



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HASHIM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON LIABILITY AND
RELIEF**

Counsel for the Applicant:

Ochieng Ogutu

Counsel for the Respondent:

Robert Nadelson, UNDP

Thomas Jacob, UNDP

Introduction

1. The Applicant challenges the decision dated 19 August 2014 not to renew her fixed-term appointment (“FTA”) with UNDP Sudan.

Procedural history

2. The Applicant filed an Application with the United Nations Dispute Tribunal (“UNDT”) in Nairobi on 24 June 2015. The Respondent filed his Reply on 30 July 2015.

3. Pursuant to Order Nos. 352 (NBI/2016) and 366 (NBI/2016), the parties submitted a joint statement of agreed facts on 30 November 2015 but, as they were not able to agree on the issues, they presented them separately in their joint submission.

4. At a case management discussion (“CMD”) held on 6 April 2016, the Tribunal clarified with Counsel the disputed facts in the case and set the matter down for an oral hearing¹.

5. By Order No. 205 (NBI/2016), the Tribunal allowed the parties to submit additional evidence.

6. The Tribunal conducted an oral hearing from 3–5 May 2016.

7. On 9 May 2016, the Applicant filed a motion to admit additional evidence.

Applicant’s motion to admit additional evidence

8. On 9 May 2016, the Applicant filed a motion seeking leave to admit additional evidence “about the UNDP Sudan Structural Review that was communicated for the first time to UNDP staff on April 25, 2016 and May 3, 2016”. She submitted that she had: “just received this information and it is crucial pieces of evidence that will enable the Honourable Tribunal arrive at a just and fair determination of this matter” and that the three official email communications

¹ Order No. 187 (NBI/2016).

from UNDP Senior management “show the invitation to staff members to participate in an office wide staff meeting about the restructuring process, its proceedings, suggested new organigrams, and decisions made”.

9. After reviewing the additional documents submitted by the Applicant, the Tribunal, in accordance with arts. 18.1 and 18.5 of its Rules of Procedure, has concluded that these documents are not relevant to the case at hand because they relate to events that occurred after the Applicant’s separation. Accordingly, the Applicant’s motion is rejected.

Facts

10. The following facts are taken from the pleadings and the detailed joint statement of facts submitted by the parties. Oral evidence was given at the hearing by the Applicant, Ms. Mariam Kirollous, the former Vice Chairman of the United Nations Development Programme (“UNDP”) Staff Association, and Christopher Opar, formerly Head of Finance UNDP Sudan. The Respondent called Mr. Jorg Kuhnel, the former Team leader, Oversight and Support Division (“OSD”) at UNDP Sudan.

11. Following a successful career with the World Bank, on 11 November 2012 the Applicant joined UNDP Sudan as a Communications Specialist (Head of Communications) on a one-year FTA, at the NOC level. She was stationed at Khartoum. The vacancy announcement for the post stated that.

Under the direct supervision of the Country Director and in consultation with the Regional Information and Communications Office, the Communications Specialist develops and leads the implementation of a strategic communications plan for UNDP Sudan . . . and advises senior management on all aspects of communications work.

The Communications Specialist supervises and leads the communications staff of the country office and the Field Offices. The Communications Specialist also works in close collaboration with the Programme and Operations teams in the country office.

12. In that post, the Applicant was part of the Partnerships, Communications, and Strategic Advisory Unit (“PCSAU”). She was supervised by a Partnership

Specialist until January 2013 at which time she assumed the functions of the PCSAU Supervisor without any change to her Terms of Reference (“TOR”).

13. Mr. Kuhnel was part of a Management Consulting Team engaged in October and November 2012 to develop the overall rationale, functional structure and terms of reference for a new division of UNDP Sudan Office. In January 2013, following an in-depth review of the Sudan Country Office, an Oversight Support Division (OSD) was created to realign and streamline the office structure and existing capacities in Khartoum and the field locations. Mr. Kuhnel became the Team Leader of that division.

14. On 7 February 2013, Mr. Kuhnel shared the TORs for the new OSD which was to comprise four teams. One of these was the Partnership and Communications Team (“PACOM”) which was proposed to supersede PCSAU. He requested comments by close of business on 10 February 2013.

15. In early March 2013, the organogram for the PACOM team was approved and shared. It included a new P-4 post of External Relationship Specialist (“PACOM Team Coordinator”) to have oversight and coordination responsibilities for the Communications, Partnership and Translation teams.

16. According to the organogram, the Applicant’s post continued as before that is as Communications Specialist - NOC supervising three team members: a communications analyst at the NOB level, a communications Associate, GS-7 and a website associate GS-7. In response to a request from the Applicant, Mr. Kuhnel sent the organogram to her on 1 July.

17. The Vacancy Announcement for the PACOM Team Coordinator was advertised in early August 2013. It stated that the “External Relationship Specialist coordinates and supervises the OSD Partnership and Communication team (PACOM), . . .in close cooperation with other Oversight and Support Division staff, the Programme division and the Operations division”.

18. The Applicant, who at that time was acting as interim team leader of PACOM, told the Tribunal that she noticed enormous similarities and duplications

between her TOR and the TOR of the newly advertised job. She said that she realized that OSD was part of a new structure and understood that this was pursuant to an institutional policy. However she had concerns about the proposed PACOM structure. On 15 August 2013, she wrote to the Resident Representative, UNDP Sudan:

I have serious concerns that embedding the COMM Unit within PACOM will jeopardize my ability to lead, plan and deliver as it clearly states that the PACOM Coordinator “will manage, supervise, coach, and guide the COMM Unit work and its staff members”. Additionally, the PACOM Coordinator tasks clearly duplicate my current responsibilities and the position even requires a Master’s Degree in Communications and Media rather than a more relevant academic degree in International Development. I do believe that the new structure will complicate things rather than to ensure a smooth flow of work evident by the overlapping responsibilities and additional management and reporting layers.

As someone who received repeated positive performance feedback from my current supervisor, [Jorg Kuhnel], I fail to understand the need to slice my job responsibilities rather than streamline efforts to create efficiency across the organization.

19. The Resident Representative referred this letter to Mr. Kuhnel who told the Tribunal that he met with the Applicant to discuss these matters and explained to her that this was not a question of overlapping responsibilities but the transfer to the new post of overall supervisory functions. He confirmed to her that under the new OSD structure the Applicant would continue to manage the communications functions and team members with an overall oversight by the PACOM Team Coordinator and that her position would not be affected.

20. In August 2013, UNDP HQ requested that UNDP Sudan align its Country Office with the 2014- 2017 UNDP Strategic Plan, and develop a financial sustainability and effectiveness plan to achieve this. As a result, UNDP Sudan decided to structure the process in two phases. Phase I consisted of adjustments made to cut overall staff costs to be completed by January 2014.

21. On 11 November 2013, Mr. Kuhnel extended the Applicant’s FTA until 10 November 2014.

22. Mr. Kuhnel told the Tribunal that in January 2014, driven by the Financial Sustainability and Effectiveness plan and the sharp decrease in available funding, the three divisions of UNDP Sudan: OSD, Programmes, and Operations, were asked to assess and review their structures in light of the business needs for the next two years. Over the next six months the Senior Management Team (SMT) conducted an analysis and functional review of OSD's teams, the required changes and the implementation of those changes. This was referred to as the realignment or the restructuring.

23. During this time UNDP Sudan held several meeting and workshops with staff from each of the divisions, including the Applicant, to discuss the realignment process.

24. The result of the realignment was that within OSD a total of 13 posts were to be abolished. Three were moved to other divisions and four had a functional change. Within PACOM two out of eight posts were abolished and a more junior NOA post was created.

25. Phase 2 of the restructuring process started in March 2014. It consisted of four consecutive steps to be completed by December 2014: (i) Refocusing and Repositioning of the Programme (March 2014); (ii) Finalisation of the CO programme portfolio (April — May 2014); (iii) Determination of required structural and process changes (June — July 2014); and (iv) Implementation of changes to staffing as well as processes to be done from August to December 2014. The Senior Management Team (“SMT”) decided that it was preferable for most staffing changes to be made through attrition and where required non-renewal and only lastly by early ending of contracts.

26. In her performance appraisal for the year 2013 dated 12 March 2014; Mr. Kuhnel gave the Applicant a rating of “Good”. He stated:

She has shown dedication and enthusiasm to overcome challenges, and has invested her knowledge and capacities into achieving results, often beyond working hours. Looking forward, it will be important to refine her ability to mentor and guide her team. It will also be important to focus more on the engagement with programme units. Overall, [she] has shown a good performance in

2013, with tangible opportunities to achieve all her objectives in 2014.

27. On 16 March 2014, the Country Director, UNDP Sudan, sent an email to the team leaders in UNDP Sudan which stated:

Please find attached the refocusing plan [dated 2 February 2014] for your information and team discussions . . . in which we will look at linkages, reduction of projects merged into and/or replaced by larger and fewer programs. . . Once we have a clear picture of the direction we're heading in, we will have a careful look at office capacities and how they should be aligned to deliver results under the outcome.

28. On 16 April 2014, the appointment of the PACOM Team Coordinator was finalised. The Applicant met with Mr. Kuhnel on 17 April 2014 to discuss the distribution of roles and responsibilities between herself and the PACOM Team Coordinator.

29. The Applicant told the Tribunal that at that meeting Mr. Kuhnel said to her, “It isn’t working, I will change your job title to Senior Communications Officer instead of Head of Communications, and I will change your TOR and the PACOM organogram accordingly”. She also said that when she asked Mr. Kuhnel to clarify his statement, he gave her two options regarding her future career with UNDP. She was either to accept a downgrading of her title from Head of Communications to Senior Communications Officer and surrender all her managerial functions to the PACOM Team Coordinator, or if she declined this proposal, “and out of fairness” “there [would be a] possibility that [her] contract will not be extended” beyond its expiry date in November 2014.

30. Mr. Kuhnel denied that he said any of this or gave her the options as she alleged. He said that at that meeting with the Applicant he discussed her concerns about internal management, responsibilities and hierarchy as a result of the PACOM Team Coordinator taking up the new post. He said that he did not and could not change the Applicant’s grade or title and that he assured her they would attempt to fully address her concerns regarding the delineation of her responsibilities with that of the PACOM Team Coordinator including by ensuring

that specific communication projects and the staff related to these projects would continue to be supervised by the Applicant.

31. On 1 May 2014, the first issue of the UNDP Sudan Digest informed both UNDP staff and its external partners of the status of the UNDP Country Programme Refocusing and Alignment process. On 20 and 21 May the UNDP Administrator published updates on the structural review of UNDP based on the UNDP Strategic Plan and referred to “reorganizing functions and sharing new organograms for each bureau which were the first step of the realignment process”.

32. The Applicant continued to be concerned about the effects of the arrival of the PACOM Team Coordinator, in particular that she had been excluded from management meetings that she had formerly attended and sent an email to Mr. Kuhnel to that effect on 19 May 2015.

33. Mr. Kuhnel replied to the Applicant on 20 May 2015 agreeing for her to take part in work plan discussions relating to the PACOM team. He said that she was also most welcome to join the OSD weekly coordination meeting. He added that he was “very supportive of her engaging in strategic OSD issues as she had in the past”. He noted that the PACOM team is one team managed by the PACOM Team Coordinator. One of PACOM’s functions was to bring the partnership and communications functions together. He said he needed to be able to discuss issues related to PACOM with the PACOM Team Coordinator that are not specific to communications and trusted that the PACOM Team Coordinator would internally communicate and discuss further as required. He agreed that as much as possible the Applicant should be part of these discussions.

34. On 25 May 2014, the Applicant responded to Mr. Kuhnel stating:

I cannot agree with you anymore that PACOM is one team coordinated by ... the Team Leader and I have collaborated with her under this capacity since she joined the Team. It should be noted, however, this doesn't eliminate my role as Head of the Communications Team, as per my TOR. If you recall our recent discussion in which you indicated your intention to abolish my current title and change it to Senior Communications Officer, for

which I still need further clarifications.

Still, I am happy to work in collaboration with the [External Relationship Specialist] as PACOM Team Leader [...] I reiterate my request to you as OSD team leader to define clear roles and responsibilities for both of us.

35. That same day, Mr. Kuhnel responded that he was looking forward to her pro-active participation in the weekly OSD coordination meetings and noted her willingness to fully collaborate with the PACOM Team Coordinator. He said there would be no change to her title and they should meet again next week, this time with the PACOM Team Coordinator to discuss roles and responsibilities”.

