



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/142

Judgment No.: UNDT/2021/095

Date: 5 August 2021

Original: English

Before: Judge Rachel Sophie Sikwese

Registry: Nairobi

Registrar: Abena Kwakye-Berko

OPOLOT

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. The Applicant is a former GS-5 Telecommunications Assistant in the Field Technology Section of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”) based in Entebbe, Uganda. He filed an application and an amended application on 25 September 2019 and 10 March 2021 respectively, contesting the decision not to extend his fixed-term appointment (“FTA”) beyond 30 June 2019 (“the contested decision”).

2. The Respondent filed a reply on 25 October 2019. The Respondent argues that the contested decision is lawful because, the Applicant’s appointment was not renewed following a lawful restructuring exercise. The Applicant has not proved the contrary. For reasons provided below the application is dismissed.

Facts and Procedure

3. The Applicant joined the Organization on 4 March 2014 as a GL-5 Information Management Assistant in Entebbe on a fixed-term appointment. On 1 July 2016, the Applicant’s functional title was changed to Telecommunications Assistant following the implementation of the classification of the post he encumbered.¹

4. On 29 March 2019, the Secretary-General submitted MONUSCO’s 2019-2020 proposed Budget to the General Assembly.² The Budget proposed the abolition of six Telecommunication Assistant posts in the Field Technology Section in the General Service category.³

5. On 16 May 2019, MONUSCO Human Resources Section (“HR”) sent the Applicant the Chief Human Resources Officer’s (“CHRO”) letter of 15 April 2019

¹ Reply, para. 3 and annex R/1.

² A/73/816.

³ Budget, para. 96.

explaining the Secretary-General's proposed abolition of 764 posts, and the need to conduct a Comparative Review Process ("CRP").⁴ HR requested that the Applicant submit his personal history profile ("PHP") and completed performance evaluations for 2016-2017 and 2017-2018 for consideration in the CRP. On the same day, the Applicant sent HR the requested documents.⁵

6. On 16 May 2019, the Advisory Committee on Administrative and Budgetary Questions ("ACABQ") recommended that the General Assembly approve the abolition of posts as proposed in the Budget, and recommended further reductions.⁶

7. On 17 May 2019, the Comparative Review Panel ("CRP Panel") reviewed the Applicant against the other three G-5 Telecommunication Assistants in the Field Technology Section in Entebbe to determine which staff members would be retrenched.⁷

8. By letter dated 29 May 2019, MONUSCO informed the Applicant of the decision not to renew his fixed-term appointment beyond 30 June 2019.⁸

9. On 17 June 2019, the Applicant requested suspension of action and management evaluation of the contested decision from the Management Evaluation Unit.⁹

10. On 24 June 2019, the Applicant filed before the Dispute Tribunal an application for suspension of the implementation of the contested decision pending management evaluation, which was granted by Order No. 086 (NBI/2019).¹⁰

⁴ Amended application, para. VII (3) and reply, para. 8.

⁵ Reply, annex R/6.

⁶ A/73/755/Add.15, Budget performance for the period from 1 July 2017 to 30 June 2018 and proposed budget for the period from 1 July 2019 to 30 June 2020 of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, Report of the Advisory Committee on Administrative and Budgetary Questions, para. 33.

⁷ Reply, annex R/7.

⁸ Amended application, annex 2.

⁹ Amended application, annex 3.

¹⁰ Amended application, annexes 4 and 5.

11. On 3 July 2019, the General Assembly approved the Budget.¹¹
12. On 20 September 2019, the Under-Secretary-General for Management Strategy, Policy and Compliance upheld the contested decision.¹²
13. On 26 September 2019, the Tribunal issued Order No. 147 (NBI/2019) in which it found that it was not competent to suspend the contested decision because it was an appointment decision and therefore fell under the exclusionary clause of art. 10.2 of the UNDT Statute and art. 14 of the Rules of Procedure.¹³
14. The Applicant was separated effective 1 October 2019.¹⁴
15. A case management discussion (“CMD”) took place on 23 February 2021. On 24 February 2021, the Tribunal issued Order No. 055 (NBI/2021) which directed the Applicant to, *inter alia*, file an amended application which he did on 10 March 2021.
16. At the CMD, the parties agreed that the application would be determined based on the parties’ pleadings and supporting documentation without the need for an oral hearing.
17. The Respondent filed a reply to the amended application on 17 March 2021.

Parties’ submissions

The Applicant

18. The contested decision was as a result of an unfair CRP process. All staff in his office who were to be subjected to the CRP received communications on the CRP on 4 April 2019 vide a memorandum dated 2 April 2019 whereas he received notification on 16 May 2019, more than 40 days later.

¹¹ A/73/929, Financing of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo.

¹² Application, annex 6.

¹³ Reply, annex 9.

¹⁴ Reply, annex R/8.

19. The late notification spoke volumes about the transparency, fairness and correctness of the process as it could not even clearly identify staff to be included and excluded from the CRP. There was a biased motive against him being selected for the CRP. It is also highly doubtful that the results of the process could be any fair and transparent.

20. The CRP and retrenchment were done before the Secretary-General's proposed 2019/20 Budget was approved by the General Assembly.

21. The MONUSCO HR Administration's decision on the CRP is questionable. He was the last to be asked to submit his documents for the CRP and it seems that the decision to retrench him had been taken even before submitting my documents.

The Respondent

22. The contested decision was lawful. The Applicant's appointment was not renewed following a lawful restructuring exercise. There were four GS-5 Telecommunications Assistants serving in the Field Technology Section in Entebbe. In line with the new mission structure, two of the four posts were to be abolished. Therefore, a comparative review was conducted. Following the CRP, the Applicant and another staff member received the lowest scores. Two other staff members scored higher than the Applicant because they had more years of relevant experience. Accordingly, the Applicant was one of the two Telecommunication Assistants proposed for retrenchment.

23. The CRP was fair and transparent. The fact that MONUSCO, in error, sent the Applicant a notification regarding his participation in the CRP on 15 May 2019 rather than 15 April 2019 did not affect the CRP results. The Applicant does not dispute that he was properly included in the CRP. He was able to timely provide the requested PHP and performance evaluations to HR. The CRP Panel reviewed the Applicant based on the same information provided by the three other staff members.

Considerations

24. In a dispute involving a challenge of the Secretary General's exercise of discretion, the role of this Tribunal is to examine whether his discretion was exercised properly.

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".¹⁵

25. In the case at hand, the Applicant challenges the procedure leading up to his separation from service through non-renewal of his fixed-term contract. In particular, he argues that the contested decision was as a result of an unfair CRP process.

26. He has cited two reasons for alleging that his separation was unfair. Firstly, that all staff in his office who were subject to the CRP received communications on the CRP on 4 April 2019 through a memorandum dated 2 April 2019; whereas he received the same notification on 16 May 2019, more than 40 days later.

27. In his view, the late notification "talks volumes about the transparency, fairness and correctness of the process as it could not even clearly identify staff to be included and excluded from the CRP process. There was a bias motive against him being selected for the CRP. It is also highly doubtful that the results of the process could be any fair and transparent".¹⁶ He stated that he was the last to be asked to submit his documents for the CRP and that it seemed that the decision to retrench him had been taken even before he had submitted his documents.

28. Secondly, he argues that the retrenchment was done before the Secretary-General's proposed 2019/20 Budget was approved by the General Assembly. The Tribunal shall consider these two allegations in turn as follows:

¹⁵ *Sanwidi* 2010-UNAT-084, para. 38.

¹⁶ Amended application, para. VII (3).

a. Delayed communication on the CRP

29. The relevant and guiding materials on this allegation are the ‘Terms of Reference (“TORs”) of the CRP Panel for MUNOSCO’ (Annex R/3) which provides in paragraph 19 that;

Staff members who are subject to the comparative review process will be individually notified and must submit their updated PHPs/P.11 and two completed ePerformances covering 2016-2017 and 2017-2018 performance circles to monusco-hrs-crp2019@un.org. Non-submission of a completed PHPs/P.11 will result in the CRP reviewing the latest PHP that is on file for the staff member.

30. The question that the Tribunal must answer is whether, as alleged by the Applicant, the Administration failed to comply with this requirement by communicating with the Applicant on 16 May 2019 instead of 4 April 2019. The Respondent has argued that although MONUSCO, in error, sent the Applicant a notification regarding his participation in the CRP on 15 May 2019 this did not affect the CRP results. The Applicant was able to timely provide the requested PHP and performance evaluations to HR. The CRP Panel reviewed the Applicant based on the same information provided by the three other staff members.

31. The Applicant has confirmed that he complied with the communication of 16 May 2019, by submitting the requested documentation within the deadline. He has not made any reference to any provision in the CRP TORs that sets a specific date by which he should have been notified of participation in the CRP. He has not demonstrated how submitting his PHPs/P.11 and relevant ePerformances on 16 May 2019 instead of 4 April 2019 negatively affected his terms and conditions of appointment.

32. Article 2 of the Statute of the Dispute Tribunal provides the mandate to hear and pass judgement on an application filed by an individual, to appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment.

33. There is a presumption that official functions are regularly performed¹⁷. The Respondent has a minimal burden of proof to justify his actions in administrative matters¹⁸. Once discharged the burden shifts to the staff member to show the contrary through clear and convincing evidence.¹⁹

34. In the instant application, the Tribunal finds that the Applicant has not satisfied his burden of proof to show through clear and convincing evidence that his separation was unfair. The Administration did not violate any term of the Applicant's contract of employment.

35. In terms of allegations of ulterior motive, it is now well established that allegations of bias, ill will, discrimination must be supported by evidence.²⁰ The Applicant has not shown any material to suggest that non-renewal of his contract was motivated by bias on the part of the Administration against him.

36. The record shows that the Administration based the CRP on art. 101 of the Charter of the United Nations as a guiding principle to ensure that the staff members under review met the highest standards of efficiency, competency and integrity. The Applicant and one other staff member scored the lowest points and were retrenched based on this assessment. The Applicant has not disputed the fact that he scored the lowest points.

¹⁷ *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.

¹⁸ *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.

¹⁹ *Ibid.*

²⁰ *Al Najjar* 2021-UNAT-1084, para. 34; *Obdeijn* 2012-UNAT-201 para. 38; *Azzouni* 2010-UNAT-081, para. 35.

b. The retrenchment was done before the Secretary-General's proposed 2019/20 Budget was approved by the General Assembly

37. The Applicant challenges the fact that he was separated on ground of retrenchment before the General Assembly had approved the Budget to abolish his post. The record shows that this issue was already adjudicated upon in favour of the Applicant under Order No. 086 (NBI/2019) holding that:

... The Tribunal finds it surprising that MONUSCO is proceeding with its decision not to renew the Applicant's FTA although the General Assembly has not yet approved the Secretary- General's final budget proposal for 2019/2020. While the ACABQ has recommended that the General Assembly approve the budget, this approval is still pending. (Para. 21).

In the Tribunal's considered view, unless the General Assembly's anticipated resolution on the mission's proposed budget is approved on or before 30 June 2019, the Applicant's post cannot be deemed to be abolished. Under these circumstances, MONUSCO's decision not to renew the Applicant's FTA due to an abolition of post, which has not been approved, is *prima facie* unlawful and cannot stand. (Para 22).

38. In accordance with this Tribunal's earlier final finding on the matter, it is unnecessary to re-consider the issue as doing so would go against the rule of *res judicata*.

Judgment

39. The Administration has satisfied the Tribunal that the CRP was fair. The Applicant has failed to demonstrate through clear and convincing evidence that the CRP leading to his separation was unfair. The Tribunal has no good cause to interfere with a lawful exercise of discretion. The application is dismissed.

(Signed)

Judge Rachel Sophie Sikwese
Dated this 5th day of August 2021

Entered in the Register on this 5th day of August 2021

(Signed)

Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi