



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2021/087

Judgment No.: UNDT/2022/080

Date: 13 September 2022

Original: English

**Before:** Judge Margaret Tibulya

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

WATHANAFI

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

Sètondji Roland Adjovi, *Etudes Vihodé*

**Counsel for the Respondent:**

Nicole Wynn, AAS/ALD/OHR, UN Secretariat

Maureen Munyolo, AAS/ALD/OHR, UN Secretariat

## Introduction

1. The Applicant is a former P-3 Disarmament, Demobilization and Reintegration (“DDR”) Officer with the United Nations Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”) in Goma.<sup>1</sup>
2. On 14 October 2021, she filed an application before the Dispute Tribunal contesting the decision to not renew her fixed-term appointment (“FTA”) beyond 30 June 2021 and to separate her on retirement.<sup>2</sup>
3. The Respondent filed a reply on 17 November 2021 in which it is argued that the contested decision was lawful.<sup>3</sup>
4. The Tribunal held a hearing on the merits of the case on 16 and 17 August 2022.
5. The parties filed their closing submissions on 31 August 2022.

## Facts

6. On 26 October 2020, the Secretary-General established a joint strategy on the progressive and phased drawdown of MONUSCO with the Government of the Democratic Republic of the Congo (“Joint Strategy”). According to the Joint Strategy, the Government of the Democratic Republic of the Congo resolved to pursue a new, community-based national disarmament, demobilization, and reintegration approach in preparation for the Mission drawdown.<sup>4</sup>
7. On 19 February 2021, the Secretary-General submitted his proposed 2021-2022 MONUSCO budget (“Budget”) to the General Assembly. The Budget proposed the abolition of 113 posts (23 international staff, 67 national staff and 23 United Nations Volunteers) effective 1 July 2021. The Budget specified, *inter alia*, that four

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<sup>1</sup> Application, section I.

<sup>2</sup> *Ibid.*, section V.

<sup>3</sup> Reply, section II, para. 2.

<sup>4</sup> Reply, annex 2.

international staff posts, including three P-3 DDR positions would be nationalized and converted to DDR National Professional Officer positions in line with the Joint Strategy.<sup>5</sup>

8. On 2 April 2021, MONUSCO's Officer-in-Charge ("OIC") Human Resources Section, informed the Applicant that the anticipated approval of MONUSCO's proposed budget would result in the abolishment of the post she encumbered through a "dry cut" and of the non-renewal of her fixed-term appointment, expiring on 30 June 2021.<sup>6</sup>

9. On 26 April 2021, the Advisory Committee on Administrative and Budgetary Questions ("ACABQ") recommended the approval of some parts of the Budget.<sup>7</sup>

10. On 18 May 2021, MONUSCO notified the Applicant of the non-renewal of her appointment beyond its expiration on 30 June 2021.<sup>8</sup>

11. On 9 June 2021, the Applicant submitted a management evaluation request concerning the contested decision.<sup>9</sup>

12. On 29 June 2021, the General Assembly approved the MONUSCO budget.<sup>10</sup>

13. On 16 July 2021, the Management Evaluation Unit issued its decision, upholding the decision to not renew the Applicant's FTA beyond 30 June 2021.<sup>11</sup>

## **Submissions**

### *Applicant's submissions*

14. The Applicant does not contest that three of the four DDR international P-3

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<sup>5</sup> *Ibid.*, annex 3, paras. 40, 82 and 86.

<sup>6</sup> Application, annex 3.

<sup>7</sup> Reply, annex 5.

<sup>8</sup> Application, annex 1.

<sup>9</sup> Application, section VI.

<sup>10</sup> Reply, annex 6.

<sup>11</sup> Application, annex 6.

posts in MONUSCO were abolished in favour of national professional officers in the 2021-2022 budget for MONUSCO. However, she contends that both the United Nations Multidimensional Integrated Stabilization Mission in Mali (“MINUSMA”) and the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (“MINUSCA”) also have significant DDR sections unaffected by Security Council Resolution 2556 or any other downsizing decision. The Applicant as an international staff member was eligible to be either reassigned to suitable positions within MONUSCO or reassigned both across entities and duty stations. The Applicant was, however, not considered to be retained in favour of other DDR officers in these locations despite being female, long serving and having outstanding performance appraisals.

15. The Applicant further submits that she applied for numerous other positions where she did not even receive any consideration whatsoever. She was either discriminated against on the basis of her age, or that the downsizing flag in *Inspira* was not switched on to highlight that she was a candidate impacted by downsizing. The Applicant’s retirement date was 29 February 2024 at the age of 65. She did not want to retire, and she continued to apply for positions despite being eligible to retire at 62. When her FTA was not renewed on 30 June 2021, the Applicant was improperly and unilaterally forced into retirement by the Organization without any consultation. It cannot be the decision of the Organization to force a staff member into retirement before the mandatory retirement age set by the General Assembly.

16. The Applicant maintains that being a female staff member already in the service of the Organization, she did not get the requisite consideration for retention as required by ST/AI/2020/5 (Temporary special measures for the achievement of gender parity) particularly noting the abysmal representation of female staff members at the professional level in field missions and hardship duty stations.

17. As a remedy, the Applicant requests the Tribunal to order rescission of the contested decision and a suitable position be found that utilizes her skillsets. If rescission is granted, the Applicant requests payment of her emoluments from 1 July

2021 to 29 February 2024, including pension. The Applicant also seeks compensation for harm for the damage to her career and self-respect in separating her so close to her retirement.

*Respondent's submissions*

18. The Respondent maintains that the contested decision was lawful, and that it is supported by the facts. The General Assembly abolished the post she encumbered. The General Assembly decided that three international DDR positions should be nationalized and converted to DDR National Professional Officer positions. Under art. 2.1(a) of the Dispute Tribunal's Statute, the Dispute Tribunal lacks jurisdiction to review the General Assembly's decision to abolish a post.

19. The Respondent contends that contrary to the Applicant's allegations, the Organization bears no obligation to retain her in service beyond the expiration of her FTA. Under staff rule 9.6(e), the Organization must make reasonable efforts to retain staff members where there has been a decision to terminate the staff member's appointment due to the abolition of a post or the reduction of staff. In the present case, there was no decision to terminate the Applicant's FTA. The Applicant received a notice of non-renewal of her FTA effective 30 June 2021. Since the present case is not a case of termination, but rather a case of non-renewal, staff rule 9.6(e) does not apply. Under staff rule 4.13, the Applicant's FTA expired at the end of its term with no expectancy of renewal.

20. Regarding the Applicant's contention that she should have been retained in service based on her gender and on the gender parity statistics in MONUSCO, MINUSCA and MINUSMA, the Respondent submits that this argument is without merit. Pursuant to staff rules 9.6(e) and 13.1(d), retention of staff members whose appointments are terminated because of the abolition of post, or the reduction of staff is determined by their type of appointment. Staff members on continuing appointments are above those on a fixed-term appointment in the order of preference for retention. Staff rules 9.6(e) and 13.1(d) do not provide for retention based on gender.

21. In response to the Applicant's argument that she was not re-assigned or selected for other positions that she applied for; the Respondent argues that sections 2.5 and 11 of ST/AI/2010/3, (Staff selection system), do not provide any rights to the Applicant to be re-assigned to other positions upon expiration of her FTA. Additionally, all claims relating to the Applicant's non-selection for other positions that she applied to are not receivable. Those claims are distinct administrative decisions outside the scope of the present application. The Applicant has not requested management evaluation of those administrative decisions.

22. Regarding the Applicant's submissions relating to her retirement age, the Respondent maintains that the Applicant has no right or expectation to serve until the mandatory age of separation. In accordance with staff regulation 4.5(c) and staff rule 4.13(c), the Applicant only had an expectation to serve until the end of her FTA.

23. In view of the foregoing, the Respondent requests the Tribunal to dismiss the application. The Applicant has failed to demonstrate that the contested decision was unlawful. She is not entitled to the relief that she requests.

### **Considerations**

24. The facts of this application require that the Tribunal determines two issues:

- a. Whether the Applicant was forced to retire, and
- b. Whether the decision not to renew her FTA beyond 30 June 2021 is lawful.

*Whether the Applicant was forced to retire.*

25. That the Applicant held an FTA which expired on 30 June 2021 is common cause. Among the terms of the appointment was that it did not carry any expectancy, legal or otherwise, of renewal or of conversion to any other type of appointment and

that it was to expire without prior notice.<sup>12</sup>

26. The Applicant maintains that she was **forcibly retired** from service when her FTA expired on 30 June 2021. Central to that claim is a separation notice of 18 May 2021 in which the MONUSCO Human Resources officer notified the Applicant that her “separation with MONUSCO **on retirement** w[ould] take effect close of business 30 June 2021.”<sup>13</sup>(Emphasis added).

27. Proceeding from the premise that she was forcibly retired pursuant to the separation notice, while at the same time conceding that her FTA (which did not carry any obligation for renewal) ended on 30 June 2021, and that three of the four DDR international P-3 posts in MONUSCO (hers inclusive) were lawfully abolished,<sup>14</sup> the Applicant maintains that she should have been re-absorbed into the Organization. This position is clearly contradictory.

28. The subject heading of the separation notice is, “separation upon expiration of [your] Fixed Term Appointment - CBO 30 June 2021”, and its import is “to inform [you] that [your] Fixed Term Appointment with MONUSCO will expire on 30 June 2021”. While the notice mentions that the Applicant was being separated on retirement, it also mentions that her separation was upon expiration of her FTA, a position she was aware of since it had been reflected in her letter of appointment. The notice, therefore, only restates and does not purport to vary the terms of the Applicant’s appointment.

29. The MONUSCO Chief of Human Resources Section indeed explained that the suggestion that the Applicant was proceeding on retirement was made in error and that it was corrected.<sup>15</sup> Although the Applicant claims that the correction was never brought to her attention, it is strange that she believed the retirement aspect of the notice when she was already aware that her FTA was to expire on 30 June 2021, and that her position had been lawfully abolished. The separation notice, read together with the Applicant’s

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<sup>12</sup> Application, annex 2.

<sup>13</sup> Application, annex 1.

<sup>14</sup> Application, section VIII, paras. 14 and 15.

<sup>15</sup> Hearing of 17 August 2022, Mr. Ebow Idun’s testimony.

letter of appointment, leaves no doubt that hers was a case of non-renewal of appointment. The Tribunal finds that the Applicant was not forced to retire.

*Whether the decision not to renew her FTA beyond 30 June 2021 is lawful.*

30. The Applicant does not dispute the fact that MONUSCO did not renew her appointment following a lawful downsizing exercise which involved abolition of the post she encumbered effective 30 June 2021 by the General Assembly. She does not dispute the fact that these were legitimate reasons which were supported by facts, in keeping with established jurisprudence.<sup>16</sup>

31. The suggestion that the Respondent had an obligation to retain her in service beyond the expiration of her FTA is misconceived. While under staff rule 9.6(e), the Organization must make reasonable efforts to retain staff members where there has been a decision to terminate the staff member's appointment due to the abolition of a post or the reduction of staff,<sup>17</sup> there has been no decision to terminate the Applicant's FTA.<sup>18</sup> On the contrary, the Applicant received a notice of non-renewal of her FTA effective 30 June 2021.<sup>19</sup> Since the present case is not a case of termination, but rather a case of non-renewal of her appointment, staff rule 9.6(e) is inapplicable to the situation.<sup>20</sup>

32. It is established that the Administration bears no obligation to place fixed-term appointees whose posts are abolished in other positions outside of the regular recruitment process.<sup>21</sup> Such staff members may apply and be considered for other positions in the Organization through the regular selection process.<sup>22</sup>

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<sup>16</sup> *Islam* 2011-UNAT-115, para. 29.

<sup>17</sup> *Timothy* 2018-UNAT-847, paras. 30-38; *El-Kholy* 2017-UNAT-730, paras. 25-31; *Andrysek* UNDT/2020/190, para. 87.

<sup>18</sup> Application, annex 1.

<sup>19</sup> Application, annex 3.

<sup>20</sup> *Nouinou* 2019-UNAT-902, Para. 32; *Nakwafio* UNDT/2018/057, Paras. 26-27; *Shimkus* Order No. 179 (GVA/2018), paras. 20-23. See also staff regulation 4.5 (b) and staff rule 4.12 (c).

<sup>21</sup> *Nouinou*, *op.cit.* paras. 31, 66 and 67; *Russo-Got* UNDT/2020/088, Para. 49.

<sup>22</sup> *Alquza*, UNDT/2020/011, para. 17.



33. The Applicant's suggestions that:
- a. she should have been retained in favor of other DDR officers in either MISUSMA and MINUSCA since she is female, long serving and with outstanding performance appraisals;
  - b. having been an international staff member she should have been either reassigned to suitable positions within MONUSCO under section 2.5 of ST/AI/2010/3 or reassigned both across entities and duty stations under section 11 of ST/AI/2010/3; and
  - c. she should have been offered one of the numerous other positions she applied for,<sup>23</sup> but for which she was not considered, have no legal basis.
34. The type of appointment that the Applicant held did not afford her any priority for retention or reassignment, and as the Respondent pointed out, gender is not one of the priorities for staff retention provided for in staff rules 9.6(e) and 13.1(d).
35. Regarding the Applicant's non-selection for positions she had applied for, this constitutes distinct administrative decisions outside the scope of the present application, they are not receivable.
36. The Tribunal noted that Mr. Garba Patrick-Cyrille, Mr. Kitunda Wilondja Colva and Mr. John Wamungu's evidence was premised on the narrative that the Applicant had been forcibly retired. Their evidence was therefore not helpful to the Applicant.<sup>24</sup>
37. All relevant facts and evidence considered; the Tribunal finds that the decision not to renew the Applicant's FTA beyond 30 June 2021 is lawful. The remedies sought by the Applicant are not tenable.

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<sup>23</sup> Application, annex 4.

<sup>24</sup> Hearing of 16 and 17 August 2022.

**JUDGMENT**

38. The application is dismissed for lack of merit.

*(Signed)*

Judge Margaret Tibulya

Dated this 13<sup>th</sup> day of September 2022

Entered in the Register on this 13<sup>th</sup> day of September 2022

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi