2022-UNAT-1204, null Secretary-General

UNAT Held or UNDT Pronouncements

The Secretary-General filed an appeal. UNAT granted the appeal and vacated the UNDT Judgment. UNAT held that while the determination of which staff members should be compared is “primarily guided by the functional title as per the staff member’s letter of appointment”, there can be cases where the functional title does not reflect the actual functions performed as in the present case. In these circumstances, the CHRO must determine which individual falls into which occupational group. Ms. Barud’s role and functions changed in May 2018 to a Facilities Management Assistant. Therefore, at the time of the CRP, her job functions and duties were as an FMA and not as an Administrative Assistant. The Dispute Tribunal failed to consider the entirety of the Comparative Review Process terms of reference and Ms. Barud’s PHP when it held that it was immaterial that at the time of the CRP Ms. Barud performed FMA functions not reflected in her LoAs, PHP, or e-PASes. The Dispute Tribunal misinterpreted the terms of the reference of the CRP. The Dispute Tribunal erred in finding the Administration ignored relevant and clear guidelines and considered irrelevant matters resulting in an illegal decision. The Administration followed the CPR TOR and guidelines. There was no basis for the Dispute Tribunal to find that the Administration ignored relevant guidelines or considered irrelevant matters rendering the contested decision unlawful. Further, the Dispute Tribunal erred in finding there was no legal justification for conducting the CRP for Ms. Barud on the basis that she should not have been subjected to the CRP and that she was unlawfully treated as a Facilities Management Assistant. Ms. Barud was lawfully treated as a Facilities Management Assistant pursuant to the Comparative Review Process terms and to her actual functions at the time and therefore was properly subjected to the Comparative Review Process. UNAMID conducted the Comparative Review Process pursuant to the terms and guidelines of its TOR, and the relevant rules and regulations. If so, the Administration acted fairly, justly, and transparently in dealin FInally, the UNDT erred in finding that the

contested decision unfairly breached the Secretary-General's Gender Parity Initiative and that it was "unfair" for Ms. Barud to be separated in favour of a male colleague due to Ms. Barud's long service and dedication to the system. The legal framework that governed the downsizing and Comparative Review Process did not permit the Administration to consider gender parity in the downsizing process or the non-renewal decision except as an additional tie breaker criterion which was not the case here. Staff Rule 9.6(e) provides that when downsizing "due regard shall be given in all cases to relative competence, integrity and length of service" and which provides an order of preference in which staff members will be retained. It does not include any reference that would permit the Secretary-General to take gender into consideration in making decisions related to the retention of staff except in circumstances of a tie. UNAT found that the UNDT erred in determining that the Secretary-General improperly exercised his discretion by not renewing Ms. Barud's fixed-term appointment and that the contested decision was unlawful. UNAT vacated the impugned Judgment, the rescission of the contested decision and the award for compensation in lieu.

Decision Contested or Judgment/Order Appealed

The former staff member, Ms. Barud, joined UNAMID in June 2011 as a General Services Assistant at the FS-5 level within the UNAMID General Services Section. In 2013, the General Services Section at UNAMID was dismantled, and Ms. Barud was reassigned with the post she encumbered to the Facilities Management Unit (FMU) of the UNAMID Engineering, Water and Environmental Section. Ms. Barud's fixed-term appointment was not extended beyond its expiration on 30 June 2019 (the contested decision) following a comparative review process (Comparative Review Process or CRP) in which she had been identified for retrenchment after a downsizing exercise. The UNDT granted Ms. Barud's application challenging the decision not to renew her fixed-term appointment. The UNDT held that the CRP was unlawful because the Secretary-General was not entitled to assess Ms. Barud based on her job description as described in her TOR and his reliance on the Facilities Management Asisstant (FMA) TOR was irregular and unlawful. In addition, the UNDT held that the Secretary-General had no discretion to set up a CRP as the sole FMA position was expressly and clearly identified in the new UNAMID structure for abolition. Ms. Barud had demonstrated her functions were neither the same nor similar to those performed by her comparator and whose post was expressly

identified for abolition. Ms. Barud’s annual performance reviews for the two years prior to her redesignation as an FMA showed that she had performed Administrative Assistant tasks and because her post was designated as an Administrative Assistant position, the Organization should have ignored the fact that the TOR for her post had been altered before the commencement of the CRP and ignored that she was no longer working as an Administrative Assistant but as an FMA. Consequently, the UNDT held that, during the downsizing exercise, Ms. Barud should have been treated as an Administrative Assistant and should not have been considered for retrenchment. The UNDT ordered rescission of the contested decision, reinstatement in her position from the date of separation, and in lieu compensation in the amount of one year’s net base pay salary. The UNDT denied Ms. Barud’s request to address alleged misconduct on the part of her supervisors and her request for moral damages.

Legal Principle(s)

A fixed-term appointment carries no expectancy of renewal or conversion. Nevertheless, an administrative decision not to renew a fixed-term appointment can be challenged on the grounds the Agency has not acted fairly, justly or transparently with the staff member or was motivated by bias, prejudice or improper motive against the staff member. The staff member has the burden of proving such factors played a role in the administrative decision. An international organization necessarily has the power to restructure some or all its departments or units, including the abolition of posts, the creation of new posts, and the redeployment of staff. The Appeals Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly, and transparently in dealing with staff members. In reviewing the validity of the Secretary-General’s exercise of discretion in administrative matters, such as a non-renewal decision, the Dispute Tribunal determines if the decision can be challenged on the grounds that the Administration has not acted fairly, justly or transparently. In particular, the Dispute Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered and whether the decision is absurd or perverse. It is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General nor to substitute its own decision for that of the Secretary-

General.

Outcome

Appeal granted

Outcome Extra Text

We vacate Judgment No. UNDT/2021/017 and reinstate the contested decision.

Full judgment

Full judgment

Applicants/Appellants

null Secretary-General

Entity

UN Secretariat

Case Number(s)

2021-1552

Tribunal

UNAT

Registry

New York

Date of Judgement

18 Mar 2022

President Judge

Judge Sandhu

Language of Judgment

English

Issuance Type

Judgment

Categories/Subcategories

No expectancy of renewal
Expiration of appointment (see also, Non-renewal)
Abolition of post
Non-renewal
Separation from service

Applicable Law

Staff Rules

- Rule 13.1(d)
- Rule 4.13(c)
- Rule 9.6(e)

UN Charter

- Article 101

Related Judgments and Orders

2015-UNAT-500
2019-UNAT-902
2018-UNAT-825