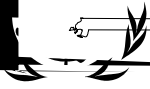


UNITED NATIONS APPEALS TRIBUNAL



TRIBUNAL D'APPEAL DE LA CEMC / P TJ(R) 1(e) 2023 TJ 0

Judgment No. 2023-UNAT-1359



Counsel for Respondent/Applicant: Self-represented

Counsel for Appellant/Respondent: Noam Wiener

JUDGE DIMITRIOS RAIKOS, PRESIDING.

1. The Secretary-General has appealed to the United Nations Appeals Tribunal (UNAT or Appeals Tribunal) Judgment No. UNDT/2022/069 (impugned Judgment), in which the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) granted Mr. Mohammad Tofazzel Hossain's application contesting the decision not to renew his fixed-term appointment due to abolition of his post (contested decision). The UNDT found that the contested decision was unlawful and ordered Mr. Hossain's reinstatement and retroactive payment to the United Nations Joint Staff Pension Fund for the reinstated period, or, alternatively, 30 months' net base pay in lieu of reinstatement.

7. On 5 October 2018, Mr. Hossain

14. On 18 May 2019, the UNDP Zimbabwe Country Office requested the Organizational Design Unit at UNDP Headquarters in New York to review the proposed classification levels of the new structure which affected four posts, among them Mr. Hossain's post.
15. On 22 May 2019, the Organizational Design Unit concluded its review and classified the newly approved post of Finance and Operations Analyst, which would replace the abolished post with a Service Contract at the ICS-09 level equivalent.
16. On 30 May 2019, Mr. Hossain was informed that based on the capacity assessment exercise, the position of Finance Specialist he encumbered would be abolished, and that his fixed-term appointment would not be renewed beyond its expiry date on 30 June 2019.
17. Mr. Hossain's request for management evaluation of the contested decision was unsuccessful, and on 23 October 2019, he

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decision not to renew Mr. Hossain's appointment in March 2018, which was later rescinded, was not made by Mr. M, but by Mr. BP, who was the Resident Representative at the time. Third, the March 2018 decision not to renew Mr. Hossain's appointment was not based on the Strategy Report which was composed in May 2018, two months after the March 2018 decision. Fourth, nothing suggests that the Strategy Report predetermined the results of the capacity assessment. Indeed, a large number of the recommendations made by the Panel differed from the proposals in the Strategy Report and several positions were affected by the recommendations.

31. Moreover, the UNDT erred in finding that the abolition of the post was a pretext for not renewing Mr. Hossain's appointment. The Resident Representative who decided, in March 2018, not to renew the appointment after 31 December 2018, himself rescinded the decision in November 2018 and extended the appointment. He was not the same Resident Representative who later in 2019 decided to abolish Mr. Hossain's post, pursuant to the Panel's recommendation. Mr. M, while serving as the Country Director, asked for the creation of the Strategy Report in May 2018. In January 2019, after he had become the Resident Representative, he shared the Strategy Report with the Panel because he correctly believed that the Panel should review it as part of its assessment of the human resources plan for the PMU. There is no evidence that the Strategy Report constrained the discretion of the three independent Panel members.

32. Furthermore, the UNDT ignored that different bodies supported the contested decision. Even if the Panel's capacity assessment was in some way tainted by the fact that the Strategy Report was among the various documents it had reviewed – which it was not - the Panel's recommendation to change the post was subsequently reviewed by additional bodies who independently agreed with the abolition of the post or who reviewed the classification of the new finance post in the new structure. Despite there being no evidence to the contrary, the UNDT found that restructuring the PMU, abolishing the international post and creating a national post in its place was arbitrary and lacked rationale. The UNDT ignored the fact that while different donors had submitted various organograms in earlier reports, the October 2018 report produced by the DFID was the most current report. It is on the basis of the DFID Report, which explicitly recommended a review of the PMU's organization, that an assessment of the PMU's functions was undertaken.

33. The Secretary-General contends that the UNDT erred in holding that the contested decision was discriminatory. The mere fact that one out of three posts was slated for abolition, provides no basis to make a finding that the contested decision was discriminatory. To substantiate

a holding that discrimination took place, the UNDT would need to state the basis on which the discrimination took place and state what evidence supports the claim that such a basis for discrimination existed. The impugned Judgment does not name an alleged basis for discrimination nor provide any proof to support such an allegation.

34. The Secretary-General further submits that even if the UNAT decided to uphold the contested decision, it should reduce the amount of compensation awarded. The UNDT provided no explanation as to the exceptionality of the case justifying 30 months' net base salary worth of compensation. Additionally, it is unclear whether the UNDT expected the Organization to retroactively pay the Pension Fund on behalf of Mr. Hossain only in case of his reinstatement to his now abolished post, or if the UNDT intended that the Organization make such payments even in case of in-lieu compensation. If the UNDT intended its order to be specific performance, then the order is not lawful because participation in the Pension Fund is only available to individuals employed by the Pension Fund's member organizations. If the UNDT intended to require the Administration to retroactively contribute to the Pension Fund on behalf of Mr. Hossain in addition to providing compensation in lieu of reinstatement, then the compensation awarded to him is even further in violation of Article 10(5)(b) of the UNDT Statute, as it amounts to 30 months' worth of net base salary plus retroactive payments to the Pension Fund.

35. The Secretary-General requests that the UNAT reverse the UNDT Judgment and uphold the contested decision.

Mr. Hossain's Answer

36. Mr. Hossain submits that the UNDT did not err in finding his application receivable. The UNDT t95 (s A)-5.92mnhha(o)-1.8 (i)2.3 (n)-4.13 (ro)-1.7.4 (n)6.8 (t,)36. sant,ct4 (n)6..261 -1.717 Td[(U)-2.1

the Secretary-General's arguments by paragraph and page numbers and rebuts his contentions by reiterating his arguments made before the UNDT as well as recounting the UNDT's findings.

38. In particular, Mr. Hossain contends that while the Organization does have the power to restructure its departments or units, the Administration has the obligation to act fairly, justly and transparently in its dealings with its staff members even in a restructuring exercise. The process to abolish Mr. Hossain's post started in February 2017 when his fixed-term appointment was only renewed for six months because of his only "partially meeting expectations" during the 2016 performance period. Contrary to the Secretary-General's submission, Mr. Hossain was never given feedback regarding his response to the Panel Report and the former's submission on this point is a "lie" to mislead the Appeals Tribunal.

39. Mr. Hossain submits that the Panel was aware of the fact that the Head of the PMU was adamant to "get rid" of him "at any costs" and in order to do so, she as well as the Country Office's management took multiple steps; her plans were eventually implemented using the "so-called panel report". Although there were no complaints against Mr. Hossain, as confirmed at the oral hearing, the Panel presented Mr. Hossain negatively to the donors, government counterparts and the Country Office management in order to humiliate him with an ulterior motive.

40. Mr. Hossain further contends that the Country Director shared the HR Strategy d (n)-4 (su.8 (m)3.38 (n)6.

unlawfully abolished, he could have continued in his position until December 2021, as other international staff, and as such the UNDT made a “legitimate award, based on the reality”. Moreover, as a candidate in an abolished post, he should have received priority consideration over other candidates in recrui-2.2 (e)-3.4 (r) [ui12 432.6M1H (s)-7.19.4 (16t)-7 (e)2t1.6 (i12a.5 (a)6.(N)-8. (e)-3.071 T

47. The UNDT's conclusions on the question of receivability are set out in the following paragraph of its Judgment. It held that:²

... In determining the issue, the Tribunal has been guided by the Applicant's request for management evaluation. The Applicant received his first notice of non-renewal of contract in March 2018. It was put on hold to allow for a capacity assessment exercise. A fresh notice was issued on 30 May 2019 that the position of Finance Specialist he encumbered would be abolished, and that his FTA would not be renewed beyond its expiry date on 30 June 2019. The Applicant requested management evaluation of this decision and is the subject of these proceedings. However, in support of his case, the Applicant raised several instances including the capacity assessment exercise and re-classification of his post to show that the impugned decision was pre-determined, improperly motivated and unlawful.

48. Having reviewed the content of Mr. Hossain's request for management evaluation and of his application brief, the specific circumstances of the present case, as well as the management evaluation response confirming the lack of Mr. Hossain's entitlement both to a renewal of his fixed-term appointment and to a notice of non-renewal, we agree with, and uphold, the UNDT's finding that Mr. Hossain's application was receivable *ratione materiae* as it was directed against the administrative decision dated 30 May 2019 not to renew his contract of employment.

49. As the Appeals Tribunal has held:³

It is the role of the Dispute Tribunal to adequately interpret and comprehend the application submitted by the moving party, whatever name the party attaches to the document, as the judgment must necessarily refer to the scope of the parties' contentions. Thp(u)0.7 9.1 (a).3 (s)-h

63. This ruling of the UNDT was primarily based on the following findings:

- In formulating the scope of the Panel’s assessment, the Resident Representative instructed the Panel to “review and finalise a long-term HR strategy for the PMU”. The UNDT

did not want him around. She wanted to get rid of him. It was an abuse of authority to prepare an HR Strategy with changes in the Finance Unit without consultation or disclosure to the ZRBF [Steering Committee] and without soliciting feedback from [Mr. Hossain] being the major casualty of the exercise. The position of Finance Specialist was reclassified without specifying any procedure from the relevant legal framework applicable to UNDP.

- Mr. Hossain was discriminated against in a pool of international staff members. There were three international positions in the PMU, and according to the Panel's leader,¹⁸

international staff get replaced by national staff as a normal sustainability process and a means to empowering nationals, the Respondent was, however, not able to provide any

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without soliciting feedback from [Mr. Hossain] being the major casualty of the exercise”;²⁴ and that:²⁵

There is no evidence that [Mr. Hossain] was given the opportunity as an affected individual to comment on the proposed restructuring of his position from the beginning of the process or at any point in time, in violation of UNAT jurisprudence which requires that such consultations take place. ... The implementation of the recommendation did not take relevant factors into consideration, namely, the requirement to carry out genuine, transparent and good faith consultations.

69. The UNDT’s interpretative approach of our Judgment in *Matadi et al.* is misplaced. Its challenged finding does not fall within the parameters of our established jurisprudence in *Matadi et al.* as referred to below. In that case, the staff members argued that in undertaking a retrenchment exercise at the United Nations Mission in Liberia, the Administration did not adequately consult the relevant staff unions. While the UNDT ruled that the Administration had not adequately consulted with the National Staff Association, the Appeals Tribunal

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explain how, if at all, the potential bias to which it referred was connected to the specific restructuring and the abolition of Mr. Hossain's position.

72. With due deference to the UNDT, in our view, it was not reasonable for the Dispute Tribunal to conclude, based on the sole fact of the alleged existence of friction between the Head of the PMU and Mr. Hossain, that the abolition of his position was the result of bias against him. Even if such disagreement existed between them that was not enough as an evidentiary basis to establish bias in the specific case and the causal link to the impugned decision. Many factors intervened which could possibly interrupt such a nexus - even if such existed - which they did.

73. Indeed, it is not in dispute that it was not Mr. Hossain's supervisor who recommended examining the roles and responsibilities of staff at the PMU. It was on the basis of the DFID Report of 31 October 2018, which explicitly recommended a review of the PMU's organization, that an assessment of the PMU's functions was undertaken by the Panel.

74. Similarly, it was not Mr. Hossain's supervisor who recommended changes to the post but the Panel, composed of three independent experts from outside the Country Office, who found

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