UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2022/004
Judgment No.: UNDT/2022/131
Date: 13 December 2022
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

HEURTEMATTE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Michel Boulianne, UN Women
Prue Smith, UN Women
Ivanova Galan, UN Women

Introduction

1. The Applicant contests the "[d]ecision of the abolishment of [his] post which caused his non-renewal of appointment beyond 30 September 2021".

2. The Respondent contends that the application is without merit.

3. For the reasons set out below, the application is granted on the merits. The issue of remedies is reserved for a subsequent judgment.

Facts

4. In September 2008, the Applicant started his employment as a driver at the G-3 level with UN Women and continued in this function until his separation from the Organization on 12 October 2021.

5. In 2019, a new Regional Director for the Americas and the Caribbean took office in Panama ("the Regional Director"). The Applicant was assigned to her as a driver, and he alleges that the Regional Director treated him disrespectfully at various occasions.

6. In 2020, due to the COVID-19 pandemic, most activities in the office of UN Women in Panama were converted into telework and conducted remotely from outside the office.

7. By letter dated 30 June 2021, the Regional Director informed the Applicant that his post was to be abolished and his fixed-term appointment would not be renewed beyond September 2021. The reason provided was that UN Women "do not have a physical office nor do they expect to have one in the medium term, and they also have not had any needs for transfers, or for deliveries of official letters; all the procedures that [the Applicant] carried out previously, have been passed to online procedures" (unofficial translation from Spanish to English).

Consideration

The issues of the present case

8. The Respondent submits that "the Applicant does not appear to have contested the separate but related decision not to renew his fixed-term appointment after it was decided to abolish his former post", but that "in view of the fact that the Applicant did request management evaluation of this decision, the Respondent will proceed on the assumption that the Applicant did intend to also appeal this decision".

9. With reference to Order No. 098 (NY/2022) dated 27 October 2022, it is noted that the Appeals Tribunal in *Fasanella* 2017-UNAT-765 held that "the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by a party and to identify the subject(s) of judicial review". As such, "the Dispute Tribunal may consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed". See para. 20.

10. The Tribunal reiterates its previous finding in Order No. 098 (NY/2022) that it is evident from the application that the Applicant is contesting both (a) the abolition of his post and (b) the non-renewal of his fixed-term appointment. The Respondent's submissions to the contrary are therefore rejected.

11. The issues of the present case are therefore the following:

a. Was the decision to abolish the Applicant's post lawful and was it lawfully executed?

b. Was the non-renewal of the Applicant's fixed-term appointment a lawful decision?

c. If any of, or both, the contested decisions were unlawful, what remedies is the Applicant entitled to under art. 10.5(b) of the Statute of the Dispute Tribunal?

The lawfulness of the abolition of the Applicant's post and its execution

12. The Tribunal notes that "[i]t is well settled jurisprudence that an international organization necessarily has the power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts, and the redeployment of staff". The Appeals Tribunal will "not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff", but "even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly, and transparently in dealing with staff members". See para. 19 of *Abdeljalil* 2019-UNAT-960, as also affirmed in *Abu Ata* et al. 2020-UNAT-1016.

13. The Tribunal further notes that it is trite law that if a staff member affected by a non-renewal decision requests to be provided a reason therefor, the Administration must do so and the reason must be lawful and supported by facts (see, for instance, *Islam* 2011-UNAT-115, *Obdeijn* 2012-UNAT-201, and *El-Arqan* 2019-UNAT-911).

14. At the same time, the Tribunal notes that UN Women's discretion is not unfettered when deciding to abolish a post and not renew a fixed-term appointment. As the Appeals Tribunal stated in its seminal judgment in *Sanwidi* 2010-UNAT-084, at para. 40, "[w]hen judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate". This means that the Tribunal "can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse".

15. The Appeals Tribunal further underlined that "it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him" or otherwise "substitute its own decision for that of the Secretary-General" (see *Sanwidi*, para. 40). In this regard, "the Dispute Tribunal is not conducting a merit-based review, but a judicial review" explaining that a "[j]udicial review is more concerned with examining how the

decision-maker reached the impugned decision and not the merits of the decision-maker's decision" (see *Sanwidi*, para. 42).

16. Among the circumstances to consider when assessing the Administration's exercise of it discretion, the Appeals Tribunal stated "[t]here can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion" (see *Sanwidi*, para. 38).

17. The Tribunal observes that when a post is abolished, this means that the post ceases to exist. Hence, according to Merriam-Webster online dictionary (https://www.merriam-webster.com/dictionary/abolition), "abolition" means "the act of officially ending or stopping something". An abolition of a post will therefore manifest itself by the post being written out of the budget and lose its funding. Even before the expiry of the budget period, a post can, however, be abolished if the mandate of the relevant operation(s) is changed and the relevant functions of the post are no longer authorized.

18. In the present case, the reason provided to the Applicant for the abolition of his post was that his function as a driver had become redundant as: (a) UN Women no longer had a physical office or expected to have one in the medium term; (b) no need any longer existed for transfers or deliveries of official letters; (c) all the procedures that the Applicant previously had carried out were now handled online. Based thereon, the Tribunal find that the provided reason was therefore lawful in accordance with the Appeals Tribunal's jurisprudence as set out above.

19. The questions, nevertheless, remain open as to whether: (a) the abolition of the Applicant's post was a "genuine organizational restructuring" (see *Abdeljalil*); (b) the abolishment was supported by correct facts (see *Islam*); (c) UN Women acted "fairly, justly, and transparently" in dealing with the Applicant (see *Abdeljalil*).

20. Regarding the evidentiary standard applicable to a decision on abolishment of post, in *Icha* 2021-UNAT-1077, the Respondent submits that the Appeals Tribunal has held that the so-called standard of presumption of regularity applies.

21. The Tribunal notes that whereas the Appeals Tribunal indeed stated in *Icha* 2021-UNAT-1077 that the Dispute Tribunal had applied the standard of presumption of regularity (see para. 1), it did not necessarily uphold this finding. Rather, when only partially granting the appeal and rescinding the relevant contested decision, the Appeals Tribunal did not pronounce itself thereon, but instead held that "[w]ith regard to the decision to abolish Ms. Icha's post, the appeal is without merit; she only reargues her case and does not establish that [the Dispute Tribunal] erred in fact or in law about this issue". Rather, on the applicable evidentiary standard, in Judge Graeme Colgan's concurring opinion, he criticized the application of the presumption of regularity standard in cases regarding abolition of post (see paras 2 and 3):

> … This case provides a good example of where this jurisprudence has proven problematic and has delayed the expeditious and just disposition of the case. The principles at issue include the "presumption of regularity" of administrative decisions; the imposition of an onus of proof resting on an affected staff member of establishing irregularity or other unlawfulness once the Organisation has met a very low threshold of regularity; and then that the burden of that proof carried by the staff member is to the high standard of a "clear and convincing" case, the same standard of evidential proof as the Organisation is expected to show in its investigation of allegations of serious misconduct against staff members that may result in their summary dismissal from service.
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> … In such situations, the Oganisation almost always holds most, if not all, of the information and therefore the evidence relevant to the grounds for its decision. At best, the staff member holds relatively little. The information power imbalance is pronounced. Yet the jurisprudence expects the staff member to make out a case to a high standard against the Organisation that holds unilaterally the relevant information and may naturally be reluctant to divulge it all. It is little wonder that such cases fail for want of proof. It is difficult, if not impossible, to prove what one may be unaware of.

22. In principle, the Tribunal agrees with Judge Graeme Colgan's concurring opinion and notes that the regular evidentiary standard used in civil trials like the

present one is the preponderance of evidence (in line herewith, see, for instance, the Appeals Tribunal in *Applicant* 2022-UNAT-1187, para. 63). In the instant case, the question of evidentiary standard is, however, only of academic importance as no matter which standard is applied, the outcome is the same.

23. Annexed to the reply, the Respondent filed certain documents, but as the Tribunal found these to be inadequate by any evidentiary standard to establish his case, by Order No. 098 (NY/2022), the Tribunal ordered him to provide additional documentation for his relevant factual submissions, or at least appropriate references to the documentation already on file. In response thereto, the Respondent submitted the following additional documentation in evidence with, as relevant, the quoted explanations:

a. A "2020 annual report on COVID 19 capitalization and [Americas and the Caribbean Regional Office]'s ("ACRO") reorganization proposal" ("the 2020 Report"). According to the Respondent, this report outlines "the findings that were subsequent to several exercises that were integral to the assessment, and of which further corroborate the fact that the [a "larger office administrative and budgetary"] assessment took place";

b. A "PowerPoint presentation to an ACRO all staff meeting on 17 February 2020" ("the PowerPoint presentation"). The Respondent submits that this presentation "indicates the existence of current or forecasted change within the organization" and "confirms that interviews and surveys were included in the basis of the process";

c. A "lease certification memorandum for year end 2020". The Respondent contends that this document "confirms the return of the office premises at the UN House in Panama in May 2020";

d. An "organigramme for 2022" ("the organigramme"). The Respondent states that "this exemplifies close to [74 personnel based in the Regional Office in Panama] (albeit not with the breakdown of staff versus non-staff)".

Also, it demonstrates that "the Regional Office has (still) not hired another driver since the Applicant's separation is evidenced by the lack of position of 'Driver' (in any version of the title) in the organigramme";

e. A "job description for the role of 'Driver to the Head of Office'". The Respondent argues that this document "provide evidence of the Applicant's primary functions";

f. A "signed certification of delivery and reception of the vehicles", an "email indicating that the buyer had deposited the funds in the [United Nations Development Programme ("UNDP")] bank account" and a document showing that "UNDP transferred funds to UN Women". The Respondent avers that this shows that "the Regional Office was in the process of selling its only two vehicles in Panama at the time of the Reply" and that "the vehicles have now been sold".

24. In and by themselves, none of these documents have the official or authoritative character of a budgetary and/or financial record to demonstrate how the Applicant's post is established and funded and—by a subsequent exclusion—also shows that the post had been abolished (see, similarly, the Dispute Tribunal's non-appealed judgment in *Quatrini* UNDT/2020/043). Also, nowhere in any of the documentation is it implied that the mandate of UN Women's office had changed in a way that would disallow the employment of a driver at 3 level of the General Service staff category ("G-3").

25. Whereas the Respondent submits that the abolition is demonstrated by his post not being mentioned in the 2022 organigramme, the Tribunal finds that this is no proof of the post having been abolished. Instead, the Tribunal finds that this could rather be explained by the fact that the author of the organigramme, who is not stated anywhere in the document, did not find it necessary to indicate a G-3 level driver's post along the various mentioned posts at the Professional or Director levels—in line

herewith, only two other General Service posts, both at the superior 7 level (G-7), are mentioned in the organigramme.

26. Accordingly, by Order No. 105 (NY/2022) dated 21 November 2022, the Tribunal ordered the Respondent to provide "formal budgetary and/or financial records demonstrating the abolition of the Applicant's post".

27. In response thereto, the Respondent submits that the Applicant's post, which is post no. 66658, is "funded via the institutional budget ["IB"] which are approved by the UN Women Executive Board". In "the instance that an original IB funded position is no longer required (as was the case with the Applicant's former position), the office can opt to not renew the position and repurpose the funds by using them for other priorities of the organization". In this process, "any unused posts are typically 'frozen' while an office that has been designated the IB funds considers how it wishes to repurpose the funds and use them for an alternative position". A "partial monetization is a short-term utilisation option while the long-term use of the funds is being considered". In the relevant IB funded post, as the Applicant's position was no longer required, the office subsequently decided to monetize some of the funds from the post to partially fund another position, that of "Executive Associate", a G-6 level (post "#56028"), and 25 percent "of the Executive Associate position was funded through the monetization of the original IB funded position, and the remainder came from core funding". A "decision on what to do with the funds for the position will be made based on a review of the longer term needs of the office".

28. To corroborate the Respondent's submissions, he submitted "a screenshot from internal database regarding post #56028" ("the screenshot"). In the screenshot is stated under "Additional Position Info" that "Position CO [unknown abbreviation] updated to reflect monetization of post 66658 DA [unknown abbreviation] for 25% from 1 April to 30 September 2022".

29. At the outset, the Tribunal notes that the Respondent has provided no legislative foundation for the scheme outlined in his submissions whereby, in

consequence, the Regional Director can allegedly, at her own initiative and without restrictions, decide to abolish a staff member's post and use the underlying funds to finance other operational activities.

30. The Tribunal further disapproves that despite its explicit order in Order No. 105 (NY/2022), the Respondent did not to provide any formal budgetary and/or financial records demonstrating the abolition of the Applicant's post. This is particularly so as his Counsel submits that such records actually exists, namely the institutional budget (IB) approved by UN Women Executive Board.

31. Accordingly, the Tribunal is left with no other option than to draw the adverse inference from the Respondent's failure to comply with Order No. 105 (NY/2022) that the relevant formal budgetary and/or financial records indeed show that the Applicant's post was, in fact, never abolished but continued to exist (in line herewith, see, for instance, the Appeals Tribunal in *Bertucci* 2011-UNAT-121, para. 51, *Zhao, Zhuang and Xie* 2015-UNAT-536 para. 49).

32. Following the rationale of the Respondent's submissions, this inference is only logical as rather than abolishing the Applicant's post, UN Women instead kept the post existing in order to use its underlying funds to finance another post, namely post no. 56028 for the Executive Associate position at the G-6 level. By doing so, it further appears that UN Women intended to keep the possibility open of hiring another driver than the Applicant against his post. This finding is supported by the Respondent's submission in which he states that "the Regional Office has (still) not hired another driver since the Applicant's separation", as highlighted by the stipulation of "still" in parenthesis.

33. Accordingly, the Tribunal finds that the Respondent has not established by any relevant evidentiary standard that the Applicant's post was actually abolished, and that the decision thereabout was therefore part of a genuine effort to restructure of UN Women's regional office in Panama. Furthermore, as the Applicant's post apparently continued to exist and consequently was not abolished, the reason

provided for the contested decision was not supported by facts. Finally, the Respondent has not established that UN Women acted "fairly, justly, and transparently" in dealing with the Applicant. Instead of abolishing the Applicant's post as stated in the contested decision, UN Women used its underlying funding to partially finance another post. This action had no apparent legal and/or budgetary basis and was seemingly taken with the intent of hiring another driver than the Applicant.

34. In conclusion, the decision to abolish the Applicant's post was unlawful.

The lawfulness of the non-renewal decision?

35. It follows from the contested decision that the Applicant's fixed-term appointment was not renewed because his post was abolished. As the Tribunal has found that the Respondent has failed to establish that the Applicant's post was, in fact, abolished, the provided reason was therefore not supported by facts and unlawful in accordance with the Appeals Tribunal's jurisprudence in *Islam* (in line herewith, see also, for instance, the Appeals Tribunal in *Obdeijn* 2012-UNAT-201, *Lui* 2016-UNAT-659, *Kellie* UNAT-2018-875, and *Handy* 2020-UNAT-1015).

Remedies

36. The Applicant principally seeks the rescission of the contested decision. In the alternative to reinstatement, he then seeks *in lieu* compensation although he has not indicated the requested compensation amount. In addition, the Applicant requests compensation for harm in the amount of two years net-base salary for "the stress and anxiety as well as permanent physical drawbacks due to COVID-19", but he has filed no evidence therefor.

37. The Respondent objects to all the Applicant's claims on remedies.

38. The Tribunal notes that in the interest of justice, the current submissions and evidence in the casefile are inadequate for it to adjudicate the question of remedies.

The Tribunal is aware that the Applicant is self-represented and may therefore be allowed "some latitude … the interests of justice" (see the Appeals Tribunal in *Al-Refaea* 2019-UNAT-971, para. 25, and similarly in, for instance, *Abdellaoui* 2019-UNAT-928 and *El Shaer* 2019-UNAT-942). The Tribunal will therefore issue a separate case management order subsequent to this Judgment instructing the parties to file their final submissions of remedies.

Conclusion

39. In light of the foregoing, the Tribunal DECIDES that:

a. The application is granted on its merits;

b. Before determining the issue of remedies, by separate written order, the Tribunal will instruct the parties to file their final submission thereon, taking into consideration the findings made in the present Judgment.

(Signed)
Judge Joelle Adda

Dated this 13th day of December 2022

Entered in the Register on this 13th day of December 2022

(Signed)

Morten Michelsen, Officer-in-Charge, New York