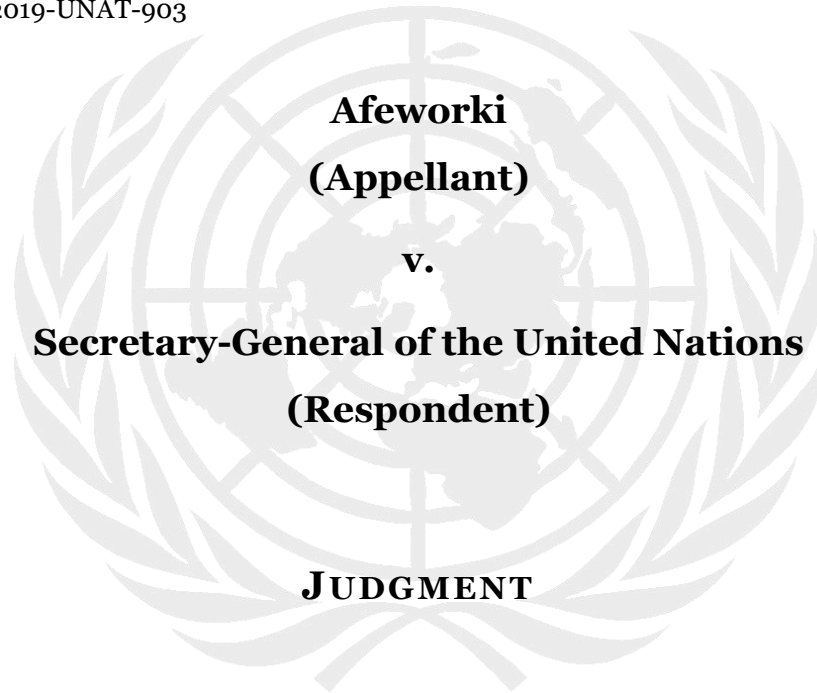




**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2019-UNAT-903



**Afeworki
(Appellant)**

v.

**Secretary-General of the United Nations
(Respondent)**

JUDGMENT

Before:	Judge Deborah Thomas-Felix, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2018-1195
Date:	29 March 2019
Registrar:	Weicheng Lin

Counsel for Appellant:	Self-represented
Counsel for Respondent:	Nathalie Defrasne

JUDGE DEBORAH THOMAS-FELIX, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Judgment No. UNDT/2018/068, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 26 June 2018, in the case of *Afeworki v. Secretary-General of the United Nations*. Ms. Kibra Afeworki filed the appeal on 27 August 2018, and the Secretary-General filed his answer on 5 November 2018.

Facts and Procedure

2. The following facts are uncontested:¹

... The Applicant commenced employment with the [United Nations] on 16 August 2001. She worked in various peacekeeping missions. On 1 July 2013, she was reassigned to the Travel Unit of the [Regional Service Center in Entebbe (RSCE)] as an Administrative Assistant at the [International Field Service (FS)-4] level. Her last fixed-term appointment was from 1 July 2014 until 30 June 2015.

... At her request, the Applicant was granted [Special Leave Without Pay (SLWOP)] from 21 October 2013 to 30 June 2015, which was the date of expiry of her fixed-term appointment.

... In 2014, the RSCE underwent a civilian staffing review. Based on the recommendations of the review, and subsequent endorsement by the RSCE Steering Committee, the proposed staffing structure for the 2015/2016 financial budget reflected a reduction of 75 [FS] posts.

... By a circular dated 3 March 2015, RSCE staff members, including the Applicant, were informed of a retrenchment exercise in which 75 FS staff posts would be converted to national posts for the 2015/2016 financial year. RSCE staff members were also informed that a comparative review was to be conducted by function and that within each function the review [would] be conducted by grade level.

... The proposed staffing structure was submitted for review and approval by the General Assembly (GA). In anticipation of approval by the GA a [comparative review process] was to be conducted in cases where there was more than one staff member occupying a position earmarked for retrenchment within the same function, category and level. Staff members were reviewed in the functional areas of human resources, finance, travel and administration.

¹ Impugned Judgment, paras. 11-23.

... By a circular dated 5 March 2015, RSCE staff received further information about the process, the applicable criteria, and projected timeline. Staff were informed that the results of the comparative review would be communicated by individual letters. A further circular dated 12 March 2015 informed staff of the evaluation criteria for the comparative review.

... The Applicant was placed in the pool of staff members performing travel functions at the FS-4 level. No such post was to be retained.

... By letter dated 13 May 2015, Ms. Safia Boly, Chief, RSCE informed the Applicant that following completion of the [comparative review process], her fixed-term appointment would not be renewed beyond 30 June 2015.

... By email dated 25 June 2015, Ms. Boly [...] informed all staff that the Fifth Committee of the [GA] had decided to implement the nationalization plan for RSCE in a phased manner, over a two-year period, by nationalizing 34 FS posts in 2015-2016, and a further 34 posts in 2016-2017. She noted that in light of that decision, a review of affected staff was being conducted.

... Subsequently, the RSCE and the Field Personnel Division (FPD) of the Department of Field Support (DFS) conducted a review of the RSCE staff. The results of the review showed that in the area of travel, two posts at the FS-6 level and three posts at the FS-5 level were retained. There were no posts available at the FS-4 level. At the time of the review, there were five staff members performing travel functions at the FS-4 level, including the Applicant. All of them were affected by the retrenchment exercise. Four of them were “reassigned” to other peacekeeping missions. However, the Applicant was not offered a position by any of the missions and was accordingly not reassigned. In the circumstances, she was to be separated upon the expiry of her appointment.

... On 30 June 2015, the Applicant received a formal letter informing her that her fixed-term appointment was not to be renewed beyond that date. She was separated from service.

... On 28 August 2015, the Applicant requested management evaluation of the decision not to renew her appointment.

... By letter dated 30 September 2015, the Officer-in-Charge, Management Evaluation Unit (OIC/MEU) replied to the Applicant’s request for management evaluation. MEU determined that her request was not receivable because it was time-barred and even if it was receivable it had no merit.

3. On 28 December 2015, Ms. Afeworki filed an application with the UNDT contesting the decision not to renew her fixed-term appointment beyond 30 June 2015 and the decision not to grant her a continuing appointment.

4. By Judgment No. UNDT/2017/011 dated 3 March 2017, the UNDT dismissed the application as not receivable. By Judgment No. 2017-UNAT-794 dated 27 October 2018, the Appeals Tribunal found the application to be receivable, vacated Judgment No. UNDT/2017/011 and remanded the case to the UNDT for a consideration of the merits.

5. On 26 June 2018, the UNDT issued Judgment No. UNDT/2018/068, dismissing Ms. Afeworki's application. The UNDT found the decision not to grant Ms. Afeworki a continuing appointment was not receivable on the grounds that she did not request management evaluation of that decision and that she was not in active service throughout the period of consideration as required by Administrative Instruction ST/AI/2012/3 (Administration of continuing appointments).

6. With respect to the non-renewal of Ms. Afeworki's fixed-term contract, the UNDT held that: a) the restructuring of the RSCE, resulting in the reduction of several posts, was conducted for a *bona fide* reason and its proposals were endorsed by the General Assembly; b) the decision to conduct the comparative review by comparing staff with the same functions was properly within the discretion of the Administration and the fact that Ms. Afeworki was not part of the review process was not due to any discrimination but because all the posts at the FS-4 level in the Travel Unit, including Ms. Afeworki's, were abolished; c) all staff affected by the retrenchment exercise had been similarly treated with regard to notifications and opportunities for alternative opportunities; and d) the Secretary-General provided an adequate explanation to rebut any inference of discrimination or favouritism towards the four staff members who were reassigned, and Ms. Afeworki failed to produce any evidence in support of her allegations of discrimination.

7. On 27 August 2018, Ms. Afeworki filed her appeal. On 24 January 2019, she filed a motion requesting that the Appeals Tribunal order the Secretary-General to produce the spreadsheet which identified all staff members who were affected by the restructuring of the RSCE, which was circulated to the Chiefs of Human Resources of all missions (hereafter, the Spreadsheet). By Order No. 340 (2019) dated 4 February 2019, the Appeals Tribunal dismissed the motion.

Submissions

Ms. Afeworki's Appeal

8. Ms. Afeworki submits that the UNDT erred on a question of fact, resulting in a manifestly unreasonable decision. Specifically, while paragraph 20 of the Judgment implies that the four staff members performing the same functions as Ms. Afeworki at the FS-4 level were reassigned following the review process sometime after 25 June 2015, Mr. BK, one of the four affected staff members, was reassigned on 28 May 2015, even before the other two FS-4 staff members on continuing appointments were reassigned. Moreover, while paragraph 31(d) of the Judgment states that Ms. Afeworki failed to produce any evidence in support of the allegations of discrimination in respect of the non-reassignment, she did present evidence in her UNDT submission in which she pointed out how favouritism and ethnicity had influenced the reassignment process. On the other hand, the Administration failed to rebut Ms. Afeworki's assertion of bias and favouritism as it did not produce the Spreadsheet identifying all staff members who were affected by the restructuring of the RSCE or justify how any peacekeeping missions could have selected affected staff members on merit, based solely on the information contained in the Spreadsheet.

9. By giving the peacekeeping missions the discretion to "pick and choose" affected staff members from the Spreadsheet, the Administration allowed for bias, discrimination and favouritism to influence staff selection decisions during the reassignment process. Even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members. Nonetheless, such "fair, just and transparent" treatment was not afforded to Ms. Afeworki. In fact, she was discriminated against when staff members with less seniority were reassigned to other missions while her contract was not extended beyond 30 June 2015. Moreover, besides having served longer in the Organization than the other four affected staff members, Ms. Afeworki is a woman from a least developed country; thus, she was probably more deserving of the reassignment, in view of the Organization's policy to have more female staff on board.

10. Ms. Afeworki asserts that the UNDT erred in law in finding that her exclusion from the comparative review process was not due to any discrimination or desire to subject her to less favourable treatment. In addition to the RSCE staffing review that was conducted between March and April 2015, following which it was determined that the five affected staff members

would not be comparatively reviewed since all FS-4 travel posts were to be abolished effective 1 July 2015, the Administration ought to have conducted a comparative review based on “relative competence, integrity and length of service” when reassigning the affected staff at RSCE, pursuant to Staff Rule 9.6(e), which clearly states that such comparative ranking needs to be done “in all cases”.

11. Ms. Afeworki requests that the Appeals Tribunal a) order the Secretary-General to produce the Spreadsheet that was circulated to the peacekeeping missions; and b) rescind the decision not to extend her contract beyond 30 June 2015.

The Secretary-General’s Answer

12. The Secretary-General submits that the UNDT correctly concluded that the decision not to renew Ms. Afeworki’s fixed-term contract was lawful and that the restructuring of the RSCE was a proper exercise of his discretion. The Appeals Tribunal has consistently held that the Administration has broad discretion to reorganize its operations and departments in order to meet changing needs and economic realities. The Appeals Tribunal has affirmed that it will not interfere with a genuine organizational restructuring exercise even though it may have resulted in the loss of employment of staff. However, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members.

13. The restructuring of the RSCE was justified and based on the approval of the General Assembly. The evidence shows that after a review of the RSCE civilian staffing, the proposed restructuring of the RSCE for the 2015/2016 budget period entailed a reduction of personnel in the FS category. The RSCE staff members were informed of the retrenchment exercise in which 75 FS positions would be converted to national posts and the methodology of the comparative review process. The procedures for the retrenchment were followed and the comparative review exercise was conducted in a fair and transparent manner.

14. Ms. Afeworki has failed to provide any evidence of discrimination, favouritism or bias against her. A review of the RSCE staff confirmed that no FS-4 travel posts were to be retained. The five affected staff members in the Travel Unit at the FS-4 level, including Ms. Afeworki, were included in the Spreadsheet which was sent out to all the missions. While the other four staff members affected by the retrenchment exercise were reassigned to other missions, Ms. Afeworki

was not offered a position by any of the missions, and she was subsequently separated from service upon the expiry of her fixed-term appointment on 30 June 2015.

15. The Secretary-General further submits that Ms. Afeworki has not established any errors warranting a reversal of the Judgment. With regard to paragraph 20 of the Judgment, Ms. Afeworki has simply stated that other staff of the Travel Unit had been reassigned before June 2015, without providing any arguments explaining what the UNDT's alleged error was and how it affected the outcome of the case. As for paragraph 31(d) of the Judgment, Ms. Afeworki merely refers to her submission before the UNDT, without showing how the UNDT erred in finding that she had not shown improper motives in the non-renewal of her fixed-term appointment. In fact, Ms. Afeworki has failed to discharge the onus of proving improper motive.

16. Moreover, Ms. Afeworki fails to show any specific error in the UNDT's finding and conclusion that the restructuring exercise of the RSCE was done appropriately and in accordance with Staff Rule 9.6(e). The manner in which the comparative review process was conducted is irrelevant, since Ms. Afeworki's non-renewal did not result from the comparative review process but the fact that no FS-4 posts in the Travel Unit had been retained. As there was no comparative review exercise relating to her post, the question of seniority based on length of service was, therefore, not relevant.

17. Finally, Ms. Afeworki's request for additional evidence should be rejected. Ms. Afeworki requests an order directing the Secretary-General to produce the Spreadsheet. Article 2(5) of the Appeals Tribunal Statute (Statute), however, provides that the Appeals Tribunal will not receive evidence that was known to either party and should have been presented at the level of the UNDT. Accordingly, the Appeals Tribunal has repeatedly held that additional evidence may not be accepted on appeal if it could have been presented before the UNDT. The Spreadsheet was discussed before the UNDT by both the Secretary-General and Ms. Afeworki in their respective submissions. The existence of the Spreadsheet was, therefore, well known to Ms. Afeworki when she presented her case before the UNDT. At no point did Ms. Afeworki request the production of the Spreadsheet before the UNDT.

18. The Secretary-General requests that the Appeals Tribunal dismiss the appeal in its entirety and affirm the Judgment. The Secretary-General further requests that Ms. Afeworki's request for additional evidence be denied.

Considerations

19. As a preliminary matter, the Appeals Tribunal notes that there is no need to further address Ms. Afeworki's request for production of evidence which has already been disposed of by Order No. 340 (2019).

20. Ms. Afeworki asserts that the UNDT erred in law in holding that the fact that she was not part of the comparative review process was not due to any discrimination or desire to subject her to less favourable treatment. It is the settled jurisprudence of the Appeals Tribunal that the Administration has broad discretion to reorganize its operations and departments to adapt to economic vagaries and challenges. In so doing, the Administration has a duty to act fairly, justly and transparently throughout the restructuring process.²

21. In this case, the restructuring of the RSCE was endorsed by the General Assembly. A review of the RSCE civilian staffing resulted in the abolition of all five FS-4 level posts in the Travel Unit. The Spreadsheet, identifying all staff members who were affected by the restructuring, was circulated to the Chiefs of Human Resources of all peacekeeping missions. Four of the five affected staff members in the Travel Unit were reassigned to other missions, but Ms. Afeworki was not offered a position by any of the missions.

22. It is not contested that Ms. Afeworki was included in the Spreadsheet (although it is unclear as to exactly what information the Spreadsheet contained). Ms. Afeworki contends that one of the peacekeeping missions chose a staff member who "comes from the same part of the world" as the director of mission support. Nonetheless, Ms. Afeworki has not produced sufficient evidence to support her allegation of bias, discrimination and/or improper motives.

23. As for the claim that the UNDT erred in law in concluding that the restructuring exercise was done in accordance with Staff Rule 9.6(e), it is important to note that a comparative review process is carried out where the existing number of staff members performing the same function at the same level exceeds the number of authorized posts for those specific functions in the proposed or approved budget. In the present case, all FS-4 level posts in the Travel Unit were to be abolished effective 1 July 2015. Accordingly, Ms. Afeworki did not fall within the scope of the comparative review process.

² *De Aguirre v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-705; *Matadi et al. v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-592.

24. The Appeals Tribunal has examined all of the grounds raised in this appeal and finds that there is no evidence that the Administration did not act fairly, justly, and transparently throughout the restructuring process. We further find that Ms. Afeworki has failed to establish any error in law or fact to support her case for a reversal of the UNDT Judgment. As a consequence, the appeal is dismissed and the UNDT Judgment is affirmed.

Judgment

25. The appeal is dismissed and Judgment No. UNDT/2018/O68 is hereby affirmed.

Original and Authoritative Version: English

Dated this 29th day of March 2019 in New York, United States.

(Signed)

Judge Thomas-Felix,
Presiding

(Signed)

Judge Raikos

(Signed)

Judge Knierim

Entered in the Register on this 29th day of May 2019 in New York, United States.

(Signed)

Weicheng Lin, Registrar