
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/007

Judgment No.: UNDT/2016/186

Date: 14 October 2016

Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Hafida Lahiouel

LEMONNIER

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Introduction

1. On 22 February 2016, the Applicant, a former staff member of the United Nations Stabilization Mission in Haiti (“MINUSTAH”), serving at the P-5 level on a continuing appointment, filed an application challenging the decision to terminate his employment. The Applicant was informed of the contested decision on 1 September 2015. The Applicant submits that the contested decision was unlawful because the Administration failed to take proper steps to find him an alternative post pursuant to staff rule 9.6(e). He also submits that he was improperly separated while being on paternity leave, which was due to end on 11 September 2015.

2. On 16 March 2016, the Respondent replied to the application, submitting that the decision to terminate the Applicant’s appointment was lawful.

Procedural history

3. By Order No. 175 (NY/2016) dated 20 July 2016, the Tribunal directed the parties to file a joint submission by 24 August 2016 addressing a number of issues in preparation for a hearing on the merits. The parties were also invited to consider informal resolution of the case.

4. On 12 August 2016, the parties filed a joint motion for suspension of proceedings for one month, stating that they are actively engaged in efforts to informally resolve the case and that their discussions were positive and ongoing.

5. By Order No. 197 (NY/2016) dated 12 August 2016, the Tribunal suspended the proceedings in Case No. UNDT/NY/2016/007 until

decided on the papers. The parties were also directed to file their closing submissions by 4 October 2016.

10. On 7 October 2016, the parties filed a joint submission pursuant to Order no. 224 (NY/2016), attaching Mr. Otti's written statement and stating that the Applicant accepted Mr. Otti's statement as part of the record, without the need for cross-examination; that the parties consented to the Tribunal deciding this case on the papers; and that the parties saw no practical benefit to consolidating the two cases.

11. On 10 October 2016, the parties filed their closing submissions.

Facts

12. The Applicant joined the Organization in 2001 as a P-2 level staff member. By 2010, he was rostered for P-4 and P-5 level positions in the area of information and communication technology resources.

13. Effective 20 December 2010, the Applicant joined MINUSTAH as Chief Telecommunications and Information Technology Officer at the P-4 level on a fixed-term appointment. Effective 1 January 2011, he was promoted to the P-5 level.

14. On 1 July 2012, the post used to finance the Applicant's appointment was abolished. The Applicant is not disputing the decision to abolish his post in July 2012. The Applicant was thereafter moved to the post of Chief of Administrative Services, which was vacant.

15. Starting in 2012, the Applicant was placed on a list of staff affected by downsizing, maintained by the Career Support Unit ("CSU") of the Field Personnel Division, Department of Field Support. The CSU provides career support to staff in the field and manages the reassignment of staff affected by

downsizing, within the constraints of availability of vacant posts. The list of staff affected by downsizing is circulat

was subsequently reclassified downwards to the P-4 level under MINUSTAH's 2015–2016 budget.

18. In January 2014, MINUSTAH announced a retrenchment exercise.

19. On 17 April 2014, MINUSTAH advertised a job opening for the position of Chief, Integrated Support Services. The Applicant was considered but was not selected. The Applicant appealed his non-selection as a separate case (Case No. UNDT/NY/2015/011/R1).

20. By letter dated 1 October 2014, the Applicant was notified that he had been granted a continuing appointment effective 30 September 2014.

21. In the first half of 2015, the Applicant applied to the following positions:

a. Job opening (“JO”) 40537, Chief Acquisition Planning Officer (Bangui), P-5 level, to which the Applicant applied on 24 March 2015. This was a roster-based recruitment exercise. The Respondent submits that the Hiring Manager recommended a candidate who was found more suitable for the position.

b. JO 41496, Chief of Communications and Information Technology Section (Abidjan), P-4 level, to which the Applicant applied on 4 May 2015. No selection has been made yet for this position.

c. JO 42824, Chief Communications and Information Technology Section (Amret Al Faouar), P-5 level, applied on 4 May 2015. The Applicant was considered but, according to the Respondent, “a more suitable candidate was recommended for selection.”

- d. JO 42610, Chief Communications and Information Technology Section (Mogadishu), P-5 level, to which the Applicant applied on 12 May 2015. The Applicant was considered but, according to the Respondent, “a more suitable candidate was recommended for selection.”
 - e. JO 43401, Chief Communications and Information Technology Section (Baghdad), P-4 level, to which the Applicant applied on 9 June 2015. The Applicant was considered but, according to the Respondent, “a more suitable candidate was recommended for selection.”
 - f. JO 44451, Deputy Chief Mission Support (Erbil), P-5 level, to which the Applicant applied on 6 July 2015. The Applicant was considered but, according to the Respondent, “a more suitable candidate was recommended for selection.”
 - g. JO 46145, Chief Communications and Information Technology Section (Kabul), P-4 level, to which the Applicant applied on 20 August 2015. The Applicant was considered but, according to the Respondent, “a more suitable candidate was recommended for selection.” The Applicant was recommended as the second choice candidate.
 - h. JO 46493, Chief Service Delivery Officer (Baghdad), P-5 level, to which the Applicant applied on 7 September 2015. The Applicant did not meet the requirements for the position.
22. On 3 August 2015, the Applicant went on approved paternity leave until 11 September 2015.

its efforts to assist the Applicant. However, as of 1 July 2015, there were no longer any suitable vacant posts.

32. Article 101.3 of the Charter of the United Nations provides that “[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity.” In its resolution 51/226 (para. 5), the General Assembly requested the Secretary-General “to announce all vacancies so as to give equal opportunity to all qualified staff and to encourage mobility.” However, there are particular rules that apply to certain categories of staff—including staff on continuing appointments—who are affected by abolition of posts. As *lex specialis*, such rules apply to and govern the applicable situations. In particular, staff rule 9.6(e) requires that the staff on continuing posts affected by abolition of posts be retained on a priority basis as compared to fixed-term staff (although, pursuant to staff rule 13.1, staff holding permanent appointments are retained in preference to staff on continuing appointments). Staff regulation 1.2(c) and secs. 11.1(b) and 11.2 of ST/AI/2010/3 allow the Organization to transfer and assign staff members affected by the abolition of posts to suitable positions outside the normal selection process.

33. In his closing submission, the Respondent submitted that “[t]he Applicant had been considered for a number of other vacant positions, but he was not deemed *the most suitable* candidate for any of them” (emphasis added). Indeed, in the months preceding the termination of his appointment, the Applicant applied and was considered for eight posts. However, although he was found suitable for at least some of them, he was not selected as,

member on a continuing appointment and in need of placement, the Applicant should have received priority consideration for suitable posts.

34. For instance, with respect to one of the posts—Chief of Communications and Information Technology Section (Abidjan)—which the Applicant had applied to in May 2015, no selection has

a continuing appointment in the same pool as fixed-term or temporary staff members or external candidates.

37. The Tribunal therefore finds that the Organization breached its obligations under staff rule 9.6(e) by failing to afford the Applicant proper priority consideration for suitable available posts as a staff member on a continuing appointment affected by the abolition of his post.

Termination while on paternity leave

38. The Applicant submits that the decision to terminate his appointment while he was on paternity leave was unlawful. He states that sec. 11.3 of ST/AI/2005/2 (Family leave, maternity leave and paternity leave) should be read to include termination and should not be interpreted simply to include instances where a staff member's fixed-term appointment expires. The Respondent submits that, under ST/AI/2005/2, there is no prohibition on a staff member's appointment being terminated due to post abolition while he is on paternity leave. The Respondent submits that to interpret sec. 11.3 of ST/AI/2005/2 in the manner suggested by the Applicant would be to impose an obligation on the Organization to refrain from terminating a staff member in circumstances not provided for in the Staff Rules.

39. Administrative instruction ST/AI/2005/2 contains the following provisions regarding maternity and paternity leave:

Section 8

Relationship of maternity leave to other entitlements

...

Extension of fixed-term appointments for utilization of maternity leave entitlement

8.2 Pregnant staff members on fixed-term appointments shall be considered for extension or conversion of their appointment

under the same criteria as other staff. The fact that a staff member is or will be on maternity leave shall not be a factor in that consideration.

8.3 If, however, on the basis of considerations unrelated to the staff member's pregnancy, a decision is made not to offer a new fixed-term appointment and the current appointment is due to expire during the period of maternity leave, the appointment will be extended to cover the full duration of the leave. ...

Section 11

Relationship of paternity leave to other entitlements

...

Extension of fixed-term appointments for utilization of paternity leave entitlement

11.2 The fact that a staff member is or will be on paternity leave shall not be a factor in considering extension or conversion of appointment.

11.3 If, however, on the basis of considerations unrelated to the staff member's decision to take

setting aside the compensation award); *Shashaa* UNDT/2009/034; *D'Hooge* UNDT/2010/044; *Obdeijn* UNDT/2011/032 (affirmed in *Obdeijn* 2010-UNAT-201, with variation of compensation award)). As the Tribunal stated in *Gaskins* UNDT/2010/119 (not appealed), each employment contract has an implied term of mutual trust and confidence between employer and employee, which means that both parties must act responsibly and in good faith (see also *Goddard* UNDT/2010/196).

42. The Tribunal considers that the termination of the Applicant's continuing appointment while he was on paternity leave was a flagrant breach of the requirement of good faith and fair dealing. Notably, his termination was also backdated since he was notified of it on 1 September 2015 although it went into effect on 31 August 2015.

43. How an employer deals with staff on maternity and paternity leave speaks volumes about the working conditions and the working environment. Maternity and paternity leave signifies a particularly vulnerable time in an employee's life. When staff members use their entitlement to a maternity or paternity leave, they place a lot of reliance on predictability of income and access to health insurance. It is also difficult for staff members in such situations to present their position or mount an urgent legal challenge to such terminations. This explains why particular care should be taken with regard to staff members who exercise their rights to maternity and paternity leave. In this regard, in the Tribunal's view, administrative instruction ST/AI/2005/2 requires further revisions to address more fully the various types of issues that may arise.

44. The Administration should also be mindful that terminations during maternity or paternity leave immediately raise concerns as to whether they were a result of improper discrimination or retaliation for staff taking time off

to care for their newborn children. Such things have been known to happen in the history of employer-employee relations, and they shall not be tolerated in a working environment such as the United Nations. There is no evidence in this case that the Applicant was discriminated against nor that the contested decision was influenced by his paternity leave status. However, needless to say, any discrimination of this sort would be unacceptable.

45. In this case in particular, the Applicant's continuing appointment was being terminated through no fault of his own. He did not engage in any type of misconduct. He was a good e8.4(i) was a go

the contested decision was in fact influenced by improper factors, the Tribunal will not make such a finding.

48. The Tribunal finds that there is insufficient evidence in this case to establish that the contested decision in this case was motivated by bias against the Applicant.

Relief

49. The Applicant seeks rescission of the decision to separate him from service or, alternatively, compensation for unlawful termination.

General principles

50. By resolution 69/203, adopted on 18 December 2014 and published on 21 January 2015, the General Assembly amended art. 10.5 of the Tribunal's Statute to read as follows: "As part of its judgement, the Dispute Tribunal may *only* order one or both of the following ... (a) [r]escission ... [or] (b) [c]ompensation for harm, *supported by evidence*" (emphasis added). (See also *Antaki* 2010-UNAT-095, stating that "compensation may only be awarded if it has been established that the staff member actually suffered damage.")

51. Pursuant to art. 10.5(a) of the Tribunal's Statute, when ordering rescission in cases of termination, "the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision."

Pecuniary loss

52. As the Tribunal stated in *Fayek* UNDT/2010/113, in assessing compensation, certain assumptions can be made, but they must be reasonable. Each case must be seen on the basis of its own facts and surrounding

circumstances. Normal contingencies and uncertainties that may intervene in the average working life include early retirement, career change, disability, and lawful termination (see also *Tiefenbacher* UNDT/2016/183). The Tribunal finds it reasonable to conclude, taking into account the Applicant's good performance record, that, had the Organization complied fully with staff rule 9.6(e), it can be reasonably expected that the Applicant's employment would have continued for two years after 1 September 2015. Any findings regarding his continued employment beyond that period would be too speculative as they would not take into account the various contingencies of life. The Tribunal also notes, in this regard, thatz). Theo-5.82ed f4reessee

the staff member's earnings, if any, during the relevant period of time for the purpose of calculating compensation (see, e.g., *Tolstopiatov* UNDT/2011/012; *Mmata* 2010-UNAT-092). The Applicant has submitted that, since separating from the United Nations, he remains unemployed as he has been unable to secure alternative employment. However, the Tribunal finds that, given the Applicant's experience, skills, excellent performance record, relatively young age and his continued efforts to find alternative employment, it can be expected that he will be gainfully employed at some point in the foreseeable future.

55. In view of the above, the Tribunal assesses the Applicant's pecuniary loss at two years' net base salary minus the payments already paid to him as a result of his termination. Taking into account the Applicant's prospects of re-employment in the foreseeable future and thus mitigating his losses, the Tribunal assesses his financial loss stemming from the breach of contract at eight months' net base salary.

Moral injury in connection with termination while on paternity leave

56. The Tribunal finds that the termination of the Applicant's continuing appointment while he was on paternity leave was in flagrant breach of the requirement of good faith and fair dealing. There is no doubt that any reasonable person in the Applicant's situation would have been deeply disturbed emotionally by the sudden and retroactive termination of his employment while being on maternity or paternity leave. The Tribunal awards the Applicant USD5,000 under this heading of damages.

Orders

57. The application succeeds.

