UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2022/026
Judgment No.: UNDT/2023/088
Date: 17 August 2023
Original: English

Before: Judge Margaret Tibulya

Registry: Geneva

Registrar: René M. Vargas M.

KEMBOUCHE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Ana Giulia Stella, OSLA
Robbie Leighton, OSLA

Counsel for Respondent:
Louis Lapicerella, UNHCR
Elizabeth Brown, UNHCR

Introduction

1. By application filed on 12 July 2022, the Applicant, a former staff member of the Office of the United Nations High Commissioner for Refugees ("UNHCR"), contests the decision to terminate her indefinite appointment.

2. For the reasons set forth below, the Tribunal decides to grant the application in full and award the Applicant the remedies set out in para. 68 of this judgment.

Facts and procedural history

3. In 1989, the Applicant joined UNHCR. In her career with UNHCR, she primarily held the position of Secretary (G-3 to G-6) in Brussels.

4. On 1 January 1998, the Applicant was granted an indefinite appointment with the special undertaking "not to terminate [her] appointment except by applying the criteria provided in Staff Regulation 9.1(a) relating to the termination of a permanent appointment, or in accordance with the provisions of Staff Regulation 10.2".

5. Given her qualification for the Personal Grade Award, the Applicant was promoted to the G-7 level on 1 April 2020, while encumbering the G-6 position of Executive Support Associate in the Multi-Country Office in Belgium.

6. On 27 April 2021, in a meeting with her supervisor and Human Resources ("HR"), the Applicant was informed about an intent to change the title of the position she was encumbering.

7. On 28 April 2021, the Applicant was placed on full-time sick leave. Effective 15 November 2021, she was placed on half-time sick leave.

8. By letter dated 30 April 2021, the Representative for EU Affairs of UNHCR ("the Representative") informed the Applicant of his intent to reclassify the position of Executive Support Associate, which she encumbered, to Protection Associate (G-6), Multi-Country Office in Belgium, and to initiate the process to change the status of her position.

9. On 2 May 2021, the Applicant applied for the position of Senior Finance Assistant (G-5) in Brussels, but she did not respond to the invitation for a written test. Ultimately, another candidate was selected.

10. By letter dated 29 September 2021, the Representative notified the Applicant of his decision to change the title of the position she encumbered from Executive Support Associate (G-6) to Protection Associate (G-6) effective 1 April 2022, resulting in the advertisement of the position. By the same letter, he encouraged the Applicant to apply for all suitable vacant positions from then on.

11. On 24 November 2021, the Applicant requested management evaluation contesting the decision to reclassify her position.

12. By letter dated 14 February 2022, the Director of the Division of Human Resources, UNHCR, informed the Applicant that her indefinite appointment would be terminated effective 1 April 2022, under the terms of staff regulation 9.3(a)(i).

13. By letter dated 26 February 2022, the Deputy High Commissioner, UNHCR, responded to the Applicant that her request for management evaluation dated 24 November 2021 was not receivable and that, in any event, the Organization had lawfully exercised its operational and managerial discretion in the position change.

14. On 23 March 2022, the Applicant requested management evaluation of the decision to terminate her indefinite appointment mentioned in para. 1 above.

15. On the same day, the Applicant requested suspension of action, pending management evaluation, of the decision to terminate her indefinite appointment.

16. By Order No. 46 (GVA/2022) of 28 March 2022, the Tribunal decided that the application for suspension of action was moot in view of the Administration's decision to voluntarily suspend implementation of the decision pending the outcome of the management evaluation request.

17. By letter dated 13 April 2022, the Deputy High Commissioner, UNHCR, informed the Applicant that the decision to terminate her indefinite appointment was lawful.

18. On 1 May 2022, the Applicant was separated from service.

19. On 12 July 2022, the Applicant filed the application mentioned in para. 1 above.

20. On 12 August 2022, the Respondent filed his reply.

21. By email of 7 June 2023, the Tribunal convoked the parties to a case management discussion ("CMD").

22. On 13 June 2023, a virtual CMD took place, as scheduled, through Microsoft Teams, in the presence of Counsel for each party and the Applicant. At the CMD, both parties agreed that the case could be determined on the written pleadings without holding a hearing on the merits.

23. By Order No. 58 (GVA/2023) of 14 June 2023, the Tribunal instructed the parties to file their respective closing submission, which they did on 27 June 2023.

Consideration

Standard of review

24. It is settled law that "[t]he Administration has broad discretion to reorganize its operations and departments to meet changing needs and economic realities" (see, e.g., *Timothy* 2018-UNAT-847, para. 25; *Smith* 2017-UNAT-768, para. 26), and that "an international organization necessarily has 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" (see, e.g., *Timothy*, para. 25; *Fasanella* 2017-UNAT-765, para. 23).

25. The Tribunal will thus "not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff" (see, e.g., *Timothy*, para. 25; *Fasanella*, para. 23). However, "the Administration is obliged to act fairly, justly and transparently and without bias, prejudice, or improper motive in such exercises" (see, e.g., *Russo-Got* 2021-UNAT-1090, para. 29; *Timothy*, para. 25; *Smith*, para. 26).

26. In the context of a discretionary decision of the Organization, the Tribunal's scope of review is limited to determining whether the exercise of such discretion is legal, rational, reasonable, and procedurally correct to avoid unfairness, unlawfulness or arbitrariness (see, e.g., *Sanwidi* 2010-UNAT-084, para. 42; *Abusondous* 2018-UNAT-812, para. 12). It is not the role of the Tribunal "to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. [The Tribunal will not] substitute its own decision for that of the Secretary-General" (see *Sanwidi*, para. 40).

27. The issues for determination in this case are as follows:

a. Whether the Applicant's position was abolished pursuant to staff regulation 9.3(a)(i);

b. Whether the decision to terminate the Applicant's indefinite appointment is lawful; and

c. Whether the Applicant is entitled to any remedies.

Whether the Applicant's position was abolished pursuant to staff regulation 9.3(a)(i)

28. It is common cause that the Applicant's indefinite appointment could, *inter alia*, be terminated "[i]f the necessities of service require abolition of the post or reduction of the staff" (see staff regulation 9.3(a)(i) of ST/SGB/2018/1; former staff regulation 9.1(a) of ST/SGB/Staff Rules/1/Rev.8 of 1 June 1995).

29. The evidence on record is that the Administration's decision at issue was to "change the title of the position" from Executive Support Associate to Protection Associate. This is not contested by the Respondent.

30. The Respondent, however, argues that since the change of position title implied major changes to the job description in terms of functions and essential and desirable requirements, the Applicant's position was factually and legally abolished in terms of staff regulation 9.3(a)(i). In his view, both acts of change of a position

title and discontinuation of the post displace a staff member and render the former role non-existent or abolished in terms of staff regulation 9.3(a)(i).

31. On the other hand, the Applicant argues that a "change of position title" is not synonymous to an "abolition of post" and that her position was not abolished as it would continue existing albeit under a new title.

32. The Tribunal agrees with the Applicant and finds no merit in the Respondent's submissions for the following reasons.

33. First, the Tribunal considers that while, arguably, changing the title of a position may carry the same effect as abolishing it, the two actions are not synonymous under the UNHCR legal framework. In changing the Applicant's position title, the Respondent admittedly acted under the UNHCR New Resource Allocation Framework (UNHCR/AI/2019/7/Rev.1). Sec. 6.4 of this administrative instruction outlines the authorities for the management of positions and provides in its relevant part as follows (emphasis added):

> c. authorities to change status of an existing position:
>
> - **discontinue (same as abolition of a post defined in the Staff Regulations and Rules of the United Nations)**;
> - redeploy from one location to another (as-is without any change);
> - upgrade or downgrade;
> - harmonization exercise (footnote omitted);
> - **change of position title.**

34. Since "discontinuance/abolition of post" and "change of position title" are separately provided for, it follows that they are independent from each other. Indeed, the above provision has explanatory language indicating that "discontinuance of a post" is "same as abolition of a post defined in the Staff Regulations and Rules of the United Nations". No such explanation is made for the term "change of position title". This implies that there was no intention of treating a change of position title as an abolition of post.

35. Second, the Respondent's argument that the two actions have the same effect runs counter to the fact that each of them is treated separately in the Staff Regulations and Rules. The fact that all the legal provisions cited by the parties reference each of the two actions independently supports the assertion that "change of position title" is not legally equivalent to "abolition of a post".

36. In addition, intrinsic in the Respondent's argument that, pursuant to the legal framework of UNHCR, a change of position title *may* displace a staff member in the same way as a post discontinuation or any other position change requiring advertisement (upgrade, downgrade, redeployment), is a concession that the reverse, i.e., that a change of position title *may not* displace a staff member in the same way as a post discontinuation, is a possibility. Sec. 6.6 of UNHCR/AI/2019/7 for example provides for situations where a change of position title would not lead to advertisement of the post, which is inescapable when a new position is created following the abolition/discontinuation of another position.

37. The Respondent heavily relied on the fact that the Applicant's former role no longer exists to argue that the post she encumbered was abolished. This alone does not support the Respondent's argument. It is not disputed that the impugned decision was the "change of position title" and not the abolition of the post. This contradicts the submission that "change of position title" is factually equivalent to abolition of a post in terms of staff regulation 9.3(a)(i). The factually correct statement is that the position no longer exists because there was a change of position title in terms of the UNHCR legal framework.

38. The Respondent maintains that a finding that the Applicant's position was not "abolished" would result into an illogical and impossible situation. This assertion is however premised on the factually incorrect position that the only remedy open to the Tribunal is to order the Applicant's reinstatement in service.

39. All facts and evidence considered, the Tribunal finds that the Respondent changed the Applicant's position title, as relayed to her by email, and did not abolish the position pursuant to staff regulation 9.3(a)(i).

Whether the decision to terminate the Applicant's indefinite appointment is unlawful

40. The Applicant submits that the termination of her indefinite appointment is unlawful because the Organization could not legally terminate her appointment on account of abolition of her post. She specifically argues that the change of her position title does not amount to the abolition of the post under staff regulation 9.3(a)(i), and that a "change of title of position" is not provided for under staff regulation 9.3(a)(i) or former staff regulation 9.1(a) as a reason for appointment termination.

41. The Respondent submits that the termination of the Applicant's indefinite appointment is lawful because the change of position title amounts to an abolition of post under staff regulation 9.3(a)(i).

42. The Tribunal notes that the 1998 Letter of Appointment granting the Applicant an indefinite appointment contains a special conditions clause, providing in its relevant part as follows:

> The High Commissioner undertakes not to terminate this appointment except by applying the criteria provided in Staff Regulation 9.1(a) relating to the termination of a permanent appointment, or in accordance with the provisions of Staff Regulation 10.2 [related to disciplinary measures]. Notice of termination will be given in accordance with Staff Rule 109.3(a).

43. Former staff regulation 9.1(a) provides in its relevant part that:

> The Secretary-General may terminate the appointment of a staff member who holds a permanent appointment … if the necessities of the service require abolition of the post or reduction of the staff[.]
>
> …
>
> Finally, the Secretary-General may terminate a staff member who holds a permanent appointment, if such action would be in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned.

44. The available evidence is that the Applicant's indefinite appointment was terminated under the terms of staff regulation 9.3(a), which contains similar language as former staff regulation 9.1(a).

45. Having found that the change of the Applicant's position title does not amount to abolition of post under staff regulation 9.3(a)(i), the Tribunal cannot but conclude that the termination of the Applicant's indefinite appointment pursuant to staff regulation 9.3(a)(i) on account of change of position title goes against the clear terms of her employment.

46. The Tribunal therefore finds that the decision to terminate the Applicant's indefinite appointment is unlawful.

Whether the Applicant is entitled to any remedies

47. In her application, the Applicant seeks the recission of the decision to terminate her indefinite appointment. In the alternative, she requests compensation in lieu equivalent to two years' net base salary. The Applicant also claims compensation for moral harm.

48. The Tribunal recalls that the remedies it may award are outlined in art. 10.5 of its Statute as follows:

> As part of its judgement, the Dispute Tribunal may only order one or both of the following:
>
> (a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;
>
> (b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

Rescission of the contested decision

49. Having found that the termination of the Applicant's service is unlawful, the Tribunal is of the view that there was a miscarriage of justice in this case. As such, the contested decision must be rescinded. This implies the reinstatement of the Applicant on her post and under the same kind of contract she held at the time of her separation.

Compensation in lieu

50. The contested decision constitutes an administrative decision that concerns termination within the scope of art. 10.5(a) of the Tribunal's Statute. Therefore, the Tribunal must set an amount that the Respondent can choose to pay as an alternative to the rescission of the contested administrative decision and the reinstatement of the Applicant pursuant to art. 10.5(a).

51. The very purpose of compensation in lieu is "to place the staff member in the same position in which he or she would have been, had the Organization complied with its contractual obligations" (see *Laasri* 2021-UNAT-1122, para. 63). In this respect, the Appeals Tribunal has consistently held that:

> In-lieu compensation under Article 10(5) of the UNDT Statute shall be an economic equivalent for the loss of rescission or specific performance the Tribunal has ordered in favor of the staff member. When the Secretary-General chooses not to accept this order, he must pay compensation as an alternative to replace (in-lieu) such rescission or specific performance. Hence, the most important factor to consider in this context is the pecuniary value of such rescission or specific performance for the staff member in question[.]
>
> The nature and degree of the irregularities committed by the Administration, on the other hand, are of no legal relevance for the pecuniary value of the ordered rescission or specific performance. On the contrary, as the UNDT may not award punitive damages according to Article 10(7) of the UNDT Statute, we find the UNDT is not allowed to consider these factors when deciding on the amount of in-lieu compensation (see, e.g., *El-Awar* 2022-UNAT-1265, paras. 73, 74; *Yavuz* 2022-UNAT-1266, paras. 26, 27).

52. It follows from the above that in determining the amount of compensation in lieu, the Tribunal must consider "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" (see *Quatrini* UNDT/2020/053, para. 14; see also *Laasri* 2021-UNAT-1122, para. 64). Moreover, the Tribunal must take into account that the two-year limit imposed by art. 10.5(b) of is Statute "constitutes a maximum, as a general rule, albeit with exceptions" (see *Laasri* 2021-UNAT-1122, para. 64; see also *Mushema* 2012- UNAT-247 para. 28).

53. In support of her prayer for compensation in lieu, the Applicant submits, *inter alia*, that a compensation will never sufficiently cover the four years of salary that she would have earned before retirement. The Applicant explains that she was officially hired in January 1989, her normal retirement age should have been 60 but since the Organization only formalized her recruitment on 1 June 1991, her normal retirement age was set to 62.

54. The Tribunal considered the undisputed fact that the Applicant had 33 years of unblemished career at the United Nations. Based on this, the assertion that she would have been employed with UNHCR until her normal retirement age is neither unreasonable nor speculative. Any contrary suggestion is itself unreasonable and overly speculative.

55. The Respondent argues, however, that even if the Tribunal were to assume that the Applicant would have worked until retirement (either early retirement or retirement at age 62), on 19 July 2022 the Applicant's separation clearance was approved and consequently she was paid a net amount of EUR104,790.17, consisting of payment of 1.5 months of salary in lieu of notice, of 12 months of salary towards termination indemnity in accordance with staff rule 9.8 and Annex III to the Staff Rules, and of 60 days of unused annual leave. In the Respondent's view, these termination indemnities would not have been paid to the Applicant had she worked with UNHCR until retirement (see staff rule 9.8 (c)).

56. In this respect, the Tribunal notes that the Appeals Tribunal has rejected the deduction of termination indemnity in determining the amount of in-lieu compensation on numerous occasions (see, e.g., *Eissa* 2014-UNAT-469, para. 27; *Fasanella* 2017-UNAT-765, para. 34; *El-Kholy* 2017-UNAT-730, para. 39). In dismissing the Secretary-General's submission that the Tribunal erred by not discounting from its award of compensation in lieu the Appellant's termination indemnity, the Appeals Tribunal held in *El-Kholy* 2017-UNAT-730, at para. 39, that:

> Compensation in lieu and the termination indemnity have two different legal natures and one cannot be deducted from the other (footnote omitted). While the purpose of the compensation is an alternative to rescission, so that the person would receive the same amount had the unlawful decision not occurred, the objective of the termination indemnity is to provide sufficient means of survival for the staff member to identify a regular placement in the labour market. Whilst length of service is taken into account for its calculation, the very purpose of termination indemnity is to warrant the professional future of the staff member, not to restore the *status quo ante*.

57. Moreover, the Respondent's suggestion that the Tribunal deduct the termination indemnity in the calculation of compensation in lieu is premised on the speculation that the Applicant would not have been employed with UNHCR until her normal retirement age and is, therefore, unreasonable.

58. Accordingly, the Tribunal finds no reason to reduce the in-lieu compensation by the amount of the termination indemnity the Applicant received, to which she has a right under the Staff Regulations and Staff Rules.

59. In light of the above and considering the circumstances of the present case, the Tribunal finds it appropriate to set the in-lieu compensation at the equivalent of two years' net base salary. This award is consistent with awards made in cases of similar nature (see, e.g., *Fasanella* 2017-UNAT-765; *Nugroho* 2020-UNAT-1042; *Mukhopadhyay* UNDT/2021/085).

Compensation for harm

60. Under art. 10.5(b) of the Tribunal's Statute, the Applicant may be awarded compensation for damages, such as stress, anxiety, and reputational harm, provided that harm be supported by evidence.

61. The Appeals Tribunal has consistently held that "an entitlement to moral damages may arise where there is evidence produced to the Tribunal, predominantly by way of a medical or psychological report of harm, stress or anxiety caused to the employee, which can be directly linked, or reasonably attributed, to a breach of his or her substantive or procedural rights and where the Tribunal is satisfied that the stress, harm or anxiety is such as to merit a compensatory award" (see *Coleman* 2022-UNAT-1228, para. 42; see also *Ashour* 2019-UNAT-899, para. 31; *Kebede* 2018- UNAT-874, para. 20).

62. In support of her claim for moral damages, the Applicant submits that since the beginning of the rumours about the reclassification of her post, she suffered, for the first time in her life, from a persistent severe stress and serious depression and anxiety, which required psychiatric therapy and medication. To substantiate her submission, the Applicant provided two medical reports, dated 7 and 28 March 2022.

63. The Respondent however submits that the requirements for a breach of substantive or procedural rights, and the existence of a link between such a breach and any moral damages are not met because he acted in good faith, followed the relevant rules, and the Applicant was afforded all the applicable procedural safeguards in cases of post abolition. He further points to the fact that the Applicant's medical report dated 28 March 2022 states that she has been facing psychological issues since 2018 ("état de stress chronique sévère évoluant depuis 2018 et en aggravation depuis un peu moins [d'une] année").

64. The Tribunal does not consider the assertion that the Applicant has been facing psychological issues since 2018 as contradictory evidence of the Applicant's claim that "for the first time in her life [she] suffered from a persistent severe stress and suffered from serious depression and anxiety which required psychiatric

therapy and medication." The two statements are different. Also, there can be no doubt that the contested decision further aggravated the Applicant's health issues. Moreover, the Tribunal recalls its finding that the decision to terminate the Applicant's indefinite appointment is unlawful.

65. The Tribunal thus finds a causal link between the Applicant's medical condition and the contested decision. The stress, serious depression, and anxiety merit a compensatory award.

66. Turning to the level of compensation, the Tribunal recalls that it is best placed to calculate, based on the evidence, the appropriate award of moral damages (see, e.g., *Finniss* 2014-UNAT-397, para. 36; *Fiala* 2015-UNAT-516, para. 48).

67. Having reviewed the evidence on record, the Tribunal finds it appropriate to award the Applicant USD8,000 as moral damages (in comparison, see, for example, the Tribunal's award of USD10,000 in *Quatrini* UNDT/2020/053).

Conclusion

68. In view of the foregoing, the Tribunal DECIDES that:

a. The application succeeds;

b. The decision to terminate the Applicant's indefinite appointment is rescinded;

c. As compensation in lieu under art. 10.5 of the Tribunal's Statute, the Applicant is awarded two years' net base salary;

d. As compensation for moral damage under art. 10.5(b) of the Tribunal's Statute, the Applicant is awarded USD8,000; and

e. The aforementioned compensations 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 Margaret Tibulya
Dated this 17th day of August 2023

Entered in the Register on this 17th day of August 2023
(*Signed*)
René M. Vargas M., Registrar, Geneva