
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/037

Judgment No.: UNDT/2020/137

Date: 6 August 2020

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

MONTECILLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

Introduction

1. The Applicant, a former Learning Specialist at the P-4 level with the United Nations Development Programme (“UNDP”), contests the Administration’s decision to terminate his permanent appointment following the abolition of his post.

2. For the reasons stated below, the application is rejected.

Facts

3. In 2015, the Applicant’s post in New York was abolished due to restructuring exercise. Following a realignment job fair, in August 2015, the Applicant was selected and assigned to a post of the Learning Specialist, Talent Development Unit, in Copenhagen in January 2016.

4. In December 2016, Chief of the Talent Development Unit informed the team members, including the Applicant, that the team would be restructured.

5. In January 2017, the Chief of Integrated Talent Management informally notified the Applicant that his post would be abolished and that she was delaying an official notification of the abolition of post to allow him more time to apply for other posts.

6. On 24 April 2017, the Applicant was officially notified that his post would be abolished as of 31 July 2017. The Applicant was informed that he was afforded three months to search for another job until 23 July 2017 and that his Human Resources Business Partner would assist him and advocate for his candidacy. He was also informed that he would be allowed to take up to 20 business days for full time search during this period.

7. On 28 July 2017, the Applicant was informed that he was placed on temporary assignment in New York as a Learning Resource Specialist for three months until 31 December 2017. He was informed that if he did not find another position by the

conclusion of his temporary assignment on 31 December 2017, his appointment would be terminated and he would be paid compensation in lieu of the notice period.

8. On 19 December 2017, the Applicant filed a management evaluation request to contest the decision to terminate his permanent appointment.

9. In January 2018, the Administration informed the Applicant that it withdrew the decision to terminate the Applicant's permanent appointment due to procedural errors and that it would continue to review whether there were suitable positions for him.

10. In June 2018, the Applicant attended a meeting with UNDP Human Resources Director and was verbally informed that his permanent appointment would end in three months.

11.

permanent appointment is terminated as a result of the abolition of a post or the reduction of staff shall be retained in preference to those on all other types of appointments.

21. In *Timothy* 2018-UNAT-847, the Appeals Tribunal held that staff rules 9.6(e) and 13.1(d) create an obligation on the Administration to make reasonable and good faith efforts to find suitable placements for the redundant staff members whose posts have been abolished (para. 31).

22. As the Appeals Tribunal held, “the Administration is bound to demonstrate that all reasonable efforts have been made to consider the staff member concerned for available suitable posts. Where there is doubt that a staff member has been afforded reasonable consideration, it is incumbent on the Administration to prove that such consideration was given” (*Timothy*, para. 32).

23. The Appeals Tribunal held that while the Administration is required to consider the relevant staff members on a preferred basis for the available suitable posts, “this requires, as per the clear language of this provision, determining the suitability of the staff member for the post, considering the staff member’s competence, integrity and length of service, as well as other factors such as nationality and gender. If the redundant staff member is not fully competent to perform the core functions and responsibilities of a position, the Administration has no duty to consider him or her for this position” (*Timothy*, para. 38).

24. While efforts to find a suitable post for the displaced staff member rest with the Administration, it is lawful and reasonable to expect that the affected staff members cooperate fully in the process: the relevant staff member is required to cooperate fully in these efforts and must show an interest in a new position by timely and completely applying for the position. Once the application process is completed, however, the Administration is required to consider such staff members “on a preferred or non-competitive basis” for the position in an effort to retain him or her (*Timothy*, paras. 45-47).

April 2017 and February 2019, and the Administration rushed the termination during his last days with UNDP to get rid of him as soon as possible.

27. The Tribunal notes that the Applicant provides some factual background relating to the abolition of his posts in 2015-16 and suggests that these decisions were ill-motivated and amounted to retaliation as a result of his cooperation with the UNDP Office of Audit and Investigation's investigation in 2014. However, the Applicant does not challenge these decisions made in 2015-16 and should he wish to do so, his application would be, in any event, time-barred. Accordingly, the Tribunal will not consider allegations relating to the abolition of posts.

28. In light of the above, the Tribunal will review the following issues: (a) whether the Administration lawfully concluded that the Applicant was not suitable for the posts he applied for after he was notified of the contested decision; (b) whether the Administration had a legal obligation to consider the Applicant for frozen vacant posts or for potential vacant posts that could have become available in the near future; and (c) whether the Administration otherwise failed to act in good faith throughout the process leading up to the contested decision.

Did the Administration lawfully conclude that the Applicant was not suitable for posts he applied for?

29. The Respondent submits that UNDP promulgated the Standard Operating Procedures for Termination of a Permanent Appointment Holder in February 2019 ("SOP") to fulfil its obligations under staff rules 9.6(e) and 13.1(d) and that it followed the process set forth in the SOP in the Applicant's case.

30. Specifically, the Respondent submits that UNDP convened a two-person panel to assess the Applicant's suitability for the posts he applied for on a non-competitive basis. However, the panel found that the Applicant did not meet the minimum educational and/or work experience criteria for each of the positions. The Respondent submits that considering the specialized functions of these positions, especially when

compared to the Applicant's own specialized experience, it is conceivable and credible that the Administration was not able to retain the Applicant against these positions.

31. To support his claim, the Respondent produced two documents: (a) the eligibility matrix signed by a two-person panel, which documents the assessment of the Applicant's candidacy for positions he applied for between March and May 2019, and (b) the summary of the eligibility determinations which documents the assessment of the Applicant's candidacy for positions he applied for between 2016 and 2019. The Tribunal notes that the summary of the eligibility determinations does not show the names of the individuals who evaluated the Applicant's candidacy and when the evaluation was done for each post. Since the Applicant does not dispute the veracity of the panel's assessment as documented in these two records, the Tribunal accepts that this documentation accurately summarizes the requirements of the positions and the Applicant's education and work experience.

32. According to the record, the Applicant holds an Associate of Arts degree in data processing and has over 29 years of experience in programme management in the areas of the information and communications technology ("ICT"), budgets, and procurement. The Applicant also has strong experience in the fields of online learning, and knowledge management through virtual platforms, especially in the management of ICT projects.

33. Between 2016 and 2018, the Applicant applied for nine positions at his level or lower level. The summary of eligibility determinations shows that he did not meet the minimum work experience requirement for the following seven positions: Policy Specialist (Leadership Development) (P-4), Management Specialist (P-4), Chief "PSU" (P-4), Reporting Officer (P-4), Results Based Management, Monitoring & Evaluation Specialist (P-4), Strategic Management Specialist (P-3), and Special Assistant to the Administrator (P-4).

34. The Applicant also applied for two Human Resources Specialist (P-4) positions but was not considered further as these positions were frozen.

does not find any fault with the Administration's conclusion that the Applicant was not fully competent for the above-referenced positions and thus the Administration's decision not to retain him in these positions is lawful.

Did the Administration have legal obligations to consider the Applicant for frozen vacant posts or potential vacant posts?

40. The Applicant also argues that he should have been considered for frozen vacant posts or posts that would likely to be created after the upcoming OHR restructuring.

41. Regarding the frozen posts, the Respondent submits that a position that is frozen does not meet the definition of an "available post" as there is no intent to fill that position due to reasons such as budgetary restrictions or future reorganizations.

42. Regarding the Administration's plan to restructure OHR, the Respondent submits that the process would have resulted in the changes to the functions of a large number of positions and it was unknown at the time of the contested decision, what the result of this process would have been.

43. As stated above, the Administration's legal obligation under staff rules 9.6(e) and 13.1(d) is premised on the fact that there are available suitable posts where a redundant staff member can be placed. The Tribunal agrees with the Respondent that "frozen" positions are, by definition, not available positions.

44. It is settled jurisprudence that the Administration has ample latitude to organize its departments (see *Hersh* 2014-UNAT-433, *Bali* 2014-UNAT-450, *Matadi et al.* 2015-UNAT-592). However, this discretion is not unfettered and the Administration cannot freeze a position only to exclude a staff member. However, the Applicant does not claim that the Administra

45.

Conclusion

58. In light of the foregoing, the application is rejected.

(Signed)

Judge Joelle Adda

Dated this 6th day of August 2020

Entered in the Register on this 6th day of August 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York