



Case No.: UNDT/NBI/2013/094

Order No.: 265 (NBI/2013)

Date: 23 December 2013



abolished effective 1 July 2013 his contract would not be extended beyond 30 June 2013.<sup>2</sup>

7. There were five other Finance Management Specialists at the NOC level in the Applicant's division at that time, four of whom were recruited around the same time as the Applicant.

8. On 6 June of 2013, the Applicant wrote to the Regional HR Practice Advisor of UNOPS, complaining that the decision to abolish his post did not appear to have been taken fairly.<sup>3</sup> The Applicant stated that it was not clear why his post was singled out for abolishment, as he has four other colleagues on the same post at the same level who had been recruited at the same tim



16. On 11 October 2013, a draft cost proposal for 2014 pertaining to UNOPS's Ethiopia office was circulated. This contained a list of all of the key services that would be provided by the UNOPS's Ethiopia office in 2014 and specified the staff members who would be providing those services.

17. All of the Financial Management Specialists employed by UNOPS' Ethiopia office were included on this draft cost proposal, except for the Applicant.<sup>9</sup>

18. The Applicant sought clarification as to why he was excluded from the 2014 draft cost proposal but no substantive response was provided.<sup>10</sup> Mr. Shimkus later told the Applicant: "The draft [cost proposal] was developed by the Global Fund, not UNOPS. We will follow our established procedures for determining staffing."

19. On 12 November 2013, the Applicant received a letter from Mr. Shimkus stating that due to lack of funding, his post was being abolished as of 31 December 2013.<sup>11</sup>

20. On 13 November 2013, Mr. Shimkus sent an email to the LFA team in Ethiopia regarding the 2014 staffing situation and how the Global Fund's 2014 Ethiopia cost proposal would impact staffing.<sup>12</sup> The email stated that the Global Fund was continuing to reduce both funding and the services that it was requesting, such that the then-current level of LFA staffing could not be maintained and that a restructuring would take place. The email also stated that the restructuring would include the abolishment of some positions, continuation of some positions, and the creation of new positions. The email also detailed the new 2014 Ethiopia LFA staffing structure, which included two new Financial Management Specialist positions at the NOC level. The six Financial Management Specialist positions at the NOC level that were in existence were not included in the 2014 staff structure.

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<sup>9</sup> Applicant's Annex 9.

<sup>10</sup> Applicant's Annex 10.

<sup>11</sup> Applicant's Annex 11.

<sup>12</sup> Applicant's Annex 12.

21.







loss of opportunity, as a result of an unlawful decision, cannot be properly compensated and represents an irreparable harm.

37. The Respondent argues that there was nothing to show that the Applicant would have been one of the two selected candidates, even if the “job fair” method of selection was employed. The Respondent cites the case of *Karl* Order No. 110 (NBI/2010) in which the Court stated as follows:

The Applicant submitted that he was recommended for the post. However, in light of the fact that the Applicant was not the only recommended candidate, it cannot be concluded that he would have been selected for the post.

### **Deliberations**

38. Applications for suspension of action are governed by art. 2 of the Statute of the United Nations Dispute Tribunal (“the Tribunal”) and art. 13 of the Tribunal’s Rules of Procedure. The three statutory prerequisites contained in art. 2.2 of the Statute, i.e. *prima facie* unlawfulness, urgency and irreparable damage, must be satisfied for an application for suspension of action to be granted. Under art. 13.3 of the UNDT Rules, the Tribunal has five working days from the service of an application on the respondent to consider an application for interim measures.

39. A suspension of action order is, in substance and effect, akin to an interim order of injunction in national jurisdictions. It is a temporary order made with the purpose of providing an applicant temporary relief by maintaining theef(por)]TJns forD s beng the-5.4( )]-22 99.6



47. The Applicant is on a fixed-term appointment. Whereas it is trite law that a fixed term appointment dies a natural death at the end of the period stipulated in the contract, staff members across contractual types are entitled to expect to be treated fairly and accorded the same due process rights.

48. In other words, the Respondent's exercise of its broad discretionary authority must not be "tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness, or other extraneous factors that may flaw his decision."<sup>20</sup>

49. While the burden is on the Applicant to show that the Respondent did not properly exercise his discretion, the Tribunal is not required at this stage to resolve any complex issues of disputed fact or law. All that is required is for a *prima facie* case to be made out by the Applicant to show that there is a triable issue here.<sup>21</sup>

50. There is ample jurisprudence regarding the grounds upon which a decision not to renew a fixed-term appointment may be found unlawful. In *Koumoin* the Appeals Tribunal held that, in reviewing a decision not to renew an appointment, it examines "whether the discretion not to renew ... was validly exercised."<sup>22</sup> Similarly, it has been held at first instance that:

[E]ven though the staff member does not have a right to the renewal of

may be set aside only where there has been a breach of procedure or *mala fides* on the part of the reviewers as to taint the entire exercise.

52. On the facts of the present case, the Tribunal has carefully reviewed the submissions of the Parties, and is not persuaded that the decision of the Respondent to abolish the six posts and consolidate the functions of the six *vis-à-vis* needs and advertise two new posts to reflect those needs and new funding realities, was improperly made or tainted by bias and bad faith.

53. The Tribunal also notes that the Applicant was afforded the opportunity to compete for those two new posts, but chose not to.

54. Having found that the impugned decision was not *prima facie* unlawful, and given that the test for suspension of action is *cumulative*, the Tribunal considers a review of the facts against the remaining two limbs of the test unnecessary.

55. The Application for Suspension of Action is hereby **DISMISSED**.

(Signed)

Judge Vinod Boolell