



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Judgment No. 2023-UNAT-1367

Mihai Nastase

(Appellant)

v.

Secretary-General of the United Nations

(Respondent)

JUDGMENT

Before:	Judge John Raymond Murphy, Presiding Judge Kanwaldeep Sandhu Judge Dimitrios Raikos
Case No.:	2022-1722
Date of Decision:	30 June 2023
Date of Publication:	31 July 2023
Registrar:	Juliet Johnson

Counsel for Appellant: Self-represented

Counsel for Respondent: Francisca Lagos Pola

JUDGE JOHN RAYMOND MURPHY, PRESIDING.

1. Mr. Mihai Nastase, a former staff member, contested a decision not to renew his fixed-term appointment (contested decision). By Judgment No. UNDT/2022/061 (impugned Judgment),¹ the United Nations Dispute Tribunal (UNDT) dismissed his application. Mr. Nastase filed an appeal with the United Nations Appeals Tribunal (Appeals Tribunal or UNAT). For the reasons set out below, the Appeals Tribunal dismisses the appeal and affirms the impugned Judgment.

Facts and Procedure

2. Mr. Nastase served as an Information and Communications Technology Specialist at the United Nations Office for Project Services (UNOPS) on a fixed-term appointment at the P-3 level.² Mr. Nastase was one of several UNOPS staff members that provided services to the Office of Information and Communications Technology (OICT), United Nations Secretariat, under a Financial Agreement (FA). UNOPS had an ongoing program with OICT for over a decade for the provision of several services to OICT and its clients.

3. During 2020, the Secretary-General advised all United Nations staff members that there was a liquidity crisis in the Organization and that budget reductions had become necessary across the board.³

4. Due to the liquidity crisis, OICT no longer had the funds to pay for all of the services that it had contracted from UNOPS, and it was thus decided to abolish some of the posts involved in the provision of services to OICT.⁴ UNOPS accordingly conducted an assessment. In consultation with the Director of OICT, the Chief Information Technology Officer (CITO) of UNOPS assessed which projects and work streams could be slowed down, ceased or postponed. Based on that assessment, the CITO requested that UNOPS programme costs be reduced by freezing all ongoing recruitments and eliminating all vacant positions. Decisions were also taken to move some posts to cheaper locations and to abolish several encumbered positions based on the organizational requirements for the immediate future. Twenty-nine UNOPS staff members including Mr. Nastase

¹ *Nastase v. Secretary-General of the United Nations*, Judgment dated 21 June 2022.

² *Ibid.*, para. 2.

³ Secretary-General's letter dated 10 December 2020 (Annex 5 to the Respondent's reply before the UNDT).

⁴ Impugned Judgment, paras. 32–33.

were selected for separation from service as a result of this budgeting and operational requirements assessment exercise.

5. On 18 September 2020, during a meeting with UNOPS management, Mr. Nastase was informed that due to the anticipated budget reductions the post of ICT Specialist which he encumbered, would be abolished and that consequently his fixed-term contract would not be renewed beyond its expiration date of 30 November 2020.⁵

6. On 27 October 2020, Mr. Nastase received the contested decision—a letter from UNOPS senior management confirming that his fixed-term appointment would not be renewed beyond 30 November 2020 and that he would be separated from the service of UNOPS effective on that date.⁶

7. Mr. Nastase requested management evaluation of the non-renewal decision on 16 November 2020 and filed an application before the UNDT contesting the decision on 30 March 2021.⁷ In February 2021, Mr. Nastase was employed by OICT directly. He nonetheless persisted with his application.

8. Before the UNDT, Mr. Nastase contended that the contested decision was both unreasonable and improperly motivated.⁸ The UNDT rejected Mr. Nastase's contentions and upheld the contested decision as rational and without ulterior purpose.

9. In its review of the contested decision, the UNDT addressed the non-renewal of Mr. Nastase's fixed-term appointment together with the decision to abolish the P-3 post encumbered by him, noting that abolition of a post resulting from a reorganization constitutes a valid reason for not renewing a staff member's appointment.⁹ The UNDT accepted that the decision of the Administration to retain a P-2 post and to abolish Mr. Nastase's P-3 position was rational for the following reasons:¹⁰

⁵ *Ibid.*, para. 3.

⁶ *Ibid.*, para. 4.

⁷ *Ibid.*, para. 5.

⁸ *Ibid.*, para. 21.

⁹ *Ibid.*, para. 24.

¹⁰ *Ibid.*, paras. 34–38.

(...) The Respondent submitted that the cloud¹¹ strategy implementation defined by OICT has played a key role in the skill shift that is requested from the team, having DevOps¹² as a leading component together with hybrid cloud and automation. As a result of this cloud strategy implementation, a shift in the skills needed from the staff profiles was envisaged with focus shifting (...) towards Automation and Infrastructure as a Code¹³ (...) tools.

This along with the impending budget and liquidity crisis have brought about the abolition of two vacant G-6 positions and the reduction for one existent P-3 staff from the Hybrid Cloud Computing Group.

...

(...) The Respondent provided a very reasonable explanation as to why the post the Applicant was encumbering was chosen for abolition. The Hybrid Cloud Computing Group was at the time split between two teams in Valencia: Cloud Operations Team and Cloud Deployment Team. The Cloud Deployment Team was formed by one P-2, one P-3, three G-6 and one IICA2. All positions had different terms of reference.

(...) The Applicant joined UNOPS in 2010 as Virtualization Officer at the P-3 level. He has an educational background in Actuarial Science and in Cybersecurity, as well as experience in the private sector and academia in diverse IT roles. The other staff member in the professional category [P-2] joined UNOPS in 2020 as Senior Linux and Automation Engineer at the P2 level. Prior to that, he worked with UNICC¹⁴ for seven years and in the private sector as a systems technician with focus on Linux and Cloud computing and he has a master's degree in Telecommunications and Networks.

(...) From OICT's perspective, a clear requirement had been established to focus on the Automation and Infrastructure as a Code technologies in the cloud which eventually, further clarified how the onboarding would be done in the future, i.e., prioritizing automation when possible. This strategy adjustment made it necessary to review the profiles and skills needed in the team. Based on a number of different factors explained in detail in an analysis dated 17 September 2020 [Recommendation Document], the UNOPS IT Project and Operations Manager decided that the P-2's profile would be more aligned to deliver the requisite service. Accordingly, it was recommended to keep the P-2 and release the Applicant.

10. With regard to Mr. Nastase's contention that he was equally capable of performing the tasks of the post retained and that the P-2 post should have been abolished, the UNDT held that there was nothing to indicate that the Administration did not properly exercise its discretion in

¹¹ Cloud computing is the on-demand availability of computer system resources to users. Hybrid cloud is a common infrastructure setup of clouds.

¹² DevOps is a set of practices and tools that integrates and automates the work of software development and information technology (IT) operations.

¹³ Infrastructure as Code is an advanced process of managing computer infrastructure.

¹⁴ United Nations International Computing Centre.

deciding to abolish the P-3 position.¹⁵ It also rejected as false Mr. Nastase's contention that he was the only person to be selected for non-renewal under the applicable FA. The record showed that one other staff member employed under the FA was also selected for separation.

11. In the premises, the UNDT concluded that the presumption of regularity had been satisfied in that it had been minimally shown that Mr. Nastase was given fair and adequate consideration.¹⁶ In an attempt to rebut the presumption of regularity, Mr. Nastase alleged that the contested decision was improperly motivated in that he had been targeted because of disagreements he had with his supervisors regarding his performance and his placement in a performance improvement plan during the performance assessment cycle. The UNDT noted that there was sufficient evidence showing that a performance shortcoming had been identified by Mr. Nastase's supervisors of which he was properly informed, but there was no clear and convincing evidence of retaliation. In the result, the UNDT held that Mr. Nastase had failed to adduce clear and convincing evidence of improper motive or bias sufficient to rebut the presumption of regularity. It accordingly dismissed the application.

12. Mr. Nastase filed his appeal against the impugned Judgment with this Tribunal on 18 August 2022. The Secretary-General filed its answer on 18 October 2022.

Submissions

Mr. Nastase's Appeal

13. Mr. Nastase submits that the UNDT erred in its reliance upon, and interpretation of the analysis contained in the Recommendation Document in support of the contested decision.

14. He further maintains that the author of the Recommendation Document lacked both the necessary authority to make the decisions therein and the technical background and skills to undertake the evaluation.

15. He further contends that the Recommendation Document was created subsequent to the decision not to renew his fixed-term appointment and that this indicates some element of impropriety.

¹⁵ Impugned Judgment, para. 42.

¹⁶ *Ibid.*, para. 46.

16. In addition, Mr. Nastase argues that his skills and experience were not given full and fair consideration in the decision to abolish his post and to retain the P-2 post in his team. He submits that he had the necessary skills and experience to perform the tasks that were reserved in the team for the P-2 position.

17. He repeats the submissions he made before the UNDT that the decision to abolish his post was improperly influenced by the issues around his alleged poor performance and amounted to retaliation for his challenges in relation to that issue, and that the UNDT erred in its assessment of his contentions in this regard.

18. Mr. Nastase requests this Tribunal to declare the contested decision “null and void with retroactive effect” and to order UNOPS to reassign him to a post commensurate with his competencies. He requests ancillary relief in relation to the performance issues, compensation equivalent to two months of salary for the loss of income and benefits during the period he was unemployed, and compensation equivalent to 12 months of salary for moral damages suffered during this time.

The Secretary-General’s Answer

19. The Secretary-General submits that the UNDT did not err in its finding that the contested decision was lawful, and that Mr. Nastase has not demonstrated any errors warranting a reversal of the impugned Judgment.

20. The Secretary-General maintains that the contested decision was not in any way irregular and that there was a rational and reasonable basis for it.

21. The Secretary-General contends that Mr. Nastase has not met his evidentiary burden to rebut the presumption of regularity. The allegations made regarding the merits of the decision to abolish the post and the claims of impropriety are largely unsubstantiated and are inconsistent with the record of evidence supporting the decision. The lack of a budget to pay for UNOPS services justified the decision to abolish various posts involved in the provision of services to OICT. UNOPS management engaged in a proper assessment to determine which posts needed to be abolished and set out a rational basis in that regard in the Recommendation Document.

22. Finally, the Secretary-General contends that Mr. Nastase has not adduced sufficient evidence showing that the decision to abolish his post was tainted by bias or ulterior purpose, particularly in relation to the issues around his poor performance and his allegations of retaliation.

23. The Secretary-General accordingly requests the appeal to be dismissed.

Considerations

24. Staff Regulation 4.5(c) and Staff Rule 4.13(c) provide that a fixed-term appointment does not carry any expectancy of renewal. Moreover, the Organization has the right and power to restructure some or all of its departments or units where it considers such necessary to meet organizational needs and priorities. Such restructuring may justify the termination of employment on grounds of operational requirements. The abolition of a post resulting from a reorganization or effectuated on the grounds of operational requirements therefore usually constitutes a valid substantive reason for non-renewal of an appointment or not extending a fixed-term appointment. However, a non-renewal of a fixed-term appointment can be challenged on the grounds of procedural irregularity, or that the staff member had a legitimate expectation of renewal or that the decision was arbitrary or motivated by bias, prejudice or improper motive.¹⁷

25. By the same token, the UNDT should not interfere with an organizational restructuring exercise unless there is evidence that the discretion was exercised unreasonably, unlawfully or without due process. In this regard there is always a presumption that effective official acts have been regularly performed. The presumption of regularity is however rebuttable. If the Administration is able to minimally show that the staff member was given full and fair consideration, then the evidentiary burden shifts to the staff member to show that he or she was subject to an act of unreasonableness or unfairness.¹⁸

26. The record of evidence confirms that there was a genuine and large-scale restructuring required in UNOPS due to the budget cuts which resulted in OICT needing fewer UNOPS services. This led to the retrenchment of 29 staff members, including Mr. Nastase.

27. Mr. Nastase, as his first ground of appeal, contends that the UNDT erred in failing to properly examine the Recommendation Document of 17 September 2020 which formed the basis

¹⁷ *Smith v. Secretary-General of the United Nations*, Judgment No. 2017-UNAT-768, paras. 26–27.

¹⁸ *Rolland v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-122, para. 26.

of the assessment and analysis that the P-2 post and its incumbent, rather than Mr. Nastase's post, was more aligned to the delivery of the requisite services after the restructuring. He argues that the author of the Recommendation Document lacked the skill to take decisions and make recommendations in the Hybrid Cloud Computing area as she was not involved in this area and did not have the technical background skills and experience to make such an evaluation. He complains that the document ignored his peculiar skills and experience and simply jumped to the decision without proper justification. He maintains that the functional requirements of his P-3 post were not really analyzed and there could not have been any fair comparison. He submits that the assessment ignored the fact that he was already performing the work and had the skills and experience to meet the relevant criteria.

28. Mr. Nastase's submission fails to compare his particular skills and experience with those spelt out in the rationale in the Recommendation Document. On page 2, it set out as follows:

From the OICT perspective, a clear requirement has been established to focus on the Automation and Infrastructure as a Code technologies in the cloud which, eventually, further clarified how the onboarding would be done in the future: prioritizing automation when possible. This strategy adjustment made it necessary to review the profiles and skills needed in the team. Consequently, staff members needed to master technologies such as GIT, Terraform and Ansible. The staff are no longer needed to focus on high level architectures design (...).

...

Based on all the factors listed above and the current and known future requirements of the client, it is envisaged that Senior Automation and Linux Engineer profile would be more aligned to deliver the requisite services. It is therefore recommended to keep Mr. (...) and release Mr. Nastase.

29. Mr. Nastase in his appeal does not challenge the details and distinctive features of this rationale in any meaningful or convincing fashion. For example, he does not address the claim in the Recommendation Document that it was "no longer necessary to focus on high level architectur[al] design". Nor does he give any cogent evidence or explanation indicating in what respects he possessed the requisite knowledge of the technologies of GIT, Terraform and Ansible. Moreover, he fails to meaningfully contradict the implication that the incumbent of the P-2 post had a more apposite Senior Automation and Linux Engineer profile than himself. He merely makes unsubstantiated general claims that he had the requisite skills and experience. In the premises, as the UNDT correctly held, he failed to discharge the evidentiary

burden to rebut the presumption of regularity that arose from the minimal showing of a rational basis for the conclusion in the Recommendation Document.

30. Mr. Nastase also maintains that the Recommendation Document was created on 5 October 2020, subsequent to 18 September 2020 when he was first informed that he would be separated from service and that this in some way indicated impropriety, allegedly being an *ex post facto* justification for the decision to terminate his employment. In support of this he has produced a screenshot of the document properties window showing that the electronic PDF document was created on 5 October 2020. The Secretary-General explains that Mr. Nastase has not distinguished between the date when the paper document was created and when it was scanned to create an electronic PDF document. There is no evidence that casts doubt on the truth of that assertion by the Secretary-General. But, whatever the factual context, the contested decision was taken on 27 October 2020 and whether the rationale for it was formulated in writing on 17 September 2020 or on 5 October 2020 is in the final analysis immaterial. The rationale for the decision is clearly explicated in the Recommendation Document and the date of that document provides no compelling indication of any impropriety.

31. Likewise, Mr. Nastase fails to substantiate his allegation that the author of the Recommendation Document was unqualified to pronounce on the issues under consideration. He does not adduce any evidence to show why the author was not qualified or authorized to produce the document or that she neglected to gather relevant information or take any advice in relation to the decision that was required to be taken. The accusation is thus unsustainable.

32. Mr. Nastase's contention that he was the only staff member in his team whose term of appointment was not renewed, and that this too is an indication that the decision was improperly motivated, is not correct. The record shows that Mr. Nastase was one of two staff members in his team separated from service. It is further clear from the record that there were instances in other teams where only one post was abolished. The abolition of posts in the different teams depended on the requirements of the clients of UNOPS. No inference of irregularity can be drawn from this incorrect assertion.

33. Mr. Nastase further takes issue with the UNDT's finding that there were issues in relation to his performance and that his placement on a performance improvement plan was justified by his underperformance. The fact that he was placed on a performance improvement

plan is not *per se* an indication of bias or ulterior purpose in relation to the subsequent decision, taken during a restructuring exercise, to abolish his post. Indeed, in some circumstances poor performance may be a legitimate consideration in the selection of a staff member for retrenchment. However, there is no evidence that such was the case in this matter as confirmed by the fact that Mr. Nastase was re-employed by OICT shortly after his appointment at UNOPS expired. Insofar as Mr. Nastase might have been aggrieved by these managerial actions in relation to his alleged poor performance, he had other remedies at his disposal. The issues concerning his performance do not themselves amount to clear and convincing evidence that the rationale for the decision to abolish his post was unreasonable, especially in light of the essentially unchallenged reasons put forward in the Recommendation Document.

34. The UNDT did not err in finding that there was insufficient evidence to support the assertion that the contested decision was retaliation. It may be noted that the UNOPS Ethics and Compliance Office had rejected his request for protection against retaliation in March 2021. The merits of the claim of retaliation are not under consideration in this case. They are relevant only to the extent that the UNDT correctly found that the evidence was insufficient to prove impropriety in the non-renewal decision. In this regard, it should again be kept in mind that Mr. Nastase was re-employed by OICT in February 2021, not long after the contested decision. This fact, to some extent, intimates that the claim of retaliation may not be well-founded.

35. In the premises, Mr. Nastase has not established that the UNDT erred in any respect. The appeal must accordingly be dismissed.

Judgment

36. Mr. Nastase's appeal is dismissed and Judgment No. UNDT/2022/061 is hereby affirmed.

Original and Authoritative Version: English

Decision dated this 30th day of June 2023 in New York, United States.

(Signed)

Judge Murphy, Presiding

(Signed)

Judge Sandhu

(Signed)

Judge Raikos

Judgment published and entered into the Register on this 31st day of July 2023 in New York, United States.

(Signed)

Juliet Johnson, Registrar