
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/001

Judgment No.: UNDT/2019/031

Date: 25 February 2019

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

DZUBUR

v.

SECRETARY-GENERAL

Introduction

1. The Applicant is an FS-5 Contingent Owned Equipment (COE) Assistant with the United Nations-African Union Mission in Darfur (UNAMID) in El Fasher, Sudan.
2. She filed an application on 1 January 2019 challenging the outcome of a comparative review process (CRP) conducted by UNAMID to include her among staff members identified for retrenchment, communicated to her by letter dated 28 October 2018.
3. The Respondent filed a reply on 4 February 2019 in which it is submitted, *inter alia*, that the application is not receivable *ratione materiae* since the outcome of the CRP is not a reviewable administrative decision within the meaning of art. 2.1(a) of
4. On 13 February 2019, the Applicant filed submissions addressing the issue of receivability pursuant to Order No. 009 (NBI/2019). On 22 February 2019, the Respondent filed additional submissions addressing the merits.
5. of Procedure, that an oral hearing is not required in determining the preliminary issue

Facts

6. and additional submissions.
7. On 27 April 2009, the Applicant was reappointed as an FS-3 COE Assistant with UNAMID. On 1 July 2009, the Applicant was selected as COE

8. On 16 March 2018, the Secretary-General submitted his proposed 2018-2019 UNAMID budget to the General Assembly. The budget proposed a drawdown of 1,183 civilian staff to be implemented in three phases by 30 June 2019.²

9. On 1 June 2018, the Chairperson of the African Union Commission and the United Nations Secretary-General issued a joint special report on the strategic review

component with a view to close the mission by 30 June 2020.³ On 13 July 2018, the Security Council endorsed the Sp

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10.. Between August and September 2018, UNAMID held three town hall meetings to apprise staff members of the ongoing mission restructuring and the CRP that would determine which staff members would be identified for retrenchment.⁵ In the PM/COE Section, five of the 14 FS posts were subject to retrenchment.⁶ The Chief, PM/COE

of continuing appointments to certain international staff members.⁸

12. T

17. On 10 January 2019, the Management Evaluation Unit (MEU) informed the Applicant that her request was not receivable in the following terms.

We note that in your present request, you challenge the outcome of the comparative review process. However, the notification of this outcome is also an intermediary step in the UNAMID downsizing process: as you are yet to receive a final termination notice, there has been no reviewable decision which has a direct or concrete legal effect or consequence on your contract of employment. The outcome of the downsizing process may only be challenged in the context of a final decision taken based on that process.

Respondent’s submissions on receivability

18. Article 2. Dispute

An administrative decision is a unilateral decision taken by the Administration in a precise individual case, which produces direct legal consequences to the legal order. Only a decision which carries adverse consequences for the staff is reviewable before the Dispute Tribunal. In reliance on the Appeals Tribunal jurisprudence, the Respondent submits that for an administrative decision to fall under judicial review by the UNDT, it must produce a direct impact and not a future injury. Specifically, in *Lee*¹³, the Appeals Tribunal held that the outcome of the downsizing process may only be challenged in the context of a final decision taken based on that process.

19. In the present case, since there has been no decision to terminate the Applicant's appointment, the outcome of the CRP does not carry any direct and adverse

consequences for the Applicant that between now and 1 July 2019, it will share her profile with other staff members in an effort to place her in another position, if possible. Therefore, the application is not receivable *ratione materiae*.

Applicant’s submissions on receivability

20. The terms of reference (TORs) circulated on 17 September 2018 gave rise to

¹³ 2013-UNAT-481.

specific contractual rights regarding how the restructuring of UNAMID would be conducted and the conclusion that she is less qualified renders the decision properly reviewable.

21. The creation of an extraordinary panel was expected to adhere to the terms of reference of the review process. The CRP was not conducted fairly and its outcome is reviewable for two reasons, namely, that there are contractual issues arising from the notification of the outcome of the CRP and procedural errors that vitiated this.

Contractual issues arising from the notification of the outcome of the CRP

22. The HRMS notification of 28 October 2018 regarding her

Respondent has failed to share with the Tribunal the fact that there exists an FS-5 COE Assistant post in UNSOS that has been vacant, among other vacant posts in logistics in other missions. Moreover, since she received the HRMS notification, she shared her Personal History Profile (PHP) with the Career Development Unit in the Field Personnel Division (FPD), however, to no avail. This is an indication that the mission and the Career Development Unit in FPD are focused on the termination of her continuing appointment rather than making the effort, as claimed, to place her in another mission.

25. Because of her with answers, the MEU refusal to fully evaluate all the aspects listed in her two requests and the failure of the Respondent to offer her the vacant posts in UNSOS and other missions have all caused unnecessary stress and anxiety. It is a known fact that HRMS is unable to maintain confidentiality of staff affairs and she is now suffering from reputational harm and uncertainty while the time passes and her appointment is terminated.

Considerations

26. The key characteristic of an administrative decision subject to judicial review is that the decision must produce direct terms and conditions of appointment.¹⁴

27. In *Lee*, the Appeals Tribunal held that the Secretary- adoption by resolution of the budget proposal are merely acts prefatory to, or preceding, an administrative decision that would produce direct legal consequences to employment. Although the applicant in *Lee* could not challenge the discretionaed, to the effort,

Entered in the Register on this 25th day of February 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi