



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

GEEGBAE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

George Irving

Counsel for Respondent:

Nicole Wynn, ALD/OHR, UN Secretariat

Nusrat Chagtai, ALD/OHR, UN Secretariat

Introduction

1. The Applicant, a former Administrative Assistant at the FS-4 level with the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (“MONUSCO”), contests the Administration’s decision to terminate his fixed-term appointment. The application was initially filed with the Nairobi Registry.

2. On 19 July 2019, the case was transferred to the New York Registry, and on 17 February 2020, it was assigned to the undersigned Judge.

3. For the reasons below, the application is granted in part.

Facts

4. The Applicant was initially appointed with MONUSCO on 6 May 2009 as a Logistics Assistant at the FS-4 level on a fixed-term appointment. In 2015, the Applicant was reassigned from the post of Logistics Assistant in Dungu to the post of Administrative Assistant in Kalemie.

5. On 29 June 2017, the General Assembly approved the reduced budget for MONUSCO for the period from 1 July 2017 to 30 June 2018.

6. On 4 August 2017, the Special Representative of the Secretary-General (“SRSG”) for MONUSCO sent a broadcast to all MONUSCO staff members informing them of the budget reduction amounting to USD92,755,100 and of the impending process for the reduction of posts in light of the budget reduction. On the same day, the Chief of Staff provided guidance to the mission leadership on achieving a higher staff vacancy rate to reduce the budget.

7. On 22 August 2017, the Chief of Staff of MONUSCO provided the mission leadership with a list of required staff reductions and priority recruitments. In the Field Administrative Offices, the Applicant’s office, administrative assistants were identified for a reduction proposal.

8. On the same day, MONUSCO informed the Applicant that, due to budget reduction, decisions were made to reduce civilian staff in the mission including his section. He was informed that since there were more staff members in his section with the same functional title at the same level than available posts, a comparative review process would be conducted. He was asked to send his updated personal history profile and the last two completed performance reports to the Human Resources section.

9. On 25 August 2017, the Applicant was informed that MONUSCO would seek the termination of his appointment effective 30 September 2017.

10. On 5 September 2017, the Comparative Review Panel, which conducted the comparative review process of 430 staff members covering 67 functions from 22 August to 5 September 2017, transmitted the report to the Compliance Review Committee.

11. On 14 September 2017, the Compliance Review Committee endorsed the Comparative Review Panel's report, concluding that the panel followed correct procedures.

12. On 25 September 2017, SRSG for MONUSCO informed staff members that the process required more time than anticipated and as a result the effective date of separation of affected staff members would be 31 October 2017.

13. On 2 October 2017, the Applicant received the memorandum titled "Advance notification of termination of appointment with MONUSCO". The Applicant was informed that he was among those identified for retrenchment in the comparative review process and his fixed-term appointment would be terminated subject to the approval for the termination by the Under-Secretary-General for Management.

14. On 20 October 2017, the Under-Secretary-General for Management approved the termination of 146 MONUSCO staff members.

15. On 26 October 2017, the Applicant was notified that his appointment would be terminated effective 31 October 2017.

16. On 27 October 2017, the Applicant requested a management evaluation of the decision to terminate his fixed-term appointment and the suspension of action of the contested decision.

17. On 8 November 2017, the Management Evaluation Unit (“MEU”) informed the Applicant that the Secretary-General granted suspension of the contested decision during pendency of the management evaluation.

18. On 18 December 2017, the Applicant filed the present application.

19. On 2 January 2018, in response to the Applicant’s management evaluation request, Chef de Cabinet upheld the contested decision. It was noted that there were four FS-4 incumbents within the Applicant’s section performing the same function, and out of four, two held continuing appointments. As per staff rule 9.6(e), the Organization is required to retain continuing appointees over fixed-term and temporary appointees during staff reduction exercises and thus decided to retain two continuing appointees. Therefore, the Organization, who was to reduce two FS-4 administrative assistants, decided to “dry-cut” two fixed-term appointees including the Applicant. “Dry-cut” describes a situation where a post proposed for reduction does not have a comparative post as a result of which the incumbent will not be subject to comparative review. In response to the issues the Applicant raised related to his placement on an Administrative Assistant post in 2015, he was advised that this aspect of his request is not receivable, as it is time-barred.

Consideration

Scope of review

20. The present case concerns a decision to terminate the Applicant’s fixed-term appointment following the retrenchment exercise conducted by MONUSCO.

21. Based on the Applicant's submissions, the Tribunal considers that the Applicant raises two issues regarding the contested decision.

22. First, the Applicant claims that the contested decision is tainted by improper motives. He argues that he was reassigned from the post of Logistics Assistant to the post of Administrative Assistant in 2015 under questionable circumstances and the Administration reassigned him to the post of Administrative Assistant knowing that this post would likely be abolished. In response to the Respondent's objection that the reassignment decision in 2015 is not receivable, the Applicant contends that he is not contesting the 2015 decision but provides relevant factual circumstances as evidence. The Applicant says that he "was placed in harm's way by the prejudicial actions of his managers, tainting the process leading to his notice of termination".

23. Second, the Applicant claims that the Organization did not fulfil its obligation to make a good faith effort to find him an alternative post under staff rule 9.6(e). The Applicant claims that he applied for posts in logistics group but was apparently not given any priority consideration.

24. The Tribunal will review each of the two issues raised by the Applicant.

Whether the decision to abolish the Applicant's post and to terminate his fixed-term appointment is tainted by improper motives

25. The Tribunal will first assess if the decision to abolish the Applicant's post and terminate his fixed-term appointment as a result of the retrenchment exercise is tainted by improper motives.

26. Staff regulation 9.3(a)(i) and staff rule 9.6(c)(i) provide that the Secretary-General may, giving the reasons therefor, terminate the appointment of a staff member for abolition of posts or reduction of staff.

27. It is also 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, and the Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff, but like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with staff members (see *Hersh* 2014-UNAT-433, *Bali* 2014-UNAT-450, *Matadi et al.* 2015-UNAT-592). If the applicant claims that the decision was ill-motivated, the burden of proving any such allegations rests with the applicant (see, for instance, *Azzouni* 2010-UNAT-081, para. 35; *Obdeijn* 2012-UNAT-201, para. 38).

28. The Applicant does not question the validity of the retrenchment exercise itself, and the Tribunal finds that the process is well documented. As described in detail above, the evidence shows that after the General Assembly approved the budget reduction, the Chief of Staff, in consultation with the mission leadership, identified posts proposed for reduction across different offices, including the Applicant's function. MONUSCO formed the panel which conducted the comparative review process, whose report was further endorsed by the compliance review committee. As the response to the Applicant's management evaluation request explains, among four FS-4 Administrative Assistant posts, two posts were to be reduced and MONUSCO decided to terminate appointments of two fixed-term appointees as the other two staff members held continuing appointments.

29. The Applicant's main argument is that the decision was based on improper motives since he "was placed in harm's way by the prejudicial actions of his managers". Specifically, he argues that he was reassigned to the Administrative Assistant post in 2015 on the ground that his old post was to be abolished and nationalized, and yet this plan was not carried out and his old post was filled through external recruitment. The Applicant further submits that the Administration reassigned him to the Administrative Assistant post knowing that the post would likely be abolished.

30. The Applicant essentially argues that the Administration orchestrated his reassignment to his post in 2015 knowing that this would result in his termination two

years later. This claim is not supported by evidence. The record shows that the budget was reduced by the General Assembly in 2017, which then prompted the reduction of staff. The Applicant's appointment was terminated because he and the other staff member both held fixed-term appointments, which carried lower priority for retention than staff members on continuing appointment in accordance with staff rule 9.6(e).

31. The burden of proving the allegation of improper motives rests with the applicant, and the Tribunal finds that the Applicant did not meet the burden of proof.

32. Therefore, the Tribunal finds that the decision to abolish the Applicant's post and to terminate his fixed-term appointment was not tainted by improper motives.

Did the Organization comply with its obligations to make all reasonable efforts to place the Applicant, whose post was abolished, on available suitable posts as required by staff rule 9.6(e)?

33. The Tribunal will now assess whether the Administration made all reasonable efforts to place the Applicant on available suitable posts as required by staff rule 9.6(e).

34. Under staff rule 9.6(e), subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, a staff member whose appointment is terminated as a result of the abolition of a post or the reduction of staff shall be retained in the following order of preference: (i) staff members holding continuing appointment; (ii) staff members recruited through competitive examinations for a career appointment; (iii) staff members holding fixed-term appointments.

35. In *Timothy* 2018-UNAT-847, the Appeals Tribunal held that staff rule 9.6(e) creates an obligation on the Administration to make reasonable and good faith efforts to find suitable placements for the redundant staff members whose posts have been abolished (para. 31).

36. As the Appeals Tribunal held, “the Administration is bound to demonstrate that all reasonable efforts have been made to consider the staff member concerned for available suitable posts. Where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given” (*Timothy*, para. 32).

37. Nevertheless, while efforts to find a suitable post for the displaced staff member rest with the Administration, it is lawful and reasonable to expect that the affected staff members cooperate fully in the process: the relevant staff member is required to cooperate fully in these efforts and must show an interest in a new position by timely and completely applying for the position. Once the application process is completed, however, the Administration is required by staff rule 9.6(e) to consider such staff members “on a preferred or non-competitive basis” for the position in an effort to retain him or her (*Timothy*, paras. 45-47).

38. In this case, since the Applicant was first notified of the Administration’s intent to seek his termination in August 2017, he applied for three Logistics Assistant posts at the FS-4 level. He also applied for posts at the FS-5 level. However, the Applicant is not entitled to priority consideration for a position at a higher grade than his grade level under staff rule 9.6(e) as the Appeals Tribunal held in *Timothy* that “suitable posts” include posts at the displaced staff member’s grade level or even at a lower grade, if, in the latter case, the staff member has expressed an interest by way of application thereto (*Timothy*, paras. 56-58).

39. Out of the three FS-4 posts the Applicant applied for, two Logistics Assistant posts at the FS-4 level were with the United Nations Mission for Justice Support in Haiti. The record shows that the selected candidates were staff members holding continuing appointments from the predecessor peacekeeping mission in Haiti, which had closed. Since staff members holding continuing appointment have priority over staff members holding fixed-term appointment under staff rule 9.6(e), the Tribunal finds that the Administration’s decision with regard to these two posts is lawful.

40. The other position the Applicant applied for was Job Opening 81519 advertising two Logistics Assistant positions with MONUSCO. The record shows that these two posts were reclassified upwards from the FS-3 to the FS-4 level and that after a competitive recruitment process, two incumbents were selected and promoted.

41. The Applicant applied for the post but did not respond to an invitation to a written assessment. The Applicant submits that he did not respond since he received an email from the Chief, Logistics Operations Unit in MONUSCO who informed him that “this is to get some one rostered for a position they are already occupying so they can select them after a reclassification ... you are rostered already so why waste your time”. The Applicant argues that he was entitled to be considered on a non-competitive basis under staff rule 9.6(e) and therefore opening up the position to competition was highly irregular and unlawful.

42. The Respondent responds that advertising the reclassified positions and allowing the incumbents to compete for a promotion is allowed under sec. 4.3 of ST/AI/1998/9 (System for the classification of posts), and the non-selection of the Applicant for this position was a result of the Applicant’s own actions in removing himself from consideration. The Respondent argues that the Applicant did not fulfil his obligation to “timely and completely” apply for positions and “to respect the formal requirements” under *Timothy*.

43. As stated above, the Appeals Tribunal held in *Timothy* that once a redundant staff member shows an interest in a new position by timely and completely applying for the position, the Administration is required by staff rule 9.6(e) to consider such staff members “on a preferred or non-competitive basis” for the position in an effort to retain him or her. The reason why the Appeals Tribunal requires that a redundant staff member must show an interest in a new position by timely and completely applying for the position is because “otherwise, the Administration would be engaged in a fruitless exercise, attempting to pair the staff member with a position that would not be accepted” (*Timothy*, para. 35).

44. When the Applicant applied for Job Opening 81519, he met his obligation by showing his interest in the position. However, MONUSCO failed to consider the Applicant on a preferred or non-competitive basis for this job opening. Instead, MONUSCO opened the positions to competition and conducted the written assessment and interview and selected the incumbents who were promoted to the reclassified posts. The incumbents of the FS-3 posts certainly did not have any right to priority consideration for these positions under staff rule 9.6(e) because the advertised position was of higher level. It is irrelevant that the Applicant did not respond to a written test invitation since administering a written test to job candidates who were not entitled to priority consideration was already in violation of staff rule 9.6(e).

45. The Tribunal also notes that the Applicant decided not to take a written test based on written information he received from the Chief, Logistics Operations Unit in MONUSCO that these posts would be awarded to the incumbents. The Tribunal is perplexed by this email from a manager in the mission. In a blatant violation of the rules not only does this message suggest that the Applicant would be deprived of his entitlement to priority consideration, it also clearly implies that no other staff member would be afforded their rightful full and fair consideration in this recruitment process.

46. The Appeals Tribunal held that if it is found that the Administration did not fully comply with its obligations under staff rule 9.6(e) to make all reasonable and good faith efforts to consider a redundant staff member for available suitable posts, the Administration's decision to terminate the said staff member will be found unlawful (*Timothy*, para. 63).

47. Accordingly, the Tribunal finds that the contested decision is unlawful.

Remedies

48. The remedies that the Dispute Tribunal may award are outlined in art. 10.5 of the Dispute Tribunal's 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.

49. Having concluded that the contested decision is unlawful, it is appropriate to rescind the contested decision and order the reinstatement. Since the contested decision concerns the "termination", the Tribunal is obligated, pursuant to art. 10.5(a) of its Statute, to set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested decision.

50. As the Appeals Tribunal stated, in-lieu compensation, an alternative to rescission, "should be as equivalent as possible to what the person concerned would have received, had the illegality not occurred" (*Ashour* 2019-UNAT-899, para. 20).

51. In this case, the Applicant's fixed-term appointment was set to expire on 30 June 2018, and he was separated from the Organization on 16 January 2018. Since a fixed-term appointment does not carry any expectancy of renewal under staff regulation 4.5(c) and staff rules 4.13(c) and 9.4, the Tribunal considers that the Applicant's fixed-term appointment would have expired on 30 June 2018 had the

illegality not occurred. As such, the Tribunal sets the in-lieu compensation at five months and 15 days' net-base salary at the time of his separation. The Applicant's employment status after his fixed-term appointment's expiration date on 30 June 2018 is irrelevant in calculating the in-lieu compensation.

52. The Applicant also requests compensation for harm to his "*dignitas*" and for loss of opportunity caused by his professional dislocation.

53. Under art. 10.5(b) of the Dispute Tribunal's Statute, compensation for harm should be supported by evidence, and the Appeals Tribunal held that it should be supported by three elements: the harm itself, an illegality, and a nexus between them, and 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, "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 did not submit any evidence to support his claim for moral damages. Therefore, the Tribunal rejects his claim for moral damages.

Conclusion

55. In light of the foregoing, the Tribunal DECIDES:

- a. The application is granted in part;
- b. The decision to terminate the Applicant's fixed-term appointment is rescinded and the reinstatement is ordered;
- c. Should the Respondent elect to pay in-lieu compensation, the Applicant shall be paid, as an alternative, a sum equivalent to five months and 15 days' net-base salary at the time of his separation;
- d. The Applicant's claim for moral damages is rejected;

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 Joelle Adda

Dated this 30th day of April 2020

Entered in the Register on this 30th day of April 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York