



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/001

Judgment No.: UNDT/2019/031

Date: 25 February 2019

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DZUBUR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Rosangela Adamo, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is an FS-5 Contingent Owned Equipment (COE) Assistant with the United Nations-African Union Mission in Darfur (UNAMID) in El Fasher, Sudan.
2. She filed an application on 1 January 2019 challenging the outcome of a comparative review process (CRP) conducted by UNAMID to include her among staff members identified for retrenchment, communicated to her by letter dated 28 October 2018.
3. The Respondent filed a reply on 4 February 2019 in which it is submitted, *inter alia*, that the application is not receivable *ratione materiae* since the outcome of the CRP is not a reviewable administrative decision within the meaning of art. 2.1(a) of the Dispute Tribunal's Statute.
4. On 13 February 2019, the Applicant filed submissions addressing the issue of receivability pursuant to Order No. 009 (NBI/2019). On 22 February 2019, the Respondent filed additional submissions addressing the merits.
5. The Tribunal has decided, in accordance with art. 16.1 of the Tribunal's Rules of Procedure, that an oral hearing is not required in determining the preliminary issue of receivability in this case and will rely on the parties' pleadings.

Facts

6. The facts laid out below are uncontested and supported by the parties' pleadings and additional submissions.
7. On 27 April 2009, the Applicant was reappointed as an FS-3 COE Assistant with UNAMID. On 1 July 2009, the Applicant was selected as COE Assistant in the Property Management (PM), COE section, where she currently serves on a continuing appointment.¹

¹ Reply para. 4 and annex 1.

8. On 16 March 2018, the Secretary-General submitted his proposed 2018-2019 UNAMID budget to the General Assembly. The budget proposed a drawdown of 1,183 civilian staff to be implemented in three phases by 30 June 2019.²

9. On 1 June 2018, the Chairperson of the African Union Commission and the United Nations Secretary-General issued a joint special report on the strategic review of UNAMID (Special Report), which recommended a reduction in UNAMID's civilian component with a view to close the mission by 30 June 2020.³ On 13 July 2018, the Security Council endorsed the Special Report's recommendations.⁴

10. Between August and September 2018, UNAMID held three town hall meetings to apprise staff members of the ongoing mission restructuring and the CRP that would determine which staff members would be identified for retrenchment.⁵ In the PM/COE Section, five of the 14 FS posts were subject to retrenchment.⁶ The Chief, PM/COE Section determined the distribution of the five FS posts to be abolished in the following functions: two FS-4 Property Control and Inventory Assistant, one FS-5 COE Assistant and two FS-4 COE Assistant posts. The Applicant is one of two FS-5 COE Assistants currently serving in the section.⁷ Both serve on continuing appointments.

11. During the UNAMID downsizing, 125 UNAMID staff members, including the Applicant, were awarded continuing appointments after the initial comparative review of international staff members had taken place. Since staff members serving on continuing appointments are given a preference during a staff reduction, UNAMID convened an extraordinary comparative review panel to conduct an additional review to identify staff members to be retrenched taking into consideration the recent award

² Reply para. 5 and A/72/794, Budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2018 to 30 June 2019, p. 4.

³ Reply, para. 6 and S/2018/530, Special report of the Chairperson of the African Union Commission and the Secretary-General of the United Nations on the strategic review of the African Union-United Nations Hybrid Operation in Darfur, paras. 61-63.

⁴ S/RES/2429 (2018).

⁵ Reply, para. 6 and application, Annex 8.

⁶ Reply, para. 7 and Annex R2, Table 11, p. 41.

⁷ Reply, para. 7 and Annex R6.

of continuing appointments to certain international staff members.⁸

12. The extraordinary panel reviewed the Applicant against the other FS-5 COE Assistant. The Applicant received a score of 74 points, while the other staff member received a score of 83.5 points. Therefore, the Panel identified the Applicant for retrenchment.⁹

13. By letter dated 28 October 2018, the UNAMID Human Resources Management Section (HRMS) informed the Applicant that because of the CRP, she had been identified for retrenchment effective 1 July 2019. The letter read in the relevant part:

In light of the recent endorsement of the comparative review process by UNHQ, we wish to inform you that you are among staff members that has been identified for retrenchment effective 1 July 2019. Subject to approval of the budget by the General Assembly, you will soon be serving (sic) with an official letter informing you on the non-renewal for fixed term staff and termination of appointment for staff with continuing appointment beyond 30 June 2019. In the meantime, we are working closely with colleagues in Career Development Unit in Field Personnel Division (FPD) to share the profiles of the downsizing staff members via cosmos platform with other missions for review and consideration for possible placement. In this regard, we are kindly requesting if you could please send us the following documents so that we can upload them in cosmos platform....¹⁰

14. On 5 November 2018, the Secretary-General submitted to the General Assembly a revised 2018-2019 budget for UNAMID.¹¹

15. The Applicant requested management evaluation of the outcome of the CRP on 27 November 2018.

16. The General Assembly approved the Secretary-General's revised budget on 22 December 2018.¹²

⁸ Reply, para. 8 and Annex R6.

⁹ Reply, para. 9 and Annex R8.

¹⁰ Reply, para. 10 and application annex 1.

¹¹ Reply, para. 11 and A/73/588, Revised budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2018 to 30 June 2019, available at: <https://undocs.org/A/73/488>.

¹² Reply, para. 12 and A/RES/73/278, Financing of the Africa Union-United Nations Hybrid Operation in Darfur, available at: <http://www.un.org/en/ga/73/resolutions.shtml>.

17. On 10 January 2019, the Management Evaluation Unit (MEU) informed the Applicant that her request was not receivable in the following terms.

We note that in your present request, you challenge the outcome of the comparative review process. However, the notification of this outcome is also an intermediary step in the UNAMID downsizing process: as you are yet to receive a final termination notice, there has been no reviewable decision which has a direct or concrete legal effect or consequence on your contract of employment. The outcome of the downsizing process may only be challenged in the context of a final decision taken based on that process.

Respondent's submissions on receivability

18. Article 2.1(a) of the Dispute Tribunal's Statute defines the scope of the Dispute Tribunal's jurisdiction. An administrative decision is a unilateral decision taken by the Administration in a precise individual case, which produces direct legal consequences to the legal order. Only a decision which carries adverse consequences for the staff member's legal rights and obligations is receivable before the Dispute Tribunal. In reliance on the Appeals Tribunal jurisprudence, the Respondent submits that for an administrative decision to fall under judicial review by the UNDT, it must produce a direct impact and not a future injury. Specifically, in *Lee*¹³, the Appeals Tribunal held that the outcome of the downsizing process may only be challenged in the context of a final decision taken based on that process.

19. In the present case, since there has been no decision to terminate the Applicant's appointment, the outcome of the CRP does not carry any direct and adverse consequences for the Applicant's legal rights. In addition, UNAMID has informed the Applicant that between now and 1 July 2019, it will share her profile with other missions in an effort to place her in another position, if possible. Therefore, the application is not receivable *ratione materiae*.

Applicant's submissions on receivability

20. The terms of reference (TORs) circulated on 17 September 2018 gave rise to

¹³ 2013-UNAT-481.

specific contractual rights regarding how the restructuring of UNAMID would be conducted and the Respondent's conclusion that she is less qualified renders the decision properly reviewable.

21. The creation of an extraordinary panel was expected to adhere to the terms of reference of the review process. The CRP was not conducted fairly and its outcome is reviewable for two reasons, namely, that there are contractual issues arising from the notification of the outcome of the CRP and procedural errors that vitiated this.

Contractual issues arising from the notification of the outcome of the CRP

22. The HRMS notification of 28 October 2018 regarding her retrenchment was clear in stating that she will soon be served with an official letter informing her of the termination of her appointment. The HRMS notification does not explicitly include the Respondent's claim that there had been no final decision to terminate her appointment, but rather it is evident that the termination is indeed final. The placement referred to by the Respondent is just a possibility which carries no obligation. There is no reference about a likelihood that the termination decision would be changed. The only certain matter is that an official letter will be served in due course.

23. In *Mcneill* UNDT/NBI/2015/081, UNAMID used the budget approval as a way to justify the termination of a staff member's appointment. In her case, a review of the mission was carried out, the budget was subsequently approved in accordance with the recommendation to abolish five FS posts in the PM/COE section. The endorsement of the outcome of the CRP gives the mission the greenlight to proceed with sending notifications to the affected staff and initiate the process of termination. The outcome of the CRP and the HRMS memorandum constitute implementation of the proposed staffing cuts and carry direct and adverse consequences for her contractual rights. The mission has not thus far notified her of any change regarding her retrenchment. Therefore, the damage is in the present, not in the future.

24. Although the Respondent refers to sharing her profile with other missions for possible placement to support its claim that the HRMS notification is not final, the

Respondent has failed to share with the Tribunal the fact that there exists an FS-5 COE Assistant post in UNSOS that has been vacant, among other vacant posts in logistics in other missions. Moreover, since she received the HRMS notification, she shared her Personal History Profile (PHP) with the Career Development Unit in the Field Personnel Division (FPD), however, to no avail. This is an indication that the mission and the Career Development Unit in FPD are focused on the termination of her continuing appointment rather than making the effort, as claimed, to place her in another mission.

25. Because of the Respondent's delays in providing her with answers, the MEU refusal to fully evaluate all the aspects listed in her two requests and the failure of the Respondent to offer her the vacant posts in UNSOS and other missions have all caused unnecessary stress and anxiety. It is a known fact that HRMS is unable to maintain confidentiality of staff affairs and she is now suffering from reputational harm and uncertainty while the time passes and her appointment is terminated.

Considerations

26. The key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment.¹⁴

27. In *Lee*, the Appeals Tribunal held that the Secretary-General's budgetary proposal and the General Assembly's adoption by resolution of the budget proposal are merely acts prefatory to, or preceding, an administrative decision that would produce direct legal consequences to the applicant's employment. Although the applicant in *Lee* could not challenge the discretionary authority of the Secretary-General to restructure the Organization or to abolish her post, she could challenge an administrative decision resulting from the restructuring once that decision has been made.¹⁵ The same tenet transpires from *Hersh*, where the Appeals Tribunal upheld a rescission of a separation

¹⁴ *Andati-Amwayi* 2010-UNAT-058.

¹⁵ *Lee* 2013-UNAT-481 at para. 51.

decision based on an unlawful comparative review¹⁶ and from *Loeber*, where it confirmed irreceivability of the application against the outcome of the comparative review as such.¹⁷

28. On the other hand, in *Lloret Alcaniz et al.*, where the matter concerned implementation of a unified salary scale in relation to staff members with non-dependent spouses, who had been previously paid at the dependency rate on account of their first child and who under the new regime became eligible for a child allowance and the progressively depreciating transitional allowance for a six-year period, the UNAT concluded that the application was receivable. It held:

All the [concerned staff] will incur a pecuniary loss as a result of the gradual depreciation of the transitional allowance, which is further compounded by the fact that once their first child ceases to be dependent, [they] will not receive the transitional allowance for the entire period despite having other dependent children. Thus, although the loss may not be immediate, a loss of some kind will inevitably afflict all the [concerned staff] with the loss of eligibility for the transitional allowance. The inevitability of the loss may be a future event but it is nonetheless certain and only a matter of time. As such, the decision has an adverse impact for all the [staff]. In the premises, the majority of Judges hold that the UNDT was correct in finding the applications to be receivable.¹⁸

29. This Tribunal takes it that “inevitability” and “certainty” as elements conditioning the receivability issue are meant to denote a situation where all the elements of the disposition of the impugned decision are readily determined and only the implementation is deferred, or extended, in time. This is to be distinguished from a situation contemplated in *Mirella et al*¹⁹, which concerned staff members who receive the dependent spouse allowance which will not decrease over time and thus it is yet uncertain whether the staff members will ever suffer any adverse consequences. The application being about potentially affecting staff member’s terms of appointment or contract of employment by decisions issued in the future, it was found irreceivable.

¹⁶ *Hersh* 2014-UNAT-433-Corr.1.

¹⁷ *Loeber* 2018-UNAT-844.

¹⁸ *Lloret Alcaniz et al.* 2018-UNAT-840 para. 67.

¹⁹ *Mirella et al.* 2018-UNAT-842.

30. Turning to the impugned decision, the Tribunal recalls that it makes it clear that the final decision to terminate the Applicant's continuing appointment has not yet been taken. At the same time, the case needs also to be distinguished from the situation in *Chama* UNDT/2017/062, where this Tribunal held:

It would be for the parties to test through appellate processes whether the outcome of *Lee* might be revisited by UNAT in relation to designation of a specific post for abolition, considering that it is a decision of individual application and final in the administrative course of the matter, the immediate consequences of which render the status of the appointment precarious. [...]

[A]fter the endorsement of the abolition of the specific post by the General Assembly no remedy is available to a staff member, no matter the possible error in designation: the post in question ceases to exist and reinstatement becomes impossible whereas validation of the non-extension decision by the General Assembly precludes compensation.²⁰

31. Unlike in *Chama*, in this case, the General Assembly did not endorse abolition of the specific post encumbered by the Applicant, but, rather, one of the two which were subject to the comparative review. Retaining the Applicant in service is not foreclosed and may be effected by either the Administration's own action or by the Tribunal's judgment, should the Applicant's case prevail on the merits. For the time being, in accordance with the Appeals Tribunal's jurisprudence, the contested decision does not have a direct impact on the applicant's terms of appointment as it merely constitutes a prefatory act. As such it is irreceivable.

Judgment

32. The application is not receivable *ratione materiae*.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 25th day of February 2019

²⁰ Paragraph 24.

Entered in the Register on this 25th day of February 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi