UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2009/016/ JAB/2008/018
Judgment No.: UNDT/2010/004
Date: 13 January 2010
Original: English

Before: Judge Adams

Registry: New York

Registrar: Hafida Lahiouel

DUMORNAY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON ABOLISHED POST

Counsel for applicant:
Jofred Grinblat, OSLA

Counsel for respondent:
Jorge Ballestero, UNICEF

Introduction

1. The applicant contests a decision to separate her from service upon abolition of her post. She claims that the respondent created another post with a different job title which was essentially the same as her post in order to employ another staff member on a fixed-term appointment whom the Administration wished to retain. She further claims that the respondent then abolished the applicant's post as a means by which to unfairly separate her from the Organization. The respondent initially contended, when the matter was pending before the Joint Appeals Board, that the application was time-barred. However, this matter was not indicated as an issue at the directions hearing, was not mentioned in subsequent written submissions and was not raised at the hearing. I infer that it is not pressed and, consequently, do not deal with it. Substantively, the respondent contends that the new post was significantly different from that of the applicant and that the respondent fully met its obligations to her as a permanent staff member on an abolished post.

2. For completeness, I note that the applicant was separated from service with full termination indemnity of one year's salary in the amount of approximately $80,000 as of 1 June 2008.

3. On 1 July 2009, the matter was transferred to the United Nations Dispute Tribunal. On 6 August 2009, both parties agreed at a directions hearing that the matter was ready for trial. On 13 August 2009, both parties jointly moved that the matter be decided on the submitted written submissions without further hearing, on grounds that it was agreed that no further documents or witness testimony were required and written summaries of argument would be produced to the Tribunal.

4. The principle of open justice is a fundamental element of the Tribunal's exercise of its jurisdiction. The General Assembly has given the Tribunal the attributes of a court and it seems to me, with this, the expectation that its proceedings will be open to the public unless there is good reason otherwise. In this context, the

rule that justice must not only be done, it must be seen to be done, is particularly apt. Although a great deal can be done on documents without undermining this principle, at some stage or other of the proceedings there should be a public hearing at least sufficient to demonstrate the workings of the Tribunal and the way in which the issues in any particular case are being approached (and see art 16.6 of the Rules of Procedure of the Dispute Tribunal). Applying this principle to this case, I decided that there should be a public hearing on the merits and, accordingly, the parties attended the Tribunal to make submissions on 27 August 2009.

Facts

5. The applicant joined the Organization in 1986 as a Bilingual Secretary at the G-3 level on a short-term appointment. On 19 December 1986, she was promoted to Senior Secretary (G-4) and in 1989, her appointment was converted to permanent. In 1990, she was promoted to Principal Secretary (G-5).

6. Pursuant to an agreement between the applicant, her Director and a Human Resources Officer, in March 1997, the applicant changed reporting lines to report to the Deputy Director, as she had done in her previous role as Senior Secretary.

7. On 15 August 2007, the applicant was informed that her post (ie, the post she was currently occupying) was to be abolished. On 15 November 2007, the applicant responded that the post to be abolished was not her permanent post but the one she only encumbered temporarily and requested his assistance in returning to her post.

8. The applicant was informed by a letter from human resources dated 10 December 2007 of separation procedures and entitlements which would be effective upon abolition of her post on 29 February 2008. On 11 January 2008, the applicant filed a request for review and a request for a suspension of action on the decision to terminate her permanent appointment. By letter dated 29 February 2008, the Secretary-General extended the applicant's permanent appointment for three months to allow the Administration to further pursue its efforts to find the applicant a suitable

post. Following the abolition of the post, the applicant worked as Executive Assistant on a short-term contract from 1 March to 31 May 2009 in the Office of Communication for Development at the United Nations Children's Fund (UNICEF).

Issues

9. The main issues can be summarised as follows:

a. the nature of the arrangement, ie, whether the applicant has a right to return her original position;

b. whether the abolition was *bona fide*; and

c. whether the respondent met its obligations to the applicant as a permanent staff member on an abolished post, including making a good faith effort to find the applicant another post.

Legal instruments

10. Former staff rule 109.1(c)(i) provides:

> Except as otherwise expressly provided in subparagraph (ii) b below, if the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments . . . provided that due regard shall be had in all cases to relative competence, to integrity and to length of service. . .

11. UNICEF's policy entitled "Staff on Abolished Posts" (CF/AI/2007-007 of 27 June 2007) provides as follows:

> **During the Notice Period**
>
> **Actions by the Staff Member**
>
> 2.8 Staff members whose posts have been or will be abolished are expected to apply to all available UNICEF posts for which they believe they have the required competencies.

Actions by the Organization

2.9 UNICEF (HR contact) may take the following steps:

a) assist staff in identifying and applying for suitable available posts;

b) add the staff member's name to a list of applicants or to a shortlist for an available post even if the staff member did not submit an application for the post.

. . .

Special Measures for Staff Holding Permanent Appointments

2.14 In the event that two or more UNICEF staff members on abolished posts applied to or were included in the list/shortlist for the same post and one of them holds a permanent appointment, the UNICEF staff member holding the permanent appointment shall be given preference if his/her qualifications are better than or equal to those of the other staff member.

12. Chapter 16, sec 1, para 16.3.1 of the UNICEF Human Resources Manual on Policy and Procedure states:

> Staff who decide to formally appeal an administrative decision must, as a first stage in the appeal process, submit a Request for Administrative Review to the Executive Director in accordance with the provisions of UN Staff Rule 111.2.

Applicant's submissions

13. In her statement of appeal of 20 March 2008, the applicant's main arguments were: the post that was eliminated was not hers; the abolition of the post was a subterfuge for separating the applicant and replacing her with another staff member; and the respondent did not make a good faith effort to find the applicant another post.

14. Counsel for the applicant argued that the post which was abolished was not the applicant's. Counsel pointed to the lack of documentary evidence from the respondent that the applicant had been transferred from her post of Principal Secretary (secretary to the Director) to that of Senior Secretary (secretary to the

Deputy Director) and the failure of the respondent to provide the alleged correspondence dating back to 1998 to which the Officer-in-Charge referred in his letter of 27 November 2008.

15. The applicant submitted that since the job descriptions of both posts were virtually identical, it should be inferred that the abolition was a subterfuge for removing the applicant from her permanent position and moving another candidate on a fixed-term contract into the applicant's role. The applicant referred to UN Administrative Tribunal Judgment No. 879 *Karmel*, in which the respondent had abolished a post and created a new post with nearly identical functions, and the Administrative Tribunal had ordered that the applicant be placed in a permanent post equivalent to the one she encumbered before the artificial elimination of her own post.

16. The respondent did not make a good faith effort to find the applicant another post, as required under para 2.14 of CF/AI/2007-007, which required that the applicant should have been afforded priority over candidates who were non-permanent staff. As evidence of not being afforded such a priority, the applicant listed all the posts for which she unsuccessfully applied.

Respondent's submissions

17. The abolished post was that encumbered by the applicant. The overview of the Personnel Actions taken concerning the applicant proves that she has been against that specific since 1990 and prior to that there was a different numbering system in place. The post did not change, rather the reporting lines did and this was a managerial discretion agreed between all parties, including the applicant, and confirmed by a letter from the Human Resources Officer of 1999 (reproduced below). This being so, the applicant is estopped from withdrawing her consent: ILOAT Judgment No. 193. Further, the time lapse of some eleven years between the original change in reporting line and the applicant's complaint required the inference that the change was permanent and the applicant had waived any rights to claim otherwise.

18. As to whether the abolition was a subterfuge, the new post was distinctly different from that encumbered by the applicant and was created to meet specific needs of the office as decided by the Director. The differences are demonstrated by a comparison of the old and new job descriptions.

19. The panel found that the applicant lacked the basic competencies required for the new post.

20. All rules, regulations and policy applying to the obligations to permanent staff whose posts are abolished were complied with. The applicant was even given six rather than three months' notice as required under staff rule 109.3(a). Moreover, the applicant did not apply to all available vacancies during her notice period, as expected of her under para 2.8 of UNICEF's policy. The applicant was placed against all vacancies for which she met the minimum requirements and was short-listed for twenty-nine posts by the Division of Human Resources. However, better qualified candidates were selected. Over the last twenty years, the applicant did not sufficiently develop her qualifications as a secretary to meet current work requirements.

The applicant's right to return to her original position

21. There is a lack of documentary evidence that sheds light on the type of agreement which was reached with regard to the applicant taking up the position in 1997, although there appears to be no dispute that some kind of arrangement was made in which the applicant's role in the department was changed and that this arrangement was in place for some ten years. The maintenance of records of decisions affecting a staff member, such as in this case, is primarily the obligation of management although the staff member ought also to keep documents that affect him or her. In certain cases, the failure to keep and, hence, to produce relevant records will justify drawing inferences adverse to the Administration where the evidence in support of an applicant's case suggests he or she should succeed but is insufficient, of itself, to constitute a preponderance of evidence. In effect, the applicant submits that

the Tribunal should apply this rule in this case. However, it seems to me that, as the following shows, the evidence is sufficiently clear to make this course inappropriate.

22. Although it may well be that the applicant believed the agreement was temporary in nature, in the sense that the previous situation could be restored if she wished, the question is whether there is evidence that supports the correctness of such a belief. The applicant relies on a letter of 26 February 1999 written by her to the then Deputy Director of the Division of Human Resources, which states—

> I currently hold the title of Principal Secretary in the Programme Funding Office. From January 1997, after a number of discussions between [the then Director, the Human Resources Officer] and myself, a verbal decision was taken in March 1997 that I would temporarily report to the Deputy Director, PFO. Now that [the Director] is retiring on 30 April 1999. I am requesting that as of May 1999, I return to my legitimate position as Principal Secretary, reporting directly to the Director.

On 12 April 1999, the Human Resources Officer replied to this request as follows—

> As you know, your present assignment was an internal agreement which was discussed and agreed upon by all parties concerned in March 1997. We have no objection to your returning to your original position, provided it is once again agreeable to all staff concerned…

The applicant's request was refused by the incoming Director on 29 April 1999—

> I write in response to the letter copied to me from [another named person]…regarding your request to DHR to resume the position of Secretary to the Director of Program Funding Office.
>
> As you are aware, I shall be assuming the responsibilities of Director of the Program Funding Office in July and will have to depend on very effective secretarial support from the very beginning, given the multitude of challenges facing PFO in our mission to reach our resource mobilization goals. I do not believe it is in the interest of the office to change the current secretarial arrangements, given that you have not been directly supporting the Director for sometime. In the interest of continuity and effectiveness, I will have to account on the support of [another named person] as I assume my responsibilities.

> I hope you will have some sympathetic understanding for this decision and I trust I can count on you to provide the best possible support to the Deputy Director in carrying out her responsibilities.

23. Although the applicant's letter was written some two years after the event, it provides some evidence that it was agreed that the change of reporting line was to be temporary. However, even if this arrangement was to be "temporary", the response to the applicant's letter made it clear that any return to the former arrangement required the agreement of all affected parties and could not be done simply at the behest of the applicant. In light of the terms of this letter, it is scarcely surprising that the reply of the incoming Director is cast as a refusal to agree to the returns sought by the applicant. The mere fact that there was no direct contradiction of the applicant's claim that the changed arrangement was temporary does not imply an acceptance of this description. The correct inference to draw from this correspondence is that, if the position were temporary this was only in the sense that it could be changed by agreement of all the relevant parties. By parity of reasoning, it could correctly be stated that the arrangement was permanent until it was changed by such agreement. Indeed, it seems to me, that this is the more appropriate description, especially because the applicant's return to her former role would require displacement of the person then performing that function and it was clearly envisaged that this person could not be removed by such rearrangement without her consent. The applicant did not respond to either of the letters dealing with her request and it should be inferred that this was because she accepted they correctly stated the situation.

24. The evidence discloses that the applicant did not again raise the matter until being informed on 15 August 2007 that the position of Secretary to the Deputy Director was to be abolished. The applicant claimed that she only "temporarily" encumbered that post and that her permanent post was Principal Secretary (Executive Assistant) to the Director, despite her absence from that post for well over ten years. Management was entitled to act on the basis that she accepted the position as permanent rather than temporary.

25. Accordingly, the arrangement was permanent either in the sense that it required the agreement of all relevant parties for the applicant to resume her earlier position or in the sense that she acquiesced in the implicit assertion of management that she did not have the option to return at her behest alone. It follows that the applicant was, in the relevant sense, the occupant of the post that was to be abolished.

Was the abolition of the post *bona fide*?

26. Following an Organizational Review exercise and budget review, two GS-5 posts in the same section, including the post then encumbered by the applicant, were abolished. The Deputy Director had no use for secretarial support, as he administered his correspondence himself. The "new" post was, according to the respondent, created to support a newly created "Strategic Unit" in the division, of which the most significant change was that it was intended to support multiple staff rather than provide a secretary to a senior manager. The new post reported to a Senior Adviser whose line manager was the Deputy Director. Thus, whilst both posts were similar, the old post emphasized the need for significant secretarial experience, whilst the new post emphasized working experience in the administrative field. I have carefully examined the descriptions of both the old and new jobs and, considering them as a whole, am left with a strong overall impression that the applicant's old job involved considerably greater personal responsibility than the new job and that the context for the exercise and attributes of that responsibility are substantially different.

27. Both positions involve administrative tasks such as making travel arrangements, dealing with correspondence, contributing to daily office management, scheduling and arranging meetings, minute-taking and filing and external relations. However, the old job required the incumbent to organise travel for one director – one of nine listed administrative tasks to which altogether is attributed 30 per cent of the incumbent's time – whilst the new job required organising travel for nine staff – which, alone, attributed 20 per cent of the incumbent's time. This strikes me as a significant difference in responsibilities, not only in the quantity of travel-related

work but its complexity. As to IT skills required for the new job, one of the basic education requirements of the new job description is familiarity with Microsoft Office, Lotus Notes and two other electronic database software systems. This was not a specific requirement of the old job, although I do not doubt that the applicant has some familiarity with the first two programs. She did not claim familiarity with the other systems, which were concerned with budget and finance. Although the new job description does not dedicate any specific percentage of time to this duty, and hence it ought not to be regarded as a major attribute of the position, the fact that the old job did not specify any such requirement or make references to the additional software systems is not insignificant and does suggest a genuine, as distinct from artificial, change in job requirements. Whilst it is true that these detailed requirements do not themselves demonstrate markedly different job responsibilities, nevertheless, they do significantly support my overall impression of substantial difference. It is necessary, of course, to examine the detail of the job descriptions, but it is important in my view to consider these details as a whole. When this is done it appears to me that the two jobs are very different. I repeat that the job occupied by the applicant certainly seems to have carried the heavier responsibilities but the new job not only differed in degree; it differed also in substance and because of the way in which its particular attributes are described and the different structure of which it is a part.

28. Whether a new post is sufficiently different from another post in the same section as to require the abolition of one and the advertisement of the other is obviously a question of fact and degree, requiring the exercise of careful managerial judgment. The ways in which one post relates to the others with which it is connected are rarely simple and opinions about what adjustments are desirable when reorganization occurs can quite reasonably differ and suggest different reasonable outcomes. Having regard especially to the length of time for which the applicant had occupied her position, I do not think that the decision not to retrain her, but rather to enable her to compete with other candidates for the new post was unreasonable, although it may be that another manager might have made a different decision.

29. Overall, it seems to me that the preponderance of evidence favours the conclusion that the impugned changes were motivated by genuine organizational readjustments and were not influenced by any improper considerations.

Did the respondent meet its obligation to the applicant as a permanent staff member on an abolished post?

30. The documents which have been tendered as to the recruitment process for the new post show that the panel in question considered the applicant not to have equal qualifications to the individual who was successful. A memorandum of 9 December 2007 dealing with the recommendation for the position contains a detailed description of the skills and experience demonstrated by the applicant in the assessment process and entirely justifies, in my opinion, the conclusion of the panel that the recommended candidate was manifestly the best candidate out of the four who were shortlisted. On 11 December 2007, a Human Resources Officer raised the question why two out of the three candidates who were staff on abolished posts were not found suitable for the new position mentioning, in particular, the applicant and the Officer's understanding that the applicant was currently performing administrative assistant work of a type similar to that required by the post under recruitment. The Deputy Director's explanation, provided the following day, strikes me as comprehensive, fair and sufficient. It is unnecessarily invasive of the applicant's privacy to give further details.

31. Turning to former staff rule 109.1(c)(i) which refers to retention of permanent staff in preference to all other types of appointments, I note that there is a caveat that regard shall be given to "relative competence". Again, I am satisfied on the papers before me that the interview panels were fair in their assessment of the applicant and it appears clear that she did not have the required skills or competencies.

32. Finally, with regard to paras 2.9 and 2.14 of UNICEF's policy as referenced above, I am persuaded by the evidence rendered by the respondent that reasonable efforts were made on the part of the respondent to find the applicant another position.

I also note for completeness of the record that following the applicant's initial request for a suspension of action and the JAB's finding that the "UNICEF Administration had not shown good faith efforts to find you another post within UNICEF or elsewhere", the administration agreed, by letter dated 29 February 2008, to suspend the decision to terminate the applicant's permanent appointment for three months to allow UNICEF to further pursue good faith efforts to find the applicant a suitable post.

33. I have considered the vacancies for which the applicant was a candidate. The respondent provided a list of twenty-nine positions for which the applicant was short-listed, which included a number of posts for which the Applicant did not even apply to but for which she was short-listed nonetheless. This list comprised seventeen Administrative Assistant positions, three Human Resources Assistant positions, seven Executive Assistant positions, one Editorial Assistant position and one Programme Assistant position. The lack of success of the applicant in obtaining a position despite her positive performance appraisals is not evidence that the Organization did not fulfill its obligations to her, it is merely consistent with such a failure. Even if it gives rise to the suspicion, it does not provide significant evidence that the Organization did not fulfill its obligations. On the other side there was a multiplicity of selection panels responsible for weighing the applicant's suitability against the other candidates and were obliged to take her situation into account. As far as the evidence goes, it appears this was appropriately done. Counsel for the applicant went as far as to say that there was bad faith on the part of the Administration. However, the evidence taken as a whole does not justify this submission.

34. While it is clearly unfortunate for a staff member who has served the Organization for so many years to find herself in a position where her post is abolished and she is not successful in finding another post, there is insufficient evidence to support her claims.

Conclusion

35. The application is dismissed.

(*Signed*)

Judge Michael Adams

Dated this 13th day of January 2010

Entered in the Register on this 13th day of January 2010

(*Signed*)

Hafida Lahiouel, Registrar, New York