



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, AAS/ALD/OHR

Rosangela Adamo, AAS/ALD/OHR

Introduction

1. The Applicant is a former staff member of the United Nations - African Hybrid Operation in Darfur (UNAMID), where he served as a Child Protection Officer, at the P-3 level.¹

2. On 26 June 2018, he filed an application contesting the decision to terminate his fixed-term appointment (FTA) following the abolition of the post which he held. He seeks compensation for the loss suffered; in the alternative, he prays to the Tribunal to find that the procedure followed to terminate his appointment was defective and thus order for his reinstatement at an equivalent post within UNAMID.²

3. The Respondent filed a reply on 2 August 2018 in which it is argued that the claim is not receivable *ratione materiae* in part. If found receivable, then the contested decision was lawful.

Facts

4. The facts laid out below are uncontested and supported by the parties' pleadings and submitted documents.

5. Since 15 May 2016, the Applicant served as a Child Protection Officer with UNAMID at the P-3 level.³

6. On 18 May 2017, the United Nations Secretary-General and the Chairperson of the African Union Commission submitted their joint report on the strategic review of UNAMID to the United Nations Security Council.⁴ The report took note of the improved security situation in Darfur, recommended a drawdown of the mission and called for a comprehensive civilian staffing review (CSR) with a view to implementing reductions in civilian staffing commensurate with the drawdown of uniformed

¹ Application, section I

² Application, section III

³ Reply, section B

⁴ Reply - Annex 1 – Executive Summary, UNAMID Staffing Review, 2017 dated 19 October 2017.

personnel. Regarding the Child Protection Section, the Report recommended the abolition of two P-3 posts by 31 December 2017.⁵

7. Consequently, to determine which staff members would be retained and those to be retrenched, UNAMID undertook a comparative review exercise.⁶ With regard to the Child Protection Section, since there were three P-3 Child Protection Officer positions and two had been proposed for abolition, the three officers were comparatively reviewed. The Applicant scored the lowest.⁷

8. On 28 November 2017, the Director of Mission Support of UNAMID, (DMS/UNAMID), informed the Applicant that following the completion of the comparative review exercise, his post was identified for abolition, accordingly he was placed among the staff members that had been identified for retrenchment by 31 December 2017.⁸

9. On 4 December 2017, the Applicant received a letter from the DMS/UNAMID informing him that his fixed-term appointment would be terminated effective 31 December 2017.⁹

10. On 9 December 2017, the Applicant requested for management evaluation of the decision to terminate his fixed-term appointment.¹⁰ By the same request, he sought suspension of the contested decision pending management evaluation; the suspension was granted on 19 December 2017.¹¹ On 1 January 2018, UNAMID issued the Applicant a new Personnel Action extending his fixed-term appointment until 30 June 2018.¹²

⁵ Ibid.

⁶ Reply, Annex 7, Terms of Reference-Comparative Review Panel.

⁷ Reply, Annex 3 - Report -Comparative Review Panel for International Staff.

⁸ Application, Annex 1

⁹ Application, Annex 2.

¹⁰ Application, Annex 3

¹¹ Application, Annex 7

¹² Application, Annex 6

11. On 24 December 2017, the General Assembly endorsed the recommendations of the Advisory Committee on Administrative and Budgetary Questions on staff changes and the reductions at UNAMID.¹³

12. On 28 March 2018, the Applicant received a response to his management evaluation request upholding the decision to terminate his fixed-term appointment.¹⁴ On 2 April 2018, the Chief Human Resources Officer (CHRO), UNAMID notified the Applicant that his appointment would end on 8 April 2018.¹⁵

Submissions

Applicant's submissions

13. The Applicant maintains that the termination of his appointment was vitiated by bias, which extended against the whole Child Protection Section. Moreover, the CSR recommendation to reduce the mandate of the Child Protection Section was in violation of the relevant Resolutions of the United Nations Security Council on children and armed conflicts and, in particular, Resolution 2363 (2017) specific to UNAMID.

14. Further, the manner in which he was requested to leave the Mission within a period of five days, including night correspondences, was in contravention of staff rule 9.7(b). A 30-day notice must be granted to the concerned staff following the procedure of contract termination. The spirit of this rule is to allow the concerned staff members to prepare themselves accordingly and complete all the formalities needed with the competent services.

15. By way of remedy, the Applicant requests the Tribunal to order for compensation for the loss he suffered. In the alternative, he prays to the Tribunal to

¹³ Reply, Annex 2, A/RES/72/259, Resolution adopted by the General Assembly on 24 December 2017.

¹⁴ Application, Annex 7

¹⁵ Application, Annex 8

find that the procedure followed to terminate his appointment was defective and thus order for his reinstatement at an equivalent post within UNAMID.

Respondent's submissions

Receivability

16. To the extent that the Applicant is contesting the CSR Report and Final Recommendations of the Report, which recommends reducing staff in the Child Protection Section, this claim is not receivable *ratione materiae*. The CSR report is not an administrative decision within the meaning of art. 2.1(a) of the Dispute Tribunal's Statute.¹⁶ The Applicant may not challenge the CSR Report which was a prefatory act that produced no direct legal consequences to the legal order.¹⁷

Merits

17. Pursuant to staff regulation 9.3(a)(i), the Secretary-General may, giving reasons therefor, terminate the appointment of a staff member who holds a temporary, fixed-term or continuing appointment due to abolition of posts or reduction of staff.

18. The termination of the Applicant's appointment was lawful since it was undertaken in accordance with a lawful restructuring exercise. The Organization has the discretion and the power to restructure its departments and units. The CSR did not breach Security Council resolution 2363 (2017). The Secretary-General endorsed the CSR recommendations proposing the abolition of two P-3 posts in the revised UNAMID 2017/2018 budget. The General Assembly abolished the posts.

19. The Applicant's post was selected for reduction in a proper procedure. There were three P-3 posts in the Child Protection Section and two posts were to be abolished. A comparative review was conducted by an independent panel. The Applicant scored the lowest. Consequently, the Applicant was separated following termination of his appointment.

¹⁶ Reply, Para 4

¹⁷ Lee 2014-UNAT

20. The Applicant's claim that the 4 December 2017 formal notice does not meet the required time frame of 30 calendar days is without merit. The Applicant was separated effective 9 April 2018, four months after UNAMID had given him official notice of the issue.

21. The Organization had no obligation to laterally re-assign the Applicant. The comparative review considered the type of appointment that each staff member held, giving priority for retention to those holding a continuing or permanent appointment in accordance with staff rule 9.6(e). The USG/DFS has the discretion to place staff members outside the normal recruitment process, but is not required to do so.¹⁸ The USD/DFS may reassign staff affected by downsizing "with priority to those holding a permanent or continuing appointment, to suitable positions in the existing missions outside of the regular recruitment exercise."¹⁹ In this case, given the number of staffing reductions, it was not possible to retain the Applicant, who held a fixed-term appointment.

Considerations

22. Regarding the question of receivability, the Tribunal agrees that the CSR Report and its Final Recommendations including recommendation on reducing staff in the Child Protection Section, no matter how possibly controversial as a policy decision, did not produce direct effect on the Applicant's terms and conditions of service. The application, however, although the CSR Report is in the centre of the argument, is clearly directed against the decision on termination of the appointment. As such, the impugned decision falls squarely under the Tribunal's jurisdiction pursuant to art 2.1 of the UNDT Statute.

23. Regarding the merits, the abolishment of a number of posts was decided by the General Assembly. This decision is outside the Tribunal's jurisdiction. The Secretary-General's role was to implement it through identifying particular posts for reduction.

¹⁸ Reply, para 25

¹⁹ *ibid*

In the process, the Applicant's post was so selected, which entailed the decision on termination of his appointment. The Tribunal's cognizance extends over reviewing the appropriateness of the steps which led to this decision, however, in so far only as they are attributed to the Secretary-General.

24. In line with the aforesaid, the question boils down to whether the comparative review was carried out in accordance with the applicable law and in a rational and fair manner. In this regard, it is apparent that the review had been undertaken in anticipation of the General Assembly's endorsement of the CSR Report and its recommendations, which however does not render its results unlawful. Prima facie, the Tribunal finds no reason to question the composition of the panel, the criteria used and the points assigned, which appear to have properly favoured seniority and performance evaluation. In this regard, it is noteworthy that the Tribunal twice called upon the Applicant to provide his submissions regarding the matter of comparative review, however, to no avail. The Tribunal accepts thus that the Applicant had scored the lowest in his category and, accordingly, selecting him for reduction was meritorious.

25. The Tribunal further agrees with the argument presented by the Respondent that the Organization was not under the obligation to re-assign the Applicant through a lateral move. The Tribunal finds, moreover, that the notice of the final date of separation given to the Applicant was appropriate under the circumstances.

Conclusion

26. The application is dismissed.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 31st day of July 2019

Entered in the Register on this 31st day of July 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi