



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2018/055

Judgment No.: UNDT/2020/054

Date: 14 April 2020

Original: English

Before: Judge Francesco Buffa

Registry: Geneva

Registrar: René M. Vargas M.

WILLIAMS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Edward Patrick Flaherty

Counsel for Respondent:
Kong Leong Toh, UNOPS

Introduction

1. The Applicant, a former Executive Director of the Water Supply and Sanitation Collaborative Council (“WSSCC”) at the D-2 level with the United Nations Office for Project Services (“UNOPS”) in Geneva, contests the Administration’s decisions on 3 October 2017 to “abolish his post”, “issue a new post description”, and “force [him], the incumbent, to apply for his own post”, which resulted in the decision not to renew his fixed-term appointment beyond 31 December 2017 (“the contested decisions”).

Facts and procedural history

2. UNOPS is the hosting agency of WSSCC and provides administrative and operational support to WSSCC. According to the WSSCC Governance Document, the Executive Director of WSSCC is a staff member of UNOPS and is contractually obligated to work in accordance with the duties contained in the job description made by UNOPS. The Executive Director has a dual reporting line to the Steering Committee for programme matters and UNOPS management for administrative matters.

3. The Applicant, who was a Director at the D-1, step II level with the United Nations Human Settlements Programme (“UN-Habitat”), was seconded to UNOPS to assume the position of the Executive Director, WSSCC at the D-2, step I level for two years from 1 October 2012 to 1 October 2014. The secondment was subsequently extended twice, until 31 December 2015 and 31 December 2017, respectively. Under the secondment agreement, there is no maximum limit to the secondment period, which may be extended subject to the concurrence of all three parties concerned (i.e., UNOPS, UN-Habitat, and the Applicant).

4. In April 2017, the then Chair of the Steering Committee decided to resign, and two interim co-chairs were appointed.

5. On 7 September 2017, one of the co-chairs of the Steering Committee sent an email to the other Steering Committee members, as “a follow up to the change management process and the transition that was initiated by the recent [Steering Committee’s] decision to develop ‘significantly different’ [terms of reference] and job description for the position of Executive Director”. To this email, the new terms of reference for the Executive Director post were attached.

6. On 16 September 2017, the Steering Committee requested that UNOPS modify the job description of the Executive Director, stating that they decided to update the terms of reference for the Executive Director position “given the significant changes in WSSCC over the past five years”.

7. On 3 October 2017, UNOPS informed the Applicant in writing that a new job description for his position had been approved, which would come into effect on 1 January 2018. It was further stated that since the new job description was “the result of a deliberate managerial design decision, a new competitive process must (as per UNOPS policies) be held for the WSSCC Executive Director post”. Therefore, the Applicant was informed, his appointment would not be renewed, and he would be separated from UNOPS effective 31 December 2017 unless he applied and was selected for this modified post or another post with UNOPS.

8. On 5 November 2017, the Applicant applied for the modified post of the WSSCC Executive Director.

9. On 1 December 2017, the Applicant requested a management evaluation of the contested decisions.

10. On 31 December 2017, the Applicant was separated from UNOPS at the expiration of his fixed-term appointment.

11. On 26 February 2018, UNOPS responded to the Applicant's management evaluation request, upholding the contested decisions. UNOPS informed the Applicant that the new elements in the new job description fundamentally changed the work of the WSSCC Executive Director, and that the new job description intended to address serious financial problems that resulted from the old job description. UNOPS wrote that these changes were fundamental and thus the Applicant could not be directly appointed to the new post.

12. On 1 March 2018, the Applicant returned to UN-Habitat as a Director at the D-1 level.

13. On 26 May 2018, the application was filed with the Geneva Registry of the Dispute Tribunal, and the case was assigned to Judge Rowan Downing under Case No. UNDT/GVA/2018/055.

14. On 21 March 2019, by Order No. 17 (GVA/2019), the Tribunal granted the Applicant's motion concerning the recordings of the November 2017 Steering Committee accountability meeting and ordered the Respondent to preserve them.

15. On 20 December 2019, the case was reassigned to the undersigned Judge. On 24 March 2020, by Order No. 38 (GVA/2020), upon review of the case file, the Tribunal ordered the Respondent to produce a copy of the recordings of the November 2017 Steering Committee accountability meeting, and a copy of the entire record of the Reclassification Review Body's decision to modify the job description of the WSSCC Executive Director and to fill the resulting vacancy through a competitive process.

16. On 30 March 2020, the Respondent made a submission pursuant to Order No. 38 (GVA/2020).

17. On 6 and 8 April 2020, respectively, pursuant to Order No. 40 (GVA/2020), the Applicant and the Respondent submitted closing statements.

Consideration

Scope of review

18. It is trite law that the applicant must identify and define the administrative decision that the applicant wishes to contest (see, for instance, Planas 2010-UNAT-049 and Farzin 2019-UNAT-917). The Appeals Tribunal has, however, held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by an applicant and to identify the subject(s) of judicial review” and as such “may consider the application as a whole ... in determining the contested or impugned decisions to be reviewed” (Fasanella 2017-UNAT-765, para. 20).

19. In the application, the Applicant describes the contested decision as the Administration’s decisions on 3 October 2017 to “abolish his post”, “issue a new post description”, and “force [him], the incumbent, to apply for his own post”. As remedies, the Applicant requests that the decision to abolish his post be rescinded, that he be retroactively appointed to the “new” post of the Executive Director of WSSCC and granted a two-year fixed-term appointment, and to be awarded USD50,000 for moral damages and interest on damages.

20. The Tribunal notes that the Administration’s decision on 3 October 2017 informed the Applicant that his appointment would not be renewed as a result of the advertisement of the modified Executive Director post, and he would be separated from UNOPS effective 31 December 2017 unless he applied and was selected for this modified post or another post with UNOPS. The Applicant further requests that he be awarded a two-year fixed-term appointment as remedies although he did not identify explicitly the non-renewal decision as the contested decision.

21. Considering the application as a whole, including the requested remedies, the Tribunal defines the contested decision as the decision not to renew the Applicant’s fixed-term appointment beyond 31 December 2017 as a result of the alleged reclassification of the post. The issue is whether this decision was lawful.

Whether the non-renewal decision as a result of the alleged reclassification of post is lawful

22. A fixed-term appointment does not carry any expectancy of renewal and expires automatically without prior notice on the expiration date pursuant to staff regulation 4.5(c) and staff rules 4.13(c) and 9.4. The Administration is, nevertheless, required to provide a reason for such a non-renewal upon the affected staff member's request or the Tribunal's order, and, as the Appeals Tribunal held in Islam 2011-UNAT-115, "when a justification is given by the Administration for the exercise of its discretion it must be supported by the facts" (see Islam 2011-UNAT-115 (paras. 29-32), Obdeijn 2012-UNAT-201 (paras. 33-39), Pirnea 2013-UNAT-311 (paras. 33-34)).

23. It is also well settled jurisprudence that an international organization necessarily has power to restructure some or all of its departments or units, including by the abolition of posts. The Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with staff members and has the duty to follow its own regulations and rules (see Hersh 2014-UNAT-433, Bali 2014-UNAT-450, Matadi et al. 2015-UNAT-592). As the Appeals Tribunal stated in Sanwidi 2010-UNAT-084, at para. 40, when judging the validity of the exercise of discretionary authority,

the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

24. In this case, the reason proffered by UNOPS for not renewing the Applicant's appointment is that the new job description was approved "as a result of a deliberate managerial design decision" and therefore "a new competitive process must be held for the WSSCC Executive Director". Thus, UNOPS informed the Applicant that he would be separated effective 31 December 2017 at the expiration of his appointment and therefore it would not request UN-Habitat to extend the Applicant's secondment.

25. In the reply, the Respondent further elaborates that since WSSCC was facing serious financial difficulties, the new job description included the functional competency of "[b]usiness acumen ... including resource mobilization" and required the selected candidate to "[d]evelop strategy for urgent mobilization of additional resources and donor diversification, and implements strategy", which were fundamental changes to the job. Since the job description changes were a result of a deliberate managerial design decision, the post had to be filled by a competitive process in accordance with sec. 7.2.7 (Reclassify a Position) of the UNOPS Policy and Quality Management System.

26. Under sec. 7.2.7, the Reclassification Review Body is established to "make recommendations regarding the functions assigned to UNOPS positions and the classification of such positions according to the International Civil Service Commission (ICSC) Standards" (see subsec. 1.1). For a reclassification request to be considered, the change to the position must be "a significant change (i.e., more than 30%) in the duties/tasks of the position" (see subsec. 4.1). The review must consider "whether the changes in an existing position are the result of or are required by either a) a deliberate managerial design decision (such as a response to a change in business needs) or b) a gradual increase in responsibilities" (see subsec. 4.4), since this finding has a bearing on the consideration of the incumbent.

27. According to subsec. 6 (Considerations regarding the incumbent), when, on the one hand, the job description changes are “as a result of a deliberate managerial design decision as opposed to a gradual increase in responsibilities”, a competitive process must be used to fill the vacancy. On the other hand, if the new job description is a result of the addition of gradually accrued additional responsibilities to the existing job responsibilities and other conditions are met, the vacancy must be filled through the reassignment of the incumbent.

28. UNOPS informed the Applicant in the non-renewal notification that a competitive process had to be used to fill the modified Executive Director post because the job description changes were “a result of a deliberate managerial design decision”. The Respondent further states that the contested decision was made in compliance with sec. 7.2.7 of the UNOPS Policy and Quality Management System.

29. The Tribunal therefore directed the Respondent, by Order No. 38 (GVA/2020), to submit the entire record of the Reclassification Review Body’s decision relating to the modification of the Executive Director job description.

30. In response, the Respondent submitted that there was in fact no reclassification process and apologized for “this error”. According to some email exchanges in September 2017, the Respondent submitted, it appears that UNOPS decided not to go through the reclassification process since the post was “classified as D2 already”. The Respondent instead now argues that the post was advertised under para. 4.2 of the UNOPS operational Instruction, Personnel Management Framework, which states that “the preferred selection procedure would be a regular competitive selection process”.

31. As the Appeals Tribunal held in Islam, when the reason is given by the Administration for the contested decision, such reason must be supported by the facts. In addition, the Administration has the duty to follow its own Regulations and Rules when exercising its discretion.

32. In this case, the Administration submits that the non-renewal decision was due to the modification of the job description as a result of “a deliberate managerial design decision”, which mandated the opening of the modified position for a competitive process, instead of the reassignment of the incumbent to the modified post, in accordance with sec. 7.2.7 of the UNOPS Policy and Quality Management System.

33. The Tribunal notes that the said UNOPS Policy, at sec. 7.2.7, sets up the “mandatory procedures” to be followed for reclassifying a position, providing that the Reclassification Review Body is the body that is authorized to make such determination, and that this body has to perform a specific evaluation of the fact that the position is already encumbered.

34. In the case at hand, however, the evidence shows that UNOPS “approved” the reclassification of the job description and advertised the reclassified post in contravention of its own Regulations and Rules. While the Respondent submits to the Tribunal that significant changes were made to the job duties of the WSSCC Executive Director as a result of a deliberate managerial design decision and thus it was necessary to advertise the modified post, such submission should have been made to and approved by the Reclassification Review Body. It does not result that this was done in this case.

35. This was not a minor procedural mistake but a fundamental procedural irregularity since without the proper reclassification process, the Administration could not have taken the contested decision based on the proffered justification.

36. As the reclassification of the post encumbered by the Applicant did not follow UNOPS Regulations and Rules concerning reclassification, the Tribunal consequently finds that the decision not to renew the Applicant’s fixed-term appointment beyond 31 December 2017, taken only as a result of the said reclassification of the post, is unlawful.

37. The Applicant, presenting in support of his allegations only the recordings of a meeting of the Steering Committee held in November 2017, further submits that the contested decision was tainted by prejudice, bias, and malice of the interim co-chairs of the Steering Committee who “long sought to derail his career”. The Tribunal, considering that the said meeting was held after the contested decision had been taken and also notified to the Applicant, and that the lawfulness of the reclassification of the post encumbered by the Applicant has already been assessed, finds it is not necessary to further examine this claim.

Remedies

38. The remedies that the Dispute Tribunal may award are outlined in art. 10.5 of its Statute as follows:

As part of its judgement, the Dispute Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years’ net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

39. The Applicant seeks various remedies both under art. 10.5(a) and (b), which the Tribunal will review in turn.

Rescission of the contested decision and compensation in lieu

40. Having concluded that the contested decision is unlawful, it is appropriate to rescind the contested decision and order the reinstatement of the Applicant in the same position he encumbered.

41. Since the contested decision concerns an “appointment” pursuant to art. 10.5 of its Statute, the Tribunal must set an amount, which the Respondent can choose to pay as an alternative to the rescission of the contested administrative decision and the reinstatement of the Applicant.

42. It clearly results from art. 10.5(a) of the Dispute Tribunal’s Statute, as consistently interpreted by the Appeals Tribunal, that compensation in lieu is not compensatory damages based on economic loss, but only the amount the administration may decide to pay as alternative to rescission of the challenged decision or execution of the ordered performance (see, for instance, *Eissa* 2014-UNAT-469).

43. As to the amount of the compensation in lieu the Appeals Tribunal in *Ashour* 2019-UNAT-899, para. 21, found that “the amount of in-lieu compensation will essentially depend on the circumstances of the case” and that “due deference shall be given to the trial judge in exercising his or her discretion in a reasonable way following a principled approach”.

44. This Tribunal finds that the determination of the compensation in lieu between the minimum and the maximum provided by the Statute must take into account—so graduating the amount accordingly—the specific circumstances of the case, and in particular the type and duration of contract held by the staff member, the length of his/her service, the issues at the base of the dispute and the impact that the contested decision has on the work relationship; instead, the compensation in lieu is not related at all to the economic loss suffered and to the salary of the staff member, being the latter only the parameter of the outcome of the decision on compensation and not also the precondition of the compensation (so we can have compensation in lieu also in case

with no economic damage suffered). More specifically, it seems reasonable—for instance—to grant the largest compensation in cases of termination of permanent appointments of senior staff members, and to limit the compensation in cases of non-renewal of fixed-term appointments for recently appointed staff members (where there is not a security of tenure, but only a chance of renewal), or for staff who are only temporarily seconded to the Organization concerned (where the chance of non-renewal of the contract is in addition connected to that related to the secondment, so being the security of tenure relevantly reduced and consequently the impact of the decision lower).

45. In the present case, having in mind the above-mentioned criteria and applying them to the specific case at hand (and so having considered the seniority of the Applicant, the type of contract held, the fact he was seconded, and the chance of renewal of the contract in a position the Administration intended to change, and probably to cover in the future with its own staff), the Tribunal sets the amount of the compensation in lieu at three months' net-base salary at the D-2, step I level as per the salary scale in effect at the time of the Applicant's separation from UNOPS' service.

Compensation for harm

46. In addition to and irrespectively of the so-called compensation in lieu, compensation under art. 10.5(b) of the Dispute Tribunal's Statute may be awarded for a) pecuniary damages, such as income loss, and b) non-pecuniary damages, such as stress, anxiety, and reputational harm.

Pecuniary damages

47. The Tribunal notes that the Appeals Tribunal held that in a non-renewal case, the compensable period is typically the same as the last appointment (see, for instance, *Gakumba* 2013-UNAT-387, para. 16, *Kasmani* 2013-UNAT-305, para. 36, and *Belkhabbaz* 2018-UNAT-895, para. 38).

48. In this case, the record shows that the Applicant's last secondment with UNOPS was for two years. The Tribunal notes that the secondment agreement between UN-Habitat and UNOPS does not set the maximum duration of the secondment and thus it could have been further extended. Therefore, the Tribunal finds that had the illegality not occurred, the Applicant's secondment could have been extended for another two years.

49. The Applicant claims economic damages in the total amount of USD297,000:

- a. USD30,000 for two months' lost salary (January 2018 and February 2018), namely the period between the end of his employment with UNOPS and the beginning of his employment with UN-Habitat;
- b. USD48,000 for reduced salary from March 2018 to March 2020, which according to the Applicant represents the difference between the gross monthly take-home salary of a D-2 in Geneva (USD15,000) and that of a D-1 in New York (USD13,000). The Applicant calculates this amount as follows: USD2,000 per month x 24 months;
- c. USD150,000 for Education Grant;
- d. USD30,000 for Travel Grant entitlements for two years;
- e. USD35,000 for additional taxes (incurred as a citizen of the United States of America ("USA") working for the United Nations in the USA. The Applicant calculates this amount as follows: USD17,500 per year x two years); and
- f. USD4,000 for pension (for January 2018 and February 2018, period during which the Applicant was not employed by the United Nations). The Applicant calculates this amount as follows: USD2,000 per month x two months).

50. It results from the record that the Applicant was unemployed for two months from January to February 2018 and returned to UN-Habitat as a Director at the D-1 level as of 1 March 2018. Consequently, and recalling its conclusion in para. 48 above, the Tribunal sets the amount of the compensation for pecuniary damages at two months' net-base salary at the D-2, step I level plus 22 months' net-base salary difference between the D-2 step I level and the D-1 step II level as per the salary scale in effect at the time of the Applicant's separation from UNOPS' service.

51. With reference to the other economic damages claimed (the loss of education grant, the loss of travel grant, additional taxes incurred as an USA citizen working for the United Nations in the USA and "loss of pension"), the Applicant failed to present any supporting evidence, even though by Order No. 40 (GVA/2020) of 1 April 2020, the Tribunal ordered that the Applicant submit evidence in support of his request for remedies.

52. Considering that the claimant bears the burden of proof in this matter, the Applicant's claim for the above pecuniary damages is rejected.

Moral damages

53. As stated above, compensation for harm should be supported by evidence. The Appeals Tribunal held that it should be supported by three elements: the harm itself, an illegality, and a nexus between them. Moreover, the claimant bears the burden of proof to establish that the harm is directly caused by the Administration's illegal act (*Kebede* 2018-UNAT-874, paras. 20-21). The Appeals Tribunal further held that "the testimony of the complainant is not sufficient without corroboration by independent evidence (expert or otherwise)" (*Langue* 2018-UNAT-858, para. 18, citing *Kallon* 2017-UNAT-742).

54. In this case, the Applicant requests compensation for moral damages in the amount of USD50,000. To support his claim for moral damages, the Applicant submitted a compensation claims form under Appendix D to the Staff Rules signed on

22 December 2017. In the form, the Applicant wrote that the actions by the Steering Committee members, who orchestrated changes that led to the loss of his own and his staff's employment, caused him stress and his symptoms included insomnia, anxiety, deterioration of mental health, weight loss, reflux indigestion, etc. To this form, a signed medical statement by his physician was attached, in which the physician wrote that the Applicant suffered from post-traumatic stress disorder ("PTSD") and answered in the affirmative to the question of whether there was "any relationship (total or partial) between the medical remarks and the causes of the accident or of the illness".

55. In response, the Respondent submits that the Applicant's claim under Appendix D is still being reviewed by the Advisory Board on Compensation Claims ("ABCC"), which would award compensation if appropriate and, thus, the Tribunal should refrain from making a determination on this issue to avoid multiplicity of reviews.

56. The Tribunal notes that the Respondent does not explicitly challenge the veracity of the contents of the provided documentation and only objects to the presented evidence on the ground that the Tribunal should refrain from deciding the Applicant's claim under Appendix D to the Staff Rules. However, the Tribunal will only consider the contents of the signed statements by the Applicant and his physician as evidence, and such consideration will not interfere with the adjudication of the Applicant's claim by the ABCC who will review his claim under a different legal framework.

57. Based on the review of the evidence provided by the Applicant, the Tribunal finds that the Applicant established the nexus between harm and the illegality since the statements were made soon after the contested decision was notified to him and a few days before his separation, and the Applicant provided a detailed statement connecting the harm he suffered with the events that led to the reclassification of his post and his eventual loss of employment. This statement is further supported by the physician's signed statement.

58. As for the compensation amount, the Tribunal notes that while the physician noted that the Applicant was fully incapacitated for work for an indefinite period starting on 18 December 2017, he did not provide any other subsequent medical reports, and the record shows that the Applicant returned to UN-Habitat as of 1 March 2018. Therefore, his incapacity to work due to PTSD lasted for two to three months at the maximum. The Tribunal further notes that the physician's statement only provided that the Applicant suffered from PTSD and otherwise does not corroborate other mental and physical illness the Applicant supposedly suffered. Accordingly, the Tribunal awards the Applicant USD5,000 in compensation for moral damages.

Conclusion

59. In light of the foregoing, the Tribunal DECIDES:
- a. The decision not to renew the Applicant's fixed-term appointment beyond 31 December 2017 is rescinded and the reinstatement of the Applicant is ordered; should the Respondent elect to pay compensation in lieu, under art. 10.5(a) of the Dispute Tribunal's Statute, the Respondent is to pay the Applicant three months' net-base salary at the D-2, step I level as per the salary scale in effect at the time of the Applicant's separation from UNOPS' service;
 - b. As compensation for pecuniary damages under art. 10.5(b) of the Dispute Tribunal's Statute, the Applicant shall be paid a sum equivalent to two months' net-base salary at the D-2, step I level plus twenty two months' net-base salary difference between the D-2, step I level and the D-1, step II level as per the salary scale in effect at the time of the Applicant's separation from UNOPS' service;
 - c. As compensation for moral damages under art. 10.5(b) of the Dispute Tribunal's Statute, the Applicant is awarded USD5,000;
 - d. The Applicant's claim for other remedies is rejected; and

e. If payment of the above amount is not made within 60 days of the date at which this judgment becomes executable, five per cent shall be added to the United States Prime Rate from the date of expiry of the 60-day period to the date of payment. An additional five per cent shall be applied to the United States Prime Rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Francesco Buffa

Dated this 14th day of April 2020

Entered in the Register on this 14th day of April 2020

(Signed)

René M. Vargas M., Registrar, Geneva