



Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KHAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Introduction

1. The Applicant is a former Vehicle Mechanic at the FS-4 level, working with the United Nations Interim Security Force for Abyei (“UNISFA”).¹

2. By an application filed on 3 November 2020, the Applicant is contesting a decision not to extend his contract beyond 30 June 2020.²

3. The Respondent filed a reply on 7 December 2020 in which it is argued that the contested decision was lawful because the post encumbered by the Applicant was abolished following a lawful downsizing exercise.³

Facts

4. The Applicant joined UNISFA on 28 September 2014 as a Vehicle Mechanic, FS-4 level. He was recruited against post #86072.⁴

5. On 29 January 2016, in his budget proposal for UNISFA for the period 2016-2017, the Secretary-General proposed abolition of six field service positions.⁵ The post encumbered by the Applicant was among the positions proposed for abolition.⁶

6. By an Inter-Office Memorandum dated 29 May 2016, Mr. Elijah Karambizi, Chief of Mission Support (“CMS”), UNISFA, informed the Applicant that the post which he encumbered was among the positions proposed for abolition in the 2016-2017 UNISFA budget submission. The CMS also informed the Applicant that as a result of the abolition of the post, his fixed-term appointment (“FTA”), which was to expire on 30 June 2020, would not be renewed.⁷ The General Assembly approved the 2016-2017

¹ Application, section I.

² Application, section V.

³ Reply, section A, para. 2.

⁴ Reply, R/1; Application, annex 13.

⁵ Reply, R/2.

⁶ Application, annex 13.

⁷ Reply, R/3.

UNISFA budget on 17 June 2016.⁸

7. On 20 June 2016, UNISFA accommodated the Applicant and placed him against a borrowed post from the Supply, Centralized Warehouse and Property Management Section.⁹

8. In 2018/2019, UNISFA underwent a restructuring and the post that the Applicant encumbered was reassigned to the Supply Chain Performance Management Unit and it was reclassified as a Property Management Assistant, FS-5 post.¹⁰ The Applicant was notified of the reclassification of the post on 12 December 2018.¹¹

9. In light of the fact that the post of Property Management Assistant was to be taken back by the Supply Chain Management Unit, on 23 April 2020, UNISFA informed the Applicant that the Transport Unit did not have another post on which he could be placed. As a result, UNISFA informed him that his FTA would not be extended beyond 30 June 2020 (“the contested decision”).¹²

10. On 11 May 2020, UNISFA advertised the post of Property Management Assistant FS-5 as Recruit-from-Roster and the position was filled on 21 June 2020.¹³

11. On 20 June 2020, the Applicant requested management evaluation of the contested decision.¹⁴ On the same day, he filed before the Tribunal an application for suspension of the implementation of the decision pending management evaluation.¹⁵

12. Awaiting the outcome of the management evaluation request, UNISFA extended the Applicant’s appointment until 31 August 2020.¹⁶ On 6 August 2020, the Management Evaluation Unit informed the Applicant that the Secretary-General had

⁸ Reply, para. 6.

⁹ Reply, R/4; Application, annex 13.

¹⁰ Reply, R/6.

¹¹ Application, annex 13.

¹² Application, annex 1.

¹³ Reply, R/8 and R/9.

¹⁴ Application, section IV.

¹⁵ Application, R/16.

¹⁶ Reply R/10, R/11.

decided to uphold the contested decision.¹⁷

Submissions

Applicant's submissions

13. In presenting his case, the Applicant puts forward three arguments. First, he contends that he was discriminated against. Many other staff members, totaling 17 who belonged to other sections, were moved to the Supply Chain Section while he was not moved together with his post in the Supply Chain Section. Second, that he is just one year from mandatory retirement age of 65 years and he is the sole bread earner of his family. Therefore, non-extension of his appointment will have a huge adverse impact on him and his family. Third, he argues that he is one of the persons identified with underlying medical conditions and due to the COVID-19 pandemic, he telecommutes from his home country. By not extending his appointment, UNISFA is using his medical condition against him, which he contends, is very unfair. The pressure and stress of not extending his appointment, in his view, amounts to harassment.

14. The Applicant thus requests the Tribunal by way of remedies to rescind the contested decision and award him compensation due to the harassment that he suffered.

Respondent's submissions

15. The Respondent submits that the contested decision was lawful. With regard to the Applicant's first argument, the Respondent concedes that indeed during the previous restructurings some staff members were redeployed to other sections with posts that they encumbered. However, these deployments were in accordance with the budgets approved by the General Assembly. In addition, unlike the Applicant, those staff members had been selected for positions against the posts they encumbered and their terms of reference corresponded to the functions of their new assignments.

¹⁷ Application, annex 13.

16. The Respondent emphasizes that the Applicant had been performing Vehicle Mechanic functions while he was placed against a supply chain management post. It was lawful and reasonable for UNISFA to redeploy the post to perform the supply chain management functions for which the General Assembly had budgeted it. The Applicant did not have the skills or the experience to perform the functions of the Property Management Assistant FS-5.

17. Regarding the Applicant's second and third arguments, the Respondent submits that the Applicant has produced no evidence to support his allegation that the contested decision was motivated by his "underlying medical conditions due to Covid-19 impact". The Applicant has also not shown that he was treated differently than any similarly situated UNISFA staff member.

18. In view of the foregoing, the Respondent requests the Tribunal to reject the application. The Applicant has not demonstrated any procedural or substantive breach of his rights nor has he presented any evidence of harm as required by article 10.5(b) of the Dispute Tribunal Statute.

Considerations

Standard of review

19. Pursuant to staff regulation 4.5(c), a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service. The Administration is, nevertheless, required to provide a reason for such a non-renewal upon the affected staff member's request or the Tribunal's order, and, as held by the Appeals Tribunal, "when a justification is given by the Administration for the exercise of its discretion, it must be supported by the facts."¹⁸

¹⁸ *Islam* 2011-UNAT-115, paras. 29-32, *Obdeijn* 2012-UNAT-201 paras. 33-39; *Pirnea* 2013-UNAT-311 paras. 33- 34; *Ahmed* 2011-UNAT-153, para. 45.

20. In *Islam*, the Appeals Tribunal affirmed, specifically, that abolishment of a post as a result of reorganization constitutes a valid reason for not renewing the contract of a concerned staff member.¹⁹

21. Further, it is well settled that an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff.²⁰ In line with this principle, the UNAT has affirmed the authority of the Secretary-General to engage in such restructuring, “including the abolition of posts, the creation of new posts and the redeployment of staff.”²¹ In such decisions, the Administration has broad discretion to reorganize its operations and departments to adapt to economic vagaries and challenges.²² The Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with staff members.²³

22. It follows that in restructuring, the Respondent exercises wide discretion. This discretion is not unfettered and is subject to review pursuant to the general *Sanwidi* test²⁴, i.e., whether an exercise of discretion is legal, rational, procedurally correct and proportional.

¹⁹ *Islam, op.cit.*

²⁰ *Gehr* 2012-UNAT-236, citing to ILOAT Judgment No. 2967, quoting ILOAT Judgment Nos. 2510 and 2856.

²¹ *Pacheco* 2013-UNAT-281.

²² *Afeworki* 2019-UNAT-903.

²³ *Hersh* 2014-UNAT-433, *Bali* 2014-UNAT-450, *Matadi et al.* 2015- UNAT-592; *Loeber* 2018-UNAT-844.

²⁴ *Sanwidi* 2010-UNAT-084.

Whether the decision was based on improper motives or discriminatory

23. The decision to not renew an appointment may be challenged on the grounds that the staff member had a legitimate expectancy of renewal, procedural irregularity, or the decision was arbitrary or motivated by improper purposes.²⁵

24. There is a presumption that official acts have been regularly performed.²⁶ An applicant bears the burden of proving that the contested decision was based on improper motives.²⁷

The contested decision was lawful

25. The Applicant's appointment had been financed by one of the six General Temporary Assistance ("GTA") funded FS posts in the Engineering Section that the General Assembly abolished in 2016.²⁸ He had no right to renewal of his appointment beyond 30 June 2020.²⁹ He was informed at the outset that he was being retained on an exceptional basis to allow him to find other employment.³⁰

26. The Applicant was never selected for the FS-5 Property Management Assistant position, which was financed by the borrowed post. Nor could he be promoted to the higher-level FS-5 position non-competitively.³¹ The Applicant had been performing Vehicle Mechanic functions while he was placed against a supply chain management post. It was lawful and reasonable for the Mission to redeploy the post to perform the supply chain management functions for which the General Assembly had budgeted it. The Applicant did not have the skills or the experience to perform the functions of the FS-5 position.³²

²⁵ *Frechon* 2011-UNAT-132, para. 44; *Ahmed* 2011-UNAT-153, para. 47.

²⁶ *Rolland* 2011-UNAT-122, para. 26.

²⁷ *Nouinou* 2019 UNAT-902, para..64.

²⁸ Reply, annexes 2 and 4.

²⁹ Reply, annex 6.

³⁰ Reply, annexes 4 and 5.

³¹ ST/AI/2010/3 (Staff selection system).

³² Reply, annex 12.

The Applicant served on a fixed-term appointment with no expectancy of renewal.

27. UNISFA did not renew the Applicant's appointment because there was no longer a post available to continue to finance his appointment. The contested decision was lawful.

The non-renewal of the Applicant's appointment was properly motivated

28. The burden of proving improper motivation lies with the staff member contesting the decision not to renew his or her contract.³³ The Applicant has not met his burden. Mere allegations are not proof.³⁴

29. The Applicant has produced no evidence to support his allegation that the contested decision was motivated by his "underlying medical conditions due to the Covid-19 impact".³⁵ Nor has he shown that he was treated differently than any similarly situated UNISFA staff member.³⁶

30. It is true that during previous restructurings that some staff members were redeployed to other sections with the posts that they encumbered. However, those redeployments were in accordance with the budgets approved by the General Assembly.³⁷ Also, unlike the Applicant, those staff members had been selected for positions against the posts they encumbered and their terms of reference corresponded to the functions of their new assignments.

31. As it pertains to the factual circumstances, it is noted that the record bears out the factual assertions of the Mission regarding the reason for the non-renewal of the contract. There is no dispute that the decision to abolish the post the Applicant was occupying and, consequently, the decision not to extend his appointment originated in the restructuring approved in the 2016/17 budget for UNISFA by the General

³³ *Nouinou* 2019 UNAT-902, para.65; *Hepworth* 2011-UNAT-178, para. 29.

³⁴ *Nouinou* 2019 UNAT-902, para. 63-65.

³⁵ Application, section VII, paras. 8 and 9.

³⁶ Application, section VII, paras. 2, 8 and 9.

³⁷ See A/71/767, Budget for the United Nations Organization Interim Security Force for Abyei for the period from 1 July 2017 to 30 June 2018, paras. 59-61 and 68.

Assembly.

32. Subsequently, the Applicant continued to be placed against borrowed posts in order to allow him to reach the retirement age. Most recently, he was placed against an FS-5 post of Property Management Assistant, while he, in fact, served as an FS-4, Vehicle Technician.

33. The Officer-in-Charge of the Supply Chain Performance Management Unit asked for the return of the loaned post to its proper section due to Organizational needs. Based on the foregoing legal framework, the Administration could lawfully decide not to extend the appointment in line with its priorities for staffing.

34. However, the Applicant contends that the decision was unlawful and discriminatory because other staff members in other sections were moved to the Supply Chain Section while he was not, although the Applicant was informed that the post he encumbered belonged to the Supply Chain Section. In this regard, following the abolishment of six Field Service positions in the Engineering Unit in 2016, including the Applicant's, UNISFA accommodated him on more than one occasion by retaining him on different posts to allow him to reach his retirement age in July 2018.

35. UNISFA accommodated him on a position in the Supply, Centralized Warehouse and Property Management Section, even though he did not perform the functions of this specific post. After the United Nations-wide retirement age was revised to 65, UNISFA showed the Applicant further leniency by extending his appointment further on a borrowed post from a different section.

36. The post that the Applicant was encumbering was reclassified upwards of the Applicant's level to FS-5. Accordingly, the Applicant was placed against a post not compatible with his level of FS-4, nor compatible with his skills and terms of reference of the job opening for which he had been recruited.

37. In addition, the Applicant failed to substantiate claims of discrimination against him. The fact that some staff members, whose personal level and functions corresponded to their posts, were redeployed to the Centralized Warehouse Unit in

order to perform the specific functions covered by their terms of reference, does not mean that the Applicant had the same right to be reassigned when he did not have the skills or the experience required to perform the functions in the new unit. As such, the contested decision was taken in compliance with the relevant rules and regulations.

JUDGMENT

38. The application is rejected.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 29th day of November 2021

Entered in the Register on this 29th day of November 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi