



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2015/051

Judgment No.: UNDT/2018/083

Date: 28 August 2018

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HAROUN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Robbie Leighton, Office of Staff Legal Assistance

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Nicole Wynn, ALS/OHRM

Introduction

1. At the time of the filing of this application, the Applicant held a fixed-term appointment as an Administrative Assistant at the G-5/10 level in the United Nations Assistance Mission for Iraq (UNAMI). She was based in Kuwait City.

The Application and Procedural History

2. On 13 April 2015, the Applicant filed an application challenging the

3. The Respondent filed his reply to the application on 2 June 2015. His case was that there was no basis for including the Applicant in the comparative review of warehouse assistants because her primary duties were different from those of the warehouse assistants who were part of the review. Her functions and title, he

23. On 3 February 2016, the Tribunal proposed formal mediation for a resolution of the matter. The parties agreed.

24. The matter was formally referred to mediation by Order No. 017 (NBI/2016) of 5 February 2016. The proceedings were suspended for mediation until 5 April 2016.

25. On 4 April 2016, the Office of the Ombudsman and Mediation Services (OMS) requested more time for mediation. This request was granted and the proceedings remained suspended.

26. On 5 May 2016, the Tribunal received information from the OMS that efforts to have the matter resolved were unsuccessful.

27. The case was thereupon adjourned for judgment.

informing her that she had been laterally assigned to the Supply Section of the warehouse.¹

30. The Applicant challenged the decision to redeploy her alleging, *inter alia*, that the decision was motivated by malice and was a punitive action on the part of the former CMS Mr. Arumugham and the CAS Ms. Nandkumar. The Management Evaluation Unit upheld the administrative decision.

31. The Applicant subsequently challenged the decision at the UNDT where a hearing was held and testimonies of both Ms. Nandkumar and Mr. Arumugham were taken. Closing submissions were filed on 16 December 2013 and judgment was issued in favour of the Applicant on 24 May 2016 (UNDT/2016/058).

32. Since her redeployment in 2012, the Applicant had been working as a Supply Assistant in the Supply and Services Section of the warehouse.

33. On 20 November 2014, the Applicant received a memorandum dated 15 November 2014 which had been sent by email at 9.45pm the previous evening.² The memorandum indicated that her contract would be terminated effective 1 January 2015 as her post had been relocated to Erbil, Iraq.

34. The Applican

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54. Further, the memorandum of Hassena Yasin of 18 November 2014 requested FPD assistance in placing staff members who would otherwise be terminated because of the restructuring. At the time that the Applicant was being excluded from the comparative review for supply assistant posts, her former post of Administrative Assistant in the CAS was vacant. The Applicant had performed the functions of this post with excellent performance appraisals for a period of almost seven years.

55. The failure to consider the Applicant for a transfer to her vacant former post demonstrated that the intention in excluding her from the IRP was to ensure her separation from the Mission.

56. Also, transfer to the Supply Section been accurate, moving her back to that post would have been the obvious way to mitigate the impact of the restructuring.

57. The comparative review from which the Applicant was excluded considered years of U

for the two GL-5 Warehouse Assistant positions in the new mission structure.

Further submissions by the Applicant

69. The Respondent now concedes that the Applicant was performing the functions of a Warehouse Assistant and should have been included in the relevant comparative review. Had this been accepted at the management evaluation stage, the reversal of the decision not to include the Applicant would have allowed for the damage done to the Applicant to be corrected.

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even if she was included in the comparative review is untrue.

71. All the participants for the comparative review for Warehouse Assistants were required to provide updated PHPs containing their complete work history. Since the Applicant was never part of that exercise, she did not provide such an updated PHP with which she would have been reviewed.

72. The Respondent claimed _____ office of the CAS would not have been deemed relevant professional experience. He failed to consider _____ ious work experience might have been relevant. The Applicant had a long professional history working for several different organizations and performing a diverse range of functions. The Respondent was not in the position to judge whether the IRP would have considered those functions relevant professional work experience. His conclusion that the Applicant would not have been retained in the comparative review was without foundation.

Deliberations

73. The principal issue in this case is whether the decision to separate the Applicant from service was lawful. Did the Respondent exercise his discretion judiciously when he excluded her from the comparative review exercise which served

interfere, the appearance of an absence of fairness and transparency in the process provides an *open sesame* *Hersh* 2014-UNAT-433, the United Nations Appeals Tribunal (the Appeals Tribunal/UNAT) held:

The Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members.

84. In *Diallo* 2014-UNAT-430, the Appeals Tribunal noted with approval the observations of the Advisory Joint Appeals Board (AJAB) which underscored the gravity of any decision to abolish a post regarding its effects on affected staff members when the AJAB stated that: the abolition of a post is always a traumatic experience for the incumbent, and therefore greater objectivity, care, good faith and transparency were required.

85. A review of how the relevant managers at UNAMI exercised their discretion to exclude the Applicant from the comparative review process for two posts in the Warehouse Section where she was working and instead separated her, will naturally depend wholly on the evidence before the Tribunal. Does evidence

87. The circumstances of that transfer have been exhaustively discussed and pronounced upon in UNDT/2016/058. In sum, the Tribunal held:

The Tribunal finds that the Applicant was moved not so much in the interest of the Organization, or in the pursuit of using the best resources of the Organization, but in the interest of Mr. Arumugham and Ms. Nandkumar. Had they been more mindful of the rule that the paramount responsibility in the Organization is to ensure compliance with avowed objectives of the Organization, and had they been more objective, the Applicant, even if she had to be reassigned, would have been entrusted with responsibilities more commensurate with her skills and experience. It is obvious to the Tribunal that the process thus undertaken was a waste of material and human resources. The evidence is clear that this move was ill-conceived, clumsily effected and most certainly made based on extraneous factors.

88. This context is important because it is central to the A present case that the decision to exclude her from the comparative review exercise which led to her separation, was made in bad faith, and that it stems from the conflict surrounding

the comparative review raises significant concerns as to the quality and *bona fides* of the instructions of the Respondent to

100. The involvement of Ms. Nandkumar and her central role in the process is easily gleaned from correspondence and testimonial evidence. Correspondence exists to show that Ms. Nandkumar examined the functions of various staff members vis-à-vis their functions and titles and essentially corrected errors where staff members were wrongly included or-9()49 634xatede

105. In answer to a question from the Tribunal as to how records were kept by the participants (which the witness claimed included chiefs of the affected sections) at the important meetings in which decisions were taken about which staff members would be separated and those to be retained or comparatively reviewed, Ms. Nandkumar stated that only decisions taken were recorded. There were therefore no records of the deliberations.

106. When pressed for an answer as to who exactly made the decision to exclude the Applicant from the list of those to be comparatively reviewed, the witness gave a long-winded answer and claimed that the decision was arrived at during the meetings of section chiefs and the CMS although there were no minutes of such meetings.

107. When during cross-examination it was brought to her attention that the exclusion of the Applicant from the comparative review process was done in error and that this point had been conceded, she challenged the Respondent's position thus:

I don't know who said that. I still stand by what is here, that she should be included for separation because her position of administrative assistant, she was performing the functions of an admin assistant within the supply warehouse. Yes, she was not a contract management assistant [the Applicant] was put on that post specifically to perform the admin assistant position in the warehouse to the warehouse chief, who was Mr. Courcey Holder. She was not performing warehouse functions.] at no time or do I ever, ever recall there was a single communication from anyone who was supervising [the Applicant] that she was not an admin assistant.

108. In reviewing the exclusion of the Applicant in the comparative review process, the email of 15 November 2014 from Ms. Nandkumar to Ms. Gidali instructing that the Applicant be included in the list of staff members to be separated is the only relevant document provided to the Tribunal. It is apparently the only existing record on [(is)-20s/a1 275.3

109. Her strenuous denial that t
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Is there merit in the claim that even if the Applicant participated in the comparative review process, she would have had the lowest scores?

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inference not previously argued, nor proved or commented on by the other party. To the Secretary-General, this amounts to a breach of his right to due process and a fair hearing.

The Appeals Tribunal notes that the separation from service was the sole ground for awarding compensation for damage to career prospects. However, there is no evidence on the record with respect to the exact reasons for separating Ms. Haroun from service and the circumstances of such separation. The Secretary-General, in violation of his right to due process and a fair hearing, was not given an opportunity to present his views on the possible reliance of the UNDT on the separation for an award of damages. In fact, the separation decision is challenged in a separate application pending before the UNDT under Case No. UNDT/NBI/2015/051.

