



Before: Judge Francesco Buffa

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NEGA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY

Counsel for the Applicant:

Brandon Gardner, OSLA

Counsel for the Respondent:

Nicole Wynn, AS/ALD/OHR, UN Secretariat

Maureen Munyolo, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant, then Chief of Service at the United Nations-African Union Hybrid Operation in Darfur (“UNAMID”) holding a continuing appointment at the D-1 level and based in Khartoum, challenges the Administration’s refusal to “make good faith efforts to absorb him on to a new post after it decided to abolish his existing post.”

Factual and Procedural History

2. The Applicant had been employed with the United Nations since 16 October 2001 and was granted a continuing appointment effective 28 October 2016.

3. On 15 January 2021, the Applicant received a letter from the UNAMID Director of Mission Support (“DMS”) informing him that due to the imminent closure of the Mission, his post would soon be abolished and he would be separated from service. The letter stated:

[I]n line with the civilian staff drawdown plan, which was developed in consultation with Section Chiefs and approved by the Senior Leadership, the reduction of staff will take place in staggered phases [...] your separation will be effective on 13 April 2021.

4. On 14 February 2021, UNAMID sent a broadcast to all staff about the Horizon post matching system, requesting that permanent/continuing appointment holders populate an electronic form for each post they have applied to in Inspira which is still under consideration. The Applicant complied and uploaded his applications on to the database.

5. On 10 March 2021, the Applicant requested management evaluation of the contested decision.

6. On 18 March 2021, the Applicant applied for the position of Deputy Director, D-1, Western Africa Division, Departments of Political and Peacebuilding Affairs and Peace Operations (“DPPAPO”), New York (TJO 152064).

7. On 19 April 2021, the Management Evaluation Unit (“MEU”) informed the Applicant that the decision to terminate his appointment had been suspended.

8. The Applicant had applied for several posts at his grade.
9. On 4 June 2021, the Applicant was invited to an interview, on 16 June 2021, for the post of TJO 152064 Deputy Director, D1, Western Africa Division, DPPAPO. The Applicant was made to understand that he had not been selected for the post, but as at the time of this application had not received formal communication on it.
10. On 7 June 2021, the MEU informed the Applicant of its decision to uphold the decision to terminate his appointment. Regarding the post of Deputy Director, D1, Western Africa Division, DPPAPO, the MEU stated,

[That] at the time of completion of the management evaluation, the selection process for this TJO is on hold, as this post is a regular budget post under the freeze. The MEU considered that this is without prejudice to your right to challenge the outcome of that selection process, once it is finalized.
11. The Applicant was separated from service on the same day.
12. On 8 June 2021, the Applicant retired.
13. On 19 August 2021, the Applicant filed an application with the United Nations Dispute Tribunal sitting in Nairobi to impugn the Respondent's refusal to "make good faith efforts to absorb him on to a new post after it decided to abolish his existing post."
14. On 7 September 2021, the Under-Secretary-General for Political Affairs made the selection decision for TJO 152064.
15. The Respondent filed his reply on 20 September 2021. The Respondent's principal contention is that the application is not materially receivable before the Tribunal.
16. On 3 August 2022, the Tribunal issued Order No. 108 (NBI/2022) to inform the parties of its decision to adjudicate this matter on the basis of their written submissions. To that end, the parties were invited to file their closing submissions simultaneously on 16 August 2022.

17. The Applicant and Respondent filed their respective closing submissions as directed.

Parties' submissions

18. It is the Applicant's case that as a staff member on a continuing appointment the onus was on the Respondent, and not on him, to make good faith efforts to find him a suitable available post. For his part, the Applicant applied to posts at his level for which he met or exceeded all mandatory and desirable criteria, but he was not selected for those posts.

19. The Applicant submits that the MEU was incorrect that the DPPAPO post remained frozen. Indeed, the Applicant was invited to interview for the post only three days before the MEU letter, and for a date well after the letter. The Applicant argues that this proves that recruitment was not frozen but was in fact proceeding as advertised.

20. The Applicant further submits that having met all the mandatory and desirable criteria for the position, the Respondent was obliged to "consider him for that position on a preferred or non-competitive manner." The Respondent was required to either place him against the DPPAPO post at that stage or, if there were more than one continuing appointment holder competing for the post, to conduct further assessments only against other continuing appointment holders facing separation due to the abolition of their posts.

21. The Applicant submits that the Respondent made "no effort to place him in the DPPA post or any other post by way of lateral move/assignment."

22. The Respondent argues that the Applicant was clear as to his intention to retire from service of the Organization. The Applicant elected retirement and completed the necessary paperwork for the Organization to act on it in January 2021.

23. He did not apply for any vacant positions at his level for the three-month notice period before he requested management evaluation which further extended his employment.

24. The impugned decision is therefore not receivable. Having informed the Organization that he intended to retire, he cannot now claim that the Organization had an obligation to assist him in securing another post.

25. The Respondent submits that in and of itself, the impugned decision was lawful. The Applicant has not shown that the drawdown process was mismanaged or tainted by bias, prejudice or malice.

26. Given that the Mission's mandate was ending, UNAMID established a Liquidation Team composed of substantive experts based on the skill sets and competencies needed to oversee the drawdown. The Mission leadership determined that the Applicant's skill sets and competencies as a Political Affairs Officer were not required. The organization of work is within the discretion of the Mission; and the decision to abolish the Applicant's post was neither arbitrary nor unreasonable.

27. Contrary to his submissions, the Applicant had no right to a non-competitive promotion; nor did he have the right to be placed against available positions on a priority and non-competitive basis because of his roster membership.

Considerations

28. The Tribunal finds the application receivable.

29. Indeed, the Applicant never sought to retire and informed that he wanted to continue in service until his mandatory retirement age, which per staff rule 13.3(a), meant that the Applicant, who entered United Nations service in 2006, could elect to work until he reached 65 years of age in December 2023.

30. The records show that on 11 February 2021, the Applicant submitted completed retirement documents only upon request, whilst simultaneously explicitly stating that it was not his intention to retire. In those submissions, the Applicant disclaimed:

At the same time, please note, the attached documents are submitted without prejudice to any follow-up actions on my part with respect to the decision on the termination of my appointment, nor the

submission would imply my agreement or acceptance of the termination of my appointment.

31. Finally, it is worth noting that on 14 September 2021 the Chief – Client Service Delivery Pillar of the United Nations Regional Service Centre Entebbe (“RSCE”) wrote:

As a result we have rescinded the decision to handle your separation as a retirement and reverted to the original separation that had been communication by the Mission which is abolition of post.

32. As to the merits, the Applicant is among the 1,026 UNAMID staff members who received a notice of termination or non-extension of appointment in line with the civilian drawdown plan related to the imminent mission closure.

33. The United Nations Tribunals’ jurisprudence is exceedingly clear in regard to 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 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.

34. In the UNDT’s consistent interpretation of the case law, these rules imply that the Organization shall not terminate the appointment of a staff member whose post has been abolished, at least if he or she holds an appointment of indeterminate duration, without first taking suitable steps to find him/her alternative employment. In other terms, the compliance with the recalled rule is relevant for the lawfulness of the termination decision (see *Nugroho* UNDT/2020/032, confirmed by the United Nations Appeals Tribunal (“UNAT”); *Nakhlawi* UNDT/2016/204, para. 96, not appealed; and *Fasanella* UNDT/2016/193 (para. 76).

35. The said principles have been affirmed before in *Timothy* UNDT/2017/080, as confirmed by 2018-UNAT-847, specifically paras. 32-59, where UNAT affirmed that:

- a. The Administration is bound to demonstrate that all reasonable efforts have been made to consider the staff member concerned for available suitable posts;
- b. The Administration is bound to consider the redundant staff members only for suitable posts that are vacant or likely to become vacant in the future;
- c. While efforts to find a suitable post for the displaced staff member rest with the Administration, the person concerned is required to cooperate fully in these efforts, showing an interest in a new position by timely and completely applying for the position;
- d. Simply advertising posts and requiring the concerned staff member to apply and compete for the same does not discharge the burden of the Administration;
- e. The Administration is bound to assign the affected staff members holding continuing or indefinite appointments on a preferred basis in the order of preference prescribed in Staff Rule 9.6;
- f. If the redundant staff member is not fully competent to perform the core functions and responsibilities of a position, the Administration has no duty to consider him or her for this position;
- g. The term “suitable posts” must be interpreted not only as posts at the staff member’s duty station and at the staff member’s grade level and within the same functional group as per the position title, but also all the lower available suitable posts in the same duty station, for which the staff member had expressed interest by way of application thereto. For the Professional level staff members, “suitable posts” are also available suitable posts covering the entire parent organization, including but not limited to the duty station of assignment.

36. These principles are confirmed too by jurisprudence of the former United Nations Administrative Tribunal (“UNAdT”) and of the International Labour Organization Administrative Tribunal (“ILOAT”) in relation to the same issue.

37. The UNAdT held that the obligation of the Administration under former staff rule 109.1(c) meant that “once a bona fide decision to abolish a post has been made and communicated to a staff member, the Administration is bound — again, in good faith and in a non-discriminatory, transparent manner — to demonstrate that all reasonable efforts had been made to consider the staff member concerned for available and suitable posts” (UNAdT Judgment No. 1409, *Hussain* (2008)).

38. The former UNAdT further noted in its Judgment No. 679, *Fagan* (1994), that the application of former Staff Rule 109.1(c) was:

referred repeatedly to the application of this provision, which is vital to the security of staff who, having acquired permanent status, must be presumed to meet the Organization's requirements regarding qualifications. In this connection, while efforts to find alternative employment cannot be unduly prolonged and the person concerned is required to cooperate fully in these efforts, staff rule 109.1(c) requires that such efforts be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation.

39. The ILOAT stated in Judgment No. 3437 (2015), para. 6, that its case law has consistently upheld the principle that an international organisation may not terminate the appointment of a staff member whose post has been abolished, at least if he or she holds an appointment of indeterminate duration, without first taking suitable steps to find him or her alternative employment (see also Judgment 269 (1976), 1745 (1998), 2207 (2003), or 3238 (2013)).

40. As a result, when an organisation must abolish a post held by a staff member who, like the complainant in the instant case, holds a contract for an indefinite period of time, it has a duty to do all that it can reassign that person as a matter of priority to another post matching his or her abilities and grade. Furthermore, if the attempt to find such a post proves fruitless, it is up to the organisation, if the staff member concerned agrees, to try to place him or her in duties at a lower grade and to widen its search accordingly (see Judgments 1782 (1998), or 2830 (2009)).

41. In Judgment No. 3238 (2013), the ILOAT decided that advertising a post and inviting reassigned staff members to apply to it would not be sufficient to comply with the duty to give them priority consideration.

42. In applying the said principles to the case at hand, the Tribunal notes that the Applicant acknowledges that under the Tribunals' jurisprudence in *Timothy*, in order to receive preferential placement, he is obliged to express interest in suitable posts by applying to them.

43. Although there are limited appropriate posts available at the D-1 level, the Respondent avers in para. 19 of the reply that the Organization did advertise vacant positions at the Applicant's level (although without offering them to the Applicant owing to his decision to retire).

44. The record shows that the Applicant holds roster memberships for various D-1 posts. Roster membership means that he meets the requirement or possesses the specific qualifications for the related job opening; it does obviate the requirement to express interest in available positions, but not necessarily applying to them but also responding favourably to offerings by the Administration.

45. The Applicant was diligent in applying to vacant posts, within the relevant time frame; such as the vacant D-1 Chief of Staff position and post number 152064, Deputy Director, D1, Western Africa Division, DPPA (Deputy Director post).

46. The Tribunal is aware that the first vacancy was later cancelled by the Administration.

47. As to the other post, the Respondent alleges in his closing submissions that

the Applicant had no right to priority consideration for TJO 152064 because the recruitment for that position was finalized after the Applicant's separation from service. Although the Applicant applied for TJO 152064 on 18 March 2021 before his separation on 31 March 2021, the Secretary-General suspended all selections for regular budget positions, including TJO 152064, due to budgetary constraints. As a result, DPPA had no authority to make a selection decision against the TJO. The position had been advertised in March 2021 with the understanding that the selection and onboarding of a successful candidate would be contingent upon lifting of the recruitment suspension. When the hiring freeze for that position was lifted in September 2021, the Applicant had already separated from the Organization and retired. The Applicant had no right to priority consideration as a former staff member and retiree.

48. The Tribunal is of the view that the moment to be considered for a position to be deemed available is not only when - as the Respondent says in his closing submissions - that position was finalized (which happened after the Applicant's separation from service), but when the recruitment process was ongoing (which happened months before, after the hiring freeze was lifted).

49. While no indication has been provided by the Administration with reference to this moment, the Applicant, on this point, demonstrated that, far from the recruitment process being frozen as stated by the MEU, the recruitment was proceeding as the Applicant received an e-mail convoking him for an interview for the impugned post on 15 June 2021.

50. This proves that hiring for the post was no longer frozen and that the selection process was no more on hold, nor that it only became available after the Applicant's retirement became effective.

51. The present case is therefore different from *Raja* UNDT/2022/047, where the Dispute Tribunal dismissed an application of a UNAMID downsized staff member where the staff member did not adduce evidence to show that there was any suitable vacant position to which he could have been laterally assigned.

52. In this case, the Applicant was found suitable for the available positions. Indeed, for the Deputy Director post the Applicant was one of the eight candidates (out of 31 Applicants: see R9 annex to Respondent's reply) short-listed and convoked to interview. By shortlisting him, the Administration had tacitly acknowledged that he was deemed suitable for the position; per *Timothy*, as a continuing appointment holder facing termination, the Administration was obliged from that point to consider his candidacy on a preferred, non-competitive basis.

53. The Tribunal is of the view that the Administration failed in its obligation to make good faith efforts to absorb the Applicant into a new post after it decided to abolish his existing post.

54. The Applicant must be placed in a position - among those he applied to - of the same level to that one he had at the time of the abolition of the post.

55. Pursuant to art. 10.5 of the Dispute Tribunal's Statute, the Tribunal must set an amount, which the Respondent can choose to pay as an alternative to the rescission of the contested administrative decision and the reinstatement of the Applicant.

56. It clearly results from art. 10.5(a) of the Dispute Tribunal's Statute, as consistently interpreted by UNAT, that compensation *in lieu* is not compensatory damages based on economic loss, but only the amount the administration may decide to pay as an alternative to rescinding the challenged decision or execution of the ordered performance (see, for instance, *Eissa* 2014-UNAT-469).

57. As to the amount of the compensation *in lieu*, the above recalled article of the Dispute Tribunal's Statute sets a general framework for its determination, stating that, apart from exceptional circumstances, it "shall normally not exceed the equivalent of two years' net base salary of the applicant".

58. The Appeals Tribunal in *Ashour* 2019-UNAT-899 found that:

the amount of in lieu compensation will essentially depend on the circumstances of the case" and that "due deference shall be given to the trial judge in exercising his or her discretion in a reasonable way following a principled approach.

59. This Tribunal finds that the determination of the compensation *in lieu* between the minimum and the maximum provided in its Statute must take into account the specific circumstances of the case, and in particular the type and duration of the contract held by the staff member, the length of his/her service, and the issues at the base of the dispute. The compensation *in lieu* is not related at all to the economic loss suffered and to the salary of the staff member, the latter being the parameter of the outcome of the decision on compensation and not also the precondition of the compensation (so we can have compensation *in lieu* also in a case where no economic damage has been suffered). More specifically, it seems reasonable—for instance—to grant the largest compensation in cases of termination of permanent appointments of senior staff members, and to limit the compensation in cases of non-renewal of fixed-term appointment for recently appointed staff members (where there is no security of tenure, but only a chance of renewal).

60. In the present case, having in mind the above-mentioned criteria and applying them to the specific case at hand (and so having considered the seniority of the Applicant, the type of contract held, and the chance of being offered other equivalent positions), and in particular taking into account the reasons for

termination and the months of service left till retirement age, and also considering the Administration's non-payment of the education grant for 2021-2022 and 2022-2023 school years, the Tribunal sets the amount of the compensation *in lieu* at two years' net-base salary at the Applicant's grade level as per the salary scale in effect at the time of his separation from service.

Conclusion

61. In light of the foregoing, the Tribunal decides:

- a. The application is **granted**;
- b. The Applicant must be placed in a position - among those he applied to - of the same level to that one he had at the time of the abolition of his post;
- c. The Respondent is to pay to the Applicant the compensation *in lieu* at two years' net-base salary at the D-1 level as per the salary scale in effect at the time of the Applicant's separation from service;
- d. The compensation amounts shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensations. An additional five per cent shall be applied to the United States prime rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Francesco Buffa

Case No. UNDT/NBI/2021/071

Judgment No. UNDT/2022/105

Dated this 7th day of October 2022

Entered in the Register on this 7th day of October 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi