



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/087

Judgment No.: UNDT/2016/093

Date: 28 June 2016

Original: English

Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

Introduction

1. The Applicant has challenged the decision of 22 May 2015 to abolish her post with the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).

Procedural history

2. In her Application dated 10 August 2015, she alleged that there were three procedural errors which impugned the abolition of post process.

3. On 9 September 2015, the Respondent filed his reply in which he submitted that the Applicant's claim of gender discrimination was not receivable.

4. On 3 November 2015, the Tribunal issued Order No. 356 (NBI/2015) advising the parties that it had decided to deal with receivability as a preliminary issue and gave the Applicant the opportunity to file submissions on receivability.

5. On 16 November 2015, the Applicant filed her submissions on receivability.

6. In Judgment No. UNDT/2016/006, the Tribunal found the Application dated 10 August 2015 was receivable.

7. The parties filed a joint statement of facts and issues on 9 February 2016 in compliance with Order No. 009 (NBI/2016).

8. The Tribunal heard the matter from 10-12 May 2016.

Facts

9. The following is taken from the joint statement of facts submitted by the parties, supplemented by oral evidence and documents filed with the Tribunal by the parties. At the hearing, the Applicant gave evidence and called Mr. Ermias Yohannese and Ms. Battsetseg Toison. The Respondent called Mr. Peter Leskovsky.

10. In 2006 the Applicant joined the Engineering Section of the United Nations Organization Mission in the Democratic Republic of the Congo, (MONUC, which was the predecessor of MONUSCO) on secondment from the United Nations Development Programme (UNDP).

11. She was separated from service with UNDP as of 1 September 2009. She was then reappointed to MONUC in September 2009 as an FS-5 Administrative Assistant (post number 61321).

12. From the Applicant's appointment to MONUC in September 2009 until 30 June 2013, the post the Applicant encumbered (post number 61321) was titled "Administrative Assistant". Throughout, her duty station was Kinshasa.

13. Pursuant to resolution 66/264 of July 2012, the General Assembly mandated that missions were to conduct civilian staffing reviews over a three year period. MONUSCO undertook such a review.

14. On 28 March 2013, the Security Council adopted resolution 2098, which mandated the Mission to augment its presence in areas affected by conflict and reduce its presence in areas not affected by conflict, such as Kinshasa.

15. Effective 1 July 2013, the title on the Applicant's letter of appointment was changed to "Engineering Technician" to reflect the title on the budget staffing table. The Applicant stated in evidence that she did not apply for this post, nor was she elected or assigned 4133(s)rg 0.9983(1e)17(c)-24(t)-5(th)9(e)-3(-)-5(ti)22(t)-20(7)-155(d)-11(i)22(c)

administrative unit of the Engineering Section, including: recruitment of new staff; overseeing the e-PAS of all staff, interpretation of Human Resources procedures and administrative instructions, redeployment of staff and organisation of staff training. In her evidence she stated that she prepared the Engineering Section's 2015-2016 budget for the downsizing. In that process four Field Service (FS) posts were identified that would be vacated by staff due to retire in early 2015.

18. Pursuant to resolution 2098 and, subsequently, Security Council r

21. Mr. Yohannes has served as an Asset Manager and the Officer-in-Charge (OIC) of the Budget Unit of the Engineering Section of MONUSCO since 2003. He and Ms. Toison, the Head of the Sanitation and Water Unit for the Engineering Section at Kinshasa both testified to the nature and quality of the duties performed by the Applicant.

22. The Tribunal notes that her performance was consistently rated at a high level in her e-PAS.

23. By email dated 12 March 2015 from her Section Chief, the Applicant learned that the FS-5 post she encumbered was to be subject to a “dry cut”. Attached to the email was a document entitled “Table for the 2015 MONUSCO Retrenchment Exercise”.

24. The Applicant sought management evaluation of that decision which was rejected as a final decision had not been made.

25. On 14 April 2015, the Director of Mission Support issued Information Circular 2015/09 (Information Circular on Downsizing/Reduction of Posts in 2015/16 Budget Period: Establishment of the Comparative Review Panel (CRP) and Review Criteria) to announce the establishment of the CRP.

26. On 18 April 2015, the Applicant received a memorandum dated 17 April 2015 from the Director of Mission Support stating that, pursuant to Security Council resolution 2098, the post she encumbered was being proposed for abolition. She was encouraged to apply for all available posts for which she believed she had the required competencies and skills.

27. On 6 May 2015, the Applicant emailed the Department of Field Support (DFS) in New York regarding the abolition of the post she encumbered seeking

policy of DFS regarding staff that are close to retirement and pointed out that women were being depleted from the Mission and that she was the only representative from Mauritius at the Mission. She described her work as FCM. She asked if it was possible to have an extension on her post or to have her functional title changed to reflect the work she was actually doing until she left the Organization. She did not receive a reply.

28. On 18 May 2015, the Director of Mission Support sent to all staff Information Circular 2015/11 (Downsizing/Reduction of Posts in 2015/16 Budget Period: Procedure for Recruitment against Vacant Positions during the Downsizing Process). Its purpose was to communicate the procedures which applied for recruitment against vacant posts within the context of the MONUSCO downsizing process. It called for expressions of interest from currently serving staff affected by the downsizing to be laterally transferred to vacant posts at the same grade and level. It asked those staff to submit their letter of interest, their personal history profiles (PHP) and two most recently completed e-PAS reports.

29 MONUSCO's Chief Human Resources Officer (CHRO) wrote a memorandum dated 22 May 2015 to the Applicant, informing her that the post she encumbered had been identified for abolition effective 1 July 2015, and as a

32. On 30 May 2015, the Deputy Chief Engineer, MONUSCO, forwarded an email to the Applicant from the CHRO. The subject line was “Vacant National/International Posts and affected staff members for consideration for placement”. It attached Information Circular 2015/13 and the list of staff affected

40. Finally she cited a number of alleged “improper actions” by the Organization towards her, particularly in the period 2004-2006, as background to the treatment she received over the abolition of her post.

Issues

41. In light of the relevant jurisprudence, the pleadings, the documents

Submissions

Applicant

42. The decision not to renew her appointment due to the abolition of her post was unlawful because:

- a. She was not properly informed of the impugned decision as she never received the 22 May 2015 memorandum.
- b. She functioned, at least in part, as an engineering technician and as such her post should have been put through the CRP process. Instead, her post was subjected to a 'dry cut'. Had a comparative review been done, it would have revealed that the Applicant's post was not administrative as claimed but rather primarily related to FCM, which might have resulted in the preservation of her post.
- c. MONUSCO violated the principles of equal treatment as it failed to treat her the same as other staff members some of whom had their contracts renewed until the next mandate extension and/or beyond ~~exa~~94.4 Tm [() TJ ET Q q BT /F1 11.28 Tf 0 0 0 q BT /F1 11.0-46(y)30(o)

f. MONUSCO abused its authority by cutting her post and failing to assist her to find a vacant post. It was the goal of the Administration to oust her and disguise the decision as a mere retrenchment exercise and/or non-renewal.

g. MONUSCO failed to treat her with the dignity and respect she

48. The Applicant's allegations of bias and improper motives are not supported by the evidence.

49. She was offered the same assistance as was offered to other affected staff members.

50. Her allegations of retaliation for her role as a staff union representative and gender discrimination are also not supported by the evidence. She has not demonstrated any link between her service as staff representative several years before the date of the impugned decision and the motivation for the decision.

51. The contested decision was not vitiated by bias, prejudice and discrimination.

52. MONUSCO established procedures for assignment to affected staff to suitable vacancies but she did not apply.

Considerations

53. The legal principles to be applied in this case are well settled. The decision must be based on reasons which are able to be substantiated by evidence. This Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff.¹ However like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members². And the procedure adopted must be in accordance with relevant rules and policies.

54. Normally, there can be no expectation of renewal of a fixed-term appointment but the non-renewal decision must not be tainted by improper motives or countervailing circumstances. The burden of proving a legitimate expectancy of renewal or that the non-renewal of a fixed-term appointment

¹ Hersh2014-UNAT-433/Corr.1.

² Ibid.

was arbitrary or motivated by bias, prejudice or improper motive is on the staff member who makes the allegations.³

55. The relevant procedures in this case are contained in Information Circulars 2015/09, 2015/11 and 2015/13.

56. Information Circular 2015/09 established the Comparative Review Panel and the Review Criteria.

57. Section 3 of this information circular states that the Comparative Review Panel will not review posts where staffing by section, occupational group/functional title, category and level are equal to or less than the proposed numbers in the revised Mission structure.

58. Paragraph 2(b) of Information Circular 2015/09 provides: “The functional title is determined upon appointment or redeployment. In case the functional title does not match the functions actually performed, the functions truly exercised will be taken into consideration in the review process”.

59. Paragraph 6 of the Terms of Reference (TOR) of the Comparative Review Panel⁴ states that: “The determination of which individuals fall into the same occupational group shall be based primarily on functional title and the assessment of the programme manager. In acknowledgement of the fact that the functional title does not in all cases, truly reflect the occupational group...the Chief Human Resources Officer, will in case of doubt, determine which individuals fall into which occupational group within the same grade”.

60. Information Circular 2015/09 also provided that staff members who would reach retirement age by 31 December 2015 would be placed against surplus vacant posts until the retirement date.

³ Hepworth2015-UNAT-503.

⁴ Annex to Information Circular 2015/09.

61. Information Circular 2015/13 sets out the procedure for placement/matching of affected staff.

62. This information circular recognized that in order to avoid disrupting Mission operations during staff reductions critical vacant posts must continue. The information circular aimed to guarantee that currently serving

the Applicant fair and timely notice of both the proposal to abolish her post and the actual decision.

68. The failure to actually serve the decision on the Applicant at the time it was sent did not prejudice her unfairly, and the error does not vitiate the decision.

The Applicant's functions and the comparative review process

69. Paragraph 6 of the TOR of the Comparative Review Panel confers the power to decide which occupational group an affected staff member falls under on the programme manager or, in case of doubt, the CHRO. Information Circular 2015/09 gives guidelines to apply when making such a decision.

70. The question for the Tribunal is whether those guidelines were applied and the decision was reasonable and substantiated.

71. The Tribunal finds that the evidence, including that of the Applicant and her witnesses, overwhelmingly supports the decision that, although her functional title of Engineering Technician on her letter of appointment was changed on 1 July 2013 to reflect the title on the budget staffing table, the functions truly exercised by the Applicant were administrative. Even during the two months before the abolition of her post when she assumed some of the additional duties of the FCM, her functions continued to be supervisory and administrative in nature rather than technical.

72. The Tribunal concludes that the decision is not substantiated.

was the only administrative assistant at her grade in the Engineering Section
a comparative review was not necessary.

Was the decision tainted by improper motives?

Were proper steps taken to retain the Applicant in the service of the United
Nations following the restructuring exercise?

74. The process for placement and matching of staff affected by the

84. The Applicant's allegations of gender discrimination went no further than statements of her belief.

85. The Tribunal holds that the evidence in support of the Applicant's allegations under this heading was not sufficient to meet the burden of proof required in order to render the decision unlawful.

