



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2022-UNAT-1204

**Obah Yusuf Barud
(Respondent/Applicant)**

v.

**Secretary-General of the United Nations
(Appellant/Respondent)**

JUDGMENT

Before: Judge Kanwaldeep Sandhu, Presiding
Judge Graeme Colgan
Judge John Raymond Murphy

Case No.: 2021-1552

Date: 18 March 2022

Registrar: Weicheng Lin

Counsel for Obah Yusuf Barud: Self-represented

Counsel for Secretary-General: Noam Wiener/André Luiz Pereira de Oliveira

JUDGE KANWALDEEP SANDHU, PRESIDING.

1. The former staff member, Obah Yusuf Barud, contested the decision of the United Nations Hybrid Operation in Darfur (UNAMID) not to renew her fixed-term appointment beyond its expiration on 30 June 2019 (the contested decision) following a comparative review process (Comparative Review Process or CRP) in which she had been identified for retrenchment after a downsizing exercise. In Judgment No. UNDT/2021/017 (the Judgment), the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) held the CRP was unlawful and ordered rescission of the contested decision, reinstatement in her position from the date of separation, and *in lieu*-compensation of one year's net base pay. The UNDT denied Ms. Barud's request to address alleged misconduct on the part of her supervisors and her request for moral damages. The Secretary-General appeals.

2. For the reasons set out below, we allow the appeal and vacate the Judgment.

Facts and Procedure

3. The former staff member, Ms. Barud, joined UNAMID on 20 June 2011 as a General Services Assistant at the FS-5 level within the UNAMID General Services Section.

4. In 2013, the General Services Section at UNAMID was dismantled, and Ms. Barud was reassigned with the post she encumbered to the Facilities Management Unit (FMU) of the UNAMID Engineering, Water and Environmental Section (Engineering Section).

5. On 29 June 2017, the Security Council adopted Resolution 2363 (2017), which, among other things, mandated a reduction of the civilian force at UNAMID. Subsequently, on 16 March 2018, the Secretary-General submitted to the General Assembly a budget for UNAMID for the biennium 2018-2019, proposing a reduction of civilian staff, with such reduction to be implemented in three phases by 30 June 2019. The Secretary-General's proposed reduction included the abolition of six field service posts in the Engineering Section.

6. On 15 May 2018, Ms. Barud received written terms of reference (TOR) for her role as "Interim Offices Supervisor". The TOR set out roles and responsibilities of a Facilities Management Assistant (FMA), FS-5. The internal Personnel Action Form indicates her Position Title as Administrative Assistant. However, her Personal History Profile printed 13 September 2018, indicates present employment as Facilities Management Assistant (FMA)

from 15 May 2018 as well as Administrative Assistant. On 9 and 17 September 2018, UNAMID broadcasts informed all mission staff members about the proposed reduction in personnel and confirmed the establishment of the CRP. In the 17 September 2018 e-mail to staff members, UNAMID confirmed the TOR for the CRP.

7. After assessing the future needs of the Engineering Section during UNAMID's wind-down period, the Chief of the Engineering Section determined that only one of the two FMAs would be required to carry out the mandate of the Engineering Section. Ms. Barud and the other staff member, both of whom were performing the functions of an FMA at the FS-5 level, participated in the CRP to determine which of them would be retained and which would be retrenched. Ms. Barud scored lower than the other staff member and was identified for retrenchment.

8. By e-mail dated 29 October 2018, UNAMID's Human Resources Management Section (HRMS) informed Ms. Barud that she was among staff identified for retrenchment effective 1 July 2019.

9. The General Assembly approved the revised budget on 22 December 2018.

10. On 24 February 2019, the Acting Director of Mission Support informed Ms. Barud that her fixed-term appointment would not be renewed beyond 30 June 2019 (the contested decision). She applied to the UNDT challenging the contested decision.

11. In the resulting Judgment, the UNDT rescinded the contested decision. The UNDT held that the CRP was unlawful because the Secretary-General was not entitled to assess Ms. Barud based on her job description as described in her TOR and his reliance on the FMA TOR was irregular and unlawful. In addition, the UNDT held that the Secretary-General had no discretion to set up a CRP as the sole FMA position was expressly and clearly identified in the new UNAMID structure for abolition. Ms. Barud had demonstrated her functions were neither the same nor similar to those performed by her comparator and whose post was expressly identified for abolition. Ms. Barud's annual performance reviews for the two years prior to her redesignation as an FMA showed that she had performed Administrative Assistant tasks and because her post was designated as an Administrative Assistant position, the Organization should have ignored the fact that the TOR for her post had been altered before the commencement of the CRP and ignored that she was no longer working as an Administrative Assistant but as an FMA. Consequently, the

UNDT held that, during the downsizing exercise, Ms. Barud should have been treated as an Administrative Assistant and should not have been considered for retrenchment. The UNDT ordered rescission of the contested decision, reinstatement in her position from the date of separation, and in lieu compensation in the amount of one year's net base pay salary. The UNDT denied Ms. Barud's request to address alleged misconduct on the part of her supervisors and her request for moral damages.

Submissions

The Secretary-General's Appeal

12. The Secretary General says the UNDT erred in fact and law by finding that Ms. Barud was not a Facilities Management Assistant, and that consequently it was unlawful to subject her to a Comparative Review Process. In coming to this conclusion, the Secretary-General contends that the UNDT confused various stages of the Comparative Review Process, one in which the function of staff members is determined and the second in which the comparison of staff members occurs. Specifically, the Secretary-General contends that the UNDT confused the criteria used to determine the function of staff members and the criteria used to compare staff members who are deemed to be performing similar functions. The first stage of the Comparative Review Process, described in the "Scope of the Review" section of its TOR, involved grouping of staff members into categories based on the functions they performed (including rank and category) for the purpose of comparison. The determination of which staff members should be compared together within each section was to be guided by the functional title as per the staff member's letter of appointment (LoA). However, in cases where the functional title did not reflect the actual functions performed, the Chief Human Resources Officer (CHRO) determined which individual falls into which occupational group within the same grade. Ms. Barud's actual functions, at the time of the Comparative Review Process, were those of an FMA.

13. The TOR for her role within the Engineering Section show that she was tasked with the work of an FMA. In the personal history profile document Ms. Barud submitted to the Panel to determine her suitability for in the context of the CRP, she enumerated duties and achievements which corresponded precisely to the functions of an FMA. Moreover, when the Administration notified Ms. Barud that she was among the staff members identified for retrenchment effective 1 July 2019, she responded describing herself as an FMA and prepared a chart in which she compared herself, as an FMA, to the other FMA working for the

Engineering Section at her level. Thus, with regard to the first step in the process, it did not matter, for the sake of the “grouping” or classification of Ms. Barud’s functions at the time of the Comparative Review Process, that in the past she had performed the functions of an Administrative Assistant. At the relevant time she was performing the functions of an FMA and as such, UNAMID legitimately compared her to the other FMA during the process.

14. At the second stage of the Comparative Review Process, described in the “Order of Preference (Retention)” and “CRP Evaluation Criteria” sections of the TOR for the Comparative Review Process, staff members within each category would be evaluated and given a score to determine which of the staff members would be retained and which would be retrenched. At this second stage, the Panel would examine and score each staff member on length of continuous service, relevant experience in relation to the current function, overall performance ratings for the two previous reporting cycles (2016/2017 and 2017/2018), and core values rating for each reporting cycle. Additionally, in cases where two staff members scored the same number of points, the Panel was permitted to determine who would be subject to retrenchment based, among others, on gender and national origin in relation to troop or police contributing countries.

15. The Secretary-General submits that because the UNDT erred by confusing these two distinct stages of the process, it erroneously concluded that the Secretary-General was not permitted to rely on a description of the functions that Ms. Barud was performing at the time of the downsizing, and that instead the Secretary-General could only rely on Ms. Barud’s annual performance evaluations and the personal history profile.

16. The Secretary General says that it was an error of law on the part of the UNDT to hold that the past performance reviews were the only documents that could be used at the first stage of the process.

17. Further the Secretary-General submits that the UNDT incorrectly held that the Secretary-General abused his discretionary power when he decided to determine whether Ms. Barud should be retained or retrenched based on a CRP. UNAMID determined that only one FMA would be needed at the Engineering Section following the downsizing. In accordance with the Secretary-General’s “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”, UNAMID was authorized to make this determination. In accordance with the Secretary-General’s obligation to “act fairly, justly, and transparently in dealing with staff members”, UNAMID then conducted the

second part of the process – the Comparative Review Process – transparently and fairly, following the TOR it had sent to UNAMID staff.

18. The Secretary-General says that the UNDT's holding that the contested decision violated a gender parity initiative is an error of law. The UNDT did not specify or cite any specific Regulation or Rule, or administrative instruction issued thereunder, on gender parity that the contested decision had violated. The legal framework under which the CPR took place did not permit the Secretary-General to give preference to Ms. Barud for gender parity reasons as erroneously held by the UNDT.

19. The Secretary-General requests UNAT to vacate the Judgment and uphold the contested decision.

Ms. Barud's Answer

20. Ms. Barud submits that the Secretary-General's allegation that Ms. Barud served as an Administrative Assistant at the Engineering Section between 2013 and 15 May 2018 only is untrue and unsupported. Her Personnel Actions (PAs) until 30 June 2019 reflect her functional title as Administrative Assistant until June 2019.

21. She also says that the Secretary-General's claim, that on 15 May 2018 Ms. Barud's TOR were changed and that her new functions were those of an FMA is untrue and misrepresents the facts. The e-mail dated 15 May 2018 was an internal document sent by Ms. Barud's First Reporting Officer and was not an official document sent by an authorized office (Human Resources (HR) or Field Personnel Division). HR never discussed with her, or informed her of, any changes to her contractual status, including official functional title or job duties and responsibilities. There was no reclassification of her post which required the change of her functional title.

22. Moreover, the FMA functions in the 15 May 2018 e-mail were copied from a generic job description to reflect the duties and responsibilities of an FMA. They were not actually performed functions recorded in her 2016-2017 and 2017-2018 e-PAS documents as required by the CRP. The performance cycles required for the CRP were for the cycles 2016-2017 and 2017-2018. The CRP Panel was bound by the period ending on 31 March 2018 and as such the e-mail dated 15 May 2018 which attached the TOR for Ms. Barud's role of Interim Offices Supervisor for the 2018-2019 cycle was irrelevant as it did not fall within the CRP review period.

The Secretary-General's claim that as of 15 May 2018 Ms. Barud's functions changed to FMA is irrelevant and immaterial to the requirements of the CRP.

23. Ms. Barud says that the Secretary-General's contention that the Chief of the Engineering Section determined that only one of the two Facilities Management Assistants would be required to carry out the mandate of the Engineering Section is also misleading and misrepresents the facts: Ms. Barud is not an FMA. In line with the Comparative Review Process' terms of reference titled "Scope of Review", the FMA, which was a unique post explicitly identified for abolition, should have been "dry-cut". Ms. Barud's Administrative Assistant post was not abolished. Ms. Barud was subjected to an unlawful review process for the benefit of the male FMA staff member whose post was abolished.

24. Further, she argues that the Secretary-General's statements that a Comparative Review Process panel conducted a review of the two FMA staff members working in the Engineering Section, applying the Comparative Review Process terms of reference, and the Panel awarded Ms. Barud's colleague who was performing the same function, a higher score than Ms. Barud, are again misleading and misrepresent the facts. Ms. Barud's official functional title prior, at the time, and after the Comparative Review Process and until her last day of service was Administrative Assistant. The FMA functional title was used to justify the unlawful comparative review since the abolished function was the FMA and the FMA male staff was the one to be terminated.

25. The TOR of the Comparative Review Process under the "Scope of Review" required that the determination of which staff members should be compared within each section was primarily guided by the functional title in accordance with the staff member's LoA. Ms. Barud's LoAs and PAs at the time reflected her official functional title as Administrative Assistant and she should not have been compared to a staff member bearing the functional title of FMA.

26. Furthermore, under "Scope of Review", the terms of reference provided that within a section, staff members were to be reviewed against other staff members performing the same or similar functions at the same level and in the same category. The responsibilities for an FMA as set out in the 15 May 2018 letter were entirely different from the Administrative Assistant related functions properly recorded in Ms. Barud's 2016-2017 and 2017-2018 e-PASs.

27. The UNDT relied on Ms. Barud's LOA's functional title and the administrative functions recorded in her 2016-2017 and 2017-2018 performance evaluations required for the purpose of the Comparative Review Process and correctly held that her performance evaluations related to the functions she performed at the time of the evaluation in accordance with the TOR. The Comparative Review Process terms of reference were not followed and the UNDT appreciated all the facts and did not err in law or fact.

28. Ms. Barud says she was separated from the Organization after 28 years of dedicated service and excellent performance. She requests reinstatement in service retroactively from 1 July 2019 with all her benefits and entitlements restored including her pension contribution. She also seeks compensation for "damage caused to [her] health, human dignity, human right and staff rights".

Considerations

29. The issue in the appeal is whether the contested decision, namely the non-renewal of Ms. Barud's fixed-term appointment, was unlawful. We note that this is not an issue of termination due to abolition of a post.

30. The Secretary-General says the Dispute Tribunal erred in law and fact in rescinding the contested decision and in finding that Ms. Barud fulfilled the role of an Administrative Assistant and not an FMA and that the Comparative Review Process was unlawful. In addition, he submits the UNDT erred in finding that the Secretary-General abused his discretion in not retaining Ms. Barud based on the Comparative Review Process.

Did the Dispute Tribunal err in finding the Comparative Review Process was unlawful?

31. The Dispute Tribunal held that there was "clear and convincing evidence that the CRP was unlawful" and the "administration violated its own regulations and rules governing its conduct" namely the "gender policy by placing [Ms. Barud] in an unfair comparative review process" and in breach of the CRP regulations and rules.¹

32. The starting point of a judicial review of a non-renewal of a fixed-term appointment is that a fixed-term appointment carries no expectancy of renewal or conversion (Staff Rule 4.13(c)). "Nevertheless, an administrative decision not to renew a fixed-term appointment can be

¹ Impugned Judgment, paras. 60-62.

challenged on the grounds the Agency has not acted fairly, justly or transparently with the staff member or was motivated by bias, prejudice or improper motive against the staff member. The staff member has the burden of proving such factors played a role in the administrative decision.”²

33. In reviewing instances of abolition of a post, the settled jurisprudence is that an international organization necessarily has the power to restructure some or all its departments or units, including the abolition of posts, the creation of new posts, and the redeployment of staff. The Appeals Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly, and transparently in dealing with staff members.³

34. In the present case, the issue is whether the contested decision (Mr. Barud’s non-renewal due to abolition of post) can be challenged on the ground that the Administration has not acted “fairly, justly, or transparently”.

35. In the Judgment, the Dispute Tribunal reviewed the Comparative Review Process’ terms of reference and scope of review and held that the Administration failed in its duty to act fairly, justly, and transparently in dealing with Ms. Barud and failed to follow its own regulations and rules. In particular, the Comparative Review Process panel failed to rely on Ms. Barud’s 2016-2017 and 2017-2018 e-PASs, PHP and LoAs in determining her functions and job duties.

36. The terms of reference of the Comparative Review Process recognized that the United Nations Security Council in its resolution 2429 (2018) endorsed the recommendations of the Special Report of the Chairperson of the African Union Commission and the Secretary-General on the strategic review of UNAMID of 1 June 2018 (S/2018/530) including that “(i)n line with the UNSCR 2429 there will be a decrease in the Mission’s geographical footprint in Darfur, with a commensurate overall reduction in the uniformed personnel and civilian staff by June 2019”. Recognizing the impact of the reduction, the Administration established comparative review panels to undertake a review of staff encumbering posts that would be abolished as guided by the criteria set out in Staff Rules 9.6(e) and 13.1(d) as well as Article 101 of the UN Charter.

² *Said v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-500, para. 34 (internal footnotes omitted).

³ *Nouinou v. Secretary-General of the United Nations*, Judgment No. 2019-UNAT-902, para. 34.

37. The Dispute Tribunal held that the Administration was not entitled to assess Ms. Barud based on a job description as described in the FMA TOR and that the only legitimate documents to consider her actual functions were the “letters of appointments” as recorded in the PHP.

38. However, there is nothing in the terms of reference of the Comparative Review Process or in the Regulations and Rules that prevented consideration of the FMA TOR of 15 May 2018. Rather, the scope of review of the Comparative Review Process set out the following:

The determination of which staff members should be compared together within each section is primarily guided by the functional title as per the staff member’s letter of appointment. In cases where the functional title does not reflect the actual functions performed (e.g. a driver may be performing clerical duties, or an administrative assistant may be performing program assistant functions), the CHRO must determine which individual falls into which occupational group within the same grade, while clearly documenting the basis upon which the determination was made (e.g. workplan as documented in the e-Performance, consultation with the relevant Section Chief, emails regarding work allocation, etc.).

39. Therefore, while the determination of which staff members should be compared together is “primarily guided by the functional title as per the staff member’s letter of appointment”, there can be cases where the functional title does not reflect the actual functions performed as in the present case. In these circumstances, the CHRO must determine which individual falls into which occupational group.

40. The Dispute Tribunal says that Ms. Barud outlined her actual administrative functions during the relevant period 2016 to March 2018 as an Administrative Assistant and that she had demonstrated her functions were not as an FMA. We find the Dispute Tribunal erred in fact in making this finding. Ms. Barud’s role and functions changed in May 2018 to a Facilities Management Assistant as per the FMA TOR and e-mail of 15 May 2018. Therefore, at the time of the Comparative Process Review, her job functions and duties were as an FMA and not as an Administrative Assistant. In addition, Ms. Barud’s Personal History Profile lists her employment as Facilities Management Assistant with a description of her duties. These duties are different from the duties listed in the Personal History Profile as Administrative Assistant.

41. The Dispute Tribunal failed to consider the entirety of the Comparative Review Process terms of reference and Ms. Barud's PHP when it held that it was immaterial that at the time of the Comparative Review Process Ms. Barud performed FMA functions not reflected in her LoAs, PHP, or e-PASs.

42. We agree with the Secretary-General that the Dispute Tribunal confused or misinterpreted the terms of the reference of the Comparative Review Process.

Did the Dispute Tribunal err in finding the Secretary-General abused his discretion in the Comparative Review Process?

43. In reviewing the validity of the Secretary-General's exercise of discretion in administrative matters, such as a non-renewal decision, the Dispute Tribunal determines if the decision can be challenged on the grounds that the Administration has not acted fairly, justly or transparently. In particular, the Dispute Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered and whether the decision is absurd or perverse.⁴

44. The Dispute Tribunal held that there was "no legal justification for conducting the Comparative Review Process and further for introducing a document, namely the 15 May 2018 FMA/TOR" as the Comparative Review Process terms of reference "clearly prescribed the documents that would be used".⁵ We disagree. The Comparative Review Process terms of reference enumerates what documents the HRMS would provide to the Comparative Review Process Panel, including lists of posts, the CRP terms of reference, individual staff members' latest two e-Performance reports, individual staff members' PHPs, and a scoring matrix. It is correct that an e-mail such as the 15 May 2018 e-mail which changed Ms. Barud's functions is not included in the list.

45. However, later in the Comparative Review Process terms of reference, it specifically considers circumstances where a staff member's LoA does not reflect their actual functions performed, in which case the CHRO is tasked to determine which individual falls into which occupational group within the same grade and clearly documenting the basis for the determination including "workplan as documented in the e-Performance, consultation with the relevant Section Chief, emails regarding work allocation, etc.". Therefore, in determining

⁴ *Ibid.*, para. 48; *He v. Secretary-General of the United Nations*, Judgment No. 2018-UNAT-825, para. 43.

⁵ Impugned Judgment, para. 54.

which staff members are to be compared, the CHRO makes a determination based on relevant documents not restricted by the TOR. However, once this determination is made, then the Comparative Review Process relies on the documents presented by the HRMS as set out above.

46. As a result, the Dispute Tribunal erred in finding the Administration ignored relevant and clear guidelines and considered irrelevant matters (i.e., the FMA TOR) resulting in an illegal decision. The Administration followed the Comparative Review Process terms of reference and guidelines. There was no basis for the Dispute Tribunal to find that the Administration ignored relevant guidelines or considered irrelevant matters rendering the contested decision unlawful.

47. Further, the Dispute Tribunal erred in finding there was no legal justification for conducting the Comparative Review Process for Ms. Barud on the basis that she should not have been subjected to the Comparative Review Process and that she was unlawfully treated as a Facilities Management Assistant. Ms. Barud was lawfully treated as a Facilities Management Assistant pursuant to the Comparative Review Process terms and to her actual functions at the time and therefore was properly subjected to the Comparative Review Process.

48. There is no dispute that the Administration and UNAMID have the power to restructure some or all its departments or units, including the abolition of posts, the creation of new posts, and the redeployment of staff. Pursuant to this authority, UNAMID determined that only one FMA would be needed at the Engineering Section following the downsizing. We find that UNAMID conducted the Comparative Review Process pursuant to the terms and guidelines of its TOR, and the relevant rules and regulations. If so, the Administration acted fairly, justly, and transparently in dealing with Ms. Barud.

49. The Dispute Tribunal found that the contested decision unfairly breached the Secretary-General's Gender Parity Initiative and that it was "unfair" for Ms. Barud to be separated in favour of a male colleague due to Ms. Barud's long service and dedication to the system. This finding is an error of law. It is not clear what Gender Parity Initiative the Dispute Tribunal relied upon. There is a System-wide Strategy on Gender Parity issued by the Administration that sets out goals and special measures for the recruitment, promotion and retention of women in the Organization. However, the UNDT did not specify or cite any specific special measure, Regulation or Rule, or administrative instruction issued on gender parity that the contested decision violated.

50. The legal framework that governed the downsizing and Comparative Review Process did not permit the Administration to consider gender parity in the downsizing process or the non-renewal decision except as an additional tie breaker criterion which was not the case here. Staff Rule 9.6(e) provides that when downsizing “due regard shall be given in all cases to relative competence, integrity and length of service” and which provides an order of preference in which staff members will be retained. It does not include any reference that would permit the Secretary-General to take gender into consideration in making decisions related to the retention of staff except in circumstances of a tie.

51. Finally, it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General nor to substitute its own decision for that of the Secretary-General.⁶ Here, the Dispute Tribunal instead considered the “fairness” of the contested decision and as such erred in law.

52. In conclusion, we find the Dispute Tribunal erred in determining that the Secretary-General improperly exercised his discretion by not renewing Ms. Barud’s fixed-term appointment and that the contested decision was unlawful. Therefore, the impugned Judgment and rescission of the contested decision and the award for compensation *in lieu* are vacated. As there has been no illegality, Ms. Barud’s claim for damages and other remedies cannot be granted.

⁶ *He Judgment, op. cit.*, para. 44.

Judgment

53. We vacate Judgment No. UNDT/2021/017 and reinstate the contested decision.

Original and Authoritative Version: English

Dated this 18th day of March 2022.

(Signed)

Judge Sandhu, Presiding
Vancouver, Canada

(Signed)

Judge Colgan
Auckland, New Zealand

(Signed)

Judge Murphy
Cape Town, South Africa

Entered in the Register on this 26th day of April 2022 in New York, United States.

(Signed)

Weicheng Lin, Registrar