



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

MATAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant

Kyung-Min Lee, OSLA

Counsel for Respondent:

Alan Gutman, AAS/ALD/OHRM, UN Secretariat

Introduction

1. The Applicant, a former staff member of the United Nations Assistance to the Khmer Rouge Trials (“UNAKRT”), contests the decision to terminate his permanent appointment and subsequently to separate him from service.

Facts and procedural background

2. Since the Tribunal did not hold a hearing on the merits in the present case, the account of facts below is limited to those accepted by the Respondent and documented on file.

3. The Applicant joined the service of the United Nations in 1998. In June 2008, he was appointed as Finance Assistant at the FS-4 level in UNAKRT, on a fixed-term appointment. In August 2011, he was promoted to Finance Assistant/Cashier at the FS-5 level.

4. Although, initially, the Organization denied the conversion to a permanent appointment, after the Applicant challenged that decision before this Tribunal and appealed before the Appeals Tribunal, the Organization reconsidered his suitability and decided to grant him a permanent appointment by letter dated 17 March 2017. The letter stated that the permanent appointment was limited to service with UNAKRT and retroactive to 30 June 2009. The letter also stated:

Please note that in January 2012 your appointment was limited to service with the UNAKRT and your permanent appointment will have the same limitation. While this condition may be lifted in certain circumstances, taking into account all relevant circumstances and issues, lifting this limitation was not justified in January 2012. As such, for you to be transferred to a position in the Secretariat outside the UNAKRT, it is necessary for you to apply through a regular selection process and be selected following a selection exercise approved by a Central Review Body.

5. On 3 April 2017, the Applicant signed his acceptance of the permanent appointment, while at the same time noting his willingness to appeal its limitation to service with UNAKRT.

6. In November 2017, the Applicant was informally informed by his supervisor about the possibility of his post being abolished.

7. By letter dated 30 November 2017, the Applicant was informed that his post was among those proposed by the Secretary-General for abolition at UNAKRT effective 31 December 2017. The letter indicated that it did not constitute an official notice of the termination of the appointment in line with staff rule 9.7 but an advance information in the interest of keeping the Applicant fully informed.

8. By letter dated 21 February 2018, the Applicant was informed that the Under-Secretary-General for Management had approved the termination of his permanent appointment effective 28 February 2018. The letter stated that he would receive a termination indemnity and three months of compensation in lieu of notice.

9. By email of 27 February 2018, the Applicant was provided with the separation checklist.

10. On 27 February 2018, the Applicant requested management evaluation and suspension of action pending management evaluation of the decision to terminate his permanent appointment effective 28 February 2018. The suspension of action was granted.

11. By letter dated 9 April 2018 from the Chef de Cabinet, the Applicant received the outcome of his request for management evaluation. The contested decision was upheld.

12. On 17 April 2018, through Counsel, the Applicant made a request to UNAKRT for a 50 per cent increase in the payment of his termination indemnity pursuant to Staff regulation 9.3(d).

13. On 20 April 2018, the Applicant was separated from service.

14. On 29 May 2018, the Applicant received, through Counsel, UNAKRT's denial of his request for an increase in the payment of his termination indemnity.

15. On 6 July 2018, the Applicant filed the present application and on 8 August 2018, the Respondent filed his reply.

16. By Order No. 69 (GVA/2020) of 18 June 2020, the Tribunal informed the parties that the present matter could be determined without holding a hearing and instructed them to file their respective closing submission.

17. On 30 June 2020, the parties filed closing submissions.

Parties Submissions:

18. The Applicant's principal contentions are:

- a. He was not meaningfully consulted or notified about the abolition of his post and subsequent termination;
- b. The Organization failed to make any good faith effort to absorb him onto a suitable alternative post. The Organization failed to fully discharge its obligations under staff rule 9.6(e) and 13.1(d);
- c. The Organization failed its obligations by limiting its search for alternative suitable positions for the Applicant to those with his same job title (Finance Assistance), at the same level (FS-5) and only within UNAKRT;
- d. There is no evidence that the Applicant was considered for any available FS-4 posts at UNAKRT. He was never contacted by the Organization to discuss his options and the possibility to be placed on any posts at the G-6, G-7 or P-3 level;
- e. The Organization made minimal efforts to find him an alternative post and those efforts only started too late in the process; and
- f. The Applicant lost the opportunity to continue his career with the United Nations until his retirement age and he suffered stress and anxiety due to his termination.

19. The Respondent's principal contentions are:

- a. The Applicant's post became redundant following the introduction of Umoja at UNAKRT and was consequently abolished;

- b. The Applicant was duly informed of the abolition of his post. On 22 August 2017, he was informed of the proposed abolition and the 30 November 2017 advance notice provided him with over seven months to apply for job openings throughout the Organization before his initial separation date of 28 February 2018;
- c. A Committee was established to identify vacant and suitable positions at UNAKRT for the Applicant. However, there were no vacant positions at the FS-5 level;
- d. The Organization's obligations under staff rule 13.1(d) extends only to vacant positions in the same category, namely the Field Service category;
- e. The Applicant did not apply for any FS-4 position; and
- f. The Organization met its obligation under staff rule 13.1(d) to provide the Applicant with all reasonable consideration for vacant and suitable positions in UNAKRT, consistent with the limitation of his permanent appointment.

Consideration

Contested decision and scope of judicial review

20. The contested decision in the present case is the decision communicated to the Applicant on 22 February 2018 to terminate his permanent appointment as Finance Assistant/Cashier at the FS-5 level, with UNKART, following the abolition of his post.

21. As remedies, the Applicant requests the rescission of the contested decision or, in the alternative, payment of compensation in the amount of three years' net base salary plus moral damages.

22. In his application, the Applicant argues that his permanent appointment should not be limited to service with UNAKRT. However, the limitation clause in the Applicant's permanent appointment is not the contested decision in the present case and, therefore, the Tribunal will not examine its legality.

23. It suffices to mention that on 3 April 2017, the Applicant accepted a permanent appointment limited to service with UNAKRT, effective retroactively to 30 June 2009.

24. Furthermore, the Tribunal notes that while the Applicant requested management evaluation of the decision to limit his permanent appointment to service with UNAKRT, to which the Administration replied on 26 May 2017, he did not challenge said decision before this Tribunal.

25. Consequently, the limitation of the Applicant's permanent appointment to service with UNAKRT is not a matter before the Tribunal and the scope of judicial review in the present case is limited to the contested decision as indicated in para. 20 above.

26. The Tribunal has identified the following legal issues for review:

- a. What was the modality of the Applicant's separation from service?
- b. Has the Organization demonstrated to have made "good faith" efforts to find an alternative post for the Applicant?
- c. Is the Applicant entitled to any remedies?

Modality of the Applicant's separation from service

27. Staff regulation 9.3(a) provides the legal framework for the termination of an appointment in cases of post abolition. It reads in its relevant part as follows:

(a) The Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment in accordance with the terms of his or her appointment or for any of the following reasons:

(i) If the necessities of service require abolition of the post or reduction of the staff;

28. Staff rule 13.1(d), which applies to staff members holding permanent appointments, also foresees the termination of a permanent appointment "[i]f the necessities of service require abolition of a post or reduction of the staff".

29. In *Matadi et. al* 2015-UNAT-592, the Appeals Tribunal noted that:

16. Both the Appeals Tribunal and the Administrative Tribunal of the International Labour Organization (ILOAT) have held that it is well settled jurisprudence that “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 staff”.

17. This 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 its staff members. (footnote omitted)

30. After a careful analysis of the facts and the evidence available on file, the Tribunal finds that the post encumbered by the Applicant was abolished due to a restructuring exercise in UNAKRT linked to budgetary restrictions and the implementation of Umoja, which rendered the Applicant’s position redundant.

31. Indeed, following the introduction of Umoja at UNAKRT, there was no longer an operational need for the post encumbered by the Applicant.

32. The Respondent clarified in his reply that the Cashier functions were principally to manage the receipt and disbursement of funds to and from UNAKRT’s bank account. However, following the introduction of Umoja, that bank account was converted to a United Nations House Bank in Cambodia and the responsibility for management of the bank account was transferred from UNAKRT to the United Nations Treasury in Headquarters, effective 1 July 2017. Consequently, the Applicant’s post of Cashier became redundant and was slated for abolition in the UNAKRT’s proposed budget for the 2018-2019 biennium.

33. The evidence shows that the proposed budget was approved by the Group of Interested States on 15 December 2017 and the abolition of the post of Cashier, together with other posts, took effect on 1 January 2018.

34. This sequence of events clearly demonstrates that the reason for the abolition of the Applicant's post was a genuine restructuring exercise in line with the interest of the Organization and its operational needs.

35. The Tribunal notes that the Applicant neither contests the lawfulness of his post abolition *per se* nor the restructuring exercise leading to it. Instead, he claims that he was not meaningfully consulted about the abolition of his post, not given sufficient notice of the termination of his appointment, and that the Organization did not make good faith efforts to find him an alternative position.

36. Concerning the alleged lack of consultation, the Tribunal is also of the view that the Organization is not bound to initiate a formal consultation process with a staff member before deciding to abolish his/her post. In any event, consultation is not equivalent to negotiation, and it is not necessary for the Administration to secure consent or agreement of the consulted party.

37. The evidence on record shows that between August and November 2017, the Applicant was made aware of the budgetary situation in UNKART and of the proposal to abolish his post effective 31 December 2017.

38. According to a note for the file dated 11 January 2018 prepared by the Chief, Budget and Finance Section, UNAKRT, the Applicant was informed first on 22 August 2017 that his post was among those proposed for abolition in the budget for the biennium 2018-2019.

39. The Chief, Budget and Finance Section reiterated during another meeting on 9 November 2017 that the Applicant's post was one of the two FS-5 positions proposed for abolition.

40. Finally, on 30 November 2017, UNAKRT gave advance written notice to the Applicant of the possible abolition of his post effective 31 December 2018. He was also informed that UNAKRT would seek approval for the termination of his permanent appointment effective 1 March 2018 and was encouraged to apply for other vacancies. The Applicant hence cannot argue that he was not kept informed of UNAKRT's intention to abolish his post.

41. Regarding the alleged insufficient notice of termination of the Applicant's appointment, the Tribunal notes that the Applicant was formally notified on 22 February 2018 about the termination of his permanent appointment effective 28 February 2018. He was also informed that he would receive termination indemnity and three months of compensation in lieu of notice.

42. Staff rule 9.7(a) provides that in cases of termination of continuing appointments, staff members "shall be given not less than three months' written notice of such termination".

43. Staff rule 9.7(d) provides that "in lieu of the notice period, the Secretary-General may authorize compensation ... corresponding to the relevant notice period at the rate in effect on the last day of service".

44. In the current case, the Organization did not only keep the Applicant informed of the proposal to abolish his post but it also paid him three months' compensation in lieu of the notice period, which he accepted as part of his separation entitlements. The Tribunal notes that it is not legally nor ethically correct to accept said payment and, at the same time, to argue in court that he was not given sufficient notice period as this amounts to *venire contra factum proprium*. Consequently, the Applicant's arguments in this regard, cannot be accepted.

45. The Tribunal will now assess whether the Organization has made all reasonable efforts to find the Applicant an alternative position.

Efforts to find alternative employment for the Applicant

46. In cases of termination for abolition of posts or reduction of staff, the Organization must follow the requirements set out in the Staff Regulations and Rules.

47. Staff rule 9.6 (Termination) provides the order of preference in which staff members shall be retained in cases of termination of appointments for abolition of posts and reduction of staff. It states in its relevant part as follows:

(e) Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, if the necessities of service require that appointments of staff members be terminated as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:

(i) Staff members holding continuing appointments[.]

48. Staff rule 13.1(d), which applies to the Applicant, a staff member with a permanent appointment, provides that:

If the necessities of service require abolition of a post or reduction of the staff and subject to the availability of suitable posts for which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on all other types of appointments, provided that due regard shall be given in all cases to relative competence, integrity and length of service. Due regard shall also be given to nationality in the case of staff members with no more than five years of service and in the case of staff members who have changed their nationality within the preceding five years when the suitable posts available are subject to the principle of geographical distribution.

49. In *Timothy* 2018-UNAT-847, the Appeals Tribunal clarified the requirements that the Organization must comply with to fulfil its obligations and duty of care towards staff members with permanent or continuing appointments whose posts are abolished in the context of a restructuring exercise.

50. The Appeals Tribunal stated in *Timothy* that the “Administration is bound to demonstrate that all reasonable efforts have been made to consider the staff member concerned for available suitable posts” and that “[w]here there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given”.

51. That said, in *Timothy* (see in particular para. 35) the Appeals Tribunal also established a shared responsibility between the Organization, who must act fairly and transparently, and the affected staff member who should act proactively by timely and completely applying for vacant positions.

52. On the one hand, the Administration has to demonstrate that it has made good faith efforts to find a suitable post for the staff member whose post would be abolished by:

- a. Considering him/her for suitable posts that are vacant or likely to be vacant in the future;
- b. Assigning him/her on a preferred or non-competitive basis (bearing in mind his competence, integrity and length of service, as well as other factors such as nationality and gender); and
- c. Finding an alternative post for him/her at his/her category and grade level or even at a lower grade, if, in the latter case, the staff member concerned has expressed an interest.

53. On the other hand, the staff member has to be fully competent to perform the core functions and responsibilities of an available position and show interest in a new position by timely and completely applying for the post.

54. The Applicant argues that the Organization failed to make good faith efforts to absorb him onto a suitable alternative post and that it neither considered him for posts outside UNAKRT nor for posts at a lower level.

55. In relation to these arguments, the Tribunal recalls that the Applicant's appointment contained a clause limiting his permanent appointment to service with UNAKRT. Therefore, the search for alternative posts was rightly limited to vacant posts at UNAKRT.

56. The Tribunal further notes that at the time the contested decision was made, the ruling of the Appeals Tribunal in *Timothy* had not been issued and the possibility of assigning a staff member to a lower position was not yet an obligation on the Administration. In any event, there is no evidence that the Applicant applied for any FS-4 position.

57. It is well documented on file that the abolition of ten posts, including the Applicant's post of Finance Assistant/Cashier, took effect on 1 January 2018 and

that, in the same month, UNAKRT established a committee to review the UNAKRT staffing table with a view to identifying any vacant suitable posts. There were no vacant posts at the FS-5 level in the Budget and Finance Section or any other section within UNAKRT and, consequently, the Applicant's post was terminated.

58. While according to a note for the file on record, said committee considered whether there were any suitable vacant or encumbered FS-5 posts for which the Applicant would qualify and be accommodated against, the Tribunal agrees with the Respondent that the consideration of encumbered posts was not necessary as the Organization's obligations to retain a staff member only extends to vacant suitable posts.

59. It results from the file that the Applicant applied to five available positions (one at the P-3 level, two at the FS-6 level and two at the FS-5 level) but, unfortunately, was not successful in being selected for any of them. Concerning the two FS-5 positions, the Tribunal notes that the recruitment process for one of them was cancelled and that the Applicant was not shortlisted for the other one. Regarding the FS-6 positions, the Applicant was not recommended for one of them as he did not meet the academic and work experience requirements and he was not shortlisted for the other one. According to the evidence on record, his application for the P-3 post is still under consideration.

60. In light of the above, the Tribunal is satisfied that the Organization has showed it made good faith efforts to find an alternative position for the Applicant but due to the limitation of his contract to service with UNAKRT and UNAKRT's downsizing exercise, it was not possible to retain him on service.

61. Therefore, the Tribunal finds the contested decision lawful.

Is the Applicant entitled to the remedies requested?

62. Having found that the contested decision was lawful, the Tribunal will not examine the remedies requested by the Applicant and it is satisfied that the Organization has paid him all his separation benefits and entitlements.

Conclusion

63. In view of the foregoing, the Tribunal rejects the application.

(Signed)

Judge Teresa Bravo

Dated this 27th day of August 2020

Entered in the Register on this 27th day of August 2020

(Signed)

René M. Vargas M., Registrar, Geneva