



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2011/018

Judgment No.: UNDT/2012/042

Date: 30 March 2012

Original: English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

PRLJACA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Shelly Pitterman, UNHCR

Introduction

1. The Applicant, a staff member of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), contests the decision to discontinue her position of Principal Secretary at level G-6 in the UNHCR office in Sarajevo, Bosnia and Herzegovina.

2. She seeks reinstatement to a post commensurate with her qualifications or, in the alternative, compensation for financial loss and emotional distress.

Facts

3. The Applicant joined UNHCR in Bosnia and Herzegovina in April 1996 as a Secretary at level G-3. At the time of the contested decision, she held the post of Principal Secretary at level G-6, in Sarajevo, under an indefinite appointment.

4. On 16 April 2010, the UNHCR Representative in Sarajevo submitted to UNHCR headquarters the 2011 Comprehensive Needs Assessment, which included the Prioritization Preview of the Initial Budget Target for the year 2011. The positions that were later to be discontinued, including that of the Applicant, were included in this submission.

5. On 2 August 2010, the Representative was informed by headquarters that UNHCR Sarajevo would be facing important financial constraints, in particular a decrease of USD922,646 of the Initial Budget Target for 2011.

6. On 25 August 2010, the Representative, together with the Administrative and Finance Officer in Sarajevo, verbally explained to the Applicant and three other affected staff members the situation regarding the proposed budget cuts in 2011.

7. By letter dated 26 August 2010, the Representative formally notified the Applicant that her position of Principal Secretary would be discontinued effective 28 February 2011.

8. By email dated 15 October 2010, the Applicant requested management evaluation of the decision to discontinue her post.

9. On 22 November 2010, the Comparative Review Panel met to review the situation of three G-6 staff members, including the Applicant, who would be affected by the discontinuation of their positions effective 28 February 2011 and establish whether there existed similar positions in the office which could be compared with the abolished positions. Concerning the Applicant, the Comparative Review Panel concluded that no comparative review could be conducted as: (i) there was no staff member at the duty station on an indefinite appointment occupying a similar post at the same level, (ii) there was no staff member at the duty station on another type of appointment occupying a similar post either at the same level, one level higher or one level lower, and (iii) there were no similarities between the Applicant's position and a position that was vacant in the office.

10. On 24 November 2010, the local Appointments, Postings and Promotions Committee ("APPC") for Bosnia and Herzegovina endorsed the findings of the Comparative Review Panel and recommended that the Applicant's appointment be terminated effective 28 February 2011.

11. By letter dated 30 November 2010, the Applicant was informed that following the recommendation of the local APPC, her indefinite appointment would be terminated on 28 February 2011 pursuant to staff regulation 9.3(a)(i).

12. By letter dated 14 January 2011, the Deputy High Commissioner responded to the Applicant's request for management evaluation. He concluded that the contested decision had been made in good faith and in line with the discretionary powers vested in the Representative. He nevertheless decided to grant the Applicant compensation in the amount of one month's net base salary for a "minor technical flaw in the notification process whereby the initial oral notification of the intention to discontinue [her] post was not provided to [her] in writing in accordance with the applicable procedures".

13. On 28 February 2011, the Applicant was separated from service.

14. The Applicant filed the present application on 12 April 2011. The Respondent submitted his reply on 18 May 2011 and on 17 June 2011, the Applicant filed observations.

15. By Order No. 37 (GVA/2012) of 15 February 2012, the Tribunal directed the Respondent to file additional information and supporting documents. The Respondent filed the requested information on 29 February, and on 7 March, the Applicant filed observations.

16. By Order No. 58 (GVA/2012) of 21 March 2012, the Tribunal informed the parties that in its view the case could be dealt with on the papers, without an oral hearing, but that should a party object, a hearing would be held on 5 April 2012. Neither party objected to the matter being determined on the papers.

Parties' submissions

17. The Applicant's principal contentions are:

a. In addition to her functions as Principal Secretary, she also assumed additional duties related to public information, which are very important;

b. Although she held an indefinite appointment, she was not offered any other available post within the office or with UNHCR implementing partners in Bosnia and Herzegovina, in violation of staff rule 9.6(f). She applied for a post with a UNHCR implementing partner but was not even short-listed. During the period from August 2010, when she was informed of the discontinuation of her post, to February 2011, when she was separated, there were four local posts available, none of which was offered to her or the other staff members affected by the discontinuation of their posts;

c. The office created two new posts, a P-4 and a G-5, and hired two international consultants, while at the same time abolishing four General Service posts, including hers, allegedly due to "budget gaps";

d. She was deliberately excluded from further employment within UNHCR.

18. The Respondent's principal contentions are:

a. The Representative had no intention to discontinue the position prior to being advised by headquarters that budgetary constraints would require cost-cutting efforts. Due to the unexpected decrease of the operation's budget, it was decided that one post at level G-6 would be identified for discontinuation in each department (Administration, Operations, Protection and the Office of the Representative). The decision to discontinue the Applicant's position was therefore the result of operational needs alone;

b. It was within the discretion of the Representative to identify the appropriate measures to take to meet the budget targets. It is not for the Tribunal to substitute its views to that of the Administration in such matters;

c. The failure to provide a written notification of the intention to discontinue the Applicant's position, in accordance with paragraph 1 of IOM/FOM No. 027/2009 (Procedural guidelines for changes in status of positions), was addressed in the management evaluation with the award of compensation in the amount of one month's net base salary;

d. The Applicant was duly notified in writing of the discontinuation of her post on 26 August 2010 and provided with the requisite six months' notice as required in IOM/51/2007-FOM/54/2007 (Revised framework for resource allocation and management) and IOM/FOM No. 027/2009;

e. UNHCR was not in a position to offer the Applicant positions with its implementing partners. The new P-4 position was not created by the Representative but moved from Belgrade to Sarajevo by the Europe Bureau. A G-5 post of Senior Administrative/Programme Clerk was created to provide support to the P-4 post but it was not considered as a

suitable alternative post for the Applicant as the functions of this position are fundamentally different from those of the Applicant. The two international consultants and their locally recruited assistants were not UNHCR staff members but outside consultants hired to provide technical expertise in the field of housing and for development of a Centre for Refugees and Internally Displaced Persons Studies;

f. The Applicant agreed to assume additional duties related to public information during a meeting held on 13 April 2010.

Consideration

19. At the outset and for purposes of clarification, it has to be noted that there are two distinguishable decisions in this case. The first one is the decision to discontinue the Applicant's post effective 28 February 2011, which was notified to her in writing on 26 August 2010. She requested management evaluation of the same on 15 October 2010. The second one is the decision to terminate the Applicant's indefinite appointment effective 28 February 2011, which was notified to her on 30 November 2010. The Applicant did not request management evaluation of that decision.

20. Pursuant to well-settled case law of the Dispute Tribunal (see for example *O'Neill* UNDT/2010/203, *Leboeuf et al.* UNDT/2010/206, *Klein* UNDT/2010/207, *Znamenski* UNDT/2010/208, *Jennings* UNDT/2010/213) and the Appeals Tribunal (see *Crichlow* 2010-UNAT-035, *Planas* 2010-UNAT-049, *Syed* 2010-UNAT-061, *Jennings* 2011-UNAT-184), requests for administrative review or management evaluation are mandatory first steps in the appeal process. Accordingly, the decision to terminate the Applicant's indefinite appointment is not properly before the Tribunal, and the arguments regarding the unlawfulness of this decision may not be considered by the Tribunal.

21. The only decision that was the subject of a request for management evaluation, and that is therefore properly before the Tribunal, is the decision to discontinue the Applicant's post.

22. The relevant provisions in this respect are contained in IOM/FOM No. 027/2009 (Procedural guidelines for changes in status of positions), which provides:

1. When a manager intends to seek a reclassification or review, including discontinuation or redeployment, of a position encumbered by a staff member who was appointed to the position through the APPC ... process, the manager must inform the staff member in writing that a reclassification/review of the position is being sought ...

2. ... [T]he effective date of discontinuation ... of all positions that are encumbered will be no less than six months after the approval of the request by the Budget Committee ...

3. The six month period of notification starts from the date of the staff member being informed by his/her manager of the relevant decision on the change in the status of the position ...

23. It is not contested by the Applicant that these procedures were complied with and the Tribunal notes that the Respondent compensated her for a minor flaw in the notification process by awarding her one month's net base salary.

24. The *onus* is on the Applicant to provide sufficient evidence that the contested decision was tainted by improper motives (see *Parker* 2010-UNAT-012, *Asaad* 2010-UNAT-021, *Hepworth* 2011-UNAT-178).

25. In the present case, however, she did not produce any evidence that the decision to discontinue her post was arbitrary or based on improper motives. As the records stands, it appears on the contrary that this decision—which concerned several posts, not only the Applicant's—was based on genuine budgetary constraints.

26. Even assuming *arguendo* that the appeal is receivable insofar as it concerns the subsequent decision to terminate the Applicant's appointment, the Tribunal can nonetheless add that there do not appear to be valid grounds for contesting that decision either. The evidence produced by the Respondent pursuant to Order No. 37 (GVA/2012) shows that the comparative review exercise was conducted in accordance with established procedures and that the decision to terminate the Applicant's appointment was based on lawful considerations.

Conclusion

27. In view of the foregoing, the Tribunal DECIDES:

The application is rejected.

(Signed)

Judge Thomas Laker

Dated this 30th day of March 2012

Entered in the Register on this 30th day of March 2012

(Signed)

René M. Vargas M., Geneva