



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/011/R1

Judgment No.: UNDT/2016/187

Date: 14 October 2016

Original: English

**Before:** Judge Alexander W. Hunter, Jr.

**Registry:** New York

**Registrar:** Hafida Lahiouel

LEMONNIER

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Daniel Trup, OSLA

**Counsel for Respondent:**

Steven Dietrich, ALS/OHRM, UN Secretariat

Alister Cumming, ALS/OHRM, UN Secretariat

## **Introduction**

1. On 5 March 2015, the Applicant, a former staff member of the United Nations Stabilization Mission in Haiti (“MINUSTAH”), serving at the P-5 level on a continuing appointment, filed an application challenging his non-selection for the position of Chief, Integrated Support Services (“CISS”), MINUSTAH. The Applicant submits that the Respondent advertised the CISS post without providing him priority consideration under staff rule 9.6(e) and that he was not considered fully and fairly for the post.

2. On 8 April 2016, the Respondent replied to the application, submitting that the decision to terminate the Applicant’s appointment was lawful.

## **Procedural history**

3. On 24 August 2016, the United Nations Appeals Tribunal published *Lemonnier* 2016-UNAT-679, remanding Case No. UNDT/NY/2015/011 “for a consideration on the merits” (see paras. 50 and 53 of the Appeals Tribunal’s judgment). Effective 24 August 2016, the matter was re-opened by the New York Registry under Case No. UNDT/NY/2015/011/R1, as per the Tribunal’s standard procedures.

4. On 30 August 2016, the Tribunal issued Order No. 206 (NY/2016), inviting the parties to consider whether the present matter could also be settled amicably, in view of their efforts at informal resolution of Case No. UNDT/NY/2016/007, which concerns the termination of the Applicant’s employment with MINUSTAH. The parties were directed to file a joint submission by 1 September 2016 stating whether they agree to attempt informal resolution of the present case.

5. On 1 September 2016, the parties filed a joint submission confirming their agreement to attempt informal resolution and requesting that the case be suspended for a period of one month.

6. On 2 September 2016, the Tribunal issued Order No. 210 (NY/2016), suspending the proceedings in Case No. UNDT/NY/2015/011/R1 until 29 September 2016.

7. On 27 September 2016, the Tribunal held a case management discussion in the present case and Case No. UNDT/NY/2016/007 (in which the Applicant contested the termination of his continuing appointment). Counsel for the Applicant stated that no hearing was needed in these cases. Counsel for the Respondent stated that the Respondent had only one witness in relation to Case No. UNDT/NY/2016/007. The parties agreed that they would provide a stipulation regarding that witness's statement of proposed evidence, following which the parties would be provided with the opportunity to file their closing submissions. The parties agreed that both cases would thereafter be decided on the papers.

8. By Order No. 224 (NY/2016) dated 27 September 2016, the parties were directed to file a joint submission by 30 September 2016, including a written confirmation that they consented to the Tribunal deciding the two cases on the papers before it and the parties' views as to whether there was any practical benefit to consolidating these two cases through an order for a combined proceeding, given that the matter would be decided on the papers. The parties were also directed to file their closing submissions by 4 October 2016.

9. On 7 October 2016, the parties filed a joint submission pursuant to Order No. 224 (NY/2016), stating, *inter alia*, that the parties consented to the

Tribunal deciding this case on the papers and that the parties saw no practical benefit to consolidating the two cases.

10. On 10 October 2016, the parties filed their closing submissions.

### **Facts**

11. The Applicant joined the Organization in 2001 as a P-2 level staff member. By 2010, he was rostered for P-4 and P-5 level positions in the area of information and communication technology resources.

12. Effective 20 December 2010, the Applicant joined MINUSTAH as Chief Telecommunications and Information Technology Officer at the P-4 level on a fixed-term appointment. Effective 1 January 2011, he was promoted to the P-5 level.

13. On 1 July 2012, the post used to finance the Applicant's appointment was abolished. The Applicant is not disputing the decision to abolish his post in July 2012. The Applicant was thereafter moved to the post of Chief of Administrative Services, which was vacant.

14. On 1 July 2013, the General Assembly abolished the post of Chief, Administrative Services, following its approval of MINUSTAH's 2013–2014 budget.

15. From 1 July 2013, the Applicant was placed against the post of Chief Budget Officer, with the functional title of Umoja Site Coordinator. This post was subsequently reclassified downwards to the P-4 level under MINUSTAH's 2015–2016 budget.

16. In January 2014, MINUSTAH announced a retrenchment exercise.

17. On 17 April 2014, MINUSTAH advertised a job opening for the CISS post. It was advertised as a “recruit from roster” selection exercise, which meant that it was open only to candidates who were already on pre-approved rosters. The job opening required a minimum of ten years of relevant experience “*both in the field and at headquarters*” (emphasis added). The job opening further stated, under the “Responsibilities” section, that the incumbent would “manag[e] and coordinat[e] all multifunctional support requirements between the UN Headquarters, mission components and other UN and non-UN entities.” The Applicant was on the pre-approved roster and was one of ten candidates considered for the position. However, he was found as not meeting the mandatory requirement of Headquarters experience indicated in the job opening.

18. By letter dated 1 October 2014, the Applicant was notified that he had been granted a continuing appointment effective 30 September 2014.

19. By memorandum dated 1 December 2014, the outcome of the selection process for the CISS post was submitted to the Director of Mission Support for approval. The memorandum stated:

... Approval is requested for the selection of [the successful candidate] for the position of CISS (P-5), against post no. 51511 which is authorized under O/CISS for the approved budget period 1 July 2014–30 June 2015.

... In making the selection decision, a total number of 10 screened candidates from the Recruit from Roster (RfR) Job Opening No. 34579 for CISS at the P-5 level were considered. The list of nominated candidates is attached.

... Having considered the recommended candidates, I confirm that [the successful candidate] is the most suitable candidate for the position, on the basis of her relevant experience in field missions and at the HQ level. I also confirm that in recommending the selection of [the successful candidate] I have taken into consideration MINUSTAH human resources

objectives and targets, especially with regard to geography and gender. Due consideration was also given to internal candidates as well as candidates that were victims of malicious acts or natural disasters; serving staff members who have served under the former 200 and 300 series of the staff rules; candidates from troop and police contributing countries; and prior service or employment of candidates with relevant experience in field duty stations or locations for which relevant field experience is highly desirable as applicable and as stipulated in General Assembly resolution 63/250.

20. On 1 December 2014, the Director of Mission Support signed off on the memorandum dated 1 December 2014, approving the selection of the recommended candidate.

21. The Applicant subsequently requested management evaluation of the decision not to selection him for the post of CISS. By letter dated 5 February 2015, he was notified that the outcome of management evaluation was to uphold the decision of 1 December 2014.

22. On 5 March 2015, the Applicant filed the present application before the Tribunal.

23. On 1 September 2015, the Applicant was notified of the decision to terminate his appointment, effective 31 August 2015. The termination date was subsequently amended to 1 September 2015.

## **Consideration**

### *Applicable law*

24. Staff regulation 1.2(c) provides:

#### **General rights and obligations**

(c) Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of

the activities or offices of the United Nations. In exercising this authority the Secretary-General shall seek to ensure, having regard to the circumstances, that all necessary safety and security arrangements are made for staff carrying out the responsibilities entrusted to them;

25. Staff rule 9.6(e) states:

**Rule 9.6**

...

**Termination for abolition of posts and reduction of staff**

(e) Except as otherwise expressly provided in paragraph (f) below [concerning staff members in the General Service category and thus not relevant to the present case] and staff rule 13.1, if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:

- (i) Staff members holding continuing appointments;
- (ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;
- (iii) Staff members holding fixed-term appointments.

26. Section 11 of ST/AI/2010/3 (Staff selection system) states:

**Section 11**

**Placement authority outside the normal process**

11.1 The Assistant Secretary-General for Human Resources Management shall have the authority to place in a suitable position the following staff members when in need of placement outside the normal process:

...

(b) Staff, other than staff members holding a temporary appointment, affected by abolition of posts or funding cutbacks, in accordance with Staff Rule 9.6(c)(i);

...

11.2 The Under-Secretary-General for Field Support, after consultations with the heads of the Departments of Peacekeeping Operations and Political Affairs, the head(s) of the missions involved and the staff members(s) concerned, shall have the authority to transfer staff members whose appointment is not limited to a specific mission or department, outside the normal process, between activities away from Headquarters that are administered by the Department of Field Support as well as between those activities and the Departments of Peacekeeping Operations, Political Affairs and Field Support, to suitable job openings at the same level without advertisement of the job opening or further review by a central review body.

*Requirement of “Headquarter experience”*

27. The Applicant submits that he was incorrectly deemed ineligible on the basis that he lacked Headquarter Logistics experience, despite having logistics experience at the United Nations Logistics Base in Brindisi, Italy, and having been on frequent logistics missions to the United Nations Headquarters in New York. He also submits that the selected candidate did not have any Headquarter Logistics experience. The Respondent disagrees, submitting that, by the memorandum dated 1 December 2014, the Hiring Manager found that the Applicant did not meet the requirement of Headquarters experience, whereas the selected candidate did possess the relevant experience.

28. The Tribunal is persuaded by the Applicant’s submission for two reasons. Firstly, the Applicant placed before the Tribunal a copy of the selected candidate’s publicly-accessible employment profile (LinkedIn page), which indicates that she has never held any positions in the United Nations Headquarters in New York. The accuracy of this information has not been contested by the Respondent. Secondly, the memorandum dated 1 December



2014 stated that the selected candidate had “relevant experience in field missions and at the HQ level.” However, the memorandum provides no specifics regarding the selected candidate’s experience at the Headquarters level and contradicts the selected candidate’s employment profile as submitted by the Applicant. Further, the Applicant has raised reasonable argument that his experience in Brindisi, where the United Nations has its main Logistics Base used for peacekeeping operations, and his frequent work visits to New York, should have been given due weight.

29. Accordingly, as the Respondent has not challenged the Applicant’s submission regarding the selected candidate’s lack of Headquarters experience or the publicly-accessible records provided by the Applicant, the Tribunal accepts them as accurate. It follows that the vacancy requirement of “Headquarters experience” was applied arbitrarily and inconsistently.

30. The Tribunal finds that, on the balance of evidence before it, the decision to deem the Applicant ineligible for the CISS post was vitiated by the arbitrary and inconsistent application of the requirement of “Headquarters experience.”

*Application of staff rule 9.6(e)*

31. The Applicant submits that the Organization failed to give him proper consideration under staff rule 9.6(e), as a rostered candidate on a continuing appointment. He states that, given that this post was advertised as a recruit-from-roster selection exercise, the Applicant should have been considered and most likely selected for the post, since he was on the roster of pre-approved candidates. The Applicant further submits that the Respondent failed to demonstrate that the Applicant was given any priority with regard to this post as a staff member on a continuing appointment in need of placement.

32. The Respondent submits that the decisions to advertise the CISS post and not to select the Applicant were lawful. His post was abolished in 2012 and, accordingly, the policy governing the abolition of posts in 2014 had no impact on the Applicant's rights. The Applicant also did not meet the basic requirements of the CISS post and for this reason could not have been appointed to the position. Even if he had been granted priority consideration he would not have been found eligible for the position since he did not meet the basic requirements for the CISS post.

33. As stated in *Lemonnier* UNDT/2016/186, the Administration is required to make good faith efforts to find suitable and available posts against which the Applicant can be placed (see also *El-Kholy* UNDT/2016/102; *Hassanin* UNDT/2016/181; *Tiefenbacher* UNDT/2016/183). Staff regulation 1.2(c) allows the Administration to transfer or reassign staff laterally, whereas sec. 11 of ST/AI/2010/3 specifically permits the placement of staff affected by the abolition of posts outside the normal selection process.

34. The selection memorandum of 1 December 2014 listed various factors taken into account during the selection exercise. However, the memorandum contained no references to staff rule 9.6(e) or the fact that the Applicant was a staff member on a continuing appointment and in need of placement. The fact that the Applicant's post was abolished in 2012, whereas he was granted a continuing appointment in 2014, has no bearing on the fact that at the relevant times, namely at the time of the termination of his appointment and his preceding job search, the Applicant had a continuing appointment and had been affected by the abolition of his post.

35. The Tribunal therefore finds that the Applicant was not afforded proper priority consideration for the CISS post under the framework established by

staff rule 9.6(e). He, therefore, lost a fair chance of being selected for the CISS post.

*Alleged bias*

36. The Applicant alleged that there was bias against him on the part of the Deputy Special Representative of the Secretary-General (“DSRSG”), MINUSTAH. The Applicant referred the Tribunal to emails exchanges from July 2012 and September 2014, which, according to him, demonstrate that the DSRSG was prejudiced against him. However, no evidence has been placed before the Tribunal showing that the selection exercise was influenced by bias against the Applicant. In the absence of evidence showing that the contested decision was in fact influenced by improper factors, the Tribunal will not make such a finding.

37. The Tribunal finds that there is insufficient evidence in this case to establish that the contested decision in this case was motivated by bias against the Applicant.

**Relief**

38. The Applicant requests the Tribunal to “award compensation for the manifestly unlawful process of non-selection that led to his ultimate separation.”

39. In *Lemonnier* UNDT/2016/186, the Tribunal found that the Applicant suffered pecuniary harm as a result of the Administration’s failure to apply good faith efforts under staff rule 9.6(e) to identify suitable posts against which the Applicant could be placed as a staff member on continuing appointment affected by the abolition of his post. The Tribunal found that, had the Organization complied with the requirements of staff rule 9.6(e), it can be

reasonably expected that the Applicant would be employed for two years beyond 1 September 2015. The Tribunal also found that it could be expected that the Applicant will be gainfully employed at some point in the foreseeable future. Taking into account the payments made to the Applicant as a result of his improper termination, the Tribunal awarded the Applicant eight months' net base salary as compensation for pecuniary loss suffered by him in connection with the lost earnings in the period of September 2015 to September 2017.

40. In the present case, the Tribunal finds that, had the Applicant been selected for the CISS post, it would be reasonable to conclude that he would have commenced his functions in January 2015 and that, taking various contingencies of life into consideration, his foreseeable period of employment on that post would be two years (see *Fayek* UNDT/2010/113; *Tiefenbacher* UNDT/2016/183). Therefore, the Tribunal finds that his foreseeable employment against the CISS post would have been from 1 January 2015 to 31 December 2016.

41. However, both the Dispute Tribunal and the Appeals Tribunal have said that there is a duty to mitigate losses and the Tribunal should take into account the staff member's earnings, if any, during the relevant period of time for the purpose of calculating compensation (see, e.g., *Tolstopyatov* UNDT/2011/012; *Mmata* 2010-UNAT-092).

42. The Tribunal finds that the Applicant has already mitigated his losses for a portion of the relevant period (1 January 2015 to 1 September 2015) and received compensation for the rest of his lost earnings (2 September 2015 to 31 December 2016). Specifically:

a. With regard to the period of 1 January 2015 to 1 September 2015, the Applicant was fully employed by the United Nations and suffered no pecuniary harm;

b. With regard to the period of 2 September 2015 to 31 December 2016, the Applicant's lost earnings are fully compensated in *Lemonnier* UNDT/2016/186, which compensated him for the loss of earnings in the period of September 2015 to September 2017—an even longer period than the period covered by the present case. The Tribunal cannot award the Applicant additional compensation for lost earnings during the same period as he could not have held two jobs at the same time with the Organization.

43. Accordingly, the Tribunal finds that, although the Applicant's rights were breach with respect to the contested selection exercise, no further awards of compensation for pecuniary loss are warranted.

#### *Moral injury*

44. In his application, the Applicant sought compensation for moral injury in the amount of six-month net base salary “for grave breaches of [his] staff rights and emotional distress.” The Applicant referred the Tribunal to *Asariotis* 2013-UNAT-309. In *Asariotis*, the Appeals Tribunal outlined some principles of assessment of claims for moral damages, but found that the Dispute Tribunal's award of damages in the amount of CHF15,000 was not warranted.

45. Having considered the evidence in this case and the jurisprudence of the Appeals Tribunal on issues of relief, the Tribunal does not find that the present case satisfies the requirements for an award for moral injury. The Appeals Tribunal has consistently held that, as a general principle of compensation, moral damages may not be awarded without specific evidence

supporting the claim for such relief (*Kozlov and Romadanov* 2012-UNAT-228; *Hasan* 2015-UNAT-541). No evidence has been provided by the Applicant to substantiate his claim for compensation for moral injury, nor does the Tribunal consider that the breach of his rights was of such a fundamental nature that it should give rise, in and of itself, to an award of compensation in addition to compensation for his pecuniary loss (see also art. 10.7 of the Tribunal's Statute, precluding awards of exemplary or punitive damages). Accordingly, the claim for an award for moral injury is dismissed.

### **Orders**

46. The application succeeds. However, in view of the compensation ordered in *Lemonnier* UNDT/2016/186, no further compensation is warranted for pecuniary loss. The Applicant's request for compensation for moral injury is rejected.

*(Signed)*

Judge Alexander W. Hunter, Jr.

Dated this 14<sup>th</sup> day of October 2016

Entered in the Register on this 14<sup>th</sup> day of October 2016

*(Signed)*

Hafida Lahiouel, Registrar, New York