



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2020/063

Judgment No.: UNDT/2021/160

Date: 23 December 2021

Original: English

Before: Judge Francis Belle

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BASSEY

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Sètondji Roland Adovi, *Études Vihodé*

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant served as a Security Officer at the FS-5 level in the Special Investigations Unit (“SIU”) with the United Nations Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”). He filed an application on 11 August 2020 challenging the Respondent’s decision to not renew his appointment beyond 30 June 2020. The Applicant included a motion for production of evidence at Section C, paras. 81-83 of his application.

2. The Respondent filed his reply on 17 September 2020 and a response to the Applicant’s motion for production of evidence on 9 August 2021.

3. After a Case Management Discussion (“CMD”) on 29 July 2021, the Tribunal referred the matter to the Office of the United Nations Ombudsman and Mediation Services (“UNOMS”) for mediation.¹ On 3 November 2021, UNOMS referred the matter back to the Tribunal for adjudication after an unsuccessful mediation effort.

4. The parties filed their closing submissions on 14 December.

5. On 16 December 2021, the Registry informed the parties of the Tribunal’s decision to grant disclosure of only the documents listed at para. 82(e) of the application and to reject the Applicant’s other disclosure requests and his request for a hearing.

6. On 17 and 21 December 2021, the Respondent complied with the Tribunal’s 16 December 2021 directive.

Facts

7. On 29 March 2019, the Secretary-General submitted his proposed 2019-2020 MONUSCO budget to the General Assembly. The budget proposed the abolition of 764 posts (120 international staff, 565 national staff and 79 United Nations

¹ Order No. 150 (NBI/2021).

Volunteers), effective 1 July 2019.² The budget proposed the abolition of, *inter alia*, two Security Coordination Officer posts (P-3 and P-4), 15 Security Officer posts (FS) and one Fire Safety Officer post (FS) in the Security and Safety Section.³

8. MONUSCO established a Comparative Review Panel (“CRP”) to determine which staff members would be retrenched and which would be retained.⁴

9. By a letter dated 29 May 2019, the Applicant was notified of the non-extension of his fixed-term appointment (“FTA”) beyond 30 June 2019 due to the abolition of his post.⁵ The Respondent avers that this letter incorrectly stated that the Secretary-General had proposed the abolition of the specific post that the Applicant encumbered (post number 30037926) because, in actuality, post numbers 30061376 and 30061374 were abolished.⁶

10. On 27 June 2019, the MONUSCO Chief Human Resources Officer (“CHRO”) informed the Applicant that he had been identified for retention beyond 30 June 2019 and that his FTA would initially be extended until 31 July 2019 and then until 31 December 2019, subject to budget approval.⁷

11. On 2 July 2019, MONUSCO assigned the Applicant to serve as Officer-in-Charge (“OIC”) of SIU due to the retirement of the P-4, Chief of Unit and pending recruitment for that position.⁸ The Respondent asserts that due to this temporary assignment, the Applicant was administratively placed against a borrowed FS-6 Administrative Officer post from the Office of the Director of Mission Support (post number 30071886)⁹ to finance the extension of his appointment until 31 December 2019.¹⁰

² Reply, annex R/2.

³ Ibid., p. 40, paras. 90 & 91.

⁴ Reply, annex R/4.

⁵ Application, annex 3.

⁶ Reply, para. 11 and annex 5.

⁷ Ibid., annex 4.

⁸ Reply, annex R/7.

⁹ Application, annex 5.

¹⁰ Reply, p. 4, para. 12.

12. On 5 July 2019, MONUSCO HR emailed a list of MONUSCO staff to be separated, retained and/or placed to the Regional Service Centre in Entebbe (“RSCE”). The RSCE extended the Applicant’s FTA to 30 June 2020.¹¹

13. The Applicant alleges that on 5 August 2019, he “questioned” MONUSCO’s Principal Security Advisor (“PSA”) about the downsizing of a Security Information Coordination Unit (“SICU”) Security Officer on 31 July 2019 and the advertisement of a post at the same level as the downsized SICU officer.¹² On the same day, the PSA requested the Special Representative of the Secretary-General (“SRSG”) to transfer the Applicant from Goma to Kindu, in the Democratic Republic of the Congo, to fill a gap left by the transfer of another staff member.¹³

14. On 9 August 2019, the Applicant emailed the PSA, copying the SRSG and others, providing reasons why he should not be transferred to Kindu and requested the SRSG to restrain the PSA from carrying out the deployment because it was “ill motivated”.

15. On 14 August 2019, the Applicant addressed an email to the SRSG requesting an investigation by the Office of Internal Oversight Services (“OIOS”) into the PSA’s conduct, “occupational harassment” and her decision to deviate his experience as an investigator to a Field Security Coordinator (“FSCO”) in a location where his capacity would be “neglected, underutilized and unproductive”.¹⁴ He submitted a formal complaint on 20 August 2019.¹⁵ The transfer was not effected. On 23 December 2019, the OiC, Conduct and Discipline Team informed the Applicant that his complaint had been forwarded to OIOS for action.¹⁶

16. The Applicant alleges that he raised the issue of the downsized SICU security officer again at meetings with the Under-Secretary-General of the Department of Safety and Security (“USG/DSS”) on 4 and 8 December 2019 and that this resulted in

¹¹ Application, annex 14 (Respondent’s reply in Case No. UNDT/NBI/2020/040, annex 8).

¹² Application, pp. 5-6, paras. 21-23.

¹³ Application, annex 7.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Application, annex 10 (20200713 MER for Bassey EE-2).

the PSA threatening to remove him from the Mission at an Integrated Security Section staff meeting on 9 December 2019.¹⁷

17. On 12 December 2019, the RSCE realized that the Applicant's FTA had been extended to 30 June 2020 instead of to 31 December 2019 in Umoja as requested by MONUSCO. The RSCE then amended the contract end date to 31 December 2019 in Umoja.¹⁸

18. On 16 December 2019, the Applicant received a memo notifying him of his separation from service upon the expiry of his FTA on 15 January 2020.¹⁹ On 17 December 2019, the Applicant requested management evaluation of this decision²⁰ and filed a formal complaint of abuse of authority against the PSA with the USG/DSS.²¹ OIOS informed him on 13 January 2020 that it had referred his complaint to the SRSG/MONUSCO for appropriate action under ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority).²²

19. On 15 April 2020, the Applicant filed an application contesting the non-renewal of his fixed-term contract and separation from the Organization effective 15 January 2020.²³ The Tribunal found this application to be irreceivable due to the extension of the Applicant's FTA to 30 June 2020.²⁴

20. On 1 June 2020, the Applicant received a memo notifying him of his separation from service upon the expiry of his FTA on 30 June 2020.²⁵ He requested management evaluation of this decision on 2 June 2020, and on 6 August 2020, the Management Evaluation Unit informed him of the decision of the Under-Secretary-General for Management Strategy, Policy and Compliance ("USG/DMSPC") to uphold the non-

¹⁷ Application, p. 7, paras. 29-32 and annex 8.

¹⁸ Application, annex 14 (Respondent's reply in Case No. UNDT/NBI/2020/040, annex 8).

¹⁹ Application, annex 9.

²⁰ The Applicant received a response from the Management Evaluation Unit dated 29 May 2020.

²¹ Application, annex 10 (20200713 MER for Bassey EE-1).

²² Application, annex 10 (20200713 MER for Bassey EE-3).

²³ Case No. UNDT/NBI/2020/028.

²⁴ Judgment No. UNDT/2020/085.

²⁵ Reply, annex R/11.

renewal decision.²⁶

Submissions

Applicant's submissions

21. The Applicant's case is that the contested decision is unlawful because it was tainted by the PSA's bias against him. This is evidenced by: his removal from his original parent post; his placement temporarily on a loaned post; and his unsuccessful transfer to Kindu. The abolishment of his post (number 30037926), which was used as the justification for his separation on 30 June 2019 and his placement on post number 30071886 was false. Relying on the Tribunals' jurisprudence²⁷, the Applicant submits that "when a justification is given by the Administration for the exercise of its discretion it must be supported by the facts".

22. The Applicant avers that there is a nexus between the 9 December 2019 meeting where the PSA threatened him with separation and the RSCE suddenly noticing the error with his FTA on 12 December 2019 and the 16 December 2019 separation notice. The Applicant highlights the fact that his 17 December 2019 complaint against the PSA has not been addressed.

23. Pursuant to the first sentence of paragraph 13 and paragraphs 14 and 23 of the CRP's terms of reference, the comparative review was not required only for FS-5 posts but also with lower level posts, most relevantly Security Officer Posts at the FS-4 level which were vacant or encumbered by other staff with FTAs against which the Applicant should also have been fairly compared. The Applicant submits that the Respondent has continuously failed to produce any document to prove that there was no other suitable FS Security Officer post in the Safety and Security Section, including posts at a lower level than the Applicant's current FS-5 level. To this end, he avers that an FS-4 MINUSCA staff member on a temporary contract was unlawfully promoted to FS-5 during the CRP process, and placed on one of the remaining Security FS-5

²⁶ Application, annex 13.

²⁷ *Islam* 2011-UNAT-115, paras. 29-32; *Obdeijn* 2012-UNAT-201, paras. 33-39; *Hassan* UNDT/2020/051, para. 28; *Rehman* UNDT/2018/018.

posts in the MONUSCO Security and Safety Section following the abolishment of posts in preference to retaining the Applicant on this post. The Applicant should have been retained against this post instead of promoting a temporary staff member at the FS-4 level from another mission.

24. The Applicant seeks rescission of the decision not to renew his fixed-term appointment or alternatively, he requests that the Tribunal finds that the exceptional circumstances required in article 10(5)(b) are met. The Applicant also requests due compensation for the emotional distress induced by the contested decision and the continuous abuse of authority over the last 20+ months which has had negative implications for his health and the health of his spouse.

Respondent's submissions

25. The Applicant was retrenched following a lawful downsizing exercise. The fact that MONUSCO erroneously informed the Applicant that his post had been abolished does not render the contested decision unlawful. MONUSCO was charged with reducing the complement of FS posts and determining which staff members would be retained against the residual posts in the new mission structure. MONUSCO was required to give preference to staff members holding continuing and permanent appointments. There were nine FS-5 Security Officer posts across all duty stations, eight of which were encumbered. Two posts were abolished. As the Applicant was the only one of the eight FS-5 Security Officers, who served on a fixed-term appointment, he was identified for retrenchment. Seven posts were retained, including the post that had previously financed the Applicant's FTA. These seven posts were used to finance the continuing appointments of the retained FS-5 Security Officers across the mission.

26. MONUSCO temporarily assigned the Applicant to the OiC/SIU functions on an exceptional basis while it was recruiting for the P-4 Chief of Unit. He was informed at the outset that his appointment would be extended until 31 December 2019. The P-4 Chief of Unit position was filled on 13 September 2019. The Applicant had no right to continue to serve against the post used to finance his temporary assignment as OiC/SIU beyond 31 December 2019.

27. The Applicant has not exhausted the internal remedies provided under ST/AI/2019/8 thus the Tribunal lacks jurisdiction to review his allegations against the PSA. His allegations that the contested decision was motivated by bias or ulterior motives are not supported by the evidence. The contested decision resulted from the May 2019 downsizing, which occurred prior to the incidents which the Applicant cites as evidence of bias and ulterior motives. Additionally, any allegations of abuse of authority and bias by the PSA are unrelated to the contested decision since she did not make the decision not to renew the Applicant's appointment.

28. The Applicant is not entitled to relief because he has not demonstrated any procedural or substantive breach of his rights. Nor has the Applicant adduced any evidence of harm. His appointment was renewed from 1 January 2020 to 31 July 2020 following the MEU's suspension of the implementation of the contested decision pending its review. His appointment was further renewed from 1 August 2020 to 29 September 2021 to enable him to utilize his sick leave in accordance with section 4.9 of ST/AI/2013/1 (Administration of fixed-term appointments).

29. Further, the Applicant has not demonstrated that he tried to mitigate his loss of employment. The Tribunal should assess how this impacts any compensation award.

Considerations

30. When the Tribunal is reviewing administrative decisions, there is a presumption of regularity. This presumption is satisfied where the Administration minimally shows that the staff member was given fair and adequate consideration. Once this requirement is satisfied by the Administration, the burden shifts to the applicant to show through clear and convincing evidence that in dealing with him/her, the Administration failed to give his/her case fair and adequate consideration.²⁸

31. The Tribunal notes that there is no dispute that a fixed-term appointment does not carry any obligation for renewal.²⁹ However, the Tribunal also accepts that a

²⁸ *Mohamed* 2020-UNAT-985, para. 38 citing *Lemonnier* 2017-UNAT-762, paras. 31 and 32.

²⁹ *Nounou* 2019-UNAT-902, para. 44; *Bagot* 2017-UNAT-718, para. 74; *Munir* 2015-UNAT-522, para. 24; *Badawi* 2012-UNAT-261, para. 33; *Obdeijn* 2012-UNAT-201.

decision not to renew must be fair and lawful.³⁰ It should not be tainted by bias or irrelevant considerations.³¹ The Applicant argues that the decision was tainted by bias and irrelevant considerations, including favoritism.

32. The Tribunal has assessed the arguments of both sides and concluded that the following issues arise for consideration: (i) was the Applicant retrenched following a lawful downsizing exercise?; (ii) what was the effect of the Applicant's post not being abolished?; (iii) does the Tribunal lack jurisdiction to review the Applicant's allegations against the PSA?; (iv) are the Applicant's allegations of abuse of authority and bias by the PSA unrelated to the contested decision since the PSA did not make the decision not to review the Applicant's appointment?; and (v) is the Applicant obliged to mitigate the loss of his employment?

i. Was the Applicant retrenched following a lawful downsizing exercise?

33. There is no doubt that the Secretary-General in his 28 March 2019 budgetary proposal for MONUSCO 2019 to 2020 had announced the proposed abolition of several positions amounting to 764 posts (120 international staff, 565 national staff and 79 United Nations Volunteers). The exercise was discussed and those affected were put on notice. In the case of the Applicant, he was first notified of the non-extension of his contract beyond 30 June 2019, by letter dated 29 May 2019. Thereafter, the date of his separation was changed on two occasions.

34. The Tribunal views the changes in the separation date with concern for a few reasons. Firstly, it creates the picture of uncertainty about the decision not to renew the Applicant's FTA. Secondly, the error made in Umoja to the effect that the separation date would be 30 June 2020 caused confusion and must have raised the Applicant's hopes that his requests to reconsider the decision not to extend his appointment were not falling on deaf ears. Finally, these circumstances would have bolstered the

³⁰ *Afeworki* 2019-UNAT-903, para. 20; *Loeber* 2018-UNAT-844, para. 18; *Abdeljalil* 2019-UNAT-960, para. 19; *Hersh* 2014-UNAT-433 para. 29 citing to *Brisson* 2013-UNAT-371, para. 16; *Ljungdell* 2012-UNAT-265, para. 30.

³¹ *Ross* 2019-UNAT-926; *Sanwidi* 2010-UNAT-084, para. 40.

Applicant's view that the decision to abolish his post and not renew his FTA had not been finally decided. When this is added to the fact that his post number 30037926 was not actually abolished the seeds of doubt would have been well sown. In light of this uncertainty the challenge to the legitimacy of the decision-making process is understandable.

35. Therefore, when the Applicant later learnt that his post had not been abolished, and that other Security Officers of a lower or similar experience and grade had been maintained, and thirdly he became aware that the PSA had allegedly made comments to the effect that she would see to it that he be removed from the Mission, it would have been evident that these circumstances may have had an impact on the lawfulness of his non-extension if they are substantiated or proven to have been related to the decision not to extend his FTA.

36. Indeed, the disclosure order sought by the Applicant was clearly intended to expose any possible wrongdoing in relation to the decision not to extend his appointment. The Tribunal assessed the application carefully and concluded that only the reference to the PSA's remarks about ensuring that the Applicant was removed from the Mission would have any bearing on the propriety of the non-extension of his FTA. The fact is that even if there had been favouritism to ensure that other security officers were retained it does not mean that the non-extension of the Applicant's appointment was unlawful. But the Tribunal has not seen any evidence of favouritism beyond the usual considerations of the nature of the specific officers' contracts being permanent or continuing appointments.

37. However, based on the disclosure by the Respondent of 21 December 2021, the Tribunal has determined that there is no documentary evidence disclosed which shows a relationship between anything said or done by the PSA and the decision to not renew the Applicant's FTA. In the circumstances, the Applicant has not established that there was any bias or impropriety which had any impact on the decision not to renew his FTA. The Applicant has not provided any further information which would assist in a production of relevant information and the Tribunal does not have the jurisdiction to

embark upon a full investigation of this matter and can only rely on what has been made available pursuant to its case management powers.

38. In the circumstances the Tribunal also holds that the non-extension of the Applicant's FTA is not related to the PSA's comments about the Applicant's future in the Mission.

ii. What was the effect of the Applicant's post not being abolished?

39. The Tribunal finds that the non-abolition of the post previously encumbered by the Applicant is not a salient point in a determination of the lawfulness of the non-renewal of his appointment. Indeed, the post was not personal to him although his qualifications may have fit the necessary requirements for the appointment. In a downsizing exercise it was possible that the post could be retained, and the incumbent replaced by an equally qualified officer who was on a permanent or continuing appointment. Consequently, the Tribunal does not find that this issue had any impact on the legality of the non-renewal of the Applicant's appointment.

iii. Does the Tribunal lack jurisdiction to review the Applicant's allegations against the PSA?

40. The Tribunal is not proceeding to review the Applicant's allegations against the PSA. However, in deciding the lawfulness of the decision not to extend the Applicant's appointment, the Tribunal is entitled to interrogate the available paperwork which may disclose any impropriety in the decision-making process. The finding of some possible appearance of impropriety may not have any impact on the PSA's status in the Organization without further investigation but it may have an impact on the lawfulness of the decision not to extend the Applicant's appointment. In the circumstances the Tribunal's review is not of the allegations against the PSA but into the lawfulness of the decision not to renew the Applicant's appointment.

41. It would be pointless to pursue an investigation of the PSA's role in the non-extension of the Applicant's appointment after the decision on the lawfulness of the non-extension has already been made. The Tribunal is not aware of any retroactive

reconsideration of the non-extension decision which would produce a just result in the circumstances since there could be no guarantee of an extension being granted. The Tribunal's consideration of the relevance of the PSA's words is therefore legitimate.

iv. Are the Applicant's allegations of abuse of authority and bias against the PSA unrelated to the contested decision since the PSA did not make the decision not to renew the Applicant's appointment?

42. The Applicant's allegations of abuse of authority and bias would be relevant where other parties who did make the decision are involved in the alleged abuse by counselling or procuring such abuse via the PSA and or allowing themselves to be influenced by the views of the PSA. Since the Tribunal has held that there is no evidence to establish a relationship between the alleged abuse of authority and the decision not to renew the Applicant's appointment it follows that since the PSA did not make the decision not to renew his appointment that the two issues are unrelated. The limits of the Tribunal's jurisdiction ended with its examination of available documentary evidence.

v. Is the Applicant obliged to mitigate the loss of his employment?

43. The Tribunal accepts that failure to mitigate loss may be an issue where the Applicant claims damages against the Organization for loss of employment. However, the Applicant may pursue the failure to lawfully refuse an extension of his appointment as a way of correcting a wrong procedure which had an adverse impact on him even if he had mitigated his loss and found alternative employment. However, the Tribunal accepts that this issue of mitigation of loss may have been raised solely to rebut a claim for alleged compensation for loss of employment.

44. The Respondent does not provide any basis for the proposition that in a case of abolition of an FTA the Applicant seeking review of the decision to abolish his post or not renew his contract must also seek alternative employment in the United Nations or would be entitled to the opportunity to be re-hired. In any event such a determination would be moot.

JUDGMENT

45. Based on the aforesaid considerations the Tribunal holds that the application is rejected.

(Signed)

Judge Francis Belle

Dated this xx day of December 2021

Entered in the Register on this xx day of December 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi