Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

ADUNDO et al.

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Lennox S. Hinds

Introduction

1. On 17 May 2012, the Applicants, a group

4. On the last day of hearing, the Applicants clarified that the relief they seek is for the Tribunal to find that they should not be subjected to the competitive process as it constitutes an arbitrary and illegal exercise because the Administration failed to act in good faith and failed to properly notify them that they were on temporary budget posts. They ask the Tribunal to find that they were contracted on regular budget posts and that any variation was not brought to their attention by lawful means. In the alternative, the Applicants ask the Tribuna

being no objection by the Applicants. Whilst it disrupted the normal court roll, I deemed it imperative to list this case for such expedited hearing even though it caused considerable strain on the resources of the Tribunal.

11. The case was heard over seven days, on 8, 11, 13, 15, and 18–20 June 2012. At the hearing, each party made oral submissions and called witnesses. Four of

14. On 20 June 2012, the last day of the hearing, the parties agreed that no motions or requests remained outstanding. Following oral closing submissions by both Counsel, the hearing was concluded.

15. These expedited proceedings required extensive effort from both the Tribunal and Counsel. It involved a total of seven days of hearing the oral testimony of eight witnesses over two weeks. As a result of the expedited nature of the hearing, parties continued to tender documents throughout the course of the proceedings; all documents tendered were added to the court bundle prepared for the hearing. Over 1,600 pages of documents were filed in this case. However, in view of the scope of

who assumed his position after the Applicants were recruited, testified that he had been informed that all Security Officers were hired against a generic vacancy announcement and SSS created a roster of eligible candidates.

19. The Applicants in this case were recruited between 2008 and 2009 as Security Officers on fixed-term appointments. Each of the Applicants signed a letter of appointment stating that her or his appointment was a "temporary appointment for a fixed term" and did "not carry any expectancy of renewal". The Applicants' initial contracts were subsequently extended. The contracts of 19 of the Applicants expire in August 2012, whilst those of the remaining 38 Applicants expire in November 2012.

The winding down of CMP

20. It was submitted to the Tribunal that 85 Security Officers were hired between 2008 and 2011 and that they are all affected by the anticipated winding down of CMP. Seventy-four of them, including the Applicants, are engaged on fixed-term appointments and 11 staff members are engaged on temporary appointments. At the same time, 24 of these Security Officers are on regular budget posts that were used to perform some CMP-related functions, and 61 are allegedly on CMP-funded posts.

21. For reasons explained below, it cannot be determined at this stage which of the affected Security Officers encumber the 24 regular budget posts. The Respondent submits that, at some point in time, only 49 posts will remain available for the group of 85 Security Officers affected by the winding down of CMP and related decrease in funding. Thus, 36 jobs are on the line. It is unclear when exactly the winding down of CMP will be completed, but it appears that it is intended to be a gradual exercise that will primarily take place over the course of 2013. The 49 posts that will remain will consist of 24 regular budget posts and 25 new regular budget posts.

Initial meetings with Security Officers regarding abolition of posts and downsizing

22. In February and March 2012, the Chief of SSS held a series of town hall meetings and several meetings with Security Officers, including some of the Applicants, informing them that CMP was coming to an end and that, as a consequence, SSS would be abolishing a number of posts. The posts to be abolished would come from those of the 85 Security Officers allegedly recruited in connection with CMP.

23. The Applicants submit that the February and March 2012 meetings were the first notice they had received that they had been hired under the CMP budget and that their posts were subject to abolishment upon termination of CMP. The Respondent denies this, and submits that they were informed on recruitment.

Announcement of the *ad hoc* competitive process

24. On 6 April 2012, an internal vacancy announcement was published in the SSS bulletin of 6–9 April 2012 for "the currently vacant regular budget posts" for Security Officers at the S-1 and S-2 level. The bulletin stated:

> With reference to the recent town-hall meetings conducted by the Chief of Service and as guided by [the Office of Human Resources Management ("OHRM")], all Security Officers who have been recruited since November 2008 are hereby invited to apply for the currently vacant regular budget posts for Security Officers at the S-1/S-2 level. This internal announcement will be the first in a number of steps towards establishing a post-CMP staffing table in view of the impending reduction of posts funded under the Associated Cost of the Capital Master Plan (CMP) project.
>
> All officers who joined SSS New York on or after November 2008 are strongly encouraged to apply. The assessment method will include a written test appropriate to the functions performed at S-1/S-2 level and a competency-based interview. Successful applicants will be formally placed against the regular budget posts.

25. The parties stated in the agreed facts submitted on 7 June 2012 that the announcement of April 2012 was made "in light of the cutbacks referred to above and the need to make decisions on the renewal or non-renewal of the appointments of the Applicants". Thus, the competitive exercise had several purposes, including deciding on retrenchments, renewals or non-renewals, and new appointments.

26. The comparative process was pointed to and included the following steps: (1) a written test; (2) competency-based interviews; (3) a comparative review; and (4) gender balance review. The first step in the competitive process announced in the SSS bulletin—the written test—was initially scheduled for 2 June 2012, but it did not take place as a result of the suspension of action ordered by the Tribunal in Adundo et al. UNDT/2012/077. The format of the test was that those who did not pass it with a score of at least 65 per cent would be excluded from further consideration. Those who passed the test to

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28. A series of meetings and exchanges took place in March–May 2012 between the staff representatives, the Chief of SSS, the Office of the Ombudsman, and OHRM. The Applicants submit that these meetings did not amount to an effective consultation process and that neither the Chief of SSS nor OHRM properly consulted with them or their staff representatives on the format of the competitive process prior to posting the vacancy announcement.

29. On 9 April 2012, a group of Security Officers delivered a petition to the President of the General Assembly and the Ombudsman protesting the decision to conduct the competitive exercise. The petition was subsequently provided to the Secretary-General and senior members of the Administration.

30. The Applicants submit that, on 2 May 2012, they were informed that the written test to fill vacancies would be held on Saturday, 2 June 2012. Their request for management evaluation, filed on 23 April 2012, was rejected on the grounds of receivability.

Consideration

What is the nature of the contested decision?

31. Throughout the proceedings, the Respondent made varying and at times inconsistent submissions regarding the nature and purpose of the competitive exercise announced in April 2012. It was and still is unclear if this process is for abolition of posts, retrenchment, consideration for renewal, consideration for selection for new appointments, or all of the above. Initially, the Respondent submitted that the contested decision was neither a decision on renewal or non-renewal nor a decision on selection or non-selection of staff, but an intermediary process of determining future appointment and renewal decisions. The Respondent also referred to the contested exercise as a “promotion session” and submitted that it was the start of a process that will inform future renewal decisions. In his closing submission on

35. The Respondent has raised the argument that the contested decision in this case is of a preliminary and preparatory nature. Although it is

also UN Administrative Tribunal Judgment No. 99, Mr. A (1966), para. II). The Tribunal is therefore satisfied that this application is receivable.

Administrative decisions based on budgetary reasons

39. It is trite law that although appointments do not carry an automatic expectation of renewal, such legitimate expectation may be created. Furthermore, administrative decisions must be made on proper reasons and the Administration has the duty to act fairly, justly and transparently in dealing with its staff members, including in matters of appointments, separation, and renewals (Obdeijn UNDT/2011/032, Obdeijn 2012-UNAT-201). The Respondent's argument that the contract contained a disclaimer of expectancy of renewal is not in itself conclusive. Indeed, the Tribunal is surprised that the Respondent plied this argument despite the Dispute Tribunal's ruling in Obdeijn, which was upheld by the United Nations Appeals Tribunal.

40. The Respondent submits that the question of which posts the Applicants are assigned against and which budget is used to finance them is of no concern to the Applicants. The Tribunal does not agree. Reasons given by the Administration for the exercise of its discretion must be supported by the facts (Islam 2011-UNAT-115). If reasons for administrative decisions are cited as budgetary, budget and post assignment obviously become relevant and the Administration must be able to demonstrate which staff members are affected by the stated budgetary constraints. If it were otherwise, any staff member could be separated at any point in time by blind reliance on unsubstantiated budgetary reasons that are unknown to her or him and that could not be tested. No staff member could ever challenge, and no Judge could ever review, any budget-based administrative decision, no matter how untrue and flawed the alleged budgetary reasons were.

41. Notably, the April 2012 vacancy announcement issued by SSS states that "[s]uccessful applicants will be formally placed against the regular budget posts"—

this is, in fact, an acknowledgement on the part of the Administration that assignments against regular budget posts have certain meaning and do matter.

42. The Tribunal agrees with the Respondent that the placement of a staff member

The Tribunal finds on the evidence tendered that there was no coherent process of assigning staff members against budgeted posts and that these staff members were recorded as somehow drifting from one random post number to another. Indeed, it was the Respondent's case that Security Officers were floating between different posts from time to time.

55. It is conceded by the Applicants that there are other staff members among the 85 staff members involved in performing CMP-related functions who are not party to this case but are in the exact same contractual situation as the Applicants. In 2008 and 2009, a total of 52 Security Officers, approximately half of whom are the Applicants, were hired on identical or similar contracts. Finding that these particular 25 Applicants should be treated as having been assessed against 24 regular budget posts when there are other staff members in the exact same position would create a fiction of an accountable decision-making process in SSS regarding the assignment of contracts against budgeted posts. Furthermore, the fact that there are 25 Applicants and only 24 existing regular budget posts would pose a further difficulty as each one of the Applicants appears to be identically situated, and yet one would be inevitably left out.

56. This case demonstrates that there is no accountable contract and budget management process in SSS and that the actual and budgetary questions, at least with respect to S-1 and S-2 level Security Officers, are not decided in a transparent and clear manner. No contemporaneous paper trail has been provided to the Tribunal demonstrating when, how, and why certain staff members were placed against posts financed from different budgets. It appears to be an acceptable practice in SSS that staff members are moved, apparently randomly, between posts from various budgets regardless of their core functions. Although the Respondent did not argue this, this may be a matter of expediency and efficacy, but it does not make for a satisfactory state of affairs.

61. Further, the reason provided for the announced exercise cannot possibly be true with respect to 24 of the 85 Security Officers. If at all staff members on regular budget posts in this case were to be affected by any type of retrenchment exercise, it would be expected in all fairness, that the "last in first out" (known as "LIFO") principle would have some relevance. It is impossible at this stage to ascertain which 24 Security Officers should not be affected by the budgetary constraints. In the Tribunal's view, the situation created by the lack of proper management of contractual and budgetary matters in SSS should be interpreted in favour of the Applicants.

62. The vacancy announcement issued in April 2012 is also plainly misleading. It refers to "the currently vacant regular budget posts". It is clear that none of the regular budget posts used for CMP needs are vacant and will not become vacant in the near future. Since the 24 regular budget posts used for CMP needs are not dependent on CMP funds but on the regular budget, these posts cannot be included in the pool of posts advertised as vacant at the present time. This further undermines the propriety of the exercise.

63. The Tribunal is not persuaded by the evidence given in this case that the announced exercise is consistent with the actual budgetary requirements. For instance, the internal vacancy announcement issued in April 2012 does not indicate how many posts are being advertised. Furthermore, no clear information has been provided to the Tribunal with respect to the posts that would remain and the posts that would be created. Are these going to be new posts, approved by the General Assembly? Or are these going to be the same posts that are being recycled time and time again, after being labeled "vacant" when they are, in fact, not? It is also unclear how many of these proposed 49 posts would be at S-1 level and how many would be at S-2 level. In effect, 85 Security Officers at the S-1 and S-2 levels are being mixed together to compete for an unknown number of S-1 and S-2 positions (presumably, totaling 49) without any regard to the current level of the Security Officers and without any regard to the differences in the job requirements for S-1 and S-2

management and staff representatives. The relevant criteria were prepared by the members of the Comparative Review Panel and announced well in advance, with performance evaluation reports, relevant experience, and length of service among the main factors. Furthermore, staff members at different levels were placed in different pools and the retrenchment process in MINUSTAH envisaged no mandatory exclusionary competency-based test.

66. The Chief of SSS testified that the existing performance evaluation reports were inadequate for the purpose of carrying out of the exercise, which was the reason for conducting a mandatory competency test. In effect, this means that the main, if not the only, reason for the Administration's insistence on the ad hoc competitive process announced in April 2012 was to compensate for the inadequacy of the performance evaluation management system. The Chief of SSS testified that the new comparative test was required because the initial test that all Security Officers undertook upon recruitment was a basic test, whereas the written test was an advanced written examination, which would be a better reflection of the staff members' abilities than their performance evaluation reports. When it was suggested to him that there was already an established tried and tested evaluation process within the Organization, the Chief of SSS was very candid in his criticism of the current performance evaluation system as being inadequate. Much as this may be, the Organization is bound to follow its own rules.

67. The announced competitive process has the effect of substituting the standard

exclusionary and by removing 11 Security Officers who were hired in 2011 and are on temporary appointments from the pool of 35 affected Security Officers that would be permitted to participate in the competitive exercise. The Tribunal cannot adjudicate cases involving decisions of a changing nature. Although the Respondent considered the proposed competitive process capable of various changes, the litigation was pursued to the very end, despite several interventions by the Tribunal for an amicable resolution, which is regrettable.

77. It is not the function of the Tribunal to unduly interfere or instruct the manner in which the Administration carries out retrenchment or selection exercises, but it is apparent in this case that the parties need to go back to the drawing board. If any new process is going to be established to solve the situation, it must be transparent, fair, reasonable, and respect the applicable rules and regulations of the Organization.

Observation on the tone of the proceedings

78. It is regrettable that at some moments during the hearing, the tone of the proceedings did not auger well for those personalities still involved in a working relationship, through no fault of their own. There was, for instance, an allegation made by Respondent's Counsel at the outset of the oral proceedings that the Applicants were being dishonest and were in collusion in fabricating this case. All of the witnesses in this case appeared credible and their demeanor did not indicate that they were being untrustworthy. In the end, not a shred of evidence was produced to support this allegation, which was not pursued by the Respondent during the remainder of the hearing or during closing submissions. The unsubstantiated allegation that 25 Security Officers—whose continued employment is premised on a relationship of trust and confidence and who are entrusted by the Organization to protect the security of its staff—were colluding, hardly contributes to maintaining harmonious industrial relations in a continuing working relationship. Counsel should refrain from making unsubstantiated and outlandish allegations of collusion, fabrication, and dishonesty on the part of applicants or witnesses if these cannot

clearly be substantiated, particularly where there is acceptable evidence in rebuttal, as was the case here.

Conclusions

79. The Tribunal finds that the ad hoc competitive process announced in April 2012 is unlawful. In view of the particular circumstances of this case, the Tribunal finds that the appropriate form of relief in this case is the rescission of the decision to carry out the ad hoc competitive process announced in April 2012.

Order

80. The decision to carry out the ad hoc competitive process as announced in April 2012 is unlawful and is hereby rescinded.

(Signed)

Judge Ebrahim-Carstens

Dated this 31st day of July 2012

Entered in the Register on this 31st day of July 2012

(Signed)

Hafida Lahiouel, Registrar, New York