



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2016/008

Order No.: 69 (GVA/2016)

Date: 4 April 2016

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

HAMMAD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION**

Counsel for Applicant:
Robbie Leighton, OSLA

Counsel for Respondent:
Kong Leong Toh, UNOPS

Introduction

1. The Applicant seeks the suspension, pending management evaluation, of the implementation of the decision to abolish the post he currently encumbers and to require him to “take part in a competitive recruitment to secure ongoing employment”, as notified to him by letter of the Deputy Director, People and Change Group (“PCG”), United Nations Office for Project Services (“UNOPS”), dated 1 March 2016.

Facts

2. The Applicant joined the Organization in 1992. After holding various positions with the Department of Peacekeeping Operations, first, and later with the United Nations Development Fund (“UNDP”), he was transferred from UNDP to UNOPS, carrying over his permanent appointment.

3. In 2015, UNOPS set up a unit within the Global Shared Service Center (“GSSC”), in Bangkok, with the aim of administering benefits and entitlements of UNOPS contractual personnel and staff members, and also providing staff contracts’ administration services to other United Nations Services around the world. For a long time, these services had been offered by UNDP.

4. The post of Benefits and Entitlements Manager (P-3), GSSC, currently encumbered by the Applicant, was first advertised in March 2015; since the selected person at the time did not finally take it up, the post was readvertised in June 2015, following which the Applicant was recruited on 10 October 2015.

5. On 1 January 2016, UNOPS launched its new Enterprise Resource Planning, and GSSC undertook the full administration of personnel, a service provided to UNOPS by UNDP’s Human Resources Services up to 31 December 2015. According to the Respondent, expressions of interest for said UNOPS services from other agencies were much stronger than expected.

6. By letter dated 1 March 2016, that the Applicant received on the following day, the Deputy Director, PCG, UNOPS, advised the former that (emphasis in the original):

[I]n view of the increased responsibilities and tasks related to HR services to Partners, UNOPS, has decided to establish a new post of *Manager, Personnel Administration* at P-4 level, to be based in [GSSC] and reporting to the Manager GSSC.

As this new P-4 post will include all the duties and responsibilities of the *Manager, Benefits and Entitlements* (P-3) post that you are presently encumbering as well as other duties and responsibilities, I must with regret inform you that your P-3 post will be abolished effective 15th April 2016.

A Vacancy Announcement for the P-4 *Manager, Personnel Administration* post will be issued shortly. I strongly encourage you to apply for this.

7. On 4 March 2016, the new post of Manager, Personnel Administration (P-4), was advertised, with 19 March 2016 as the closing date for applications. The Applicant applied for this post on 18 March 2016.

8. Alerted that the Applicant did not fulfil the minimum educational requirements for the post, the Deputy Director, PCG, waived them for the Applicant on 23 March 2016, so that he could be included in the short list of candidates. On the same day, the Applicant was invited to the written test as part of the selection process.

9. Also on 23 March 2016, the Applicant submitted to the Executive Director, UNOPS, a request for management evaluation of the decision “to abolish his post, create a new post at the P-4 level and render his ongoing employment subject to competitive recruitment against that new post”.

10. On the same day, he filed the instant application for suspension of action. The Respondent filed his reply on 31 March 2016.

Parties' contentions

11. The Applicant's primary contentions may be summarized as follows:

Prima facie unlawfulness

a. The functions of the newly created P-4 post do not significantly differ from those of the post currently encumbered by the Applicant. Although the letter of the Deputy Director, PCG, of 1 March 2016 refers to "increased responsibilities and tasks" to justify the abolition of the existing post and the creation of a new one at the P-4 level, it becomes clear when examining the terms of reference (ToR) of both posts that they perform in fact the same functions. The wording of the "Background Information—Job specific" section of the Vacancy Announcement ("VA") of each post is largely identical; both posts occupy the same position in the organization, handle the same work and interact with the same actors. While the VA has been manipulated to create "cosmetic" differences (elements of the Applicant's role were simply expanded into the Summary of Functions of the P-4 post to give the impression of additional or higher level tasks), the content of the position remains the same;

b. Business acquisition is inaccurately presented as a new responsibility. Instead, it has been a GSSC priority from its inception; the P-3 VA to which the Applicant applied specifically referenced the provision of human resources services to partners, and other VAs released at the time of GSSC's setting up referred to actively seeking out new business and expanding. The Applicant has been actively involved in business acquisition;

c. A comparison of the Summary of Functions of the newly created P-4 post and other recent P-4 and P-5 posts points to an attempt to inflate the functions of the former, by including adjectives, adverbs and expressions that give the impression of greater responsibility and expanded functions, as opposed to citing any actual new function. Moreover, as per his current supervisor's instructions, Manager Personnel Administration captures more

appropriately the Applicant's role than the functional title in the VA under which he was recruited, i.e., Benefits and Entitlements Manager;

d. Since no substantial functional changes have been made between the P-3 and the P-4, the justification for the abolition of the Applicant's post does not correspond with the facts. Had the proper procedures been followed, his ToR would not have changed, and even if a reclassification exercise had been undertaken, it would not have resulted in a change in the post's level;

e. Even assuming that the P-4 post included some additional duties with respect to the P-3, the post abolition is procedurally unlawful and not justified by the circumstances. According to sec. 3.2.1 of UNOPS Administrative Instruction AI/PCG/2015/01 (Talent Management Framework), a modification of the ToR may be triggered only if the Applicant's functions had changed by more than 30%, which was not the case. Nevertheless, if the functions of the post had changed by at least 30% a reclassification exercise should have taken place, under sec. 3.2.2 of AI/PCG/2015/01. These safeguards were bypassed by a decision to abolish one post and create another;

f. Pursuant to sec 3.2. of AI/PCG/2015/01, reclassification of a post can only take place once the budget has been secured, whereas the Applicant's post had already been budgeted through 2016. Further, under AI/PCG/2015/01, requests for reclassification are subject to review by the "re-classification review body"; this is also in line with staff rule 2.1. Yet, no review in relation to the International Civil Service Commission common system of job classification standards took place;

g. Had a reclassification process taken place, it would not have resulted in the upward reclassification of the post. The deliberate bypass of the procedures for post modification is evidence of bad faith. UNOPS' failure to follow the proper procedures for modifying the Applicant's post led to its unlawful abolition;

h. If a reclassification process had been undertaken, the Applicant would have benefited from procedural protections that were bypassed. Notably, said instruction caters for the line manager to “submit a request for appointment of the incumbent to the reclassified position to the reclassification review body for recommendation to the hiring authority for decision”, whilst requiring the manager to justify the decision to advertise the post instead;

Urgency

i. The recruitment process for the new P-4 post is currently ongoing. If allowed to continue, the selection of another candidate for the P-4 post would entail the Applicant’s separation. The suspension of the decision to abolish his post would have the effect of halting the recruitment exercise;

Irreparable damage

j. Monetary damages are inadequate to compensate the frustration and unhappiness, as well as loss of chance of career development associated with loss of employment. The loss of career opportunities is particularly clear regarding employment within the Organization, which is highly valued employment, particularly because, once out of the system, the prospect of returning to a comparable post is significantly reduced. The Tribunal has routinely suspended action in retrenchment cases.

12. The Respondent’s primary contentions may be summarized as follows:

Receivability

a. The application at hand is not receivable since it contests a restructuring decision, and no notice of termination has been issued. According to the relevant case law, decisions such as the one aimed against do not produce direct legal consequences on a staff member;

Prima facie unlawfulness

b. A full comparison of the P-3 and the P-4 posts at issue reveals many significant differences between them. Essentially, according to its VA, the new post contains the following entirely new senior-level functions, absent in the P-3:

- i. Business acquisition set of functions; and
- ii. Design and prepare “all necessary instructions, [standard operation procedures] and checklists to ensure efficient and accurate administration of personnel contracts and [benefits and entitlements]”;

As well as, functions having a higher degree of responsibility than those of the P-3 post;

c. The decision to abolish the P-3 post and create the P-4 one was justified in view of the significant differences between them. The officials whose recommendations/clearances/approvals are required under secs. 3.2.2 and 3.2.3 of AI/PCG/2015/01 did intervene as needed;

d. As to the timing of the decision, the P-3 post was conceived in late 2014-early 2015. The need for a post with business acquisition functions became apparent in 2016, when GSSC initiated full administration of UNOPS personnel and, in parallel, found the interest of external clients in its services to be much stronger than expected, to the point that it was feared that, if UNOPS did not respond adequately, potential clients would turn to other providers;

e. The Applicant was not denied the opportunity for the incumbent of a reclassified post to be confirmed on the position without a selection process. Rather, the Applicant could not satisfy the requirements for such confirmation—a performance evaluation for the past 12 months showing evidence of satisfactory capability of performing these new functions—because:

i. His tasks with UNOPS have never included business acquisition, hence no evidence of his performing this function exists; and

ii. UNOPS' performance evaluation cycle starts in January, whereas the Applicant started on his current post only in October 2015;

f. Regarding the existence and scope of the Administration's obligation to make efforts to find an alternative position for the incumbent of an abolished post, the Applicant is being given reasonable consideration for the newly created P-4 post, including exempting him of the requirement of a university degree specified in the VA. Also, if not selected for this post, the Applicant will be considered for other available posts;

Urgency

g. The Respondent is prepared to proceed on the basis that the requirement of urgency is satisfied;

Irreparable damage

h. The Applicant cites various rulings on suspension of action applications concerning non-renewal decisions. Unlike those, the instant case is not about termination/non-renewal of appointment. In none of the cited cases did the Tribunal suspend a decision to restructure.

Consideration

Receivability ratione materiae

13. As a preliminary question, the Tribunal must consider if the decision that the Applicant seeks to have suspended constitutes an administrative decision subject to judicial review under art. 2.1 of its Statute (see e.g., *Tabari*, 2010-UNAT-030; *Schook*, 2010-UNAT-013. *Wasserstrom* 2014-UNAT-457, *Al Surkhi*

et al. 2013-UNAT-304, endorsing the definition in the former United Nations Administrative Tribunal Judgment No. 1157, *Andronov* (2003)).

14. In this respect, the Tribunal is aware, on the one hand, of the Appeals Tribunal's view in *Lee* 2014-UNAT-481 that an applicant cannot "challenge the discretionary authority of the Secretary-General to restructure the Organization or to abolish [his or] her post", but only a subsequent administrative decision "resulting from the restructuring once that decision has been made" (see also *Gehr* 2012-UNAT-236). On the other hand, the Tribunal takes note that in *Messinger* 2011-UNAT-123, the Appeals Tribunal entered into analysing the merits of the applicant's claims, which also contested the abolition of his post. Likewise, *Dumornay* 2010-UNAT-097 ruled on "the administrative decision to abolish [the applicant's] post", without questioning the Tribunal's subject-matter jurisdiction to do so.

15. As expressly held in the relevant jurisprudence, the key characteristic of an appealable administrative decision is that it produces direct legal consequences affecting a staff member's terms and conditions of appointment (*Lee* 2014-UNAT-481, *Andati-Amwati* 2010-UNAT-058). Accordingly, it is worth noting that the Applicant undisputedly has been appointed to the P-3 post which is now slated for abolition.

16. Against this background, the Tribunal is satisfied that, under the circumstances of the present case, the Applicant's rights within the meaning of art. 2.1 of the Tribunal's Statute might indeed be affected by the implementation of the contested decision.

Substantive requirements to grant suspension of action

17. According to art. 2.2 of its Statute and art. 13 of its Rules of Procedure, the Tribunal may suspend the implementation of an administrative decision during the pendency of management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency and where implementation of the decision would cause irreparable damage to the concerned staff member. The three aforementioned requirements are cumulative and must all be met for a suspension

of action to be granted (*Ding* Order No. 88 (GVA/2014), *Essis* Order No. 89 (NBI/2015), *Carlton* Order No. 262 (NY/2014)). Each of these three requirements will be analysed in turn with respect to the present case.

Prima facie unlawfulness

18. At the outset, the Tribunal recalls that the threshold required in assessing this first condition is that of “serious and reasonable doubts” about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

19. As regards procedural legality, it is trite law that the Administration has to fully adhere to its own rules and regulations (*Kuchеров* UNDT/2015/106; *Eldam* UNDT/2010/133, see also, *Dhanjee* 2015-UNAT-527, *Abubakr* 2012-UNAT-143, *Nogueira* 2014-UNAT-409).

20. Turning to the administrative procedure used to arrive at the impugned decision, the Tribunal has carefully read the series of emails annexed to the Respondent’s reply, whereby different UNOPS officials—including the Deputy Executive Director, UNOPS, the Deputy Director, PGC, UNOPS the two approved classifiers and the Hiring Manager—participated in the posting change at issue concerning the P-3 post encumbered by the Applicant. It transpires from these exchanges (being particularly explicit from the initial email dated 1 February 2016 from the Director, Corporate Support Practice Group & CIO) that the officials involved intended to “reclassify the position in Bangkok”, that is, the Applicant’s post. It was only toward the final stages of this procedure i.e., in the email of the Hiring Manager of 22 February 2016, that the “post abolition of the current position” is mentioned for the first time.

21. Thus, while the Administration initially ostensibly headed towards a reclassification, it apparently ended up simply abolishing one post and creating another one *ex novo* one level above. In this respect, the Tribunal notes that the

Organization's applicable rules, namely AI/PCG/2015/01, clearly distinguish between "Establishing and classifying new positions" and the "Modification and reclassification of existing positions", and establishes distinct procedures for each of the two types of exercises, under sec. 3.1 and 3.2, respectively.

22. In the present case, reclassification seemed to be indeed the correct course of action, since such is the procedure to be adopted where "without reorganization, the duties and responsibilities of a position are proposed to be materially changed for at least 12 consecutive months" (sec. 3.2.1(b) of AI/PCG/2015/01). Considering the explanations given by the Respondent, this is exactly what was intended with respect to the Applicant's P-3 post.

23. Yet, it is more than doubtful whether the Organization applied the applicable rules for a reclassification exercise. For example, the reclassification procedure requires the participation of a "re-classification body" (sec. 3.2.3 of AI/PCG/2015/01) which, as per the record made available to the Tribunal, did not take place. In addition, and importantly, the procedure stipulated for reclassification exercises encompasses a number of safeguards for the incumbent of the reclassified post. In particular, sec. 7.1.6.5.2(a) allows for the Hiring Manager of a reclassified position to "submit a request for appointment of the incumbent to the reclassified position ... for recommendation to the hiring authority for decision".

24. Based on the above, it would seem that the Administration failed to follow its own procedures to reclassify the Applicant's position, insofar as, while initially aiming for reclassification, the Administration wrongfully shifted to abolishing the post. This raises "serious and reasonable doubts" about the lawfulness of the decision at issue. To this extent, said decision appears to be *prima facie* illegal, in accordance to the standard required in suspension of action proceedings.

25. Having reached this conclusion, and for the sake of procedural economy, the Tribunal needs not to examine at this point the rest of the heads of illegality brought forward by the Applicant.

Urgency

26. The post currently encumbered by the Applicant is scheduled to be abolished on 15 April 2016, i.e., within merely ten working days from the issuance of this Order. Additionally, the recruitment process for the newly created P-4 post is ongoing: the deadline for applications already expired on 19 March 2016, and certain candidates have already been invited to a written assessment to be administered shortly.

27. In this light, the Respondent has acknowledged that the urgency requirement is met, and so does the Tribunal.

Irreparable damage

28. It is well-settled jurisprudence that loss of career opportunity with the Organization amounts to harm that cannot be adequately repaired through financial compensation (*Kotanjyan* Order No. 272 (GVA/2015), *Saffir* Order No. 49 (NY/2013), *Farrimond* Order No. 200 (GVA/2013), *Moise* Order No. 208 (NY/2014), *Kamuguisha* Order No. 270 (GVA/2015)). With this in mind, the Tribunal holds that separating the Applicant—who joined the Organization in 1992—after nearly 25 years of service and merely months after taking over a new post in Bangkok would cause him irreparable damage.

29. That said, the Tribunal is mindful of the fact that the Applicant has not—unlike the applicants in the cases cited in para. 28 above—received notice of termination of his appointment for the time being. Moreover, he holds a permanent appointment and the Administration admits to having a duty to make efforts with a view to identifying an alternative job for him following the abolition of his post. Also, since the recruitment is in progress, it remains completely open whether or not the Applicant will be selected for the advertised P-4 position; it is, in any event, extremely unlikely that the selection process will be finalized within the next weeks, namely during the period where an order for suspension of action pending management evaluation is meant to operate. Notwithstanding the foregoing, it is not unreasonable to assume that the implementation of the intended abolition of the Applicant's current post bears a considerable risk of

eventually resulting in the end of his professional career with the Organization in the near future. Indeed, abolition of post is one of the few hypothesis that may potentially lead to the termination of a permanent appointment, according to staff rule 13.1 in conjunction with staff rule 9.3.

30. Under these specific circumstances, the abolition on 15 April 2016 of the P-3 post the Applicant is encumbering to date could cause him irreparable damage.

Conclusion

31. In view of the foregoing, it is ORDERED that the decision of 1 March 2016 to abolish the Applicant's current post be suspended pending the outcome of the management evaluation.

(Signed)

Judge Thomas Laker

Dated this 4th day of April 2016

Entered in the Register on this 4th day of April 2016

(Signed)

René M. Vargas M., Registrar, Geneva