



Before: Judge Francis Belle
Registry: Nairobi
Registrar: René M. Vargas M., Officer-in-Charge

MACKIE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Shubha Suresh Naik, OSLA

Counsel for Respondent:
Lucienne Pierre, AS/ALD/OHR, UN Secretariat

Introduction and Procedural history

1. The Applicant filed an application on 27 December 2022 challenging the decision to not extend his fixed-term appointment (“FTA”) beyond 30 November 2022 due to redundancy of his post after a staffing review. At the time the application was filed, the Applicant’s FTA had been temporarily extended for one month until 31 January 2023.
2. The Respondent filed a motion on 23 January 2023 seeking:
 - a. Determination of the receivability of the application as a preliminary matter because the Applicant’s FTA had been extended to 28 February 2023; and
 - b. Suspension of the 27 January 2023 deadline for the filing of his reply pending determination of the motion.
3. On 24 January 2023, the Tribunal issued Order No. 18 (NBI/2023) granting the Respondent’s request for suspension of the 27 January 2023 reply deadline pending determination of the motion.
4. The Applicant filed a rejoinder to the Respondent’s motion on receivability on 31 January 2023.
5. The case was assigned to the undersigned Judge on 5 May 2023.
6. On 13 June 2023, the Tribunal held a case management discussion (“CMD”).
7. On 14 July 2023, the Tribunal issued Order No. 118 (NBI/2023) in which it determined that the application is not moot and dismissed the Respondent’s motion on receivability. The Respondent was directed to file his reply to the application by close of business on 27 July 2023. The Respondent complied with the directions.
8. On 8 August 2023, the Tribunal held another CMD. At the CMD, the Applicant, through an oral motion, requested leave to file a rejoinder to the reply. The motion was granted and said rejoinder was filed on 16 August 2023.

9. The Respondent filed a response to the rejoinder on 25 August 2023.
10. A CMD was held on 3 January 2024 during which the parties agreed that an oral hearing was not required and that the Tribunal should determine the case on the basis of the parties' written submissions.

Facts

11. At the times material to this application, the Applicant served as a Senior Peacebuilding Officer ("SPBO"), P-5, in the Office of the Special Envoy of the Secretary-General for Yemen ("OESGY"), Political Affairs Section, on an FTA.
12. On 6 August 2021, a Special Envoy ("SE") to OESGY was appointed by the Secretary-General.
13. From 25 to 26 October 2021, the SE organized a retreat with senior staff, including the Applicant, to outline his strategic vision.
14. In February 2022, the SE appointed an Organizational Design Consultant to undertake a Mission-wide Staffing Review. The Consultant interviewed the Applicant on 17 February 2022.
15. On 3 March 2022, the Consultant presented his thematic observations from the Staffing Review to the Senior Management Team.
16. On 6 March 2022, the Applicant was informed in a meeting with the SE, the Chief of Staff ("COS"), and his supervisor that his post would be abolished. He was further informed that he should hand the "economy file" over to a consultant and that his position would be moved from the Front Office to the Political Affairs Section.
17. On 28 March 2022, the Applicant received a memorandum informing him that the Staffing Review had determined the redundancy of his position and that his FTA, expiring on 30 November 2022, would not be renewed.

18. On 3 April 2022, the Applicant sent an email to the SE, copying his supervisor, the COS and the Chief of Mission Support (“CMS”) expressing interest in being reassigned internally but received no response.

19. The Applicant filed a management evaluation request against the decision not to renew his contract on 21 May 2022.

20. On 29 September 2022, the Management Evaluation Unit (“MEU”) recommended that the contested decision to not renew the Applicant’s FTA beyond 30 November 2022 be upheld.

Parties’ submissions

21. The Applicant’s principal contentions are:

a. The budget reports, as he was informed in a meeting on 27 March 2022 by the CMS and the Chief Human Resources Officer (“CHRO”), indicated that the post he encumbered was not being abolished but was essentially subject to a change of functional title from SPBO to Senior Gender Advisor as had been requested in the budget approval;

b. The Administration, after initially deciding to abolish the post, resorted to change its functional title to avoid seeking approval of the Advisory Committee on Administrative and Budgetary Questions (“ACABQ”)/General Assembly for abolishment. Since the post he encumbered was on the regular budget, it could not be abolished by OSESGY and required approval of the General Assembly. To circumvent this, OSESGY resorted to change the functional title of the post from SPBO to Senior Gender Advisor;

c. In response to the management evaluation request, the Administration admitted that, initially, it had decided to abolish his post but later decided to merely change the functional title. MEU in its response stated that it was justified, that the Office of Programme Planning, Finance and Budget confirmed that this was the appropriate procedure, and that the change was

approved by the Office of Human Resources at the Department of Management Strategy, Policy and Compliance (“DMSPC”) on 26 September 2022;

d. This was a surreptitious method employed to avoid reclassification of the post. DMSPC and MEU failed to see that this was not merely a change in functional title/nomenclature, and although both posts belong to the same job family their functions are entirely different. Effectively, the Terms of Reference (“TORs”) of the post will undergo significant changes and, therefore, in usual course, OSESGY should have sought for reclassification of the post;

e. Even before the budget was approved, OSESGY issued a notice of non-renewal of contract virtually pushing him out of the office. Moreover, the rationale that the SE offered was that the abolishment of the post/change of functional title was due to peacebuilding not being part of the programmatic priorities of OSESGY in 2022 and 2023 in addition to the need for the Senior Gender Advisor position to be created in the regular budget. However, key components of the Applicant’s TORs, such as those related to serving as a donor focal point as well as on the economic file, shifted to other staff and consultants, reflecting the ongoing priority of these files;

f. Other elements of his portfolio such as strengthening collaboration with Track-II partners and serving as focal point for the Peace Support Facility all remain key areas of focus for the Office. The redundancy of his position was therefore arbitrary and a targeted means to push him out of the office, whereas his performance review process had not raised any concerns on his performance in any of these substantive areas. His 2021-2022 performance review was rated as exceeding expectations, which the SE endorsed;

g. The arbitrariness of the decision was also evident from the fact that even before the post underwent a change, he was moved from the front office to the Political Affairs Section to pave way for change of the functional title and TORs of the position he encumbered so that he could not have a claim for the said post by way of reclassification or otherwise. Whilst he was reassigned

from his position, there was no clarity given whether he moved along with the encumbered post or whether he was assigned to a different post altogether;

h. The process of abolishment was not fair and was not conducted as per standard procedure by way of consultative process as required under staff regulation 8.1(a). During the Staffing Review there was no effective staff consultation. The one and only interaction the Consultant held with the Applicant was only to understand the functions of the post, with whom he collaborates internally and externally, information sharing and overall challenges encountered. Thereafter, neither the Consultant nor anybody in OSESGY revealed the rationale and conclusions of the Staffing Review exercise that would amount to determining that peacebuilding was not a priority;

i. The Consultant only briefed the senior management, which cannot be considered “staff consultation”. There was no involvement of the staff or the staff representatives, nor consultation with them during the staffing review exercise before and after abolition of the post. After the decision to abolish the post was taken, the Applicant was merely informed of the decision. He was not provided any opportunity to question the process;

j. A staff retreat was held from 25 to 26 October 2021 in which the view, strategy vision and the Staffing Review was discussed by the SE including having individual meetings. The Applicant’s name was not in the original list of invitees for the retreat. He was invited to attend this retreat as an after-thought only because the then Principal Military Advisor dropped out as he was in the process of leaving the office. While a discussion on Gender was held, it was not presented in a manner that it would be mutually exclusive with peacebuilding. The retreat was held even before the Consultant was appointed for the restructuring and, therefore, there was no indication that the Applicant’s post would be abolished and that his contract would not be renewed;

k. In 2020, OSESGY had written to the United Nations Headquarters asking for a hiring freeze in place at the time to be removed since it was justified that the SPBO post was a critical post that needed to be filled. The reasons provided by OSESGY for the redundancy were the very reasons used to justify the criticality of the post in 2020;

l. The SE and COS responsibilities to meet with United Nations and external stakeholders differ from the focus of SPBO. The focus of SPBO on economy and Track-II as well as peacebuilding would allow the Mission to increase contact with Yemenis and with those that the Mission does not normally meet. All the main elements of the original TORs of SPBO continue to be priorities for OSESGY;

m. At different points the Administration provided different reasons for the non-renewal of the Applicant's contract as well as different processes by which it was done;

n. The Respondent admits that there was a reclassification done that has procedural requirements under ST/AI/1998/9 (System for the classification of posts), which should have been followed. Sec. 1.1 (a)-(d) of ST/AI/1998/9 lays down the condition under which reclassification can be sought. None of which include the reasoning for which the Respondent did the reclassification. At the level of DMSPC there was a lack of "proper application of mind". The purported request for reclassification was sent on 26 September 2022, five months after the Applicant was given notice of non-renewal and whilst the MEU review decision was due. On the same day, within a few hours, it was approved; and

o. The Organization did not comply with its obligations to make all reasonable efforts to place the Applicant in available suitable posts as required under staff rule 9.6(e). Upon receipt of the non-renewal notice on 28 March 2022, he has applied for multiple posts. However, he has not yet received any assurance of priority consideration. The OSESGY Administration had opportunities internally to keep the Applicant but did not do so.

22. For the above reasons, the Applicant requests the following reliefs:
- a. That the decision to identify his post for abolishment be rescinded; or
 - b. In the alternative, to find him a suitable post in the new structure or elsewhere and that, consequently, his contract be extended; and that he be compensated.
23. In support of his claim for compensation, the Applicant submits that:
- a. There is a serious concern on the renewal of his residency due to the short nature of his contract. The host country (Jordan) has expressed reservations to grant residency to staff with short contracts and there is no clarity on whether he would receive a residency permit. A possible consequence is that his son's daycare requires residency, which is not possible at this time and may impact the confirmation of his registration;
 - b. Both his spouse and son carry regular passports, which means that they cannot stay for extended periods of time in Jordan and need to enter as tourists;
 - c. The Applicant cannot obtain domestic help services, which require residency for the sponsor;
 - d. His vehicle's registration has expired and cannot be renewed until he has residency. This has forced him to take taxi service when he otherwise has access to a vehicle;
 - e. For the second year in a row, he is unable to avail of home leave despite having the necessary number of points. His need to reunite with his family is, therefore, coming at a great personal cost as this entails travel between Jordan and the United States;
 - f. Similarly, his landlord has sought to increase rent cost given that the Applicant is unable to commit to a long-term lease that is typical in the local housing market. This increases the risk that the landlord might look for more

“permanent” lessors, which would severely impact the Applicant and his family’s housing choices;

g. The impact on his professional career and advancement is also undoubtedly felt as this ongoing instability has made prioritizing “survival” more than anything else at this point; and

h. His mistreatment indicates discrimination/arbitrariness by the Administration and the facts by themselves indicate discriminatory and arbitrary behaviour.

24. The Respondent’s principal contentions are:

a. The contested decision was lawful, rational and procedurally correct. The expiration date specified in the Applicant’s letter of appointment was 30 November 2022. The Applicant had no legitimate expectation of renewal, and there were no countervailing circumstances. OSESGY had not made any express promise to the Applicant in writing that gave the Applicant an expectancy that his appointment would be extended;

b. The SE’s delegation of authority as Head of Entity includes the authority to restructure OSESGY as necessary to fulfil its operational mandate. The process by which OSESGY restructured was rational and procedurally correct. Consistent with 2023 operational objectives of OSESGY, which include ensuring “the meaningful participation of women in all aspects of OSESGY’s engagement and integrating gender perspectives across all issues”. OSESGY conducted a comprehensive analysis of how to best utilize available resources to allow for a stronger, gender-focused approach to the conflict in Yemen;

c. The comprehensive analysis included the two-day staff retreat wherein the SE set out his strategic vision for OSESGY, the Staffing Review, and individual meetings the SE had with OSESGY staff, including the Applicant, and Yemeni stakeholders. After that comprehensive analysis, it was determined that that the SPBO position did not suit the strategic direction of

OESGY and that this senior role would be better utilized as a Senior Gender Officer position;

d. OESGY was concerned that continuing the position of SPBO would limit the Mission's engagement with Yemenis and other stakeholders as the position's focus is working with other United Nations and external stakeholders, responsibilities that are already carried out by the SE and COS;

e. Regarding fulfilment of its mandate, OESGY determined that it needed a Senior Gender Officer position to pursue necessary channels of engagement with Yemeni actors, particularly women, and to reflect, as part of its staffing, that gender is a core function of the office, not one that is project-based and temporary in nature. OESGY determined that, in order to reflect the current reality of the situation on the ground, it was critical that the Mission had appropriate staffing to allow the Mission to take a stronger, gender-focused approach to the conflict and assist with the development of a gender-sensitive political process;

f. The Applicant has not met his burden of proof regarding his allegations of bias or improper motivation. Without evidence, the Applicant states that the contested decision was a targeted means to push him out of the office. Similarly, without evidence, the Applicant alleges that OESGY failed to comply with sec. 1.1(a)-(b) of ST/AI/1998/9, in that OESGY did not, as required, seek reclassification of the post he encumbered;

g. In the 2023 budget submission, OESGY initially sought to abolish the SPBO position and create a P-5 Senior Gender Officer position. The aim of OESGY was for this change to be made in the 2023 staffing table. On 13 March 2022, the COS submitted to the Chief Budget and Finance Officer ("CBFO") the required staffing justifications forms for the abolishment of the P-5 SPBO position and creation of a P-5 Senior Gender Officer position. The CBFO subsequently discussed with OESGY and advised that the abolish/create action was not required, and it was not necessary to include these staffing justifications with the budget submission.

The CBFO explained that because the SPBO position and the P-5 Senior Gender Officer were in the same job family, OSESGY had the authority to reclassify the position and change the functional title in consultation with, and final approval provided by, the DMSPC Office of Human Resources Compensation and Classification Section;

h. The Applicant's arguments that OSESGY sought to "avoid reclassification of the post" and that "in the usual course ... OSESGY should have sought for reclassification of the post" contradict the evidence. On 26 September 2022, OSESGY requested reclassification/change of functional title of Post 31014178 from Senior Peacebuilding Officer (P-5) to Senior Gender Affairs Officer (P-5). The request specified that this was proposed for 2023, the post would remain within the same job family, and the grade level would remain at the P-5 level. That same day, the reclassification request was approved. The decision to reclassify post 31014178 was a reasonable exercise of managerial discretion based on operational needs;

i. The Applicant's arguments that the contested decision was subject to the consultative process set forth in staff regulation 8.1(a) is meritless. Staff regulation 8.1(a) is inapplicable to staff members on an individual basis. There was no requirement for staff representatives to be consulted about the contested decision or for the Applicant to be given "any opportunity to question the process". Regardless, OSESGY acted fairly, justly and transparently in its dealings with the Applicant in the restructuring exercise. The Applicant was interviewed as part of the Staffing Review and had several consultations with senior management. OSESGY was not required to obtain the Applicant's consent, or the consent of staff representatives, before taking the contested decision;

j. Staff rule 9.6 is not applicable to the Applicant's case. Staff rule 9.6(e) is only applicable where the abolition of posts or reduction of staff leads to the need to terminate the appointment of a staff member. The contested decision is a separation decision based on expiration of appointment, and not a termination decision. As such, the Applicant did not fall within the category

of staff with the right to be considered on a preferential basis for retention under staff rule 9.6(e). Notwithstanding, OSESGY made good faith efforts to support the Applicant in his search for a new post, which the Applicant acknowledged, expressing his “strong appreciation” and “gratitude”;

k. The 26 September 2022 classification is not relevant with respect to determining the lawfulness of the 28 March 2022 decision to not renew the Applicant’s appointment beyond its expiration date of 30 November 2022. The 26 September 2022 classification took place over five months after the contested decision, and thus cannot reasonably be part of the Dispute Tribunal’s consideration. Since the Applicant did not seek management evaluation of the 26 September 2022 classification and did not identify that decision as one that he sought to contest in the application, the 26 September 2022 classification is beyond the scope of this matter;

l. The Applicant’s contentions regarding ST/AI/1998/9 lack merit. Whether OSESGY executed the change in the functional title of post 31014178 by way of abolishment or reclassification did not make a difference regarding the legal effect on the Applicant—he was ineligible for the P-5 Senior Gender Advisor position due to the difference in TORs and experience criteria;

m. The Applicant does not establish the applicability of ST/AI/1998/9 to him such that he had standing or legal interest in the 26 September 2022 classification; and

n. The Applicant is not entitled to any remedy. The contested decision was lawful and comported with the Organization’s applicable legal framework. Therefore, the Applicant is not entitled to rescission. The Applicant has not produced evidence to support his claim for compensation for harm as required under art. 10.5(b) of the Dispute Tribunal’s Statute.

25. In view of the foregoing, the Respondent requests that the Dispute Tribunal dismiss the application.

Consideration

26. The first issue that arises for consideration is one of fact and law. The Applicant's post, SPBO (P-5) was made redundant. However, The Applicant's FTA came to an end due to the effluxion of time. It is well known that there can be no expectation of renewal of a fixed term contract.

27. The second issue that arises is the effect of consultation on the position of the Applicant. The Applicant would have been consulted as part of the planning process, which required data to be collected on the functioning of the position that he held. This consultation would prove important in the decision to make the Applicant's position redundant and replace it with one of Senior Gender Affairs Officer. But as long as the decision was made to make the position redundant and the Applicant's contract expired, the consultation made no difference to the Applicant's circumstances.

28. As far as the Applicant's position as an officer whose post was made redundant was concerned, the Applicant's situation was not one of a person who would have been affected because of the redundancy of the position he held. His FTA would come to an end whether the position was or was not made redundant. He was not entitled to review because the post was made redundant.

29. The reclassification exercise is outside of the scope of the application. Firstly, the Applicant did not seek management evaluation. Secondly, the review of the reclassification exercise would be done at the departmental level where it was relevant and appropriate. In this case this was not required.

30. There is no doubt that there were several steps taken that would have made it appear that the Applicant was being meted out special treatment, which reduced his right to recourse. However, these steps were taken to accomplish the transition from Senior Peacebuilding Officer to Senior Gender Affairs Officer within the least required time and with the least amount of complex consideration of steps such as a vote of the General Assembly.

31. Despite the above conclusions, the question of whether the process was fair just and transparent remains. When it is considered that there was a basis for changing the focus of the position in OSESGY, the exercise that was pursued proceeded with consultation and collection of data before implementation. But in that process, no promises were made to the Applicant in relation to his continued employment. Indeed, he was informed that his post would be made redundant and his contract would come to an end on expiry. There is nothing inherently unfair about this.

32. The decision to proceed with the decision to change the functional title of the Applicant's position would be implemented only after the Applicant's contract terminated. It is true that he continued to be employed but none of these positions appeared to be equivalent to the Applicant's previous position. The Applicant was in continued employment with the Administration but it clearly was not the equivalent of his previous position.

33. The decisions made to fast track the transition from SPBO to Senior Gender Officer were accounted for with decisions being made by the appropriate and relevant authorities. None of the criticism of the steps taken shows any merit as being contrary to law or improper. The Tribunal therefore concludes that the relevant decisions were fair, just and transparent.

34. It did not help that the Applicant never succeeded in procuring a position that would maintain his status in his duty station and avoid hardship resulting from his FTA coming to an end.

35. The Applicant argued that he was never really given a chance as a former staff member affected by redundancy to be placed on the downsizing list. Firstly, he was not actually affected by redundancy. What happened was that the redundancy of the post he held made it impossible for his FTA to be renewed.

36. It does appear that the Applicant was never offered a comparable position. This is unfortunate. But there is no evidence that this occurred due to arbitrariness or discrimination.

37. Consequently, the foundation of the Applicant's pursuit of compensation is severely weakened and there is no basis for rescission of the Respondent's decision to terminate his contract and change the name and function of his former post to Senior Gender Affairs Officer.

Conclusion

38. In view of the foregoing, the Tribunal DECIDES to dismiss the application in its entirety.

(Signed)

Judge Francis Belle

Dated this 8th day of February 2024

Entered in the Register on this 8th day of February 2024

(Signed)

René M. Vargas M., Officer-in-Charge, Nairobi