final correspondence to the Chairperson on 20 December 2019, and to subsequently advance his grievance to the Tribunal on 9 February 2020. Respondent's receivability challenge is therefore rejected.

Applicant's transfer to the African Union Liaison Office in Guinea-Bissau and his subsequent reassignment

29. The Tribunal notes that under Staff reg. 6.1(b), the Chairperson is granted the power of appointment⁹ including the "posting of [staff members], their periodic advancement from one step to another in the salary scale as well as their

¹ Staff rule 62.1; *B.W.*, AUAT/2015/008.

² Staff rule 62.1.; AUAT Statute art. 13(i); AUAT Procedure, rule 11.7.

³ *Id.*

⁴ *Id.*

⁵ Staff rule 62.1; AUAT Statute art.13(iv).

⁶ *M.Z.L.*, AUAT/2018/001, para. 13.

⁷ *S.G.*, AUAT/2015/002; *T.T.*, AUAT/2015/007;

⁸ *A.D.*, AUAT/2021/005; *see also*, ILOAT *Judgment No. 2901* para. 10.

⁹ While AHRM's transfer memorandum erroneously cites Staff rules 4(f); 10 (1993), those provisions were repealed by the Staff Regulations and Rules enacted in July 2010.

promotion, *transfer* and release/termination... [Our emphasis]. This authority must be exercised with the advice of the Appointment, Promotion and Recruitment Board (APROB). Staff reg. 6.1(c).

30. The Chairperson's discretionary decision may, however, be set aside where it has been exercised in violation of the law or policy or was motivated by improper considerations. Additionally, as with all administrative decisions, the Organization owes its staff members a duty of care and must deal with them with fairness and in good faith when considering a transfer.¹⁰
31. Applicant's complaint that the decision to transfer him was taken based on erroneous grounds is well-founded. While Respondent contends that the transfer was a lawful exercise of the Chairperson's appointment authority, the Tribunal is convinced that the decision was not based on any operational or programmatic considerations. Rather, the decision resulted from a political influence exerted by a member state as documented in the AHRM memorandum of 25 June 2012. In fact, Applicant was replaced by a national of that member state even before Applicant's actual transfer was effected.
32. Further, Respondent's officials in writing conceded that the transfer was a political decision taken by a political organization.¹¹ The Tribunal has considered that the AHRM memorandum dated 25 June 2012, pointed out substantial practical concerns and recommended against the transfer. It is therefore clear to the Tribunal that AHRM correctly disapproved of the decision to transfer Applicant, but Respondent disregarded AHRM's counsel and solely acted upon external political influence in transferring Applicant.
33. In a sister tribunal, a decision to transfer a staff member is judged for appropriateness by assessing "whether the new post was at the staff member's grade, whether the responsibilities involvement corresponded to his or her level; whether the functions to be performed were commensurate with the staff member's competence and skills; and whether he or she had substantial experience in the field."¹² Having found the decision entirely motivated by improper political considerations, it is not necessary for the Tribunal to scrutinize the transfer decision by borrowing these principles. But the Tribunal observes that none of the assessment factors, enumerated above, were considered prior to Applicant's transfer or when subsequently reassigning him back to the headquarters in 2013.
34. The Tribunal adds that the decision to transfer Applicant was reached without any consultation with Applicant and in an irregular fashion. Transfer is one of the personnel actions reserved for the advisory role of APROB in the first instance. The Tribunal has not seen any evidence that APROB ever considered or recommended Applicant's transfer prior to the Chairperson's decision.
35. The Tribunal next considers Applicant's subsidiary claims. Despite his relocation to the headquarters in 2013, Applicant was not reassigned to a post commensurate with his salary grade and title as specified in his letter of appointment. Rather, he was reassigned to a P-4 post of Principal Advisor and it has not been explained why such decision should stand considering Respondent's obligation to deal with staff members in good faith and with fairness. The Tribunal finds this to be a significant breach of Applicant's terms of appointment, irrespective of the fact that Applicant retained his salary and benefits at the P-5 level.
36. Applicant requested confirmation on the post of Head of ISC in 2018 after Respondent appointed Applicant to the post on acting basis under Staff rule 35. While it is not within the purview of the Tribunal to order Applicant's reassignment, it is not clear why Applicant was appointed on acting basis rather than a simple reassignment under Staff reg. 6.1, given that Applicant's salary grade(P-5) was equivalent to that of Head of ISC. In any event, the Tribunal's larger problem here is that Respondent neglected Applicant's request. The Tribunal finds such attitude unacceptable and against Applicant's right to have his request considered and decided independent of its merits.¹³
37. Therefore, the Tribunal concludes that the Organization breached its duty of care and repeatedly victimized Applicant by unlawfully transferring him without legitimate operational or programmatic grounds. In an affront to his professional dignity, the Organization re-assigned him to a lower-graded post and refused to reinstate him in a post commensurate to his title and salary grade. The Organization further neglected Applicant's administrative requests for years and showed little regard to his contractual rights. In the circumstances, the Tribunal finds that Applicant was subjected to moral harm, for which he must be awarded a global sum in moral damages.
38. Because Applicant succeeded in his application, he is entitled to costs which the Tribunal sets at \$2,000.

¹⁰ *A.L.*, AUAT/2017/002; see also, *Abdeljalil*, 2019-UNAT-960; *Obdeijn*, 211-UNDT-032.

¹¹ The Tribunal finds this inconsistent with Staff reg. 3.3(c), which bars Union officials from seeking or receiving external influence in the discharge of their official functions.

¹² *Chemingui*, 2019-UNAT-930 para. 40.

¹³ *M.M.*, AUAT/2021/003 para. 26.

39. Lastly, Applicant claims \$8,400 in travel costs expended to travel to the headquarters at his own cost. He also claims \$5,000 in lost interest payments due to the Organization failing to timely remit salary arrears and pension deductions to the Credit Union and to ALICO, respectively. Aside from Applicant's own correspondence to AHRM claiming the same, neither claim has been substantiated, which the Tribunal rejects.

Orders

40. The Tribunal ORDERS as follows:

- a. Applicant is awarded nine months' gross salary in moral damages.
- b. Applicant is awarded \$2,000 in costs.
- c. The sums above are payable within 30 days from the date of this judgment, failing which a 5% interest shall accrue and escalate to 10% if the sums are not paid in full beyond 60 days after the date of this judgment.
- d. All other prayers are rejected.

Date: 18 August 2021

/signed/

SYLVESTER MAINGA, PRESIDENT
JAMILA B. SEDQI
PAULO D. COMOANE

Secretary: 