



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

ABOUA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Nicole Wynn, AAS/ALD/OHR
Nusrat Chagtai, AAS/ALD/OHR

Introduction

1. The Applicant is a former GS-5 Web Assistant with the United Nations Operation in Côte d'Ivoire (UNOCI).
2. On 26 October 2016, he filed an application before the Dispute Tribunal contesting the decision not to renew his fixed-term appointment with UNOCI.
3. The Respondent filed a reply to the application on 19 December 2016, where it is argued that the impugned decision was lawful.
4. The Tribunal has decided, in accordance with art. 16.1 of the Tribunal's Rules of Procedure, that an oral hearing is not required in determining this case and that it will rely on the parties' pleadings and written submissions.

Facts

5. The following facts are uncontested and/or result unambiguously from the submitted documents.
6. UNOCI was established pursuant to Security Council resolution 1528 (2004) [Côte d'Ivoire] with a mandate in the areas of: monitoring the ceasefire and movements of armed groups; disarmament, demobilization, reintegration, repatriation and resettlement; protection of United Nations personnel, institutions and civilians; support for the peace process; assistance in the field of human rights; public information; and law and order.¹
7. On 11 March 2014, UNOCI's Special Representative of the Secretary-General (SRSG) sent a memorandum to all UNOCI Section Chiefs informing them of the UNOCI 2014 retrenchment exercise, aimed at implementing staffing changes set out in the 2014/15 UNOCI budget and reflecting the outcome of the civilian staffing review as well as additional adjustments proposed by the United Nations Headquarters (UNHQ). The exercise would involve five main steps, including a comparative review exercise which was applicable to situations where the number

¹ Paragraph 4 of the reply.

of posts within the same section under the new structure was less than the number of currently serving staff. All affected staff would go through a comparative review exercise in order to determine who would be retained under the new structure.²

8. The SRSG convened a Townhall meeting on 12 March 2014 which was attended by UNOCI staff. The SRSG met with the national staff union, *Association du Personnel Local* (APEL), explaining that civilian staffing reviews would be conducted over the coming years as UNOCI would progressively be closing. The meeting discussed issues of concern to national staff and addressed any questions that they had.³

9. On 8 February 2016, the UNOCI Transition plan was submitted to the SRSG for her approval. The plan set out UNOCI's staffing and budgetary needs until and after June 2016. The plan indicated that since 2014, the Public Information Office (PIO) had been engaged in a gradual phasing-out and transfer of certain aspects of its work in preparation for the eventual withdrawal of the Mission. Among other, maintenance of UNOCI's website was a priority only until April 2016 and was not included amongst the "Critical Needs Beyond April 2016". Accordingly, the one Web Assistant post in UNOCI would only be required until June 2016.⁴

10. On 31 March 2016, the Secretary-General presented to the United Nations Security Council a report containing proposals for the further downsizing and possible termination of UNOCI, taking into account security conditions on the ground and the capacity of the Government of Côte d'Ivoire to take over the security role of the Operation, a request reiterated by the Council in its resolution 2260 (2016).⁵

11. On 28 April 2016, the Security Council adopted Resolution 2284 (2016) [on extension of the mandate of UN Operation in Côte d'Ivoire (UNOCI) until 30 June 2017]. The resolution extended UNOCI's mandate for a final period until the end of 30 June 2017 and requested the Secretary-General to complete, by 30 April 2017,

² Reply – Annex 1.

³ Reply – Annexes 2 and 3.

⁴ Reply – Annex 11 at page 4.

⁵ Reply – Annex 5.

the withdrawal of all uniformed and civilian UNOCI components, other than those required to carry out the complete closure of the Mission.⁶

12. In a Code Cable dated 10 May 2016, the Under-Secretary-General of the Department of Peacekeeping Operations (USG/DPKO) provided strategic guidance to UNOCI on the implementation of key aspects of the mandate as set out in resolution 2284. The USG/DPKO instructed the Mission to prepare its exit strategy and the drawdown of uniformed and civilian personnel.⁷

13. On 20 May 2016, the SRSG held a townhall meeting with UNOCI staff to discuss the staffing implications of UNOCI's final mandate. In a Code Cable to the USG/DPKO dated 24 May 2016, she relayed her account of what had transpired. The key parts of her account are reproduced below:

In my initial statement, I reiterated to all staff that UNOCI was now entering a final and critical phase towards its closure by 30 June 2017, with the endorsement by the UN Security Council of the special report of the Secretary-General on 31 March (S/2016/297) and the final extension of UNOCI' mandate for a one-year period. Accordingly, I informed that in this context, the UN has considered several options for a phased Civilian, Police and Force reduction, as recommended in the Secretary-General's special report on UNOCI. In this regard, I informed the meeting of steps taken and arrangements that will be put in place to ensure that the Mission adjusts its staffing in full alignment with the new mandate and the resulting changed operations requirements of the Mission.

...

The reaction to my introductory remarks was tense, especially the national staff, who had come to the townhall meeting dressed in white as a form of protest. Some of the interventions the national staff made were with virulent rancorous tones, of a rare nature, against the UNOCI leadership and the United Nations secretariat, especially on the claims for "separation indemnity/package". In addition to the said "separation indemnities", key demands from the national staff included: i) the refund of their pension within a reasonable period; ii) the provision of "Individual Contracts" to staff pending the payment of their pension; iii) the extension of all contracts for six months, as UNOCI was granted a "six-month budget"; iv) for the opening of a new phase of rostering to enable national staff to be cleared for international positions; and v) for the Mission to facilitate a meeting between President Ouattara and the

⁶ Reply – Annex 6.

⁷ Reply – Annex 7.

national staff union with regard to possible employment with Government entities.⁸

14. On 25 May 2016, the SRSG sent a memorandum to Mr. Robert Cannon, UNOCI's Chief of Mission Support (CMS) informing him of the next steps with regard to UNOCI staffing in light of the United Nations Security Council Resolution 2284 (2016) on the UNOCI mandate⁹. On the same date, the SRSG sent a memorandum to all the heads of Components, Sections and Regional Offices informing them of the closure of offices in light of Security Council Resolution 2284 (2016).

Further to the Townhall Meeting of 20 May 2016, the United Nations Security Council Resolution 2284 (2016) on the UNOCI mandate and CNC-247 (1003) of 10 May 2016 on the implementation of the said Resolution, the Mission is now expected to ensure that with respect to the drawdown of civilian personnel: i) adjustments are fully aligned to the new mandate and the resulting changed operational requirements of the Mission; ii) progressive reductions are effected at a pace that assures the full closure, including withdrawal, of UNOCI by 30 June 2017; and iii) the retrenchment strategy and plan are consistent with the rules and regulations of the Organisation.¹⁰

15. By letter dated 31 May 2016, the Applicant was notified of the non-extension of his fixed-term appointment by the UNOCI/CMS, which would thus expire on 30 June 2016.¹¹

16. On 28 June 2016, the Applicant, as part of a group of 66 staff members, requested management evaluation of the contested decision. The legal arguments were centered on two issues: First, it is apparent that the 2016-2017 ONUCI Budget envisioned the retention of the posts for all of the affected staff members. The Senior Management lacked the authority to effectively overrule the Budget. The drastic measures which were undertaken exceed the scope of Resolution 2284. Second, the non-renewal of the affected staff members came days after a major upheaval in labour relations between APEL and ONUCI Senior Management. The APEL Board of Directors ordered its members to withdraw from all joint staff-

⁸ Reply – Annex 8.

⁹ There is a typographical error as it is indicated as 25 May 2015 at Annex 9 of the reply.

¹⁰ Reply- Annex 10.

¹¹ Application – Annex 2.

management committees, including the Comparative Review Committee. The coincidental timing between the labour action initiated by the APEL Executive Board on 20 May 2016 and the *en masse* release of nationally-recruited staff commencing 11 days later gives rise to a serious concern that the ostensible “restructuring exercise” undertaken by ONUCI Senior Management was, in fact, a collective reprisal against the nationally-recruited staff.¹²

17. On 12 August 2016, the Under-Secretary-General Department of Management informed the Applicant that the Secretary-General had upheld the contested decision and explained in details the downsizing plan in relation to four categories of employees, including the Applicant’s Section.¹³

Applicant’s case

18. The Applicant submits that the terms and conditions of his employment were not respected. He received the non-extension notice overnight by late e-mail, after work hours. The notice was given out of time because it did not respect the 30-day period to which he is entitled in cases of separation from UNOCI.

19. The termination of his employment by the Secretary-General under staff regulations 9.3(a)(i) and 9.6(c)(i) entitles him to payment of severance pay in accordance with Annex III to the Staff Regulations of the United Nations.

20. Of the three existing positions in the Web Unit of the PIO, only his post was abolished without any explanation. Of the three members of the Web and Digital Media Team, he is of the greatest seniority. In considering the criterion of seniority, the choice of the post to be abolished would have to be another post.

21. It is not the quality of his work that could have justified the abolition of his post because his work has always been very much appreciated by his superiors as indicated in his performance appraisals.

22. He worked for eight years in UNOCI at the peril of his security and his life because so much of the local population manifested hostility to the action of

¹² Management evaluation request – Annex 6 to the application.

¹³ Application – Annexes 6 and 7.

UNOCI in resolving the political-military crisis that has shaken Côte d'Ivoire. He is still ostracized by some members of his family who accuse him of being a traitor for working for UNOCI, an organization that they believe works against the interests of the Ivory Coast. Although he does not share this opinion, he has suffered and continues to suffer from this stigma and the insoluble family conflicts that it has generated.

23. The Applicant supports the argument made by the Office of Staff Legal Assistance (OSLA) in the request for management evaluation about the arbitrary nature of that decision, the brutality with which that decision was issued and the departure from the UNOCI budget until December 2016.

Remedies sought

24. In view of the foregoing the Applicant seeks "restoration of his rights" and compensation from UNOCI corresponding to 18 months of gross salary, that is, the sum of approximately USD43,524.

Respondent's case

The contested decision was lawful

25. The Applicant had no right to have his appointment renewed. His appointment expired on 30 June 2016, and he has adduced no evidence that UNOCI made a firm commitment to renew his contract. On the contrary, the UNOCI leadership informed the Applicant and all other staff of UNOCI's anticipated closure and that some staff members would not serve beyond 30 June 2016.

26. The reasons for the non-renewal of the Applicant's appointment were legitimate. The PIO, like other units, had been the subject of a gradual phasing down prior to 2016, of which staff were kept informed, through townhall meetings with the SRSG. Subsequently, the Transition Plan for UNOCI dated 8 February 2016 specified that since 2014, PIO had been engaged in a gradual phasing-out and transfer of certain aspects of its work in preparation for the eventual withdrawal of the Mission. Specifically, the Web Assistant post was foreseen only until June 2016.

27. Security Council Resolution 2284 stated that UNOCI would not exist beyond 1 July 2017. With respect to the PIO, resolution 2284 specifically referred to a reduced and very limited mandate that did not prioritize website maintenance.

28. Following on from the reduced mandate for the PIO, UNHQ in New York provided support to UNOCI at the technical level with migration of UNOCI's website to UNHQ's Common Website Platform. In addition, the PIO web team included a Webmaster (international UNV) and a P-3 Public Information (PI) Officer who could perform the remaining functions of the team. The Applicant served as a Web Assistant in the PIO. His functions included maintaining and updating UNOCI's website. The functions of the post he encumbered were no longer required under the reduced mandate.

29. The decision to not renew the Applicant's appointment was reached through a transparent process. It was based on UNOCI's reduced operational needs resulting from its phasing down.

30. Contrary to the Applicant's allegations, the 4 May 2016 Report of the Advisory Committee on Administrative and Budgetary Questions (ACABQ) did not require UNOCI to renew his appointment. In that report, the ACABQ recommended that the budget for UNOCI remain the same as the prior year for six months, subject to the Secretary-General submitting a revised budget in light of resolution 2284, which had been issued only one week prior.

31. The ACABQ report in no way altered UNOCI's obligation to implement the phased drawdown in accordance with resolution 2284. On the contrary, the report recognized that following resolution 2284, UNOCI was required to reduce staff and that the draw down would result in significant changes to the staffing levels in the budget that the Secretary-General had originally proposed. Accordingly, the ACABQ recommended "that the General Assembly take note of the Secretary-General's intention to submit a revised budget proposal for 2016/2017 reflecting the decision of the Security Council contained in its resolution 2284 (2016).

The contested decision was based on proper considerations

32. The Applicant states that he was the only one of three in his team whose appointment was not renewed. The Web and Digital Media team served under the PIO's Multimedia Unit. The team consisted of a PI Officer (P-3), a Webmaster (international UNV), and a Web Assistant (the Applicant). The other two staff members, who were retained in service, perform substantially different functions to that of the Applicant. The P-3 PI Officer supervises the team, and the Webmaster, operating at a higher level than the Web Assistant, has supervisory responsibility and requires minimum supervision in the context of liquidating UNOCI. Accordingly, while the other two staff members continued to have a role in the execution of UNOCI's reduced mandate, the functions associated with the post of Web Assistant were no longer required.

33. Therefore, the decision not to renew the Applicant's appointment, but to retain the other two staff members, was sound. It was based on proper motives.

There was no need to include the Applicant in a comparative review process

34. The UNOCI comparative review process was to be conducted between staff in the same section, within the same category and at the same level, and who performed the same or substantively similar functions. The Applicant suggests that he should have been compared to his colleagues on the Web and Digital Media team. This is incorrect. The three staff members on the team served in different categories, and at different levels. The team members were not comparators.

35. In addition, there was no need to conduct a comparative review of the Applicant against other staff members, because the Applicant was the only staff member performing the functions of the post he encumbered at his level within his section.

The Applicant received adequate notice of the contested decision

36. The Applicant's appointment was not terminated in accordance with staff regulation 9.3 and staff rule 9.6, as he claims. His fixed-term appointment expired at the end of its term. There is no legal notice requirement with respect to fixed-

term appointments, which expire automatically and without prior notice on the expiration date specified in the letter of appointment. Nevertheless, on 1 June 2016, UNOCI informed the Applicant in writing that his appointment would not be renewed beyond its expiration on 30 June 2016.

The Applicant is not entitled to termination indemnity

37. No indemnity payments shall be made to a staff member, who had a temporary or fixed-term appointment that was completed on the expiration date specified in the letter of appointment as per Staff Regulations and Rules, Annex III (d)(ii)). The Applicant's appointment was not terminated pursuant to staff regulation 9.3. It expired. Expiration of an appointment is not a termination within the meaning of the staff rules (staff rule 9.6 (b)). The Applicant has no right to a payment of a termination indemnity.

Considerations

38. It is trite law that this Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. That said, however, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members¹⁴ and any procedure adopted must be in accordance with relevant rules and policies. Considering the parties' pleadings and the documents filed in support of the pleadings from this perspective, the legal issues arising for determination in this case are:

- a. Whether the decision not to renew the Applicant's appointment due to the abolition of the post violated the applicable rules. On this point, the Tribunal will consider:
 - i. Whether the Applicant had a legitimate expectancy of renewal;
 - ii. Whether UNOCI's Senior Management acted contrary to the 2016/2017 budget;

¹⁴ *Hersh* 2014-UNAT-433-Corr.1.

- iii. Whether the Applicant's post was improperly singled out for abolition whereas he should have been included in a comparative review process; and
- iv. Whether there was a violation of notification procedure.
- b. Whether the contested decision was tainted by improper motives.
- c. Whether the Applicant is entitled to termination indemnity

The Tribunal will address these issues below.

Whether the decision not to renew the Applicant's appointment due to the abolition of the post violated the applicable rules.

39. As expressly stated in staff rule 4.13(c), United Nations staff members have no expectation of renewal of their fixed-term appointments. The evidentiary burden of proving a legitimate expectancy of renewal lies upon the applicant, who is required to show that the Administration made an express and firm commitment in writing to extend his or her fixed term appointment.¹⁵ No such showing has been made in this case. Conversely, it is shown that starting from the February 2016 Transition Plan, the Mission had no intention to maintain the Applicant's post and proceeded with the downsizing.

40. To the extent the Applicant bases his claim on the UNOCI budget, the Tribunal recalls that the availability of budgetary funds only authorizes the Mission's expenditures in connection with certain posts but does not create a right on the part of the incumbent to have the post retained.¹⁶ The Tribunal, therefore, agrees with the Respondent that the 4 May 2016 Report of the Advisory Committee on Administrative and Budgetary Questions (ACABQ) did not require UNOCI to renew his appointment, neither did it alter UNOCI's obligation to implement the phased drawdown in accordance with the Security Council Resolution 2284. The Applicant's claim fails on this score.

¹⁵ *Ahmed* 2011-UNAT-153; *Abdalla* 2011 UNAT-138. *Munir* 2015-UNAT-522.

¹⁶ *Toure* 2016-UNAT-660; *Oguntola*, 2018-UNAT-848; *Filippova* UNDT/2016/008.

41. Based on the documents on the makeup of the Web and Digital Media team, the reasons stated by the Respondent for not conducting a comparative review of the Applicant's post are sound and in line with the announced Mission's policy. The undisputed fact of satisfactory service, relied upon by the Applicant, would have had impact in the comparative review process. It has, however, no import for the legality of abolishment of a sole post of specific level and functionality, as in this case. Similarly, of no relevance are the Applicants complaints about the tensions that his employment with UNOCI had caused in his family.

42. Turning on to the question of notice of non-extension, the Tribunal concedes that indeed, there is no legal notice requirement with respect to fixed-term appointments, which expire automatically on the expiration date specified in the letter of appointment. The absence of such requirement is unfortunate but, as observed by the Tribunal, the prevalent practice is to give such a notice. In the present case, a notice of one month was entirely appropriate, considering the fix-term nature and short duration of the appointment; the context of the Mission's downsizing, which had even earlier signaled the reduction of posts; and the fact that the Applicant was a national staff member, not exposed to a total uprooting. The circumstance that the notice would have been delivered after the working hours is immaterial.

Whether the contested decision was tainted by improper motives

43. A non-renewal decision must not be vitiated by extraneous factors or any improper motives. The evidentiary burden of proving that the non-renewal of a fixed-term appointment was arbitrary or motivated by bias, prejudice or improper motive is on the staff member who makes the allegations.¹⁷ In the present case it appears that the Applicant maintains the suggestion made in the management evaluation request, that the non-renewal was influenced by the deteriorated labour relations between APEL and UNOCI's Senior Management. This proposition, if not dispelled by the detailed management evaluation, is untenable in light of the fact that the plan of downsizing the PIO had been articulated already in February

¹⁷ *Hepworth* 2015-UNAT-503.

2016, three months prior to the APEL's démarche. As such, the Tribunal concludes that the Applicant did not make the showing of improper motives.

Whether the Applicant is entitled to termination indemnity

44. The Tribunal concurs with the reasons stated by the Respondent (para. 37 above) that the Applicant was not entitled to termination indemnity. Concerning the issue whether the matter of termination indemnity could be subject to negotiations, as it had been demanded by APEL, the Tribunal notes that the UNAT in *Ahmed* endorsed a payment of termination indemnity outside the applicable rules where explicit written commitment to that effect had been made by the administration.¹⁸ No such commitment was made in the present case. The Applicant's claim for termination indemnity has no basis.

Conclusion

45. The application is rejected in its entirety.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 9th day of April 2019

Entered in the Register on this 9th day of April 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi

¹⁸ 2013-UNAT-386, at paras. 21 and 23.