UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2021/020
Judgment No.: UNDT/2022/061
Date: 21 June 2022
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: Geneva

Registrar: René M. Vargas M.

NASTASE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Kong Leong Toh, UNOPS

Introduction

1. The Applicant, a former staff member of the United Nations Office for Project Services ("UNOPS"), filed an application contesting the decision to not renew his contract beyond 30 November 2020.

Facts

2. The Applicant was one of several UNOPS staff members providing services to the UN Secretariat's Office of Information and Communications Technology ("OICT"). OICT is part of the UN Secretariat, with dual reporting lines to the Department of Management Strategy, Policy and Compliance ("DMSPC") and the Department of Operational Support ("DOS"). UNOPS, which is not part of the UN Secretariat, provides services to OICT pursuant to written agreements between UNOPS and the UN Secretariat (known as "Financial Agreements" or "FAs").

3. On 18 September 2020, the Applicant had a meeting with UNOPS Senior Programme Manager ("UNOPS SPM"), UNOPS Chief, Hybrid Cloud Computing Group, and UNOPS Human Resources Specialist, during which the Applicant was verbally told that his post of ICT Specialist would be abolished due to lack of funding and, consequently, that his contract with UNOPS would not be renewed beyond 30 November 2020.

4. On 27 October 2020, the Applicant received a letter from the Deputy Director, People and Change Group, UNOPS, recalling the terms of the 18 September 2020 meeting, namely that the Applicant's appointment would not be renewed and that he would be separated from UNOPS on 30 November 2020.

5. On 16 November 2020, the Applicant requested management evaluation ("MER") of the decision not to renew his contract.

6. On 30 November 2020, the Applicant separated from UNOPS.

7. On 30 March 2021, the Applicant filed an application before this Tribunal contesting the decision to not renew his contract.

8. On 30 April 2021, the Respondent filed his reply.

9. On 28 May 2021, the Applicant filed a motion seeking permission to file a rejoinder.

10. By Order No. 97 (GVA/2021) dated 1 June 2021, the Tribunal granted the Applicant's motion.

11. On 11 June 2021, the Applicant filed a rejoinder.

12. On 2 July 2021, the Respondent filed a motion for leave to file additional evidence in response to the Applicant's rejoinder.

13. On 29 July 2021, the Applicant requested an extension of time to respond to the Respondent's motion.

14. By Order No. 132 (GVA/2021) dated 30 July 2021, the Tribunal granted the Applicant's requested extension.

15. On 12 August 2021, the Applicant filed a response to the Respondent's motion dated 2 July 2021.

16. On 10 January 2022, the present case was assigned to the undersigned Judge.

17. By Order No. 21 (GVA/2022) dated 16 February 2022, the Tribunal instructed the parties to inform it as to whether an oral hearing was warranted in this case, identifying the material issues of fact that may require said hearing.

18. On 26 February 2022, the Applicant expressed the need for an oral hearing due to the Respondent's spin on certain facts and information provided by him. In addition, the Applicant made an *ex-parte* submission consisting of his communication with the UN Ethics Office in relation to his retaliation claims.

19. On 28 February 2022, the Respondent advised the Tribunal that he did not find that an oral hearing was necessary.

20. By Order No. 34 (GVA/2022) dated 8 March 2022, the Tribunal considered that the Applicant's *ex parte* submission dated 26 February 2022 did not contain any confidential information requiring protection and, accordingly, it decided to share it with the Respondent and admitted it into the case record. Further, the Tribunal found that the matter could be determined based on the papers and advised the parties that it would be moving forward with adjudication.

Parties' submissions

21. The Applicant's principal contentions are:

a. Prior to the non-renewal of his contract, he was being subject to harassment and retaliation. Within one month of the Chief Infrastructure Operations Section ("CIOS") notifying the Applicant that he was allegedly "underperforming" (i.e., emails dated 22 April 2020 and 11 May 2020), the UNOPS SPM decided to remove the Applicant from the Cloud Development Team ("CDT") and to place him in a performance improvement plan ("PIP");

b. Pursuant to sec. 5 of ST/AI/2010/5 (Performance Management and Development System), the Applicant's performance evaluation should have been done by his FRO, not the CIOS;

c. Contrary to sec. 10.1 of ST/AI/2010/5, the decision to remove the Applicant from the CDT and to place him in a PIP was taken without a proper performance evaluation and only after instructions from the CIOS, who was not the Applicant's FRO, and without informing the Applicant of the basis for such decision;

d. When the Applicant asked for the decision that was the basis for the determination of the PIP, there was no concrete answer. In fact, according to UNOPS SPM, the course of action and proposed PIP were relevant for the Applicant's performance evaluation in 2020, yet not a result of underperformance following a performance evaluation;

e. At the end of the previous performance cycle, the Applicant's appraisal exceeded expectations. However, contrary to sec. 10.2 of ST/AI/2010/5, he was never consulted regarding the implementation of the PIP, only notified of it. Thus, it is evident that the April 2020 PIP, due to be implemented in June 2020, blatantly infringed ST/AI/2010/5;

f. Besides ignoring reporting lines, the CIOS ignored the established performance framework. Although at UN and UNOPS performance is evaluated over year-long cycles, on 22 April 2020, the CIOS took a snapshot picture of data from a yet-not-adapted tool, i.e., iNeed, and decided that the Applicant was performing below expectations for an experienced P-3 staff member;

g. A few months following the disagreements with the CIOS, and the taking of the above-mentioned decisions, the Applicant was informed of the non-renewal of his contract. The context described shows that the non-renewal decision was tainted by ulterior motives;

h. Putting the Applicant outside of his area of expertise in a PIP is a strong indication that performance improvement was not desired and intended as a solid dismissal motive. If the outcome of the PIP was predetermined before its institution, i.e., the non-renewal of the Applicant's contract, the entire process was improper (*Caruso* UNDT/2018/043);

i. A non-renewal decision can be challenged on the grounds that the Organization did not act fairly, justly or transparently, or if the decision is motivated by bias, prejudice or improper motive against the staff member (*Andelic* UNDT/2020/007, par. 63);

j. According to UNOPS SPM, more than 20 persons in the programme portfolio were in the same situation as the Applicant. However, the Applicant was the only staff member whose contract was not renewed in the framework of the FA despite hirings at the end of 2019 and early 2020. A vacancy for the same FA was published in March 2021; and

k. The non-renewal/post abolition justification appears flawed, as it cites prioritization of projects by the Chief Information Technology Officer ("CITO") imposing abolition of vacant posts and putting ongoing recruitments on hold. However, the fact that recruitment continued, and vacancies were published across the portfolio and within the Applicant's FA suggests that his non-renewal was targeted and biased, not a result of project priorities or budget constraints, but rather to force the Applicant out of the Organization.

22. The Respondent's principal contentions are:

a. The need for reductions, including separations of UNOPS staff, was specifically discussed in a 14 September 2020 OICT "town hall" chaired by the CITO. All staff were informed during this town hall that severe budget cuts were being executed, including in regard to the contracts of UNOPS staff members;

b. In a 10 December 2020 letter to all UN staff, the Secretary-General provided details of the ongoing cash crisis happening across the Organization, which required substantial reduction in OICT's budget and resulted in a reduction in the amount of services that OICT obtained from UNOPS;

c. There were 29 UNOPS staff members, including the Applicant, who were separated from service as a result of this budgeting exercise;

d. The fact that other recruitment continued is irrelevant to the matter, since the CITO stated that there was a "[pause to] all but most critical recruitments", and not that there would be zero recruitments;

e. The evidence clearly shows that there was a genuine, large scale restructuring due to severe budget cuts, and that this resulted in 29 UNOPS staff members being separated from service. The presumption of regularity has been satisfied. In the absence of any evidence of bias or improper motives, the decision not to renew the Applicant's appointment was lawful;

f. The Applicant failed to show by "clear and convincing" evidence that the contested decision was improperly motivated;

g. The Applicant also failed to prove that the post he was encumbering should not have been abolished. The Applicant's argument that his was the only non-renewal case under the same FA is not true. The continuation of recruitment within the Applicant's FA does not show that OICT did not have funding problems, or that the Applicant's non-renewal was targeted or biased. Most of the vacancies for OICT that were posted are not funded by OICT. Of the four that are funded by OICT, one was a non-staff position that was subsequently cancelled, another was a non-staff position put on hold until the financial situation became clear, and the remaining two are local posts;

h. The Applicant claims that the adverse comments about his performance a few months prior were the reason leading to the decision to abolish the post he was encumbering and to not renew his contract. However, the Respondent notes that the Applicant was rehired by OICT in February 2021. If there were any ulterior motive, one could have expected that such ulterior motive would have also prevented him from being rehired by OICT;

i. Notwithstanding, even if the Applicant's rehiring is disregarded, the Applicant does not meet the "clear and convincing" threshold established by the case law to prove that his non-renewal was biased and driven by ulterior motives. Unless the Applicant can convincingly argue why his post should not have been abolished, even though the posts of dozens of other staff members were abolished, the application must be dismissed; and

j. Finally, if the Tribunal were to rule in favour of the Applicant, it would in effect mean that the post of any staff member that has ever been the subject of adverse comments about his/her performance can never be abolished, and that such a staff member will be a specially-protected class during any restructuring/retrenchment exercise.

Consideration

Whether the Dispute Tribunal can review non-renewals and/or post abolishment

23. Staff regulation 4.5(c) and staff rule 4.13(c) provide that a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal. The UN Appeals Tribunal ("UNAT") has consistently held that an International Organization has the power to restructure some or all of its departments or units where it deems it necessary to meet changing organizational needs, priorities and economic realities (*Matadi et al* 2015-UNAT-592, *Lee* 2014-UNAT-481, *Smith* 2017-UNAT-768).

24. It follows that abolition of a post resulting from a reorganization constitutes a valid reason for not renewing a staff member's appointment (*Islam* 2011-UNAT-115). Moreover, a proposal to restructure resulting in loss of employment for staff members falls within the Secretary-General's discretionary authority (*Gehr* 2012-UNAT-236, *Pacheco* UNDT/2012/008, *Rosenberg* UNDT/2011/045).

25. Nonetheless, non-renewals can be challenged on the grounds that the staff member had a legitimate expectation of renewal, procedural irregularity, or the decision was arbitrary or motivated by bias, prejudice or improper motive (*Obdeijn* 2012-UNAT-201, *Ahmed* 2011-UNAT-153, *Frechon* 2011-UNAT-132). In this regard, the Dispute Tribunal's review is limited to whether the restructuring was conducted in accordance with relevant procedures, due process was afforded, and it was not improperly motivated (*Sanwidi* 2010-UNAT-084). The Applicant bears the burden of proving that the discretion not to renew his appointment was not validly exercised (*Hepworth* 2015-UNAT-503).

26. Moreover, UNAT has held that 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 it. Nor is it the role of the Dispute Tribunal to substitute its own decision for that of the Secretary-General (*Kule Kongba* 2018-UNAT-849). UNAT has also affirmed that it will not interfere with a genuine organizational restructuring exercise even though it may have resulted in the loss of employment of staff (*Matadi et al.* 2015-UNAT-592), and that it is not within the remit of the Dispute Tribunal to pronounce on the exercise of this discretion, unless there is evidence of arbitrary and unlawful exercise of the discretion (*Simmons* 2016-UNAT-624).

27. In addition,

> Which post to abolish and whether or not to merge departments falls within the discretion of the Organization and the Appeals Tribunal will not interfere with this lightly, since no improper motives have been evidenced in the present case. The UNDT was thus correct when it held that it would not have valid grounds to interfere with the UNFPA decision, even if the abolition of Ms. Collins' post had been unwise because the significance of her role had not been fully understood. (*Collins* 2020-UNAT-1021).

28. And,

> There is always a presumption that official acts have been regularly performed. This is called a presumption of regularity. But this presumption is a rebuttable one. If the management is able to even minimally show that the Appellants candidature was given a full and fair consideration, then the presumption of law stands satisfied. Thereafter the burden of proof shifts to the Appellant who must show through clear and convincing evidence that she was denied a fair chance of promotion. (*Rolland* 2011-UNAT-122).

29. The applicability of the presumption of regularity to restructuring/retrenchment cases was confirmed in *Dieng* UNDT/2020/163, where the Dispute Tribunal stated that "[the] starting point when reviewing administrative decisions is the presumption that official functions have been regularly performed. This presumption is satisfied where management minimally shows that the staff member was given fair and adequate consideration. Once management satisfies this

initial requirement, the burden shifts to the Applicant to show through clear and convincing evidence that in dealing with him, management did not give his case fair and adequate consideration".

30. Similarly, in *Alema* UNDT/2020/168, the UNDT provided: "The Tribunal's jurisprudence points to the maxim that there is always a presumption that the administration's decision was properly executed and should stand unless it is shown to be tainted or otherwise improperly made".

31. Therefore, it is clear from the foregoing that the Dispute Tribunal can review decisions related to contract non-renewal or post abolishment, but that said review has a limited scope in that it can only analyse whether the decision was unlawful and/or tainted by bias or ulterior motives.

Whether the decision to abolish the Applicant's post and to not renew his contract was lawful

32. UNOPS has had an ongoing program with the UN for over a decade and provides dozens of services to OICT and its clients. Due to the cash liquidity crisis that the UN is facing, the UN Controller advised all heads of departments and offices of the UN about eminent cuts. OICT was informed about the 57% of non-post regular budget cut and significant reduction in cost recoveries from e.g., peacekeeping missions, departments and offices. Approximately half of OICT funding comes from cost recoveries.

33. In consultation with the OICT Director, the CITO assessed which projects and workstreams could be slowed down, ceased or postponed. Based on that assessment, the CITO requested that UNOPS program costs be reduced by freezing all ongoing recruitments and eliminating all vacant positions. However, given the budget and cash shortfall, the CITO in collaboration with Senior Managers advised UNOPS program to also move some posts to cheaper locations and abolish several encumbered positions based on organizational requirements (projects and services) for the upcoming period.

34. The Respondent submitted that the cloud strategy implementation defined by OICT has played a key role on the skill shift that is requested from the team, having DevOps as leading component together with hybrid cloud and automation. As a result of this cloud strategy implementation, a shift on the skills needed from the staff profiles was envisioned, with focus shifting for working towards Automation and Infrastructure as a Code ("IaC") tools.

35. This along with the impending budget and liquidity crisis have brought about the abolition of two vacant G-6 positions and the reduction for one existent P-3 staff from the Hybrid Cloud Computing Group.

Why the Applicant and why his post?

36. The Respondent provided a very reasonable explanation as to why the post the Applicant was encumbering was chosen for abolition. The Hybrid Cloud Computing Group was at the time split between two teams in Valencia: Cloud Operations Team and Cloud Deployment Team. The Cloud Deployment Team was formed by one P-2, one P-3, three G-6 and one IICA2. All positions had different Terms of Reference.

37. The Applicant joined UNOPS in 2010 as Virtualization Officer at the P-3 level. He has an educational background in Actuarial Science and in Cybersecurity, as well as experience in the private sector and academia in diverse IT roles. The other staff member in the professional category joined UNOPS in 2020 as Senior Linux and Automation Engineer at the P-2 level. Prior to that, he worked with UNICC for seven years and in the private sector as a systems technician with focus on Linux and Cloud computing, and he has a master's degree in Telecommunications and Networks.

38. From OICT's perspective, a clear requirement had been established to focus on the Automation and Infrastructure as a Code technologies in the cloud, which eventually, further clarified how the onboarding would be done in the future, i.e., prioritizing automation when possible. This strategy adjustment made it necessary to review the profiles and skills needed in the team. Based on a number of different factors explained in detail in an analysis dated 17 September 2020, the UNOPS IT

Project and Operations Manager decided that the P-2's profile would be more aligned to deliver the requisite service. Accordingly, it was recommended to keep the P-2 and release the Applicant.

39. However, the Applicant argues that he too had the skillset required to perform the new priorities:

> [The] Applicant, as Cloud Deployment Lead, performed low level solution engineering and hands-on implementations using Automation and Site Reliability Engineering tools that the R-4 document lists as the new, required skills…The R-4 document also omits that the Applicant, who joined the Infrastructure Operations team in 2010, has extensive hands-on experience in operations in on-premise infrastructure and cloud, including design and implementation and operational support for technologies like Automation, Linux, DevOps, also listed in the R-4 document as the new skills required. The author of the R-4 document, [Mr. S], ignores the Applicant's experience with these domain's processes and tools, and the fact that many of these new technologies were introduced, validated and used under Applicant's technical coordination.

40. It appears from this submission that the Applicant is arguing that he was equally capable of performing the tasks of the post that was kept. As such, his allegedly lack of skills and the analysis provided by the Respondent does not provide a good enough reason for the Applicant's post being chosen.

41. However, it is not for the Dispute Tribunal, much less the Applicant, to decide who should or should not have his contract renewed, or which post should have been abolished in place of another or others. The judicial review is limited to determine whether the decision was tainted by bias or ulterior motives or improperly made.

42. In this case, there is nothing to indicate that the decision was improperly made, as the Respondent provided proof that both posts were analysed and considered for abolition, with the one that the Applicant was encumbering being chosen due to the staff profiles priority decision which is well within the Organization's discretionary authority.

43. In addition, while the Applicant claims that his was the only non-renewal case in his FA despite hirings, evidence on record shows that this is not true. There was another staff member working under the same FA who was also separated from service, as provided in the summary of abolished positions and separated personnel.

44. Moreover, the Applicant argues that recruitment continued and that vacancies were published across portfolio and within his FA, suggesting that the non-renewal of the Applicant's contract was targeted and biased, not a result of project priorities or budget constraints.

45. However, as the evidence on record shows, most of the vacancies published are not funded by OICT but rather by other parties such as the Government of Canada, the UN Support Office in Somalia ("UNSOS"), and the Executive Office of the Secretary-General ("EOSG"). Thus, these vacancies do not show that OICT did not have funding problems. Of the four vacancies that are/were funded by OICT, one was a non-staff position that was subsequently cancelled, another was a non-staff position that was subsequently put on hold until the financial situation improved, and the remaining two are local posts.

46. Thus, the Tribunal finds that the Respondent's explanation as to why the Applicant's post was the one chosen for abolition is well substantiated. There was a genuine large scale restructuring due to severe budget cuts, which resulted in twenty-nine (29) UNOPS staff members being separated from service, including the Applicant, and there was a legitimate explanation for the recruitments and vacancies that were not cancelled. The presumption of regularity has been satisfied.

47. Since the Applicant cannot convincingly show why his post should not have been abolished even though the posts of dozens of similarly situated other staff members were abolished, the allegations of illegality do not stand.

Whether the Applicant has shown through clear and convincing evidence that the contested decision was tainted or improperly motivated

48. With the burden of proof now shifting to the Applicant, the Tribunal will analyse whether the Applicant has shown through clear and convincing evidence that the contested decision was improperly motivated.

49. The Applicant claims that his disagreements with the CIOS regarding an alleged underperformance assessment, and the decisions taken by his supervisors to remove him from the CDT and place him in a PIP, were actually the reason behind the Organization choosing not to renew his contract and to abolish the post he was encumbering. In addition, he claims that such decisions were retaliatory in nature due to the Applicant reporting the CIOS for wrongdoing months prior.

50. However, such assertion is speculatory at best. The Applicant did not present any clear and convincing evidence that indicates those decisions were biased and improperly motivated. The disagreement over the "underperformance" emails pertain to the framework of performance management and development, whilst the aforementioned decisions by the Applicant's supervisors were well within their discretionary authority.

51. Moreover, the institution of a PIP during the performance cycle is not unlawful. Sec. 10 of ST/AI/2010/5 provides that:

> 10.1 During the performance cycle, the first reporting officer should continually evaluate performance. **When a performance shortcoming is identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s). Remedial measures may include** counselling, **transfer to more suitable functions**, additional training **and/or the institution of a time-bound performance improvement plan**, which should include clear targets for improvement, provision for coaching and supervision by the first reporting officer in conjunction with performance discussions, which should be held on a regular basis (emphasis added).

> 10.2. If the performance shortcoming was not rectified following the remedial actions indicated in section 10.1 above, and, where at the end of the performance cycle performance is appraised overall as "partially meets performance expectations", a written performance improvement plan shall be prepared by the first reporting officer. This shall be done in consultation with the staff member and the second reporting officer. The performance improvement plan may cover up to a six-month period.

52. As provided in secs. 10.1 and 10.2 above, when a performance shortcoming is identified during a performance cycle, a staff member's supervisors should proactively assist the staff member to remedy said shortcoming. Remedial measures may include transfer to more suitable functions, i.e., removing the Applicant from the CDT, and the institution of a time-bound performance improvement plan, i.e., the PIP due to be implemented from 1 June 2020 to 30 September 2020, which was shared with the Applicant in detail by email dated 13 June 2020, after the Applicant returned from sick leave.

53. Only when the performance shortcoming is not rectified following remedial actions and where at the end of the performance cycle, performance is appraised overall as "partially meets expectations", is when a written performance improvement plan shall be prepared.

54. The Applicant is misguided in his interpretation of sec. 10.2, in that he claims that only after an overall "partially meets expectations" appraisal for the performance cycle can a PIP be prepared. However, that is not what ST/AI/2010/5 provides. It is clearly indicated in sec. 10.1 that a time-bound performance improvement plan can be instituted as a remedial measure when a performance shortcoming is identified during the performance cycle.

55. Accordingly, the decision to implement a PIP could only be rendered improper in this case if no performance shortcoming had ever been identified. However, that is not what the evidence indicates. Written documentation on record shows that a performance shortcoming was identified by both the CIOS and the Applicant's supervisors, that the Applicant was informed of this by email and in person, and that the PIP was decided upon as a result. The fact that the Applicant

disagrees with the performance shortcoming identified does not mean that its identification was illegal, nor is it the role of the Dispute Tribunal to substitute the authority of the Applicant's supervisors and determine whether the PIP was warranted or not.

56. Thus, considering that a performance shortcoming was identified by the Applicant's supervisors, explained to the Applicant in person, and later formalized via emails, that a time-bound performance improvement plan was prepared to be in place for four months, and that the plan's details were sent to the Applicant via email, there is no evidence on record that the Applicant's rights were violated in relation to his removal from the CDT and the institution of a PIP.

57. In relation to the Applicant's retaliation claims, UNOPS Ethics and Compliance Office ("UNOPS ECO") informed him via email dated 24 March 2021 that his report of wrongdoing against the CIOS for alleged misconduct during a recruitment exercise in December 2019 did not constitute a protected activity. As a result, the Applicant's request for protection against retaliation was rejected.

58. UNOPS ECO's decision is not the contested decision under review. Accordingly, it is not for this Tribunal to determine its correctness. Since the Applicant cannot provide evidence to support his allegation that the decisions to not renew his contract and to abolish his post were motivated by retaliation, they cannot be rendered improperly made in this regard either.

59. Accordingly, the Applicant's claims do not meet the "clear and convincing" threshold established by the case law, especially when one recalls that twenty (20) other staff members, and eight (8) individual contractors, were also separated from service at around the same time as the Applicant because the United Nations was (and still is) experiencing a severe cash crisis. Consequently, all of his assertions regarding bias and improper motives are speculatory.

60. As such, in the absence of any evidence of bias or improper motives, the decision to abolish the Applicant's post and to not renew his contract was lawful.

Conclusion

61. In view of the foregoing, the Tribunal DECIDES that the application is rejected in its entirety.

(*Signed*)
Judge Alexander W. Hunter, Jr.
Dated this 21st day of June 2022

Entered in the Register on this 21st day of June 2022
(*Signed*)
René M. Vargas M., Registrar, Geneva