



**Before:** Judge Coral Shaw

**Registry:** Nairobi

**Registrar:** Abena Kwakye-Berko

KEEGAN

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT ON LIABILITY AND  
RELIEF**

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**Counsel for the Applicant:**

Monika Bileris

**Counsel for the Respondent:**

Steven Dietrich, ALS/OHRM

Nicole Wynn, ALS/OHRM

## **Introduction**

1. The Applicant has challenged the decision of 22 May 2015 to abolish her post with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).

## **Procedural history**

2. In her Application dated 10 August 2015, she alleged that there were three procedural errors which impugned the abolition of post process.

3. On 9 September 2015, the Respondent filed his reply in which he submitted that the Applicant's claim of gender discrimination was not receivable.

4. On 3 November 2015, the Tribunal issued Order No. 356 (NBI/2015) advising the parties that it had decided to deal with receivability as a preliminary issue and gave the Applicant the opportunity to file submissions on receivability.

5. On 16 November 2015, the Applicant filed her submissions on receivability.

6. In Judgment No. UNDT/2016/006, the Tribunal found the Application dated 10 August 2015 was receivable.

7. The parties filed a joint statement of facts and issues on 9 February 2016 in compliance with Order No. 009 (NBI/2016).

8. The Tribunal heard the matter from 10-12 May 2016.

## **Facts**

9. The following is taken from the joint statement of facts submitted by the parties, supplemented by oral evidence and documents filed with the Tribunal by the parties. At the hearing, the Applicant gave evidence and called Mr. Ermias Yohannese and Ms. Battsetseg Toison. The Respondent called Mr. Peter Leskovsky.

10. In 2006 the Applicant joined the Engineering Section of the United Nations Organization Mission in the Democratic Republic of the Congo, (MONUC, which was the predecessor of MONUSCO) on secondment from the United Nations Development Programme (UNDP).

11. She was separated from service with UNDP as of 1 September 2009. She was then reappointed to MONUC in September 2009 as an FS-5 Administrative Assistant (post number 61321).

12. From the Applicant's appointment to MONUC in September 2009 until 30 June 2013, the post the Applicant encumbered (post number 61321) was titled "Administrative Assistant". Throughout, her duty station was Kinshasa.

13. Pursuant to resolution 66/264 of July 2012, the General Assembly mandated that missions were to conduct civilian staffing reviews over a three year period. MONUSCO undertook such a review.

14. On 28 March 2013, the Security Council adopted resolution 2098, which mandated the Mission to augment its presence in areas affected by conflict and reduce its presence in areas not affected by conflict, such as Kinshasa.

15. Effective 1 July 2013, the title on the Applicant's letter of appointment was changed to "Engineering Technician" to reflect the title on the budget staffing table. The Applicant stated in evidence that she did not apply for this post, nor was she elected or assigned to the post of Engineering Technician.

16. Mr. Leskovsky served in MONUSCO as the Deputy Chief of the Engineering Section from September 2008 to June 2012 during which time he was the Applicant's first and second reporting officers. From July 2012, he was Chief of the Engineering Section and from then until she left the mission, he was the Applicant's second reporting officer. He regarded the Applicant as an administrative assistant and did not know how or why her job title was changed.

17. The Applicant's functions during the performance cycle 2013-2014 as described in her performance documents included being in charge of the

administrative unit of the Engineering Section, including: recruitment of new staff; overseeing the e-PAS of all staff, interpretation of Human Resources procedures and administrative instructions, redeployment of staff and organisation of staff training. In her evidence she stated that she prepared the Engineering Section's 2015-2016 budget for the downsizing. In that process four Field Service (FS) posts were identified that would be vacated by staff due to retire in early 2015.

18. Pursuant to resolution 2098 and, subsequently, Security Council resolution 2147 adopted in 2014, the Mission increased its presence in the eastern part of the Democratic Republic of the Congo. This resulted in the reduction of MONUSCO staff numbers in Kinshasa and an increase in Goma. The Facilities and Camp Manager (FCM) was transferred to Goma from 5 February 2015. In the absence of anyone in charge of camp management, Mr. Leskovsky told the Tribunal that he encouraged the Applicant to perform the administrative duties of FCM for the next two months. A United Nations Volunteer (UNV) and a national staff member were the engineering technicians at Kinshasa.

19. In her performance document for the cycle 2014-2015, the Applicant stated that in addition to her regular administrative duties she was "also taking care of Facilities and Camp management in Kinshasa". She referred to monitoring the contract of a sanitation contractor.

20. Mr. Leskovsky told the Tribunal that the responsibilities of the Engineering Section were to provide services, including facilities camp management services related to Mission operational demands. He said that engineering technicians typically provide services exclusively of a technical nature such as electrical, HVAC technician, generator mechanic, construction technician, water and sanitation technician, draughtsman and the like. To his knowledge the Applicant never performed any of these functions. The FCM duties she performed were administrative in nature. In her oral testimony, the Applicant agreed that she was encumbering the post of engineering technician but was performing as an administrative assistant.

21. Mr. Yohannes has served as an Asset Manager and the Officer-in-Charge (OIC) of the Budget Unit of the Engineering Section of MONUSCO since 2003. He and Ms. Toison, the Head of the Sanitation and Water Unit for the Engineering Section at Kinshasa both testified to the nature and quality of the duties performed by the Applicant.

22. The Tribunal notes that her performance was consistently rated at a high level in her e-PAS.

23. By email dated 12 March 2015 from her Section Chief, the Applicant learned that the FS-5 post she encumbered was to be subject to a “dry cut”. Attached to the email was a document entitled “Table for the 2015 MONUSCO Retrenchment Exercise”.

24. The Applicant sought management evaluation of that decision which was rejected as a final decision had not been made.

25. On 14 April 2015, the Director of Mission Support issued Information Circular 2015/09 (Information Circular on Downsizing/Reduction of Posts in 2015/16 Budget Period: Establishment of the Comparative Review Panel (CRP) and Review Criteria) to announce the establishment of the CRP.

26. On 18 April 2015, the Applicant received a memorandum dated 17 April 2015 from the Director of Mission Support stating that, pursuant to Security Council resolution 2098, the post she encumbered was being proposed for abolition. She was encouraged to apply for all available posts for which she believed she had the required competencies and skills.

27. On 6 May 2015, the Applicant emailed the Department of Field Support (DFS) in New York regarding the abolition of the post she encumbered seeking clarification of the decision to abolish her post. She said that: she was encumbering an Engineering Technician post; 80% of her duties were FCM related; and the other 20% was Personnel & Administration related. She referred to a 12 March 2015 email from the OIC of the Integrated Support Services (ISS) which advised her that her post had been subjected to a dry cut. She asked for the

policy of DFS regarding staff that are close to retirement and pointed out that women were being depleted from the Mission and that she was the only representative from Mauritius at the Mission. She described her work as FCM. She asked if it was possible to have an extension on her post or to have her functional title changed to reflect the work she was actually doing until she left the Organization. She did not receive a reply.

28. On 18 May 2015, the Director of Mission Support sent to all staff Information Circular 2015/11 (Downsizing/Reduction of Posts in 2015/16 Budget Period: Procedure for Recruitment against Vacant Positions during the Downsizing Process). Its purpose was to communicate the procedures which applied for recruitment against vacant posts within the context of the MONUSCO downsizing process. It called for expressions of interest from currently serving staff affected by the downsizing to be laterally transferred to vacant posts at the same grade and level. It asked those staff to submit their letter of interest, their personal history profiles (PHP) and two most recently completed e-PAS reports.

29. MONUSCO's Chief Human Resources Officer (CHRO) wrote a memorandum dated 22 May 2015 to the Applicant, informing her that the post she encumbered had been identified for abolition effective 1 July 2015, and as a result, her appointment would not be renewed beyond 30 June 2015. That memorandum stated that "The Mission will put every effort to assign you to a vacant post where your qualifications and experience are suitable at your personal grade level".

30. The memorandum was inadvertently emailed to the Applicant's husband on 22 May 2015. The Applicant did not personally receive it until 29 May 2015.

31. By email dated 26 May 2015, the Applicant complained to the CHRO that the 17 April 2015 memorandum did not indicate that the Mission would identify a suitable vacant post for her as it did for her colleagues. She wrote to DFS again on the same day to complain about the discrimination she believed she was facing at MONUSCO. She did not receive a reply.

32. On 30 May 2015, the Deputy Chief Engineer, MONUSCO, forwarded an email to the Applicant from the CHRO. The subject line was “Vacant National/International Posts and affected staff members for consideration for placement”. It attached Information Circular 2015/13 and the list of staff affected by retrenchment which included the Applicant’s name.

33. On 2 June 2015, Mr. Leskovsky sent a memorandum to the Director of Mission Support with a potential list of vacant posts for which the Applicant might be considered. The Applicant was not placed against any of the listed posts.

34. The Applicant stated in evidence that she applied for one or two vacancies before she was separated but could not recall the details or how many. She said there were very few FS-5 and FS-6 vacancies available. She also applied for a generic job opening for the field roster and was invited to take a written test but was unable to take the test for personal reasons and was not placed on the roster at her level. After that she knew she was going to retire and did not apply for any other vacancies.

35. An FS-6 Administrative Officer post was advertised but she did not apply for it. In any event it was withdrawn shortly after she was separated.

36. The Applicant was separated from service as at 31 July 2015 after 35 years of service at the age of 59 years.

37. In her evidence to the Tribunal, the Applicant alleged that the Organization never intended to help her find a post whereas every staff member in her section whose post was cut was reassigned to a vacant post except her.

38. She also alleged that the Organization wanted to remove her from her post in retaliation for work she had performed as Chairperson of the Field Staff Union (FSU) “fighting against abuse of power and authority”.

39. Further she believes that she was targeted as a woman, because she only had one year left before retirement and because Kinshasa is a family duty station.

40. Finally she cited a number of alleged “improper actions” by the Organization towards her, particularly in the period 2004-2006, as background to the treatment she received over the abolition of her post.

**Issues**

41. In light of the relevant jurisprudence, the pleadings, the documents filed and the parties’ joint submissions the Tribunal finds that the issues for determination are:

- a. Whether the decision not to renew the Applicant’s appointment due to the abolition of the post she encumbered was lawful or whether it was vitiated by procedural violations. In particular:
  - i. Was there a failure to inform the Applicant and, if so, whether that vitiates the decision?
  - ii. Whether the Applicant was functioning as an administrative assistant or an engineering technician.
  - iii. Was the Administration obliged to submit the Applicant’s post to the CRP process?
- b. Whether the contested decision was tainted by improper motives? In particular:
  - i. Whether proper steps were taken to retain the Applicant in the service of the United Nations following the restructuring exercise.
  - ii. Was the Applicant treated with dignity and respect?
  - iii. Was the decision vitiated by bias, prejudice and discrimination?



## **Submissions**

### ***Applicant***

42. The decision not to renew her appointment due to the abolition of her post was unlawful because:

a. She was not properly informed of the impugned decision as she never received the 22 May 2015 memorandum.

b. She functioned, at least in part, as an engineering technician and as such her post should have been put through the CRP process. Instead, her post was subjected to a 'dry cut'. Had a comparative review been done, it would have revealed that the Applicant's post was not administrative as claimed but rather primarily related to FCM, which might have resulted in the preservation of her post.

c. MONUSCO violated the principles of equal treatment as it failed to treat her the same as other staff members some of whom had their contracts renewed until the next mandate extension and/or beyond their age of retirement.

d. MONUSCO discriminated against her because she is a woman in violation of staff rule 1.2(f). It failed to recruit women to her section and most recently cut women-only posts. The three male staff in the Engineering Section whose posts were abolished remained in the section and were placed in vacant field staff posts with full collaboration of Human Resources while MONUSCO failed to find any vacant post for her.

e. The decision was tainted by bias and prejudice due to her participation as FSU Vice Chair from 2006 to 2008 and FSU Chairperson from 2008 to 2013.

f. MONUSCO abused its authority by cutting her post and failing to assist her to find a vacant post. It was the goal of the Administration to oust her and disguise the decision as a mere retrenchment exercise and/or non-renewal.

g. MONUSCO failed to treat her with the dignity and respect she deserves as an international civil servant as it repeatedly failed to answer her inquiries as to her status and the status of the impugned decision in addition to all the other improprieties committed against her throughout the years.

***Respondent***

43. A fixed-term appointment carries no expectancy of renewal.

44. A proposal to restructure a mission that results in loss of appointment for staff members falls within the Secretary-General's discretion. The Administration has wide but not unfettered discretion in implementing *bona fide* retrenchment exercises.

45. Although the staff rules do not require notice of non-renewal of an appointment, MONUSCO gave the Applicant adequate prior notice of the non-renewal of her appointment due to the proposed abolition of her post more than two months before its expiration. On 30 May she received the information that she was a staff member affected by the downsizing.

46. At all times the Applicant was functioning as an administrative assistant and not as an engineering technician.

47. The Applicant's allegation that she should have been included in a comparative review is without merit. As the Applicant was the only administrative assistant in the Engineering section there was no need to conduct a comparative review of the FS-5 Administrative Assistant post.

48. The Applicant's allegations of bias and improper motives are not supported by the evidence.

49. She was offered the same assistance as was offered to other affected staff members.

50. Her allegations of retaliation for her role as a staff union representative and gender discrimination are also not supported by the evidence. She has not demonstrated any link between her service as staff representative several years before the date of the impugned decision and the motivation for the decision.

51. The contested decision was not vitiated by bias, prejudice and discrimination.

52. MONUSCO established procedures for assignment to affected staff to suitable vacancies but she did not apply.

### **Considerations**

53. The legal principles to be applied in this case are well settled. The decision must be based on reasons which are able to be substantiated by evidence. This Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff.<sup>1</sup> However like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members<sup>2</sup>. And the procedure adopted must be in accordance with relevant rules and policies.

54. Normally, there can be no expectation of renewal of a fixed-term appointment but the non-renewal decision must not be tainted by improper motives or countervailing circumstances. The burden of proving a legitimate expectancy of renewal or that the non-renewal of a fixed-term appointment

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<sup>1</sup> *Hersh* 2014-UNAT-433/Corr.1.

<sup>2</sup> *Ibid.*

was arbitrary or motivated by bias, prejudice or improper motive is on the staff member who makes the allegations.<sup>3</sup>

55. The relevant procedures in this case are contained in Information Circulars 2015/09, 2015/11 and 2015/13.

56. Information Circular 2015/09 established the Comparative Review Panel and the Review Criteria.

57. Section 3 of this information circular states that the Comparative Review Panel will not review posts where staffing by section, occupational group/functional title, category and level are equal to or less than the proposed numbers in the revised Mission structure.

58. Paragraph 2(b) of Information Circular 2015/09 provides: “The functional title is determined upon appointment or redeployment. In case the functional title does not match the functions actually performed, the functions truly exercised will be taken into consideration in the review process”.

59. Paragraph 6 of the Terms of Reference (TOR) of the Comparative Review Panel<sup>4</sup> states that: “The determination of which individuals fall into the same occupational group shall be based primarily on functional title and the assessment of the programme manager. In acknowledgement of the fact that the functional title does not in all cases, truly reflect the occupational group...the Chief Human Resources Officer, will in case of doubt, determine which individuals fall into which occupational group within the same grade”.

60. Information Circular 2015/09 also provided that staff members who would reach retirement age by 31 December 2015 would be placed against surplus vacant posts until the retirement date.

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<sup>3</sup> *Hepworth* 2015-UNAT-503.

<sup>4</sup> Annex to Information Circular 2015/09.

61. Information Circular 2015/13 sets out the procedure for placement/matching of affected staff.

62. This information circular recognized that in order to avoid disrupting Mission operations during staff reductions critical vacant posts must continue. The information circular aimed to guarantee that currently serving staff affected by the downsizing were considered for these posts by publishing mission specific calls for expressions of interest before launching the regular recruitment process.

63. Staff members who were on the list to be retrenched could indicate their interest by submitting a letter of interest together with their PHP and two recent e-PAS reports.

64. MONUSCO staff members recommended for one of these vacancies would be laterally transferred to the new position.

**Was the decision not to renew the Applicant's post lawful or was it vitiated by procedural violations?**

***Delay in informing Applicant***

65. The Tribunal finds as a matter of fact that the Applicant did not receive the formal notification of the contested decision until six or seven days after it was sent to her husband's email address on 22 May 2015. This was because of an error rather than a deliberate attempt not to inform her.

66. It is also clear that well before this, on 12 March and 18 April 2015 she received written notice that the post she encumbered was being proposed for abolition. She was encouraged to apply for all available posts for which she believed she had the required competencies and skills. Further, on 30 May 2015 she received unequivocal information that she was a staff member who was affected by retrenchment.

67. While the staff rules do not stipulate a notice period in the case of non-renewal of appointment, the Tribunal holds that the Administration gave

the Applicant fair and timely notice of both the proposal to abolish her post and the actual decision.

68. The failure to actually serve the decision on the Applicant at the time it was sent did not prejudice her unfairly, and the error does not vitiate the decision.

***The Applicant's functions and the comparative review process***

69. Paragraph 6 of the TOR of the Comparative Review Panel confers the power to decide which occupational group an affected staff member falls under on the programme manager or, in case of doubt, the CHRO. Information Circular 2015/09 gives guidelines to apply when making such a decision.

70. The question for the Tribunal is whether those guidelines were applied and the decision was reasonable and substantiated.

71. The Tribunal finds that the evidence, including that of the Applicant and her witnesses, overwhelmingly supports the decision that, although her functional title of Engineering Technician on her letter of appointment was changed on 1 July 2013 to reflect the title on the budget staffing table, the functions truly exercised by the Applicant were administrative. Even during the two months before the abolition of her post when she assumed some of the additional duties of the FCM, her functions continued to be supervisory and administrative in nature rather than technical.

72. The Tribunal concludes that the functional title of the Applicant's post did not match the functions she actually performed and that the Administration correctly placed her in the occupational group of administrative assistant when it came to deciding if her post was to be subject to a comparative review.

73. Such a review was to be conducted between staff in the same section, occupational group, functional title, category and grade. As the Applicant

was the only administrative assistant at her grade in the Engineering Section a comparative review was not necessary.

**Was the decision tainted by improper motives?**

***Were proper steps taken to retain the Applicant in the service of the United Nations following the restructuring exercise?***

74. The process for placement and matching of staff affected by the downsizing was promulgated to all staff in Information Circulars 2015/09 and 2015/13. These indicated that it was for the affected staff members to submit expressions of interest in vacant posts. The Administration did not assume full responsibility for unilateral placement of staff members.

75. Although the Applicant was long serving and approaching retirement age, she was not due to reach her retirement age by 15 December 2015 and therefore was not entitled to be automatically retained against a vacant post until that date.

76. The Applicant had been encouraged in April 2015 to apply for all available posts for which she was eligible and on 29 May received the lists of job openings available to her.

77. The decision letter of 22 May 2015 although received by her some days later, included information of the efforts to be taken by the Mission to reassign her to a vacant post and the requirement for her to submit her PHP and e-PAS reports.

78. Although the Applicant believes that the Administration never intended to help her find a post, in fact she was sent a number of communications advising her, as an affected staff member, of the opportunities for her to express interest in vacant posts. Her evidence was vague and uncertain about the posts she did apply for and there was no evidence that she had submitted an expression of interest and forwarded her PHP and e-PAS as required in order to be considered for a lateral transfer. Mr. Leskovsky advocated on her behalf to have her placed on one of a

potential list of vacant posts in the Engineering Section but this was not successful.

79. The Tribunal finds that the Administration fully informed the Applicant of the efforts it would take to try to retain her services but these efforts were dependent on her engaging fully with the process. There was no evidence to suggest that the Administration breached its obligations in this regard.

***Was the Applicant treated with dignity and respect and was the decision vitiated by bias, prejudice and discrimination?***

80. The decision to cut the Applicant's post and to not renew her appointment beyond its expiry was made in the context of the downsizing of the Mission. It was a rational decision made in light of the needs of the Organization. It was made and conducted in accordance with the procedures outlined in the information circulars. It was, with the exception of the short delay in conveying the actual decision, procedurally regular and lawful.

81. The burden of rebutting this regularity lies with the Applicant but such a burden cannot be met by making unsubstantiated allegations.

82. Having heard her testimony, it is apparent to the Tribunal that the Applicant who had served the United Nations for so long and so well was both surprised and disappointed that her post was included in those to be retrenched. However the evidence she adduced in support of her allegations of ill motivation pre-dated the decision by approximately five years. Since then she had been retained on her post and performed both her usual and assumed duties to a high level of competence.

83. The Applicant did not explain how her former roles as an FSU representative resulted in any retaliatory decisions by the Administration. The failure of DFS to respond to her communications about her concerns with the decision, while unfortunate, is not of itself evidence of such disrespect to her that the challenged decision was undermined.



84. The Applicant's allegations of gender discrimination went no further than statements of her belief.

85. The Tribunal holds that the evidence in support of the Applicant's allegations under this heading was not sufficient to meet the burden of proof required in order to render the decision unlawful.

### **Conclusions**

86. The MONUSCO downsizing in 2015 was a large-scale exercise undertaken at the direction of both the General Assembly and Security Council. There is no evidence that it was designed to remove specific staff members.

87. The Tribunal finds that, although the retrenchment resulted in the non-renewal of the Applicant's appointment, the motivation for that decision was rational and was genuine. It was a lawful decision.

88. The Applicant encumbered the sole administrative post in the Engineering Section. It was not required to be reviewed by the CRP. The Applicant was given full and fair notice and the opportunity to express her interest in suitable vacant posts. The implementation of the decision was procedurally correct.

### **Decision**

89. The Application is dismissed.

*(Signed)*

Judge Coral Shaw

Dated this 28<sup>th</sup> day of June 2016

Entered in the Register on this 28<sup>th</sup> day of June 2016

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi