



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/165

Judgment No.: UNDT/2021/085

Date: 22 July 2021

Original: English

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**Before:** Judge Rachel Sophie Sikwese

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

MUKHOPADHYAY

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for the Applicant:**

George Irving

**Counsel for the Respondent:**

Nicole Wynn, AAS/ALD/OHR

Maureen Munyolo, AAS/ALD/OHR

## **Introduction**

1. The Applicant is former staff member of the United Nations Organization Stabilization Mission (“MONUSCO”) in the Democratic Republic of the Congo. He is contesting the “decision by the Administration to terminate [his] continuing appointment following the decision to abolish his post, and without making good faith efforts to absorb him or to assist him in finding an alternative position” (“the contested decision”).

2. The Respondent argues that the contested decision is lawful because, effective 1 July 2019, the General Assembly abolished the post encumbered by the Applicant. There are no vacant positions in MONUSCO for which the Applicant is suitable. The Organization has not identified any alternative positions outside of MONUSCO for which the Applicant is suitable and the Organization continues to make reasonable and good faith efforts to assist the Applicant in finding a suitable position. The application is granted for the reasons given below.

## **Facts and Procedure**

3. At the time of filing the application, the Applicant held a P-4 Airport Engineer position. He joined the Organization in November 2003. On 26 September 2018, the Applicant’s fixed-term appointment was converted to a continuing appointment.<sup>1</sup>

4. On 29 November 2018, the Applicant learned that his post would be proposed for abolishment in MONUSCO’s 2019-2020 budget year.<sup>2</sup>

5. On 29 March 2019, the Secretary-General submitted MONUSCO’s 2019-2020 proposed budget to the General Assembly. The budget proposed the abolition of several posts in the Engineering and Facilities Maintenance Section.<sup>3</sup>

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<sup>1</sup> Amended application, para.5 and annex A.

<sup>2</sup> Amended application, annex B.

6. On 1 April 2019, MONUSCO's Chief Human Resources Officer ("CHRO") gave the Applicant advance notice of the proposed termination of his continuing appointment.<sup>4</sup>
7. On 10 June 2019, the Applicant went on certified sick leave.<sup>5</sup>
8. On 3 July 2019, the General Assembly approved the MONUSCO Budget for 2019-2020.<sup>6</sup>
9. On 12 July 2019, the CHRO notified the Applicant of the decision to terminate his appointment, effective 2 August 2019. The Applicant was not separated because his certified sick leave extended beyond 2 August 2019.<sup>7</sup>
10. On 2 August 2019, the Applicant requested management evaluation and suspension of action of the contested decision.<sup>8</sup>
11. On 7 August 2019, the Management Evaluation Unit ("MEU") suspended the implementation of the contested decision, pending management evaluation.<sup>9</sup>
12. By letter dated 29 October 2019, the Applicant was placed on special leave with full pay ("SLWFP") pending the outcome of the management evaluation.<sup>10</sup>
13. On 9 September 2020, MEU issued its management evaluation of the contested decision. The Applicant was separated from the Organization on 10 September 2020.<sup>11</sup>

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<sup>3</sup> Reply, para. 4, referencing A/73/816, Report of the Secretary-General, Budget for the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo for the period from 1 July 2019 to 30 June 2020.

<sup>4</sup> Reply, annex R/2.

<sup>5</sup> Reply, annex R/4.

<sup>6</sup> Amended application, annex F; reply para. 8 referencing A/RES/73/315, Financing of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo.

<sup>7</sup> Amended application, annex G; reply para. 9.

<sup>8</sup> Amended application, annex H.

<sup>9</sup> Amended application, annex I.

<sup>10</sup> Amended application, annex M.

<sup>11</sup> Amended application, annexes O and P.

14. On 16 December 2019 and 20 February 2020, the Applicant filed an application and an amended application respectively, challenging the contested decision.

15. The Respondent had earlier filed a reply on 17 January 2020.

16. On 26 February 2021, the Respondent filed a response to Order No. 045 (NBI/2021). Paragraph 5 of said Order required the Respondent to produce the comparative evaluation analyses and Personnel History Profiles (“PHPs”) of the successful candidates for the following job openings to which the Applicant applied but for which he was not selected:

- a. Post No. 119995 at the United Nations Mission in South Sudan (“UNMISS”);
- b. Post No. 126580 at UNMISS;
- c. Post No. 112220 at the United Nations Support Office in Somalia (“UNSOS”);
- d. Post No. 129143 at MONUSCO (P-3); and
- e. Job openings 121739 and 140211 in Bamako, Mali.

17. The parties filed their closing submissions on 19 March 2021.

### **Parties’ submissions**

#### ***The Applicant***

18. MEU incorrectly claims that the issue of the abolition of his post was not disputed in his request for management evaluation. That is false because, as acknowledged in the MEU’s letter, on 22 August 2019 the Applicant submitted a detailed supplementary request challenging the basis for selecting his post for

abolition. Neither the management evaluation nor the reply addressed these arguments.

19. In addition, he challenged the failure of the Administration to make good faith efforts to find him a suitable alternative post upon the abolition of his current post as a staff member holding a continuing appointment. This is a violation of the Administration's obligation vis-à-vis staff members on continuing appointments who face abolition of posts. Such obligations relate specifically to the principles of order of retention in line with staff rule 9.6(e) as well as the jurisprudence of the Tribunals.

20. There were irregularities in the decision to abolish his post, specifically:

a. There was no original justification for abolishing the Applicant's unique post; it was inserted in the proposal to the General Assembly over the line manager's objections.

b. There was a lack of programmatic justification for the inclusion of his post among those identified for downsizing. Although the General Assembly had approved the proposed budget, the Applicant's actual duties continue to be required.

21. There was a failure to afford the Applicant the due consideration to which he was entitled as a staff member with a continuing appointment against an abolished post. Staff rules 9.6(e) and 13.1, as well as the jurisprudence of the Tribunals, establish that the Administration has an obligation to assist continuing appointment holders whose posts are abolished and to treat them with priority when it comes to filling vacancies for which they are qualified. The Appeals Tribunal has found that the onus is on the Administration to prove that they have fulfilled their obligations to make a good faith effort to find suitable alternative posts for such staff members.

22. The Applicant submits that he holds a continuing appointment in the P-4 category for which he is rostered and his current post was abolished on 30 June 2019. He has even expressed interest in existing posts at the P-3 level in the Engineering

Unit at MONUSCO but the Administration has failed to place him on any of those posts, in spite of the obligation to do so. Allowing him to compete for vacancies does not satisfy this obligation.

23. There has been no effort made to assign him to another post by way of lateral assignment under the Secretary-General's delegation of authority to assign staff members unilaterally to a position commensurate with their qualifications, under staff regulation 1.2(c) or via any other method. As the Applicant is rostered for Engineering posts at the P-4 level, the Administration could also transfer him into a vacant post in one of those categories within MONUSCO or in another mission, but until now, has chosen not to do so.

24. In reviewing the analysis provided in the management evaluation the Applicant notes, it has not covered the posts to which the Applicant actively applied. Of the eight posts list in *Inspira*, only four were addressed by the management evaluation.

25. An analysis of the selection procedures for the posts to which the Applicant applied, (paragraph 16 above) confirms that he was not afforded the full and fair consideration to which he was entitled as a continuing staff member against an abolished post rendering his separation improper. Specifically;

- a. In relation to job opening No. 119995 UNMISS (Sudan), the selected candidate for the referenced position was a P-3 staff member with a continuing appointment in UNMISS. UNMISS was not a downsized mission; nor was she against a post proposed for abolishment. The Respondent in his reply on 17 January 2020 submitted an interoffice memorandum ("IOM") of Mr. Atul Khare, Under Secretary-General ("USG") Operation Support, dated 26 April 2019, requesting all missions to accommodate United Nations staff members, particularly permanent/continuing staff whose posts were subject to abolishment in downsizing missions. The memo had a list of such staff members with the index number, posts held, and type of contract held. The

Applicant was in the list, but the candidate selected for job opening No. 119995 was not.

b. For job opening No. 126580 UNMISS (Sudan) Engineer, the selected candidate for the referenced position was a P-3 staff member with a continuing appointment in UNSOS (Mogadishu). UNSOS was not a downsized mission nor was that candidate's post being abolished. The Comparative Analysis Report against Job Opening 126580 found the Applicant suitable and recommended him. However, the Applicant was not selected because he was found to be lacking budgetary and planning skills. The selected candidate for job opening No. 126580 was not on the list of staff members whose posts were being abolished in downsizing missions.

c. For job opening No. 112220 UNSOS (Somalia) Engineer, the selected candidate for the position was working as a P-3 staff member with a fixed term appointment in the United Nations Mission for Justice Support in Haiti ("MINUJUSTH"). MINUJUSTH was a downsized mission and that post was proposed for abolishment. The Applicant had a continuing appointment whereas the candidate selected for job opening No. 12220 had a fixed-term appointment and was at a lower level. That staff member's appointment was in violation of the order of retention. Further, the justification for rejecting the Applicant was not supported by the record. The UNSOS management claimed that the Applicant's experience was limited to horizontal construction yet he was Deputy Chief Engineer and Engineering Operation Officer of the United Nation's largest mission. Deputy Chief Engineer or Engineering Operation Officer handle all engineering operations, including military camp construction, level 3 hospitals, offices, electrical, mechanical, environment, water and sanitation, roads, bridges, airports, and rails. The UNSOS management's conclusion is unsupported.

d. For job opening No. 29143 MONUSCO Engineer, the Respondent argues that the Applicant was found not suitable due to integrity issues and a

misrepresentation of his disciplinary history on his job application. When applying for job opening No. 29143 the Applicant stated that he had not received a disciplinary measure or administrative measure following a disciplinary process. He did not disclose that a disciplinary sanction of written censure was imposed on him in November 2018. The Applicant submits that he explained that this was a clerical error he made on the application form. Since it was his own mission, they would have been fully aware and there is no indication this would have prevented him from being appointed. Moreover, as a lower-level P-3 post, he should not have been required to apply competitively for it once he had expressed an interest; indeed it was improper to conduct a recruitment action instead of accommodating him with an available post.

e. For job opening No. 121739 in Bamako, Mali, (Engineer), the selected candidate's PHP indicated that he was working as P-3 Property Control and Inventory Officer in the same mission. The mission was not a downsized mission nor was that candidate's post as Property Control Officer under abolishment. While the Applicant was in the aforesaid list of staff for placement, the selected candidate was not.

f. For job opening No. 140211 in Bamako, Mali (Engineer), the selected candidate for this position was working in UNSOS (Mogadishu) at the P-4 level on a fixed-term contract. In the Comparative Analysis report, the Applicant was not considered but the Comparative Analysis Report against another similar Job Opening 126580 UNMISS (Sudan) found the Applicant suitable and recommended him for a similar engineering position. Although the Applicant was on the list attached to the 26 April 2019 IOM, the selected candidate for job opening No. 140211 was not.

g. The Applicant applied for the P-4 Engineer, Job Opening No. 123320 in the United Nations Integrated Office in Haiti ("BINUH") but was

automatically screened out by *Inspira* because he did not meet the language requirement of the position, that is, fluency in French.

26. The Respondent should have placed him against the remaining P-3 post in his section. Instead, the Respondent chose to advertise the post.

27. A review of the selection process for the five posts shows that the candidates selected were either not against abolished posts or did not have continuing appointments. In six out of seven of the cases examined, the reasons put forward for rejecting the Applicant in favour of those who were not entitled to preferred treatment are highly suspect given the fact that the Applicant was already rostered and had been performing similar engineering functions in the largest mission at the time.

28. The Applicant seeks the following reliefs: rescission of the contested decision, reinstatement in service and appropriate compensation for the harm to his career and professional reputation.

29. In his closing submission, the Applicant pleaded an additional remedy, that is, an appropriate termination indemnity and compensation in lieu of notice for his wrongful separation from service.

### ***The Respondent***

30. The Applicant's challenge of the decision to abolish the post is not receivable *ratione materiae* under art. 2.1(a) of the Dispute Tribunal's Statute. The decision was taken by the General Assembly. It was not an administrative decision of the Secretary-General. The Dispute Tribunal lacks jurisdiction to review the General Assembly's decision to abolish a post.

31. The contested decision was lawful. The Applicant's appointment was terminated because the General Assembly abolished the post he encumbered. There were no vacant positions in MONUSCO for which the Applicant was suitable at the time of the contested decision.

32. The Applicant has produced no evidence that the termination of his appointment was in bad faith or ill-motivated. He does not dispute that he encumbered the post, that the General Assembly abolished the post, or that his appointment was financed by the post.

33. The Applicant's allegation that the Administration has made no efforts to assist him in finding an alternative suitable position is unsupported. Since 1 April 2019, when the Applicant was notified that he might be adversely affected by the Budget, the Organization has made efforts to assist the Applicant to identify suitable positions.

34. In addition to uploading the Applicant's profile to COSMOS for hiring entities to access, the Under-Secretary-General for the Department of Operational Support ("USG/DOS") has shared the Applicant's job profile with several Secretariat entities and reiterated that he must be given priority consideration for available vacancies in accordance with staff rules 9.6(e) and 13.1 (d). However, these efforts have not been fruitful.

35. The Applicant has applied for several positions. MONUSCO's Human Resources has written to peacekeeping missions drawing their attention to his applications as a continuing appointee affected by downsizing. The Applicant has either not been found suitable for these positions due to the job requirements or is still under consideration.

36. The Applicant was not selected for Job Opening No. 119995 UNMISS because another continuing appointment holder was found more suitable for the position. In Job Opening No. 126580 UNMISS, the Applicant was not selected for the position because he lacked the necessary budgetary skills and planning skills in relation to supplies at Mission/Section level required for the job opening. The Applicant was not deemed suitable for P-4 Engineer, Job Opening No. 112220, UNSOS/Somalia because a staff member from the United Nations Mission for Justice Support in Haiti, also a downsizing mission, was selected for the position. With

regards to the P-4 Engineer, Job Opening No. 123320 in the United Nations Integrated Office in Haiti, the Applicant was automatically screened out by *Inspira* because he did not meet the language requirement for the position, that is, fluency in French.

37. Contrary to the Applicant's allegations, there was only one P-3 Engineer position in MONUSCO, Job Opening No. 129143, for which the Applicant was found not suitable due to integrity issues and a misrepresentation of his disciplinary history on his job application. The Applicant has not produced any evidence that he applied for any other P-3 engineering post in MONUSCO and was not considered. There is no obligation to retain a staff member who has not applied for a position

38. The Applicant's contention that he should have been placed against available job openings on a priority and non-competitive basis based on his roster membership is without merit. Roster membership does not necessarily mean that a staff member meets the requirements or possesses the qualifications for a specific job opening. The Administration is required to determine the suitability of a staff member for a position. The Applicant's roster membership did not exempt him from technical evaluation to determine his suitability.

39. In light of the foregoing, the Respondent submits that the Applicant is not entitled to the relief sought and requests the Tribunal to reject the application.

40. Should the Tribunal decide to compensate the Applicant, it should consider that the Applicant continued to receive his full salary, benefits, and entitlements for 13 months after his appointment was terminated. While he received a notice of termination of his continuing appointment on 12 July 2019 with an effective date of 2 August 2019, the Applicant did not separate from the Organization until 10 September 2020. During this time, the Applicant was not providing services to the Organization. He was placed on Special Leave With Full Pay to allow for the Organization's efforts to identify a suitable alternative position for him. Any award of

compensation should be offset by the 13 months' salary, benefits, and entitlements already paid to the Applicant.

41. The Applicant's claims for termination indemnity and compensation in lieu of notice are not receivable *ratione materiae*. Neither did the Applicant request management evaluation of those claims. Nor did the claims form part of his application. In any event, the Organization already paid the Applicant his termination indemnity. Awarding the Applicant termination indemnity will result in duplicative remuneration, which would result in unjust enrichment. The Applicant's claims for compensation in lieu of notice are pending determination by the Dispute Tribunal in case number UNDT/NBI/2020/089.

### **Considerations**

42. The issues before the Tribunal are whether the claim for abolition of the Applicant's post is not receivable and whether the Administration did not make reasonable and good faith efforts to absorb the Applicant in the system based on his statutory entitlement as a staff member holding a continuing appointment after his post was abolished.

#### *Abolition of post*

43. The Respondent argued that the Applicant's challenge of the decision to abolish the post is not receivable *ratione materiae* under art. 2.1(a) of the Dispute Tribunal's Statute. The decision was taken by the General Assembly. The Dispute Tribunal lacks jurisdiction to review the General Assembly's decision to abolish a post.

44. In his application, the Applicant contends that his position was essential for the operations of the Organization as he was the only Engineer at the P-4 level in the Engineering Section. He argued that in view of this, the Chief of Engineering sent an IOM to the Director of Mission Support to "...immediately cease the abolishment of

the Applicant's post..."<sup>12</sup> However, he was advised that the recommendation had come too late for consideration as the budget had already been submitted for approval. The General Assembly approved the abolition of the Applicant's post on 3 July 2019.

45. There is no dispute that the Applicant's position was abolished following a General Assembly resolution after the Administration had submitted the 2019-2020 budget proposing abolition of posts within MONUSCO. This Tribunal has jurisdiction over administrative decisions only as per its Statute. General Assembly resolutions are not administrative decisions. UNAT held in *Lloret Alcañiz et al*<sup>13</sup> that:

The jurisdiction of the UNDT is limited by Article 2(1) of the UNDT Statute to hearing appeals against "administrative decisions" ... Where the General Assembly takes regulatory decisions, which leave no scope for the Secretary-General to exercise discretion, the Secretary-General's decision to execute such regulatory decisions depending on the circumstances, may not constitute administrative decisions subject to judicial review. Discretionary powers are characterised by the element of choice that they confer on their holders. An administrator has discretion whenever the effective limits of his or her power leave him or her free to make a choice among possible courses of action and inaction. Only in cases where the implementation of the regulatory decision involves an exercise of discretion by the Administration-including the interpretation of an ambiguous regulatory decision, compliance with procedures, or the application of criteria- is it subject to judicial review<sup>14</sup>.

46. The Applicant has not advanced any exception to the rule that General Assembly resolutions may not be amenable to judicial review by this Tribunal. These exceptions arise where the Secretary-General is mandated to interpret an ambiguous regulatory decision, to comply with procedures or where the implementation of the resolution involves application of a criteria. In the instant case, the Secretary-General's role in implementation of the resolution to abolish the P-4 Engineering

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<sup>12</sup> Amended application paras. 8 and 9.

<sup>13</sup> 2018-UNAT-840, para. 59.

<sup>14</sup> Ibid.

position was mechanical and is not reviewable<sup>15</sup>. In that regard, the Respondent is correct that this limb of the application is not receivable *ratione materiae*. The Tribunal so finds.

47. The Tribunal has competence to review whether after abolition of posts the affected staff members are given the opportunity, subject to the availability of suitable posts in which their services can be effectively utilized, to be reassigned in the order of preference established by the staff rules to avoid termination. This brings us to the remaining issue in the application:

*(ii) Whether the Administration did not make reasonable and good faith efforts to absorb the Applicant in the system based on his entitlement as a staff member holding a continuing appointment.*

48. This claim is governed by staff rule 9.6 (e) which provides that;

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;
- (ii) Staff members recruited through competitive examinations for a career appointment serving on a two-year fixed-term appointment;
- (iii) Staff members holding fixed-term appointments.

When the suitable posts available are subject to the principle of geographical distribution, due regard shall also be given to nationality in the case of staff members with less than five years of service and in the case of staff members who have changed their nationality within the preceding five years. And,

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<sup>15</sup> *Kagizi et al.* 2017-UNAT-750, para. 21.

49. Staff rule 13.1 (d) which 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.

50. Where a staff member affected by abolition of post alleges that he was not given the opportunity, subject to the availability of suitable posts in which his services could be effectively utilized, to be reassigned in the order of preference established by the staff rules, the onus is on the Respondent to demonstrate that he made all proper, reasonable and good faith efforts to assist the staff member in finding suitable alternative employment.<sup>16</sup>

51. In the present case, the Respondent has outlined in detail the measures that he took to assist the Applicant secure alternative employment. He avers that, firstly, MONUSCO had no suitable vacant position at the Applicant's grade to which he could be reassigned. Secondly, the Applicant was considered but disqualified from the lower position, P-3 Engineering, at the application stage due to integrity issues. Thirdly, since 1 April 2019, when the Applicant was notified that he might be adversely affected by the Budget, the Organization made efforts to assist him to identify suitable positions by uploading his profile to COSMOS for hiring entities to access, and finally, the USG/DOS shared the Applicant's job profile with several Secretariat entities, urging them to give the Applicant priority consideration for available vacancies in accordance with staff rules 9.6(e) and 13.1(d).

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<sup>16</sup> See generally, *Icha*, 2021- UNAT-1077 (citing *Timothy*, 2018-UNAT-847, paras. 31 and 32 *El-Kholy*, 2017-UNAT-730, paras. 24 and 31; and *Fasanella*, 2017-UNAT-765, para. 24.

52. The relevant parts of the USG/DOS IOM of 26 April 2019 state:<sup>17</sup>

2. Following the recent revisions to the Secretary-General's delegation of authority, as outlined in SGB/2019/02, authority to laterally transfer existing staff within the same entity has been delegated to each head of entity. Request for lateral transfer between entities can be submitted to the Department of Management Strategy, Policy and Compliance for approval. Consideration of lateral placement is particularly relevant where staff members affected by downsizing initiatives, including the abolition of posts, are entitled to ongoing employment within the Secretariat, including holding status as permanent or continuing staff members.

3. In this regard, a series of judgments in recent years by the United Nations Appeals Tribunal have clarified that staff members facing termination due to abolition of post or reduction of staff, must be given priority consideration for available vacancies in accordance with the order of preference set out in Staff Rules 9.6(e) and 13.1(d).

4. This is a responsibility of the Secretariat as a whole. Only if there are no suitable staff members holding permanent or continuing appointments requiring placement may the Secretariat consider other applicants.

53. The record shows that the Applicant applied for several positions. The Applicant was found not suitable in some of these positions. Reasons were advanced relating to integrity in Job Opening No. 129143, language in Job Opening No. 123320 in the United Nations Integrated Office in Haiti and competence in Job Opening No. 126580 UNMISS.

54. It is the established view of UNAT that,

Once the application process is completed...the Administration is required by Staff Rule 13.1(d) to consider the permanent staff member on a preferred or non- competitive basis for the position, in an effort to retain the permanent staff member. This requires determining the suitability of the staff member for the post, considering the staff member's competence, integrity and length of service...<sup>18</sup>

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<sup>17</sup> Reply, annex R/5.

<sup>18</sup> *Fasanella*, para. 32.

The Tribunal finds, based on this authority, that the Respondent was entitled not to reassign the Applicant to the positions for which he was not suitable for reasons furnished by the Respondent.

55. The Respondent has however not given any reasons or valid reasons why the Applicant was not qualified for the rest of the suitable positions he applied for. It has been held that failure to give reasons may entitle this Tribunal to draw adverse inferences<sup>19</sup>. These positions are outlined below:

a. The Applicant was not selected for Job Opening No. 119995 UNMISS because another continuing appointment holder was found more suitable for the position. The Applicant has argued that the selected candidate for the referenced position was a P-3 staff member with a continuing appointment in UNMISS. UNMISS was not a downsized mission; nor was the selected candidate against a post proposed for abolishment.

b. The Applicant was not deemed suitable for the P-4 Engineer, Job Opening No. 112220, UNSOS/Somalia because a staff member from the MINUJUSTH, also a downsizing mission, was selected for the position. The Applicant avers that the selected candidate for the position was working as a P-3 staff member with a fixed term appointment in MINUJUSTH. That staff member's appointment was in violation of the order of retention.

c. For job opening No. 121739 in Bamako, Mali, (Engineer), the selected candidate's PHP indicated that he was working as P-3 Property Control and Inventory Officer in the same mission. The mission was not a downsized mission nor was that candidate's post as Property Control Officer under abolishment.

d. For job opening No. 140211 in Bamako, Mali (Engineer), the selected candidate for this position was working in UNSOS (Mogadishu) at the P-4

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<sup>19</sup> *Obdeijn* 2012-UNAT-201.

level on a fixed-term contract.

56. The Respondent has not demonstrated that reasonable and good faith efforts were made to offer the Applicant any of the suitable four positions outlined above. The Respondent has not provided any evidence against the Applicant's suitability in relation to competence, integrity or length of service for those positions.

57. The Respondent was under an obligation to give priority to the Applicant, who, as a holder of a continuing appointment, had a right under the Staff Rules to be offered any available post for which he was found suitable. The Respondent has not provided justification for offering the positions to staff members holding fixed term appointments or to those whose missions were not under threat of a downsizing exercise and whose staff members were not on the priority list for consideration for placement. UNAT has consistently held that;

Only if there is no permanent staff member who is suitable may the Administration then consider the other, non-permanent staff members who applied for the post.<sup>20</sup>

58. The Respondent failed to take the Staff Rules into consideration, especially staff rule 13.1(d) and ignored the well-established jurisprudence on the matter and did not comply with his own internal communication regarding adherence to the rules and regulations and jurisprudence on priority retention of staff members whose positions are abolished<sup>21</sup>. This failure to comply with the relevant provisions constitutes a material irregularity.<sup>22</sup> The decision to terminate the Applicant's services was unlawful.

#### *Effect of Roster membership*

59. The Applicant argued that he was rostered for Engineering posts at the P-4 level, therefore the Administration could transfer him into a vacant post in one of

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<sup>20</sup> *Fasanella* para. 32. See also *Geegbae* 2021-UNAT-1088, para. 56.

<sup>21</sup> IOM dated 26 April 2019.

<sup>22</sup> *Icha*, para. 51 citing *Timothy*.

those categories within MONUSCO or in another mission. Indeed, as the Respondent points out, roster membership does not guarantee a position<sup>23</sup>, nonetheless, the Applicant's roster membership was a relevant material asked for in the "advance information: Anticipated termination of continuous appointment"<sup>24</sup> communication, addressed to the Applicant by the Chief Human Resources Officer to facilitate his placement in a suitable position.

## **Judgment**

60. The Applicant has successfully argued that as a staff member with a continuing appointment faced with termination of employment due to abolition of post he was not afforded proper, reasonable and good faith opportunity to be absorbed into the system, in violation of, staff rules 9.6(e) and 13.1(d). The termination was unlawful. The application succeeds.

## **Reliefs**

61. The Applicant seeks rescission of the contested decision, reinstatement in service and appropriate compensation for the harm to his career and professional reputation (in the amount of two years' net base pay).

62. The Respondent argued that the Applicant's claims for termination indemnity and compensation in lieu of notice filed in his closing submissions are not receivable *ratione materiae*. The Applicant neither requested management evaluation of those claims nor did the claims form part of his application. In any event, the Organization already paid the Applicant his termination indemnity. He further argues that awarding the Applicant termination indemnity will result in duplicative remuneration, which would result in unjust enrichment. Further, he avers that the Applicant's claims for compensation in lieu of notice are pending determination by the Dispute Tribunal in

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<sup>23</sup> *Lemonnier*, 2017-UNAT-762, para. 29; *Krioutchkouv*, 2016-UNAT-807, para. 29; *Charles*, 2014-UNAT-416, para. 28.

<sup>24</sup> Reply, annex R/2.

case number UNDT/NBI/2020/089.<sup>25</sup> The Applicant made no submissions in response to these assertions.

63. The Tribunal rejects the Applicant's claims for compensation for termination indemnity and in lieu of notice because he has failed to justify them in view of the Respondent's objections and they did not form part of his claims in the amended application for consideration.

64. The Tribunal rescinds the contested decision. The Applicant shall be reinstated in his position from the date of his separation. Pursuant to art. 10.5(a) of the Tribunal's Statute, the Respondent may elect to pay compensation in lieu of rescission.

65. Some of the factors to take into consideration when setting in lieu compensation whose aim should be to ensure that, "the person would receive the same amount had the unlawful decision not occurred", are; the type of contract held by the staff member, mitigation if any evidence is adduced by the Respondent and in cases of abolition of posts whether the staff member made good faith efforts to cooperate with the Administration in applying for suitable positions to avoid termination.<sup>26</sup>

66. The Applicant held a continuing appointment and he applied in vain for suitable positions in order to be absorbed in the system. The in-lieu compensation is set at the equivalent of two years' net base salary. This award is consistent with awards made in cases of similar nature and affirmed by UNAT.<sup>27</sup>

### **Moral damages**

67. The Tribunal agrees with the Respondent that the Applicant has not adduced evidence to support a claim for damages for moral harm. It is well settled

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<sup>25</sup> Paragraph 14 of the Respondent's closing submissions.

<sup>26</sup> *El Kholy*, paras. 25, 28, 29, 31 and 37.

<sup>27</sup> For example, *Nugroho 2020-UNAT-1042* and *Fasanella, op. cit.*

jurisprudence since *Kallon*<sup>28</sup> that a claim for moral damages must be supported by independent evidence.<sup>29</sup>

*(Signed)*

Judge Rachel Sophie Sikwese

Dated this 22<sup>nd</sup> day of July 2021

Entered in the Register on this 22<sup>nd</sup> day of July 2021

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi

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<sup>28</sup> 2017-UNAT-742.

<sup>29</sup> See *Ross* 2019-UNAT-926 para. 57, *Langue* 2018-UNAT-858 para. 20, *Timothy* 2018-UNAT-847 para. 69, *Auda* 2017-UNAT-787 para. 64 and *Zachariah* 2017-UNAT-764 para. 37.