



Before: Judge Francis Belle
Registry: Nairobi
Registrar: Abena Kwakye-Berko

QASSEM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Omar Shehabi, OSLA
Endah Ayuningsih Indini, OSLA

Counsel for Respondent:

Esther Shamash, UNDP

Introduction

1. The Applicant held a fixed-term appointment at the GS-3 level when he served as an Administrative Clerk/Dispatcher at the United Nations Development Programme's Programme of Assistance to the Palestinian People ("UNDP/PAPP"). He was based in East Jerusalem.

Procedural History

2. On 6 August 2020, the Applicant filed an application with the United Nations Dispute Tribunal sitting in Nairobi to challenge the Respondent's decision to not renew his appointment beyond 31 March 2020. It is the Applicant's case that the impugned decision was retaliatory, made in response to his whistleblowing and that the decision to abolish the post he encumbered was tainted by extraneous factors and was therefore unlawful.

3. The Respondent filed his reply to the application on 9 September 2020. The Respondent takes the position that the application is materially not receivable by the Tribunal and is time-barred. The decisions to abolish his post and therefore not renew his appointment, the Respondent further contends, were lawfully made and that the Applicant's allegations of bad faith have not been borne out by the evidence.

4. A Case Management Discussion ("CMD") took place as scheduled on 12 May 2021.

5. On 14 May 2021, the Tribunal issued Order No. 097 (NBI/2021) recording the contents of the CMD. The Tribunal allowed the filing of an amended application by the Applicant and further submissions on receivability by both parties.

6. On 19 May 2021, the Respondent filed his additional submissions on receivability pursuant to Order No. 097 (NBI/2021).

7. On 26 May 2021, the Applicant filed an amended application. This amended application also addressed the Respondent's submissions on receivability.

8. On 27 May 2021, the Respondent file an objection to the length and scope of the amended application.

9. On 28 May 2021, the Applicant responded to the objection.

10. Having considered the parties' submissions, the Tribunal called for a further CMD on 27 July 2021 with the parties.

11. On 29 July 2021, the Tribunal issued Order No. 148 (NBI/2021). The Order recorded the discussion on receivability. The Tribunal found the application receivable, allowed the amended application, and granted the Respondent leave to respond to the amended application.

12. The parties were strongly advised to resolve this dispute without recourse to further litigation, and to that end the Tribunal referred the matter to the United Nations Ombudsman and Mediation Services ("UNOMS") to facilitate mediation discussions.

13. On 23 February 2022, UNOMS wrote to the Registry:

This is to kindly advise the Tribunal that there has been a recent transition of this case to another mediator of the Office of the Ombudsman for UN Funds and Programmes. In the past four months, the parties were in settlement discussions sporadically, but we are now putting efforts to reactivate the mediation process.

The parties have reconfirmed to our Office about their willingness to continue trying to find an informal resolution to this dispute. To that end, I kindly request that the Tribunal extend the deadline for mediation to allow the parties to finalize their informal discussions through our Office.

14. The Tribunal granted the requested extension.

15. On 20 May 2022, UNOMS informed the Registry that the parties were still in mediation.

16. On 10 June 2022, UNOMS informed the Tribunal that the "parties have decided to proceed with litigation while still maintaining the possibility of an amicable settlement, which can be pursued in parallel with litigation."

17. The Parties filed their respective closing submissions on 17 August 2022.

Facts and Submissions

18. The Applicant joined UNDP-PAPP, which is UNDP's country office in the occupied Palestinian territory ('oPt' or 'Palestine'), in April 2003 on a Special Service Agreement until January 2004.

19. The Applicant was appointed on a fixed-term appointment as an Administrative Clerk/Dispatcher at the GS-3 Level on 14 November 2011.

20. The Applicant was initially assigned to work in East Jerusalem. Because the post of Head of Transport was vacant, the Applicant was temporarily made Head of Transport for East Jerusalem and the West Bank, *ad interim*.

21. On 22 September 2015, the Applicant wrote to the then-Special Representative and asked for his help resolving the Applicant's conflict with Mr. Khaled Shahwan, then-Deputy Special Representative. The Applicant complained to the Special Representative of the UNDP Administrator that the Deputy Special Representative for Operations ("DSR-O"), who was the highest-ranking national staff member in the country office, was abusing his authority and engaging in (or tolerating) fraud, waste and abuse.

22. On 3 November 2015, the then-Special Representative decided that, effective 11 November 2015, the Applicant would be reassigned to work from UNDP-PAPP's Ramallah office.

23. The Applicant and the staff association which negotiated the reassignment with UNDP-PAPP management understood it to be a temporary measure. The Applicant submits that while the reassignment protected him from retaliation by the DSR-O, it also left him with little work to perform.

24. On 9 November 2015, the Applicant was informed by the Ethics Office that "his case did not raise concerns of retaliation."

25. On 12 November 2015, the Office of Audit and Investigations (“OAI”) informed the Applicant that no further investigation was warranted and closed the case. In mid-2016, the UNDP Ombudsman conducted a mission to UNDP-PAPP in order to mediate the inter-personal aspects of the Applicant’s relationship with the DSR-O.

26. Between 2016 and 2018, the Applicant continued to ask to be reassigned to East Jerusalem. The Respondent submits that he often failed to report for duty in Ramallah, sometimes appearing at the East Jerusalem office instead. UNDP-PAPP repeatedly clarified that his workstation was Ramallah. The Applicant’s claim that the Administration’s refusal to reassign him to East Jerusalem was retaliatory was reviewed by the Ethics Office, which found that there was no retaliation.

27. In 2017, the Applicant learned that he had been declared surplus to requirements in Ramallah. He contacted the Ethics Office, whose director “elicited a personal commitment from the Special Representative that the Applicant’s post would not be abolished.”

28. On 18 September 2018, following a restructuring exercise, the Applicant received a ‘No-Change’ letter, indicating that his post remained unchanged.

29. The Applicant submits that he was matched to the post, as defined by the original job description. He assumed that with the DSR-O’s departure from UNDP-PAPP and his original job description reinstated, he would be allowed to return to work in East Jerusalem and perform all the duties specified in the job description. He was not. Instead, UNDP-PAPP management kept him in Ramallah while it continued to rely on service contractors to perform his former job duties.

30. The Applicant challenged UNDP-PAPP’s refusal to implement the matching decision and its decision to strip him of his job duties in separate proceedings before this Tribunal.

31. The Applicant submits that UNDP-PAPP retaliated by proposing to UNDP Headquarters that the Applicant’s post be abolished – the only fixed-term post UNDP-PAPP abolished in 2020. That proposal came one year after the

Headquarters-led restructuring exercise, and weeks after the Administration advised the Tribunal of the continued need for the Applicant's post. "The Applicant was the only staff member encumbering a post abolished in either 2018 or 2020 who was not invited to apply for agreed separation."

32. On 2 October 2018, the Applicant again requested to move to East Jerusalem.

33. On 3 October 2018, Office of Human Resources ("OHR") in Headquarters, and Mr. Geoffrey Prewitt, then-Deputy Special Representative in UNDP-PAPP both reiterated that the Applicant was to remain in Ramallah.

34. On 1 December 2018, Mr. Al Hammal joined UNDP-PAPP as the Operations and Services Manager.

35. On 18 April 2019, the Applicant wrote, to the Operations and Services Manager, and asked again to be reassigned to East Jerusalem. The Applicant complained to Mr. Al Hammal that he was effectively precluded from exercising the functions of his post. The Applicant specified the tasks and activities which form part of the Job Description for his post but which he no longer performed.

36. On 8 May 2019, Mr. Al Hammal responded that the Applicant's post had not changed. Mr. Al Hammal did not address the Applicant's specific allegations regarding the stripping of his core job functions.

37. On 10 May 2019, the Operations and Services Manager met the Applicant, together with representatives of both OHR and the Local Staff Association to discuss the ongoing disagreement and once more attempt, to resolve it, without success.

38. On 19 June 2019, the Applicant requested management evaluation regarding: (1) the decision to strip him of the majority of his functions and duties; (2) the decision to move him from his duty station of East Jerusalem to Ramallah; and (3) the Administration's failure to implement the decision dated 18 September 2018 related to the outcome of the restructuring process. The Applicant named Mr Al

Hammal as the decision-maker responsible for the decision to strip him of his job functions.

39. On 13 December 2019, Mr. Al Hammal came to the Applicant's office and asked, 'how could you file a case against me before the UN tribunal?' Referencing the fact that his name was mentioned in the Applicant's submissions to the Tribunal, Mr. Al Hammal told the Applicant, 'Since you have filed a case, I will renew your contract for three months and then you will have to look for another job.'

40. On 14 December 2019, the Applicant reported this incident to the UNDP Ethics Office and sought protection from retaliation. In his complaint, the Applicant reiterated that the threat to abolish his post was an act of reprisal by Mr. Al Hammal for having complained against his actions in a UNDT application.

41. On 16 December 2019, the Ethics Office wrote to the Applicant

UNDP Protection against Retaliation Policy does not cover alleged retaliation for having filed an action in the UNDT or UNAT. Rather, your solution is to contact the UN Office of Staff Legal Assistance and raise your concern. Alternatively, you can approach the judge in your matter directly through your legal counsel. It is a long accepted practice that the judges in Tribunal matters will protect litigants from retaliation for matters they are hearing.

42. In an all-staff meeting on 16 December 2019, Ms. Helle, the new Special Representative warned of impending post abolitions and advised that affected staff would receive three-month extensions.

43. On 17 December 2019, the Applicant was issued a three-month extension, which had been processed on 12 December.

44. On 18 December, he sought clarification from UNDP-PAPP's HR business partner, Ms. Margaret Cameron, regarding his contractual status. Ms. Cameron directed the Applicant back to Mr. Al Hammal.

45. On 20 December 2019, UNDP-PAPP management requested the Regional Bureau for Arab States ("RBAS") to review and grant clearance to proceed with the proposed post abolitions.

46. On the same day, the Applicant was requested to attend a meeting with Mr. Al Hammal to discuss the planned abolition of his post.

47. The Applicant was unable to attend the meeting. He received the following email from Mr Al Hammal:

The purpose of today's meeting was to notify you of the planned abolishment of your post. I wish to reiterate and clarify that the PAPP senior management has notified all staff of the need to review all office functions across Programme and operations in order to finalize the office re-alignment process as well as address the substantial financial limitations currently faced by the office due to the low delivery and the associated cuts within our Admin budget for 2020. Your post has therefore been identified as one of a number of Permanent and Fixed Term posts to be abolished in 2020 along with additional post reductions among SC project and operations staff. This decision has not been taken lightly but is necessary to ensure the future sustainability of the office under the current financial constraints. Once you are back to office and we return in the new year I will be happy to arrange an alternate meeting so that we can discuss the above further and provide you with all necessary clarifications.

48. The Applicant submits that his was the only fixed-term appointment which UNDP-PAPP management abolished in 2020. The six other abolished posts were encumbered by permanent appointment holders who were near retirement age and opted for early retirement. Several of these staff members had requested early retirement, including Ms. BA, Ms. SK, and Ms. MS.

49. On 28 December 2019, the Applicant was put on certified sick leave.

50. On 27 January 2020, the Applicant received a letter, dated 24 January 2020, informing him that his fixed-term appointment would not be renewed upon its expiry on 31 March 2020. The letter did not provide a reason for the non-renewal.

51. On 13 February 2020, Ms. Helle requested OHR approval for six agreed separations with termination packages ranging from \$50,321 to \$110,630. The letter states of the six posts and their incumbents: 'the following posts were identified for abolishment and staff occupying those posts opted to take cash *in lieu* of notice'.

The Applicant was not provided with the option of taking compensation *in lieu* of notice, nor was he presented with the opportunity to apply for agreed separation.

52. On 6 April 2020, UNDP-PAPP notified the six staff members, including Ms. MS that the Bureau of Management Services had approved their agreed separations.

53. The Applicant's contract was extended beyond 31 March 2020 for the purposes of exhausting his sick leave entitlement.

54. On 23 March 2020, the Applicant requested suspension of action, pending management evaluation, of the non-renewal decision. UNDP submitted a reply on 25 March 2020.

55. In Order No. 64 (NBI/2020) of 30 March 2020, the Tribunal granted the suspension of action application.

56. On 13 April 2020, the Applicant's Counsel wrote to the UNDP Ethics Office, asking that it re-consider its decision not to pursue interim protective measures in light of Order No. 64 (NBI/2020).

57. 14 April 2020, the Applicant was informed that 'the Ethics Office does not agree that the underlying allegations create a prima facie case of retaliation as defined in the UNDP Protection against Retaliation Policy.'

58. On 6 May 2020, the Administration issued its response to the Applicant's request for management evaluation. It asserted that the Applicant had presented no evidence that the non-renewal decision was unlawful, that a challenge to the post abolition was time-barred, and that both decisions were, in any event, lawful.

59. On 4 June 2020, while the Applicant remained on certified sick leave, he was contacted by an investigator with OAI. The investigator informed the Applicant that OAI had 'received information that [the Applicant] may have witnessed some wrongdoings [sic] in [his] workplace' and asked that he 'describe in detail any potential misconduct [he] may have witnessed or suffered directly.'

60. The Applicant initially declined to participate due to his poor health. By the time he got in touch with OAI on 12 July 2020, he was informed that the matter had been closed.

61. On 11 December 2020, the Applicant filed an Appendix D claim with the Advisory Board on Compensation Claims (“ABCC”). In his claim, the Applicant asserts that he developed a psychiatric condition as a result of work-related stress.

62. On 12 May 2021, the Applicant was separated from service.

Considerations

63. A comprehensive understanding of this application can be gleaned from an examination of the facts and arguments relating to:

- a. Whether the Respondent has adduced sufficient evidence and a basis in law for the decision to terminate the applicant’s fixed-term appointment;
- b. Whether the Applicant can rebut the Respondent’s argument that the application is now moot since the Applicant was in fact terminated on the basis of disability;
- c. Whether there are other features of this case such as bad faith which may require a referral to the Secretary General in accordance with art.10 of the Statute of the UNDT; and
- d. Whether the Tribunal’s determination of receivability should be revisited.

Was the non-renewal of the Applicant’s appointment lawful?

64. The Applicant argues in some detail that the Respondent has not adduced sufficient evidence in accordance with *Loose* 2020-UNAT-1043 to establish that there was insufficient funds, the main plank of the argument in favour of the non-renewal of the Applicant’s fixed-term appointment to support the continued employment of the Applicant.

65. An example of the argument mounted by the Applicant was that the Administration refused to return him to his substantial post in Jerusalem but instead kept him in a post in Ramallah which suffered reduced funding. Later, it was shown that the Jerusalem office had sufficient funding for his appointment to be renewed if he was sent back to Jerusalem.

66. Indeed, in Jerusalem the job he did as a single officer is now being done by two persons, a United Nations staff member and a private contractor for the purpose of dispatching vehicles, which was his substantive post in Jerusalem.

67. The Respondent replied to this assertion by insisting that the true situation with the dispatches in Jerusalem was that the two persons involved there now do the work of three because they cover his former position in Ramallah along with Jerusalem.

68. The Tribunal observes that the Applicant always said that the dispatch work in Ramallah was a negligible 4-5 vehicles; while in Jerusalem there were more than 20 vehicles.

69. The Respondent also argues that the circumstances in which the Applicant could have agreed to be terminated with pay *in lieu* of notice in 2018 no longer exist because the policy was changed before 2020.

70. The Respondent further argues that there was no obligation to return the Applicant to his former position in Jerusalem and that he was reassigned to Ramallah for his health and to avoid conflict with his former first reporting officer (“FRO”) in Jerusalem.

71. But the Respondent’s more substantial answer to all the allegations of the Applicant is that the termination of the Applicant’s contract based on non-renewal was never implemented because the Applicant sought sick leave and therefore his appointment was extended beyond the date of the planned termination based on non-renewal. In fact, his appointment was eventually terminated on grounds of disability. According to the Respondent, the termination on the ground of disability rendered the Applicant’s application “moot.”

72. The Applicant argued that the application to rescind the decision refusing to renew his contract is not moot since the contract was not renewed in any event and that decision not to renew was never rescinded by the Respondent.

73. According to the Applicant, the sick leave followed refusal to renew his appointment and the basis for the refusal was never resolved due to his illness.

74. The Tribunal observes that there can be no denial that the Applicant's appointment was extended beyond the date of the intended termination because of the extension of the contract due to sick leave. The Respondent's view is that the Applicant did not suffer any loss due to termination.

Receivability

75. The Respondent continues to argue that the application was not receivable *rationae temporis*.

76. However, the Tribunal stands by the earlier determined position that the matter is receivable as reasoned in Order No. 148 (NBI/2021). The reasons for this decision are as follows:

77. The Tribunal notes that the response was sent to the Applicant on Friday, 7 May 2020, at 10:51 a.m., New York time (EDT), which was 5:51 p.m. in East Jerusalem and Ramallah. UNDP sent the RME Response after working hours in the duty station, at the start of the Applicant's weekend (which was Saturday and Sunday), and during the traditional weekend in the oPt which is Friday and Saturday.

78. The Tribunal has therefore determined that the first full day of the delivery of the email was 8 May 2020, which means that the 90-day count under art. 8.1(d)(i)(a) of the UNDT Statute starts from 9 May 2020 since art. 34 of UNDT Rules of Procedure provides that time limits "shall not include the day of the event from which the period runs".

79. Based on this approach the 90 days would end on 7 August and not 6 August 2020. Consequently, the application is receivable.

Bad faith and irregularities.

80. The more worrisome aspect of this application is that which can be summarised under the head “bad faith and irregularities.” This heading is chosen since it is clear that the Administration was less than forthright with the Applicant which led him to think that his transfer to Ramallah was temporary when it was permanent; it also served to reduce him to an unproductive post while he could have continued to be more productive in his chosen position in Jerusalem.

81. It is accepted that the Tribunal cannot substitute its decision for that of the Administration. However, the United Nations Charter would not support a decision which reduces the workload of an officer to a level where they feel as if they are being punished but without any cause being stated for such punishment. It is clear that the ability to perform his original assignment was dear to the Applicant.

82. The reasons given for reassigning him to Ramallah were that it was to protect his mental health and reduce the incidences of conflict between himself and his former FRO. But even after the FRO left the office he held and could no longer be the Applicant’s supervisor or reporting officer, UNDP, without stating a reason, continued to keep him in Ramallah. This decision flies in the face of the argument that the transfer was done with the interest of the Applicant’s health in mind. The record clearly shows that the Applicant’s consistent protests about the continued reassignment fell on deaf ears.

83. There can be no doubt that the Applicant would have been more useful in Jerusalem. If there were reasons for his continued presence in Ramallah, he should have been informed of those reasons. The evidence shows that the failure to reassign the Applicant to Jerusalem placed him in the firing line for termination or non-renewal based on the funding of the Ramallah post. Indeed, the outcome where a later appointee along with a contractor were placed in the same position seems to contradict what was being argued about funding. Any way you look at it, two persons could have done the same job even based on the Respondent’s argument.

84. It also appears that the Applicant was poorly advised not to accept termination with pay *in lieu* of notice when he would have been better off doing so. If the

Administration did not think he deserved better treatment, then why did they attempt to revisit the policy to allow him to be terminated with pay *in lieu*?

85. The net result of these missteps was that the Applicant could have benefited from the restructuring of the Jerusalem office but was for some reason kept out of that position, his substantive position, and told that his appointment would not be renewed. Appointment of an outside contractor was seen as the more advantageous strategy which meant that there was no space for the Applicant. Yet the contractor was totally new, and he was already completing a contract.

86. The Applicant was not told that his work was not satisfactory although some implied slur was made regarding his refusal to work. Was it refusal to work or illness? What can one expect if the decisions being made all seem to have adverse results for the person affected by those decisions?

87. The fact that the Applicant's final termination was based on disability due to illness is not something that exonerates the Administration from responsibility in the circumstances. It is true that the Applicant has not sought management evaluation of the decision to terminate his appointment based on disability, but this is not surprising considering the full history of this matter.

88. Having examined the facts of this case, the Tribunal finds that the Applicant has not adduced sufficient evidence to connect his illness to the non-renewal decision. The Tribunal also finds that the Applicant has not filed an application appealing the decision to terminate him for disability, but the underlying facts do lead to the conclusion that there were an extraordinary number of steps taken which adversely affected the Applicant's position and these circumstances should be the subject of further inquiry.

89. The Administration admits they made errors in the process; these errors were followed by his illness and termination on the ground of disability. This is a convenient coincidence.

Conclusion

90. The Tribunal is not in a position based on the law to find that the decisions taken by the Administration were unlawful because firstly, the refusal to renew the Applicant's contract is moot.

91. Secondly the Applicant has not appealed the disability finding and termination on those grounds and subjected it to review by management evaluation.

92. For those reasons alone, the Application must be dismissed.

Further Observation

93. Given the peculiar circumstances of this case, the Tribunal finds it appropriate to refer the matter to the Secretary-General pursuant to article 10(8) of the Tribunal's Statute for special consideration of accountability since the overall impact of the decisions taken seem to run contrary to the Charter of the United Nations in respect of its aim of finding dedicated staff and enhancing their ability to serve the organisation diligently.

94. Article 101 of the Charter of the United Nations states:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

95. It is doubtful whether the decisions taken by the Administration in this matter led to an achievement of the ideal expressed in Article 101 of the Organization's Charter.

96. It is also doubtful whether due regard was given to regulation 4.4 of article IV of the Staff Regulations which requires that in filling vacancies, regard should be had to the requisite qualifications and experience of persons already in the service of the United Nations. In this case the Administration went outside the available staff pool to increase the capacity of the Jerusalem dispatch office by employing a private contractor.

Case No. UNDT/NBI/2020/061

Judgment No. UNDT/2022/095

(Signed)

Judge Francis Belle

Dated this 29th day of September 2022

Entered in the Register on this 29th day of September 2022

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi