



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

CLARKSON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Duke Danquah

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

Introduction

1. The Applicant is a former FS-4 Finance Assistant with the United Nations Mission in Liberia (UNMIL).
2. On 10 July 2015, he filed an Application contesting the decision to abolish his former post and the offer of a three-month renewal of his current contract on another position.
3. The Respondent filed his Reply on 13 August 2015. It was his case that the Application is not receivable and should be dismissed.
4. On 8 September 2015, the Tribunal issued Order No. 277 (NBI/2015) for the Applicant to file his response on the issue of receivability.
5. The Applicant filed the said response within time on 29 September 2015.

Background and Facts

6. The Applicant joined UNMIL in 2009. He held a fixed-term contract at that Mission at the FS4 level as Finance Assistant which was due to expire on 30 June 2015.
7. Sometime in May 2015, UNMIL had sent out notifications to its staff regarding a retrenchment exercise and the abolishment or nationalization of certain posts, subject to the approval of the General Assembly (GA).
8. On 18 June 2015, the Applicant was notified orally by the Chief Finance Officer, Mr. Anthony Azaglo, that he had received an email from the Chief of Staff's Office regarding the abolishment of the Applicant's post.
9. Later that day, the Officer-in-Charge (OIC) of the Finance Section, Mr. Hanno Nidos, informed the Applicant that he had also received communication

that the Applicant's post would be abolished effective 30 June 2015. They discussed the fact that another staff member in the Finance section had retired and that there was a vacant post which had been lent to another section.

10. On the next day 19 June 2015, Mr. Nidos confirmed to the Applicant that he could not be recruited to the vacant post because it had been lent to another section and was pending the recruitment of someone else.

11. On 25 June 2015, the Applicant filed a request for management evaluation of the decision to abolish his post, or the decision not to renew his contract, or to not take any decision with respect of the renewal of his post, given the upcoming 30 June 2015 expiration of his current contract.

12. On the same day, the Applicant filed an application for suspension of action.

13. On 30 June 2015, the UNDT heard the application for suspension of action. At the hearing, the Tribunal ordered further clarification from the Respondent. In response, the Respondent filed an email from Ms. Klopp, OIC, Mission Support, to the Respondent's Counsel which confirmed that UNMIL intended to extend the Applicant's contract for three months but that it was awaiting action from the Field Personnel Division (FPD) to do so.

14. Following this development, the Management Evaluation Unit (MEU) wrote to the Applicant on 1 July 2015 telling him that his request for management evaluation was moot.

15. On 3 July 2015, the UNDT granted the Applicant's application for suspension of action in Order No. 232 (NBI/2105).

16. On 29 July 2015, the Applicant received an email from Ms. Klopp which confirmed the intended extension of the Applicant's contract for a period of three months.

17. Ms. Klopp's email stated further that an FS-4 post had been located and would be borrowed to extend his contract for three months until the end of September 2015. The Applicant was also informed that in order to continue in employment at UNMIL, he needed to apply for and be selected for an existing vacancy that would extend beyond September 2015.

18. On 28 September 2015, the Applicant filed an application seeking suspension of the decision not to renew his appointment beyond 30 September 2015.

19. On 30 September 2015, the Tribunal granted the application for suspension of action in the interim and informed the Parties that a reasoned order would be issued by Friday, 2 October 2015.

20. On 2 October 2015 by its Order No. 307 (NBI/2015), the Tribunal refused the Application for suspension of action in so far as it sought an order for the retention of the Applicant beyond 30 September 2015.

Respondent's submissions on receivability

21. The Respondent argues that this Application is not receivable because:

a. The Secretary General's proposed budget for UNMIL for the 2013/14 budget cycle was approved by the GA in its Resolution A/RES/67/277¹. That approved budget abolished the Applicant's post and three other Field Service posts in the Mission's Finance Section. Neither the Secretary-General's proposal nor the GA's decision to abolish the post constitutes an administrative decision as defined under art. 2.1 of the Dispute Tribunal's Statute. They are not matters that can be reviewed by the Tribunal.

b. The contested decision has not been the subject of a prior request for management evaluation. The management evaluation request made by

¹ (Financing of the United Nations Mission in Liberia), adopted on 28 June 2013.

the Applicant on 25 June 2015 was only in regard to the decision not to renew his contract.

c. Alternatively, even if the Applicant can challenge the decision of the GA, he is time-barred. The GA's decision to abolish the post was published on 23 July 2013. A request for management evaluation ought to have been filed by the Applicant by 21 September 2013.

d. At the time of the filing of the Application, the Applicant remained in the employment of the Organization and had not been separated. Accordingly, the contested decision has been superseded by a subsequent event, which renders this claim moot and, as such, not receivable. Also, the Applicant cannot challenge the length of his appointment.

Applicant's submissions on receivability

22. The Applicant disagrees with the Respondent's framing of the abolishment issue. He is not challenging any action of the GA. Rather, he attacks the apparent identification of his post for abolishment by the mission, the subsequent inadequate notice given to him by the mission, the irregular and non-transparent procedure of the abolishment and the subsequent attempt to render those actions immune from challenge by issuing a short term extension. Those aspects of the abolishment, which now, three months later have led to the mission's attempt to separate him, are, in fact, subject to challenge and therefore receivable.

23. The Applicant asks the Tribunal to find that the original issue cannot be rendered moot by an unlawful piecemeal three month extension. Although, at the time of the Application the Applicant was still employed, the detrimental effect of the abolishment of his post or non-renewal of his contract was only delayed not erased by the issuance of the short term extension. Furthermore, since the filing of the Application, that detriment has become realized and it is not in the interests of fairness or expeditious justice to deprive the Applicant of the ability to timely challenge the initial actions which led to the three-month extension.

24. This Tribunal found that the lack of adherence to proper abolishment procedures in this case gave rise to *prima facie* unlawfulness in Order No. 232 (NBI/2015) (para. 31). The Tribunal also found that the three month extension did not render the urgency of the Application moot. The Respondent's position is that the Applicant would have to wait until the end of the three month extension. However, upon filing a new application at that stage, the Respondent will inevitably argue that the original issue is again moot or time-barred and that the limited extension itself is regular and immune from any challenge. This puts the Applicant in an impossible position.

25. The Applicant submits that he did not have to file a request for management evaluation of the three month renewal because it is inextricably tied up with the original issue of abolishment and non-renewal. If a staff member were to file a request for management evaluation for each act in a series of acts which stems from the same original decision, the MEU and the Tribunal would be flooded with challenges. As it is, the Respondent's actions in this case have forced the Applicant to file another case at the end of the piecemeal extension.

26. Furthermore, although the UNDT found in *Oummih*² that the staff member could not challenge a renewal for a term less than satisfactory, in that case one year instead of two, the Applicant requests the Tribunal to distinguish that case from the present. At what point is the renewal so short as to be detrimental? Could the Administration be allowed to renew a staff member's contract every two weeks in order to avoid litigation?

27. The Applicant would agree with the Tribunal that a renewal of a year instead of two years may be perceived as a decision which is not adverse. However, such is not the case before the Tribunal. The Applicant submits that the length of the extension, combined with the circumstances under which it was granted, gives rise to an adverse administrative decision and one which must be open to challenge.

² UNDT/2013/045.

28. The very fact that the extension only came about once litigation commenced suggests it was not originally considered. Furthermore, it served to render the mission immune from attack on the original circumstances under which it did not grant the Applicant a one year renewal like other staff members. The Mission did not have to explain or provide reasons for the previously communicated abolishment or lack of information regarding the Applicant's non-renewal. When the Applicant resorted to litigation, the Mission stated its intention to extend so as to appease the challenge. The Mission cannot be allowed to benefit from this half-measure.

29. In this vein, the Applicant asks the Tribunal to distinguish his situation from *Oummih*³ and to hold that he does not have to wait for the expiry of the short extension in order to contest the overall circumstances under which it arose. If the Applicant is made to rely on the later application, he risks the Respondent's challenge that it is too late to attack the original decision or that it is no longer relevant. The original issue is relevant because but for it, the Applicant would not be in this situation at all.

Considerations

30. In this Application, the Applicant contests the decision to abolish his post and having later been placed on a borrowed post, he contests also the decision to renew his contract for only three months.

31. With regards to receivability, the Applicant submits that his case is receivable because it is about the "abolishment of his post, inadequate notice given to him by the Mission, the irregular and non-transparent manner of the abolishment and the subsequent attempt to render those actions immune from challenge by issuing a short term extension".

32. In order to determine the receivability of this Application, it is necessary to ascertain when the contested decisions were taken and whether or not the

³ *Op. cit.*

Applicant complied with the applicable rules governing the filing of applications before the Tribunal.

Decision to abolish the Applicant's post

33. On 25 April 2013, the UNMIL Director of Mission Support informed the Applicant by a memorandum that his post would be abolished on 30 June 2013. He was also informed that UNMIL would give priority consideration to his candidacy where suitable vacancies occurred within the Mission.

34. Although the abolition of his post was to take effect on 30 June 2013, on 17 June 2013 the Applicant was transferred to the Office of Internal Oversight Services (OIOS) for six months through 31 December 2013. Thereafter, he was given short contract extensions until September 2015.

35. The uncontested evidence before the Tribunal is that the Secretary-General proposed the abolition of four Field Service posts within the UNMIL Finance Section for the 2013/14 budget cycle. The Applicant's post was one of those slated for abolition. On 28 June 2013, the GA approved the said budget and abolitions through Resolution A/RES/67/277.

36. The Tribunal finds and holds that to the extent that the decision to abolish the Applicant's post was that of the GA, this Tribunal lacks jurisdiction to review the said decision.

37. It was held in *Ovcharenko et al*⁴⁴ that decisions of the GA are binding on the Secretary-General. Any administrative decision based on the decision of the GA is lawful and cannot be challenged.

⁴⁴ 2015-UNAT-530, para. 35.

Non-renewal decision

38. Prior to the abolition of his post by the GA on 28 June 2013, the Applicant had been transferred to OIOS for an initial six months through to 31 December 2013. The Tribunal reiterates its findings in Order No. 307 (NBI/2015),

17. What emerges from a thorough reading of the pleadings on both sides is that the Applicant's substantive post of Finance Assistant at the FS4 level, post no 50342 in UNMIL, was abolished at the end of the 2012/2013 budget cycle which ended on 30 June 2013. The Respondent exhibited Annex R1 which was the notice of the said abolition dated 25 April 2013 and addressed to the Applicant. That document is not denied by the said Applicant.

18. It has been submitted on behalf of the Applicant that no proper procedures were followed in the abolition process with regard to his post because a proper staffing review was not carried out. The Respondent's case is that following the abolition of the Applicant's substantive post in 2013, UNMIL Administration had funded the Applicant's continued extensions from borrowed posts since July 2013 including a one-year stint with the Office of Internal Oversight Services (OIOS).

19. Considering that the Applicant's substantive post has not existed for the past two years and that the said Applicant has temporarily encumbered vacant posts to which he was not recruited since then, it is evidently too late in the day to challenge the abolition of his post which took place in 2013. The Applicant in the circumstances is not competent to challenge the non-renewal of his temporary contract funded from other vacant and borrowed posts at the end of September 2015.

Decision

39. In view of the foregoing, the Tribunal finds that this Application is not receivable and accordingly refuses it.

Case No. UNDT/NBI/2015/075

Judgment No. UNDT/2016/119

(Signed)

Judge Nkemdilim Izuako

Dated this 30th day of August 2016

Entered in the Register on this 30th day of August 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi