



Case No. UNDT/NBI/2015/095

UNDT/NBI/2016/023

## **Facts**

7. The Applicant was appointed to the post of Legal Officer at the P-4 level with the MONUSCO Legal Affairs Office on 24 September 2011.

8. On 22 October 2012, he formally complained of harassment and abuse of authority against senior management in MONUSCO.

9. On 25 July 2014, following several applications by the Applicant to the UNDT in Nairobi, the parties were urged by the Tribunal to enter into settlement discussions with a view to mediating their disputes.

10. The settlement discussions started late in 2014 and the parties entered into a Settlement Agreement which the Applicant signed on 5 May 2015.

11. Two days later, on 7 May 2015, an email was sent to the Applicant by a Human Resources (HR) officer informing him that he was part of a pool of staff members who had not submitted his documents for an ongoing Comparative Review

14. On 25 May 2015, the Applicant submitted a formal written complaint of prohibited conduct to the SRSG against his First Reporting Officer (FRO), the

offender of his complaint because the SRSG had not responded to him with a timely response to his complaint of 25 May 2015 within sixty (60) after its receipt.

19. On 31 July 2015, the Applicant was separated from the Organization. On the same day, the Management Evaluation Unit (MEU) issued a letter affirming the impugned decision. The Applicant received a memorandum from the DMS on the same day informing him that he would be separated from service at close of business.

20. On 3 August 2015, the Director of the Ethics Office informed the Applicant that his request had been reviewed and determined that the information he provided did not establish a *prima facie* case of retaliation in accordance with ST/SGB/2005/21.

21. On 16 September 2015, the Applicant requested management evaluation of the Ethics Office's decision dated 3 August 2015.

22. On 20 September 2015, the Applicant made additional allegations of retaliation with the Ethics Office. He alleged that the decision not to renew his appointment beyond 30 June 2015 as well as various other actions taken by the DMS related to his checkout from MONUSCO constituted retaliation.

23. On 22 September 2015, MEU informed the Applicant that his 16 September 2015 request for evaluation of the Ethics Office's 3 August 2015 decision was not receivable because it was not an administrative decision of the Secretary-General.

24. On 6 October 2015, the Applicant requested the Under-Secretary-General, Department of Field Support (USG/DFS) to appoint an investigation panel to review his allegations of prohibited conduct under ST/SGB/2008/5 against four members of MONUSCO's senior management.

25. On

panel to investigate his ST/SGB/2008/5 complaint against the SRSG. He requested management evaluation before he received the USG/DFS's decision on his complaint.

32. On 20 January 2016, the Under-Secretary-General, Department of Management (USG/DM) informed the Applicant that the Secretary-General had upheld the SRSG's decision not to convene a fact-finding panel to investigate the three MONUSCO staff members.

33. On 12 February 2016, the USG/DM informed the Applicant that the Secretary-General had upheld the USG/DFS's decision not to convene a fact-finding panel to investigate the allegations against the SRSG.

## **Submissions**

### ***Applicant***

34. The decision to nationalize the post encumbered by the Applicant was tainted by extraneous factors. He was targeted for separation. The Respondent has failed to prove that the abolishment of his post was unrelated to his complaints against the Mission's senior management. The Applicant was the only staff member in the legal office to lose his job.

35.

restructuring exercises, a Mission would first abolish vacant posts to minimize effects on staff members. There was a vacant P-3 post, with terms of reference identical to that of the P-4 encumbered by the Applicant, which was not nationalized.

37.



41. The Mission made no effort to place the Applicant against any other suitable and vacant posts at his level. Ms. Seck in fact testified that “no efforts were made to place the Applicant within MONUSCO or elsewhere.”

42. The Respondent’s refusal to investigate the Applicant’s complaint against the Mission’s senior management was unlawful. The Mission ignored the Applicant’s complaint for a long time and it took the intervention of the Conduct and Discipline Unit in Headquarters before receipt of the complaint was even acknowledged.

43. The oral and documentary evidence in this case clearly demonstrates that the Respondent failed to treat the Applicant with the dignity and respect owed to international civil servants.

***Respondent***

44. The decision not to renew the applicant’s appointment was lawful.

45. A fixed-term appointment does not carry any expectancy of renewal, irrespective of length of service. The Secretary-General’s discretion not to renew an appointment is however not unfettered. The Applicant bears the burden of proving that the discretion not to renew his appointment was tainted or improperly exercised.

46. The Applicant, therefore, had no legitimate expectancy of renewal when his contract expired on 31 July 2015. Contrary to the Applicant’s contentions, there is no indication that the Settlement Agreement he signed to resolve prior litigation promised him “a new beginning”. On the contrary, the agreement expressly states in paragraph 3 that the post the Applicant encumbered would be “on loan from the Office of Legal Affairs (OLA) to the Security Sector Reform Unit (SSRU)” until 30 June 2015 in accordance with the memorandum between OLA and the SSR Unit.

47. There was no promise that the Applicant's appointment would be renewed beyond 30 June 2015 or that the post would be loaned to the SSR Unit beyond 30 June 2015. Indeed, the agreement expressly states in paragraph 3 that in accordance with the Staff Rules and Regulations "there is no guarantee that any posts will carry any expectancy of renewal or of conversion."

48. The nationalization of a P-4 Legal Officer post was discussed during the mediation that led to the Settlement Agreement. The Administration performed on all its obligations under that agreement. The Applicant does not allege that it has not; nor has he filed an Application for Enforcement of the Settlement Agreement pursuant to article 8 of the Dispute Tribunal's Statute and as provided in paragraph 16 of the Agreement. The Applicant's allegations contravene the plain language of the agreement. The Applicant's claim that the non-renewal of his appointment violated the agreement has no basis in law or fact.

49. The post encumbered by the Applicant was legitimately nationalized as part of a properly conducted restructuring exercise.

50. A proposal to restructure a mission that results in loss of employment for staff members falls within the Secretary-General's discretionary authority. The Respondent has a wide, but not unfettered, discretion in implementing *bona fide* retrenchment exercises. The Dispute Tribunal's review is limited to whether the restructuring was conducted in accordance with relevant procedures, due process was properly accorded, and it was properly motivated.

51. Where a retrenchment process involves a comparative review of staff, the review must be based on objective criteria, and carried out by a process that is impartial and transparent. Like a review of a non-selection decision, the Dispute Tribunal may not substitute its views for those of the Administration in determining



post the Applicant encumbered was identified for retrenchment. The other P-4 Legal Officer also had higher e-PAS ratings than the Applicant, even taking into consideration his revised e-PAS evaluations resulting from the Settlement Agreement.

57. The Applicant has adduced no evidence to show that the comparative review results were flawed. Notwithstanding the late individual notification to the Applicant, he was aware of the comparative review process both from the Information Circulars and from the discussions of the resolution of his prior litigation. His challenges to the comparative review should therefore be dismissed.

58. The Applicant also claims that he should have been laterally assigned to a vacant P-3 Legal Officer position. MONUSCO was not required to assign the Applicant to that post. First, the mission undertook lateral assignments, where appropriate. Mr. Siri testified that MONUSCO had no authority to assign the Applicant, a P-4 Legal Officer, downward to a P-3 Legal Officer posthe

Case No. UNDT/NBI/2015/095

UNDT/NBI/2016/023

Judgment No. UNDT/2019/003



## **Deliberations**

69. Through the mountain of pleadings and oral and documentary evidence tendered before the Tribunal, several issues have been raised and addressed by both parties. The Applicant in his first Application UNDT/NBI/2015/095 challenged the non-renewal of his FTA beyond 30 June 2015 and challenged also the implementation of the Settlement Agreement reached between the parties on 5 May 2015 which he alleges was entered into by the Respondent through deception and tainted by bad faith on the part of the Respondent.

70. In his second application UNDT/NBI/2016/023, the Applicant severally alleges discrimination and mistreatment and other prohibited conduct on the part of his former FRO and other Senior Administration officials at MONUSCO. The Tribunal has thoroughly examined the evidence presented and finds that the Applicant who was representing himself made a number of unsustainable claims<sup>1</sup> and clutched at straws, perhaps based on his frustration with the turn of events. Even though the Respondent countered that some of these claims are not receivable due to late filing by the Applicant, the Tribunal finds them to be mostly unsustainable and therefore will not address them beyond dismissing them.

71. Only one clear issue emerges for determination in this case. It is whether the Settlement Agreement entered into by the parties is properly before the Tribunal for its enforcement and if it is, whether it was tainted by bad faith or breached in its implementation by the Respondent when the Applicant's contract was not renewed beyond 30 June 2015.

---

<sup>1</sup> These claims included: restructuring of MONUSCO and the Legal Affairs Office; nationalization of the Applicant's post; the comparative review process; placement of the Applicant on the vacant P-3 post in the Legal Affairs Office; the Applicant's complaints under ST/SGB/2008/5 and his complaint to the Ethics Office.

72. The Applicant's case is that the Settlement Agreement he entered into with the Respondent on 5 May 2015 was tainted by bad faith on the part of the Respondent and therefore was breached in its implementation by MONUSCO Senior Management. He has exhibited the said Settlement Agreement before the Tribunal and testified that in the course of the settlement talks, he was promised a new beginning in the Organization; in that his e-PASes for four years would be cleaned up and that his P-4 post at the Legal Affairs Section would be lent to the SSR Unit to which he would be reassigned with a new supervisor since the SSR Unit did not have a vacant post at that time.

73. As to the paragraph in the Settlement Agreement stating that his contract would expire on 30 June 2015, the Applicant told the Tribunal that it was explained to him during the settlement discussions that it was a mere technicality since his move to the SSR Unit would be renewed after 30 June 2015. He continued that he was told that the Mission did not have the capacity to state so in the written Settlement Agreement because section 4.2.3 of the SOP on Staffing Table and Post Management of Peacekeeping Operations provides that "there must be a limit to the loan not exceeding the budget cycle." He also tendered a staffing table for the SSR Unit which he testified was shown to him to convince him that the legal officer position which he would encumber in the unit had become a core post in that unit.

74. On his part, the Respondent submitted in his Reply that he had performed all his obligations under the Settlement Agreement. He submitted also that the Applicant had not filed an application for enforcement of the said Settlement Agreement pursuant to article 8 of the Dispute Tribunal's Statute and as provided for under paragraph 16 of the document. He argued too that in tendering the Settlement Agreement before the Tribunal, the Applicant had breached its confidentiality. At paragraphs 10 and 11 of his said Reply, the Respondent further quoted from the 3<sup>rd</sup> paragraph of the Settlement Agreement in support of his assertions that the Applicant was neither promised a new beginning nor a renewal of his appointment.



75. In further filings on 11 March 2016, it was submitted on behalf of the Respondent that the Applicant is attempting to challenge the Settlement Agreement without following the proper procedure and that the Tribunal's Statute prohibits him from doing so. The Respondent argued that the Applicant has not complied with the provisions of article 8.2 of the Statute. He continued that to enforce an agreement reached through mediation; the Applicant must bring the application within the timelines prescribed by article 8. He also argued that in challenging the non-renewal of his appointment, the Applicant must do so without relying on the Settlement Agreement or other confidential communications made during mediation. According to him, article 15.7 of the Tribunal's Rules of Procedure prohibits such disclosures.

76. The Respondent also submitted that the nationalization of a P-4 Legal Officer post was part of the mediation discussions that led to the drafting and signing of the Settlement Agreement. However, beyond that bare assertion, the Respondent did not lead evidence on this score in order to show in what light such a discussion was held or rebut through his lone witness or other witnesses, the substance of any mediation discussions as presented by the Applicant.

***Is the Settlement Agreement properly before the Tribunal for its enforcement?***

77. For ease of reference the Tribunal reproduces article 8.2 of its Statute and article 15.7 of its Rules of Procedure thus:

78. Article 8.2 of the UNDT Statute provides:

“An application shall not be receivable if the dispute arising from the contested administrative decision had been resolved by an agreement reached through mediation. However, an applicant may file an application to enforce the implementation of an agreement reached through mediation, which shall be receivable if the agreement has not been implemented and the application is filed within 90 calendar days after the last day for the implementation as specified in the mediation



application for the enforcement of a Settlement Agreement; and (ii) the Respondent had joined issues on this score with the Applicant. Specifically, in paragraphs 10 and 11 of his pleadings, the Respondent himself invoked and relied on the contents of paragraph 3 of the said Settlement Agreement in support of his position. He also pled that the nationalization of a P-4 Legal Officer post was part of the settlement discussions. This application challenging the Settlement Agreement is therefore receivable and properly before the Tribunal and the Respondent cannot blow hot and cold as it suits him. In other words, he cannot plead and rely on parts of the Settlement Agreement while arguing that the document is not before the Tribunal.

83. The Applicant's clear challenge of the Settlement Agreement and his exhibition of the document while alleging that it was tainted by bad faith constitutes not only a plea that the Agreement has been breached but also a plea that it be properly enforced through his reinstatement to the Organization.

84. As to the Respondent's submission that article 15.7 of the Tribunal's Rules of Procedure serve to estop the Applicant from relying on the Settlement Agreement or other confidential communications made during the mediation, this submission is both misguided and untenable. Article 15.7 of the Rules of Procedure would only apply where the Settlement Agreement is not at issue before the Tribunal. As already stated, the document is properly before the Tribunal here. Any review of the said



members who were affected by the restructuring and were to undergo comparative review of their posts were informed by 18 April 2015. The Applicant was only notified on 7 May 2015, barely two days after he signed the Settlement Agreement, that he would undergo a comparative review which may result in loss of his job if his post was nationalized. The fact of informing the Applicant on 7 May 2015, two days after he signed the Settlement Agreement, that his post may be nationalized was admitted by the Respondent's witness Mr. Siri who testified that not giving the Applicant this information in April 2015 when other affected staff members were informed was an error on the part of the Respondent.

88. The Applicant told the Tribunal that it did not make sense for him to enter into an agreement to give him good e-PASes for four years and move him to another unit if he was not going to keep his job with MONUSCO for more than six weeks. He testified that during the negotiations he was promised that his new position was secure and that he was even given a new chart of the SSR Unit<sup>3</sup> to which he was to be moved which showed that the new position of legal officer he would encumber in that unit was a core position which would survive the imminent restructuring of the Mission.

89. While the Settlement Agreement reflected that the Applicant's post would last up till 30 June 2015, the Applicant testified that when he raised the issue during mediation discussions, it was orally explained to him that setting forth a date beyond the end of the fiscal year would be a breach of section 4.2.3 of the Standard Operating Procedures (SOP) on Staffing Tables and Post Management of UN Peacekeeping Operations. He was told not to worry and assured that the borrowing of the post would be renewed upon its expiration.

90. Another witness Maja Bogicevic was the Officer-in-Charge of the SSR Unit at the time the Applicant was deployed there. Under cross-examination, he stated that

---

<sup>3</sup> Applicant's Annex 6.

Annex 6, the new organogram for the unit was created in January 2015 by the Director of the SSR Unit to show the new configuration of the unit. He said that in this new configuration, two new positions were added as shown in the organogram. The two new posts were for a child protection officer post and the legal officer post which the Applicant encumbered. The witness stated that the SSR Unit was never told that the Applicant was to spend only a few weeks at the unit and following the Applicant's report for duty at the n

tainted by bad faith on the part of any party to the said agreement/contract. In doing so, the Tribunal must be satisfied that the spirit and intent of the parties were not breached in the implementation of the Settlement Agreement.

93. The first and opening paragraph of the document which was signed on 5 May 2015 states that the parties agreed that the Applicant will assume functions in Kinshasa at the Security Sector Reform Division of MONUSCO. His Terms of Reference (TORs) are then spelt out to include conducting legal analysis on identification of systemic issues in the areas of Gender, Democratic CTL, Children in Armed Conflict and Sexual and Gender balance issues. Only two days later, there is notice given the Applicant (by way of notice of a comparative review of his post) that these new functions that he had just signed on to embark upon were not likely to be carried out since his post was at risk of nationalization.

94. It cannot be denied that in any employment relationship between a staff member and the Organization, the staff member is the party in a weaker position especially because he/she is not privy to the considerations behind the decisions that affect him/her. The Respondent argued that the Applicant's allegations contravene the plain language of the Settlement Agreement. That may well be so. But does it contravene the spirit of the Settlement Agreement? Unrebutted evidence led by the Applicant clearly show that he was lied to and false explanations made to him in order to have him sign the Settlement Agreement whose plain language did not capture those promises and explanations.

95. No matter the legal wrapping and plain language of the written Settlement





protested that date, it was explained to the Applicant that under the relevant SOP for peacekeeping missions, the Settlement Agreement could only bear that date which was the last day of the budget cycle and he was promised an extension in the new budget cycle.



b. Payment of his salary from the day of his unlawful separation until his restatement;

c. That the Tribunal find that the Mission acted in bad faith and breached the Settlement Agreement;

d. That the Tribunal find that Messrs. Maia, Siri and Sinclair acted in bad faith in entering and implementing the Agreement and that appropriate remedial measures be taken against them; and

e.

- b. Payment of the Applicant's net base salary from 1 August 2015 to 31 October 2015.
- c. Compensation in the amount of one month's net base salary for the procedural irregularity of separating the Applicant on 31 July 2015 instead of 30 October 2015.
- d. Amendment of the Applicant's e-PASes in accordance with paragraph 6 of the Settlement Agreement.

105. The Appeals Tribunal has held previously that a staff member's testimony alone is not sufficient as evidence of harm warranting compensation under Article 10.5(b) of the UNDT Statute.<sup>10</sup> Apart from his pleadings and the evidence he provided during the hearing, the Applicant has not placed any corroborating evidence before the Tribunal that would justify an award of moral damages. Consequently,1-nC(n)19(t)-22Covi0(A

Entered in the Register on this 9<sup>th</sup> day of January 2019

*(Signed)*

Abena Kwakye-Berko, Registrar, Nairobi