



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

MONTECILLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Brandon Gardner, OSLA

Counsel for Respondent:
Angela Arroyo, UNDP

Introduction

1. The Applicant, a former Learning Specialist at the P-4 level with the United Nations Development Programme (“UNDP”), contests the Administration’s decision to terminate his permanent appointment following the abolition of his post.

2. For the reasons stated below, the application is rejected.

Facts

3. In 2015, the Applicant’s post in New York was abolished due to restructuring exercise. Following a realignment job fair, in August 2015, the Applicant was selected and assigned to a post of the Learning Specialist, Talent Development Unit, in Copenhagen in January 2016.

4. In December 2016, Chief of the Talent Development Unit informed the team members, including the Applicant, that the team would be restructured.

5. In January 2017, the Chief of Integrated Talent Management informally notified the Applicant that his post would be abolished and that she was delaying an official notification of the abolition of post to allow him more time to apply for other posts.

6. On 24 April 2017, the Applicant was officially notified that his post would be abolished as of 31 July 2017. The Applicant was informed that he was afforded three months to search for another job until 23 July 2017 and that his Human Resources Business Partner would assist him and advocate for his candidacy. He was also informed that he would be allowed to take up to 20 business days for full time search during this period.

7. On 28 July 2017, the Applicant was informed that he was placed on temporary assignment in New York as a Learning Resource Specialist for three months until 31 December 2017. He was informed that if he did not find another position by the

conclusion of his temporary assignment on 31 December 2017, his appointment would be terminated and he would be paid compensation in lieu of the notice period.

8. On 19 December 2017, the Applicant filed a management evaluation request to contest the decision to terminate his permanent appointment.

9. In January 2018, the Administration informed the Applicant that it withdrew the decision to terminate the Applicant's permanent appointment due to procedural errors and that it would continue to review whether there were suitable positions for him.

10. In June 2018, the Applicant attended a meeting with UNDP Human Resources Director and was verbally informed that his permanent appointment would end in three months.

11. In August 2018, the Applicant attended another meeting with UNDP Human Resources Director. Following the meeting, in response to the Applicant's email stating that a verbal notice given in June 2018 was not a valid notification of his termination, the Human Resources Director confirmed that only a written notice would be valid and that he would get back to the Applicant after reviewing his case.

12. In February and March 2019, the Deputy Director, Office of Human Resources ("OHR"), sent the Applicant a list of available posts at the P-3 and P-4 levels. The Applicant expressed an interest in two positions, namely, the position of Management Specialist, P-4 in New York and the position of Planning and Coordination Specialist, P-4 in Bangkok. The latter position was with UN Women.

13. On 21 March 2019, the Deputy Director, OHR informed the Applicant that he did not meet the minimum criteria for the position of Management Specialist, P-4 in New York and therefore his permanent appointment would be terminated as of 27 March 2019.

14. Following the Applicant's filing of his second management evaluation request, in April 2019, the Administration withdrew the decision to terminate his permanent

appointment and gave him additional time to search another position in accordance with the Standard Operating Procedures for Termination of a Permanent Appointment Holder updated in February 2019 (“SOP”).

15. In April 2019, the Deputy Director, OHR sent the Applicant a list of vacant positions at the P-3 and P-4 levels. The Applicant responded that he applied for the following five positions: Fund Portfolio Manager, Investigations Specialist, Partnership Specialist, Policy and Programme Specialist, and Chief, Human Resources Section.

16. On 16 May 2019, the Applicant was notified by the Deputy Director, OHR at a meeting that his permanent appointment would be terminated on the same day. The Applicant filed an application for suspension of action pending management evaluation regarding this decision, which was granted by the Dispute Tribunal.

17. On 24 May 2019, the Applicant received a response to his third management evaluation request, which upheld the contested decision, and his permanent appointment was terminated.

18. On 30 May 2019, the Applicant filed the present application.

Consideration

The applicable legal framework and the issues of the case

19. The present case concerns a decision of 16 May 2019 to terminate the Applicant’s permanent appointment following the abolition of his post. The Applicant claims that the Organization did not fulfil its obligation to make a good faith effort to find him an alternative post under staff rules 9.6(e) and 13.1(d).

20. In the case of the termination of permanent appointment, staff rule 13.1(d) applies. Under staff rule 13.1(d), subject to the availability of suitable posts for 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, a staff member whose

permanent appointment is terminated as a result of the abolition of a post or the reduction of staff shall be retained in preference to those on all other types of appointments.

21. In *Timothy* 2018-UNAT-847, the Appeals Tribunal held that staff rules 9.6(e) and 13.1(d) create an obligation on the Administration to make reasonable and good faith efforts to find suitable placements for the redundant staff members whose posts have been abolished (para. 31).

22. As the Appeals Tribunal held, “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” (*Timothy*, para. 32).

23. The Appeals Tribunal held that while the Administration is required to consider the relevant staff members on a preferred basis for the available suitable posts, “this requires, as per the clear language of this provision, determining the suitability of the staff member for the post, considering the staff member’s competence, integrity and length of service, as well as other factors such as nationality and gender. If the redundant staff member is not fully competent to perform the core functions and responsibilities of a position, the Administration has no duty to consider him or her for this position” (*Timothy*, para. 38).

24. While efforts to find a suitable post for the displaced staff member rest with the Administration, it is lawful and reasonable to expect that the affected staff members cooperate fully in the process: the relevant staff member is required to cooperate fully in these efforts and must show an interest in a new position by timely and completely applying for the position. Once the application process is completed, however, the Administration is required to consider such staff members “on a preferred or non-competitive basis” for the position in an effort to retain him or her (*Timothy*, paras. 45-47).

25. In this case, it is not disputed that since the Applicant was notified of the decision to abolish his post in April 2017, he applied for a number of posts at his level or lower level with UNDP. After considering the Applicant's suitability for the posts he applied for, the Administration determined that he was not suitable for these posts and thus it could not retain him. Therefore, the Respondent claims that the Administration met its obligation under staff rule 13.1(d) and thereby lawfully terminated the Applicant's permanent appointment.

26. The Applicant raises several issues regarding the contested decision, and his main arguments can be summarized as follows:

a. In response to the Respondent's claim that the Applicant was not suitable for the posts he applied for, the Applicant states that he has obtained broad experience in training, human resources, procurement, information technology, and related fields for over 20 years with UNDP, and it is inconceivable that he did not meet the relevant criteria for any of the posts;

b. The Applicant claims that there were several vacant positions which were frozen or not advertised and that the Administration could have placed him on those positions;

c. The Applicant further claims that the Administration announced to its staff members that it was about to reorganize OHR shortly after the termination decision. This reorganization would have resulted in the filling of vacant positions, and therefore the Applicant argues that the Administration failed to act in good faith when it terminated the Applicant's permanent appointment right before the reorganization process began, instead of trying to find a suitable post for him;

d. The Applicant claims that the Administration did not act in good faith towards him throughout the process, which was evidenced by the Administration's various actions. In particular, the Applicant claims that the Administration took no action to find him a suitable alternative post between

April 2017 and February 2019, and the Administration rushed the termination during his last days with UNDP to get rid of him as soon as possible.

27. The Tribunal notes that the Applicant provides some factual background relating to the abolition of his posts in 2015-16 and suggests that these decisions were ill-motivated and amounted to retaliation as a result of his cooperation with the UNDP Office of Audit and Investigation's investigation in 2014. However, the Applicant does not challenge these decisions made in 2015-16 and should he wish to do so, his application would be, in any event, time-barred. Accordingly, the Tribunal will not consider allegations relating to the abolition of posts.

28. In light of the above, the Tribunal will review the following issues: (a) whether the Administration lawfully concluded that the Applicant was not suitable for the posts he applied for after he was notified of the contested decision; (b) whether the Administration had a legal obligation to consider the Applicant for frozen vacant posts or for potential vacant posts that could have become available in the near future; and (c) whether the Administration otherwise failed to act in good faith throughout the process leading up to the contested decision.

Did the Administration lawfully conclude that the Applicant was not suitable for posts he applied for?

29. The Respondent submits that UNDP promulgated the Standard Operating Procedures for Termination of a Permanent Appointment Holder in February 2019 ("SOP") to fulfil its obligations under staff rules 9.6(e) and 13.1(d) and that it followed the process set forth in the SOP in the Applicant's case.

30. Specifically, the Respondent submits that UNDP convened a two-person panel to assess the Applicant's suitability for the posts he applied for on a non-competitive basis. However, the panel found that the Applicant did not meet the minimum educational and/or work experience criteria for each of the positions. The Respondent submits that considering the specialized functions of these positions, especially when

compared to the Applicant's own specialized experience, it is conceivable and credible that the Administration was not able to retain the Applicant against these positions.

31. To support his claim, the Respondent produced two documents: (a) the eligibility matrix signed by a two-person panel, which documents the assessment of the Applicant's candidacy for positions he applied for between March and May 2019, and (b) the summary of the eligibility determinations which documents the assessment of the Applicant's candidacy for positions he applied for between 2016 and 2019. The Tribunal notes that the summary of the eligibility determinations does not show the names of the individuals who evaluated the Applicant's candidacy and when the evaluation was done for each post. Since the Applicant does not dispute the veracity of the panel's assessment as documented in these two records, the Tribunal accepts that this documentation accurately summarizes the requirements of the positions and the Applicant's education and work experience.

32. According to the record, the Applicant holds an Associate of Arts degree in data processing and has over 29 years of experience in programme management in the areas of the information and communications technology ("ICT"), budgets, and procurement. The Applicant also has strong experience in the fields of online learning, and knowledge management through virtual platforms, especially in the management of ICT projects.

33. Between 2016 and 2018, the Applicant applied for nine positions at his level or lower level. The summary of eligibility determinations shows that he did not meet the minimum work experience requirement for the following seven positions: Policy Specialist (Leadership Development) (P-4), Management Specialist (P-4), Chief "PSU" (P-4), Reporting Officer (P-4), Results Based Management, Monitoring & Evaluation Specialist (P-4), Strategic Management Specialist (P-3), and Special Assistant to the Administrator (P-4).

34. The Applicant also applied for two Human Resources Specialist (P-4) positions but was not considered further as these positions were frozen.

35. The Applicant also applied for positions at a higher level, for which he did not receive a priority consideration.

36. Additionally, the Applicant applied for 10 positions between March and May 2019, during which the new SOP became effective. The eligibility matrix prepared by a two-person panel shows that he did not meet the minimum work experience requirement for the following 10 positions: Accelerator Lab Network Systems Specialist (P-4), Africa Accelerator Lab Network Specialist (P-4), Fund Portfolio Manager (P-4), Innovative Finance and Accelerator Lab Partnerships Development Specialist (P-4), Investigations Specialist (P-4), Management Specialist (P-4), Partnerships Development Specialist (P-4), Partnership Specialist (P-4), Policy and Programme Specialist/Crisis and Fragility (P-4), and Security Training Specialist (P-4).

37. The Tribunal reviewed the records produced by the Respondent. Based on the review of the above-referenced positions' work experience requirements and the Applicant's work experience, the Tribunal is persuaded by the Respondent's argument that these positions required specialized work experience which the Applicant did not have. The Tribunal finds that the Administration reasonably concluded that the Applicant did not meet the minimum work experience required for these respective positions.

38. While the Applicant argues that it is inconceivable that he did not meet the relevant criteria for any of the positions considering his broad experience in training, human resources, procurement, information technology, and related field over 20 years with UNDP, he does not specifically contest the evaluation of his candidacy for the positions he applied for and was deemed not to meet the minimum work experience requirement.

39. As the Appeals Tribunal held in *Timothy*, at para. 38, the Administration has no duty to consider a redundant staff member for a position if he or she is not fully competent to perform the core functions and responsibilities of a position. The Tribunal

does not find any fault with the Administration's conclusion that the Applicant was not fully competent for the above-referenced positions and thus the Administration's decision not to retain him in these positions is lawful.

Did the Administration have legal obligations to consider the Applicant for frozen vacant posts or potential vacant posts?

40. The Applicant also argues that he should have been considered for frozen vacant posts or posts that would likely to be created after the upcoming OHR restructuring.

41. Regarding the frozen posts, the Respondent submits that a position that is frozen does not meet the definition of an "available post" as there is no intent to fill that position due to reasons such as budgetary restrictions or future reorganizations.

42. Regarding the Administration's plan to restructure OHR, the Respondent submits that the process would have resulted in the changes to the functions of a large number of positions and it was unknown at the time of the contested decision, what the result of this process would have been.

43. As stated above, the Administration's legal obligation under staff rules 9.6(e) and 13.1(d) is premised on the fact that there are available suitable posts where a redundant staff member can be placed. The Tribunal agrees with the Respondent that "frozen" positions are, by definition, not available positions.

44. It is settled jurisprudence that the Administration has ample latitude to organize its departments (see *Hersh* 2014-UNAT-433, *Bali* 2014-UNAT-450, *Matadi et al.* 2015-UNAT-592). However, this discretion is not unfettered and the Administration cannot freeze a position only to exclude a staff member. However, the Applicant does not claim that the Administration decided to freeze these positions in bad faith and therefore the Tribunal finds that it was lawful not to consider the Applicant for frozen posts.

45. With respect to potential vacant posts likely to be created by the upcoming restructuring plan, the Tribunal finds that they are also, by definition, not available posts. They only become available posts once restructuring has taken place. The outcome of the process was unknown at the time of the contested decision and thus the future availability of posts was speculative at the time of the contested decision.

46. Accordingly, the Tribunal finds that the Administration lawfully did not consider the Applicant for frozen posts or potential vacant posts.

Did the Administration otherwise fail to act in good faith towards the Applicant throughout the process?

47. The Applicant raises several issues to claim that the Administration failed to act in good faith towards the Applicant.

48. First, the Applicant claims that between April 2017 and February 2019, the Administration took no action to find him a suitable alternative post. Thereafter, the Applicant was sent four lists of available posts at his level between February and May 2019, but the Applicant claims that these lists were not curated to highlight relevant posts commensurate with his skill set or job title, but rather appeared to contain all UNDP vacancies at his level.

49. In response, the Respondent submits that the Administration repeatedly made good faith efforts to find the Applicant a suitable alternate post before the implementation of the SOP in February 2019. In particular, the Respondent submits that after a three-month search period from April to July 2017, the Applicant was offered a temporary assignment through 31 December 2017. The Respondent further submits that throughout 2017-2018, the Administration reviewed the Applicant's candidacy on an ongoing basis to give him a priority consideration while the development of the relevant SOP was pending.

50. The Respondent also submits that the Administration sent the list of all available posts according to the SOP and it would not be reasonable for the

Administration to limit application opportunities before a staff member had a chance to express an interest.

51. According to the summary of eligibility determinations discussed above, the Administration reviewed the Applicant's candidacy for the positions he applied for in 2016-2018 and lawfully determined that he did not meet the minimum work experience requirements. While the Administration seemed to have lacked a more systematic way to fulfil its legal obligations under staff rule 13.1(d) before the implementation of the SOP in February 2019, it nonetheless produced evidence that it gave priority consideration to the Applicant's candidacies during this period.

52. With respect to the Applicant's claim that the vacancy lists were not curated to highlight relevant posts commensurate with his skill set or job title, the Tribunal accepts the Respondent's explanation. As the Applicant submits, he obtained broad experience in different fields over years of service with UNDP, and the Tribunal does not find that sending the lists of all available posts shows the Administration's lack of good faith. The Applicant was given the opportunity to review all available vacancies and apply to the ones he considered suitable for him.

53. Second, the Applicant further claims that the Administration's actions towards him in the final days of his employment with UNDP—from 16 May 2019, when he was informed of the termination decision, through 24 May 2019 when his termination was effectuated—are particularly instructive concerning the Administration's attitude towards him. The Applicant was informed of the termination decision around 4:00 p.m. on 16 May 2019 and the Administration decided to pay him compensation in lieu of the three-month notice period. The Administration further reviewed the Applicant's management evaluation request on an expedited basis to separate him as soon as possible. The Applicant submits that these actions show the lack of good faith on the part of the Administration.

54. In response, the Respondent submits that the Administration properly exercised its discretion to pay compensation in lieu of the three-month notice period under staff rule 9.7(d).

55. The Tribunal agrees that under staff rule 9.7(d), the Administration can choose to pay compensation in lieu of the three-month notice period, and nothing in staff rule 13.1(d) and the relevant jurisprudence limits the Administration's discretion in that regard.

56. Further, under the jurisprudence of the Appeals Tribunal, if an applicant claims that the decision was ill-motivated or based on improper motives, the burden of proving any such allegations rests with the applicant (see, for instance, *Azzouni* 2010-UNAT-081, para. 35; *Obdeijn* 2012-UNAT-201, para. 38).

57. The Tribunal notes with concern that it took two years from the notification of the abolition of the Applicant's post in April 2017 to the final notification of the termination in April 2019. Moreover, during this period, the Administration had to withdraw the termination notice twice due to procedural errors. The Tribunal finds that while this course of action is regrettable, it produced no direct legal consequence in the Applicant's contractual rights as his contract was not terminated. As discussed above, the final notice of termination, which did result in the Applicant's separation, was conducted lawfully under staff rule 13.1(d).

Conclusion

58. In light of the foregoing, the application is rejected.

(Signed)

Judge Joelle Adda

Dated this 6th day of August 2020

Entered in the Register on this 6th day of August 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York