



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2016/030

Judgment No.: UNDT/2018/057

Date: 08 May 2018

Original: English

Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NAKWAFIO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Thomas Jacob, UNDP

INTRODUCTION

1. The Applicant is a former Assistant Humanitarian Affairs Officer with the Office for the Coordination of Humanitarian Affairs (OCHA) in the Democratic Republic of the Congo (DRC). He filed an application on 19 April 2016 contesting the decision not to renew his fixed-term appointment (FTA) beyond 31 December 2015.

2. On 3 June 2016, the Respondent filed his reply.

THE CLAIM

3. The Applicant submits that the decision not to renew his appointment, following the abolishment of his post, is improper and arbitrary in that:

a. There is no evidence of the alleged reorganization of OCHA. The restructuring of OCHA/DRC is not reflected in any of the OCHA's official documents including its Strategic Plan 2014-2017, OCHA Plan and Budget for 2016, and the Secretary-General's report to the General Assembly.

b. The Administration breached staff rule 9.6(e) as it failed to consider him for any other suitable position following the abolishment of his post.

c. The Administration failed to conduct a comparative review exercise in relation to the abolishment of posts.

d. The Administration states that the restructuring of the OCHA/DRC Office and the dismantling of the Emergency Preparedness and Response (EPR) Unit were the two main reasons for the decision not to renew his contract. However, the Applicant states that his post was not attached to the EPR Unit.

e. His post was abolished while other colleagues in the EPR unit were transferred from Goma to Kinshasa and Kalemie within the same area of operations of the OCHA/DRC Office.

f. Absent a justifiable reason, the Applicant submits that the decision not to renew his contract is an act of retaliation. He further submits that his non-renewal is linked to a memorandum he wrote to the Deputy Head of Office, OCHA/DRC on 11 August 2015 concerning the difficult working environment with the Management Cell and to his claims for DSA payments.

4. The Applicant seeks rescission of the contested decision and reinstatement to his former post. He also requests compensation of two years' salary and the payment of his outstanding Daily Subsistence Allowance (DSA).

THE REPLY

5. The Respondent submits that the post occupied by the Applicant was abolished due to the ongoing restructuring taking place within OCHA/DRC, and that it was a proper exercise of administrative discretion:

a. Due to the need to properly address operational and emergency situations, OCHA reviews its staffing structures and composition on an ongoing basis as required, and as set out in its biennial plans. The ongoing nature of the review of OCHA/DRC structure and staffing level is clearly reflected in OCHA/DRC's Country Office Strategies, particularly 2014-2015 and 2016-2017.

b. The operational realities of the 2016 budget reflect the fact that OCHA/DRC was required to reduce its planned staff costs by USD 528,966. Disbanding the EPR Unit was a legitimate exercise of OCHA/DRC's discretion to determine how best to utilize its resources by a legitimate and lawful structural reorganization and reallocation of resources. This exercise resulted in the Applicant's post being abolished.

c. The Applicant's separation from service was not the result of a termination and as such, staff rule 9.6(e) does not apply. OCHA/DRC was under no legal obligation to take steps to reassign the Applicant to another post. Rather, the Applicant's appointment was not renewed as indicated in the notification he received.

d. The Applicant received due consideration for a suitable post within OCHA/DRC. Following the completion of a comparative analysis, OCHA/DRC determined that the Coordinated Assessments Specialist, who had been recruited to perform Programme Monitoring and Evaluation functions, was better suited than the Applicant to support the Coordination Section's Humanitarian Response Plan and Programme Monitoring and Evaluation functions.

e. The Applicant has not met his burden of proof regarding his claim for retaliation. The existence of a prior workplace disagreement is not, in itself, evidence that a contested decision was motivated by an improper purpose.

FINDINGS OF FACT:

6. On 1 October 2017, the Applicant joined OCHA/DRC, as a Human Affairs Assistant, at the National Officer Grade A (NOA), step 2, by a UNDP letter of appointment service limited to OCHA. As part of the ongoing restructuring of OCHA/DRC, the Applicant was transferred from Kinshasa to Goma, DRC with effect from 1 March 2015.

7. On 11 August 2015, the Applicant addressed a memorandum entitled "[m]anagement crisis in the EPR Unit", to Mr. Joseph Inganji, Deputy Head of Office, OCHA/DRC. In his memorandum, the Applicant noted that, following the appointment of Ms. Sophie Seged as Head, EPR Unit, the Unit appeared to be mismanaged.

8. On 17 September 2015, the Applicant addressed a memorandum to the Head of Office requesting his transfer from the EPR Unit, Goma, to the Coordination Section, Kinshasa.

9. On 30 September 2015, Ms. Alice Sequi, Chief of Section, Central and West Africa, OCHA, HQ, sent an email to the Head of Office advising him that the front office had informed her that OCHA/DRC “should be showing a zero growth on [its] 2016 cost plan (relative to 2015 presumably)”.

10. On the same day, Mr. Joseph Balogh, Programme Management Advisor, Coordination and Response Division, OCHA, HQ informed the Head of Office that OCHA/DRC’s draft 2016 cost plan reflected an increase in expenditure of USD568,220 when compared to the approved 2015 cost plan. He suggested “to reflect a higher vacancy rate for the national staff costs” in order “to make sure that the national staff costs are planned on a realistic level”.

11. On 1 October 2015, the Finance Officer informed the Head of Office that UNHQ was “asking [OCHA/DRC] to absorb the whole deficit by cutting from national staff posts”. The following day, a revised budget for 2016 was completed which reflected a reduction in staff costs of USD528,966.

12. On 5 November 2015, the Head of Office sent an email to the Deputy Head of Office requesting feedback in relation to proposed changes to the EPR Unit’s reporting lines. In his email, he noted that the Applicant’s relocation to Kinshasa was agreed due to the changes in the reporting lines of the Unit. On the same day, the Deputy Head of office responded to this email noting that he “fully concur[ed] with the [Applicant’s] move to Kinshasa”.

13. On 16 November 2015, the Senior Management Team¹ decided that, considering that the functions of the EPR Unit were part of the core mandate of OCHA, there was no need to have a dedicated unit to perform those duties. Accordingly, it was decided to disband the EPR Unit, thereby achieving approximately USD300,000 in operational savings.

14. As a result of the disbanding of the EPR Unit, OCHA/DRC conducted a comparative review of the Applicant and another staff member to determine who was the most suitable candidate to perform Project Monitoring and Evaluation

¹ The Senior Management Team is composed by the Head of Office, the Deputy Heads of Office, Heads of Sub-Offices and Heads of Sections.

functions in the Coordination Section. OCHA/DRC concluded that the other staff member was a more suitable candidate than the Applicant. The comparative matrix states:

In view of the fact that [the other candidate] understands English fluently, has done all his work coordinating humanitarian assistance and that he was recruited to do the Project Monitoring and Evaluation work, a task he has continued to discharge diligently, the Coordination Section and the management of OCHA fully agree that he is the best among the two and should be the one selected for the job.

15. By memorandum dated 25 November 2015, the Applicant was notified of the decision not to renew his appointment beyond 31 December 2015.

16. On 7 December 2015, the Applicant requested management evaluation of the decision not to renew his appointment.

17. By letter dated 20 January 2016, the Assistant Administrator and Director, Bureau for Management Services replied to the Applicant's request for management evaluation. The contested decision was upheld.

THE APPLICABLE LAW

18. The relevant legal principles applicable to this case are:

Staff regulation 4.5 (c) provides that "a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service".

Similarly, staff rule 9.4 provides that a temporary or fixed-term appointment "shall expire automatically and without prior notice on the expiration date specified in the letter of appointment".

Administrative Instruction ST/AI/2013/1 (Administration of fixed-term appointments) provides in section 7.1 that a fixed-term appointment "expires on the expiration date specified in the letter of appointment or letter of renewal of appointment".

19. In *Munir* 2015-UNAT-522, the United Nations Appeals Tribunal (“UNAT”) held that:

It is well established that a party to a fixed-term appointment has no expectation of renewal of that contract. In order for a staff member’s claim of legitimate expectation of a renewal of appointment to be sustained, it must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case.

20. Regarding allegations of improper motive, UNAT held in *Hepworth* 2015-UNAT-503 that:

Our jurisprudence places the burden on the staff member to show a legitimate expectancy of renewal or that the non-renewal of his fixed-term appointment was arbitrary or motivated by bias, prejudice or improper motive against the staff member.

21. In relation to a restructuring exercise, UNAT ruled in *Khalaf* 2016-UNAT-678 citing *Matadi et al.* 2015-UNAT-592 as follows:

Both the Appeals Tribunal and the Administrative Tribunal of the International Labour Organization (ILOAT) have held that it is well settled jurisprudence that “an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff”. This Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members.

CONSIDERATIONS

22. The issues for determination are:
- a. Was the abolition of the post occupied by the Applicant due to a genuine restructuring and reorganization?
 - b. If so, was the decision to carry out a comparative review of the competencies and eligibility of two candidates, namely the Applicant and the successful candidate carried out in a fair, rational and just manner

without any ulterior motive to disadvantage the Applicant or otherwise to act to his detriment?

c. Did the Applicant have any legitimate expectation of renewal of his fixed term appointment?

23. The Tribunal is satisfied that the Respondent has provided sufficient evidence to support the submission that OCHA was, at the material time, under pressure to effect substantial savings in its budget and that the Organization had constantly to review its operational priorities to meet changing demands and budgetary constraints.

24. The decision to abolish the post encumbered by the Applicant was taken for legitimate business needs in that it was within the discretion of the decision makers within OCHA to conclude that the functions being performed by the Applicant at the time were part of OCHA's core mandate and that there was not the need to have a dedicated unit to carry them out. Having arrived at this decision and having regard to the need to streamline services and effect the required cost savings it was legitimate for OCHA to carry out a comparative review of the relative suitability of the Applicant and the successful candidate. The Applicant has not shown that the structural reorganization or the decision to prefer the successful candidate was motivated by impermissible considerations.

25. Insofar as the Applicant considers that he had a legitimate expectation of renewal of his appointment he is reminded that absent evidence of impropriety he is bound by the fundamental principle that a fixed term appointment does not carry any expectancy, legal or otherwise, of renewal. Further, his attention is drawn to the rulings in *Munir* 2015-UNAT-522 that for a staff member's claim of legitimate expectation of a renewal of appointment to be sustained, it must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case; and in *Hepworth* 2015-UNAT-503 that the burden is on the staff member to show a legitimate expectancy of renewal or the existence of improper motives.

26. The issue of restructuring of International Organisations has been amply dealt with in a number of cases both at first instance level and the appellate level, most recently in the rulings in *Khalaf* 2016-UNAT-678 and *Matadi et al.* 2015-UNAT-592 cited above at paragraph 21.

27. The Tribunal notes the arguments advanced by the Applicant as to the relevant law on the termination of fixed-term appointments. However, since the present case is not a case of termination but rather a case of non-renewal, the arguments put forward by the Applicant in this regard are not relevant.

28. Further, the Tribunal did not consider it necessary to comment on arguments, submissions and documents which are not relevant to the core issue to be decided namely whether the non-renewal of the Applicant's FTA was unlawful.

29. The Tribunal finds that:

- a. As a staff member on a FTA the Applicant had no right in law to have his contract renewed.
- b. The evidence shows that there was a genuine need to reduce overall costs and there was nothing perverse in the decision to abolish the post of Assistant Humanitarian Affairs Officer, at OCHA/DRC encumbered by the Applicant.
- c. The Applicant has failed to show that the decision not to renew his FTA was motivated by improper considerations or was otherwise perverse.
- d. The Respondent has provided a satisfactory explanation for preferring the successful candidate rather than the Applicant for the single vacancy of Project Monitoring and Evaluation.

Judgment

29. The Application is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 8th day of May 2018

Entered in the Register on this 8th day of May 2018

(Signed)

Eric Muli, Legal Officer, for,
Abena Kwakye-Berko, Registrar, Nairobi