



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2022/048

Judgment No.: UNDT/2023/136

Date: 14 December 2023

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: René M. Vargas M., Officer in Charge

KOURA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, AS/ALD/OHR, UN Secretariat

Fatuma Mninde-Silungwe, AS/ALD/OHR, UN Secretariat

Introduction

1. On 3 June 2022, the Applicant, a former P-3 Conduct and Discipline Officer with the African Union - United Nations Hybrid Operation in Darfur (“UNAMID”), filed an application contesting:

- a. His “unreasonable” early separation from UNAMID on 30 November 2021;
- b. The decision not to allow him to use his annual leave days; and
- c. The decision to ban the Applicant’s and other staff members’ use of United Nations vehicles during the rainy season, which affected the Applicant’s work environment and health.

2. The Respondent filed his reply on 4 July 2022 denying the allegations and further urging the Dispute Tribunal to decide that some of the Applicant’s claims are not receivable.

3. A case management discussion was conducted on 20 January 2023 at which the parties agreed that the decisions under para. 1.b and 1.c were not receivable as the Applicant had not sought management evaluation as required under staff rule 11.2 and art. 8(1)(c) of the UNDT Statute. The parties agreed that the Tribunal was to review the decision referred to as “[the Applicant’s] unreasonable early separation from UNAMID on 30 November 2021”.

4. The Tribunal heard the case on 27 February 2023. Oral evidence was adduced from the Applicant and the then Director of Mission Support (“DMS”), UNAMID.

5. The Applicant and Respondent filed their closing submission on 10 and 14 March 2023 respectively.

6. The undersigned Judge ended her deployment on 31 March 2023 and was redeployed on 11 October 2023. For the reasons given below, the application is partly allowed.

Facts

7. On 22 December 2020, the Security Council adopted resolution 2559 (2020) in which it decided to terminate the mandate of UNAMID effective 30 December 2020. The Security Council requested the Secretary-General to commence the drawdown of UNAMID personnel on 1 January 2021 and to complete the withdrawal of all uniformed and civilian UNAMID personnel, other than those required for the Mission's liquidation by 30 June 2021.¹

8. On 1 January 2021, UNAMID Operation Drawdown Directive No. 1 was issued. The purpose of the Directive was to provide the necessary guidance to implement the drawdown of uniformed and civilian personnel of UNAMID during the period 1 January-30 June 2021 in line with the Security Council Resolution.²

9. On 13 January 2021, the Under-Secretary-General for Operational Support ("USG/DOS") sent a memorandum to Heads of Departments, Offices, Regional Commissions, Offices Away from Headquarters, and Field Missions seeking their support for consideration of staff members who were affected by downsizing and closure of entities across the Secretariat, especially those with permanent and continuing appointments.³

10. On 14 January 2021, the Applicant was given notice of the non-extension of his fixed-term appointment ("FTA"), which was expiring on 30 April 2021, in line with staff rule 9.4.⁴ The letter also advised the Applicant to apply to suitable job openings in Inspira and to ensure that his profile was uploaded in the Horizon platform.

11. UNAMID subsequently decided to retain the Applicant as part of the Liquidation Team and renewed his appointment monthly until October 2021.⁵

¹ Reply, annex R/1 at paras. 1 and 2.

² *Ibid.*, annex R/2.

³ Annex 2 to the Applicant's submission dated 26 February 2023.

⁴ Application, annex 12.

⁵ Reply, para. 7 and annex R/3.

12. On 31 October 2021, the Director of Liquidation gave the Applicant a final notice that his fixed-term appointment would end on 30 November 2021.⁶ It reads as follows:

Following the letter from the Director Liquidation Team dated 5 September 2021 regarding Notice of non-renewal of your Fixed term appointment with UNAMID, kindly be advised that this letter serves as the final notice that your fixed term appointment will end on 30 November 2021. Human Resources Management Unit will liaise with you regarding your check out formalities at least two weeks before separation date.

You are encouraged to continue applying to suitable job openings in INSPIRA. Your profile has already been uploaded in the HORIZON platform.

13. On 30 November 2021, the Applicant was separated from the Organization due to the expiry of his FTA.⁷

14. On 21 December 2021, the Applicant requested management evaluation of:

a. The decision to terminate his fixed-term appointment on 30 November 2021; and

b. His non-selection for three Job Openings (“JOs”), namely JO No. 159220 for a P-3, Training Officer, Department of Operational Support (“DOS”) in New York; JO No. 164025 for a P-3, Training Officer in Nairobi; and JO No. 158741 for a P-3, Training Officer in Entebbe.⁸

15. On 5 April 2022, the Under-Secretary-General for Management Strategy, Policy and Compliance (“USG/DMSPC”) endorsed the recommendation of the Management Evaluation Unit (“MEU”) to uphold the decisions not to renew the Applicant’s FTA and not to select him for JO No. 159220 in New York, and noted that the Applicant’s

⁶ Reply, annex R/3.

⁷ *Ibid.*, annex R/5.

⁸ Application, annex 11.

request for a management evaluation concerning JO No. 164205 in Nairobi and JO No. 158741 in Entebbe were deemed not receivable.⁹

16. On 18 April 2022, the Applicant filed a motion for interim measures challenging the Respondent's decision to separate him from service when his contract expired on 30 November 2021.¹⁰

17. Pursuant to Order No. 55 (NBI/2022), the Tribunal dismissed the motion as irreceivable because the impugned decision had already been implemented.¹¹

Applicant's submissions

18. The Applicant's contentions can be summarized as follows:

- a. The contested decision was unlawful because:
 - i. In the absence of a guidance on drawdown, the Administration introduced new parameters outside of the Rules cited by the Respondent as conditions to be included in the membership of the Liquidation Team;
 - ii. As a member of the Liquidation Team, the Administration had confirmed its confidence in his ability to diligently, proactively, enthusiastically, and competently carry out the complex, tiring, voluminous programme of work entrusted to him. The Administration ignored its own Rules for retention;
 - iii. His retention within the Liquidation Team carried with it an expectation that he was good enough, qualified and suitable for other available posts. Hence, the decision to terminate his appointment with the Organization is unlawful.

⁹ *Ibid.*, annex 4(a).

¹⁰ *Ibid.*, annex 14.

¹¹ *Ibid.*, annex 15.

b. He had a legitimate expectation of continued employment within the Organization beyond [November 2021]:¹²

i. The Administration had asserted that that he possessed the right skills' set, attitude, recognized professional reputation and competence, and the right qualifications. Therefore, in the event of finding a post matching his skills, qualifications, and roster membership, it was expected that the Administration would be able to laterally assign him to occupy such post;

ii. In a post-mission stage, where the Administration had specific requirements that could not be met by the existing staff with continuing and permanent appointments, it was a given that he expected fair treatment with regards to his future placement. Namely, the Organization was morally responsible to do all that it could (and present a proof) to reassign him as a matter of priority to another post matching his abilities and roster memberships;

iii. The 13 January 2021 memorandum from USG/DOS to all Secretariat entities to support the retention of staff affected by the downsizing of UNAMID and the list of names, including his name, carried an expectation of continued employment and that the same level of attention and effort was made on behalf of UNAMID staff equally;

iv. The Respondent has failed to show that he made every effort to place him in other posts, particularly the ones that he applied for and that matched his roster memberships, which did not require any further screening. The Respondent has failed to demonstrate that the Applicant received equal

¹² The Applicant had indicated the date as 1 July 2020 at page 2 of his closing submissions but given the facts of the case and his other submissions, the Tribunal considers that to be a typographical error.

treatment to his colleagues who were placed in other posts directly using the instrument of delegation.

c. Contrary to the Respondent's assertion that he had no obligation to assist him to secure alternative employment, another similarly situated staff member from his Unit was laterally reassigned to the United Nations Headquarters ("UNHQ") in New York on a P-3, Conduct and Discipline Team position in DOS:

i. The United Nations Field Staff Union ("UNFSU") appeal on behalf of said staff member was based in part on a humanitarian aspect, while other justifications, i.e., underrepresentation and geographic diversity, were not considered. The letter sent by both USGs was solely based on the suitability of said colleague for placement. The request was for the use of the Delegation Instrument for the placement the colleague in question against a suitable vacant post without the advertisement of a JO given that his placement to DPA-DPO fell outside the scope of the staff selection system;

ii. The use of the Secretary General's authority to laterally reassign the staff member in question should also have been applied to him as it is evident that this was possible according to the letter from the USGs.

19. The Applicant seeks the following remedies as set out in his application:

a. Compensation for the effect the decisions taken affected his mental and physical health; and

b. Reassignment to a "decent job".

Respondent's submissions

20. The Respondent's contentions can be summarized as follows:

a. The contested decision was lawful. It resulted from the Security Council's resolution to terminate the mandate of UNAMID effective 30 December 2020. As the Applicant confirmed during direct examination, he was initially supposed to be separated on 31 January 2021 but remained part of the Liquidation Team until 30 November 2021;

b. The Applicant had no legitimate expectation that his appointment would be renewed beyond 30 November 2021. The fact that he was selected to serve as part of the Liquidation Team did not create an expectation that he would be renewed until the final closure of the Mission. The former Director, Liquidation Team, UNAMID, testified that contract renewals during the liquidation period were based on function, skill requirement, and budget. The Applicant, on cross-examination, confirmed that he was advised in a letter dated 21 February 2021, that "extension to the liquidation phase [was] subject to liquidation terms, operational needs and availability of budget". The same letter also clarified that should the Applicant's services no longer be required before or during the liquidation period, the Human Resources Management Section would liaise with him regarding the check-out procedures before the separation date;

c. The Applicant's functions and skills were not required beyond 30 November 2021. Contrary to the Applicant's assertion, he was not required to continue working until December or the end of the Mission, completing outstanding work in the Conduct and Discipline Team ("CDT"). The Respondent's unrefuted evidence is that there was no outstanding work that required CDT attention at the end of the UNAMID Mission. Therefore, there was no basis to maintain full CDT functions until the end of the Mission;

d. The Applicant presented no evidence in support of his claim that an Umoja Personnel Action (“PA”) of 25 November 2021 extended his contract to 31 December 2022. On the contrary, the evidence demonstrates that on 31 October 2021, UNAMID provided the Applicant with a “final notice” that unequivocally stated that the Applicant’s fixed-term appointment would end on 30 November 2021. The Applicant acknowledged receiving a check-out memorandum from the Human Resources Section dated 4 November 2021 detailing the check-out procedures prior to separation. In any case, an erroneous PA extending his appointment would not suffice as evidence of a decision to extend the Applicant’s appointment. The Organization is entitled to correct such administrative errors;

e. The Applicant produced no evidence of an “express promise” by the Administration to renew his appointment beyond 30 November 2021. On the other hand, the Applicant’s 23 November 2021 email to the Director of Liquidation requesting a two-week extension of his contract establishes that the Applicant understood that he would be separated on 30 November 2021. The response from the Director of Liquidation on 25 November 2021, the same date as the PA, confirmed that UNAMID would not extend the Applicant’s contract beyond 30 November 2021;

f. The fact that UNAMID appointed additional staff members during the liquidation period is not relevant to the contested decision. As the former Director of the Liquidation Team testified, those staff members were appointed to cover the gaps in operations and logistics created by staff members leaving UNAMID for other opportunities. The Applicant did not serve in those functional areas and, as such, there was no nexus between those appointments and the decision not to renew the Applicant’s appointment;

g. The Applicant bears the burden to establish that the contested decision was tainted by improper motives. The Applicant has not produced evidence to support his allegation that the decision not to renew his appointment was improperly

motivated. On the contrary, the evidence establishes that UNAMID was favourably disposed to the Applicant. The former Director of the Liquidation Team testified that he had meetings with the Applicant to support the Applicant's efforts to find alternative employment. The Applicant even acknowledged the Director of Liquidation's "help and guidance through these sensitive times"; and

h. The Organization was not required to assist the Applicant in finding another position. The obligations under staff rule 9.6(e) apply to the termination of appointments. UNAMID did not terminate the Applicant's appointment. The Administration bears no obligation to place staff members who, like the Applicant in this case, held a fixed-term appointments that was not renewed:

i. The Applicant's allegation that another similarly situated staff member from his Unit was laterally reassigned to UNHQ in New York on a P-3 Conduct and Discipline Team position in DOS is not factually correct. The concerned staff member was reassigned to the Department of Political and Peacebuilding Affairs/Department of Peace Operations, in response to a request from the United Nations Field Staff Union to assist nationals of a specific country facing separation from UNAMID as they could not be repatriated due to insecurity. The Applicant is not similarly situated. The Organization's exceptional humanitarian response to assist a staff member does not create an obligation to secure alternative employment for the Applicant.

21. In view of the foregoing, the Respondent requests the Dispute Tribunal to dismiss the application. He claims that the Applicant has neither demonstrated any procedural or substantive breach of his rights nor adduced any evidence of harm. Compensation for harm can only be awarded where there is a sufficient evidentiary basis establishing that harm has occurred.

Consideration

22. The Dispute Tribunal recalls that when reviewing administrative decisions of the Secretary-General, there is a presumption that the official functions have been regularly performed. The Respondent has a minimal burden of proof to justify his actions in administrative matters. Once discharged, the burden shifts to the staff member who must show the contrary through clear and convincing evidence.¹³ The principle is put as follows:

There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellant's candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion.¹⁴

23. Initially, the Applicant cited two grounds for contending that the Administration did not act regularly. The first was that he had a legitimate expectation that his FTA would be renewed to December 2021 because in November 2021 he received a PA to that effect. The second was that since UNAMID was liquidated, the Administration was under a "moral" obligation to find him a suitable position for lateral placement because the non-renewal of his FTA resulted from abnormal circumstances.

24. During the proceedings, the Applicant alleged that the Administration had laterally moved to UNHQ a similarly placed staff member who, just like the Applicant, held an FTA whose term expired during the liquidation period. The Applicant argued that the decision to laterally reassign said staff member ought to equally have applied to him.

¹³ *Rolland* 2011-UNAT-122, para 26.

¹⁴ *Ibid.*, at para. 26.

25. The Respondent submitted that the decision to place the staff member in question after the expiry of his FTA was motivated by humanitarian grounds considering the security situation of said staff member's country. The Administration avoided repatriating him to his country where the situation was volatile. The Respondent averred that the Applicant was not similarly situated.

26. Below is a determination of the three issues raised in these proceedings.

Legitimate expectation

27. The Tribunal is mindful that the case at bar is not one concerning termination of contract due to abolition of post by virtue of the liquidation of UNAMID, but one of separation from service at expiry of a fixed-term appointment. FTAs are governed by staff regulation 4.5(c) and staff rule 4.13(c), providing respectively that

[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service.

[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service", except as provided under staff rule 4.14(b).

28. The exception provided under staff rule 4.14(b) does not apply to the issue under consideration.

29. Therefore, the starting point of a judicial review of a non-renewal of an FTA is that it does not guarantee a renewal or conversion. This is the general rule. Jurisprudence has developed an exception implied from circumstances, where the Administration makes a firm promise expressed in writing to renew the FTA, thereby raising the staff member's legitimate expectation that an FTA would be renewed.

30. In order for a staff member's claim of legitimate expectation of renewal of appointment to be sustained, it must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case.

31. In the case at bar, the Applicant averred that his application fell under the exception that he had legitimate expectation of an FTA renewal. He asserted that by not renewing the FTA, the Administration did not act fairly, justly or transparently. Further, he argued that the decision was motivated by bias, prejudice and improper motive considering that he expected to be treated with equality to a similarly placed staff member.

32. The Applicant cited a number of factors to support his belief that he expected that his FTA would be renewed. He stated that he received a PA stating that his contract was expiring on 31 December 2021 as opposed to 30 November 2021.

33. He tendered a PA notification dated 25 November 2021.¹⁵ The Umoja automatically generated email contained the following information: “Personnel Action Name: *Renewal/Extension of Appt*”; “Personnel Action Reason: *Renewal of Appointment*”; “Effective Date: *01.12.2021*”; and “Processing Date: *24.11.2021*”.

34. The Respondent argued that the PA was raised in error and that at the time of raising it, the Respondent had already furnished the Applicant with a final notice of non-extension of contract and the separation procedures had commenced.

35. The Tribunal agreed with the Respondent after noting that the PA was neither preceded nor superseded by a letter of appointment. The Applicant did not submit any document that formed the basis of the PA.

36. Further, the Applicant did not offer any contradictory evidence to the Respondent’s contention that the PA was generated in error, nor that he had already received a final notice of non-extension or that his separation process had commenced.

¹⁵ Application, annex 5.

37. While considering a similar issue, UNAT, concluded that:

In the absence of a letter of appointment, a personnel notification which was erroneously raised ... did not constitute an express promise of extension or give rise to a legitimate expectation of renewal.¹⁶

38. Although UNAT was considering the non-renewal of a temporary appointment, the Tribunal finds that the principle equally applies to the issue at hand, which also concerns a contract of limited duration.

39. The Applicant has failed to convince the Tribunal that the Administration raised in him a legitimate expectation of renewal of his FTA. An erroneously raised PA without a written contract does not constitute a ground for legitimate expectation of renewal.

40. The other reasons alleged to support his claim of legitimate expectation for renewal were, the fact that there were “only two international [staff members] in the section”, or that there were “a lot of cases”,¹⁷ or that the contract was “extended month by month”,¹⁸ or that his “membership in UNAMID’s liquidation team was based on leadership confidence of [his] ability to directly and proactively - carry out tasks [he] had”,¹⁹ or that he was on the “team advising the organization, while staff holding continuous and permanent [contracts] were sent home”,²⁰ or that he possessed “skills and capability to serve the organization during this time”²¹, or indeed that “the need of [his] service[s] was very likely to be continued as the Mission faced in its final months a surge of several cases and they were expecting to have many more [cases]”,²² or that the Organization, through the Under-Secretary-General for Operational Support, wrote to all Heads of Departments, Offices, Regional Commissions, Offices away from

¹⁶ *Houenou* 2021-UNAT-1091, para. 28.

¹⁷ Trial transcript page 6 of 93.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, page 7 of 93.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

Headquarters, and Field Missions²³ “to [seek] support [for] the retention of downsized staff”²⁴ and that the Applicant’s name appeared on this list [of downsized staff],²⁵ or the fact that the Applicant had roster memberships on three posts,²⁶ or that the Applicant had “showed [his] continuous interest in working with the UN”²⁷ through his applications for several job openings, exhibited as Annex 24,²⁸ and that the Applicant “got outstanding performances for the last three years’ evaluation in [his] e-PAS”.²⁹

41. All the above factors fall short of the requisite firm promise or commitment in writing by the Administration to renew an FTA.

42. The Applicant argued further that during the period, new staff members were recruited. This, according to him, was an indication that human resources were required in the Mission. The Respondent explained that no staff member was recruited for the CDT section where the Applicant served and then provided the rationale for bringing in new staff in other sections during the liquidation period.

43. According to the Respondent, staff members were encouraged to take up job opportunities elsewhere due to the liquidation of UNAMID. Some staff members holding crucial positions, especially in logistics and operations, left the Mission prompting it to replace them “on assignment ... based on need”³⁰ to “assist the ongoing work of the liquidation itself”.³¹

²³ Annex 21, Revised Trial Bundle, pages 217-221.

²⁴ Trial transcript page 9 of 93.

²⁵ Annex 22, pages 222-229 of the Revised Trial Bundle, at page 228.

²⁶ Annex 23 at page 230 of the Revised Trial bundle.

²⁷ Page 15 of 93 of the Trial transcript.

²⁸ At pages 231-234 of the Revised Trial Bundle.

²⁹ Page 15 of 93 of the Trial transcript.

³⁰ *Ibid.*, page 65 of 93.

³¹ Annex R/9 at pages 207-208 of the Revised Trial Bundle.

44. The Respondent exhibited Annex R/7, which was a report on the end of Mission of UNAMID³² highlighting that there was no need for the Applicant's services to the end of the liquidation period as there was enough capacity in CDT to complete the process. On this aspect, the report concluded that at the time of completion of the report, "no case [was] pending with CDT for action".³³

45. The Applicant's evidence lacks relevant factors that could be construed to have raised his legitimate expectation for FTA renewal. Such being the case, the Tribunal finds that the Applicant has not discharged his burden of proof through clear and convincing evidence that the Respondent was obliged to renew his FTA. This ground of review is dismissed.

Moral obligation to find the Applicant a suitable position for lateral placement

46. The Tribunal finds the Applicant's argument that the liquidation of UNAMID was an abnormal occurrence entitling him to a lateral placement to a post without merit. The Applicant's FTA was conditioned on time limitation and not based on the subsistence of the Mission. It was therefore normal for the Applicant's FTA not to be renewed at the expiry of the contract period. The relevant Staff Regulations and Rules governing FTA were properly applied to his case.

47. Since the contract was not prematurely terminated due to the closure of the Mission, the Applicant could not benefit from lateral reassignment under staff rule 9.6(e), which provided that:

Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, if the necessities of service require that appointments of staff members be **terminated** as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length

³² Pages 111-198 of the Revised Trial Bundle.

³³ Revised Trial Bundle, page 147 para. 84 and Trial transcript, pages 61-62 and 74 of 93.

of service, staff members shall be retained in the following order of preference (emphasis added).

48. The keyword in this provision is “terminated”. The Applicant conceded in cross-examination that his services were not “terminated” but he was separated from service due to non-renewal of his contract. Therefore, the above provision did not apply to his situation.

49. The Tribunal disagrees with the Applicant that the Respondent was under a duty to “prove that they fulfilled their obligation to—make a good faith effort to find a suitable alternative post—for [him]”.³⁴ That requirement applies to cases where a contract was prematurely terminated due to abolition of a post as opposed to an FTA expiry.³⁵

50. Consequently, the Tribunal finds that the Administration was not under a moral obligation to retain the Applicant by means of finding him an alternative suitable post within the Organization. The Administration’s decision was and ought to be governed by only legal considerations. This ground of review has no merit and is dismissed.

The Staff Regulations and Rules were not applied in a fair, just, transparent, and non-discriminatory manner

51. The Applicant submitted that the Respondent did not apply the Staff Regulations and Rules in a fair, just, transparent and non-discriminatory manner. He argued that a staff member was laterally appointed without following staff selection procedures and yet in his case the Respondent argued that the rules did not allow for his placement. The Respondent argued in response that the Staff Regulations and Rules were applied to accommodate humanitarian consideration.

³⁴ Trial transcript, page 15 of 93 and page 60 of 93.

³⁵ *Timothy* 2018-UNAT-847 at para. 32.

52. The Tribunal reiterates the well-established standard of judicial review in administrative decisions concerning appointment of staff that:

In reviewing administrative decisions regarding appointments and promotions, the factors to be considered are: (1) whether the procedure as laid down in the Staff Regulations and Rules was followed; (2) whether the staff member was given fair and adequate consideration, and (3) whether the applicable Regulations and Rules were applied in a fair, transparent and non-discriminatory manner.³⁶

53. The Tribunal heard that at least one of the Applicant's colleagues whose FTA expired around the same period of liquidation of UNAMID "was laterally assigned to UNHQ, others got posts elsewhere".³⁷ The Applicant therefore expected that he would be re-assigned just like his colleagues who were "placed on lateral movement", he wondered "why [he] was not placed?"³⁸

54. In other words, the Applicant contended that the same Regulations and Rules that disqualified him from consideration for lateral placement were excepted on humanitarian grounds to laterally reassign another similarly placed staff member.

55. This is a legal issue alleging violation of the Applicant's terms and conditions of employment to be treated fairly, justly, transparently and in a non-discriminatory manner.³⁹ It is an allegation that the Applicant needed to prove through clear and convincing evidence. The Tribunal requested the Applicant, who was self-represented, to substantiate this claim that the Organization did not treat him with equality.

56. The Respondent's witness, who was the former Head of the Liquidation Team for UNAMID, maintained that if anyone on an FTA got a job elsewhere, they "would have applied for jobs, opportunities-openings in other Missions, and they would have won that job based on merit and selection by that receiving Mission. They were not

³⁶ *Savado* 2016-UNAT-642, para. 40 citing *Ljungdell* 2012-UNAT-265, para. 30, quoting *Schook* 2012-UNAT-216 and citations therein.

³⁷ Trial transcript, page 49 of 93.

³⁸ *Ibid.*, page 54 of 93.

³⁹ See generally *Icha* 2021-UNAT-1077, para 21.

placed there by UNAMID, and they were not placed there by the Organization as far as [he was] aware”.⁴⁰

57. The Applicant persisted that his colleague “was laterally assigned to New York. He did not apply, [they knew] the Mission was going to close and he was supported by the UN. He was the last three ... and he was laterally moved to New York”.⁴¹

58. Since the Applicant did not have the finer details of the recruitment process of the staff member in question and because the Respondent disagreed with him, the Tribunal, through Order No. 57 (NBI/2023), requested the Respondent to file submissions explaining the recruitment procedures of the staff member concerned. This was a normal practice under art. 18 of the Tribunal’s Rules of Procedure on evidence, and pursuant to UNAT jurisprudence, for instance, where *Hossain*⁴² was remanded to the Dispute Tribunal because the Tribunal did not assist the Applicant to secure evidence from the Organization, holding that:

23. Did the UNDT thereby err in law by not providing for a fair and expeditious disposal of the case and do justice as between the parties? Pertinent factors affecting this question include that Mr. Hossain was unrepresented and inexperienced in the ways of litigation. Also relevant is the fact that the Tribunal refused to receive his case so that it could be examined and determined on its merits. It did so by concluding that the Appellant had failed to prove matters evidentially that were beyond his control to prove, at least without the assistance of the Tribunal in calling for evidence from the relevant hiring managers, whether documentary or in person as it was empowered to under Article 9 of its Statute.

24. We conclude in the foregoing circumstances that the UNDT erred in law by rejecting Mr. Hossain’s proceedings other than on their merits and for threshold jurisdictional reasons that it was empowered to examine and assist to establish. To use the words of the Articles governing these issues, the UNDT, while perhaps disposing of the case

⁴⁰ Trial transcript, pages 85- 86 of 93.

⁴¹ *Ibid.*, page 87 of 93.

⁴² 2021-UNAT-1135.

in an expeditious way, did not do so fairly, or certainly justly, as between the parties.

59. In compliance with Order No. 57 (NBI/2023), the Respondent filed submissions on 3 March 2023 in which he argued that:

[the staff member concerned] was placed against [a] post number [of] Conduct and Discipline Officer in [the] Department of Political and Peacekeeping Affairs/Department of Peace Operations (DPPA/DPO) as a response to a request by the United Nations Field Staff Union (UNFSU) to laterally reassign ... nationals whose contracts were expiring with UNAMID and who, for their safety and security, could not be repatriated. The Applicant is not similarly situated. The Organization's exceptionally according a lateral assignment to a staff member facing a humanitarian situation does not impact the Applicant's contract of employment".⁴³

60. Along this submission, the Respondent attached a Confidential "(Immediate)" memorandum dated 7 September 2021⁴⁴ addressed to the Under-Secretary-General for Management Strategy, Policy and Compliance from the Under-Secretary-General for Political and Peacebuilding Affairs requesting for approval of placement of staff affected by downsizing.

61. The Confidential memorandum did not cite humanitarian grounds as the reason for re-assigning the staff member concerned. The memorandum reads:

1. [Concerned staff member's] Index ..., fixed term appointment, is among those affected by the downsizing in UNAMID, effective COB 30 September 2021.
2. After having carefully reviewed the staff member's profile, [staff member] was found suitable for placement against post ... P-3 Conduct and Discipline Officer position in the DPPA-DPO Executive Office, New York.
3. Given that [the concerned staff member's] placement to DPPA-DPO falls outside the scope of the Staff Selection System (i.e., placement against a suitable vacant post without advertisement of a job opening), and in line with your delegated

⁴³ Respondent's response to Order No. 057 (NBI/2023).

⁴⁴ Annex R/11 to the Respondent's Response to Order No. 057 (NBI/2023), Revised Trial Bundle, pages 264, 265 and 278.

placement authority as set out in the Delegation Instrument, your approval to place AM to DPPA-DPO effective 1 October 2021 or sooner is hereby kindly requested.⁴⁵

62. On 8 March 2023, the Applicant filed a rejoinder to the submission in which he challenged the Respondent's justification for treating him differently. He argued that "the use of the Delegation Instrument for the placement of [his colleague] against a suitable vacant post without the advertisement of a job opening, given that his placement to DPA-DPO falls outside the scope of the Staff Selection System" was irregular.⁴⁶

63. In his closing submission, the Applicant reiterated that "[t]he [R]espondent has failed to demonstrate that [he] ha[d] received an equal treatment as [his] colleagues who were placed in other posts directly by using the Instrument of Delegation, as [the Respondent] did on behalf of [his] other colleagues".⁴⁷

64. The Tribunal agrees with the Applicant that the Staff Regulations and Rules must be applied uniformly and consistently to staff members. United Nations procedures exist to facilitate fair and transparent substantive decisions, and the failure to abide by required procedures is no mere "technicality", but instead undermines substantive fairness.⁴⁸ Any exception to laid down procedures under the Staff Regulations and Rules must be taken fairly, justly and transparently to avoid the perception of abuse of the system and claims of bias and discrimination.

65. In this regard, the Tribunal reminds itself of the consistent UNAT jurisprudence⁴⁹ that:

48. When judging the validity of the Secretary-General's exercise of discretion in administrative matters, as in the case of a non-renewal decision, the Dispute Tribunal determines if the decision is legal,

⁴⁵ Reply, Annex R/11.

⁴⁶ Applicant's rejoinder to the Respondent's response to Order No. 057 (NBI/2023), para. 2.

⁴⁷ Applicant's closing submissions, 14 March 2023, para.12.

⁴⁸ See generally, *Almasri* 2023-UNAT-1377, para. 80.

⁴⁹ *Kule Kongba* 2018-UNAT-849.

rational, procedurally correct, and proportionate. The UNDT can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But 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. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General.⁵⁰

66. The Respondent decided to exceptionally use a “Delegated Instrument” to reassign a staff member similarly placed to the Applicant. In so doing, the Respondent, did not follow the laid down procedures for staff selection. The process was carried out without transparency. Its result was a decision, which was perceived prejudicial to the Applicant. The reason given to treat the Applicant with inequality was improper as it was not justifiable by the Staff Regulations and Rules and the procedure was not transparent.

67. The Tribunal finds that the Applicant has successfully rebutted the presumption of regularity and proved by clear and convincing evidence that the non-renewal of his FTA was unlawful because the rules were applied in a discriminatory manner.

Relief

68. Article 10(5) of the Dispute Tribunal’s Statute provides that:

5. 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;

⁵⁰ *Nouinou* 2019-UNAT-902; *Sarwar* 2018-UNAT-868, para. 40; *Sanwidi* 2010-UNAT-084, para. 40.

(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.

69. In light of the Tribunal's finding at para. 67 above, the decision to separate the Applicant is rescinded, and the Secretary-General is ordered to reinstate him on similar terms and conditions of employment.

70. As an alternative to the order of reinstatement, the Secretary-General may elect to pay an amount of compensation equal to four months' net base salary in effect at the time of the Applicant's separation from service. This period represents the remaining four months to the close of the UNAMID Mission from December 2021 to March 2022.

71. Pursuant to art.10.5(b), the Tribunal may award moral damages for mental and physical harm if proved to the satisfaction of the Tribunal that the Applicant did suffer such harm. The standard of proof requires evidence independent of that of the Applicant to corroborate the Applicant's assertions of moral harm. None were presented in this matter. Nor did the Applicant adduce any evidence of reputational or professional harm. On the contrary, the Applicant secured alternative employment through a competitive process within the Organization, clear proof that his reputational and professional standing were not harmed. This head of reliefs must fail for lack of corroborative evidence.⁵¹

Conclusion

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

- a. The application is allowed on the basis that the Respondent violated the Applicant's terms and conditions of employment by his failure to apply the Staff

⁵¹ *Kallon* 2017-UNAT-742.

Regulations and Rules fairly, justly, transparently and in a non-discriminatory manner;

- b. The decision to separate the Applicant is rescinded;
- c. As compensation in lieu pursuant to art. 10.5 of the Tribunal's Statute, the Applicant is awarded four months' net base salary in effect at the time of his separation from service;
- d. The aforementioned compensation 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; and
- e. All other claims are rejected.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 14th day of December 2023

Entered in the Register on this 14th day of December 2023

(Signed)

René M. Vargas M., Officer-in-Charge, Nairobi