36. On 9 June 2014, an alignment workshop was held by UNDP Sudan. At that stage no final decisions had been made about a new structure.

37. On 3 August 2014, the review of the Functions, Structures and Capabilities of OSD was presented. It suggested structural changes to OSD. The review noted that the recruitment of the PACOM Team Coordinator had strengthened the PACOM team and its functions but created an additional layer of supervision making the NOC redundant. *Inter alia*, it proposed abolishment of the post of NOC Communication Specialist which had become redundant and the redefinition of the Webmaster position.

38. On 19 August 2014, Mr. Kuhnel met with the Applicant to inform her about the possible non-extension of her contract in November to give her three months to prepare for her next professional move. He explained that the decision was due to lack of funds for her position in addition to the ongoing programme alignment exercise that would lead to changes in OSD and Operations. He advised that the Country Office was under pressure to reduce staffing levels in light of the overall downward trend of programme resources and that a certain number of positions, including the Applicant’s, might be discontinued and/or redefined. The Applicant told him that she was not being treated fairly ... and “would therefore, upon official notification, take up and contest the decision”.

39. On 26 August 2014, the Country Director, UNDP Sudan, sent an email to follow-up on the realignment workshop. She advised that they would be

continuing the realignment exercise and building on the results of the last workshop. The Applicant contends that this was the last email received from UNDP Senior Management with regards to the realignment process.

40. On 26 August 2014, the Applicant made an official complaint with the UNDP Resident Representative against Mr. Kuhnel claiming: (i) Abuse of Authority/Harassment and Discrimination; (ii) Blackmailing; and (iii) Retaliation. She claimed that she had “a legitimate expectation for her contract to be extended based on her solid performance and substantial contribution”. The Resident Representative acknowledged receipt of the email and forwarded it to the Office of Audit and Investigations (“OAI”) for its consideration and advice.

41. On 23 September 2014, the Deputy Director, OAI, responded to the Applicant. He stated that “[a]fter a review into the allegations that you forwarded on 26 August and 18 September 2014, OAI has determined that an investigation is not warranted”. He noted that OAI had closed the case because the issues identified by the Applicant were of a general managerial nature and had been referred to the Country Office for appropriate action.

42. On 28 September 2014, the Applicant and Mr. Kuhnel were invited to meet separately with an independent panel (“Panel”) established to review the Applicant’s complaint.

43. On 29 September 2014, Mr. Kuhnel sent an email to the Country Director, the Deputy Country Director/Operations and the Deputy Country Director/Programme requesting comments on the draft OSD structural review.

44. The Panel sent its findings to the Resident Representative, UNDP Sudan on 29 September 2014. The review concluded that the Applicant’s complaints were “not admissible” as the discussions were more of a consultative nature on how to make the team more effective and introduce necessary changes in the roles and responsibilities. The Panel noted *inter alia* that the Applicant did not make sufficient efforts to fully comprehend the changes taking place and her working environment.

45. The Applicant said she was not given a copy of this decision and therefore did not have an opportunity to review or comment on its accuracy and findings. She only gained access to it as part of the current proceedings.

46. On 1 October 2014, two days after her meeting with the Panel, the Applicant received a letter from the Country Director, UNDP Sudan, that stated:

This is further to the discussions with you regarding the non-extension of your contract beyond 10 November 2014. In line with our discussions with you, we are obliged to inform you that your current contract will not be extended beyond its expiry date of 10 November 2014. Head of Human Resources will remain available to you for any discussions or clarifications that you may want to have.

Clause (c) of the Staff Rule 4.13 states that: “A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service”.

Although fixed-term contract holders are not entitled to a notice period, it is our usual practice to notify staff members of the non-extension of their contracts at least one month before the expiry date. I trust that this notice will allow you to plan accordingly for your transition. You are most welcome to contact the HR Unit to help you with any appropriate career opportunities. Should you plan, we would be glad to free you fully from the official responsibilities with immediate effect allowing you to look for alternative employment opportunities within UNDP/UN or outside. You may choose to work from home as well for the remaining days of your contract if it suits your job search efforts.

To facilitate your separation from UNDP services effective close of business on 10 November 2014 (COB), I would like to draw your attention to the attached important administrative procedures as well as the forms that should be completed prior to your departure. Kindly ensure that a hand over report is submitted to the Head of OSD with copy to the HR unit, and the attached documentation/information is given to the Human Resources Unit at your earliest convenience.

I would like to thank you for your dedication and services rendered to UNDP, Country Office in Sudan. I wish you every success in your future career.

47. The Applicant states that on the day she received her separation letter she met with the Country Director and asked to be informed of the reasons. She alleges that the Country Director said “with great anger” that the decision was made because the Applicant had filed a complaint against Mr. Kuhnel which will

affect his career and reputation. She allegedly added that the decision was based on the report of the Panel. The person who allegedly said this was not called to give evidence.

48. In his evidence to the Tribunal, Mr. Kuhnel denied that the reasons for the decision related to the complaint filed by the Applicant. The decision was determined by the SMT and was one of the results of the realignment process.

49. On 27 October 2014, the Applicant requested the Head of Human Resources, UNDP Sudan for “feedback with regard to the reasons of [her] separation from service”. The Head of Human Resources replied the following day that “the reason for the non-extension of your contract is the structural change in your Unit/Division. The post encumbered by you will be abolished upon your contract expiry”.

50. On 27 October 2014, the UNDP Sudan Staff Association held a meeting with UNDP Senior Management to discuss the reasons for the non-extension of the Applicant’s appointment. Ms. Kirollous, the Vice Chairman of the UNDP Staff Association who attended the meeting, told the Tribunal that senior management provided the following three reasons for the non-renewal: “Restructuring at the unit level (Job Redundancy); budgetary issues and lack of fund for the Applicant’s position; and Administrative reasons”. It was confirmed by Management that performance was not a reason and that “Management in different levels expressed their willingness to assist the Applicant in getting a new job, if need be”.

51. In his oral evidence Mr. Kuhnel said that the creation of OSD in 2013 served the purpose of strengthening services within UNDP Sudan. On the other hand the realignment process was the result of key budget and allocation cuts as well as a decrease in project portfolios. The financial challenges continue to date and have resulted in a freeze in recruitment and further abolition of posts.

52. In answer to the Applicant’s allegation that the retention of the Applicant’s post and the abolition of the International post of PACOM Team Coordinator would have resulted in budgetary cuts due to the wide difference in

their salaries, he said that the PACOM Team Coordinator's post was strategically necessary and that there was sufficient expertise in the remaining national staff members to perform the communications functions without the need for the post of Communications Specialist.

53. In her evidence to the Tribunal, the Applicant alleged that of all the staffing changes made at UNDP Sudan in 2014, she was the only one who lost her job. Other posts that were abolished were not encumbered; other staff members left voluntarily or on staff rotation; and some posts were downgraded.

54. Mr. Opar, the former Head of Finance at UNDP Sudan, gave evidence that after serving five years he opted to exit and left on friendly terms in June 2014. His post was downgraded after he left. He was aware of the CO financial sustainability and effectiveness plan but not of any restructuring on OSD. He had nothing to do with that division apart from conducting a blind audit of it.

55. With reference to organograms and staffing tables, Mr. Kuhnel's evidence was that when Part 4 of Phase 2 of the realignment plan was implemented between August and December 2014, a large number of posts, not limited to that of the Applicant, were abolished, transferred, or required functional changes, and a limited number of post were created. Eleven out of 13 of the posts recommended for abolishment in the realignment plan were abolished and that further cuts occurred in other divisions.

56. The Applicant also alleged that there was no evidence of a restructuring plan that preceded her separation and that the review of the OSD structure was not formally approved until January 2015.

57. Mr. Kuhnel explained that the review of OSD was dated 3 August 2014 and that the signing of this in January 2015 marked the finalization of its implementation.

58. The Applicant contends that Senior Management offered her another job alternative as a Senior Communications Officer with PACOM but she rejected it.

She was separated on 10 November 2014. On 1 December 2014, she filed a request for management evaluation of the contested decision.

Issues

59. The Tribunal determined that the issues in this case are²:
- a. Did the administration follow the correct procedure during the restructuring/realignment of OSD?
 - b. Did the Administration follow proper and fair procedure in reaching the decision not to renew the Applicant's FTA, including providing sufficient reasons?
 - c. Did the Applicant have a legitimate expectation that her FTA would be renewed?
 - d. Was the decision not to extend the Applicant's FTA motivated by extraneous, discriminatory or improper grounds?
 - e. If the contested decision is found to be unlawful, what remedies should be granted to the Applicant?

Submissions of the Parties

Applicant

60. The Applicant challenges the decision to abolish her post on the grounds that it was procedurally irregular and that it was ill motivated.

61. She does not contest the reorganization of OSD by the Team Leader but contends that he used the process to create grounds to declare her post redundant and abolish it.

62. She does not contest the Respondent's powers to assign her new activities and functions but she contends that the withdrawal of her functions by the Team

² These were communicated to the parties by Order No. 187 (NBI/2016).

Leader was done with ill motives and bad faith after the creation and filling of the position of PACOM Team Coordinator.

63. The PACOM Team Coordinator was hired to take away the Applicant's position while the OSD Team Leader waited for her contract to expire. The preferential treatment of the PACOM Team Coordinator by the Team Leader suggests favouritism. The Applicant was stripped of her managerial functions when no authorized restructuring or reclassification had been authorized.

64. The Administration failed to provide formally clear reasons in support of its decision and gave five ambiguous and conflicting reasons for not renewing the Applicant's contract. The Applicant contends that there was no reason mentioned in the Country Director, UNDP Sudan's letter for the Applicant's separation. It is trite law that the duty of procedural fairness requires a written explanation for a decision. However, the Administration failed to provide clear reasons in support of its decision. The letter communicating the decision not to renew the contract stated that the decision was made "[i]n line with [management's] discussions with [the Applicant]" is insufficient to clearly communicate the rationale behind the decision and to allow the Applicant to decide whether there are grounds for appeal.

65. There was no realignment or reorganization procedure but if there was, such a process is supposed to be carried out in a fair and transparent manner and not to target any particular staff member.

66. The decision to abolish the Applicant's post before a conclusive report was prepared by the UNDP Resident Representative was arbitrary and unfair.

67. The OSD Team Leader did not exercise careful managerial judgment in abolishing the Applicant's post. He created the PACOM Team Coordinator post with overlapping functions and selected a person who was his friend and whose qualifications and experience did not qualify her for the position. She earned five times more salary than the Applicant and therefore her appointment did not meet the aim of financial sustainability.

68. Though the Applicant's employment created no expectation that her

contract would be extended for more than a year the discretion not to extend should not be as a result of abuse of discretion or motivated by discriminatory or improper grounds.

69. The Applicant wasn't provided with any concrete employment opportunity suitable to her professional level but was provided with a demotion and downgrade of her job title in violation of staff rule 9.6.

Respondent

70. The Respondent notes that the Applicant's appointment, as that of all staff members, does not carry expectancy, legal or otherwise, of renewal or conversion.

71. The decision to abolish the redundant post of Communications Specialist at the NOC level and not to renew the Applicant's FTA was taken in the context of the realignment process at UNDP Sudan concerning the Applicant's post and functions. It was a lawful exercise of the Secretary-General's discretion.

72. The decision to abolish the post followed a restructuring exercise involving the three divisions of UNDP Sudan in line with the request from UNDP Headquarters for Financial Sustainability and Effectiveness Plans for all country offices. The final step of the OSD realignment plan dated August 2014 required implementation of staffing changes by December 2014.

73. The Team Leader OSD assessed and reviewed the structure of OSD taking into consideration team capacities and functions, looking for staffing redundancies and saving opportunities. The overlapping functions of the PACOM Team Coordinator and Communications Specialist posts were found to be redundant. Interim efforts were made to clarify the supervisory roles and sub-hierarchy in the five-member communications team.

74. The Applicant had completed her second year on an FTA and had no legitimate expectancy of renewal.

75. The Applicant was provided with adequate reasons on three separate

occasions, verbally on 19 August 2014, in writing on 1 October 2014 and in an email dated 28 October 2014³.

76. The Applicant has provided no evidence to support her allegations of favouritism in the allocation of functions to the PACOM Team Coordinator. The decision to simplify the organizational structure was organizational not personal.

77. The Applicant's allegations of bias, retaliation and systematic marginalization of her by the OSD Team Leader were treated seriously and exhaustively examined. The PACOM Team Coordinator post was created as part of the new OSD structure in 2013. It was not a deliberate move to replace the Applicant.

78. The decision not to renew the Applicant's FTA beyond its expiry was a valid exercise of managerial discretion and there was no evidence that the decision was tainted by extraneous considerations.

79. The discussion with the OSD Team Leader concerning the lines of supervision and responsibilities within PACOM were unrelated to the realignment exercise.

Considerations

80. The well settled legal principles to be applied in this case are that normally, there can be no expectation of renewal of an FTA but the non-renewal decision must not be tainted by improper motives or countervailing circumstances. The burden of proving a legitimate expectancy of renewal or that the non-renewal of a fixed-term appointment was arbitrary or motivated by bias, prejudice or improper motive is on the staff member who makes the allegations⁴.

81. The Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However like any other administrative decision, the Administration has the duty to act fairly,

³ *Obdeijin* 2012-UNAT-201.

⁴ *Hepworth* 2015-UNAT-503.

justly and transparently in dealing with its staff members⁵. The decision must be based on reasons which are able to be substantiated by evidence and the procedure adopted must be in accordance with relevant rules and policies.

Issue 1

Did the Administration follow the correct procedure during the restructuring/realignment of OSD?

82. The Tribunal was advised by the Respondent that UNDP did not promulgate specific procedural guidelines to cover structural reviews in Country Offices⁶. In their absence the general principles of fair and transparent procedure apply.

83. The Tribunal finds that there were two separate structural changes at the UNDP Sudan Country Office. The first was the restructuring of OSD in early 2013 resulting in the creation of the PACOM team coordinator position. This is a matter which was entirely in the discretion of the Administration of UNDP. It was done with full consultation with the staff members including the Applicant.

84. Although from as early as August 2013 the Applicant was concerned about the possibility that the TOR of the new post would overlap with her TOR, the evidence is that at no time from when OSD came into existence until the end of her FTA, were the Applicant's TOR or her job functions altered as a result of the creation of OSD or the PACOM team coordinator post. Throughout, she remained the Communications Specialist with the same level of supervisory responsibilities. On the arrival of the PACOM team coordinator she was initially not invited to some meetings she had been attending but this was rectified when she brought it to the attention of Mr. Kuhnel.

85. The second structural change followed the directive from UNDP Headquarters (HQ) in August 2013 which required Country Offices to develop financial sustainability and effectiveness plans in alignment with the UNDP

⁵ *Hersh* 2014-UNAT-433/Corr. 1; *Bali* 2014-UNAT-450; *Pacheco* 2013-UNAT-281

⁶ At the Tribunal's request the Respondent produced a document entitled "People Realignment Guidelines" which were referred to in the Administrator's email dated 21 May 2014.

Strategic Plan. The UNDP Sudan SMT conducted an extensive review that resulted in the realignment of a number of posts within OSD including the abolition of the Applicant's post.

86. The Tribunal finds that the OSD Team Leader led an objective and unbiased review of the division for which he was responsible under the guidance of the SMT.

87. The existence and progress of the realignment plan was communicated through workshops and publications to all staff members and by 3 August 2014 the proposed structural changes were presented in writing.

88. Contrary to the contentions of the Applicant, the Tribunal finds that the 3 August 2014 review of OSD set out the structural and process changes to be followed and the actions taken to implement the proposals. The signing off of that document on in January 2015 by the Resident Representative marked the end of the implementation.

89. The Tribunal concludes that there were no procedural irregularities in either the creation of OSD or the subsequent realignment process. Both were undertaken in a fully transparent manner, with full consultation of all staff members including the Applicant.

Issue 2

Did the Administration follow proper and fair procedure in reaching the decision not to renew the Applicant's FTA including providing sufficient reasons?

90. There is no evidence to support the Applicant's contention that the PACOM Team Coordinator's position was created with the intention to cause her position to become redundant or as a consequence of her performance. Following the creation of the new post, and before the vacancy was filled, the Applicant's contract was renewed for a further year. Her performance was rated as "Good".

91. The decision that her post should be abolished was made on the basis of

the 3 August review. There is no doubt that the arrival of the PACOM Team Coordinator added another layer of supervision to the PACOM team which the Applicant thought was unnecessary and unjustifiable. However, as the review indicates, the Administration regarded the new post as having strategic importance and value. In the absence of any countervailing evidence the Tribunal may not second guess that justification.

92. The OSD Team Leader told the Applicant of the possibility that her contract would not be extended as early as 19 August 2014 giving her three months to prepare for the end of her contract.

93. It is clear from her reaction (she told him then that she would contest the decision) that the Applicant fully understood what she was being told and that she could expect formal notification of the decision.

94. In this case the Applicant was given reasons for the decision on more than one occasion including those conveyed to her by her staff representative following a meeting with UNDP Senior Management. These reasons were based on the restructuring and resulting redundancy of her position. There is no doubt that this was the genuine reason for the abolition of her post making the non-renewal of her contract inevitable. The Tribunal does not find that the Applicant's claim that she was at a loss to know the reasons for the non-renewal as credible.

Issue 3

Did the Applicant have a legitimate expectation that her FTA would be renewed?

95. There is no evidence to support the Applicant's contention that she had a legitimate expectation that her contract would be renewed. There was no written promise or any other firm commitment given to her⁷. On the contrary she was aware from early 2014 that a realignment process was underway and that changes to staffing levels were being contemplated.

⁷ *Munir* 2015-UNAT-522.

96. There is no contest that the OSD Team Leader assured the Applicant that she would continue to manage the communications functions as shown in the PACOM organogram after the hiring of the PACOM Team Coordinator. However this was a reiteration of her existing TOR, not a promise that her contract would be renewed on its expiry.

Issue 4

Was the decision not to extend the Applicant's FTA motivated by extraneous, discriminatory or improper grounds?

97. In *Morsy* 2013-UNAT-298, the Appeals Tribunal held that an administrative decision not to renew an FTA -- even one not to renew based on poor performance -- can be challenged on the grounds the decision was arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation. The staff member has the burden of proving such factors played a role in the administrative decision.

98. The Applicant claims that there are several indicators of extraneous grounds for the decision not to renew her contract. They all stem from the creation of the post of PACOM team coordinator and the subsequent impact, as she saw it, on her role of Communications Specialist. The Tribunal has already found that there was no ill motivation at play in the creation of that post.

99. Once the PACOM team coordinator position was filled in 2014, the Applicant was no longer required to act as the overall supervisor of the PACOM team as she had been for the previous several months. That was the logical consequence of the vacancy being filled.

100. The allegation that the non-renewal decision was motivated by the complaint that the Applicant had made about the OSD Team Leader is not supported by the chronology of events. That complaint arose from her meeting with the OSD Team Leader on 17 April 2014 but she did not bring it to the attention of the Administration until she formally submitted it on 26 August 2014. The underlying reasons for the ultimate decision that the post encumbered by the

Applicant was to be made redundant were apparent to the Administration on 3 August 2014 when the review of OSD was finalised. The Team leader OSD advised her of the possibility that her contract would not be renewed on 19 August. By the time the Applicant made her complaint on 26 August 2014 the realignment of OSD which led to the abolition of her post was well advanced.

101. Although the Applicant was notified of the final decision not to renew her contract on 1 October 2014, shortly after the report on her complaint by the investigation panel, the Tribunal finds that this notification was the formalization of a decision that was inevitable from 3 August and that the Applicant had known was pending since at least 19 August 2014. The Tribunal accepts the evidence of the OSD Team Leader that there was no material link between the Applicant's complaint and the decision made by the SMT that her post was redundant and therefore her contract would not be renewed.

102. The Applicant has not established that her post was the only one that was abolished or that she was personally singled out by the realignment.

Conclusions

103. The Tribunal finds that the Applicant has not discharged the burden of proving that the decision not to renew her FTA on its expiry was vitiated by procedural irregularity or was ill motivated. The contested decision was lawful. The Applicant is therefore not entitled to any compensation or costs.

Decision

104. The Application is rejected in its entirety.

(Signed)

Judge Coral Shaw

Dated this 17th day of June 2016

Entered in the Register on this 17th day of June 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi