



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/071

Judgment No.: UNDT/2016/085

Date: 17 June 2016

Original: English

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**Before:** Judge Coral Shaw

**Registry:**

## **Introduction**

1. The Applicant challenges the decision dated 19 August 2014 not to renew her fixed-term appointment (“FTA”) with UNDP Sudan.

## **Procedural history**

2. The Applicant filed an Application with the United Nations Dispute Tribunal (“UNDT”) in Nairobi on 24 June 2015. The Respondent filed his Reply on 30 July 2015.

3. Pursuant to Order Nos. 352 (NBI/2016) and 366 (NBI/2016), the parties submitted a joint statement of agreed facts on 30 November 2015 but, as they were not able to agree on the issues, they presented them separately in their joint submission.

4. At a case management discussion (

from UNDP Senior management “show the invitation to staff members to participate in an office wide staff meeting about the restructuring process, its proceedings, suggested new organigrams, and decisions made”.

9. After reviewing the additional documents submitted by the Applicant, the Tribunal, in accordance with arts. 18.1 and 18.5 of its Rules of Procedure, has concluded that these documents are not relevant to the case at hand because they relate to events that occurred after the Applicant’s separation. Accordingly, the Applicant’s motion is rejected.

### **Facts**

10. The following facts are taken from the pleadings and the detailed joint statement of facts submitted by the parties. Oral evidence was given at the hearing by the Applicant, Ms.

Specialist until January 2013 at which time she assumed the functions of the PCSAU Supervisor without any change to her Terms of Reference (“TOR”).

13. Mr. Kuhnel was part of a Management Consulting Team engaged in October and November 2012 to develop the overall rationale, functional structure and terms of reference for a new division of UNDP Sudan Office. In January 2013, following an in-depth review of the Sudan Country Office, an Oversight Support Division (OSD) was created to realign and streamline the office structure and existing capacities in Khartoum and the field locations. Mr. Kuhnel became the Team Leader of that division.

14. On 7 February 2013, Mr. Kuhnel shared the TORs for the new OSD which was to comprise four teams. One of these was the Partnership and Communications Team (“PACOM”) which was proposed to supersede PCSAU. He requested comments by close of business on 10 February 2013.



22. Mr. Kuhnel told the Tribunal that in January 2014, driven by the Financial Sustainability and Effectiveness plan and the sharp decrease in available funding, the three divisions of UNDP Sudan: OSD, Programmes, and Operations, were asked to assess and review their structures in light of the business needs for the next two years. Over the next six months the Senior Management Team (SMT) conducted an analysis and functional review of OSD's teams, the required changes and the implementation of those changes. This was referred to as the

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2013, with tangible opportunities to achieve all her objectives in 2014.

27. On 16 March 2014, the Country Director, UNDP Sudan, sent an email to the team leaders in UNDP Sudan which stated:

that specific communication projects and the staff related to these projects would continue to be supervised by the Applicant.

31. On 1 May 2014, the first issue of the UNDP Sudan Digest informed both UNDP staff and its external partners of the status of the UNDP Country Programme Refocusing and Alignment process. On 20 and 21 May the UNDP Administrator published updates on the structural review of UNDP based on the UNDP Strategic Plan and referred to “reorganizing functions and sharing new organograms for each bureau which were the first step of the realignment process”.

32. The Applicant continued to be concerned about the effects of the arrival of the PACOM Team Coordinator, in particular that she had been excluded from management meetings that she had formerly attended and sent an email to Mr. Kuhnel to that effect on 19 May 2015.

33. Mr. Kuhnel replied to the Applicant on 20 May 2015 agreeing for her to take part in work plan discussions relating to the PACOM team. He said that she was also most welcome to join the OSD weekly coordination meeting. He added that he was “very supportive of her engaging in strategic OSD issues as she had in the past”. He noted that the PACOM team is one team managed by the PACOM Team Coordinator. One of PACOM’s functions was to bring the partnership and communications functions together. He said he needed to be able to discuss issues related to PACOM with the PACOM Team Coordinator that are not specific to communications and trusted that the PACOM Team Coordinator would internally communicate and discuss further as required. He agreed that as much as possible the Applicant should be part of these discussions.

34. On 25 May 2014, the Applicant responded to Mr. Kuhnel stating:

I cannot agree with you anymore that PACOM is one team coordinated by ... the Team Leader and I have collaborated with her under this capacity since she joined the Team. It should be noted, however, this doesn't eliminate my role as Head of the Communications Team, as per my TOR. If you recall our recent discussion in which you indicated your intention to abolish my current title and change it to Senior Communications Officer, for



which I still need further clarifications.

Still, I am happy to work in collaboration with the [External

continuing the realignment exercise and building on the results of the last workshop. The Applicant contends that this was the last email received from UNDP Senior Management with regards to the realignment process.

40. On 26 August 2014, the Applicant made an official complaint with the UNDP Resident Representative against Mr. Kuhnel claiming: (i) Abuse of Authority/Harassment and Discrimination; (ii) Blackmailing; and (iii) Retaliation. She claimed that she had “a legitimate expectation for her contract to be extended based on her solid performance and substantial contribution”. The Resident Representative acknowledged receipt of the email and forwarded it to the Office of Audit and Investigations (“OAI”) for its consideration and advice.

41. On 23 September 2014, the Deputy Director, OAI, responded to the Applicant. He stated that “[a]fter a review into the allegations that you forwarded on 26 August and 18 September 2014, OAI has determined that an investigation is not warranted”. He noted that OAI had closed the case because the issues identified by the Applicant were of a general managerial nature and had been referred to the Country Office for appropriate action.

42. On 28 September 2014, the Applicant and Mr. Kuhnel were invited to meet separately with an independent panel (“Panel”) established to review the Applicant’s complaint.

43. On 29 September 2014, Mr. Kuhnel sent an email to the Country Director, the Deputy Country Director/Operations and the Deputy Country Director/Programme requesting comments on the draft OSD structural review.

44. The Panel sent its findings to the Resident Representative, UNDP Sudan on 29 September 2014. The review concluded that the Applicant’s complaints were “not admissible” as the discussions were more of a consultative nature on how to make the team more effective and introduce necessary changes in the roles and responsibilities. The Panel noted *inter alia* that the Applicant did not make







She was separated on 10 November 2014. On 1 December 2014, she filed a request for management evaluation of the contested decision.

### Issues

59. The Tribunal determined that the issues in this case are<sup>2</sup>:
- a. Did the administration follow the correct procedure during the restructuring/realignment of OSD?
  - b. Did the Administration follow proper and fair procedure in reaching the decision not to renew the Applicant's FTA, including providing sufficient reasons?
  - c. Did the Applicant have a legitimate expectation that her FTA would be renewed?
  - d. Was the decision not to extend the Applicant's FTA motivated by extraneous, discriminatory or improper grounds?
  - e. If the contested decision is found to be unlawful, what remedies should be granted to the Applicant?

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Leader was done with ill motives and bad faith after the creation and filling of the position of PACOM Team Coordinator.

63. The PACOM Team Coordinator was hired to take away the Applicant's position while the OSD Team Leader waited for her contract to expire. The preferential treatment of the PACOM Team Coordinator by the Team Leader suggests favouritism. The Applicant was stripped of her managerial functions when no authorized restructuring or reclassification had been authorized.

64. The Administration failed to provide formally clear reasons in support of its decision and gave five ambiguous and conflicting reasons for not renewing the Applicant's contract. The Applicant contends that there was no reason mentioned in the Country Director, UNDP Sudan's letter for the Applicant's separation. It is trite law that the duty of procedural fairness requires a written explanation for a decision. However, the Administration failed to provide clear reasons in support of its decision. The letter communicating the decision not to renew the contract stated that the decision was made "[i]n line with [management's] discussions with [the Applicant]" is insufficient to clearly communicate the rationale behind the decision and to allow the Applicant to decide whether there are grounds for appeal.

65. There was no realignment or reorganization procedure but if there was, such a process is supposed to be carried out in a fair and transparent manner and not to target any particular staff member.

66. The decision to abolish the Applicant's post before a conclusive report was prepared by the UNDP Resident Representative was arbitrary and unfair.

67. The OSD Team Leader did not exercise careful managerial judgment in abolishing the Applicant's post. He created the PACOM Team Coordinator post with overlapping functions and selected a person who was his friend and whose qualifications and experience did not qualify her for the position. She earned five times more salary than the Applicant and therefore her appointment did not meet the aim of financial sustainability.

68. Though the Applicant's employment created no expectation that her





occasions, verbally on 19 August 2014, in writing on 1 October 2014 and in an email dated 28 October 2014<sup>3</sup>.

76. The Applicant has provided no evidence to support her allegations of favouritism in the allocation of functions to the PACO

justly and transparently in dealing with its staff members<sup>5</sup>. The decision must be based on reasons which are able to be substantiated by evidence and the procedure adopted must be in accordance with relevant rules and policies.

### *Issue 1*

#### ***Did the Administration follow the correct procedure during the restructuring/realignment of OSD?***

82. The Tribunal was advised by the Respondent that UNDP did not promulgate specific procedural guidelines to cover structural reviews in Country Offices<sup>6</sup>. In their absence the general principles of fair and transparent procedure apply.

83. The Tribunal finds that there were two separate structural changes at the UNDP Sudan Country Office. The first was the restructuring of OSD in early 2013 resulting in the creation of the PACOM team coordinator position. This is a matter which was entirely in the discretion of the Administration of UNDP. It was done with full consultation with the staff members including the Applicant.

84. Although from as early as August 2013 the Applicant was concerned about the possibility that the TOR of the new post would overlap with her TOR, the evidence is that at no time from when OSD came into existence until the end of her FTA, were the Applicant's TOR or her job functions altered as a result of the creation of OSD or the PACOM team coordinator post. Throughout, she remained the Communications Specialist with the same level of supervisory responsibilities. On the arrival of the PACOM team coordinator she was initially not invited to some meetings she had been attending but this was rectified when she brought it to the attention of Mr. Kuhnel.

85. The second structural change followed the directive from UNDP Headquarters (HQ) in August 2013 which required Country Offices to develop financial sustainability and effectiveness plans in alignment with the UNDP

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<sup>5</sup> *Hersh* 2014-UNAT-433/Corr. 1; *Bali* 2014-UNAT-450; *Pacheco* 2013-UNAT-281

<sup>6</sup> At the Tribunal's request the Respondent produced a document entitled "People Realignment Guidelines" which were referred to in the Administrator's email dated 21 May 2014.

Strategic Plan. The UNDP Sudan SMT conducted an extensive review that resulted in the realignment of a number of posts within OSD including the abolition of the Applicant's post.

86. The Tribunal finds that the OSD Team Leader led an objective and unbiased review of the division for which he was responsible under the guidance of the SMT.

87. The existence and progress of the realignment plan was communicated through workshops and publications to all staff members and by 3 August 2014 the proposed structural changes were presented in writing.

88. Contrary to the contentions of the Applicant, the Tribunal finds that the 3 August 2014 review of OSD set out the structural and process changes to be followed and the actions taken to implement the proposals. The signing off of that document on in January 2015 by the Resident Representative marked the end of the implementation.

89. The Tribunal concludes that there were no procedural irregularities in either the creation of OSD or the subsequent realignment process. Both were undertaken in a fully transparent manner, with full consultation of all staff members including the Applicant.

## *Issue 2*

***Did the Administration follow proper and fair procedure in reaching the decision not to renew the Applicant's FTA including providing sufficient reasons?***

90. There is no evidence to support the Applicant's contention that the PACOM Team Coordinator's position was created with the intention to cause her position to become redundant or as a consequence of her performance. Following the creation of the new post, and before the vacancy was filled, the Applicant's contract was renewed for a further year. Her performance was rated as "Good".

91. The decision that her post should be abolished was made on the basis of

the 3 August review. There is no doubt that the arrival of the PACOM Team Coordinator added another layer of supervision to the PACOM team which the Applicant thought was unnecessary and unjustifiable. However, as the review indicates, the Administration regarded the new post as having strategic importance and value. In the absence of any countervailing evidence the Tribunal may not second guess that justification.

92. The OSD Team Leader told the Applicant of the possibility that her contract would not be extended as early as 19 August 2014 giving her three months to prepare for the end of her contract.

93. It is clear from her reaction (she

96. There is no contest that the OSD Team Leader assured the Applicant that she would continue to manage the communications functions as shown in the PACOM organogram after the hiring of the PACOM Team Coordinator. However this was a reiteration of her existing TOR, not a promise that her contract would be renewed on its expiry.

***Issue 4***

***Was the decision not to extend the Applicant's FTA motivated by extraneous, discriminatory or improper grounds?***

97. In *Morsy* 2013-UNAT-298, the Appeals Tribunal held that an administrative decision not to renew an FTA -- even one not to renew based on poor performance -- can be challenged on the grounds the decision was arbitrary, procedurally deficient, or the result of prejudice or some other improper motivation. The staff member has the burden of proving such factors played a role in the administrative decision.

98. The Applicant claims that there are several indicators of extraneous grounds for the decision not to renew her contract. They all stem from the creation of the post of PACOM team coordinator and the subsequent impact, as she saw it, on her role of Communications Specialist. The Tribunal has already found that there was no ill motivation at play in the creation of that post.

99. Once the PACOM team coordinator position was filled in 2014, the Applicant was no longer required to act as the overall supervisor of the PACOM team as she had been for the previous several months. That was the logical consequence of the vacancy being filled.

100. The allegation that the non-renewal decision was motivated by the complaint that the Applicant had made about the OSD Team Leader is not supported by the chronology of events. That complaint arose from her meeting with the OSD Team Leader on 17 April 2014 but she did not bring it to the attention of the Administration until she formally submitted it on 26 August 2014. The underlying reasons for the ultimate decision that the post encumbered by the

Applicant was to be made redundant were apparent to the Administration on 3 August 2014 when the review of OSD was finalised. The Team leader OSD advised her of the possibility that her contract would not be renewed on 19 August. By the time the Applicant made her complaint on 26 August 2014 the realignment of OSD which led to the abolition of her post was well

Entered in the Register on this 17<sup>th</sup> day of June 2016

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi