



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2020/001

Judgment No.: UNDT/2020/210

Date: 16 December 2020

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

AUNG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Brandon Gardner, OSLA

Counsel for Respondent:
Christine Graham, ALD/OHR, UN Secretariat

Introduction

1. On 15 January 2020, the Applicant, a holder of a continuing appointment, filed an application contesting the Administration's decisions to terminate his continuing appointment following the abolishment of his post and not to select him for the position of Information System Assistant at the FS-5 level ("the Post").
2. In the Respondent's reply dated 14 February 2020, the Respondent submits that the Applicant remains a staff member of the Organization as the termination decision has not been implemented. He argues further that the Applicant was not deemed suitable for the Post because he did not possess one of the required work experiences.
3. For the reasons stated below, the application is rejected.

Facts

4. Following the Security Council's decision to close the United Nations Mission for Justice Support in Haiti ("MINUJUSTH"), the Applicant was notified on 11 September 2019 that his continuing appointment was to be terminated effective 12 January 2020.
5. On 14 October 2019, the Applicant requested management evaluation of the termination decision. On 10 January 2020, the Administration notified the Applicant that the decision was suspended pending management evaluation and his placement on Special Leave with Full Pay ("SLWFP").
6. The Applicant applied for the Post on 22 August 2019. He subsequently discovered on the United Nations recruitment platform ("Inspira") that he had not been selected for the Post.

Consideration

Termination decision

7. Article 2.1(a) of the Tribunal's Statute states that the Dispute Tribunal has jurisdiction to pass judgment on:

... an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance ...

8. The Appeals Tribunal's well-established jurisprudence provides that an administrative decision is only capable of judicial review when it produces direct legal consequences for the applicant's terms of appointment (see, for instance, *Hassanin* 2017-UNAT-759, para. 37).

9. The Applicant notes that while the Administration has not separated him from his employment with the Organization, it has failed to find an alternate position since the closure of MINUJUSTH. He argues that the Administration has breached its obligation to provide him with meaningful work for over 14 months, which is clearly prejudicial for the Applicant who has lost the opportunity to accumulate work experience during that time.

10. The Tribunal notes with concern that the Administration has failed to find a suitable post for the Applicant for almost a year since it placed him on SLWFP pending management evaluation. This denotes, in the Tribunal's view, a serious managerial failure.

11. This notwithstanding, as the decision to terminate the Applicant's appointment remains suspended, it has no impact on the Applicant's terms of appointment.

12. The Tribunal therefore finds the application to be non-receivable *ratione materiae*.

13. However, the Tribunal notes that this finding is without prejudice for any future appeals against an eventual decision by the Administration to lift the suspension of the termination decision and proceed to separate the Applicant. This would constitute a new reviewable administrative decision if all the requisites of art. 2.1(a) of the Statute were otherwise met.

Failure to make reasonable efforts to find an alternate position for the Applicant

14. The Applicant argues that despite having submitted multiple applications, the Administration has so far failed to find him a position. Therefore, the Applicant claims that he has been deprived of meaningful work for over 14 months.

15. The Tribunal notes that this implied decision has not been submitted for management evaluation and is therefore not properly before the Tribunal in accordance with art. 8.1(c) of the Dispute Tribunal's Statute.

Non-selection decision

16. The Applicant claims that he has not been selected for the Post even though he was rostered for similar positions and had occupied an identical position with MINUJUSTH for which he received excellent feedback.

17. The Respondent states that the Applicant's status as a downsized staff member holding a continuing appointment was considered. However, the Respondent states that the Applicant was not deemed suitable for the Post because he lacked the requisite work experience of "reporting on budget/programme performance" whilst the selected candidate did.

18. The Respondent further contends that contrary to the Applicant's assertion, the Post is not identical to the Applicant's former function in MINUJUSTH given that the former has broader administrative and managerial responsibilities.

19. Under staff rule 9.6(e), subject to the availability of suitable posts in which their services can be effectively utilized and provided that due regard is given to relative competence, integrity and length of service, a staff member whose appointment is terminated as a result of the abolition of a post or the reduction of staff 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; (iii) staff members holding fixed-term appointments.

20. In *Timothy* 2018-UNAT-847, the Appeals Tribunal held that staff rule 9.6(e) creates 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).

21. 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).

22. 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).

23. In *Zachariah* 2017-UNAT-764 (para. 35), the Appeals Tribunal further found:

Once the application process is completed [...] the Administration is required by Staff Rule 13.1(d) to consider the permanent staff member on a preferred or non-competitive basis for the position, in an effort to retain the permanent staff member. This requires 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. Only if there is no permanent staff member who is suitable, may the Administration then consider the other, non-permanent staff members who applied for the post ...

24. The advertisement for the Post lists the following required job experience, among others: "Experience in carrying out programmatic/administrative tasks necessary for the functioning of the Unit including preparation of cost estimates/budgets, reporting on budget/programme performance, contracting vendor services is required".

25. From the documentation provided, it appears that the Administration compared the Applicant's profile along with that of the other candidates rather than on a priority basis.

26. However, having reviewed the Applicant's Personal History Profile, the Tribunal is satisfied that he did not indeed demonstrate any experience in the field of reporting on budget/programme performance, which was a requisite for the Post.

27. Therefore, the Tribunal is satisfied that the Administration's finding that the Applicant was not suitable for the Post was based on facts and supported by the evidence. The Tribunal further finds that the Administration would have reached the same conclusion regarding the Applicant's suitability for the Post if it had given him priority consideration on a non-competitive basis, rather than comparing him to other candidates.

28. The Tribunal therefore finds that the Applicant's non-selection for the Post was lawful.

29. In light of the above,

Conclusion

30. The application is rejected.

(Signed)

Judge Joelle Adda

Dated this 16th day of December 2020

Entered in the Register on this 16th day of December 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York