



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/066

Judgment No.: UNDT/2021/017

Date: 3 March 2021

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BARUD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Nicole Wynn, AAS/ALD/OHR
Maureen Munyolo, AAS/ALD/OHR

Introduction

1. This is an application filed by the Applicant contesting the United Nations Hybrid Operation in Darfur's ("UNAMID") decision not to renew her fixed-term appointment beyond its expiration on 30 June 2019 ("the contested decision"). The Respondent argues that the contested decision was lawful because UNAMID did not renew the Applicant's appointment following a lawful downsizing exercise and that the Applicant was identified for retrenchment after a fair and transparent comparative review process ("CRP"). For reasons set out below, the Tribunal grants the application.

Facts and Procedure

2. The Applicant was recruited as a General Services Assistant at the FS-5 level on 20 June 2011. In 2013, the General Services Section ("GSS") was dismantled and its staff distributed to other sections and units. The Applicant was reassigned to the Facilities Management Unit ("FMU") of the Engineering, Water and Environmental Section ("Engineering Section")¹.

3. On 16 March 2018, the Secretary-General submitted to the General Assembly UNAMID's 2018-2019 budget proposing a reduction of 1,183 civilian staff to be implemented in three phases by 30 June 2019 including the proposed abolition of six Field Service ("FS") posts in the Engineering Section².

4. On 1 June 2018, the Chairperson of the African Union Commission and the Secretary-General issued a joint special report on the strategic review of UNAMID (Special Report), which recommended a further reduction in UNAMID's civilian component and the closure of 13 team sites and three Sector Headquarters with a view to the closure of UNAMID by 30 June 2020. On 13 July 2018, the Security

¹ Application, para. 1; Respondent's Closing Submissions, para. 4.

² Reply, para. 4 referencing A/72/794, Budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2018 to 30 June 2019, p. 4.

Council extended UNAMID's mandate to 30 June 2019 and endorsed the Special Report's recommendations³.

5. On 9 and 17 September 2018, UNAMID broadcasts informed all mission staff about the proposed reduction in staff and provided the CRP terms of reference ("CRP/TOR")⁴.

6. On 30 September 2018, the CRP panel reviewed the Applicant against one other FS-5 staff member performing Facilities Management Assistant ("FMA") functions within the Engineering Section. The Applicant scored lower than the other staff member and was identified for retrenchment⁵.

7. By email dated 29 October 2018, UNAMID's Human Resources Management Section ("HRMS") informed the Applicant that she was among staff identified for retrenchment effective 1 July 2019⁶.

8. On 5 November 2018, the Secretary-General submitted UNAMID's revised budget to the General Assembly. The revised budget proposed the abolition of further posts, including the abolition of an additional three FS posts in the Engineering Section.⁷

9. The General Assembly approved the revised budget on 22 December 2018⁸.

10. By letter dated 24 February 2019, the Acting Director of Mission Support informed the Applicant that her fixed-term appointment would not be renewed

³ Reply, para. 5 referencing S/2018/530, Special report of the Chairperson of the African Union Commission and the Secretary-General of the United Nations on the strategic review of the African Union-United Nations Hybrid Operation in Darfur, paras. 61-63 and S/RES/2429 (2018) on extension of the mandate of the AU/UN Hybrid Operation in Darfur (UNAMID) until 30 June 2019.

⁴ Application, annex 8.

⁵ Reply, annex 4.

⁶ Application, annex 1.

⁷ Reply, para. 10 referencing A/73/488, Revised budget for the African Union-United Nations Hybrid Operation in Darfur for the period from 1 July 2018 to 30 June 2019.

⁸ Reply, para. 11 referencing A/RES/73/278, Financing of the Africa Union-United Nations Hybrid Operation in Darfur.

beyond 30 June 2019⁹.

11. On 18 June 2019, the Tribunal received an incomplete application and, on 23 June 2019, a completed application challenging the contested decision.

12. The Respondent filed a reply on 29 July 2019. The Applicant filed a response to the reply on 10 January 2021.

13. The Tribunal held a case management discussion (“CMD”) on 8 February 2021. At the CMD, the parties agreed that the application would be determined based on their pleadings and supporting documentation without the need for an oral hearing.

14. The parties filed closing submissions on 22 February 2021.

Submissions

The Applicant

15. The decision to include her in the FMA pool was unlawful. It has not been established that her post was abolished as indicated by an email dated 29 October 2018 which lists the post titles subject to abolition as being Engineering Technician, Facilities Management Assistant, Water and Sanitation Technician, Generator Technician and Electrician. Her post is classified as Administrative Assistant as reflected in her letter of appointment. The correct action to have been taken by UNAMID was a dry cut of the remaining FS-5 post of Facilities Management Assistant without the need for comparative review.

16. The CRP/TORs required the comparative review to be conducted among staff with the same job title. In cases where staff had the same functional title but carried out different functions and in cases where a dry cut would be carried out, there were no comparisons between staff with different job titles and functions.

⁹ Application, annex 2.

17. Her post had been classified as Administrative Assistant by the Field Personnel Division (“FPD”) during the Mission classification project. Her signed classification document reflected her official post title as Administrative Assistant. Her Letter of Appointment (‘LOA’) at the time of the CRP indicated her employment and functional title as Administrative Assistant. Her Personnel Action forms (“PAs”) for the years 2016-2018 also showed that her functional title was Administrative Assistant.

18. Notwithstanding the clear indication that her post title was Administrative Assistant, the UNAMID Administration included her in the FMA pool in violation of the CRP criteria.

19. The CRP/TORs specified the documents that staff members were required to submit, an updated Personal History Profile (“PHP”) and the two-last completed e-performance (“e-PAS”) reports. She fared poorly in the CRP because her relevant experience was judged against FMA functions which she did not perform during her career with UNAMID. The two e-PASes she submitted for the CRP, for the 2016-2017 and 2017-2018 e-PAS cycles, reflected her functions as an Administrative Assistant.

20. The TORs of a FMA (“FMA/TORs”) that she received in 15 May 2018 were the sole justification for including her in a comparative review with FMA staff. This was unacceptable because the FMA/TORs covered a period of five months prior to the CRP while the CRP required comparison against the last two e-performance e-PAS documents which in her case were related to administrative duties. She did not have an e-PAS relating to the role of an FMA.

21. Providing her with new FMA/TORs five months prior to the CRP was a calculated move to justify her termination and is evidence of an unlawful motive. The FMA/TORs were made deliberately to distance her from her actual job and role as there was no restructuring process that took place within FMU or the Engineering Section, there was no legitimate operational reason nor did she receive a new

personnel action advising of the change in her job title. This was demonstrated by UNAMID's and the Management Evaluation Unit's ("MEU") reliance on the new FMA/TORs to justify her inclusion among the pool of FMA staff in the CRP and to justify the termination decision.

22. The FMA/TORs of 15 May 2018 were applied to her retroactively as they did not fall within the actual duties, she was performing during the period covered by the CRP which required the latest two e-PAS documents and the PHP. The CRP was bound by a performance period not exceeding 31 March 2018 which marked the end of the second e-PAS cycle. Her placement within a CRP pool of FMAs represented a procedural error vitiating the decision to terminate her appointment.

23. Throughout her career with UNAMID, she performed her administrative duties faithfully and always exercised due diligence in the interest of the Organization. This included alerting UNAMID management about practices within FMU which exposed UNAMID to corruption, thefts, nepotism and overpayments, among other risks. None of her concerns were addressed. In some cases, she was directed by her superiors to refer matters to other offices when they failed to address them knowing that the concerns she raised fell within their responsibilities. As a result of such efforts, she was unfairly characterized over time as a trouble-maker who did not get along with others and several measures were taken against her to marginalize her and her role, to remove her from any supervisory role despite being the most senior FMU staff member after the Chief and by regularly delaying the finalization of her e-PAS.

24. None of the FMU Chiefs were properly appointed to the jobs. One abused his authority and she raised concerns about his wrongdoings. He was allowed to resign to avoid the negative outcome of an investigation into his academic qualifications. The other colleague had no background in FMU and relied fully on the FS-5 FMU colleague with whom she was falsely compared in the CRP. Another colleague was appointed as Officer-in-Charge of FMU despite the Applicant having longer and more diverse experience.

25. The Applicant submits that as a result of the contested decision, she has suffered emotional harm in the form of anxiety, stress, insomnia, migraine, heart and stomach pains.

26. The Applicant requests the following reliefs:

- a. rescission of the contested decision;
- b. retroactive reinstatement in service from 1 July 2019 and for her to be considered as having had continuous service without any break including all applicable benefits and entitlements;
- c. for UNAMID Administrators to be held accountable for bias, unfair practices as well as for abuse of authority and procedures leading to the breach of her right to due process; and
- d. one year's salary as compensation for mental anguish, loss of reputation, humiliation and uncertainty.

The Respondent

27. The Applicant's appointment was not renewed following a lawful downsizing exercise. A total of nine FS posts within the Engineering Section were to be abolished by 30 June 2019.

28. As the Secretary-General's budget and revised budget did not specify which FS posts within the Engineering Section should be abolished, the Engineering Section Chief determined which FS posts would be retained within his Section based on the mission's operational requirements after 30 June 2019. He decided that almost half of the FS posts, from various occupational groups within the Engineering Section, would no longer be required given the significant reduction in staff, as well as the closure of 13 team sites and three Sector Headquarters, resulting in a significantly reduced need for staff accommodation facilities throughout the mission. Accordingly, the Section Chief decided that of the two FS-5 staff members performing FMA

functions within the Engineering Section, which included the Applicant, only one should be retained. The Applicant and the other FS-5 FMA were therefore subject to the CRP.

29. The Applicant was correctly comparatively reviewed against the FS-5 FMA based on the functions she performed. The Applicant's allegation that she was performing Administrative Assistant functions at the relevant time is unsupported.

30. As acknowledged by the Applicant, GSS was dismantled in 2013 after which the Applicant was reassigned with the post that she encumbered to FMU. The Applicant's PAs confirm that she worked in FMU/Engineering Section. Although her functional title was Administrative Assistant, she performed FMA functions at the time of the CRP.

31. The CRP was fair, transparent and impartial. The Panel independently and correctly considered both staff members' PHPs and performance evaluations for the 2016-2017 and 2017-2018 performance cycles. Contrary to the Applicant's allegation, it is immaterial that her performance evaluations for the 2016-2017 and 2017-2018 performance cycles did not relate to when she performed FMA functions. The Panel correctly scored the Applicant based on her 2016-2017 and 2017-2018 performance evaluations and her prior work experience. When compared to the other FS-5 staff member, the Applicant had fewer years of relevant experience and service with the Organization. She also had received lower performance ratings than her comparator. Therefore, the Panel identified the Applicant for retrenchment.

32. The Applicant's claim that the other FS-5 staff member within the Engineering Section should have been identified as a dry cut has no merit. Under the CRP/TORs, dry cuts were to be applied where a unique post or function was proposed for abolition. This was not the case here. Rather, the revised budget did not specify which FS posts or functions should be abolished.

33. The Applicant's allegations of bias or ill-motive are unsupported. The Panel, which conducted the CRP, was composed of an equal number of representatives

nominated by UNAMID management and staff representatives from both the Field Staff Union and National Staff Union. None of the Panel members were from the Engineering Section. The basis for their scoring is also well-documented.

34. The CRP/TORs required UNAMID to review staff members by section, functions and grade across duty stations. Within a section, staff members were to be reviewed against other staff members performing the same or similar functions at the same level and category. The determination of which staff members were to be compared together within each section was primarily guided by the functional title as per the staff member's LOA.

35. In cases where the functional title did not reflect the actual functions performed, the Chief Human Resources Officer ("CHRO") determined which individuals fell into which occupational group within the same occupational grade while documenting the basis upon which the determination was made.

36. The Applicant's functional title did not reflect the actual functions that she performed. Although her functional title was Administrative Assistant, the TORs for her position which the FMU Chief sent on 15 May 2018 show that she was performing FMA functions. The PHP that she submitted for the CRP stated that since 15 May 2018 the Applicant was working as an FMA within FMU.

37. The Applicant makes various allegations against the former and current FMU Chiefs. However, neither had any input in the CRP. The Applicant has failed to discharge her burden of showing that the contested decision was based on improper motives. The Applicant's allegations that the contested decision was made in retaliation against her for alerting senior management about corruption and for whistleblowing are unsupported by evidence.

38. In view of the foregoing, the Respondent submits that the Applicant is not entitled to any relief. She has not demonstrated any procedural or substantive breach of her rights, nor has the Applicant adduced any evidence of harm. The Applicant has to support a claim of both procedural breaches and breaches of a fundamental nature.

The Applicant has a duty to mitigate her loss of income. Since she did not demonstrate that she tried to seek alternative suitable work to avoid unemployment, the Tribunal should assess how this should impact any compensation award.

39. The Applicant has not established any basis for a referral for accountability under art. 10.8 of the Dispute Tribunal's Statute. The Applicant has failed to prove any serious flaws, bias, retaliation or abuse of authority by Human Resources Officers or her Section Chiefs.

Considerations

40. There is a presumption that official functions are regularly performed¹⁰. The Respondent has a minimal burden of proof to justify his actions in administrative matters¹¹. Once discharged the burden shifts to the staff member to show the contrary through clear and convincing evidence.¹²

41. In this application, the Tribunal is called upon to review the decision whether the CRP conducted on 30 September 2018 for the Applicant against one other FS-5 staff member leading to the impugned decision was lawful.

42. The CRP was carried out to determine which FS-5 staff member between the Applicant and her colleague was to be retained after a restructuring exercise since only one of them could be accommodated in the new approved structure which had recommended abolition of six FS posts in the Engineering Section.

43. According to the Applicant her post of Administrative Assistant was secure as

¹⁰ *Rolland* 2011-UNAT-122, para. 26; *Ibekwe* 2011-UNAT-179, para. 30; and *Landgraf* 2014-UNAT-471, para. 28. This principle was also confirmed in *Dhanjee* 2015-UNAT-527, para. 30; *Zhuang, Zhao & Zie* 2015-UNAT-536, para. 48; *Staedtler* 2015-UNAT-547, para. 27; *Survo* 2015-UNAT-595, para. 68; *Niedermayr* 2015-UNAT-603, para. 23; *Ngokeng* 2017-UNAT-747, para. 33.

¹¹ *Rolland* 2011-UNAT-122, para. 26. Reaffirmed in *Ibekwe* 2011-UNAT-179, para. 30; *Luvai* 2014-UNAT-417, para. 40; *Simmons* 2014-UNAT-425, para. 23; *Landgraf* 2014-UNAT-471, para. 28; *Dhanjee* 2015-UNAT-527, para. 30; *Zhuang, Zhao & Zie* 2015-UNAT-536, para. 48; *Staedtler* 2015-UNAT-547, para. 27; *Survo* 2015-UNAT-595, para. 68; *Niedermayr* 2015-UNAT-603, para. 23.

¹² *Ibid.*

it was only the post of an FMA which was expressly set for abolition and only one staff member held this post and performed the FMA functions at the time of instigating the restructuring in UNAMID which was precisely on 16 March 2018¹³.

44. The Respondent argues on the other hand that at the time of implementing the proposed restructuring, the Secretary-General had discretion to determine which six FS-5 posts to abolish. In that regard and in order to ensure fairness and transparency he instituted a CRP panel which was comprised of a representative independent membership to carry out the CRP based on predetermined guidelines and CRP/TORs.

45. The salient terms of reference for the CRP are captured in annex 1 of the application and its paragraphs 3 and 4 as follows:

The TOR's for the CRP process required (annex1) the following specific documents (1) Staff members latest two e-performance reports of the reporting cycles 2016/2017 and 2017/2018 and (2) individual staff member's Personal History Profile (PHP).

46. The CRP/TORs Scope of Review (annex 1) stipulated that:

(a) staff members must be reviewed against other staff members performing the same or similar functions at the same level and category;

(b) the determination of which staff member should be compared together within each section is primarily guided by the functional title as per staff member's LOAs;

(c) in cases where the functional title does not reflect the actual functions performed, 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; and

(d) comparative review will not be necessary where a unique post or function

¹³ Reply, para. 4.

is being abolished within the comparative post or function, category and grade level within the same section/unit. Such posts shall be abolished as dry-cuts.

47. Under art. 101 of the Charter of the United Nations and staff regulations 1.2(c) and 4.1, the Secretary-General has broad discretion in matters of staff selection. In *Sanwidi*, the United Nations Appeals Tribunal (“UNAT”) held:

[A]dministrative tribunals worldwide keep evolving legal principles to help them control abuse of discretionary powers. There can be no exhaustive list of the applicable legal principles in administrative law, but unfairness, unreasonableness, illegality, irrationality, procedural irregularity, bias, capriciousness, arbitrariness and lack of proportionality are some of the grounds on which tribunals may for good reason interfere with the exercise of administrative discretion.¹⁴

48. While the Tribunal’s role is not to substitute its decision for that of the Administration, it can intervene where in the exercise of its discretion, the Administration failed in its duty to act fairly, justly and transparently in dealing with its staff members and failed to follow its own Regulations and Rules.¹⁵

i. Was the CRP lawful?

49. The Tribunal finds that contrary to the Respondent’s submissions¹⁶, the Applicant’s allegation that she was performing Administrative Assistant functions at the relevant time is supported by her 2016-2017 and 2017-2018 e-PASes, PHP and LOAs which were the relevant documents for purposes of the CRP.

50. The Respondent argues that the Applicant’s functional title did not reflect the actual functions that she performed. Although her functional title was Administrative Assistant, the FMA/TORs for her position which the FMU Chief sent on 15 May 2018 show that she was performing FMA functions. The PHP that she submitted for the CRP stated that since 15 May 2018 the Applicant was working as an FMA within

¹⁴ 2010-UNAT-084, para. 38.

¹⁵ *Hersh* 2014-UNAT-433 para. 29 citing to *Brisson* 2013-UNAT-371, para. 16; *Obeijn* 2012-UNAT-201, para. 33.

¹⁶ Para. 30 above.

FMU. As rightly argued by the Applicant, this analysis is irregular and a deliberate misrepresentation of the clear and predetermined criteria for CRP. The Respondent was not entitled to assess the Applicant based on a job description as described in her terms of reference. The only legitimate documents to consider to determine the Applicant's actual functions as per her functional title were her 'letters of appointments' properly recorded in her PHP and not the controversial FMA/TORs which were created by the local CHRO¹⁷.

51. Any reference to the 15 May 2018 FMA/TORs is irregular and unlawful because this was not a standard for review. Further, the Applicant outlined the actual administrative functions that she performed during the relevant period 2016-March 2018, these she says were:

Maintain a reliable, cost effective, flexible and prompt human resources management support to the individual contractors (ICs) of Facility Management Unit in the Sectors; Act as focal point for recruitment and administration of FMU ICs; use UMOJA portal to create shopping carts transactions for initial recruitments and extensions of contracts; Use UMOJA ECC to create service entry sheets to process the payment of FMU ICs; Focal point and team leader of FMU ICs Recruitment Cell; train ICs; Review the Service Entry Sheets payment transactions processed in UMOJA by FMA less-experienced national staff for the purpose of prevention of overpayments and underpayments and report them to Supervisors when noted.

As opposed to the FMA functions which were:

to provide daily administrative routine tasks, information regarding the status of personnel occupancy, water facilities, supervisor of interim offices, welfare offices, grocery shops, fuel balance stock, food services, generators, transportations, communications, security and safety awareness, camp facility needs, maintenance activities and likewise. Act and respond to FMU issues, perform assets and stored items inventory, keep track of assets, raise requests to Supply and acknowledge items reception for all consumable and non-consumable items, etc.

¹⁷ Applicant had challenged these terms of reference, paras. VII.3, VIII.4, 7 and 8 of the application.

52. The Applicant has demonstrated that her functions were neither the same nor similar to those performed by her comparator and whose post was expressly identified for abolition.

53. In as far as out of the six FS-5 Posts, the sole FMA position was expressly and clearly identified in the new UNAMID structure approved by the General Assembly for abolition, the Secretary-General had no discretion to set up a CRP. He abused his discretionary power.

54. The Administration breached the CRP rules and guidelines. There is no legal justification for conducting the CRP and further for introducing a document, namely the 15 May 2018 FMA/TOR to form part of the standard applied in the CRP. The CRP/TORs clearly prescribed the documents that would be used, and these were duly provided by the Applicant showing that at the relevant time she worked as an Administrative Assistant and performed duties of such post. The FMA/TORs offered to the Applicant in May 2018 could not substitute or be relied upon by the CRP panel over and above the expressly defined e-PASes and PHP without changing the CRP/TORs.

55. It is certainly material that the Applicant's performance evaluations for the 2016-2017 and 2017-2018 performance cycles related to the functions which she performed at the time of evaluation and according to the CRP/TORs. These were the actual functions which the panel ought to have reviewed against a comparator. It was rather immaterial that at the time of the CRP the Applicant performed FMA functions as these were neither reflected in her LOAs, PHP nor e-PASes. Based on *Sanwidi*, by relying on the Applicant's terms of reference of May 2018, the Respondent ignored relevant and clear guidelines and considered irrelevant matters resulting in an illegal decision.

56. The Respondent admits that the only basis for subjecting the Applicant to a CRP was due to the FMA functions that she performed from May 2018 for about five

months. As discussed above, this was irregular as it breached the CRP predetermined guidelines.

Conclusion

57. The Administration has the duty to follow its own Regulations and Rules in matters of staff selection. In reviewing such decisions, it is the role of the UNDT or the Appeals Tribunal to assess whether the applicable Regulations and Rules have been applied and whether they were applied in a fair, transparent and non-discriminatory manner. The Tribunals' role is not to substitute their decision for that of the Administration.¹⁸ Failure to follow and apply its own regulations and rules renders the decision unlawful.

ii. Retaliation and referral for Accountability

58. The Applicant has raised allegations concerning her supervisors. She states that she had reported maladministration against her supervisors and that she fears that the move to abolish her post was aimed at retaliating against her. The Applicant reported the incidents to relevant authorities, this Tribunal may not interfere before any decision is made in this regard¹⁹.

59. She also asks the Tribunal to refer certain staff members for accountability for abuse of authority. The Tribunal is not competent to make any determination on this request without affording the named parties their due process. UNAT held in *Atuya*²⁰ that;

The duty to provide a party with procedural fairness extends to all administrative decision-makers acting under statutory authority, such as the Dispute Tribunal and the Appeals Tribunal. The content of the duty will vary depending on the function performed by the administrative decision-maker. The right to a fair hearing is the basis

¹⁸ *Ljungdell* 2012-UNAT-265, para. 30.

¹⁹ ST/SGB/2017/2/Rev.1 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations).

²⁰ 2020-UNAT-984, para 26.

for procedural fairness, and this includes the right of a party to know the case against him or her and the right to reply.

Judgment

60. The Applicant has successfully rebutted the presumption of regularity by proving through clear and convincing evidence that the CRP was unlawful. The administration violated its own regulations and rules governing its conduct.

61. The Applicant has urged the Tribunal to find that the Respondent violated the gender policy by placing her in an unfair comparative review process against a male staff member and subsequently separating her from service to the unfair advantage of the male colleague.

62. The Tribunal agrees that the Applicant was unfairly reviewed in breach of the CRP regulations and rules and also although not a specific criteria for CRP review, the United Nations Secretary-General's Gender Parity Initiative which sets targets for equal representation of men and women in the United Nations and also advises on recruitment and retention practices. In this case based on the Applicant's long service and dedication in the system for 28 years, it was unfair to separate her based on an irregular CRP in favour of a male colleague on grounds that he scored higher marks in service and competence.

63. The contested decision is rescinded. The Applicant shall be reinstated in her position from the date of separation. Pursuant to art.10 of the Tribunal's Statute, the Respondent may elect to pay compensation in lieu of rescission. The compensation is set at one years' net base pay salary.

Moral damages

64. The Applicant has argued that due to the violation of her contract of employment she has suffered harm. She has not adduced any evidence to support this

claim²¹. It is declined.

(Signed)

Judge Rachel Sophie Sikwese

Dated this 3rd day of March 2021

Entered in the Register on this 3rd day of March 2021

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

²¹ *Kallon* 2017-UNAT-742 and subsequent judgments.