



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2018/027

Judgment No.: UNDT/2020/024

Date: 7 February 2020

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ICHA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

George G. Irving

Counsel for the Respondent:

Elizabeth Gall, AAS/ALD/OHR

Background

1. The Applicant is a former FS-5 Administrative Assistant with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).

2. On 16 February 2018, she filed an application with the United Nations Dispute Tribunal contesting the decision to terminate her fixed-term appointment.

3. The Respondent filed a reply to the application on 23 March 2018.

Summary of relevant facts

4. On 2 August 2001, the Applicant joined the Mission on a fixed-term appointment at the FS-5 level as an Administrative Assistant.

5. The appointment was renewed for one year, from 1 July 2017 to 30 June 2018.¹

6. By letter dated 26 October 2017, the Applicant received notice of termination of her appointment, effective 31 October 2017.² The reason for separation was budget cuts in MONUSCO that necessitated abolition of the Applicant's position among others.

7. The process leading to separation of the Applicant from service is discussed below in chronological order.

Re-assignment (2016)

8. After a Comparative Review Process (CRP) in 2016, the Applicant was informed that she would not be retained in service beyond 30 June 2016. However, this decision was not implemented. As part of a placement exercise, the Applicant

¹ Reply, annex 2.

² Application, annex 2.

was reassigned as an Administrative Assistant, FS-5 level, to the Field Administration Office, Mission Support Division, in Kinshasa, from 31 December 2016. This position was funded by a “loaned” post of Air Operations Assistant, FS-5 level, from the Aviation Section, Mission Support Division.³

General Assembly Resolution 71/301 on 2017 Budget

9. On 8 March 2017, the Secretary-General submitted his report to the General Assembly on MONUSCO’s proposed budget for the 2017-2018 year. By its resolution 71/301 adopted on 30 June 2017, the General Assembly reduced the proposed budget by USD92,755,100, representing a 7.5% reduction.⁴

10. On 4 August 2017, the MONUSCO Special Representative of the Secretary-General (SRSG) in a broadcast informed all MONUSCO staff of the budget reduction and the required reduction of USD8.7 million in the Mission’s civilian staffing component.⁵

Need to reduce staffing component and guidelines

11. In August 2017, MONUSCO promulgated Guidelines for the implementation of the reduction of the staffing component at MONUSCO (CRP Guidelines).⁶

12. The CRP was conducted by a Comparative Review Panel (CRP Panel). The CRP Panel was guided by MONUSCO’s CRP Guidelines and the Panel’s terms of reference (TORs).⁷ The TORs were subsequently amended to include a review by the CRP Panel of the process for “dry cuts”. “Dry cut” was defined as a situation where a post or function proposed for reduction did not have a comparative post or function in the same category and level within the same Section as a result of which the incumbent of the post would not be subject to comparative review. The CRP process

³ Reply, para. 5 and application, annex 13.

⁴ Reply, para. 6.

⁵ Reply, annex 3.

⁶ Application, annex 11 and reply, annex 6.

⁷ Reply, para. 11 and annex 7.

was to exclude staff members who would be subject to a dry cut.⁸

13. On 22 August 2017, the Chief of Staff provided the Mission leadership with an approved list of staff reductions.⁹ On the same day, the Applicant received a letter from the MONUSCO Chief Human Resources Officer (CHRO) notifying her that a number of posts in her section would have to be reduced and consequently, MONUSCO would undertake a comparative review of staff in her section with similar functional titles and levels.¹⁰

Rationale for not retaining the Applicant in service

14. On 23 August 2017, the SRSG informed all MONUSCO staff that the Mission had determined which functions would be reduced in light of the budget cuts, while continuing to meet the Mission's strategic priorities identified in Security Council resolution 2348 (2017). The SRSG also announced a comparative review process, which would determine which staff would be retained.¹¹

15. On 25 August 2017, the MONUSCO CHRO informed the Applicant that MONUSCO would be seeking the approval of the Department of Management to terminate her appointment effective 30 September 2017. The CHRO explained that the rationale for this decision was because there were no other posts in her section with the same functional title in the same category, at the same grade encumbered by another staff member with a contractual modality that could take precedence over the Applicant's as per the Staff Rules.¹²

16. On 5 September 2017, the CRP Panel submitted its report to the Compliance Review Committee (CRC) which was responsible for reviewing the

⁸ Reply, annex 8.

⁹ Reply, annex 4.

¹⁰ Application, para. 3 and annex 5.

¹¹ Reply, annex 5.

¹² Application, annex 6.

recommendations of the CRP Panel.¹³

Vetting by Compliance Review Committee

17. In its report of 14 September 2017, the CRC was satisfied that the CRP followed correct procedures and that there was no flaw in its implementation of the process.¹⁴

18. On 20 October 2017, the Under-Secretary-General, Department for Management (USG/DM) approved the termination of the appointments of 146 MONUSCO staff members including the Applicant's.¹⁵

Request for management evaluation and request to absorb the Applicant pending retirement

19. On 27 October 2017, the Applicant requested management evaluation of the decision to terminate her fixed-term contract.¹⁶ On the same date, the President of the MONUSCO Field Service Union (FSU) wrote an email to the MONUSCO SRSR requesting for his approval for the Applicant to be absorbed elsewhere. The pertinent parts of the email are reproduced below:

During FSU/DMS team meetings as directed by your good self on the above staff member [Applicant], it was agreed that on humanitarian grounds, she could be allowed to retire next year as she is due having served the UN for very long. Please find attached copy of minutes.

I would be grateful for your kind approval so that she can be absorbed elsewhere.¹⁷

20. On 10 January 2018, the *Chef de Cabinet*, on behalf of the Secretary-General, upheld the contested decision following management evaluation.¹⁸ The Applicant

¹³ Reply, annex 12.

¹⁴ Reply, annex 13.

¹⁵ Reply, annex 15.

¹⁶ Application, annex 3.

¹⁷ Application, annex 8.

separated from service, effective 27 January 2018, her initial date of separation having been postponed pending management evaluation.

Applicant's submissions on the merits

21. The Applicant submits that the following are the legal issues to be addressed in this case:

- a. whether the abolition of her post was carried out properly;
- b. Whether the duty of care owed to her under staff rule 9.6 was respected;
- c. Whether the decision to terminate the Applicant's appointment was improperly motivated; and
- d. What remedy is warranted from the breach of the Respondent's duty?

a. *Whether the abolition of her post was carried out properly*

22. With regard to the presumption of regularity concerning the abolishment of her post, the Respondent has failed to address several underlying challenges to the decision. This was the second time in two years that she had been faced with termination due to abolition of post. In 2016 she was redeployed from Goma to Kinshasa against the post of Aviation Assistant. Annex 13 of the application contains a detailed justification in November 2016 for the assignment of the Applicant to this post and the need for the Applicant's services in Kinshasa. Yet only two months later, in January 2017, a proposal was made justifying the elimination of the Applicant's position.

23. There has never been any written record produced of the programmatic justification for this course of action other than a general reference to "budgetary

¹⁸ Application, annex 4.

constraints.” It is significant that although the budgetary shortfall was only 7.5%, the proposed reduction of three out of seven administrative assistant positions appears significantly greater than what was being requested as cost-saving measures. Moreover, given the Applicant’s proximity to retirement and the termination indemnity that was paid, it is questionable what, if any, money was saved.

24. The Master List of dry cuts lists the Applicant as an Administrative Assistant, but this is a functional title and not the title of the post she encumbered. The Applicant was treated as encumbering an Administrative Assistant post whereas in fact she was placed against an Aviation Assistant post, and there is no record of the justification for this post to be abolished.

25. Contrary to what is asserted, “dry cuts” were not subject to any programmatic review. The CRP Panel and CRC review did not examine how this decision was arrived at and there is no record of any review. Dry cuts were originally excluded from the review process entirely. In order to conduct a pro forma review, a sample was given for a cursory review of the process, but no review of the individual cases was undertaken. Instead the Respondent’s annex 12 confirms that the Excel Master List of affected posts was not distributed to the CRP, but the CRP was able to see a sampling onscreen of the process for how the dry cuts were determined. No one reviewed the justification for the initial decision as to which posts were being abolished.

b. What duty of care was owed to the Applicant under staff rule 9.6 and was it respected?

26. Pursuant to staff rule 9.6(e), subject to the order of retention and the availability of suitable posts, she had the right to be retained in service and the Respondent has the correlative obligation to retain her in service in any of the available suitable posts in which her services could be effectively utilized with due regard to relative competence, integrity and length in service.

27. The Respondent contends that no comparative review was necessary due to

the number of posts and types of contract entailed. Since there were four staff with continuing contracts and only four posts maintained, no comparative review was indicated. However, staff rule 9.6 (e) provides that the order of preference be applied, “provided that due regard shall be given in all cases to relative competence, integrity and length of service.” The Applicant’s length of service and proximity to retirement were never considered. Given that the Applicant met all the requirements for conversion to a continuing appointment but was targeted for termination just before the review was scheduled to occur, it would appear all the more reasonable to have conducted the comparative review.

28. The decision to proceed with the separation occurred just when the Applicant might have benefited from conversion of her status to a continuing appointment and the extension of the age of mandatory separation from service to 65. It is questionable why the Applicant was not considered for a continuing appointment before this, given her years of service. It may be relevant that her Entry On Duty (EOD) date was apparently changed without her knowledge when she moved from UNEP to MONUSCO, possibly affecting her eligibility.

29. In the event the Applicant was the subject of a reduction of staff, the Respondent is not relieved from following the required procedures to prevent professional dislocation. The Applicant had only a few months left to reach full retirement age but even the intervention of the Field Staff Union to grant a brief extension was not even responded to. There is no explanation why the Applicant was afforded only five days official notice before being terminated. Even the advance notice she received in early October was less than a month.

30. Efforts to find alternative placement were non-existent. She was initially requested to send her updated Personal History Profile (PHP) to Human Resources in August 2017 but was later advised that no comparative review was required. There is no record of any efforts to place the Applicant in another position, including in another mission. The duty of care to place Field Service staff serving in missions is

not limited to one mission and the Respondent's duty under staff rule 9.6 was not limited to MONUSCO.

31. Paragraph 41 of the 2017 MONUSCO CRP Guidelines provides that for fixed-term staff with appointments beyond 30 September 2017, MONUSCO will provide relevant information to the Field Personnel Division (FPD) for possible placement elsewhere prior to requesting termination. There is no indication this ever took place.

32. Her appointment is not limited to service with MONUSCO. As a member of the Field Service, she is part of a special cadre of personnel used to service all overseas missions. Her letter of appointment specifically states that she was subject to assignment to any of the activities or offices of the United Nations and required to move periodically to new positions. In 2017, she had applied to eight posts and another in January of 2018. There were no responses to any of them. Among these, there were three FS-5 posts for which she was rostered:

- a. In May 2017, post 76615 was advertised and she applied; its status indicated "recruitment completed" with no communication of any kind to the Applicant.
- b. In September 2017 she applied for post 85402 the day it was advertised, which was "filled from the roster". The Applicant was never contacted.
- c. On 28 November 2017, post No. 87094 was advertised and the Applicant applied the same day. Its status remains "under consideration". The Applicant has never been contacted by anyone in HR about these posts she applied to or any others.

c. Evidence that the decision to terminate her appointment was improperly motivated

33. The universal obligation of both employee and employer to act in good faith towards each other includes acting rationally, fairly, honestly and in accordance with the obligation of due. That obligation has not been met in this case.

34. In the event of retrenchment, the Administration is bound to demonstrate that all reasonable efforts have been made to consider the staff member concerned for available suitable posts. Where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given. Nevertheless, while efforts to find a suitable post for the displaced staff member rest with the Administration, the person concerned is required to cooperate fully in these efforts.

35. The particular circumstances of this case have to be considered. Staff are generally not considered for new assignments involving relocation within six months of their reaching the age of retirement. The time frame for the usual selection processes would have precluded this avenue of reassignment as an immediate solution. But the Applicant was already rostered for FS-5 positions in administration and did not have to go through a competitive selection process to be placed. In the Applicant's case, efforts were made on her behalf by the Field Staff Union to seek a temporary assignment for a few months, which does not require applying for vacancies. There was no response.

36. In the absence of any good faith effort to bridge the Applicant to retirement, an improper motive can be inferred, particularly given prior efforts to terminate her and her role as MONUSCO Staff Union Vice President.

37. Given the fact that termination indemnity and other entitlements had to be paid to the Applicant, there was little if any real cost saving to be had, strengthening the argument that the contested decision was retaliatory. The Applicant and other

staff members had raised questions over the conduct of the CRP and were ultimately excluded from participating in it, contrary to the CRP Guidelines.

38. A review of the facts surrounding the contested decision indicate that the Applicant was placed in harm's way by a series of prejudicial actions. The Applicant had been relocated two years before following a similar notice of abolition of post. She was originally reassigned with her FS-5 Administrative Assistant post, but in January 2017 she was switched to a borrowed post from the Aviation Section. Consequently, the Applicant was thereafter listed as an Air Operations Assistant. It is unclear what post was actually abolished, if this was anticipated when the posts were switched and what occupational group the Applicant actually fell into for the purposes of comparative evaluation.

39. The Applicant was an outspoken staff representative. Her colleagues in the FSU voiced concerns that this may have unduly influenced MONUSCO management's action or lack of action. In spite of a subsequent recommendation to the SRSB for alternative placement for the Applicant so that she could complete her remaining eight months of service before retirement, there was curiously no response even though a concrete proposal for reassignment was put forward. On information and belief, several of the Applicant's similarly situated colleagues who were also in need of placement were found posts and remain in service, including the colleagues, who were initially identified along with her for separation. The Applicant's access to her official email account was abruptly cut off in January 2018 which was not the case with other displaced staff.

Respondent's submissions

40. The Respondent's submissions can be summarised as follows:

41. Following the General Assembly's decision to reduce the 2017-2018 budget, the Mission was required to reduce its civilian staff. MONUSCO's leadership reviewed the civilian staffing levels in light of the strategic priorities outlined in Security Council resolution 2348 (2017) and identified areas where reductions could

be made.

42. MONUSCO followed a fair, transparent and impartial comparative review process to identify staff members who would be retained. The comparative review process was conducted through the CRP Panel and the CRC according to the Guidelines adopted by the Mission. The Mission consulted the staff unions regarding the Guidelines and the TORs of the CRP Panel and CRC. The membership of the CRP Panel and CRC included representatives of the staff unions and staff members from outside the Mission. All staff members, including the Applicant, were kept informed of the Mission's efforts to identify reductions in civilian staff and the status of the comparative review process.

43. To accommodate the reduction in budget and its strategic priorities, MONUSCO decided to reduce the number of Administrative Assistants, FS-5, in the Field Administrative Offices, Mission Support Division, from seven to four. Of the seven staff members holding these positions, four held continuing appointments, and three, including the Applicant, held fixed-term appointments.

44. The CRP Panel's TORs included procedures to reflect the order of preference for retaining staff established by staff rules 9.6(e) and 13.1. Paragraph 17 of the TORs provided that the CRP will review staff members against others holding the same appointment type. Where reduction in staff can be accommodated through reduction of staff holding a particular type of appointment, it will not be necessary to review staff with greater preference for retention. Accordingly, the reduction of the Administrative Assistants, FS-5, to four staff members was accommodated by retaining the four staff members who held continuing appointments. Consequently, the Applicant and the two other staff members who held fixed-term appointments were identified as "dry cuts" and were not required to be subject to comparative review.

45. To ensure transparency, the CRP Panel reviewed the list of dry cuts provided by the Mission under its amended TORs. In its report, the CRP Panel unanimously

agreed that the process for identifying which of the functions/posts are deemed as dry cut was fair and transparent.

46. The integrity of the process was also scrutinized by the CRC. The CRC was satisfied that the CRP Panel followed correct procedures and that there was no flaw in its implementation of the comparative review process.

47. At the conclusion of the CRP, under her delegated authority, the USG/DM approved the termination of 146 appointments under staff rule 9.6(e).

48. On 4 August 2017, the Mission urged all staff to take proactive steps to ensure their continued employment. From 25 August 2017, the Applicant was informed that she was subject to a dry cut and faced termination of her appointment. On 26 October 2017, the Applicant was given notice of termination under staff rule 9.7, effective 31 October 2017. In accordance with the Guidelines, the Department of Field Support (DFS) identified the Applicant as a staff member affected by downsizing. However, no opportunities arose for selection for, or reassignment to, a suitable vacant position.

49. As a result of the reduction in staff, 146 staff members were given notice of termination of appointment. One Administrative Assistant, FS-5, who was due to be separated was reassigned after the CRP to a newly-created position in Kananga funded by the Department of Political Affairs.

50. In light of the above process the Respondent argues that the Applicant's claims have no merit.

Considerations

51. This is a case of termination of employment based on abolition of a post. The issue before the Tribunal is whether the abolition of the post was carried out in violation of the Applicant's terms of appointment or contract of employment as submitted by the Applicant. According to her, the issues for the Tribunal's determination are: (a) whether the abolition of her post was carried out properly; (b)

whether the duty of care owed to her under staff rule 9.6 was respected; (c) whether the decision to terminate the Applicant's appointment was improperly motivated; and (d) what remedy is warranted from the breach of the Respondent's duty.

52. Staff regulation 9.3 provides the general legal framework on termination of appointment as follows:

(a) The Secretary- General may, giving reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment for the following reasons: i. If the necessities of service require abolition of the post or reduction of the staff.

Staff rule 9.6 (c)(i) elaborates on the above regulation by establishing factors that the administration shall consider when carrying out an exercise leading to abolition of a post. It states that:

Except as otherwise expressly provided in paragraph (f) below 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 appointment;
- 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.

53. The general principle is that management is presumed to have taken into consideration all the above factors when it carried out the exercise leading to the abolition of the post. This is also referred to as the presumption of regularity which was enunciated in *Rolland*- 2011-UNAT-122 in the following terms:

There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this

presumption is a rebuttable one. If the management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.¹⁹

54. In *Rolland*, the application concerned the non-selection of a staff member. However, the Tribunal believes that the principle of regularity applies to all official acts including acts relating to abolition of post as is the case in this application.

55. Apart from ascertaining the burden of proof, the United Nations Appeals Tribunal (UNAT) has provided guidance on the standard of proof required in both cases of proof by the Secretary-General that official acts were regularly performed, that is, minimal standard (*Rolland*) and the reverse burden on the Applicant that these were not regularly performed. For instance, in *Lemonnier-2017-UNAT-762*, UNAT in reversing the UNDT decision on a non-selection dispute held that:

... the UNDT applied the wrong standard of proof in weighing the evidence. At all times, it was the staff member's burden to prove by clear and convincing evidence that the Administration did not give his candidacy full and fair consideration...The Dispute Tribunal concluded that the Administration's decision ...was unlawful "on the balance of evidence".

The "balance of evidence" standard is a lesser standard of proof than clear and convincing evidence.²⁰

56. According to this jurisprudence, the Administration need only to be able to minimally show that due process was followed in the exercise leading to the decision to the abolition of post. In this Tribunal's view, a just decision is one that is fair, reasonable, legal, rational, procedurally regular, devoid of bias, capriciousness, or arbitrariness and proportionate.²¹

¹⁹ Paragraph 26.

²⁰ Paragraphs 35 and 36.

²¹ *Sanwidi* 2010-UNAT-084, para. 40.

57. The Dispute Tribunal's role is therefore to review the administrative decision to abolish a post, against the standards set out in the jurisprudence to ensure that in arriving at the decision the administration did not abuse its discretionary power.²²

58. In the present case, the Respondent has outlined in detail the reason for abolition of post being due to: (a) budgetary constraints that necessitated prioritizing the operations based on advice from the Security Council; (b) notifying and updating staff members on these two issues; (c) constituting various committees and bodies to carry out a transparent reduction exercise; (d) subjecting the reports of the reduction exercise for vetting before an independent body; (e) seeking management approval to terminate services of those affected; (f) notifying the affected staff members of the impending separation; (g) encouraging the affected staff members to look out and apply for positions as they became available in the system for placement; and (h) paying termination indemnity to affected employees who could not be placed in any position.

59. The Respondent was further asked to provide the procedure and criteria applied to select one Mr. D R-B from among the three dry cut holders for reassignment in Kananga. The Respondent provided the procedure and the criteria thereby meeting the minimal standard of proof that the abolition of the Applicant's post and her non-placement on another suitable post were done in compliance with the prevailing rules and regulations.

60. It is at this point that burden of proof shifts to the Applicant to show by clear and convincing evidence that the abolition of her post and failure to place her in an available suitable post was a violation of her employment rights.

61. In support of her application, the Applicant avers that: (a) she was close to retirement and that therefore she should have been allowed to remain in service until reaching her mandatory retirement age of 62 in August 2018; (b) that her fixed-term

²² Ibid., para. 38.

contract was about to be converted to continuing employment therefore she could have had priority of retention over fixed-term appointees; (c) that her active membership (vocal) in the staff union was used against her in deciding to abolish her post; (d) that there was a history of trying to prematurely separate her from service as far back as 2016; and (e) that she qualified for priority selection to be retained in service as stipulated in staff rule 9.6.

62. Having outlined these alleged anomalies in the reduction of posts exercise, it fell upon the Applicant to substantiate these allegations with clear and convincing evidence that indeed the administration abused its powers. For example, the Applicant may give evidence to show that the Administration based its decision on irrelevant matters or that it ignored relevant matters.²³

Analysis of the evidence based on “clear and convincing” standard

63. The Applicant has made allegations which are outlined below and the Tribunal must determine whether she has satisfied the standard of proof or she has just laid out mere allegations without any substance?

(a) *She was close to retirement and that therefore she should have been allowed to remain in service until reaching her mandatory retirement age of 62 in August 2018. That her separation package would have been better if she had been allowed to retire.*

64. This is an assertion which the Applicant made but without any valid foundation in law. The fact that the Applicant had only a few months left to reach full retirement age, or the fact that the Field Staff Union intervened to have her granted a brief extension, or that she was afforded less days’ official notice before termination do not constitute valid grounds for alleging that the abolition of her post was irregular. These are not relevant matters that the Administration was obliged to consider under the law governing abolition of posts.

²³ Toure-2016-UNAT-660, para. 30.

65. This also applies to her assertion that if she had been allowed to reach mandatory retirement age her terminal benefits would have been better than what she received on termination. This is an irrelevant factor because it is just a wish. The reality was governed by the rules and regulations that applied to separation before reaching mandatory retirement age.

66. The Applicant states that efforts to find alternative placement were non-existent although “several similarly situated colleagues who were also in need of placement were found posts and remain in service, including the colleagues, who were initially identified along with her for separation”. In response, the Respondent has argued that the Applicant has not presented any evidence that she applied for any temporary or regular job openings at the FS-5 or FS-4 levels following the Mission’s announcement of the budget cut.

67. The Respondent concedes that one similarly situated staff member was placed in a post after taking into account an objective selection criteria that included, gender, bearing in mind that the post was in a security risk area and it was preferable to assign a man rather than a woman. This explanation meets the standard of proof that the selection was regular. The Applicant has not rebutted this presumption by adducing any evidence to show that the selection of Mr D R-B instead of her was irregular.

68. It is the Tribunal’s finding that the Respondent’s advice to the Applicant and other staff members facing termination to take proactive steps to ensure their continued employment satisfied the duty of care of ensuring that staff members may be considered for alternative positions.

69. UNAT found in *Fasanella* UNAT-2017-765, that;

Any permanent staff member facing termination due to abolition of his or her post- must show an interest in a new position by timely and completely applying for the position; otherwise the Administration would be engaged in a fruitless exercise, attempting to pair a permanent staff member with a position that would not be accepted.

It is the view of this Tribunal that the above reasoning though in reference to permanent staff member holds good even for fixed-term staff members such as the Applicant. Therefore, the onus was on the Applicant to show an interest and apply for a position for which she was suited. This was not the Respondent's responsibility. The Respondent did not violate staff rule 9.6 as alleged by the Applicant.

(b) That her fixed-term contract was about to be converted to a continuing employment therefore she could have had priority of retention over fixed-term appointees.

70. The fact that the Applicant's length of service and proximity to retirement were never considered does not constitute a violation of her rights since the factors that the Administration was mandated to consider are clearly outlined in staff rule 9.6 and those were considered.

71. The Applicant has not shown how she met all the requirements for conversion to a continuing appointment. The legal position on the status of tenure of contracts is well established by UNAT which in reference to staff rules 4.12 and 4.13 has held that;

temporary and fixed- term appointments do not carry any expectancy, legal or otherwise, of renewal. That there is no such expectancy of renewal or conversion, irrespective of the length of service.²⁴

In view of these statutory provisions, the Applicant's assertions are without legal basis. This applies to her assertions that she would have benefitted from an extension of retirement age to 65.

72. The Applicant has not provided any evidence to show that her EOD was changed without her knowledge and why she did not raise this fact with Administration when she became aware of it.

(c) Her active(vocal) membership in the staff union as Vice President was used

²⁴ *Igbinedion2014-UNAT-411*, para. 23.

against her in deciding to abolish her post.

73. It is not enough to just allege that the Applicant was victimised because she was an outspoken staff representative. The fact that her colleagues in the FSU voiced concerns that this may have unduly influenced MONUSCO management's action or lack of action is mere speculation without any factual basis whatsoever.

74. The Tribunal is not convinced that there is in this narrative any incidence of irregularity pertaining to the abolition of her post. Staff union members do not enjoy special privileges, neither are they immune to termination of employment on valid reasons as UNAT held in *Hassanin*²⁵ that;

it would cast doubt on the legality of the Administration's actions if a staff representative was favored in comparison to other [permanent] staff members.

The Applicant has failed to adduce any evidence to connect the decision of abolition of the post to her vocal participation in staff matters. There is no suggestion in her submissions that the Respondent held a grudge or ill will against the Applicant.

(d) There was a history of trying to prematurely separate her from service as far back as 2016.

75. The Applicant averred that this was the second time in two years that she had been faced with termination due to abolition of post.

76. The Tribunal does not consider that the Applicant has addressed any issue of irregularity in this instance. She has merely made a statement without substance.

(e) She qualified for priority selection to be retained in service as stipulated in staff rule 9.6.

77. This is clearly a misinterpretation of the provision in light of the revelation

²⁵ 2017-UNAT-759, para. 54.

that there were four staff members in the Applicant's position who had continuing appointment contracts and therefore had, according to the cited staff rule, priority over the Applicant who held a fixed-term contract. She has not demonstrated how she had priority over Mr. D R-B's selection who had been identified for a "dry cut" like the Applicant.

78. All in all, the Applicant has failed to discharge her legal duty to prove with clear and convincing evidence that the abolition of her post and non-placement on a suitable position were marred by irregularities entitling her to a remedy.

Judgment

79. The application is dismissed in its entirety.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 7th day February 2020

Entered in the Register on this 7th day February 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi