

UNDT/2020/219, Mboob

UNAT Held or UNDT Pronouncements

Receivability The Tribunal considered that the Applicant was not challenging individual non-selection decisions directly but rather challenged the Administration's alleged failure to give her priority consideration for vacant posts before terminating her fixed-term appointment, which is required under staff rule 9.6(e) (see Timothy). Therefore, the Tribunal found the application receivable and examined the merits of the case.

Restructuring process At the time of the contested decision, the Applicant worked as Humanitarian Affairs Officer (HAO) at the P-4 level. The Tribunal noted that, in OCHA's new structure, there were more P-4 HAO posts than staff members who were supposedly affected by the restructuring (i.e., nine available P-4 posts as opposed to seven P-4 staff members who needed placement). The Tribunal found that the retention criteria and the subsequent comparative review (which includes the scoring system) only apply when the number of affected staff members exceeds the number of available posts. Therefore, the Tribunal concurred with the Applicant who argued that since there were more posts than staff within the relevant functional group, there should have been no risk that appointments of such staff would be terminated and that OCHA would not have had the need to apply the retention criteria in accordance with staff rule 9.6(e). Furthermore, even if there had been a need for a retention exercise (which is not the case), the evidence showed that it was not conducted properly. The Tribunal found that the facts of the case clearly showed that OCHA did not follow the proper procedures and, as a consequence, the agreed process was not adhered to and was ab initio flawed in the Applicant's case. The Tribunal considered that the Applicant should have been retained against one of the available P-4 posts according to the comparative review outcome. The Tribunal also found that moving her to Phase 4 (Placement Phase) of the downsizing exercise was illegal and no suitability review was applicable to her. The Tribunal nevertheless assessed whether the Applicant's profile was reviewed properly against nine P-4 posts with OCHA in Geneva during Phase 4, and if OCHA's decision to place another staff member with a fixed-term appointment against Post Number 30517464 (P-4 level), for which the Applicant was recommended with

reservation, was lawful. The Tribunal noted with concern that the distinction between “recommended with reservation” and “recommended without reservation” was not included in the agreed methodology and, therefore, it should not have been taken into consideration. Yet, this distinction was used to the Applicant’s detriment and led to her non-placement against the (only) post for which she was found suitable. In light of the above, the Tribunal found additional support for its conclusion that in the Applicant’s case the restructuring exercise was not conducted lawfully and in accordance with the agreed restructuring methodology. Efforts to find a suitable post under staff rule 9.6(e) following the restructuring process The Tribunal found that the Administration exercised its discretion appropriately in finding that the Applicant was not suitable for various posts with OCHA. However, in relation to two posts outside OCHA for which the Applicant was considered, the Tribunal noted that the fact that she came from a downsizing entity and was therefore entitled to “priority consideration” was totally ignored by the Organization. There was no evidence demonstrating that the Organization made all reasonable and good faith efforts to afford priority consideration to the Applicant with respect to these posts. Consequently, the Tribunal found that the failure of the Administration in this regard is also a severe irregularity that taints the recruitment process for these two positions outside OCHA and, therefore, renders the decision to terminate the Applicant’s fixed-term appointment unlawful. Remedies The Tribunal decided to rescind the contested decision. It also found adequate to set the amount of compensation in lieu at two years’ net base salary at the P-4 level as per the salary scale in effect at the time the Applicant was separated. The Tribunal further determined that the Applicant was entitled to USD5,000 for moral damages.

Decision Contested or Judgment/Order Appealed

The Applicant contests the decision to terminate her fixed-term appointment following the abolition of her post as part of the 2018 OCHA restructuring exercise.

Legal Principle(s)

An international Organization necessarily has power to restructure some or all of its departments or units, including through 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. Nevertheless, like any other

administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with staff members (Hersh 2014-UNAT-433, Bali 2014-UNAT-450, Matadi et al. 2015-UNAT592) When a justification is given by the Administration for the exercise of its discretion, it must be supported by the facts (Islam 2011-UNAT-115). If an applicant claims that the decision was ill-motivated or based on improper motives, the burden of proving any such allegations rests with him/her (Azzouni 2010-UNAT-081, Obdeijn 2012-UNAT201). 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 2018UNAT-847). While the Administration is required to consider the relevant staff members on a preferred basis for the available suitable posts, “this requires, as per the clear language of [the applicable] provision, determining the suitability of the staff member for the post, considering the staff member’s competence, integrity and length of service, as well as other factors such as nationality and gender. If the redundant staff member is not fully competent to perform the core functions and responsibilities of a position, the Administration has no duty to consider him or her for this position” (Timothy, para.38). Regarding the definition of “suitable posts” this 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, pars. 56-58). 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 to consider such staff members “on a preferred or noncompetitive basis” for the position in an effort to retain him or her (Timothy, paras. 4547).

Outcome

Judgment entered for Applicant in full or in part

Full judgment

[Full judgment](#)

Applicants/Appellants

Mboob

Entity

OCHA

Case Number(s)

UNDT/GVA/2018/106

Tribunal

UNDT

Registry

Geneva

Date of Judgement

30 Dec 2020

Duty Judge

Judge Bravo

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

Separation from service

Applicable Law

Staff Regulations

- Regulation 9.3(a)(i)

Staff Rules

- Rule 13.1(d)
- Rule 9.6(c)(i)
- Rule 9.6(e)

UNDT Statute

- Article 10.5

Related Judgments and Orders

2018-UNAT-847

2014-UNAT-433

2014-UNAT-450

2015-UNAT-592

2010-UNAT-084

2011-UNAT-115

2010-UNAT-081

2012-UNAT-201

2019-UNAT-899

2018-UNAT-874

2018-UNAT-858