Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TOSI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-Represented

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Nicole Wynn, ALS/OHR

The Application and Procedural History

1. The Applicant was a Legal Officer at the United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo (MONUSCO). He served on a fixed-term appointment at the P-4 level in Kinshasa.

2. On 11 September 2015, he challenged the Respondent's decision not to renew his fixed-term appointment (FTA) beyond 30 June 2015. This case was registered as Case No. UNDT/NBI/2015/095. The Respondent's reply to this case was filed on 14 October 2015.

3. In another application filed on 24 March 2016, he challenged: a) the decision dated 11 September 2015 on his complaint of prohibited conduct against three senior MONUSCO staff members; b) the decision dated 14 January 2016 on his second complaint against the former MONUSCO Special Representative of the Secretary-General (SRSG); and c) the decision dated 3 August 2015 taken by the Director of the Ethics Office that the Applicant did not establish a prima facie case of retaliation. That case was registered as Case No. UNDT/NBI/2016/023.

4. The Respondent filed his reply to this second case on 27 April 2016.

5. The Tribunal held a case management discussion (CMD) on 25 October 2016 and by Order No. 462 (NBI/2016), the cases numbered UNDT/NBI/2015/095 and UNDT/NBI/2016/023 were consolidated.

6. The Tribunal heard the consolidated case from 2 to 4 May 2017 and the parties filed their closing submissions on 2 June 2017.

Facts

7. The Applicant was appointed to the post of Legal Officer at the P-4 level with the MONUSCO Legal Affairs Office on 24 September 2011.

8. On 22 October 2012, he formally complained of harassment and abuse of authority against senior management in MONUSCO.

9. On 25 July 2014, following several applications by the Applicant to the UNDT in Nairobi, the parties were urged by the Tribunal to enter into settlement discussions with a view to mediating their disputes.

10. The settlement discussions started late in 2014 and the parties entered into a Settlement Agreement which the Applicant signed on 5 May 2015.

11. Two days later, on 7 May 2015, an email was sent to the Applicant by a Human Resources (HR) officer informing him that he was part of a pool of staff members who had not submitted his documents for an ongoing Comparative Review Process (CRP). He was asked to submit his e-PAS reports for 2013/14 and 2014/15 and an updated PHP for the completion of the CRP by Tuesday, 12 May 2015.

12. Based on the Settlement Agreement, the Applicant moved to the Security Sector Reform (SSR) Unit on 11 May 2015 with his post from the Legal Affairs Section. The Settlement Agreement stipulated that the move was until the end of the fiscal year, 30 June 2015.

13. On 22 May 2015, the Applicant received a memorandum from the Chief Human Resource Officer (CHRO) informing him that his appointment would not be renewed upon its expiration on 30 June 2015 in accordance with Staff Rule 9.4. This decision was made following a comparative review of the two P-4 Legal Officers who were serving in the Mission at the time.

14. On 25 May 2015, the Applicant submitted a formal written complaint of prohibited conduct to the SRSG against his First Reporting Officer (FRO), the Mission's P-5 Senior Legal Officer, in accordance with ST/SGB/2008/5. In his complaint, the Applicant requested the SRSG to appoint a panel to review his allegations of harassment, abuse of authority, and retaliation against his FRO in accordance with ST/SGB/2008/5 and ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with the duly authorized audits or investigations).

15. On 2 June 2015, the Applicant amended his complaint against his FRO to include additional allegations against the Director of Mission Support (DMS) and the Chief of Staff (CoS) of MONUSCO. He alleged that the DMS and the CoS worked in concert with his FRO in seeking to separate him from service by not renewing his appointment beyond 30 June 2015 and that the effort was tainted by bad faith.

16. On 10 June 2015, the Applicant requested management evaluation of the decision not to renew his appointment beyond 30 June 2015. The Applicant's appointment was subsequently extended pending the outcome of his management evaluation.

17. On 16 June 2015, the Applicant submitted a request for protection from retaliation to the Ethics Office pursuant to ST/SGB/2005/21. He alleged that his FRO, the DMS, and the CoS had retaliated against him. Specifically, the Applicant attributed the decision not to renew his appointment beyond 30 June 2015 to a prior ST/SGB/2008/5 complaint he had made against his FRO in October 2012, and that the FRO had been abetted by the DMS and the CoS.

18. On 20 July 2015, the Applicant submitted an amended complaint to MONUSCO's Conduct and Discipline Team to include the SRSG as an alleged

offender of his complaint because the SRSG had not responded to him with a timely response to his complaint of 25 May 2015 within sixty (60) after its receipt.

19. On 31 July 2015, the Applicant was separated from the Organization. On the same day, the Management Evaluation Unit (MEU) issued a letter affirming the impugned decision. The Applicant received a memorandum from the DMS on the same day informing him that he would be separated form service at close of business.

20. On 3 August 2015, the Director of the Ethics Office informed the Applicant that his request had been reviewed and determined that the information he provided did not establish a *prima facie* case of retaliation in accordance with ST/SGB/2005/21.

21. On 16 September 2015, the Applicant requested management evaluation of the Ethics Office's decision dated 3 August 2015.

22. On 20 September 2015, the Applicant made additional allegations of retaliation with the Ethics Office. He alleged that the decision not to renew his appointment beyond 30 June 2015 as well as various other actions taken by the DMS related to his checkout from MONUSCO constituted retaliation.

23. On 22 September 2015, MEU informed the Applicant that his 16 September 2015 request for evaluation of the Ethics Office's 3 August 2015 decision was not receivable because it was not an administrative decision of the Secretary-General.

24. On 6 October 2015, the Applicant requested the Under-Secretary-General, Department of Field Support (USG/DFS) to appoint an investigation panel to review his allegations of prohibited conduct under ST/SGB/2008/5 against four members of MONUSCO's senior management.

25. On 11 September 2015, the SRSG determined that there were insufficient grounds to warrant convening a fact-finding investigation panel. On 15 October 2015, the Applicant amended his complaint to the USG/DFS against the SRSG, to allege that the SRSG's 11 September 2015 decision was motivated by personal animus against him and contributed to a pattern of harassment, abuse of authority, and retaliation against him.

26. On the same day, 15 October 2015, MEU informed the Applicant that his 9 October 2015 request for management evaluation of an Ethics Office decision was not receivable for the same reasons stated in 22 September 2015.

27. On 21 October 2015, the USG/DFS requested comments from the SRSG in response to the Applicant's 6 October 2015 complaint. On 22 October 2015, the Chief Conduct and Discipline Team informed the Applicant of the same. On 23 October 2015, the USG/DFS informed the Applicant that he would review the complaint against the SRSG, but not the complaint against the MONUSCO senior staff members since it had already been addressed by the SRSG.

28. On 31 October 2015, and 12 and 26 November 2015, the USG/DFS received comments from the SRSG in response to the Applicant's complaint against him.

29. On 12 November 2015, the Applicant requested management evaluation of the SRSG's decision not to convene a fact-finding panel to investigate the Applicant's 2008/5 complaint against the FRO, DMS and CoS of MONUSCO.

30. On 14 January 2016, the USG/DFS informed the Applicant that he had reviewed the Applicant's complaint against the SRSG and decided there were insufficient grounds to warrant a formal fact-finding investigation.

31. On 28 December 2015 and 19 January 2016, the Applicant requested management evaluation of the USG/DFS's decision not to convene a fact-finding

panel to investigate his ST/SGB/2008/5 complaint against the SRSG. He requested management evaluation before he received the USG/DFS's decision on his complaint.

32. On 20 January 2016, the Under-Secretary-General, Department of Management (USG/DM) informed the Applicant that the Secretary-General had upheld the SRSG's decision not to convene a fact-finding panel to investigate the three MONUSCO staff members.

33. On 12 February 2016, the USG/DM informed the Applicant that the Secretary-General had upheld the USG/DFS's decision not to convene a fact-finding panel to investigate the allegations against the SRSG.

Submissions

Applicant

34. The decision to nationalize the post encumbered by the Applicant was tainted by extraneous factors. He was targeted for separation. The Respondent has failed to prove that the abolishment of his post was unrelated to his complaints against the Mission's senior management. The Applicant was the only staff member in the legal office to lose his job.

35. All other staff members in the legal office were personally notified that the office was being restructured and that their posts might be abolished or nationalized except the Applicant. The Applicant was informed that his post was being nationalized 48 hours after he signed the Settlement Agreement releasing senior management of all investigations arising out of his complaints.

36. The Respondent has conceded that MONUSCO senior management was in complete control over the Applicant's future at the Organization. Typically, in

restructuring exercises, a Mission would first abolish vacant posts to minimize effects on staff members. There was a vacant P-3 post, with terms of reference identical to that of the P-4 encumbered by the Applicant, which was not nationalized.

37. There is sufficient testimony on the record - from two witnesses - to show that the Applicant and his FRO, Mr. Maia, did not have a good working relationship. The Applicant himself testified to the physical and professional isolation he suffered under Mr. Maia's leadership of the Office.

38. The Mission breached the Settlement Agreement signed between them by failing to make good on its promise to grant the Applicant a position with the SSR Unit lasting beyond 30 June 2015. The Mission also acted in bad faith in its negotiations and enforcement of the Settlement Agreement. The Mission also failed to modify the Applicant's performance appraisals of 2011/12 and 2012/13, as provided for in the said agreement.

39. Mr. Bogicevic testified that the SSR Unit had in fact created a P-4 Legal Officer position for the Applicant. The creation of this post was documented in an organizational chart and shown to the Applicant during the settlement discussions. The witness testified that the Applicant was introduced to the SSR Unit as a "permanent addition" to the Office, and that the Head of the Unit was surprised to learn of the Applicant's separation from the Mission.

40. The Applicant was repeatedly promised a one-year extension of his contract, and signed a Request for Extension of Appointment to that effect. That Request was then reneged upon, after the Applicant signed the Settlement Agreement and - the Respondent submits - "pending rebuttal case and result of mediation." There was, however, never a rebuttal in the Applicant's case because he was graded as having "fully" met expectations.

41. The Mission made no effort to place the Applicant against any other suitable and vacant posts at his level. Ms. Seck in fact testified that "no efforts were made to place the Applicant within MONUSCO or elsewhere."

42. The Respondent's refusal to investigate the Applicant's complaint against the Mission's senior management was unlawful. The Mission ignored the Applicant's complaint for a long time and it took the intervention of the Conduct and Discipline Unit in Headquarters before receipt of the complaint was even acknowledged.

43. The oral and documentary evidence in this case clearly demonstrates that the Respondent failed to treat the Applicant with the dignity and respect owed to international civil servants.

Respondent

44. The decision not to renew the applicant's appointment was lawful.

45. A fixed-term appointment does not carry any expectancy of renewal, irrespective of length of service. The Secretary-General's discretion not to renew an appointment is however not unfettered. The Applicant bears the burden of proving that the discretion not to renew his appointment was tainted or improperly exercised.

46. The Applicant, therefore, had no legitimate expectancy of renewal when his contract expired on 31 July 2015. Contrary to the Applicant's contentions, there is no indication that the Settlement Agreement he signed to resolve prior litigation promised him "a new beginning". On the contrary, the agreement expressly states in paragraph 3 that the post the Applicant encumbered would be "on loan from the Office of Legal Affairs (OLA) to the Security Sector Reform Unit (SSRU)" until 30 June 2015 in accordance with the memorandum between OLA and the SSR Unit.

47. There was no promise that the Applicant's appointment would be renewed beyond 30 June 2015 or that the post would be loaned to the SSR Unit beyond 30 June 2015. Indeed, the agreement expressly states in paragraph 3 that in accordance with the Staff Rules and Regulations "there is no guarantee that any posts will carry any expectancy of renewal or of conversion."

48. The nationalization of a P-4 Legal Officer post was discussed during the mediation that led to the Settlement Agreement. The Administration performed on all its obligations under that agreement. The Applicant does not allege that it has not; nor has he filed an Application for Enforcement of the Settlement Agreement pursuant to article 8 of the Dispute Tribunal's Statute and as provided in paragraph 16 of the Agreement. The Applicant's allegations contravene the plain language of the agreement. The Applicant's claim that the non-renewal of his appointment violated the agreement has no basis in law or fact.

49. The post encumbered by the Applicant was legitimately nationalized as part of a properly conducted restructuring exercise.

50. A proposal to restructure a mission that results in loss of employment for staff members falls within the Secretary-General's discretionary authority. The Respondent has a wide, but not unfettered, discretion in implementing *bona fide* retrenchment exercises. The Dispute Tribunal's review is limited to whether the restructuring was conducted in accordance with relevant procedures, due process was properly accorded, and it was properly motivated.

51. Where a retrenchment process involves a comparative review of staff, the review must be based on objective criteria, and carried out by a process that is impartial and transparent. Like a review of a non-selection decision, the Dispute Tribunal may not substitute its views for those of the Administration in determining

the review criteria, the methodology for applying the criteria, or the evaluation of staff based on the criteria.

52. In late 2014, United Nations Headquarters instructed all peacekeeping missions to reduce their budgets by ten percent for the 2015/2016 budget year. The proposal to restructure the Legal Affairs Section stemmed from this instruction and was in line with the overall policy to build national capacity within missions and save costs.

53. In late 2014, there was a Civilian Staffing Review (CSR) which proposed the conversion of one P-4 Legal Officer position to a National Professional Officer. Between March and May 2015, MONUSCO issued six information circulars informing staff of the comparative review to be conducted in line with the proposed restructuring of the Mission for the 2015/2016 budget year.

54. In addition, staff members who were subject to the review received individual notifications on 18 April 2015. However, due to an administrative error on the part of MONUSCO Human Resources, the Applicant as well as the other P-4 Legal Officer, who was subject to the review, did not receive notifications until 7 May 2015.

55. Once notified, the two staff members were each asked to submit the required documentation to the Comparative Review Panel. Although the Applicant did not submit such documentation, it was provided to the Panel and the two staff members were compared per the applicable criteria.

56. Based on the documents reviewed by the Comparative Review Panel and the Director of Mission Support, the Applicant scored higher than the other P-4 Legal Officer. Initially, the Panel erred in awarding the Applicant more points for years of United Nations experience. However, when the Director of Mission Support pointed out the error and that the other P-4 Legal Officer had more years of experience; the

post the Applicant encumbered was identified for retrenchment. The other P-4 Legal Officer also had higher e-PAS ratings than the Applicant, even taking into consideration his revised e-PAS evaluations resulting from the Settlement Agreement.

57. The Applicant has adduced no evidence to show that the comparative review results were flawed. Notwithstanding the late individual notification to the Applicant, he was aware of the comparative review process both from the Information Circulars and from the discussions of the resolution of his prior litigation. His challenges to the comparative review should therefore be dismissed.

58. The Applicant also claims that he should have been laterally assigned to a vacant P-3 Legal Officer position. MONUSCO was not required to assign the Applicant to that post. First, the mission undertook lateral assignments, where appropriate. Mr. Siri testified that MONUSCO had no authority to assign the Applicant, a P-4 Legal Officer, downward to a P-3 Legal Officer position on a non-competitive basis. Second, the Applicant was not qualified for the P-3 Legal Officer position because it required fluency in French. On cross examination, the Applicant could not testify that he was fluent in French.

59. Mr. Siri testified that the Applicant was treated the same as the other ten percent of the workforce who were affected by the restructuring and the same efforts to place the others were made on the Applicant's behalf as well.

60. The testimony of the Applicant's witness, whose identity the Dispute Tribunal ordered not to be disclosed during the hearing, was not reliable. The witness was not competent. The witness testified that the witness was not involved in the 2015 comparative review exercise resulting in the non-renewal of the Applicant's appointment. Although the witness was aware of placement exercises in other contexts where the mission reassigned staff, those placements involved lateral

reassignments. The witness's testimony that the Applicant could have been reassigned is also not reliable, because the witness did not know the Applicant was a P-4 Legal Officer. The witness erroneously believed that the Applicant was a P-3 Legal Officer.

61. The testimony of the Applicant's witness, Mr. Lars Ronved, was irrelevant and inadmissible. Mr. Ronved testified regarding discussions related to performance evaluations which were the subject of the Applicant's mediated Settlement Agreement. Mr. Ronved's testimony also did not prove animus on the part of the Applicant's FRO with respect to the nonrenewal of the Applicant's appointment. Mr. Siri testified that the FRO did not make the decision to not renew the Applicant's appointment.

62. The Applicant has produced no evidence of pecuniary harm or moral damages. The Mission notified the Applicant on 22 May 2015, more than 30 days before his appointment was set to expire, that it would not be renewed. The Applicant then sought suspension of the decision pending management evaluation. It was only after the decision to not renew his appointment was upheld, that he was notified on 31 July 2015 of his separation effective that day. In effect, the Applicant had more than two months' notice of his separation.

63. The 31 July 2015 notification included detailed instructions for the Applicant's checkout including an instruction to immediately contact the Regional Service Center Entebbe to arrange for his checkout, which he did not do. The notification stated that the Organization was willing to adjust the Applicant's checkout schedule "as reasonable."

64. However, the Applicant delayed his checkout for more than two weeks until he was ultimately given the choice of staying in Kinshasa as non-UN staff or taking steps to travel to Entebbe to check out. He delayed despite having been given notice

of his non-renewal more than two months prior and having ample time to prepare to leave the mission.

65. The Applicant has adduced no evidence of substantive or procedural flaws in the handling of his 2008/5 complaints. His complaints were processed promptly and in accordance with the Bulletin. The Applicant's claim that the SRSG should have recused himself from deciding on his 25 May 2015 complaint (as amended), is without merit.

66. There was no conflict. On 20 July 2015, the Applicant added the SRSG as an alleged offender of the complaint against MONUSCO's senior managers because the SRSG had not rendered a decision within sixty days of the Applicant's original complaint. However, by the time the Applicant made additional allegations against the SRSG on 6 and 15 October 2015, the SRSG had already issued his 11 September 2015 decision not to convene a fact-finding panel. There is also no basis for the Applicant's claim that the SRSG was required to issue an outcome within sixty days, nor is there evidence that the SRSG's decision was tainted by personal animus or bias.

67. The Applicant's claims regarding his 14 January 2016 complaint to the USG/DFS against the former SRSG are also unsupported by any evidence. The USG/DFS provided detailed reasons to support his decision not to convene a fact-finding panel.

68. The Appeals Tribunal held in *Wasserstrom* that a decision of the Ethics Office is not reviewable by the Dispute Tribunal. In addition, the Applicant's claims are time-barred. The Applicant did not file the application in this case until 24 March 2016, more than 150 days after he received the 15 October 2015 non-receivability letter from MEU.

Deliberations

69. Through the mountain of pleadings and oral and documentary evidence tendered before the Tribunal, several issues have been raised and addressed by both parties. The Applicant in his first Application UNDT/NBI/2015/095 challenged the non-renewal of his FTA beyond 30 June 2015 and challenged also the implementation of the Settlement Agreement reached between the parties on 5 May 2015 which he alleges was entered into by the Respondent through deception and tainted by bad faith on the part of the Respondent.

70. In his second application UNDT/NBI/2016/023, the Applicant severally alleges discrimination and mistreatment and other prohibited conduct on the part of his former FRO and other Senior Administration officials at MONUSCO. The Tribunal has thoroughly examined the evidence presented and finds that the Applicant who was representing himself made a number of unsustainable claims[1] and clutched at straws, perhaps based on his frustration with the turn of events. Even though the Respondent countered that some of these claims are not receivable due to late filing by the Applicant, the Tribunal finds them to be mostly unsustainable and therefore will not address them beyond dismissing them.

71. Only one clear issue emerges for determination in this case. It is whether the Settlement Agreement entered into by the parties is properly before the Tribunal for its enforcement and if it is, whether it was tainted by bad faith or breached in its implementation by the Respondent when the Applicant's contract was not renewed beyond 30 June 2015.

[1] These claims included: restructuring of MONUSCO and the Legal Affairs Office; nationalization of the Applicant's post; the comparative review process; placement of the Applicant on the vacant P-3 post in the Legal Affairs Office; the Applicant's complaints under ST/SGB/2008/5 and his complaint to the Ethics Office.

72. The Applicant's case is that the Settlement Agreement he entered into with the Respondent on 5 May 2015 was tainted by bad faith on the part of the Respondent and therefore was breached in its implementation by MONUSCO Senior Management. He has exhibited the said Settlement Agreement before the Tribunal and testified that in the course of the settlement talks, he was promised a new beginning in the Organization; in that his e-PASes for four years would be cleaned up and that his P-4 post at the Legal Affairs Section would be lent to the SSR Unit to which he would be reassigned with a new supervisor since the SSR Unit did not have a vacant post at that time.

73. As to the paragraph in the Settlement Agreement stating that his contract would expire on 30 June 2015, the Applicant told the Tribunal that it was explained to him during the settlement discussions that it was a mere technicality since his move to the SSR Unit would be renewed after 30 June 2015. He continued that he was told that the Mission did not have the capacity to state so in the written Settlement Agreement because section 4.2.3 of the SOP on Staffing Table and Post Management of Peacekeeping Operations provides that "there must be a limit to the loan not exceeding the budget cycle." He also tendered a staffing table for the SSR Unit which he testified was shown to him to convince him that the legal officer position which he would encumber in the unit had become a core post in that unit.

74. On his part, the Respondent submitted in his Reply that he had performed all his obligations under the Settlement Agreement. He submitted also that the Applicant had not filed an application for enforcement of the said Settlement Agreement pursuant to article 8 of the Dispute Tribunal's Statute and as provided for under paragraph 16 of the document. He argued too that in tendering the Settlement Agreement before the Tribunal, the Applicant had breached its confidentiality. At paragraphs 10 and 11 of his said Reply, the Respondent further quoted from the 3rd paragraph of the Settlement Agreement in support of his assertions that the Applicant was neither promised a new beginning nor a renewal of his appointment.

75. In further filings on 11 March 2016, it was submitted on behalf of the Respondent that the Applicant is attempting to challenge the Settlement Agreement without following the proper procedure and that the Tribunal's Statute prohibits him from doing so. The Respondent argued that the Applicant has not complied with the provisions of article 8.2 of the Statute. He continued that to enforce an agreement reached through mediation; the Applicant must bring the application within the timelines prescribed by article 8. He also argued that in challenging the non-renewal of his appointment, the Applicant must do so without relying on the Settlement Agreement or other confidential communications made during mediation. According to him, article 15.7 of the Tribunal's Rules of Procedure prohibits such disclosures.

76. The Respondent also submitted that the nationalization of a P-4 Legal Officer post was part of the mediation discussions that led to the drafting and signing of the Settlement Agreement. However, beyond that bare assertion, the Respondent did not lead evidence on this score in order to show in what light such a discussion was held or rebut through his lone witness or other witnesses, the substance of any mediation discussions as presented by the Applicant.

Is the Settlement Agreement properly before the Tribunal for its enforcement?

77. For ease of reference the Tribunal reproduces article 8.2 of its Statute and article 15.7 of its Rules of Procedure thus:

78. Article 8.2 of the UNDT Statute provides:

> "An application shall not be receivable if the dispute arising from the contested administrative decision had been resolved by an agreement reached through mediation. However, an applicant may file an application to enforce the implementation of an agreement reached through mediation, which shall be receivable if the agreement has not been implemented and the application is filed within 90 calendar days after the last day for the implementation as specified in the mediation

> agreement, or when the mediation agreement is silent on the matter, after the thirtieth day from the signing of the agreement"

79. Article 15.7 of the UNDT Rules of Procedure provides:

> "All documents prepared for and oral statements made during any informal conflict-resolution process or mediation are absolutely privileged and confidential and shall never be disclosed to the Dispute Tribunal. No mention shall be made of any mediation efforts in documents or written pleadings submitted to the Dispute Tribunal or in any oral arguments made before the Dispute Tribunal."

80. Article 8.2 of the Statute clearly provides for an applicant to bring an application to enforce the implementation of an agreement reached through mediation within ninety calendar days after the last day when implementation ought to have been concluded. This application was filed, according to the Tribunal's records, on 11 September 2015, 41 days after the Applicant was finally notified that he was to be separated from the Organization following the response of the management evaluation unit to his challenge of the decision to separate him. The Tribunal considers that this was the last day when implementation of the Settlement Agreement concluded. This means that the application was filed within time.

81. In *Kadri*,[2] the United Nations Appeals Tribunal (UNAT/the Appeals Tribunal) held that the applicant's challenge to the settlement agreement in that case was out of time because it was filed more than 90 calendar days after the last day for implementation.

82. Regarding the Respondent's submission that the Applicant had not properly challenged the Settlement Agreement or filed an application for the enforcement of the said Settlement Agreement as required by the Statute, the Tribunal observes that: (i) there is no special procedure prescribed by the Tribunal's Statute or Rules of Procedure or even by any of its Practice Directions for an applicant to bring an

[2] 2017-UNAT-772

application for the enforcement of a Settlement Agreement; and (ii) the Respondent had joined issues on this score with the Applicant. Specifically, in paragraphs 10 and 11 of his pleadings, the Respondent himself invoked and relied on the contents of paragraph 3 of the said Settlement Agreement in support of his position. He also pled that the nationalization of a P-4 Legal Officer post was part of the settlement discussions. This application challenging the Settlement Agreement is therefore receivable and properly before the Tribunal and the Respondent cannot blow hot and cold as it suits him. In other words, he cannot plead and rely on parts of the Settlement Agreement while arguing that the document is not before the Tribunal.

83. The Applicant's clear challenge of the Settlement Agreement and his exhibition of the document while alleging that it was tainted by bad faith constitutes not only a plea that the Agreement has been breached but also a plea that it be properly enforced through his reinstatement to the Organization.

84. As to the Respondent's submission that article 15.7 of the Tribunal's Rules of Procedure serve to estop the Applicant from relying on the Settlement Agreement or other confidential communications made during the mediation, this submission is both misguided and untenable. Article 15.7 of the Rules of Procedure would only apply where the Settlement Agreement is not at issue before the Tribunal. As already stated, the document is properly before the Tribunal here. Any review of the said Settlement Agreement for the purposes of ordering its enforcement, where necessary, must therefore essentially lift the veil off the entire process of negotiations and include a review of the statements and promises made in the course of mediation or settlement discussions.

Was there bad faith on the part of the Respondent in regard to the Settlement Agreement by the non-renewal of the Applicant's contract beyond 30 June 2015?

85. The Applicant testified that he had had problems with his FRO, Mr. Maia, in his four years of employment in the legal office of MONUSCO. He had filed three different cases before the UNDT alleging harassment, abuse of authority and retaliation by Mr. Maia. With the encouragement of the Tribunal, he entered into settlement discussions with MONUSCO management and agreed to end all litigation in exchange for a new position at the SSR Unit and clean e-PASes for his four years in the Legal Affairs Office to help his career and monetary compensation. Mr. Lars Ronved who was present at the e-PAS discussions between the Applicant and his FRO as part of the mediation process, testified to the hostility that attended the discussions.

86. The Applicant also testified that before the settlement discussions started, the then CoS at the Mission, Mr. Ian Sinclair, had invited him for a meeting in Goma regarding his cases before the Tribunal. He stated also that at the meeting, the CoS asked him if he would like to work in the SSR Unit and he agreed. The CoS insisted that his move to the SSR Unit was conditional to closing or withdrawing his cases at the UNDT and engaging in mediation. The Applicant said he agreed to that condition and that the mediation process started at the end of 2014 and ended on 5 May 2015 with the signing of the Settlement Agreement. He added that during the negotiations, the restructuring/retrenchment exercise at the Mission was on-going and he was not told that his post was to be nationalized.

87. It was also the Applicant's testimony that even while the negotiations were on-going, management was in the process of nationalizing his post unbeknownst to him. While he was told at the time that he would be moved to the SSR Unit with his post which would be loaned to that unit, he was not informed or notified that the said post was to undergo a comparative review and may be nationalized. Other staff

members who were affected by the restructuring and were to undergo comparative review of their posts were informed by 18 April 2015. The Applicant was only notified on 7 May 2015, barely two days after he signed the Settlement Agreement, that he would undergo a comparative review which may result in loss of his job if his post was nationalized. The fact of informing the Applicant on 7 May 2015, two days after he signed the Settlement Agreement, that his post may be nationalized was admitted by the Respondent's witness Mr. Siri who testified that not giving the Applicant this information in April 2015 when other affected staff members were informed was an error on the part of the Respondent.

88. The Applicant told the Tribunal that it did not make sense for him to enter into an agreement to give him good e-PASes for four years and move him to another unit if he was not going to keep his job with MONUSCO for more than six weeks. He testified that during the negotiations he was promised that his new position was secure and that he was even given a new chart of the SSR Unit[3] to which he was to be moved which showed that the new position of legal officer he would encumber in that unit was a core position which would survive the imminent restructuring of the Mission.

89. While the Settlement Agreement reflected that the Applicant's post would last up till 30 June 2015, the Applicant testified that when he raised the issue during mediation discussions, it was orally explained to him that setting forth a date beyond the end of the fiscal year would be a breach of section 4.2.3 of the Standard Operating Procedures (SOP) on Staffing Tables and Post Management of UN Peacekeeping Operations. He was told not to worry and assured that the borrowing of the post would be renewed upon its expiration.

90. Another witness Maja Bogicevic was the Officer-in-Charge of the SSR Unit at the time the Applicant was deployed there. Under cross-examination, he stated that

[3] Applicant's Annex 6.

Annex 6, the new organogram for the unit was created in January 2015 by the Director of the SSR Unit to show the new configuration of the unit. He said that in this new configuration, two new positions were added as shown in the organogram. The two new posts were for a child protection officer post and the legal officer post which the Applicant encumbered. The witness stated that the SSR Unit was never told that the Applicant was to spend only a few weeks at the unit and following the Applicant's report for duty at the new unit, a gathering at which food and drinks was served was organized at the SSR Unit to welcome the Applicant who was also sent to a two-day conference to get him acquainted with SSR Unit matters.

91. As already observed, much as the Respondent pled paragraph 3 of the Settlement Agreement to support his claim that the loan of the Applicant's post to the SSR Unit was stipulated to end on 30 June 2015, that there was no "guarantee that any posts will carry any expectancy of renewal or of conversion" and that the nationalization of a P-4 Legal Officer post was discussed at mediation; he did not lead evidence in rebuttal of the Applicant's claims that the mediation was done in bad faith due to false and misleading information and explanations provided to him. Also unrebutted is the Applicant's testimony that the mediation process dragged on for about six months during which several drafts of an agreement were made and discarded. It must also be borne in mind that during the said mediation process, the Mission was in the process of restructuring and that the Applicant was kept away from the knowledge that he was at risk of losing his job through nationalization.

92. The question arises here as to whether in considering the circumstances surrounding the mediation and the resulting impugned Settlement Agreement, the Tribunal is bound by the bare wording of the document at issue. To the extent that the impugned document is alleged by the Applicant to be tainted by bad faith due to misrepresentations and false explanations and in the absence of any credible rebuttal on the Respondent's part, the Tribunal's primary concern must be that, even while upholding the freedom of contract, it must aim to ascertain whether that principle was

tainted by bad faith on the part of any party to the said agreement/contract. In doing so, the Tribunal must be satisfied that the spirit and intent of the parties were not breached in the implementation of the Settlement Agreement.

93. The first and opening paragraph of the document which was signed on 5 May 2015 states that the parties agreed that the Applicant will assume functions in Kinshasa at the Security Sector Reform Division of MONUSCO. His Terms of Reference (TORs) are then spelt out to include conducting legal analysis on identification of systemic issues in the areas of Gender, Democratic CTL, Children in Armed Conflict and Sexual and Gender balance issues. Only two days later, there is notice given the Applicant (by way of notice of a comparative review of his post) that these new functions that he had just signed on to embark upon were not likely to be carried out since his post was at risk of nationalization.

94. It cannot be denied that in any employment relationship between a staff member and the Organization, the staff member is the party in a weaker position especially because he/she is not privy to the considerations behind the decisions that affect him/her. The Respondent argued that the Applicant's allegations contravene the plain language of the Settlement Agreement. That may well be so. But does it contravene the spirit of the Settlement Agreement? Unrebutted evidence led by the Applicant clearly show that he was lied to and false explanations made to him in order to have him sign the Settlement Agreement whose plain language did not capture those promises and explanations.

95. No matter the legal wrapping and plain language of the written Settlement Agreement, it smacked of bad faith for the Respondent to drag the Applicant through a mediation process for about six months, and at the end of the process send him to another unit where he could work separately from the FRO with whom for four years he had the problems that were being mediated, and then inform him barely two weeks later on 22 May 2015 that his post was to be nationalized and that he would be

leaving the Organization. The fact of the Respondent insisting that as part of the conditions for settlement, the Applicant must transfer to another unit with new functions, implied that in good faith, he must be given reasonable time and space to develop a work plan and perform those functions.

96. The Tribunal must emphasize that to the extent that the Applicant was made to agree to transfer to another unit as part of the condition for mediation and then shown the door out of the Organization almost before the ink had dried on the Settlement Agreement, especially under the guise of a restructuring that the Applicant was not told would affect him, is totally unacceptable in a transparent and fair Organization such as the United Nations. The excuse that the withholding of the information from the Applicant, during the mediation process, that his post could be nationalized, was done in error has no merit whatsoever. The Tribunal finds it to be deliberate and believes the Applicant's account that he never knew that his post was to undergo comparative review in the then ongoing restructuring.

97. The Tribunal has seen the correspondence from Human Resources Officers at the Mission informing the Applicant[4] on 3 February 2015 that the extension of his contract as earlier approved for one year was being held up by the non-completion of his e-PAS and that it would be extended when the e-PAS was completed. Again, on 25 March 2015, the Applicant queried Human Resources as to why his contract was only extended to 30 June 2015 rather than October 2015. The response was that the shortened contract was because of the then on-going mediation process and he was promised that it would be extended as soon as mediation was over.[5]

98. Instead when the mediation process finally ended on 5 May, the Applicant was misled into signing the Settlement Agreement which reflected that his employment contract would end on 30 June 2015. It is not rebutted that when he

[4] Annex 2
[5] Annex 3

protested that date, it was explained to the Applicant that under the relevant SOP for peacekeeping missions, the Settlement Agreement could only bear that date which was the last day of the budget cycle and he was promised an extension in the new budget cycle. The Tribunal has been told that during the mediation process, the restructuring and comparative reviews for retrenchment of some staff members were on-going. This claim was not rebutted. By not informing the Applicant until after he signed the Settlement Agreement that his post was affected in the restructuring, the Tribunal finds that the Respondent exhibited bad faith. In other words, the Settlement Agreement itself was tainted by deception and its spirit and intent have been breached in its implementation.

99. In *Gehr*,[6] UNAT stated that it defers to the determination of facts before the Dispute Tribunal and would only interfere if it is satisfied the Tribunal considered irrelevant matters or ignored relevant matters placed before it by the parties. Also in *Sanwidi*,[7] UNAT held that in judging the validity of an exercise of discretion, the UNDT can examine, among other things, if the decision is absurd or perverse. It cannot be claimed that the explanations of the Respondent given to the Applicant regarding the Settlement Agreement were irrelevant and ought not to be considered by this Tribunal especially since the Respondent has not denied them through his witness or other documentary evidence. It cannot be denied either, in view of the surrounding circumstances, that the non-renewal of the Applicant's contract beyond 30 June 2015 was absurd or perverse.

100. The Application succeeds on this issue alone.

Conclusions

101. The Tribunal finds that:

[6] 2012-UNAT-234
[7] 2010-UNAT-084

a. The MONUSCO Administration exhibited bad faith during the negotiations by not informing the Applicant until after he signed the Settlement Agreement that his post was affected in the restructuring;

b. The MONUSCO Administration's bad faith tainted the spirit and intent of the Settlement Agreement;

c. The Respondent breached the intent of the Settlement Agreement by not renewing the Applicant's contract beyond 31 July 2015[8];

d. Based on the request for extension of appointment dated 20 August 2014[9], which was signed by Mr. Maia and recommended an extension of the Applicant's FTA for one year from 31 October 2014, and the emails from MONUSCO HR regarding the extension of the Applicant's FTA, the Applicant's appointment should have been renewed at least until 30 October 2015.

Remedies

102. The Applicant, in his two applications, requested several remedies relating to his ST/SGB/2008/5 complaints, which cannot be granted. He also sought the following remedies:

a. The decision not to renew his contract be rescinded and that he be reinstated to an organization other than MONUSCO or in the alternative, compensation equal to three year's salary to reflect the salary he would have received if he had not been erroneously terminated;

[8] The Applicant's FTA was extended from 30 June 2015 to 31 July 2015 after he was granted a suspension of action by the UNDT.
[9] Annex 1 to the application in Case No. UNDT/NBI/2015/095.

b. Payment of his salary from the day of his unlawful separation until his restatement;

c. That the Tribunal find that the Mission acted in bad faith and breached the Settlement Agreement;

d. That the Tribunal find that Messrs. Maia, Siri and Sinclair acted in bad faith in entering and implementing the Agreement and that appropriate remedial measures be taken against them; and

e. Damages in the amount of USD75,000 for procedural irregularities and moral/emotional distress injuries.

f. Amendments be made to his 2011/12 and 2012/13 ePASes to correctly reflect his performance;

103. In *Warren* UNAT-2010-065, the Appeals Tribunal affirmed that the purpose of compensation is to place a staff member in the same position he or she would have been in had the Organization complied with its contractual obligations. This Tribunal notes that absent the MONUSCO Administration's breach of the intent of the Settlement Agreement, the Applicant's FTA should have been extended until 30 October 2015 but he was unlawfully separated from service on 31 July 2015. The Tribunal finds that the Applicant should be compensated for this procedural irregularity.

104. In light of its conclusions at paragraph 103 above, the Tribunal orders the following remedies:

a. Rescission of the decision not to renew the Applicant's appointment beyond 30 June 2015.

b. Payment of the Applicant's net base salary from 1 August 2015 to 31 October 2015.

c. Compensation in the amount of one month's net base salary for the procedural irregularity of separating the Applicant on 31 July 2015 instead of 30 October 2015.

d. Amendment of the Applicant's e-PASes in accordance with paragraph 6 of the Settlement Agreement.

105. The Appeals Tribunal has held previously that a staff member's testimony alone is not sufficient as evidence of harm warranting compensation under Article 10.5(b) of the UNDT Statute.[10] Apart from his pleadings and the evidence he provided during the hearing, the Applicant has not placed any corroborating evidence before the Tribunal that would justify an award of moral damages. Consequently, the Applicant's request for damages in the amount of USD75,000 is refused.

106. The compensation awarded shall be paid within 60 days of this judgment becoming executable. Interest will accrue on the total sum from the date of recovery to the date of payment. If the total sum is not paid within the 60-day period, an additional five percent shall be added to the US Prime Rate until the date of payment.

(Signed)
Judge Nkemdilim Izuako
Dated this 9th day of January 2019

[10] *Kallon* 2017-UNAT-742; *Auda* 2017-UNAT-787; *Kebede* 2018-UNAT-874.

Entered in the Register on this 9th day of January 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi