



Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: Víctor Rodríguez

BERNARD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON SUSPENSION OF ACTION

Counsel for Applicant:

None

Counsel for Respondent:

Shelly Pitterman, DHRM/UNHCR

Introduction

1. On 17 December 2009, the Applicant filed with the United Nations Dispute Tribunal (UNDT) an application requesting the Tribunal to suspend the decision not to extend her fixed-term appointment beyond its expiry date of 31 December 2009.

Facts

2. In November 2006, the Applicant joined the Office of the United Nations High Commissioner for Refugees (UNHCR) as Associate Field Officer in Bahai, Chad at the P-2 level. In December 2008, she was appointed to a Field Officer position in Tindouf, Algeria.

3. On 6 July 2009, the Applicant received notification that the P-3 post she encumbered would be upgraded to the P-4 level as of January 2010.

4. In September 2009, the Applicant contacted the Director of the Bureau for the Middle East and North Africa (MENA Bureau) to seek his advice about the difficult situation she was facing with her supervisor, the Head of Operations in Laayoune, Algeria.

5. On 29 October 2009, the Applicant sought the Ombudsman's advice on her situation in light of the reclassification of her post. On 15 November 2009, the Ombudsman informed the Applicant that the Deputy Director of the MENA Bureau had looked into opportunities for another posting for her, without success.

6. On 17 November 2009, the Applicant wrote again to the Director of the MENA Bureau, explaining her concerns with regard to her supervisor.

7. By letter dated 30 November 2009, the Division of Human Resources Management (DHRM) informed the Applicant that since she had not been selected for a new position within UNHCR, her fixed-term appointment would not be extended beyond its expiry date of 31 December 2009 and consequently she would be separated from service effective 1 January 2010.

8. On 8 December 2009, the Applicant submitted to the Deputy High Commissioner a request for a management evaluation of the decision not to extend her fixed-term appointment.

9. On 10 December 2009, the Assistant High Commissioner (Protection) acknowledged receipt of the Applicant's request for management evaluation.

10. On 11 December 2009, the Applicant wrote to the Inspector General's Office (IGO) requesting an investigation into allegations of misconduct against her supervisor.

Parties' contentions

11. The Applicant's principal contentions are:

a. The decision to upgrade to the P-4 level the P-3 post she encumbers, while her personal grade is P-2 and she cannot therefore apply to a P-4 post, is motivated by the desire of her supervisor to see the Applicant leave the operation.

b. Her supervisor claimed that the Applicant was not able to fulfill her duties because she does not speak Arabic. However, knowledge of Arabic was not a mandatory requirement for her post. She has been unofficially informed that the first choice candidate for the upgraded position does not speak Arabic either.

c. The Applicant was told that a "very negative" memorandum had been written against her and shared with the Appointments, Postings and Promotions Board (APPB), which had a negative impact on her applications to other posts.

d. The decision not to renew her fixed-term appointment is the result of the "discrimination, harassment and injustice" to which she was subjected by her supervisor.

e. If the suspension of action is not granted, her separation will become effective before the outcome of the IGO's investigation and the result of the management evaluation.

f. As a former staff member, she will be the "last priority" for any post she may apply to in future compendiums.

12. The Respondent's principal contentions are:

a. A request for suspension of action pursuant to article 2.2 of the UNDT statute can only be granted in cases where all three requirements – prima facie unlawfulness, urgency and irreparable damage - have been satisfied. The Applicant has failed to establish a prima facie case of unlawfulness.

b. The Applicant's separation is the direct result of the expiry of her fixed-term contract. In accordance with staff regulation 4.5(c) a fixed term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion. The same principle is reflected in paragraphs 100 and 158 of the Procedural Guidelines of the APPB.

c. The causal connection between the difficult relationship between the Head of Operations and the Applicant on the one hand, and the non-renewal of the Applicant's appointment on the other hand, has not been established. The Applicant does not provide sufficient evidence to conclude that the contested decision was improperly motivated.

d. The Applicant does not establish that the expiration of her fixed-term appointment and subsequent separation from UNHCR will cause her irreparable harm. In accordance with UNHCR administrative issuances on gender policy, the Applicant, as a female staff member in the international professional category, is eligible to apply for a position within UNHCR as an internal candidate after the expiration of her fixed-term appointment.

Considerations

13. The Applicant requests the Tribunal to suspend the implementation of the decision dated 30 November 2009 concerning the non-renewal of her fixed-term appointment and her separation effective 1 January 2010.

14. The application for suspension of action was filed after the Applicant wrote to Deputy High Commissioner to request a management evaluation of the contested decision. At the date of issuance of this order, the time limit for the Deputy High Commissioner's response to the request for management evaluation is still running and no such response has been made to the Applicant. Thus, the application for suspension of action must be examined in the light of article 2, paragraph 2, of the Tribunal's statute, which provides that:

“The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage...”

15. The Tribunal will examine first whether the decision “appears prima facie to be unlawful”.

16. Staff rule 104.12(b)(i), in force at the time when the Applicant received her last appointment, provides that “the fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment”. Provisional staff rule 4.13(c) applicable at the date of expiration of the Applicant’s contract further provides that “a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service”.

17. The Applicant holds a fixed-term appointment which will not be renewed beyond its expiry date of 31 December 2009. In accordance with the above-quoted rules, the Applicant cannot claim a right to the renewal of her fixed-term appointment.

18. The Tribunal may examine, however, whether the Administration’s actions created an expectancy that the Applicant’s appointment would be extended. On the contrary, it was clearly indicated to the Applicant by memorandum dated 6 July 2009 that the P-3 post that she encumbered in Tindouf would be reclassified at the P-4 level effective 1 January 2010. Neither this memorandum nor any other documents available in the records of the case could have led the Applicant to believe that she had serious chances of obtaining the renewal of her appointment.

19. The Applicant stresses that the decision to reclassify the post she encumbers in Tindouf was taken with the sole purpose of removing her from her position rather than with the best interests of the Organization in mind. The Applicant claims that the difficult working relationship she had with her

supervisor led the latter, with the objective of getting rid of the former, to seek the reclassification of her post at the P-4 level adding the knowledge of Arabic as a requirement. Even if it is correct that the Applicant's supervisor requested the reclassification of her post at a higher level, it remains that the supervisor did not have the authority to reclassify the Applicant's post, a decision that was made by the Bureau Director in accordance with Part 5, paragraph 27, of the UNHCR's Revised Framework for Resource Allocation and Management (IOM No. 051/2007 & FOM No. 054/2007). The Applicant thus does not prove that the non-extension of her appointment results solely from the desire of her supervisor to remove her from the service, nor that, consequently, the contested decision appears prima facie to be unlawful.

20. To order the suspension of an administrative decision, it is necessary that the three conditions provided for under article 2, paragraph 2, of the Tribunal's statute be fulfilled. Given that one of the conditions is not fulfilled – i.e. the contested decision does not appear prima facie to be unlawful – the Tribunal must reject the application without its being necessary to examine whether the other two conditions are fulfilled.

Conclusion

21. In view of the foregoing, the application to suspend the implementation of the contested decision during the pendency of the management evaluation is rejected.

(Signé)

Judge Jean-François Cousin

Dated this 23rd day of December 2009

Entered in the Register on this 23rd day of December 2009

(Signé)

Víctor Rodríguez, Registrar, UNDT, Geneva