



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2021/053

Judgment No.: UNDT/2022/047

Date: 20 May 2022

Original: English

Before: Judge Margaret Tibulya

Registry: Nairobi

Registrar: Abena Kwakye-Berko

RAJA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Brandon Gardner, OSLA

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Maureen Munyolo, AAS/ALD/OHR, UN Secretariat

Introduction

1. On 15 July 2021, the Applicant, a former Supply Assistant, at the FS-4 level, working with the United Nations-African Union Hybrid Operation in Darfur (“UNAMID”) filed an application contesting UNAMID’s decision not to make good faith efforts to absorb him to a new post after the abolition of his post.¹ The Applicant served on a continuing appointment.²

2. The Respondent filed a reply on 15 October 2021 in which it is argued that the contested decision was lawful.³

3. The Tribunal held a case management discussion on 12 April 2022, where among others, it was agreed that this case shall be determined on the basis of the parties’ written submissions and supporting documentation without the need for an oral hearing. The parties filed their closing briefs on 4 May 2022.

Facts

4. On 22 December 2020, the Security Council adopted Resolution 2559 (2020) and decided to terminate UNAMID’s mandate effective 31 December 2020.⁴

5. By the same Resolution, the Security Council requested the Secretary-General to commence the drawdown of UNAMID personnel on 1 January 2021 and to complete the withdrawal of all uniformed and civilian UNAMID personnel by 30 June 2021, except those required for the Mission’s liquidation.⁵

6. On 14 January 2021, Mr. Houston Fergusson, the UNAMID Director of Mission Support (“DMS”) notified the Applicant that following the Mission closure, his continuing appointment would be terminated effective 13 April 2021. He was also

¹ Application, section III, para. 1.

² *Ibid.*

³ Reply, section A, para. 2.

⁴ Reply, annex 1, para. 1.

⁵ *Ibid.*, para. 2.

informed that the termination of his appointment was due to staff reduction and was in line with staff regulation 9.3(a)(i) and staff rule 9.6(c)(i).⁶

7. By the same notification, the DMS encouraged the Applicant to apply for suitable job openings in *Inspira* and to upload his profile in the *Horizon*⁷ platform.⁸

8. On 5 March 2021, the Applicant requested management evaluation of the contested decision.⁹ On 12 March 2021, the Management Evaluation Unit suspended the implementation of the contested decision pending its review.¹⁰

9. From March to December 2021, the Applicant was placed on Special Leave With Full Pay (“SLWFP”).¹¹

10. On 9 February 2022, the Applicant was issued the separation letter and separation effected effective 31 December 2021.¹²

Submissions

Applicant’s submissions

11. The Applicant’s case is that the Administration failed in its obligation to make efforts to place him in an alternate post.

12. He contends that the jurisprudence of the United Nations Appeals Tribunal (“UNAT”) is exceedingly clear regarding staff members with continuing appointments whose posts are abolished per staff rule 9.6(c)(i); specifically, the Administration is required, per staff rules 9.6(e) and 13.1(d), to make good faith efforts to place the concerned staff member in a suitable alternative post. Staff rule 9.6(e) necessitates that

⁶ Application, annex 2.

⁷ Horizon is an online platform which provides the hiring managers with the personnel profiles of staff members affected by downsizing and restructuring initiatives within the Secretariat. *See* Reply, annex 4.

⁸ Application, annex 2.

⁹ *Ibid.*, annex 4.

¹⁰ *Ibid.*, annex 5.

¹¹ Respondent’s closing submissions, para.7.

¹² Application, annex 8.

staff on continuing appointments who are affected by post abolition shall be retained on a priority basis. Such an obligation mandates the Organization to transfer and assign staff members affected by the abolition of posts to suitable positions outside the normal selection process.

13. The Applicant seeks to rely on *Timothy*¹³, and argues that in order to receive preferential placement, he is aware that he was obliged to express interest in suitable posts by applying for them. He avers that he applied for 26 posts between being notified of the impending termination of his appointment and before the termination took effect on 31 December 2021, including six positions at his level (FS-4) which he thought fit his profile. Despite his industrious submission of applications, the Administration did not place him in a suitable alternative post. In particular, the Applicant emphasizes that he applied for of post number 151863, Movement Control Assistant, (FS-4) in the United Nations Multidimensional Integrated Stabilization Mission in Mali (“MINUSMA”), which he was suitable for; but was never considered.

14. The Applicant further, submits that he holds roster memberships for FS-4 and FS-5 Logistics Assistant posts, the Administration could have also transferred him into a vacant post in one of those categories, but it chose to terminate his appointment instead. As far as he is aware, there has been no effort made to assign him to another post by way of lateral move/assignment, under the Secretary-General’s prerogative to assign staff members unilaterally to a position commensurate with their qualifications, under staff regulation 1.2(c) or via any other method.

15. He maintains that he is aware that many other similarly situated UNAMID staff, whose posts were abolished and whose continuing appointments were scheduled for termination due to UNAMID’s closure, have seen the Administration extend their appointments and place them in alternative posts. However, the Administration did not offer him such an opportunity.

16. Accordingly, the Applicant contends that the Administration failed to meet its

¹³ *Timothy* 2018-UNAT-847, para. 47.

obligation to reassign him as a matter of priority to another post matching his abilities and grade, in violation of staff rule 9.6(e) and the jurisprudence of the Tribunals.

17. As remedies, the Applicant requests the Tribunal to:
- a. rescind the decision to separate him from service without absorbing him onto a new post; or
 - b. award him, at a minimum, one years' net-base salary in compensation to account for the Administration's failure to comply with its obligations towards him.

Respondent's submissions

18. The Respondent's position is that the contested decision was lawful. The decision to terminate the Applicant's continuing appointment resulted from the Security Council's decision to terminate UNAMID's mandate on 31 December 2020. The Applicant was not retained on the Mission Liquidation Team because his skill sets and competencies as a Supply Assistant were not required on the Liquidation Team.

19. The Applicant has not produced any evidence to rebut the presumption of regularity, or to show that the contested decision was arbitrary or tainted by improper motive. Nor has he presented any evidence of harm resulting from the contested decision.

20. The Respondent maintains that the Organization complied with its obligations under staff rule 9.6(e), which imposes a mutual obligation upon the Organization and the downsized staff members. While the Organization has an obligation to make reasonable and good faith efforts to assist the downsized staff member to find alternative positions, the staff member has an affirmative duty to apply for suitable alternative positions. As for the Organization, it fulfilled its obligation by identifying vacant positions through *Inspira*. The Applicant applied for suitable alternative positions for which he received priority consideration. Although the Organization gave

the Applicant priority consideration for the positions in which he applied, he was not suitable for them. The Applicant had no right to be given priority consideration for positions whose job requirements he did not meet.¹⁴

21. The Applicant only applied for the FS-4 Movement Control Assistant position, Temporary Job Opening (“TJO”) No. 151863, in MINUSMA. He was, however, not selected because he lacked the desired experience in the use of International Air Transport Association (“IATA”) and International Maritime Organization (“IMO”) rules and procedures for the transportation of dangerous goods; fluency in French; and technical or vocational certificate in movement control, multi-modal transportation, airline operations, and logistics management.¹⁵

22. The Respondent further argues that the Applicant could not be recruited against TJO No. 151863 because it was to be administered as a temporary assignment for internal candidates.¹⁶ The Applicant had no substantive post to lien against given that his post had been abolished.

23. The Respondent opines that in any event, the Applicant did not suffer any harm as a result of his non-selection for TJO No. 151863 because the organization retained him in employment beyond the six-months period of the TJO, *i.e.*, beyond 30 September 2021. Had the Applicant been found suitable and placed against this position, he would have served until 30 September 2021. Yet, the Organization placed him on SLWFP for nine months, from March 2021 to December 2021, while his other pending job applications were under consideration and while the Organization reviewed suitable vacant positions that were available for his reassignment.

24. The Respondent underscores that after the three-month notice period, and during the suspension of the contested decision, there were four other vacant FS-4 positions which the Applicant could have applied for based on his background.¹⁷ He

¹⁴ Respondent’s closing submissions, para. 4.

¹⁵ *Ibid.*, para. 5; Reply, annex 7.

¹⁶ Reply, annex 7.

¹⁷ *Ibid.*, annexes 5 and 6.

applied for only one of those positions, FS-4 Logistics Assistant, JO No. 157973 in MINUSMA. However, he was deemed unsuitable for the position because he did not meet the requirement of fluency in both French and English.¹⁸

25. The Respondent further stresses that whereas the Applicant applied for higher positions at FS-5 and P-2 levels, he had no right to priority consideration for positions at those levels. The Applicant applied to twelve positions at the FS-5 level and one position at the P-2 level.¹⁹ However, the Applicant had no right to priority consideration for a promotion to the FS-5 level or the P-2 level. The obligation under staff rule 9.6 is limited to vacant suitable positions at the staff member's level or one level lower. If a staff member wishes to be considered for a higher level, he must compete for the promotion on an equal footing with all other job applicants.²⁰

26. The Applicant separated from the Organization effective 1 January 2022 when no position was found for him. Other than TJO No. 151863, the Applicant has not challenged any selection exercise for a specific job opening for which he expressed interest but was not provided priority consideration. If downsized staff members, like the Applicant, apply for positions but are not selected, their retention preference under staff rule 9.6(e) does not obviate the requirement to challenge the specific selection exercises if they claim the non-selection decision was unlawful. The Dispute Tribunal should not reverse the burden of proof by requiring the Organization to show whether it accorded the Applicant priority consideration for job openings not specifically identified or contested by the Applicant.

27. The Respondent maintains that while the Administration made every effort to assist the Applicant to find an alternative suitable position, both the Organization and the Applicant did not find a suitable position before his separation because there are not enough vacant posts to support the large number of downsized staff members on permanent and continuing appointments for whom priority consideration is warranted.

¹⁸ *Ibid.*, annex 8, para. 1.

¹⁹ Application, annex 6.

²⁰ Respondent's reply, para. 15.

In the Applicant's case, he received a termination indemnity in addition to his other separation entitlements to mitigate his loss of employment.

28. In view of the foregoing, the Respondent requests the Tribunal to dismiss the application. The Applicant has not demonstrated any procedural or substantive breach of his rights. Nor has the Applicant adduced any evidence of harm. The Respondent prays that should the Dispute Tribunal decide to award damages, it has a duty to consider the Applicant's efforts to mitigate any alleged loss, and to offset the damages by the salary that the Applicant received from March 2021 to December 2021 while the contested decision was suspended and while he was not performing under his employment contract.

Considerations

Legal framework

29. Staff rules 9.6(e) and (f) provide:

(e) Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in 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, staff members shall be retained in the following order of preference:

- (i) Staff members holding continuing appointments;
- (ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;
- (iii) Staff members holding fixed-term appointments.

When the suitable posts available are subject to the principle of geographical distribution, due regard shall also be given to nationality in the case of staff members with less than five years of service and in the case of staff members who have changed their nationality within the preceding five years.

(f) The provisions of paragraph (e) above insofar as they relate to staff members in the General Service and related categories shall be deemed to have been satisfied if such staff members have received consideration

for suitable posts available within their parent organization at their duty stations.

30. This application presents one core issue; whether the Administration made good faith efforts to absorb the Applicant in a new post after they decided to abolish his post.

31. It is not contested that the Respondent, through *Inspira*, identified suitable vacant positions for which the Applicant could be considered. The Applicant's complaint however is that he was not retained on a priority basis, and that the Respondent did not fulfil its obligation to transfer and assign him to suitable positions outside the normal selection process. He further asserts that no effort was made to assign him to another post by way of lateral move/assignment under the Secretary-General's prerogative to assign staff members unilaterally to positions commensurate with their qualifications, under staff regulation 1.2(c) or via any other method.

32. The appellate jurisdiction's guidance is that while staff rules 9.6(e) and (f) create an obligation for the Administration to make **reasonable efforts** [emphasis added] to find suitable placements for staff members whose posts have been abolished, the affected member of staff has an obligation to express interest in suitable posts by applying for them. And, once the application process is completed the Administration is required to consider the continuing or indefinite appointment holder on a preferred or non-competitive basis for the position, to retain him or her. 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.²¹

33. The Applicant maintains that he applied for 26 positions between his being notified of the impending termination and before the termination took effect on 31 December 2021, including six at his level (FS-4)²² which he thought fitted his profile,

²¹ *Timothy, op cit.*, at paras. 38 and 47.

²² Application, annex 6.

but that the Administration did not place him in any suitable alternative post.

34. He, however, does not dispute the Respondent's assertion that he only applied to 12 positions at the FS-5 level and one position at the P-2 level which were promotional positions. UNAT has been clear that the obligation under staff rule 9.6 is limited to vacant suitable positions at the staff member's level or one level lower.²³ The Tribunal is therefore in agreement with the Respondent that the Applicant had to compete for the promotional positions on an equal footing with all other job Applicants since he had no right to priority consideration for them.

35. The uncontroverted evidence is that during the Applicant's initial three-month notice period, he applied for one position at his level, an FS-4 Movement Control Assistant position, Job Opening (JO) No. 151863, in MINUSMA.

36. It is noteworthy that this is the only job opening for which the Applicant expressed interest and he was not provided priority consideration, whose selection exercise he is specifically challenging. He, however, did not rebut the explanation that the TJO No. 151863 was to be administered as a temporary assignment for internal candidates, and that since he had no substantive post to lien against, he could not be offered the position. He similarly did not rebut the additional explanation that he was unsuccessful because he lacked the desired experience in the use of IATA and IMO rules and procedures for the transportation of dangerous goods; fluency in French; and technical or vocational certificate in movement control, multi-modal transportation, airline operations, and logistics management.

37. The Respondent's assertion that after the three-months' notice period, and during the suspension of the contested decision, there were four other vacant FS-4 positions which the Applicant could have applied for based on his background but that he applied for only one of those positions, FS-4 Logistics Assistant, JO No.157973 in MINUSMA was not disputed. There is credible evidence that the Applicant was deemed unsuitable for this position since he did not meet the requirement of fluency in

²³ *Timothy, op cit.*, para. 57.

both French and English.²⁴ The Applicant doesn't explain why he only applied for one position out of the four. By failing to apply for all available positions, the Applicant failed in his affirmative duty to express interest in suitable positions for which he could have been considered and shouldn't be heard to complain that the Respondent failed in his obligation to absorb him in the Organization.²⁵

38. Considering that staff rule 9.6(e) does not impose a strict liability regime, after the Applicant identified alternative positions, he was not bound to be automatically recruited. His suitability for the positions against the job requirements had to be first determined. The negative results were valid outcomes of that process.

39. The complaint that the appointments of similarly placed UNAMID staff were extended and that some were placed in alternative posts including within UNAMID as part of its liquidation team cannot be reasonably addressed in the context of this application. The Tribunal lacks all information pertinent to such an endeavour. Suffice it to say that the Applicant did not dispute the Respondent's explanation that he was not retained on the Mission Liquidation Team because he lacked the skill sets and competencies needed to oversee the drawdown.

40. The complaint that no effort was made to assign the Applicant to another post by way of lateral movement or assignment is not supported by evidence that there was any suitable vacant position to which the Applicant could have been so moved/assigned.

41. In conclusion, based on the available evidence, the Tribunal finds that the Administration has demonstrated that all reasonable efforts were made to consider the Applicant for available suitable posts in keeping with staff rules 9.6(e) and 13.1(d).

42. Good faith efforts to place him in a suitable alternative post were made but both the Organization and the Applicant did not find a suitable position before his

²⁴ Reply, annexes 5 to 8.

²⁵ *Timothy, op cit.*, paras 31, 32 and 45.

separation.

JUDGMENT

43. The application is dismissed.

(Signed)

Judge Margaret Tibulya

Dated this 20th day May 2022

Entered in the Register on this 20th day of May 2022

(Signed)

Eric Muli, Legal Officer, for
Kwaky-Berko, Registrar, Nairobi