



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/024

Judgment No.: UNDT/2020/163

Date: 4 September 2020

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DIENG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Evelyn W. Kamau, OSLA

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Rosangela Adamo AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former staff member of the United Nations-African Union Mission in Darfur (“UNAMID”), is contesting the decision to abolish his post and separate him from the Organization on grounds of non-renewal of his contract (“the impugned decision”). The Tribunal rejects the application.

Facts and procedure

2. At the time of the impugned decision, the Applicant held a fixed-term appointment at the P-5 level, as a Senior Child Protection Officer in Darfur, Sudan. On 28 February 2019, he filed an application contesting the impugned decision and, pursuant to the Tribunal’s Order, an amended application on 13 July 2020.¹

3. The Respondent filed his reply to the amended application on 22 July 2020 arguing that the application as far as it challenges the abolition of post was not receivable *ratione materiae* but that the decision not to renew his appointment beyond 31 December 2018 was reviewable. The Applicant filed submissions on receivability on 30 July 2020.²

4. The Applicant joined the Organization as a Human Rights Officer at the P-2 level on 14 July 2000. He was later appointed to several positions in the United Nations Mission in Sierra Leone and the United Nations Operations in Côte d’Ivoire. On 23 February 2009, he was appointed as Senior Child Protection Officer at the P-5 level in the Child Protection Unit (“CPU”) in UNAMID.

5. Between February and March 2017, complaints were made to Mr. Jeremiah Mamabolo, the Joint Special Representative (“JSR”), UNAMID, about the Applicant’s communication style by UNICEF Sudan staff members. On 5 June 2017,

¹ To comply with the requirement to submit the application in the appropriate form and page limit as per UNDT Practice Direction No. 4.

² By Order No. 144 (NBI/2020).

upon receiving the complaints, Mr. Mamabolo convened a fact-finding panel to review the allegations against the Applicant.

6. On 13 November 2017, the Applicant met with Mr. Mamabolo. At the meeting, Mr. Mamabolo informed him that he had nominated Ms. Aisha Dyfan “as the focal point with the co-chairs of the Country Task Force on Monitoring and Reporting Mechanism (RC/HC and UNICEF) over planned Security Council Working Group visit to Sudan/Darfur”. The decision to nominate Ms. Dyfan was upon a request by the UNICEF Representative and the United Nations Resident/Humanitarian Coordinator (“RC/HC”) who had told him that they did not want to work with the Applicant.³

7. On 13 March 2018, Mr. Mamabolo disbanded the fact-finding panel convened to review the allegations against the Applicant.⁴

8. On 18 March 2018, Mr. Mamabolo informed the Applicant that his decision to disband the fact-finding panel was partly due to the death of the complainant who had made allegations of misconduct against the Applicant.⁵

9. On 4 April 2018, the Applicant received a letter from Mr. Mamabolo with instructions that he would be reassigned from the CPU to the Office of the Joint Special Representative (“OJSR”) as a Senior Political Affairs Officer to work on mediation issues effective 8 April 2018.⁶

10. On 21 October 2018, the Applicant received advance notice of the non-renewal of his fixed-term appointment beyond 31 December 2018 because the post he encumbered was to be abolished effective 1 January 2019.⁷

11. On 31 November 2018, the Applicant sought management evaluation of the

³ Amended application, annex 3.

⁴ Ibid., annex 2.

⁵ Ibid., annex 4.

⁶ Ibid., annex 6.

⁷ Ibid., annex 13.

decision to abolish his post and not renew his appointment beyond 31 December 2018.⁸

12. Implementation of the impugned decision was suspended pending a response from the Management Evaluation Unit (“MEU”). During this time the Applicant was placed against a Political Affairs Officer post in the Office of the Deputy JSR from 1 January 2019.⁹

13. On 10 January 2019, MEU upheld the decision not to renew the Applicant’s fixed-term appointment.¹⁰

The parties’ submissions on receivability

The Respondent

14. The Respondent submits that the Applicant’s challenge of the decision to abolish the post is not receivable *ratione materiae*.

15. The Secretary-General’s budget proposal and the General Assembly’s adoption by resolution of the budget proposal do not constitute reviewable administrative decisions. They are merely acts prefatory to or preceding an administrative decision that would produce direct legal consequences.

16. The Secretary-General proposed the Applicant’s post for abolition in UNAMID’s Revised Budget. The General Assembly approved the abolition of the Post in resolution 73/278. The Dispute Tribunal lacks jurisdiction to review the steps leading up to the Secretary-General’s proposal to abolish the post, as well as the General Assembly’s decision to abolish it.

17. The only contestable administrative decision is the decision not to renew his appointment beyond 31 December 2018.

⁸ Ibid., annex 10.

⁹ Reply to amended application, annex 5.

¹⁰ Amended application, annex 11.

The Applicant

18. The Applicant submits that the abolition of his post was part of the restructuring exercise and the Administration's decision to include specific posts in the proposed budgets and the reasons for including one post vis-à-vis a different one, had to be done fairly, justly and transparently, devoid of any illegality, procedural irregularity and bias. The Administration failed to do this by:

- a. unlawfully reassigning him from CPU to the Office of the Joint Special Representative;
- b. keeping him in isolation excluded from all consultations with other Mission Program Managers over justification of posts and call for input to the draft budget proposal; and
- c. arbitrarily identifying his post for abolition and then improperly separating him without complying with the Terms of Reference for the Comparative Review Process ("CRP TORs").

19. The Applicant argues that since the General Assembly did not select which posts should be included for abolition, the Administration did and those actions warrant judicial intervention. The Administration's actions in selecting and including his post in the proposal to the General Assembly for posts to be abolished produced direct legal consequences to the Applicant. Once the General Assembly approved the Secretary-General's proposal, the Applicant's post was abolished and he was separated.

20. The application challenges an administrative decision that directly affects his terms of appointment and the impugned decision was a final decision subject to judicial review.

Considerations

Receivability

Abolition of post based on a General Assembly resolution

21. The law as it stands is that the General Assembly is the supreme law maker in the United Nations. Its decisions are legislative in nature. Considering the principle of separation of powers, the United Nations Dispute Tribunal (“UNDT”) has no jurisdiction to interfere with those powers and therefore may not review its resolutions because they are not administrative decisions.¹¹ It was held in *Lloret Alcañiz et al.* that:

The jurisdiction of the UNDT is limited by Article 2(1) of the UNDT Statute to hearing appeals against “administrative decisions” ... Where the General Assembly takes regulatory decisions, which leave no scope for the Secretary- General to exercise discretion, the Secretary-General’s decision to execute such regulatory decisions depending on the circumstances, may not constitute administrative decisions subject to judicial review. Discretionary powers are characterised by the element of choice that they confer on their holders. An administrator has discretion whenever the effective limits of his or her power leave him or her free to make a choice among possible courses of action and inaction. Only in cases where the implementation of the regulatory decision involves an exercise of discretion by the Administration- including the interpretation of an ambiguous regulatory decision, compliance with procedures, or the application of criteria- is it subject to judicial review.¹²

22. There is no exception to this principle, in as far as the decision related to abolishing the specific post held by the Applicant and not any other post. The implementation of that decision by the Administration was mechanical and is not reviewable.¹³ It is not necessary to consider the procedural irregularities in abolishing the post as argued by the Applicant.

¹¹ *Latimer* 2019-UNAT-901, para. 39; *Ovcharenko* 2015-UNAT-530, para. 35; *Reid* 2015-UNAT-563, para. 36.

¹² 2018-UNAT-840, para. 59.

¹³ *Kagizi et al.* 2017-UNAT-750, para. 21.

23. The Tribunal finds that the decision to abolish the post of Senior Child Protection Officer in Darfur, Sudan is not subject to judicial review. That aspect of the application is non-receivable *ratione materiae*.

Non-renewal of the Applicant's contract beyond 31 December 2018

The parties' submissions

Applicant

24. The decision to abolish his post did not consider his substantive functions. While his post as Senior Child Protection Officer was abolished, the Administration did not consider its own decision reassigning him as a Senior Political Affairs Officer to the OJSR. Since he had been reassigned to a different, unrelated function, his retention in the context of the restructuring process should have been considered in light of his substantive function as a Senior Political Affairs Officer, rather than based solely on the post he happened to be encumbering.

25. As from 4 April 2018, he was no longer serving as Chief of the CPU or as the Senior Child Protection Officer since an Officer-in-Charge of the CPU had been appointed. There is no indication that such consideration was carried out.

26. As set out in the CRP TORs, international staff were to be comparatively reviewed by section, functions and grade across duty stations, and, within a section, staff were to be reviewed against other staff performing the same or similar functions at the same level and category. As such, function-wise, he should have been subjected to a CRP alongside other staff performing the senior political affairs officer functions at the P-5 level across the Mission. This was not done.

27. Once the Administration decided to reassign him to a different Office but chose to have him continue encumbering the Senior Child Protection Officer post, in practise, the post was no longer located in the CPU but was now de facto loaned to/borrowed by the OJSR where he had been reassigned to. As per the CRP TORs,

staff encumbering such posts were to be subjected to a CRP in the Section where the post was on loan to, based on the functions performed. He should therefore have been subjected to a CRP alongside other staff in the OJSR. This was not done.

28. Although he was separated on the basis of the abolition of his Senior Child Protection Officer position, in the separation personnel action (“PA”) his title was listed as that of Senior Political Affairs Officer in the Office of the Deputy JSR.

Respondent

29. The Applicant’s appointment was not renewed because the post that financed his appointment was abolished along with over 1,100 other UNAMID posts. The approved Revised Budget proposed one P-5 post in the CPU for abolition “in accordance with the reconfiguration of the Operation.” The Applicant encumbered the only P-5 post in the CPU. He was reassigned to the OJSR with the Post. The Applicant’s appointment was not renewed because the funding for his appointment ceased to exist. Lack of funding is a lawful reason for not renewing a fixed-term appointment.

30. The Applicant’s claim that he should have been subject to a comparative review is without merit. The scope of the comparative review did not include unique posts that had been identified for abolition. Section V of the comparative review terms of reference states: “Comparative review will not be necessary where a unique post or function is being abolished within comparative post or function, category and grade level within the same Section/Unit. Such posts shall be abolished as ‘dry cuts’.” The Applicant’s post was the only P-5 post in the CPU. It was unique and therefore, it was abolished as a “dry cut”.

31. The Applicant had no right to be included in a comparative review in the OJSR. First, he refused to take up the functions of his new assignment, stating that he did not accept the reassignment. Second, the General Assembly did not abolish any P-5 Political Affairs Officer positions in the OJSR. Five posts in that office were abolished: 1 D-1; 1 P-3; and 3 national general service staff. Therefore, there was no

comparative review conducted among P-5 Political Affairs Officers in the OJSR.

32. The Applicant's functional title was Senior Child Protection Officer and his organizational unit was the CPU until his separation. The separation PA lists the Applicant's title as Senior Political Affairs Officer only because he was placed against a Political Affairs Officer post in the Office of the Deputy JSR from 1 January 2019 while the implementation of the contested decision was suspended pending his management evaluation. With the abolition of the post, UNAMID had to find alternative administrative means to finance the extension of the Applicant's appointment pending management evaluation.

33. The Applicant's claim that his post was to be retained through June 2019 is incorrect and unsupported by any evidence. He has also not shown that he had a right to be retained for an additional two years.

34. The contested decision was not tainted by bias. The Applicant agrees that at the time of the contested decision and the approval of the Revised Budget, he encumbered the post which the General Assembly abolished. The contested decision was a direct result of the General Assembly's decision. He has not produced any evidence of any other motivating factor. He has not met his burden to prove bias.

35. The Applicant alleges that the JSR circumvented an independent investigation into complaints made by the UNICEF Focal Point against the Applicant in February and March 2017. This allegation is unsupported. The JSR did appoint a fact-finding panel to review allegations of unsatisfactory conduct but due to the death of the complainant, and the fact that the panel had not been able to commence its work, the JSR disbanded the panel and took no further action. There is no evidence that this decision is related to the contested decision.

36. The Applicant's reassignment is not evidence of bias or ill-motive. In February 2017, the Applicant sent disparaging communications to the UNICEF Focal Point, which led to the above-stated complaints. The JSR's attempts to resolve these communication difficulties failed to yield positive results. The JSR therefore laterally

reassigned the Applicant to serve as a Senior Political Affairs Officer in the OJSR. In exercising his discretion to reassign the Applicant, the JSR considered that the OJSR would benefit from the Applicant's experience in peacekeeping and his long-established contacts with the political actors in Darfur and that this was in the best interests of the mission. The JSR acted in good faith through his efforts to accommodate the Applicant despite shortcomings in his communication skills, which were identified in his performance appraisals and are evident from the emails annexed to the application. The Applicant's claims of not being engaged in meaningful work are also unsupported. He resisted his new assignment from the very beginning and refused to take up the functions.

37. Accordingly, the Applicant has failed to discharge his burden of proving that the contested decision was based on improper motives.

Considerations

38. The starting point when reviewing administrative decisions is the presumption that official functions have been regularly performed. This presumption is satisfied where management minimally shows that the staff member was given fair and adequate consideration. Once management satisfies this initial requirement, the burden shifts to the Applicant to show through clear and convincing evidence that in dealing with him, management did not give his case fair and adequate consideration.¹⁴

39. According to the Respondent, the decision not to renew the Applicant's contract beyond its expiry date was necessitated by the legislative instrument of the General Assembly abolishing the post that the Applicant held at the time of its abolition. The post no longer existed as a matter of law as opposed to management discretion.

40. The Administration did not have discretion to decide whether or not to renew

¹⁴ *Mohamed* 2020-UNAT-985, para. 38 citing *Lemonnier* 2017-UNAT-762, paras. 31 and 32.

the Applicant's contract because the requirements of the Organization for the Applicant to carry out work of the kind that he performed as Senior Child Protection Advisor at the P-5 level in the Child Protection Unit ("CPU") in Darfur ceased to exist. The record shows that the child protection portfolio is cross cutting and is being undertaken by many stakeholders in addition to the Human Rights Section, including the United Nations Country Team, the police component and the State Liaison Functions. The Applicant as an expert in child protection issues has not disputed this, nor has he disputed the fact that no funds were allocated to his post beyond 31 December 2018 to carry out his functions.

41. The Applicant has not shown that the Respondent had discretion to retain him in the position that he held or that the functions of this position still existed. Instead the Applicant argues that the non-renewal of his contract was based on improper motives, particularly, that there were allegations against him that were not fully investigated and that Mr. Mamabolo, his First Reporting Officer ("FRO") did not want him around.¹⁵ The Respondent has argued that the reason for discontinuing investigations was partly because the complainant had died and by then the panel had not commenced its task.¹⁶ The Applicant has not substantiated his allegations with clear evidence to show how he was disadvantaged by this discontinuance or how the allegations against him negatively affected his terms of appointment and conditions of employment for purposes of this application. He has not shown any motive as to why his FRO did not wish him well.

42. The Applicant argues that his reassignment prevented him from participating in the process that led to the abolition of the post. The Tribunal is not at liberty to make any determination on the events that culminated into the General Assembly's resolution for reasons discussed above and based on *Kagizi et al.*¹⁷ and *Lloret Alcañiz*

¹⁵ Amended application, paras. 34-36.

¹⁶ Reply to the amended application, para. 31.

¹⁷ *Kagizi et al., op. cit.*

*et al.*¹⁸ that the Tribunal may not review the reasonableness or legality of the General Assembly's resolutions through the backdoor. Further, the Applicant successfully challenged the decision to reassign him from CPU to OJSR as a Senior Political Affairs Officer.¹⁹ It would be a breach of the principle of *res judicata* to reopen that case in these proceedings.

43. The Respondent has argued that, it was not required to subject the Applicant to CRP because there was only one P-5 position in his department and that was abolished alongside over 1,000 other posts and furthermore that the post was classified as 'dry cut', hence no CRP was necessary as per the terms of the comparative review. Indeed, the last paragraph of section V on *scope of the review*, of the terms of the comparative review, provided that posts classified as 'dry cuts' were exempted from CRP. The Applicant has not shown that his post was not unique and therefore not a dry cut.

44. The Applicant argues that his "retention in the context of the restructuring process should have been considered in light of his substantive function as a Senior Political Affairs Officer, rather than based solely on the post he happened to be encumbering". This assertion contradicts his own averments that "[his] expertise and experience was in child protection matters and not in political affairs and mediation. Other personnel in OJSR and the Political Affairs Section were better placed to the role"²⁰. Basing the renewal of staff member appointments along the Applicant's line of reasoning would defeat art. 101 of the United Nations Charter which stipulates that the paramount consideration in the employment of staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity.

45. He also submits that he was 'marched to the door' in reference to constructive dismissal, however as noted from the record the Applicant did not resign from his

¹⁸ *Lloret Alcañiz et al. op. cit.*, para. 59.

¹⁹ *Dieng* UNDT/2020/093.

²⁰ Amended application, para. 37.

employment, his fixed term appointment expired due to effluxion of time.

46. The Applicant asserts that in the separation PA his title was listed as that of Senior Political Affairs Officer in the Office of the Deputy JSR. He does not show how this fact affected the non-renewal of his contract.

47. The Tribunal finds that the Administration did not act unlawfully by not renewing the Applicant's contract because the contract itself was clear that it was expiring on 31 December 2018. Fixed-term contracts carry no expectation of renewal.²¹ The exception to this rule is where the Applicant can show that the non-renewal is unreasonable in that it was motivated by improper motive; that the Respondent failed to act fairly, justly, and transparently in dealing with him,²² or that the Applicant had a legitimate expectation of renewal. The Applicant has shown none to the satisfaction of the Tribunal.

Conclusion

48. Article 2(1)(a) of the UNDT Statute defines an administrative decision as one alleged to be in non-compliance with the terms of appointment or contract of employment. This has been interpreted to mean an allegation of non-compliance that has a direct impact on the terms of contract of employment or appointment²³. It follows that where an administrative decision has no unlawful impact on the Applicant's terms of appointment or contract of employment, the Tribunal must find for the Respondent²⁴. This is because the Applicant has failed to successfully rebut the presumption of regularity.

²¹ *Nouinou* 2019-UNAT-902, para. 44; *Bagot* 2017-UNAT-718, para. 74; *Munir* 2015-UNAT-522, para. 24; *Badawi* 2012-UNAT-261, para. 33.

²² *Loeber* 2018-UNAT-844, para. 18.

²³ *Avramoski* 2020-UNAT-987, para. 39.

²⁴ *Ibid.*, generally, para. 42.

Judgment

49. The application is dismissed.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 4th day of September 2020

Entered in the Register on this 4th day of September 2020

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi