



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/088
Judgment No.: UNDT/2018/118
Date: 28 November 2018
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

COKER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Sètondji Roland Adjovi

Counsel for the Respondent:

Nicole Wynn, ALS/OHRM

Rosangela Adamo, ALS/OHRM

THE APPLICATION AND PROCEDURAL HISTORY

1. At the time of the application, the Applicant served as a Civil Affairs Officer with the United Nations Mission in Liberia (UNMIL). He served on a continuing appointment at the P-4 level.
2. On 7 December 2016, the Applicant filed an application challenging the Respondent's decision to terminate his appointment with the Mission and the decision to terminate the appointment as of 31 August 2016, rather than on 28 February 2017 "as promised."
3. The Respondent replied on 9 January 2017.
4. The Tribunal held a case management discussion (CMD) on 11 September 2018. Counsel for both parties were asked to seek instructions from their respective clients on their willingness to have this matter settled *inter partes*.
5. On 13 September 2018, the Respondent informed the Tribunal that he does not consider this case as being "appropriate for mediation."
6. On 17 September 2018, the Tribunal issued Order No. 140 (NBI/2018) setting a schedule for the filing of the Respondent's additional submissions and the Applicant's sur-reply.
7. The parties were also directed to jointly advise the Tribunal of their views on the need for an oral hearing.
8. In response to Order No. 140 (NBI/2018), the Respondent filed his further submissions on 19 September 2018.
9. The Applicant filed his response to these further submissions on 21 September 2018.
10. On 25 September 2018, the Applicant informed the Tribunal that this matter can be decided on the basis of the parties' written submissions.

11. Counsel for the Respondent also filed submissions indicating that an oral hearing was not necessary in this matter. The Respondent's position was however based on the proviso that the Applicant would be required to produce evidence of mitigation of damages, specifically, his efforts to secure employment since he was separated from the Mission.

12. On 27 September 2018, the Tribunal issued Order No. 151 (NBI/2018) directing the parties to file their closing submissions by 12 October 2018. The Order also indicated that this matter would be determined on the basis of the parties' written submissions, and set a timeline for further submissions on remedies should the Tribunal find in favour of the Applicant.

13. The parties filed their respective closing submissions, as ordered, on 12 October 2018.

FACTS

14. The Applicant served as the Collections, Coordination and Intelligence Requirement Manager at the Joint Analyses and Operation Centre (JAOC) in UNMIL. On 30 September 2014, his fixed-term appointment was converted to a continuing appointment.

15. While the Applicant's relationship with his First Reporting Officer (FRO) in the JAOC was initially positive, it began to decline in November 2015, when the FRO falsely accused the Applicant of sending an anonymous email to the American Embassy stating that the FRO should not be hired for a particular post he was seeking. Although the Applicant categorically denied having sent the email in question and despite the fact that there was no evidence that he had done this, it appears that the FRO did not believe the Applicant. Shortly thereafter, the FRO generally stopped talking to the Applicant. Further, with the approval of the Applicant's Second Reporting Officer (SRO), UNMIL's Chief of Staff, the FRO also took most of the Applicant's work from him and gave it to another P-4 in the JAOC, who was on a temporary assignment.

16. On 8 February 2016, the Secretary-General proposed the abolition of 104 international positions in UNMIL in the 2016-17 budget period.

17. On 20 February 2016, the Applicant had meetings with his FRO and SRO, who informed him that his post had been earmarked for abolishment. He was further informed that since his post was considered “unique”, he would be “dry cut” and not included in any comparative process. This surprised the Applicant as he knew that there were three other staff members, at the P-4 level, in the JAOC who were performing the same functions as him, including one staff member who was on a temporary contract.

18. One week later, the Applicant’s FRO invited him to his office to sign a classification form to reclassify his post from Civil Affairs Officer to Information Analyst. The Applicant declined to sign this form, as he considered it to be a measure specifically designed to terminate him since the Applicant was aware that a P-4 post of Information Analyst in the JAOC was proposed for abolishment in the upcoming budget cycle. Further, to the Applicant’s understanding, his P-4 colleagues in the JAOC, who were performing the same functions as him, were not asked to sign such a form.

19. On 14 March 2016, a Comparative Review Panel met to review internationally-recruited posts in UNMIL for the purpose of determining which would be impacted by the downsizing exercise. As the minutes from this meeting indicate, the Principal of the Field Staff Union noted that there were at least three staff members at the P-4 level in the JAOC who were performing the same functions. The Principal thus asked why these posts were considered “unique” and not subject to a comparative review. The *ex officio* member from Human Resources responded that the matter had been reviewed by Headquarters who had confirmed that the posts in question in the JAOC were indeed unique. The *ex officio* member further stated that she would revisit the issue again when representatives from Headquarters came to the mission on 16 March 2016.

20. On 26 May 2016, the Applicant received a letter dated 24 May 2016 from the Office of the Director of Mission Support informing him that the post he had been encumbering had been proposed for abolition effective 1 July 2016 as a result of UNMIL’s phased downsizing and that his contract would not be renewed beyond 30 June 2016.

21. Throughout the course of June 2016, the Applicant and UNMIL discussed how he may be retained in the mission past 30 June 2016. On 28 June 2016, the Applicant met with the Director of Mission Support (DMS) and the Chief of Human Resources (CHRO) who offered to keep the Applicant in the employ of the mission until 28 February 2017. During this time, the Applicant would first be placed on the post of Radio Producer, at the P-4 level, for 2 months, i.e., from 1 July 2016 to 31 August 2016) and later on the post of the Deputy Chief of the JAOC for the period of 1 September 2016 to 28 February 2017. The Applicant immediately indicated his acceptance of this offer.

22. On 30 June 2016, the Applicant met with the CHRO who informed him that things had changed since their last meeting. Specifically, the Applicant was told that when the Chief of Staff was informed of the offer that had been extended to the Applicant, she instructed that he must be terminated effective 31 August 2016, rather than 28 February 2017, as agreed. Shortly thereafter, another meeting between the Applicant, the DMS and the CHRO took place. During the course of this meeting, the DMS informed the Applicant that the mission was continuing to review the matter and that he would revert upon the return of the Chief of Staff (the Applicant's SRO) to the mission. No such follow-up ever took place.

23. On 12 July 2016, the Applicant received a memo from the Administration stating that he would be separated effective 31 August 2016, and that he should commence the check-out process one week beforehand.

24. Shortly after receiving this memo, the Applicant met with the Chief of Staff, who informed him that the decision to separate him effective 31 August 2016 was not taken by her, nor was it taken by the Applicant's FRO. The Applicant was surprised to hear this as it was contradictory to the express information that he had received from the CHRO.

25. On 25 July 2016, the Applicant filed a management evaluation request, contesting the following: i) the general decision to terminate him from the Organization; and ii) the decision to terminate him effective 31 August 2016, rather than on 28 February 2017, as promised by the Administration.

26. On 31 August 2016, the Applicant separated from service. The Respondent's submissions suggest that the Applicant was separated on 9 September 2018.

SUBMISSIONS

Applicant

27. It is the Applicant's case that the decision to subject him to a dry cut was unlawful as it was not taken in accordance with the relevant UNMIL Guidelines.

28. The Respondent also failed to consider the functions he performed; he should have been comparatively reviewed against the other P4 staff members in JAOC. By neglecting to look beyond the Applicant's functional title, the Respondent unlawfully subjected him to a "dry-cut."

29. The decision to terminate the Applicant was contrary to staff rule 9.6(e) on *Termination for abolition of posts and reduction of staff*.

30. The Applicant had a legitimate expectation that his contract would not be terminated until 28 February 2017. Whilst the Administration initially informed him that he would be terminated effective 30 June 2016, there was subsequently a promise made to the Applicant that he would be extended through 28 February 2017. It is therefore submitted that the Applicant had a legitimate expectation that his appointment would not be terminated until 28 February 2017, at the earliest.

Respondent

31. The Respondent takes the position that the decision to terminate the Applicant's employment was lawful;

32. There was no promise to delay the termination of his appointment until 28 February 2017; and

33. The Applicant's claim of bias is without merit.

CONSIDERATIONS

Was the decision to subject the Applicant to a dry cut (straight) abolition taken in accordance with the UNMIL Guidelines?

34. The UNMIL Guidelines for conducting Comparative Reviews were formulated for purposes of implementing the downsizing of UNMIL, as approved by the Security Council..

35. Pursuant to paragraph 1 of the UNMIL Guidelines:

The transition review process used to retain staff members who are performing similar functions and are seeking to be placed against a limited number of posts in the new structure in the affected occupational groups and categories is conducted by the Comparative Review Panel (CRP).

36. Pursuant to paragraph 2 of the UNMIL Guidelines:

The comparative review process is guided by Article 101, paragraph 3, of the UN Charter, and Staff Rules 9.6(e) and 13.1(d). The review is established for the purpose of ensuring transparency in implementing the criteria set out in Article 101 of the UN Charter and Staff Rules 9.6 (e) and 13.1(d) and conducted on the basis of the staff member's professional competence, skills and ability to perform the functions of the post in the new structure..."

37. Pursuant to paragraph 3 of the UNMIL Guidelines:

The comparative review is conducted between or among staff in the same location, same section, at the same grade level and occupational group, where the number of serving staff members exceeds the number of proposed posts in the same section in the revised mission structure. Locally recruited staff must be reviewed by duty station. The determination of which staff member falls into the same occupational group within each section and unit shall primarily be guided by functional title. In acknowledgement of the fact that the functional title does not, in all cases, properly reflect the occupational group (e.g. a driver may be performing clerical duties, or an administrative assistant may be performing some programme assistant functions), the CHRO must determine which individuals fall into which occupational group within the same grade where any doubt exists. In line with Staff Rules 9 .6 (e) and 13.1 (d) and provided there are no performance or integrity issues, staff with permanent and continuing appointments undergo a comparative review process only in those situations when they are

effectively competing against each other for the remaining posts, at their level and function in the same Section, which will only occur when no more fixed term staff remain.”

38. Thus, the UNMIL Guidelines provide that whilst the functional title of a staff member is a key factor in determining whether he or she falls into a certain occupational group, the Guidelines also recognize that in some cases the functional title does not reflect a staff member’s functions. In such cases, the Administration should consider the functions of the staff member concerned.

39. The Guidelines further indicate that if a staff member with a continuing appointment is in a section which includes other staff members at the same level and performing the same functions, the staff member with the continuing appointment will only be part of a comparative review process if there are not enough posts remaining for other similarly situated staff members on continuing appointments.

40. Section 7.6 of the UNMIL Guidelines for the Comparative Review Panel (CRP) reads as follows:

The following personnel are not subject to review by the CRP:

The CRP will not review posts where staffing is equal to or less than the proposed number of posts in the same Section in the revised mission structure. In cases where the proposed abolition of a post encumbered by a staff member in a particular Section is a unique post with no other comparators in the same Section, that post will be considered as a straight or dry cut abolition.

41. The Applicant was informed that he was not included in any comparative exercise with the other P-4 staff members of the JAOC because his post was unique. Whilst the Administration took measures to assign the Applicant the post title of Information Analyst - a title that does not accord with the Applicant’s Letter of Appointment - this does not *ipso facto* mean that his post was unique. In fact, the Applicant was carrying out the same functions as the other P-4 staff members in the JAOC. This is supported by the minutes from the Comparative Review Panel meeting held on 14 March 2016, in which the Principal of the Field Staff Union specifically indicated that the P-4 staff members in the JAOC were performing the same functions.

42. The Administration, contrary to its own policies, took into account the Applicant's functional title only without considering his actual functions vis-à-vis the other P-4 posts in the JAOC. By neglecting to look beyond the Applicant's functional title, the Administration unlawfully determined that the Applicant would be subject to a dry-cut.

43. Significantly, the Applicant holds a continuing appointment.

44. Thus, applying the UNMIL Guidelines to the present case, the Applicant should have been automatically retained since there were, at the time of this application, other P-4 staff members in his section performing exactly the same duties as the Applicant who did not hold continuing appointments. For example, there was a P-4 staff member who was on a temporary appointment whose appointment was extended beyond 30 June 2016. The fact that the Applicant was being terminated, while this temporary staff member remained, is a violation of the mission's own Guidelines dealing with its subject downsizing exercise.

Was the decision to terminate the Applicant contrary to staff rule 9.6(e)?

45. Staff Rule 9.6 provides, in pertinent part:

Termination for abolition of posts and reduction of staff

(e) ... 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.

46. As noted in the previous section, the Applicant was subject to a dry-cut since it was determined that he would be terminated on the basis that he purportedly held a unique post at the P-4 level in the JAOC.

47. But even assuming arguendo that the Applicant's post was "unique", the Applicant should have been retained nonetheless in light of Staff rule 9.6(e).

48. There was, at the time of this filing, a staff member in the JAOC on a temporary contract who was performing the same functions as the Applicant. These functions are, indeed, the same or substantially similar such that he should have been retained over the staff member on the temporary appointment.

49. It defies logic that the temporary P-4 staff member who was in the JAOC was performing functions of a post "in which [the Applicant's] services can[not] be effectively utilized". As noted, the Applicant has been continuously in the employ of the Organization since 2001. This has enabled him to garner much experience and expertise relevant to the work of the Organization in general and more specifically that of the JAOC, which in the first instance led to his appointment in the JAOC.

50. In light of the foregoing, the Applicant cannot be considered to be unsuitable to assume the functions of a temporary staff member at the same level, who actually sits in the Applicant's office.

51. Rather, the Applicant asserts that he is indeed suitable to assume these functions and that by maintaining the temporary P-4 staff member in lieu of the Applicant, who holds a continuing appointment, the mission acted in direct contravention of Staff Rule 9.6(e).

Did the Applicant have a legitimate expectation that his contract would not be terminated until 28 February 2017?

52. It is well-settled law that a staff member has a legitimate expectation of a renewal of his or her contract if there has been a firm commitment to such renewal.¹

53. Whilst the Administration initially informed the Applicant that he would be terminated effective 30 June 2016, there was subsequently a promise made to

¹ *Ahmed v. Secretary-General of the United Nations*, 2011-UNAT-153; *Abdalla v. Secretary-General of the United Nations*, 2011-UNAT-138.

him that he would be extended through 28 February 2017. As such, the Applicant had a legitimate expectation that his appointment would not be terminated until 28 February 2017, at the earliest.

54. The Applicant argues that he was verbally promised an extension until 28 February 2017. The earlier termination has therefore ruined a legitimate expectation. Such legitimate expectation has been given legal consequences in the jurisprudence.²

55. As to the existence of the contract in question, it is trite law that a binding contract requires evidence of an offer and acceptance of the offer (in civil law jurisdictions) plus consideration (in common law jurisdictions). Herein, both standards for contract formation have been established in this case.

56. Even though this was a verbal offer, there have been written communications about it, especially the written response by the Applicant expressing his acceptance.

57. Moreover, this verbal commitment has already led to the extension from end of June 2016 to 31 August 2016. As a result, this is no longer a solely verbal agreement and will be given full legal effect. In two cases, the United Nations Appeals Tribunal has clarified that verbal assertions must be considered with the context/the circumstances for determination.

58. Those written communications provided such context that reinforce the non-written promise.

59. Pursuant to discussions between the Applicant and Administration (the DMS and CHRO) on 28 June 2016, the Administration agreed not to terminate the Applicant until 28 February 2017. In fact, the Administration was very specific about its intentions. As noted above and below, it indicated that the Applicant would first be placed on the post of Radio Producer, at the P-4 level, for two months and later on the post of the Deputy Chief of the JAOC for six months, until 28 February 2017.

² *Ahmed* 2011-UNAT-153, *Abdalla* 2011-UNAT-138 and *Munir* 2015-UNAT-522.

60. The exchange of emails which led to this offer and acceptance, in relevant part, reads as follows:

From: NW [UNON]
Sent: June 28, 2016 11:30 AM
To: [the Applicant]
Cc: Osla [UNHQ]
Subject: *Confidential: Response to your request for legal assistance from OSLA

Dear [Applicant],

As we were starting to prepare the submission on your behalf, we just received word that UNMIL is able to offer you assignments for a total of 8 months, during which time you would encumber one post for two months and another for 6 months. These will be at the P-4 level. I understand that you will be officially advised of this soon by the mission Authorities and of the exact modalities as to how this will work.

Right now the continued mandate of the mission is unclear, so assignments are for less than 12 months (and are generally being given for 6 months only) as per directives from NY to the mission. That said, I understand that the mission is working to obtain longer renewal/assignment periods for its staff, though it is not yet certain whether this will be possible.

I hope that you are pleased.

NW

Legal Officer (OSLA)

From: The Applicant
Sent: June 28, 2016 5:56 PM
To: David Penklist; Jit Gurung [CHRO]
Subject: Consent on renewal of Contract – Patrick Coker

Dear Sir,

Please, kindly be informed that I agree with the decision to renew my contract past 30 June 2016 [...]

[the Applicant]

61. As evidenced from the above exchanges, the attention to detail which corroborates without question the offer made to him by the DMS and CHRO, the Applicant immediately accepted this offer and justifiably relied on it to his

detriment of not seeking employment elsewhere for the period from 1 September 2016 – 28 February 2017.

62. Finally, this Tribunal can only wonder if the eventual decision to rescind the offer, which was already accepted by the Applicant, was due to improper bias on the part of his FRO and/or his SRO. Unfortunately, the relationship between the Applicant and his supervisors was not positive for some time, due to unsubstantiated allegations against the Applicant by his FRO – which appear to be supported by his SRO.

63. The burden of proof is on the Respondent to prove his good faith efforts to reassign the Applicant. The Respondent has not met his burden.

64. This Tribunal finds it most odd that the contractual agreement with the DMS and the CHRO was not adhered to and that the Applicant had been given disparate information as to who took this decision that gave him a legitimate expectation of renewal of his contract through to 28 February 2017.

CONCLUSION

65. The Application is **GRANTED**.

66. The Respondent is **DIRECTED** to pay the Applicant 6 months net base salary, from which the compensation *in lieu* of notice that was paid out to him at the time of his separation will be deducted.

(Signed)

Judge Alexander W. Hunter, Jr
Dated this 28th day of November 2018

Entered in the Register on this 28th day of November 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi