



UNITED NATIONS APPEALS TRIBUNAL TRIBUNAL D'APPEL DES NATIONS UNIES

Judgment No. 2017-UNAT-763

Crotty
(Respondent/Applicant)

v.

Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before:	Judge Rosalyn Chapman, Presiding Judge Dimitrios Raikos Judge Sabine Knierim
Case No.:	2016-1041
Date:	14 July 2017
Registrar:	Weicheng Lin

Counsel for Mr. Crotty: Lennox S. Hinds

Counsel for Secretary-General: Amy Wood/Nathalie Defrasne

JUDGE ROSALYN CHAPMAN, PRESIDING.

1. The Appeals Tribunal has before it an appeal of Judgment No. UNDT/2016/190, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in New York on 19 October 2016, in the case of *Crotty v. Secretary-General of the United Nations*. The Secretary-General filed the appeal on 19 December 2016; however, Mr. Maurice Paul Crotty did not file an answer.

Facts and Procedure

2. The Dispute Tribunal made the following factual findings which the Appellant does not contest:¹

... The Applicant, a former staff member in the Publishing Section, Meeting and Publishing Division of the Department for General Assembly and Conference Management (“DGACM”), filed an application contesting the decision to abolish his post and, as a result, to terminate his permanent appointment.

... The Applicant was one of fourteen former and current staff members who, in March 2014, filed applications [before the UNDT] relating to the decision to terminate their permanent appointments following the abolition of a number of posts in DGACM.

...

Employment with the Organization

... The Applicant is a long-serving employee of the United Nations, having worked with the Organization for approximately 25 years. He received a permanent appointment effective 1 October 1992.

... Before April 20, 2014, the Applicant worked as a Supervisor Prepress at grade TC-7/Step 7. Since 20 April 2014, Applicant Crotty was employed as a Digital Printing Coordinator at the G-6 level, step 11, on a permanent appointment with the UN. At the hearing [before the UNDT], the Applicant testified that he would reach mandatory retirement age on 31 March 2016 and retire on that day.

15 August 2013 report of the ACABQ (A/68/7)

... On 15 August 2013, the Advisory Committee on Administrative and Budgetary Questions (“ACABQ”) published report A/68/7 (First report on the proposed programme budget for the biennium 2014–2015), in which it included proposals for specific posts to be abolished, including in DGACM.

¹ Impugned Judgment, paras. 1-2 and 10-23 (emphases in original).

... At para. I.107, the report recorded the ACABQ's enquiry as to the potential impact of post abolition on staff in the Publishing Section who might lose employment if the budget was approved. The report noted that the Department was "actively engaged" with OHRM and other offices to "address the matter proactively":

Abolishments

I.106 A total of 99 posts are proposed for abolishment, including 4 General Service (Principal level), 56 General Service (Other level) and 39 Trades and Crafts posts, at Headquarters under subprogrammes 3 and 4, as follows:

...

(c) The abolishment of 39 Trades and Crafts posts and 22 General Service (Other level) posts in the Reproduction Unit and the Distribution Unit, reflecting the completion of the shift to an entirely digital printing operation ... ;

...

I.107 The Advisory Committee enquired as to the potential impact of post abolishment on staff and was informed that the staff in the Publishing Section who might lose employment would be affected if the proposed budget were approved. In anticipation of this possibility, the Department had been actively engaged, together with the Office of Human Resources Management and other relevant offices, to address the matter proactively. ...

I.108 The Advisory Committee recommends the approval of the proposed abolishment of 99 posts in the Department.

General Assembly resolution 68/246

... On 27 December 2013, the General Assembly approved the Secretary-General's proposed programme budget for the biennium 2014–2016,^[2] section 2 of which provided for the abolition of 59 posts in the Publishing Section of the Meetings and Publishing Division of DGACM.

Note of 30 December 2013

... On 30 December 2013, Mr. Yukio Takasu, the Under-Secretary-General for Management ("USG/DM"), sent a Note to the Chef de Cabinet, stating:

**Termination of appointments on abolition of posts –
DGACM staff members**

1. I refer to the attached recommendation by the USG/DGACM for the Secretary-General to terminate the appointments of a number of

² [This should read "biennium 2014-2015".]

staff members currently serving with DGACM. This recommendation follows General Assembly decision 68/6 (Sect. 2) that led to the abolition of posts effective 31 December 2013.

2. DGACM has reviewed and is continuing to review possibilities to absorb affected staff members; in line with staff rule 9.6(e) and (f). While it was possible to otherwise accommodate some staff members encumbering posts slated for abolition, and while others have found alternative employment in the Organization, the attached list concerns staff members where this was not possible at this time.

3. Given DGACM's confirmation that consultation efforts with staff representatives and affected staff members have been undertaken and that staff rules 9.6(e) and (f) have been taken into account and complied with, I support the recommendation that the Secretary-General consider the termination of the appointments of the staff members listed in the attachment. Once the Secretary-General has taken a decision, such decision will be conveyed to the staff members through their parent department. In case of termination, this will be a termination notice pursuant to staff rule 9.7. Should any of these staff members secure alternative employment in the Organization prior to any termination taking effect, such termination would be rendered moot.

4. Please note that the authority to terminate for abolition of posts or reduction of the staff has been retained by the Secretary-General pursuant to Annex I of ST/AI/234/Rev.1. We would appreciate EOSG's assistance in securing the Secretary-General's decision on this matter at the earliest convenience. Given the required standards for delegation of authority, most recently under judgement *Bastet* (UNDT/2013/172), please also assist in ensuring the decision is endorsed by the Secretary-General, preferable in the form of a memorandum. For use of any communication conveying delegations or administrative decisions, the tribunal has indicated its expectation that the name of the signatory must be spelled out if the signature is not readable, and that any such communication must display the functional title of the decision-maker.

5. A draft decision for the Secretary-General's consideration is attached.

Secretary-General's approval of termination of appointments

... By memorandum dated 31 December 2013, the Secretary-General approved the termination of the appointments of staff members listed in the USG/DM's proposal dated 30 December 2013, "on the grounds of abolition of posts pursuant to

staff regulation 9.3(a)(i) and staff rule 9.6(c)(i)". Attached to the Secretary-General's memorandum was a table of 34 staff members on permanent appointments, indicating for each staff member their level, entry on duty; date of birth; age; retirement age; visa status; and nationality.

Termination letter of 31 December 2013

... By letter dated 31 December 2013, signed by the Executive Officer, DGACM, the Applicant was informed as follows:

On 27 December, the General Assembly approved the Secretary-General's proposed programme budget for the biennium 2014–2015, section 2 of which provides for the abolition of 59 posts in the Publishing Section of the Meetings and Publishing Division of the Department for General Assembly and Conference Management (DGACM).

I am writing to inform you that the post against which your contract is charged is one of the 59 posts that the General Assembly has abolished effective 1 January 2014 and that, as a result, the Secretary-General has decided to terminate your permanent appointment. The present letter, therefore, constitutes the formal notice of termination of your permanent appointment under staff rule 9.7.

You are strongly encouraged to apply for all available positions for which you believe you have the required competencies and skills. Should you submit an application, you are invited to so inform the DGACM Executive Office, which will support you in liaising with the Office of Human Resources Management with a view to giving priority consideration to your application.

In the event that you are not selected for a position, I regret to inform you that you will be separated from service not less than three months (90 days) of receipt of this notice, as per staff rule 9.7. However, you will be entitled to a termination indemnity in accordance with staff regulation 9.3(c).

My office will assist you in every possible way during this difficult time, and I sincerely wish you success with your applications.

Request for management evaluation

... On 31 January 2014, the Applicant filed a request for management evaluation of the decision to abolish his post and to terminate his permanent appointment.

24 February 2014 email

... On 24 February 2014, the Executive Officer of DGACM sent an email to the affected staff members, including the Applicant, stating (emphasis in original):

Colleagues,

Mr. Gettu [Under-Secretary-General, DGACM] expresses his gratitude to all who attended the meeting held last Wednesday on the 19th, and has asked that we reiterate two important points which were shared at the meeting for the benefit of colleagues who might not have attended:

First, that in light of the fact that the termination notices were given out over a period of several weeks in January, that the decision has been taken to separate all permanent staff as of 90 days from the date of the latest letter delivered which was 20 January. For all staff with permanent contracts who do not have an appointment, their separation date will be 20 April. Because that day falls on a Sunday, and the preceding Friday is the Good Friday holiday, any staff separating as of that date will be cleared by the Executive Office on Thursday, 17 April (last work day).

Second, that the deadline for the application to the temporary digitization posts has been extended, once again, until 28 February. Staff need to apply to a job opening in order to be considered for posts.

26 February 2014 contract extension

... By letter dated 28 February 2014, the Applicant was notified by the Management Evaluation Unit ("MEU") that two days earlier they had been advised by the Administration of the extension of the Applicant's appointment until 20 April 2014. The letter further stated that, since the extension of his appointment superseded the contested decision, it effectively rendered his request for management evaluation moot, and his management evaluation file would therefore be closed.

...

Subsequent job search

... Further to the decision to terminate his appointment, the Applicant applied to five vacant posts. He was retained on a post at G-6 level, step 11.

Continued employment

... The Applicant's permanent appointment was not terminated as he secured further employment at the G-6 level, step 11.

3. Mr. Crotty brought an application before the UNDT challenging “[t]he decision to abolish Applicant’s post, effective January 2014, and as a result to terminate Applicant’s permanent appointment”. Mr. Crotty “seeks the immediate rescission of the 31 December 2013 decision to terminate his appointment”; and “enforcement of the Administration’s duties to search out and find an alternative suitable post to Applicant within the General Service in its duty station (New York Headquarters) [and] to retain Applicant in preference on all other types of appointments”.

4. On 19 October 2016, the UNDT issued Judgment No. UNDT/2016/190. Initially, the Dispute Tribunal found that Mr. Crotty’s application was not moot and was receivable although his “termination never took effect as he was retained against a different post”.³ On the merits, the UNDT found: (i) “General Assembly resolutions 54/249 and 68/246 did not have the effect of taking away the authority of the Secretary-General to terminate permanent appointments based on approved abolition of posts”⁴ and “there was no breach of General Assembly resolution 54/249”;⁵ (ii) “the Secretary-General had the legal authority to terminate the Applicant’s permanent appointment”;⁶ (iii) “the Organization committed material irregularities and failed to act fully in compliance with the framework set out in staff rules 13.1(d)-(e) and 9.6(e) by subjecting the Applicant to the requirement of competing for available posts against other, non-permanent staff members”;⁷ and (iv) Staff Rule 13.1 “does not provide for a right to alternative employment at the same or higher level”.⁸ The Dispute Tribunal denied Mr. Crotty’s request for pecuniary damages and awarded him USD 3,000 for emotional distress.

5. On 19 December 2016, the Secretary-General filed an appeal of Judgment No. UNDT/2016/190.

6. On 11 January 2017, the Registry of the Appeals Tribunal served the appeal of UNDT Judgment No. 2016/190 on Mr. Crotty, by serving counsel who had represented him before the Dispute Tribunal. At the same time, the Registry advised Mr. Crotty that an answer would be due within sixty days. Mr. Crotty did not file an answer.

³ Impugned Judgment, para. 37.

⁴ *Ibid.*, para. 70.

⁵ *Ibid.*, para. 72.

⁶ *Ibid.*, para. 79.

⁷ *Ibid.*, para. 91.

⁸ *Ibid.*, para. 90.

Submissions

7. The UNDT erred in law and exceeded its competence by finding that the application was receivable for several reasons. First, the contested decision was superseded by subsequent actions by the Administration which rendered the application moot and, therefore, not receivable. Mr. Crotty's permanent appointment was never actually terminated; thus, the impugned decision was rendered moot. Second, the decision to abolish Mr. Crotty's post was the consequence of the General Assembly's decision to abolish 59 posts, including Mr. Crotty's. The decisions of the General Assembly are binding on the Secretary-General and, consequently, the General Assembly's decision to abolish the post is not an administrative decision subject to judicial review.

8. The UNDT further erred in finding the application receivable on the basis that the 31 December 2013 DGACM notice to Mr. Crotty constituted an appealable administrative decision. The UNDT's power of review under Article 2(1)(a) of its Statute is restricted to administrative decisions that have a direct and negative impact on the staff member's rights. The challenged DGACM notice was a mere notification deprived of any such direct impact on Mr. Crotty's rights. As the decision to terminate Mr. Crotty's appointment was contingent upon him not finding an alternative position, it was preparatory in nature and "hypothetical" in that it depended on future events to be realized. In the absence of an appealable administrative decision, the UNDT did not have jurisdiction to entertain the application.

9. The Secretary-General further maintains that the UNDT erred in law and exceeded its jurisdiction by considering evidence that postdated Mr. Crotty's request for management evaluation and that he had not challenged before the MEU. The Appeals Tribunal's jurisprudence has consistently held that the scope of the application before the UNDT is limited to matters presented to management evaluation.

10. Moreover, the UNDT erred in law in finding that the Secretary-General failed to fully comply with Staff Rules 9.6 and 13.1. Staff Regulation 1.2(c) allowing for the lateral reassignment outside the normal selection process does not create a right to such placement. Contrary to the UNDT's holding, the Administration cannot be faulted for not considering Mr. Crotty for a position for which he did not even apply.

11. Given that the Administration fully complied with its obligations as set forth in the Staff Rules, the contested decision was lawful. Since there was no appealable administrative decision on which the UNDT was competent to pass judgment, the UNDT further erred by awarding compensation on the merits.

12. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment. In the alternative, the Secretary-General requests that the Appeals Tribunal vacate the award of compensation ordered by the UNDT.

Considerations

13. Article 8(1)(a) of the UNDT Statute provides, *inter alia*, that an application shall be receivable if the Dispute Tribunal is competent to hear and pass judgment on the application under Article 2 of the UNDT Statute. In turn, Article 2(1)(a) of the UNDT Statute provides, *inter alia*, that the Dispute Tribunal “shall be competent to hear and pass judgement on an application” which appeals “an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment”.

14. Article 2(1)(a) of the UNDT Statute and the term “administrative decision” have been the topics of many cases before the Dispute Tribunal and the Appeals Tribunal. The Appeals Tribunal has concluded that for the Dispute Tribunal to have competence or jurisdiction over an application, the application must appeal or contest an administrative decision which has a direct or concrete legal effect or consequence on the staff member’s terms of appointment or contract of employment.⁹

15. We have further concluded that an administrative decision which has become moot or is no longer “live” does not come within Articles 2 and 8 of the UNDT Statute:¹⁰

... The Appeals Tribunal is of the view that since the Administration rescinded the impugned decision even before [the staff member] had filed his UNDT application, ... it thereby rendered the claim before the Dispute Tribunal moot. There was thus no administrative decision on which the UNDT was competent to pass judgment in terms of Articles 2 and 8 of the UNDT Statute.

⁹ *Kalashnik v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-661, para. 25, citing *Lee v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, paras. 48-49 and citations therein.

¹⁰ *Gebremariam v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-584, para. 19 (internal footnotes omitted).

Obtaining a new job or post rendered the staff member's claim moot; there was no longer a decision to terminate his services.

16. We have held in the context of an appeal that when the contested administrative decision "cease[s] to have any legal effect", the decision has been rendered moot and there is no longer a "live issue ... upon which [this Tribunal] is competent to pass judgment".¹¹ Applying the doctrine of mootness is consistent with the purpose behind the establishment of the two-tier system of administration of justice, which was to adjudicate existing disputes; not to interpret the law when there is no live dispute before it.¹²

17. The decision to terminate Mr. Crotty due to the abolishment of his post was never implemented because he obtained another position with the Organization, as the UNDT acknowledged. Mr. Crotty's continued employment with the Organization rendered moot the Administration's decision to terminate him. Thus, the administrative decision Mr. Crotty challenged in his application was no longer a live issue and the Dispute Tribunal was not competent to pass judgment on the application. Accordingly, the Dispute Tribunal made an error of law when it found Mr. Crotty's application was receivable.

18. In light of the UNDT's error in receiving the application, which was moot, the UNDT's findings of the merits of Mr. Crotty's claims and the award of damages to him were *ultra vires* and cannot stand. The UNDT Judgment should be vacated in *toto*.

¹¹ *Finniss v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-708, para. 24; *Wilson v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-709, para. 26.

¹² *Wilson v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-709, para. 25.

Judgment

19. The appeal is granted and Judgment No. UNDT/2016/190 is vacated.

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Chapman, Presiding

(Signed)

Judge Raikos

(Signed)

Judge Knierim

Entered in the Register on this 5th day of September 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar