



Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Abena Kwakye-Berko

AFEWORKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Alister Cumming, ALS/OHRM

INTRODUCTION

1. The Applicant is a former Administrative Assistant at the Regional Service Center in Entebbe (RSCE). On 28 December 2015, she filed an application contesting the decision not to renew her fixed-term appointment beyond 30 June 2015. It was apparent from the full details that she provided that she was also complaining about the decision not to grant her a continuing appointment.

2. By judgment No. UNDT/2017/011 dated 3 March 2017, the Tribunal dismissed the application as not receivable.

3. By judgment No. 2017-UNAT-794 dated 27 October 2017, the United Nations Appeals Tribunal (UNAT) found the application to be receivable, vacated judgment No. UNDT/2017/011 and remanded the case to the UNDT for a consideration of the merits.

4. In April 2018, the case was assigned to the undersigned Judge who held a case management discussion on 9 April 2018 with the participation of the Applicant and Counsel for the Respondent.

5. Having regard to the preference of the parties, by Order No. 099 (NBI/2018) dated 14 June 2018, the Tribunal ordered by consent that the application be considered and determined on the documents.

THE CLAIM

6. The Applicant challenges two administrative decisions. First is the decision not to grant her a continuing appointment. She states that she was informed by an *Inspira* generated email on 1 August 2013 that she was being considered for a continuing appointment. She submits that despite her meeting all eligible criteria to be granted a continuing appointment in accordance with the relevant policy, she was not awarded that appointment for reasons unknown to her. She submits that if she had been granted a continuing appointment in 2013, she would not have been subject to a Comparative Review Process (CRP) and

would not have been separated. However, the Applicant did not request a management evaluation of that decision as required by staff rule 11.2 (a).

7. The second challenge is against the decision not to renew her fixed-term appointment. The Applicant submits that the decision was arbitrary, unfair and unreasonable for the following reasons:

a. A CRP was conducted unfairly and she was detrimentally affected in that the CRP should have been carried out on the basis of “functional title” and not on the basis of the “specific function” being performed. In accordance with her letter of appointment, her functional title was that of an Administrative Assistant. Therefore, she should have been comparatively reviewed with Administrative Assistants only and not with Travel Unit staff. Furthermore, Administrative Assistants at the FS-4 level continue to perform travel related functions at RSCE;

b. While the Travel Unit at RSCE was abolished in early 2014, it had been replaced with travel related service lines and five staff members at the FS-4 level of the former Travel Unit continue to perform travel functions in RSCE. These staff members are: Mr. MG, Ms. EW, Ms. CC, Mr. SN and Ms. AD;

c. She was discriminated against in that her contract was not renewed while the four staff members performing the same functions as herself at the FS-4 level were reassigned to other missions. Those staff members are: Mr. BK, Mr. BY, Mr. WJ and Mr. SN. There was no reason for not considering her for a reassignment;

d. Since she was eligible for a continuing appointment and she had been cleared for FS-5 level posts, she could have been comparatively reviewed with FS-5 level candidates before the decision not to renew her appointment.

e. She was prejudiced during the CRP because her 2013-2014 performance evaluation (e-PAS) was not available for consideration. Her

e-Pas could not be prepared because she was on Special Leave Without Pay (SLWOP) from 20 October 2013;

f. She should have been given preference over Mr. BK and Mr. SN in relation to suitable alternative posts because she had more seniority in service and is a female from a least developed country. She was discriminated against when staff members having less length of service than her were reassigned to other missions while she was separated on 30 June 2015;

g. The reassignment process was tainted by “favouritism, bias, regionalism, religion and ethnicity”.

8. The Applicant requests that her appointment be renewed and that her absence from 1 July 2015 to the time of her reinstatement be considered as special leave with full pay. Furthermore, she requests the grant of a continuing appointment and compensation for mental trauma and distress caused by the impugned decision.

THE REPLY

9. The Respondent submits that the contested decisions are lawful in that:

a. The claim relating to the decision not to offer her a continuing appointment is not receivable, *ratione materiae*, because she failed to request management evaluation of this decision. In any event, the Respondent submits that this decision was lawful. The Applicant was on SLWOP from 21 October 2013 until her separation on 30 June 2015. She was ineligible during the period of consideration because she was not in active service between 1 July 2012 and 30 September 2014 as required by Section 2.6 of ST/AI/2012/3. Consequently, she was not granted a continuing appointment

b. A fixed-term appointment does not carry any expectancy of renewal, irrespective of the length of service. Restructuring of a mission

that results in loss of employment for staff members falls within the Secretary-General's discretionary authority;

c. The CRP carried out at the RSCE was established to review cases where existing staff "in specific functions" exceeded the number of authorized posts in the budget. Therefore, the review was carried out by reference to function, not functional title. As the Applicant performed travel functions, she was placed in the pool of staff at the FS-4 level performing travel functions. All FS-4 posts in the Travel Unit were abolished. Accordingly, a CRP was unnecessary and none was carried out in relation to the Applicant's level and functions. However, if the Applicant had been reviewed against other FS-4 Administrative Assistants, she would not have been treated differently since no FS-4 Administrative Assistant posts existed in the new structure. Accordingly, her appointment would not have been renewed and she would have been separated from service;

d. The Applicant's assertion that five staff members continue to serve at the FS-4 level in the Travel Unit is misguided. All FS-4 posts in that Unit were abolished. Mr. SN was selected for a temporary assignment with the United Nations Interim Force in Lebanon (UNIFIL) with effect from 30 June 2015. He did not retain a lien on his post at the RSCE. He later returned to the RSCE and was placed against a vacant higher level post. The other four staff members mentioned by the Applicant who were retained at the RSCE, either performed different functions from the Applicant, or were at a higher level. Accordingly, they are not true comparators.

e. The Applicant was fairly treated during the entire process. She was provided with the same opportunities as similarly placed staff members. DFS maintained a spreadsheet of all staff who were affected. This document was circulated to the Chiefs of Human Resources in all missions. The named comparators Mr. BK, Mr. SN and the Applicant were all included in this spreadsheet. The document was updated regularly

and shared with all Missions so that all listed staff had an equal opportunity to be selected. If she had been found by a Mission to have been suitable for a job opening, she could have been laterally reassigned under the USG/DFS's authority.

f. There is no merit in the Applicant's assertion that she should have been comparatively reviewed at the FS-5 level. Although she may have been rostered at the FS-5 level, she had no right to an automatic consideration for higher level functions;

g. As the Applicant was not part of a CRP, the fact that her performance evaluation from 2011-2012 was not available for consideration is irrelevant. For the same reason, her length of service was not a relevant consideration.

h. The Applicant has not adduced evidence to support her allegations of discrimination or other impermissible considerations.

i. The Applicant has not adduced any evidence of harm.

10. The Respondent requests the Tribunal to dismiss the application.

FINDINGS OF FACT

11. The Applicant commenced employment with the Organization on 16 August 2001. She worked in various peacekeeping missions. On 1 July 2013, she was reassigned to the Travel Unit of the RSCE as an Administrative Assistant at the FS-4 level. Her last fixed-term appointment was from 1 July 2014 until 30 June 2015.

12. At her request, the Applicant was granted SLWOP from 21 October 2013 to 30 June 2015, which was the date of expiry of her fixed-term appointment.

13. In 2014, the RSCE underwent a civilian staffing review. Based on the recommendations of the review, and subsequent endorsement by the RSCE Steering Committee, the proposed staffing structure for the 2015/2016 financial budget reflected a reduction of 75 international field service (FS) posts.

14. By a circular dated 3 March 2015, RSCE staff members, including the Applicant, were informed of a retrenchment exercise in which 75 FS staff posts would be converted to national posts for the 2015/2016 financial year. RSCE staff members were also informed that a comparative review was to be conducted by function and that within each function the review will be conducted by grade level.

15. The proposed staffing structure was submitted for review and approval by the General Assembly (GA). In anticipation of approval by the GA a CRP was to be conducted in cases where there was more than one staff member occupying a position earmarked for retrenchment within the same function, category and level. Staff members were reviewed in the functional areas of human resources, finance, travel and administration.

16. By a circular dated 5 March 2015, RSCE staff received further information about the process, the applicable criteria, and projected timeline. Staff were informed that the results of the comparative review would be communicated by individual letters. A further circular dated 12 March 2015 informed staff of the evaluation criteria for the comparative review.

17. The Applicant was placed in the pool of staff members performing travel functions at the FS-4 level. No such post was to be retained.

18. By letter dated 13 May 2015, Ms. Safia Boly, Chief, RSCE informed the Applicant that following completion of the CRP, her fixed-term appointment would not be renewed beyond 30 June 2015.

19. By email dated 25 June 2015, Ms. Boly, informed all staff that the Fifth Committee of the General Assembly had decided to implement the nationalization plan for RSCE in a phased manner, over a two-year period, by nationalizing 34 FS posts in 2015-2016, and a further 34 posts in 2016-2017. She noted that in light of that decision, a review of affected staff was being conducted.

20. Subsequently, the RSCE and the Field Personnel Division (FPD) of the Department of Field Support (DFS) conducted a review of the RSCE staff. The results of the review showed that in the area of travel, two posts at the FS-6 level

and three posts at the FS-5 level were retained. There were no posts available at the FS-4 level. At the time of the review, there were five staff members performing travel functions at the FS-4 level, including the Applicant. All of them were affected by the retrenchment exercise. Four of them were “reassigned” to other peacekeeping missions. However, the Applicant was not offered a position by any of the missions and was accordingly not reassigned. In the circumstances, she was to be separated upon the expiry of her appointment.

21. On 30 June 2015, the Applicant received a formal letter informing her that her fixed-term appointment was not to be renewed beyond that date. She was separated from service.

22. On 28 August 2015, the Applicant requested management evaluation of the decision not to renew her appointment.

23. By letter dated 30 September 2015, the Officer-in-Charge, Management Evaluation Unit (OIC/MEU) replied to the Applicant’s request for management evaluation. MEU determined that her request was not receivable because it was time-barred and even if it was receivable it had no merit.

THE APPLICABLE LAW

24. The legal principles applicable to this case are:

Section 2.6 of ST/AI/2012/3 provides that for the granting of a continuing appointment, “eligible staff members must be in active service in the Secretariat under a fixed-term appointment throughout the period of consideration”. The term period of consideration refers to the period of time between the eligibility date as indicated in section 2.1 of ST/AI/2012/3, and the date of the granting of the continuing appointment, as indicated in section 4.2 (m) of the same instruction.

Section 4.2 (m) of ST/AI/2012/3 provides the following:

Staff members that meet the eligibility criteria at the start of the review period and are thereafter seconded to another United Nations organization, placed on special leave without pay for any

duration or separated from the Organization during the review period shall be withdrawn from the review. Eligible staff members on secondment to another United Nations organization or placed on special leave who are withdrawn from the review may be considered in future reviews under the provisions of section 2.7 above.

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”.

25. 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.

26. 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.

27. 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

28. In determining the merits of this claim the Tribunal had regard to the guidance provided by UNAT in *Massabni* 2012-UNAT-238¹ that:

The duties of a Judge prior to taking a decision include adequate interpretation and comprehension of the applications submitted by the parties, whatever their names, words, structure or content, as the judgment must necessarily refer to the scope of the parties’ contentions. Otherwise, the decision-maker would not be able to follow the correct process to accomplish his or her task, making up his or her mind and elaborating on a judgment motivated in reasons of fact and law related to the parties’ submissions.

Thus, the authority to render a judgment gives the Judge an inherent power to individualize and define the administrative decision impugned by a party and identify what is in fact being contested and subject to judicial review, which could lead to grant, or not to grant, the requested judgment.

29. The first complaint concerning the receivability of the decision not to grant the Applicant a continuing appointment may be dismissed on either of two grounds. Firstly, that it is not receivable because the Applicant did not request management evaluation and secondly, because the Applicant was not in active service throughout the period of consideration as required by the provisions of section 2.6 of ST/AI/2012/3.

30. The second and primary complaint is against the decision not to grant a renewal of the Applicant’s fixed-term contract. This falls to be determined by an

¹ See also *Zachariah* 2017-UNAT-764.

examination of the following issues having regard to the guidance and rulings by UNAT in *Khalaf* and *Matadi*:

- a) Was there a genuine restructuring of the workplace resulting in the loss of several posts because of the need to achieve economies and efficiencies?
- b) Did the RSCE have a reduced need for staff members performing the duties and functions being carried out by the Applicant?
- c) In carrying out the restructuring exercise did the Respondent discharge its duty to act fairly, transparently and justly in its dealings with staff who were at risk of losing their jobs?
- d) Has the Applicant been able to show that the restructuring exercise was tainted by discrimination, favouritism, bias or any other impermissible consideration to her detriment in that it resulted in her not being reassigned to a suitable alternative post within RSCE or any other mission?

31. The foregoing issues will now be considered:

a) The Restructuring

The Tribunal finds that the civilian staffing review conducted by the RSCE, resulting in the reduction of several posts, was conducted for a *bona fide* reason and its proposals were endorsed by the General Assembly.

b) Comparative review process by function

The decision to conduct the comparative review by comparing staff with the same functions, regardless of service line or office, as indicated by RSCE Circular, dated 3 March 2015, was an appropriate principle guiding the review and properly within the discretion of the Administration. Moreover, the fact that the Applicant was not part of the review process was not due to any discrimination or desire to subject her to less favourable treatment but because all the posts at FS-4 level in the Travel Unit, which included the Applicant, were abolished.

c) Equal treatment of staff during the retrenchment exercise

The record shows that all staff affected by the retrenchment exercise were similarly treated in the communications received and the opportunities that were made available for consideration of alternative job offers including, in particular, opportunities in other peacekeeping missions.

d) Discriminatory Treatment

The Applicant alleges that five staff members (Mr. MG, Ms. EW, Ms. CC, Mr. SN and Ms. AD) at the FS-4 level of the former Travel Unit continue to perform travel functions in RSCE. The evidence shows that all FS-4 posts in that Unit were abolished. Except for Mr. SN who was temporarily assigned to UNIFIL and returned later to RSCE at a higher-level post, the other four staff members mentioned by the Applicant, who were retained at the RSCE, performed different functions from the Applicant, or were at a higher level. They were therefore not appropriate comparators.

The Applicant also claims that she was discriminated in comparison to four staff members performing the same functions as herself at the FS-4 level. These allegations appear to be prompted by the fact that Mr. BK, Mr. BY, Mr. WJ and Mr. SN succeeded in obtaining job offers in other missions and were accordingly reassigned. However, the Respondent has produced an adequate explanation and reasons to rebut any suggestion or inference of discrimination or favouritism towards those staff members who were reassigned in that DFS sent to the Chief of Human Resources of all missions, a spreadsheet identifying all staff members who were affected by the retrenchment exercise. The Applicant and her named comparators were included in this list. It was for the missions to decide whom to select for offers of alternative employment. Unfortunately for the Applicant, she was not chosen. As for the various allegations of discrimination, favouritism and bias it was for the Applicant to show that she was subjected to any form of discriminatory treatment. The Applicant having made these bold allegations has failed to produce any evidence in support thereof.

Judgment

32. The application fails and is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 26th day of June 2018

Entered in the Register on this 26th day of June 2018

(Signed)

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