



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/165

Judgment No.: UNDT/2021/085

Date: 22 July 2021

Introduction

1. The Applicant is former staff member of the United Nations Organization Stabilization Mission (“MONUSCO”) in the Democratic Republic of the Congo. He is contesting the “decision by the Administration to terminate [his] continuing appointment following the decision to abolish his post, and without making good faith efforts to absorb him or to assist him in finding an alternative position” (“the contested decision”).

2. The Respondent argues that the

6. On 1 April 2019, MONUSCO's Chief Human Resources Officer ("CHRO") gave the Applicant advance notice of the proposed termination of his continuing appointment.⁴

7. On 10 June 2019, the Applicant went on certified sick leave.⁵

8. On 3 July 2019, the General Assembly approved the MONUSCO Budget for 2019-2020.⁶

9. On 12 July 2019, the CHRO notified the Applicant of the decision to

14. On 16 December 2019 and 20 February 2020, the Applicant filed an application and an amended application respectively, challenging the contested decision.

15. The Respondent had earlier filed a reply on 17 January 2020.

16. On 26 February 2021, the Respondent filed a response to Order No. 045 (NBI/2021). Paragraph 5 of said Order required the Respondent to produce the comparative evaluation analyses and Personnel History Profiles (“PHPs”) of the successful candidates for the following job openings to which the Applicant applied but for which he was not selected:

- a. Post No. 119995 at the United Nations Mission in South Sudan (“UNMISS”);
- b. Post No. 126580 at UNMISS;
- c. Post No. 112220 at the United Nations Support Office in Somalia (“UNSOS”);
- d. Post No. 129143 at MONUSCO (P-3); and
- e. Job openings 121739 and 140211 in Bamako, Mali.

17. The parties filed their closing submissions on 19 March 2021.

Parties’ submissions

The Applicant

18. MEU incorrectly claims that the issue of the abolition of his post was not disputed in his request for management evaluation. That is false because, as acknowledged in the MEU’s letter, on 22 August 2019 the Applicant submitted a detailed supplementary request challenging the basis for selecting his post for

abolition. Neither the management evaluation nor the reply addressed these arguments.

19. In addition, he challenged the failure of the Administration to make good faith efforts to find him a suitable alternative post upon the abolition of his current post as a staff member holding a continuing appointment. This is a violation of the Administration's obligation vis-à-vis staff members on continuing appointments who face abolition of posts. Such obligations relate specifically to the principles of order of retention in line with staff rule 9.6(e) as well as the jurisprudence of the Tribunals.

20. There were irregularities in the decision to abolish his post, specifically:

a. There was no original justification for abolishing the Applicant's unique post; it was inserted in the proposal to the General Assembly over the line manager's objections.

b. There was a lack of programmatic justification for the inclusion of his post among those identified for downsizing. Although the General Assembly had approved the proposed budget, the Applicant's actual duties continue to be required.

21. There was a failure to afford the Applicant the due consideration to which he was entitled as a staff member with a continuing appointment against an abolished post. Staff rules 9.6(e) and 13.1, as well as the jurisprudence of the Tribunals, establish that the Administration has an obligation to assist continuing appointment holders whose posts are abolished and to treat them with priority when it comes to filling vacancies for which they are qualified. The Appeals Tribunal has found that the onus is on the Administration to prove that they have fulfilled their obligations to make a good faith effort to find suitable alternative posts for such staff members.

22. The Applicant submits that he holds a continuing appointment in the P-4 category for which he is rostered and his current post was abolished on 30 June 2019. He has even expressed interest in existing posts at the P-3 level in the Engineering

Applicant was in the list, but the candidate selected for job opening No. 119995 was not.

b. For job opening No. 126580 UNMISS (Sudan) Engineer, the selected candidate for the referenced position was a P-3 staff member with a continuing appointment in UNSOS (Mogadishu). UNSOS was not a downsized mission nor was that

automatically screened out by *Inspira* because he did not meet the language requirement of the position, that is, fluency in French.

26. The Respondent should have placed him against the remaining P-3 post in his section. Instead, the Respondent chose to advertise the post.

27. A review of the selection process for the five posts shows that the candidates selected were either not against abolished posts or did not have continuing appointments. In six out of seven of the cases examined, the reasons put forward for rejecting the Applicant in favour of those who were not entitled to preferred treatment are highly suspect given the fact that the Applicant was already rostered and had been performing similar engineering functions in the largest mission at the time.

28. The Applicant seeks the following reliefs: rescission of the contested decision, reinstatement in service and appropriate compensation for the harm to his career and professional reputation.

29. In his closing submission, the Applicant pleaded an additional remedy, that is, an appropriate termination indemnity and compensation in lieu of notice for his wrongful separation from service.

The Respondent

30. The Applicant's challenge of the decision to abolish the post is not receivable *ratione materiae* under art. 2.1(a) of the Dispute Tribunal's Statute. The decision was taken by the General Assembly. It was not an administrative decision of the Secretary-General. The Dispute Tribunal lacks jurisdiction to review the General Assembly's decision to abolish a post.

31. The contested decision was lawful. The Applicant's appointment was terminated because the General Assembly abolished the post he encumbered. There were no vacant positions in MONUSCO for which the Applicant was suitable at the time of the contested decision.

32. The Applicant has produced no evidence that the termination of his appointment was in bad faith or ill-motivated. He does not dispute that he encumbered the post, that the General Assembly abolished the post, or that his appointment was financed by the post.

33.

regards to the P-4 Engineer, Job Opening No. 123320 in the United Nations Integrated Office in Haiti, the Applicant was automatically screened out by *Inspira* because he did not meet the language requirement for the position, that is, fluency in French.

37. Contrary to the Applicant's allegations, there was only one P-3 Engineer position in MONUSCO, Job Opening No. 129143, for which the Applicant was found not suitable due to integrity issues and a misrepresentation of his disciplinary history on his job application. The Applicant has not produced any evidence that he applied for any other P-3 engineering post in MONUSCO and was not considered. There is no obligation to retain a staff member who has not applied for a position

38. The Applicant's contention that he should have been placed against available job openings on a priority and non-competitive basis based on his roster membership is without merit. Roster membership does not necessarily mean that a staff member meets the requirements or possesses the qualifications for a specific job opening. The Administration is required to determine the suitability of a staff member for a position. The Applicant's roster membership did not exempt him from technical evaluation to determine his suitability.

39. In light of the foregoing, the Respondent submits that the Applicant is not entitled to the relief sought and requests the Tribunal to reject the application.

40. Should the Tribunal decide to compensate the Applicant, it should consider that the Applicant continued to receive his full salary, benefits, and entitlements for 13 months after his appointment was terminated. While he received a notice of termination of his continuing appointment on 12 July 2019 with an effective date of 2 August 2019, the Applicant did not separate from the Organization until 10

position was mechanical and is not reviewable¹⁵. In that regard, the Respondent is correct that this limb of the application is not receivable *ratione materiae*. The Tribunal so finds.

47. The Tribunal has competence to review whethero

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52. The relevant parts of the USG/DOS IOM of 26 April 2019 state:¹⁷

2. Following the recent revisions to the Secretary-General's delegation of authority, as outlined in SGB/2019/02, authority to laterally transfer existing staff within the same entity has been delegated to each head of entity. Request for lateral transfer between entities can be submitted to the Department of Management Strategy, Policy and Compliance for approval. Consideration of lateral placement is particularly relevant

level on a fixed-term contract.

56. The Respondent has not demonstrated that reasonable and good faith efforts were made to offer the Applicant any of the suitable four positions outlined above. The Respondent has not provided any evidence against the Applicant's suitability in relation to competence, integrity or length of service for those positions.

57. The Respondent was under an obligation to give priority to the Applicant, who, as a holder of a continuing appointment, had a right under the Staff Rules to be offered any available post for which he was found suitable. The Respondent has not provided justification for offering the positions to staff members holding fixed term

those categories within MONUSCO or in another mission. Indeed, as the Respondent points out, roster membership does not guarantee a position²³, nonetheless, the Applicant's roster mem) s nÓ an\$ e#

case number UNDT/NBI/2020/089.²⁵ The Applicant made no submissions in response to these assertions.

63. The Tribunal rejects the Applicant's claims for compensation for termination indemnity and in lieu of notice because he has failed to justify them in view of the Respondent's objections and they did not form part of his claims in the amended application for consideration.

64. The

