
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2013/083

Judgment No.: UNDT/2016/020

Date: 14 March 2016

Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye Berko, Registrar

NYASULU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON LIABILITY
AND RELIEF

Counsel for the Applicant:
Nicole Washienko, OSLA

Counsel for the Respondent:
Elizabeth Gall ALS/OHRM, UN Secretariat
Bérengère Neyroud, ALS/OHRM, UN Secretariat

Introduction

1.

7. The LJSS Division had 35 staff members and was part of the UNMIL Rule of Law pillar which is headed by the Deputy Special Representative of the Secretary-General Rule of Law (D/SRSG Rule of Law).

8. In September 2012, the Special Representative of the Secretary-General (SRSG) at UNMIL directed that the Mission undertake a comprehensive review of its civilian staff in line with Security Council resolution 2066 (2012) and General Assembly resolution 66/264 with a view to aligning staffing structure. Civilian staff members were advised that as a result of the comprehensive review, the structure of the Mission would change and revised staffing levels would be reflected in the 2013/14 budget.

9. The proposed restructuring of the Mission, including the Rule of Law component was reflected in the 2013/14 budget adopted 22 February 2013 and submitted by the Secretary-General in his report to the General Assembly.¹ The Secretary-General stated that the existing structure of the Rule of Law component would change under the 2013/14 budget.

10. The report particularly proposed the dissolution of the LJSS Division which the Applicant headed. Further, it proposed that the Rule of Law component be restructured along three thematic areas of focus being, access to justice and security, training and mentoring and legal and policy reforms with a view to

UNMIL.

11. As part of this restructuring, the report proposed that the Office of the D/SRSG Rule of Law be strengthened with a Director, Rule of Law at the D level, to be accommodated through the reassignment of the D-1 post from the LJSS Division encumbered by the Applicant. The same report also proposed the reassignment of two P5 posts in LJSS and the redeployment of 32 others

¹ Paragraphs 63 and 65 A/67/755 (Budget for the United Nations Mission in Liberia).

12. The A

Working Group of the Justice and Security Pillar of the Poverty Reduction Strategy II.

e. In that capacity, the Applicant held several key meetings which resulted in the submission of Priority Actions to the Liberian government. He also represented the Rule of Law Pillar at the Rule of Law Building Steering Committee where he supported Rule of Law initiatives in the Justice and

(iv) *The Applicant seeks the following remedies:*

- a. A declaration that the decision to abolish his post was unlawful and unjustified as well as the decision to fill the reassigned post through a competitive selection process
- b. That he be appointed to the new reassigned post without having to go through a competitive selection process.
- c. An award of six months net base salary as moral damages resulting from the decision not to renew his appointment.
- d. In the alternative, a monetary compensation equivalent to two

competitive selection process for the new Principal, Rule of Law Officer in order to meet the objectives art. 101.3 of the Charter and the provisions of ST/AI/2010/(Staff selection system)with regard to the employment of staff. The decision is rational and prudent and the Administration was entitled to do so.

d. The reassignment of the post is not the same process as a reassignment of a staff member. The reassignment of the post in

Administration to reassign the Applicant to the new position

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way is without merit. The lower level posts are not comparable to the D post in terms of seniority and criticality

d. The reassigned D level post has the responsibility of directly advising the SRSG and D/SRSG Rule of Law and coordinating and supervising the three sections in the new rule of law structure. The position is critical to the ability of UNMIL to discharge its mandate relating to the rule of law. It is because of the seniority of the reassigned post that a competitive selection process was warranted.

(iii) *The non-*

participate in activities relating to day-day matters. He was invited to a mission retreat and subsequent meetings in July 2013.

- e. On some occasions, the Applicant failed to meet with the D/SRSG Rule of Law to discuss his work. On 5 July 2013, the Applicant sent an email to former staff of the LJSS Division attaching a table setting out the assignment of staff under the new structure and a concept of operations paper. Before doing so, he did not consult with the D/SRSG.
- f. The procedures in ST/AI/1998/9 for the reclassification of posts showed bias is untenable. UNMIL had followed the consistent practice for the creation of field posts.

iv. *Relief sought by the Respondent*

- a. The Respondent prays that the Application be dismissed.

Considerations

21. The principal issue for determination in this case is whether, in implementing the new budget and structural adjustments in the Rule of Law pillar approved by the General Assembly for UNMIL in 2013, the administrative decision not to reassign the Applicant with his reassigned post was lawful considering all the surrounding circumstances.

22. In interrogating the above issue for determination, the Tribunal shall address various questions under three headings as follows:

- a. Did the memorandum informing him of the non-renewal of his contract? Was there a substantial change in functions between the newly reassigned position and the skills-set? Was the Applicant resistant to the newly proposed changes and reforms to the working methods for the Rule of Law pillar

- b. Was the process leading to UNMIL of the incumbent of another reassigned post within the former LSSS while separating only the Applicant a transparent exercise? claim that the newly reassigned position was of such level of seniority and criticality as to warrant a new recruitment?
- c. Was the non-retention of the Applicant motivated by bias or other improper motives?

23. The above stated questions will serve as a guide to reaching a conclusion as to whether the actions and decisions of UNMIL Management in the circumstances of the were lawful.

former post cease to exist as conveyed to him in the memorandum informing him of the non-renewal of his contract? Was there a substantial change in functions between the newly reassigned position and the skills-set? Was the Applicant resistant to the newly proposed changes and reforms to the working methods for the Rule of Law pillar in UNMIL 2013/2014 budget?

24. In an interoffice memorandum dated 1 May 2013 sent by Mr Hubert Price, Director of Mission Support at UNMIL, the Applicant was informed that was anticipated that this D-1 post of Chief Judicial Affairs Officer in the Office of the D/SRSG Rule of Law would cease to exist as of 30 June 2013 memo

1 post of Director, Rule of Law in the Office of the D/SRSG Rule of Law.

25. the LJSS Division was abolished or ceased to exist has been vigorously argued by both sides to this Application.

26. While giving testimony at the hearing of this Application, Mr. Price stated that his inter

exist in the 2013/2014 budget.

27. The Respondent cited the case *Cofhr*,³ to support his argument that within the Organization, a post is not the same as a position because a post is only a financial authorization given for a position. The said post which is created by the General Assembly may be withdrawn

significantly broader than the functions of ~~the~~ position formerly encumbered by the Applicant.

32. Both this witness and Ms. Wilman testified that the incumbent of the new

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37. When cross-examined, the witness said he was aware that the Applicant had cochaired the pre

was a D2 officer, the Applicant was the most senior. The witness stated further that because Police is a very technical area without knowledge or expertise of justice and judicial issues and because of his personality and skills, the Commissioner was not made Of the Rule of Law pillar.

42. The Tribunal pointed out that much Rule of Law pillar needed greater coordination, coherence and a more integrated approach between its different units in the way it worked. The Tribunal wanted to know why it was difficult to retain the Applicant who had participated in this new vision and the restructuring of the pillar even though every other staff member in the LJSS Division was retained.

43. The witness responded that he needed someone senior who had knowledge and experience that went beyond the responsibility of heading a section. He stated that the Applicant with his experience as a lawyer had contributed a lot to the Mission but that what was needed was someone who would sometimes step for the D/SRSG and give policy advice and recommendations to both him and the SRSG. He felt therefore that it was a very different role and a different set of skills and profile that was needed. He continued that using the evaluation criteria and job description in the new job opening, these were not met by the Applicant.

44. The witness also said that all the others who were retained were at lower levels of P5 and below and so were manageable and could make adjustments. He said that leadership could be provided to these lower level officers by a new Chief of Rule of Law and by himself in order to make the staff members of the former LJSS

56. With regard to the Applicant

reassigned position. The witnesses did not address the claim of the Applicant that he was a rostered candidate for the generic position of Chief Rule of Law or that the functions of that position were near identical with those of the position created from the newly reassigned position. The claim of being on the said roster Counsel argued that it was an irrelevant fact.

67. While reviewing and assessing the evidence before it on this issue, the Tribunal had regard to whether the functions of the position created from the newly reassigned position are substantially different to the skills-set of the Applicant. This means that in making the said review, the Tribunal considered the functions the

D/SRSG that the performance appraisal of the Applicant was not considered to see what tasks he had carried out before the decision to separate him was in the latest e-PAS which was for the 2011/2012 cycle showed that one of his goals was to maintain close working relationships with human rights, police, corrections and other sections of the mission. In the e-PAS, his FRO who was the former D/SRSG commended him in the performance of that task.

71. The evidence shows also that the functions of the generic position of Chief Rule of Law and Security Institutions Support Office for which the Applicant is a rostered candidate is near identical to the Principal Rule of Law Officer. In both positions, the incumbent oversees the work of the Mission in the areas of justice, police, security sector reform and corrections. The said incumbent is expected to ensure the overall approach and to advise and support the Mission leadership in ensuring a coordinated approach for the United Nations.

Division and the position of Chief Rule of Law and Security Institutions Support Office for which the Applicant was rostered.

75. The review showed that the requirements for the newly reassigned position are near identical and fully satisfied by the other two positions. Each of the three positions reviewed and compared requires broad professional knowledge of rule of law issues in postconflict or peacekeeping settings, an advanced university degree in law, political science or international relations. Each requires also

76. After a most careful examination of the functions of the newly reassigned position of Principal Rule of Law Officer in UNMIL, the Tribunal is of the firm

prior professional experience was the reason why he could not be reassigned with the new position failed to properly consider his skill set in relation to the said position. The

the position he had encumbered as Chief of the defunct D/SS at UNMIL was only an afterthought and was not in the best interest of the Mission or of the said Applicant.

77. The Tribunal also considered the relevance of the evidence provided by the Applicant to the effect that he regularly served as OiC of the Rule of Law pillar in the absence of the D/SRSG and had served in that capacity under different D/SRSGs. Between September 2011 and April 2013, a period of 20 months, he had served in that capacity on five occasions for a total of over 50 days.

78. Within the United Nations system, there is no proper definition of an OiC but the Tribunal takes judicial notice of the practice of appointing an OiC to act for or stand in the shoes of a senior officer in the absence of the said senior

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84. She continued that the LJSS Division was considered to work in isolation and to focus only on legal and judicial aspects of issues. She said that some parts of the pillar were more willing to engage and that there was a perception that there was not an enabling environment to work across pillars that was confined particularly to the LJSS Division Chief.

85. Under cross-examination, the witness said she was not singling out the Applicant but that there was no trust, confidence or commitment to engage within the pillar and difficulties in engaging with the LJSS Division. She said she was simply registering what was told her by different people which included that there was a long standing practice that sections engaged with each other only through their chiefs.

86. The Tribunal also asked the witness if the Applicant was sacrificed because he stood in the way of integration within the pillar and whether the D/SRSG ever addressed the perceived lack of coherence and integration but there was no clear answer to that question. The present D/SRSG of the Rule of Law pillar, Mr. Samuel, had given both written and oral testimony but did not confirm that he was told about the lack of integration and coherence problems by a previous D/SRSG. In any case, he took up his new duties [(.) TJ1 0 0 1]u8 630.580.072 Tc[(aw)

time, Ms. MensahBonsu

Was the process leading to reassigned posts within the former LJSS Division while separating only the Applicant a transparent exercise that the reassigned D-1 post formerly encumbered by the Applicant was of such level of seniority and criticality as to warrant a new recruitment exercise?

92. Evidence before the Tribunal is that in September 2012, UNMIL/SRSG directed that the Mission undertake a comprehensive review of its civilian staff in line with the Security Council resolution 2066 of 2012 and General Assembly resolution 66/264. Following this directive, the comprehensive review was done. The Applicant was a member of the committee that undertook the comprehensive review and in fact represented the Rule of Law pillar and prepared its budget.

93. On 22 February 2013, the Secretary

different category and that after a comparative review, it was found that the new selection process was required.

100. Still under cross-examination, the witness said that the Mission received guidance from the Field Personnel Division (FPD) in New York as to how to determine who could be reabsorbed following a reassignment of a post. He said also that the percentage of change between former functions and new functions of a reassigned post determined whether the staff member in question could be placed on the new position.

101. When asked further how the Mission received such guidance from FPD, the witness said he would go back and review. He added that he believed the guidance was received by both fax and email. He said that he would find and forward to the Tribunal the documented guidelines from FPD in the form of emails and faxes on which the Mission relied in determining who matched the relevant skills for the new positions created from the reassigned posts. However, no such documents were filed by the Respondent at any time.

102. While answering another question, Mr. Price said that the fact that the Applicant was rostered for the post of Chief, Rule of Law was not material to the review of his reassigned post because it was considered that the position he had encumbered in the LJSS Division was different to the new position that was created.

103. The Tribunal has witnesses explaining, supporting and giving reasons for the retention of the incumbent of one of the two reassigned P-5 posts and the non-retention of the Applicant.

104. These reasons and explanations can be summarized as follows: (a) Following the re-deployment and reassignment of certain posts within the former LJSS Division to support some newly created positions in the Rule of Law pillar, the Mission leadership conducted a comparative review with a view to matching the skill mixes of the staff members affected to new positions. (b) The guidelines for this comparative review were provided to the Mission by the FPD office in New York.

Respondent has not tendered any documentary evidence in support of this claim. Surely, if a comparative review had taken place, there would be a record of it.

109. It is noteworthy that even in his Reply to the Application, the Respondent never sought to make a case that his agents had conducted any review of the Applicant with a view to matching his skillset to the functions of the position created from his reassigned post. Instead, it was his case that upon the creation of the new reassigned posts, the Administration decided to initiate a competitive selection process in order to meet the objectives of art. 101.3 of the Charter and the provisions of ST/AI/2010/3.

110. But while giving testimony, [redacted] witnesses moved away from that pleading and the functions of the reassigned post. The guidelines from FPD that [redacted] witnesses claimed were used to conduct the review were never produced to the Tribunal.

111. As to the question whether the process of placing the incumbent of the reassigned post on another P-5 position while separating the Applicant [redacted] there was no due process employed and that if indeed there was any exercise, it was entirely arbitrary and completely lacking in transparency and credibility.

112. In se

121. On its part, the Secretary 2013/2014 stated that the Mission would leverage existing expertise and that priorities would be met through existing resources. It has been noted in the

created from the reassigning the Applicant to it even on a temporary basis, the said position of Principal Rule of Law Officer did not have a permanent incumbent more than two years after it was created

122. The Secretary was surely referring to the expertise of existing UNMIL staff and also to its existing human and material resources

background to the ACABQ recommendations and the General Assembly eventual approval of the 2013/2014 budget calls into question the credibility of the submission that the restructuring within the Rule of Law pillar needed a new recruitment in order to ensure the highest standards of efficiency and competency

123.

trusted the Applicant and had an almost open door policy for birth that it was easier for the pillar to communicate with them. She also testified that since the Applicant left the Mission, it had become more difficult for the Rule of Law pillar to deal with the said Liberian officials. The witness cited the instance of difficulties in arranging a meeting between the Liberian Chief Justice and the D/SRSG Rule of Law with the host country officials ignoring at least two requests for a meeting. This testimony was not challenged.

124. Deductions from the evidence presented to the Tribunal point out in bold relief that the promise of a fair and objective process did not avail the Applicant in the process of his non-renewal following the reassignment of his post on relations between the Rule of Law pillar and the head of Lib

did not only put their foot in their mouth in getting rid of the Applicant in the manner they did but have not acted in

the best interests of the Organization by ignoring the Secretary
intention to leverage existing expertise and General Assembly

125. While the Tribunal is well aware of the Respondent's Counsel well-
practiced mantra that the Tribunal cannot substitute its views for those of the

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