



Before: Judge Margaret Tibulya.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

MWIZERWA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Jacqueline Lule, OSLA

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Maureen Munyolo, AAS/ALD/OHR, UN Secretariat

Introduction and Procedural History

1. On 8 July 2021, the Applicant, an Administrative 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 to terminate her continuing appointment without any attempt by the Administration to secure her alternative positions.¹

2. On 9 August 2021, the Respondent filed a reply where it was argued that the contested decision is lawful.

3. The Tribunal held a case management discussion on 13 April 2022. During the discussion, the parties declared readiness to informally resolve the dispute.

4. On 25 April 2022, the parties jointly informed the Tribunal that their efforts to resolve the dispute *inter partes* have not been successful. The parties moved the Tribunal to proceed with adjudication of the dispute on its merits.

5. On 20 May 2022, the Applicant filed his closing submissions. The Respondent filed his closing submissions, and an additional document titled ‘supplementary closing submissions’ on the same day.

Facts

6. The Applicant served as an Administrative Officer, at the FS-4 level with UNAMID, until the termination of her continuing appointment on 30 June 2021. Her continuing appointment was to expire on 31 January 2033.

7. She is rostered for Administrative Assistant posts at the FS-4 and FS-5 levels.

8. On 12 January 2021, the Applicant was informed that she would be affected by the downsizing of the Mission which was imminent.

¹ Application, section V.

In line with UNAMID's civilian drawdown which was developed in consultation with section leaders and senior leadership, the reduction of staff will take place in staggered phases with staff departing the mission effective 1st February 2021, based on the functions required in each unit/section as well as the reduced operational requirements at each stage of the drawdown. [...]

It is with regret that I have to inform you that your functions are among those no longer required following termination of UNAMID's mandate.....The Joint Special Representative, (JSR), has accordingly approved the termination of your continuing appointment on the grounds of staff reduction in line with Staff Regulations 9.3(a)(i) and Staff Rules 9.6(c)(i). [...]

We encourage you to apply to suitable job openings in INSPIRA and if you not already done so, ensure that your profile is uploaded in the HORIZON platform.

9. This is the impugned decision. The scheduled date of separation was to be 11 April 2021.
10. On 10 March 2021, the Applicant's supervisor formally sought an extension of her contract through to 30 June 2021.
11. On 12 March 2021, the Applicant sought review of the impugned decision by management evaluation.
12. On 2 April 2021, the Applicant applied for an FS-5 post in Nairobi.
13. On 9 April 2021, the Applicant received a response from the Management Evaluation Unit ("MEU"). The response read, in part, as follows:

The MEU noted, firstly, in the submissions of the Mission, that your candidature has been flagged in Horizon as that of a staff member affected by downsizing. The MEU also noted that you only applied for positions at the FS-5 level, i.e., positions at one level higher than your actual grade (FS4). However, as noted above, the Administration has an obligation to make proper, reasonable, and good faith efforts to assist you in finding an alternative post at the FS4 level or even at a lower grade, if you had applied. Taking into account that your candidature was appropriately flagged for priority consideration for suitable job openings and given the absence of any breach in the Administration's obligation to consider you for suitable posts at your level, FS-4, the

MEU recommended upholding the decision to terminate your continuing appointment.

14. On 31 May 2021, the Applicant applied for another FS-5 post; this post was based in Khartoum.
15. On 3 and 7 July 2021, the Applicant applied for two positions at the FS-4 level.
16. The Applicant went on to serve at the Mission until the end of June 2021.

Parties' Submissions

17. It is the Applicant's case that the impugned decision placed the responsibility of securing an alternative position on the Applicant. This constituted an "error in approach" and "breach of obligations" on the part of the Respondent.

18. The Respondent made no reasonable or good faith effort to assist the Applicant with securing an alternative position. There is also no evidence that her candidature was given any priority, despite the fact that she held a continuing appointment.

19. The Respondent acted in breach of staff rule 9.6(e).

20. The Respondent contends that the impugned decision was lawful. The Applicant's appointment was terminated because the Security Council terminated the Mission's mandate effective 31 December 2020. The Applicant was among 1,026 UNAMID staff members who received notices of termination.

21. The Respondent further submits that between January 2021 to June 2021, the Organization identified four vacant FS-4 Administrative Assistant positions that were advertised. The Applicant applied for none of them.

22. As of May 2021, the Applicant had only applied to positions at the FS-5 level. Selection for these positions would have been a promotion for her. Although the Applicant was rostered at the FS-5 level, the Organization has no obligation to assist a staff member affected by downsizing to obtain a non-competitive promotion.

23. Had the Applicant expressed interest in and applied for any of the FS-4 level positions, the hiring managers would have been on notice that she was a downsized staff member subject to priority consideration. Instead, she applied for an FS-4 position two days before she separated, and for two more FS-4 positions after separation.

Deliberations

24. That the Respondent acted within his mandate *per* staff regulation 9.3(a)(i) and staff rule 9.6(c)(i) when he terminated the Applicant's appointment is not contested.

25. Indeed, the Applicant does not question the discontinuation of the position she encumbered, but rather maintains that the Administration terminated her continuing appointment without making reasonable and good faith efforts to assist her to find suitable alternative positions as they were obligated to do.

26. The sole issue before the Tribunal therefore is whether the Respondent fulfilled his obligations pursuant to staff rules 9.6(e) and (f) and 13.1 (d).

Legal framework

27. Staff rules 9.6(e) and 13.1(d) set out the order of preference for the retention of staff members whose appointments are terminated due to abolition of post or the reduction of staff as follows:

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

28. Staff rule 9.6(f) provides that 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.

29. Citing the language of the notice of termination to her², the Applicant asserts that from the outset the Administration did not make any, or any proper, reasonable and good faith efforts to secure her alternative employment but instead placed that responsibility on her, requiring her to apply for positions in INSPIRA and to upload her profile on HORIZON. This, she maintains, constituted an error in approach and a breach of the obligations set out in *De Aguirre*³ and *Timothy*⁴. She asserts that there is no evidence that the Administration ever inquired into the system and tried to place her *via* it.

30. On the other hand, the Respondent maintains that the HORIZON platform facilitates hiring managers to access the Personal History Profiles (PHP) of staff members who have been notified of their impending separation for consideration for suitable vacancies within the Secretariat. Further that in anticipation of the termination of UNAMID's mandate, UNAMID uploaded the Applicant's PHP onto Horizon.

31. In the Tribunal's view, the requirement that the Applicant uploads her profile on HORIZON (which was part of the application process) and to apply for positions in INSPIRA did not tantamount to placing on her the responsibility of securing alternative employment. Consistent Tribunal jurisprudence is that the obligation under staff rule 9.6(f) is mutual, and 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.⁵ Based on the foregoing, the Tribunal determines that what the Respondent asked the Applicant to do under the notice rather than being viewed as placing on her the onus

² Applicant's Annex B.

³ 2016-UNAT-705.

⁴ 2018-UNAT-847.

⁵ *Ibid.*, paras. 38-39 and 42.

of securing alternative positions for herself, was a mere reminder to her to fulfil her staff rule 9 obligations.⁶

32. The Applicant further asserts that since she had roster membership for Administrative Assistant positions at the FS-4 and FS-5 levels, she met the criteria for the FS-5 roles and was competent for those positions. That being so, she maintains that she should only have been interviewed to confirm her suitability for the positions, only competing against others holding continuing or permanent appointments. This, it is further argued, would be consonant with *Timothy* in which UNAT found that the Administration was required to consider the Applicant's suitability on a preferred non-competitive basis considering her competence, integrity and length of service, as well as other factors such as nationality and gender.

33. In the Tribunal's view, however, the assertion that the Applicant met the criteria for the FS-5 roles and was competent for those positions by virtue of her roster membership for Administrative Assistant FS,4 and FS,5 posts is fallacious. The appellate jurisdiction guidance is that roster membership does not necessarily mean that a staff member meets the requirements or possesses the specific qualifications for a particular job opening.⁷ A roster candidate must still be suitable for the specific position.⁸ The Respondent's explanation that rosters relate to job openings falling within the same job family and at the same level, and that the suitability of a roster candidate is assessed against the specific requirements of a job opening which vary depending on the particular vacancy being filled, represents the correct position.

34. It follows therefore (as Counsel for the Applicant indeed concedes and in keeping with Tribunal jurisprudence in *Krioutchkou*⁹) that the Applicant's roster membership did not give her a right to appointment to FS-5 positions and did not give

⁶ Applicant's Annex B.

⁷ *Lemonnier* 2017-UNAT-762, para. 29; *Krioutchkou* 2016-UNAT-807, para. 29; *Charles* 2014-UNAT-416, para.28; ST/AI/2010/3, sec. 7.

⁸ *Timothy*, *op cit.*, para. 38; *Fasanella* 2017-UNAT-765, para. 31.

⁹ 2016-UNAT-807.

her a right to be placed against available positions on a priority and non-competitive basis.

35. The Applicant complains that an FS-4 fixed-term appointment holder with fewer years of experience and who does not even speak French was able to secure a position as an Administrative Assistant, in the office of the Chief of Staff in Gabon, and that the FS-4 post was not advertised. Since the Applicant later concedes that she did not see the advertisement for that FS-4 role, and therefore did not apply for it, this complaint is moot. The Tribunal finds that she failed in her singular obligation towards having her re-absorbed into the organisation.

36. The assertion that she had specifically approached the Hiring Manager in Gabon and informed him about her interest in securing a similar position to that which she encumbered at the time is irrelevant to this discussion. The Applicant's obligation was to apply to declared vacant positions and not to remind responsible officers to remember her when positions fall vacant.

37. The Applicant maintains that on 2 April 2021, she applied for a post of Administrative Assistant, 145509, FS-5, Nairobi, and that on 31 May 2021, she applied for a post of Administrative Assistant, 156256, FS-5, Khartoum, but that she was not offered either position. She does not dispute the evidence that as of May 2021, she had only applied to positions at the higher FS-5 level before her separation. Selection to these positions would have been a promotion for her and yet promotion is a competitive process *per* staff regulation 4.3 and ST/AI/2010/3 (Staff Selection System). According to Tribunal jurisprudence, the Organization has no obligation to assist a staff member affected by downsizing to obtain a non-competitive promotion.¹⁰

38. It is worth emphasising that the Administration's obligation is to make proper, reasonable, and good faith efforts to assist the Applicant in finding an alternative post at the FS-4 level or at a lower grade but not at the FS-5 level.

¹⁰ *Timothy, op cit.*, paras. 57-58; *Hassinin* 2017-UNAT-759, para. 52.

39. The Applicant cites applications she made in the past to support her argument that the Respondent has failed to make ‘all proper, reasonable and good faith efforts to find her a suitable alternative employment’.

40. The Tribunal, however, notes that all the 19 applications were made before the obligations under staff rule 9.6(f) set in. And, out of the 19 positions, only 7 were at her level, the rest were at the FS-5 level.

41. The Applicant further seeks to rely on Annex K to his application, for the suggestion that she diligently applied for available positions, but that the Respondent failed in his obligation to her. The Tribunal however notes that only three positions in Annex K were applied for during the relevant period, and all three were FS-5 and G-5 level positions for which she had to compete.

42. It is in evidence that the Applicant applied for one FS-4 Administrative Assistant position on 28 June 2021, two days before the termination of her appointment. That job opening did not close until after the Applicant had separated. She then applied to two more such positions after she left the Organization.

43. Regarding the above positions, the Tribunal agrees with the Respondent that the Organization’s staff rule 9.6(e) and (f) obligation is not indefinite and does not extend beyond the separation of the staff member. The appellate jurisdiction has held that the obligation is limited to assisting the affected staff member with finding alternative suitable positions “at the time of the events.”¹¹

44. Other arguments raised by the Applicant are that there is no evidence that the Administration considered or applied section 11 of ST/AI/2010/3, which specifically permits the placement of staff affected by abolition of posts outside the normal selection process.

¹¹ *El-Kholy* 2017-UNAT-730, para. 31.

45. Going by the Tribunal jurisprudence as expounded above, the provisions of section 11 of ST/AI/2010/3 do not remove the obligation of applying for vacant positions from the affected staff member. These provisions would only come into play upon the Applicant identifying and applying for a suitable vacant position for which she qualifies.

46. It is further argued that there is no evidence that the Administration considered reassigning the Applicant laterally in accordance with staff regulation 1.2(c). Also, that there was no discussion with the Applicant about accepting a lower-level position.

47. Staff regulation 1.2(c) which relates to the Secretary-General's powers to assign staff is also irrelevant to the situation at hand. And, the Respondent's obligations under staff rule 9.6 do not include discussing with affected staff members about accepting lower-level positions.

48. The argument that the Applicant's status as a continuing appointment holder was not given any priority as against other staff at UNAMID who were affected by the downsizing, since all of them had their profiles flagged in HORIZON is without merit. The priority consideration for which the Applicant was entitled related to suitable positions for which she applied at the time of the termination decision but not in having her profile uploaded on HORIZON.¹²

49. The Tribunal is satisfied that the Organization identified to the Applicant all relevant vacant positions through INSPIRA to which she could have applied. The Mission contacted other entities within the United Nations Secretariat to remind them of the Applicant's right to priority consideration under staff rule 9.6(e).¹³ The Applicant did not apply timely for any of the four FS-4 Administrative Assistant job openings that were advertised. Based on this, the Tribunal finds that the Administration discharged the onus of proving that it a made good faith effort to fulfil its staff rule 9.6 obligations.

¹² *El-Kholy, op cit.*, para. 31.

¹³ Respondent's Annex 6.

Judgment

50. The application is dismissed.

(Signed)

Judge Margaret Tibulya

Dated this 27th day of May 2022

Entered in the Register on this 27th day of May 2022

(Signed)

Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi