UNITED NATIONS DISPUTE TRIBUNAL	Case No.:	UNDT/NY/2015/004
	Judgment No.:	UNDT/2018/030
	Date:	28 February 2018
	Original:	English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Morten Albert Michelsen, Officer-in-Charge

CARDWELL

v.

[redacted]

Introduction

1. On 12 February 2015, the Applicant,

Procedural background

5. On 12 February 2015, the Applicant, represented by counsel from the Office of Staff Legal Assistance ("OSLA"), filed the current application.

6. After the Tribunal (Duty Judge) granted his request for an extension of time by Order No. 32 (NY/2015) dated 18 February 2015, the Respondent filed the reply on 6 April 2015.

7. By Order No. 56 (NY/2015) dated 7 April 2015, the Tribunal instructed the Applicant to file and serve his comments to the Respondent's reply. The Applicant filed his submission on 8 May 2015.

8. By Order No. 79 (NY/2015) dated 11 May 2015, the Tribunal (Duty Judge) ordered the present case to join the queue of pending cases and be assigned to a Judge in due course.

9. On 12 Ju [illegible] gcnt's [illegible] the [illegible]

challenge the decisions concerning "the removal of his job responsibilities" and "abolition/reclassification of his post" as separate administrative decisions, but only challenged those regarding "non-selection in retrenchment exercise" and "non-renewal".

16. On 27 April 2017, Counsel for the Respondent notified the Tribunal that the case had been reassigned to the current Counsel of record.

17. In order to clarify the scope of the case to properly address the receivability issues and to determine the further conduct of proceedings, by Order No. 137 (NY/2017) dated 20 July 2017, the Tribunal ordered that:

> … By 5:00 p.m. on Friday, 4 August 2017, the Applicant is to file a submission in which he confirms that the contested decisions are his "non-selection in retention exercise" and "non-renewal", setting forth also, (a) the date of the decision, and (b) the decision

> … At the same time, by implication, the Applicant became aware that his contract would not be renewed beyond 31 December 2014. This decision was confirmed in writing in the letter dated 4 November 2014 from [name redacted, Mr. JW], Assistant Administrator and Director, [BOM] of UNDP at the time.

19. On 18 August 2017, the parties filed their closing statements, their respective final submissions are set out below.

Applicant's submissions

20. In the closing statement, the Applicant confirms that he contests the final decisions not to select him for the P-5 post of Deputy Director in the job fair, and the non-renewal of his contract. He states that the other matters he had raised relating to the unlawful reclassification of his post and the irregularity in the selection process, led to these final decisions. The Applicant's contentions may be summarized as follows:

Scope of the case and receivability

1) The final decisions not to select the Applicant for the P-5 level post of Deputy Director in the job fair and the non-renewal of his contract are contested. Other matters, relating to the unlawful reclassification of his post and the irregularity in the selection process, were also raised in the application, but merely le[…]d to the final determination that he was not selected to another job in the job fair and ultimately the non-renewal of his contract;

2) The downgrade of the Applicant's post as a separate administrative decision is not challenged, thus, the issue of receivability does not arise. Rather, the downgrade of his post was one of a series of preparatory steps which ultimately led to his separation, and there was no reviewable administrative decision arising from the downgrade of his post;

3) In the Applicant's request for management evaluation submitted on 16 October 2014, he also challenged his non-selection for the post of P-5 level Deputy Director, thus, this issue is receivable. He had applied to this post as part of the job fair exercise. In the management evaluation request, the Applicant argued that the non-selection for the post of P-5 Deputy Director was the result of bias;

4) The Applicant had reason to believe that the Administration had, as early as 13 June 2014 and before the position was first advertised, already decided to select an external candidate for the post even though internal candidates affected by the restructuring were to be given priority. The Applicant was told by the Director of BERA at a meeting that day that a request had been submitted, and the approval received, to advertise the post externally and that the Director had already identified a candidate from another recruitment to that post. This same decision is being challenged by the Applicant;

5) The Respondent's contention that the Applicant did not request management evaluation of the decision not to renew his appointment is without merit. The Applicant's request for management evaluation raised his concerns regarding the reclassification of his post, but it was not limited to this issue. He stated at the outset that there was effectively an administrative decision to separate him from service. When the Applicant submitted his management evaluation on 16 October 2014, his post had been abolished and he had not been able to secure another position through the job fair. The Applicant concluded that his appointment would not be renewed. In the management evaluation request, the Applicant specifically stated that, "I have been given no formal notice of my termination, although I have seemingly been deprived of my functions";

Merits

The preliminary decision to abolish the Applicant's post

6) Whilst the abolishment or reclassification of his P-5 level post as a separate administrative decision is not challenged, issue is taken with this as a preparatory step, conducted in an unlawful manner, which ultimately led to his separation;

7) While the Administration has the power to restructure some or all of its departments or units, including the abolition of posts and the creation of new posts, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members in a restructuring exercise (*Matadi* 2015-UNAT-592). The role of the Dispute Tribunal is to determine whether the abolition and reclassification of the Applicant's P-5 level post was "vitiated by bias or bad faith, that is, if it was taken for an improper purpose" (*Toure* 2016-UNAT-600);

8)

the Director of BERA in his email of 23 May 2014, the span of control for the new Team Manager post is in fact much wider and is unmatched in BERA. The new post of Team Manager supervised eight Professional staff and one General Service staff, which is a much wider supervisory function when compared with another Team Manager for the Services and Outreach Unit which supervises just four Professional staff and one General Service staff. The new Team Manager post, based on its scope should have been classified at the P-5 level. Instead, it was unlawfully downgraded to the P-4 level;

10) The Team Manager post was initially ranked at the P-5 level based on the International Civil Service Commission classification. Thereafter, the Respondent applied a "Global Master Standard" which it claims to have resulted in a lower ranking of P-4 level. However, it is not clear what this Global Master Standard is. There is no reference to a Global Master Standard in any of the documents and, furthermore, it is not known how this purported standard was applied to rank the Team Manager post. The Administration thus failed to act fairly, justly and transparently in classifying the new post;

Non-selection

11) All candidates for a job vacancy have the right to have their applications fully and fairly considered, and the Applicant was denied this right when he applied for the Deputy Director P-5 level post;

12) At the meeting that the Applicant attended with the Director of BERA, he was informed that approval for the recruitment of an external candidate for the position had been sought and already been provided. The Director further explained that he expected to eventually select one of the short-listed candidates from another recruitment for the Deputy Director P-5 level post;

16) In the letter officially notifying the Applicant of his separation, he was informed that "[a]s you are aware, your post was abolished in the context of the Structural Review exercise and you were not successful in finding a position during the job fair. As a result, I am writing to notify you that your last day of employment with UNDP will be at the expiration of your current

reading of this contested decision reflects that the Applicant attempts to contest the j

21) The jurisprudence of the Dispute Tribunal and the Appeals Tribunal is clear—final selection/non-selection decisions are contestable as they have direct legal consequences on the concerned staff member's terms of appointment. The Applicant did not contest any specific final selection or non-selection decision for either of the three posts to which he applied;

22) To the contrary, in para. 9 of the Applicant's application, he confirmed that he was not contesting these decisions by submitting that the first "[t]wo [posts] went to internal candidates and will not be discussed further". In addition, throughout his submissions, the Applicant submitted that, at the time of his management evaluation request, no selection decision had been taken with respect to the third post, though he noted that his non-selection was communicated to him on 8 October 2014. If the Applicant states that he will not discuss two out of three posts to which he applied, there is no basis for the Respondent to review whether those decisions were or were not proper, nor is there any basis for the Dispute Tribunal to consider those decisions;

23) In response to Order No. 143 (NY/2016), the Applicant submitted that he was contesting "the process by which he was separated" and that it was "only when he was formally notified of his non-selection [that he was] in a position to challenge the decision regarding his separation". The Applicant was clearly aware that he had been notified of his non-selections, yet he did not contest them in his management evaluation request, nor did he identify them as decisions being contested before the Dispute Tribunal. Instead, the Applicant identified his legal challenge as being "the decision regarding his separation";

24) The post selection exercise for the P-5 level post complied with "the People Realignment Policy and Processes" and it was not motivated by bias in favor of any candidates. Further, the Applicant does not and did not contest his non-selection for the P-5 post of Deputy Director. Rather,

the Applicant contested a "flawed" process and undefined "decisions concerning his non-selection". Had the Applicant specifically contested this decision, there would be no merit to this challenge as his non-selection was the result of a proper exercise of discretion;

25) The Applicant asserts that the job fair exercise was a pretense, was opaque and that, on 13 June 2014, the Director, BERA allegedly stated that he expected to place one of the candidates who had been short-listed for the post, "Director, Communications", in the P-5 level Deputy Director, Communications position. As reflected in the parties' joint statement, the Applicant's assertions regarding the 13 June 2014 meeting and the ensuing post selection are contested. At no point during the proceedings has the Applicant provided any evidence in support of his submission. The Applicant failed to identify potential witnesses, provide evidence in support of his allegations or request an oral hearing. The Dispute Tribunal may draw the relevant inference from the Applicant's clear reluctance to provide evidence in support of his own statements;

26) The job fair process, a procedure that was applied uniformly to all staff members affected by UNDP's restructuring, was clearly set out in "the People Realignment Policy and Processes" and was not contested by the Applicant. The Applicant has not provided any evidence identifying how this policy was breached, whether as a whole or with respect to the P-5 level Deputy Director post. The Applicant's assertion that a short-listed candidate was expected to be selected while also stating that the post would need to be advertised externally are two diametrically opposite propositions and do not stand scrutiny;

27) The Director, BERA, was not on the panel that reviewed the applications for the P-5 level post of Deputy Director and did not have a role in recommending a candidate during the desk review. A review panel only considers candidates who apply to the specific post under review

or request, namely the Organization's failure to act can be viewed as an implied decision;

33) At no time in the Applicant's request for management evaluation, nor in his application, does the Applicant state that an implied decision to separate him was taken. Rather, in his application, the Applicant stated that following his non-selection in the job fair, he "knew he would be separated". The Applicant then admits that he "was formally notified" of his non-renewal on 4 November 2014. At no time has the Applicant requested, or attempted to request, management evaluation of the 4 November 2014 decision not to renew his appointment;

34) The mere fact that the Applicant was of the belief that he would not be renewed does not make it so, absent a representation to that effect by the Organization. To the contrary, it would open the floodgates to staff members stating they "knew" an administrative decision was coming, irrespective of whether a decision had already been taken, or much less notified to the staff member;

35) The Applicant may not unilaterally decide that the decisions not to select him constituted an implied notification of the non-renewal of his appointment. The Applicant attempts to circumvent the hurdle of the date on which the notification of his non-renewal was given to him by, as reflected in his response to Order No. 137 (NY/2017), stating that the 4 November 2014 decision was a written confirmation of an earlier implied decision. There is no evidence that the Administration failed to take a decision or that it failed to act on a request from the Applicant regarding the renewal of his appointment thereby producing an implied decision not to renew the Applicant's appointment. In *Rabee* 2013-UNAT-296, the Appeals Tribunal found that "[a]n appellant may not unilaterally determine the date of the administrative decision" for the purpose of challenging it, and "[t]he date

> … The Applicant became aware on 8 October 2014 that he was unsuccessful in the job fairs, including his application for the P5 post of Deputy Director. He does not know who the decision-maker was.
>
> … At the same time, by implication, the Applicant became aware that his contract would not be renewed beyond 31 December 2014. This decision was confirmed in writing in the letter dated 4 November 2014 from [the] Assistant Administrator and Director, [BOM] of UNDP at the time.

27. The Applicant eventually identified the contested decisions as: (a) his non-

Monarawila UNDT/2016/019 and also the Appeals Tribunal in *Pirnea* 2013-UNAT-311, *Applicant* 2013-UNAT-311.

30. It is common cause that in the Applicant's request for management evaluation, his Counsel specified the decisions for management evaluation as follows:

> 1) "Decision to reclassify my post downwards";
>
> 2) "[D]ecision to separate me on the basis of reclassification of my post";
>
> 3) "[D]ecision to remove all of my managerial responsibilities until year-end, a constructive dismissal;
>
> 4) "[D]ecision to foreclose the possibility of appropriate reassignment through the job fair by: … a) pre-selecting particular posts to go to external candidates"; ... b) generating an opaque, perpetually morphing and apparently ad hoc process of change management".

31. The Applicant submits that his non-selection for the P-5 level post as Deputy Director, did indeed form part of his request for management evaluation dated 16 October 2014 as he had applied for this post as part of the job fair exercise, and also argued in the management evaluation request that his non-selection was the result of bias.

32. The Tribunal notes that, while the non-selection decision is not explicitly mentioned in the Applicant's list of impugned decisions in his management evaluation request, it could be regarded as subsumed under the description of "pre-selecting particular posts to go to external candidates" and the suggestion that the process was not transparent but "opaque". In a "narrative" attached to the management evaluation request, the Applicant further explains in relevant part that (emphasis omitted):

…

ii) The jobs fairs and the Deputy Director recruitment

… On 13 June 2014, a new Deputy Director (P5) post was discussed at a meeting of the communications group, which I

34. In the application to the Dispute Tribunal, Applicant's Counsel described the contested decision as, "non-selection in retention exercise". Under the heading, "Summary of the facts of the case or facts relied upon", it was further elaborated that (emphasis added):

> … To attempt to save his job, [the Applicant] applied for three posts, the maximum

35. While the presentation of the non-selection decision is inelegantly stated in both the management evaluation request and the application before this Tribunal, Applicant's Counsel did explicitly refer to the decision regarding the P-5 Deputy Director post in the respective narrative sections when describing the Applicant's case. In its response to the management evaluation, UNDP also, at least indirectly, makes reference to the non-selection decision. The Tribunal therefore finds that, in reference also to the Appeals Tribunal's abovementioned decision in *Planas and Applicant* or *Fasanella* 2017-UNAT-765 (see below), the Applicant did request management evaluation of the non-selection decisions and that his claim in this regard is receivable pursuant to art. 8.1(c) of the Dispute Tribunal's Statute and staff rule 11.2(a).

36. As for the decision not to renew the Applicant's fixed-term contract, the Respondent submits that because this decision was notified to the Applicant on 4 November 2014, it could not have formed part of his request for management evaluation, which was filed on 16 October 2014.

37. Counsel for the Applicant argues that the Applicant did request management evaluation of this decision in that, when the Applicant submitted his management evaluation on 16 October 2014, his post had been abolished and he had not been able to secure another position through the job fair. Counsel for the Applicant further submits that, on this basis, the Applicant concluded that his appointment would not be renewed and that, in the management evaluation request, the Applicant therefore also appealed his non-renewal by stating that, "I have been given no formal notice of my termination, although I have seemingly been deprived of my functions".

38. The Tribunal notes that the Applicant does not explicitly refer to any non-renewal decision in the list of decisions set out in the management evaluation request. Implicitly, reaching such conclusion would only be viable based on the reference to the "decision to separate [the Applicant] on the basis of reclassification of [his] post" because such separation could have been the result of

within 60 days from the date he received notification of this administrative decision. Although the Applicant questioned the processes leading up to his eventual separation by nonrenewal of contract, he never alleged that the Respondent failed to make good faith efforts to place him on a suitable alternative post in the required order of preference pursuant to the Staff Rules

32. As the Appeals Tribunal has explained, the starting point for judicial review is a presumption that official acts have been regularly performed:

the panel independently decided not to recommend an internal candidate during two successive rounds that the post was advertised externally on 9 October 2014.

50. In his application, the Applicant states that "Numerous witnesses were present" when the Deputy Director BERA announced at a meeting of the communications group, that a short-listed candidate from another recruitment exercise had already been identified to fill the P-5 level