



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/050

Order No.: 168 (NBI/2014)

Date: 30 June 2014

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TORKONOO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

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

Counsel for the Applicant:

Miles Hastie, OSLA

Counsel for the Respondent:

Alister Cumming, ALS/OHRM

Steven Dietrich, ALS/OHRM

Introduction

1. The Applicant is the Chief Transport Officer at the P5 level in the United Nations Mission in Liberia (UNMIL). On 23 June 2014, he filed an Application for suspension of the decision dated 29 May 2014 not to renew his appointment on its expiry on 30 June 2014 following a proposed abolishment of his post..
2. The Respondent filed a Reply to the Application on 25 June 2014.

Facts

3. The Applicant joined the United Nations in June 2008. His appointment was renewed on a number of occasions and is due to expire on 30 June 2014.
4. On 29 May 2014, Hubert Price, Director of Mission Support, UNMIL, informed the Applicant that as UNMIL was downsizing and the Mission's budget was going to be cut, his post would be abolished after 30 June 2014 and that his contract which expires on 30 June 2014 would not be renewed.
5. The Applicant requested management evaluation of the decision on 18 June 2014.
6. The Applicant filed the present Application on 23 June 2014. The Respondent filed a Reply on 25 June 2014. Thereafter, the Tribunal heard oral submissions from Counsel for both parties on 26 June 2014.
7. It was agreed on both sides that two grounds of the Application namely urgency and irreparable damage were conceded and that the only ground of the Application that would be canvassed and argued was that of *prima facie* unlawfulness.

Applicant's case

8. The Applicant's case may be summarized as follows:

Prima facie unlawfulness

- a. In his interoffice memorandum to the Applicant dated 29 May 2014, Mr. Price informed him that due to downsizing of the Mission and cut on its budget, his post was to be abolished after 30 June 2014 and that his current employment contract which ends on that date would therefore not be renewed.
- b. The Respondent seeks to rely on annex R2 which is the Secretary-General's Report on the Budget for the United Nations Mission in Liberia for the period from 1 July 2014 to 30 June 2015¹. At paragraph 95 of that report, there is a proposal to reclassify the post of Chief Transport Officer encumbered by the Applicant from the P5 to the P4 level.
- c. The interoffice memorandum of 29 May 2014 had therefore not given the Applicant the true reason for the non-renewal of his fixed term contract. The Applicant's post was not up for abolishment as stated in the said memorandum.
- d. Since there is a proposal by the Secretary-General to reclassify the Applicant's post, there is a detailed process under ST/AI/1998/9 (System for the classification of posts) which ought to be followed. The Applicant is not aware that a reclassification has been undertaken in respect to his post.
- e. UNMIL Administration has failed to follow the rules relating to reclassification of posts, specifically staff rule 2.1 and ST/AI/1998/9.
- f. If the Organization conducted a classification review before the budget in February 2014, it should not have negatively affected the Applicant's contractual status. There is no proposal to retain him at his current grade and salary level.
- g. No efforts have been made to reassign him to a post at his personal grade level pursuant to section 4.2 of ST/AI/1998/9.

¹ Dated 20 February 2014.

h. The UNMIL budget had not been approved at the time the memorandum of 29 May 2014 was written.

i. Should a classification review process be proposed in the future, classification will not become effective until after the Applicant's proposed separation, and thus, there is no basis for his separation.

j. Should the Administration argue that it has sought classification advice, the classification remains ineffective until after budget approval, which has not yet occurred. The Applicant should be entitled to exercise his procedural rights to appeal the classification decision at that point.

k. The Mission has generated guidelines for its downsizing/retrenchment process. The ostensible function of these guidelines is to ensure an informed, rational downsizing process, which fulfils Organizational priorities and is free of arbitrariness and bias. The guidelines are designed to ensure, *inter alia*, that staffs that have an appropriate skill-set to continue to contribute to the downsized Mission have an opportunity to demonstrate their ability to do so.

l. The Applicant has not been afforded this opportunity. In fact, not only has the Mission not given him such an opportunity to retain his position through classification review or comparative review, it has apparently not even advertised the proposed P4 post.

m. Not only does this prejudice the Applicant, it also has the necessary consequence of leaving a temporary gap in the Mission's vehicle fleet management. The Mission has not requested and the Applicant has not prepared any kind of handover for these functions.

n. In his written submissions, the Respondent argues that this is a case of non-renewal of appointment simpliciter. The authority of *Schook*² makes it clear that a case of non-renewal is reviewable by the Tribunal.

² 2012-UNAT-216.

o. The Appeals Tribunal had decided in *Obdeijn*³ that the Administration cannot legally refuse to give reasons for non-renewal of a fixed term appointment and that where reasons are not given, it will be inferred that the reasons are unlawful.

p. Finally, there is no factual basis for the impugned decision to separate the Applicant and not to renew his contract. The said decision is unlawful.

Respondent's case

9. The Respondent's case may be summarized as follows:

Prima facie unlawfulness

- a. The Applicant has not discharged his burden of showing that the contested decision is *prima facie* unlawful.
- b. The decision not to renew the Applicant's appointment was lawful. A fixed-term appointment does not carry any expectancy of renewal, irrespective of length of service.
- c. The Applicant was advised that his appointment would not be renewed after 30 June 2014. In fact, the post he currently encumbers is subject to a proposal for reclassification.
- d. There is no requirement under ST/AI/1998/9 for a classification analysis to be conducted prior to the approval of a reclassification proposal by the General Assembly. Such a classification analysis may be conducted after a General Assembly resolution. In this case, if the post is to be reclassified, it will be after a General Assembly resolution, approving the budget proposal submitted. At that stage, a request for reclassification will be made under ST/AI/1998/9. The reclassification decision has therefore not yet been made.

³ 2012-UNAT-201 at paragraph 37.

- e. In the present case, the Applicant's appointment was not terminated as a result of a reclassification process. Contrary to the Applicant's contention, section 4.2 of ST/AI/1998/9 is not applicable to this case as no reclassification decision has been taken, which affects his existing contractual status. Accordingly, the Administration is not required to reassign the Applicant to a post at his personal grade level.
- f. A staff member's fixed-term appointment may be allowed to expire as a result of the underlying post financing the staff member's position having been reclassified. This is because a fixed term appointment expires automatically and carries no expectancy of renewal. Any resulting substantive change in the function of the post financing the position may justify a decision not to renew a staff member's appointment for another fixed term.
- g. No comparative review process was carried out in this case. Such a process is not appropriate where, as in the Applicant's case, a post is to be reclassified. Instead, if the post is reclassified, the Applicant is free to compete for the newly reclassified post.
- h. The decision in *Schook* cited by the Applicant's Counsel is not relevant here because it only establishes that non-renewal decisions must be in writing. The Applicant was communicated the decision not to renew his appointment in writing.
- i. The case of *Obdeijn* also cited by the Applicant is similarly not applicable since a reason was given the Applicant for non-renewal of his appointment. The reason for the non-renewal is the proposal to reclassify the Applicant's post.

Consideration

10. Article 2.2 of the Dispute Tribunal's Statute and art. 13 of its Rules of Procedure provide that it may order the suspension, during the pendency of

management evaluation, of the implementation of a contested administrative decision that is the subject of an on-going management evaluation, where the decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage.

11. As Counsel for the Respondent has conceded that the Application is both urgent and will result in irreparable harm to the Applicant, the Tribunal shall proceed to determine whether the remaining requirement for the grant of a suspension of action as stipulated in the said art.13 which is *prima facie* unlawfulness has been met.

12. 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 staff⁴. Decisions of this kind may be set-aside only on limited grounds, for example upon the breach of procedural rules, or if discretion was exercised in an arbitrary, capricious or illegal manner. The Administration's decisions must not be based on erroneous, fallacious or improper motivation⁵. The burden of proving improper motivation lies with the staff member contesting the decision not to renew his or her contract⁶.

13. In the present case, the Applicant has been given several reasons as to why his fixed-term appointment will not be renewed on 30 June 2014. In the 29 May 2014 memorandum, he was informed that his post had been abolished due to a reduction in UNMIL's budget. At the hearing of this Application, Counsel for the Respondent argued that fixed-term appointments do not carry any expectancy of renewal, irrespective of length of service. Counsel for the Respondent filed the Secretary-General's Report on the Budget for the United Nations Mission in Liberia for the period from 1 July 2014 to 30 June 2015 to support his case. Paragraph 95 of the Report is relevant to this case and is reproduced below:

95. The Transport Section, with its currently authorized staffing establishment of 185 posts and positions (1 P-5, 16 Field Service, 1 National Professional Officer post, 144 national General Service

⁴ See for example *Pacheco*, 2013-UNAT-281 at paragraph 22.

⁵ See *Asaad* 2010-UNAT-021 at paragraph 11.

⁶ *Hepworth* 2011-UNAT-178 at paragraph 29.

posts, and 23 United Nations Volunteer positions), provides surface transport service with respect to efficient, reliable and safe vehicle usage. The Section comprises several units, including Reception, Workshops in Monrovia and the eight sectors, Transport Stores, Dispatch, Driver Assessment and Testing Unit, Accident Unit and Car Log Unit. Based on the assessment of the Mission in the context of its overall downsizing and within the context of the reorganization of Mission Support in line with the global field support strategy model, which is expected to result in the reduction of the workload of various units within the Section, it is proposed to redeploy one Field Service post, four national General Service posts and two United Nations Volunteer positions to the Supply Section and Central Warehouse. In addition, it is also proposed to abolish two Field Service posts, one of Sector Coordinator and one of Budget Assistant, as well as one National Professional Officer post of Transport Officer. In the context of the overall downsizing of the Mission, the reduction of the vehicle fleet and the transfer of certain acquisition planning and asset management functions to the Central Warehouse, ***it is proposed to reclassify the post of Chief Transport Officer from the P-5 to the P-4 level.*** (Emphasis added).

14. It is trite law even in the United Nations internal justice system that a decision not to renew a fixed-term appointment is a distinct and challengeable administrative decision⁷. Administrative decisions that affect the terms of employment of a staff member ought not to be arbitrary or motivated by factors inconsistent with proper administration, nor should they be based on erroneous, fallacious or improper motivation. When a justification is given by the Administration for the exercise of its discretion, it must be supported by the facts⁸.

15. In the present case the reasons given by the Administration are not supported by the documentary record. The Applicant's post has not been abolished. What is before the General Assembly so far is merely a proposal from the Secretary-General that the Applicant's post be reclassified. As correctly argued by the Applicant, there is a detailed process under ST/AI/1998/9 which ought to be followed if and when the Secretary-General's proposal is adopted by the General Assembly.

16. The Tribunal finds that, as there has been no decision by the General Assembly to abolish and reclassify the Applicant's post, the UNMIL Director of

⁷ *Schook, supra* at paragraph 27.

⁸ *Islam 2011-UNAT-115* at paragraph 29.

Mission Support acted without authority. He cannot by himself abolish any posts in the mission. The separation decision conveyed to the Applicant on 29 May 2014 was made without any basis or authority on the part of the UNMIL Director of Mission Support and the Tribunal finds that the requirement of *prima facie* unlawfulness has been satisfied.

Conclusion

17. In view of the foregoing, the Tribunal grants the Application for suspension of action and it is ordered that the implementation of the decision to separate the Applicant from service on 30 June 2014 be suspended pending the response from management evaluation.

18. The Applicant must be on notice that the grant of this interim Order will be necessarily discharged upon receipt of the response from the Management Evaluation Unit.

(Signed)

Judge Nkemdilim Izuako

Dated this 30th day of June 2014

Entered in the Register on this 30th day of June 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi