UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2012/069
Judgment No.: UNDT/2013/019
Date: 14 February 2013
English
Original: French

Before: Judge Jean-François Cousin

Registry: Geneva

Registrar: René M. Vargas M.

NECOVSKA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Alexandre Tavadian, OSLA
Annelise Godber, OSLA

Counsel for Respondent:
Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. By application received in the registry of the Dispute Tribunal on 24 August 2012, the Applicant requests the Tribunal to order the United Nations Interim Administration Mission in Kosovo (UNMIK) to grant her a termination indemnity equal to 11.5 months of gross salary as a result of the closing of the Mission's liaison office in Skopje.

Facts

2. The Applicant joined UNMMIK in June 1999. From 1 January 2000 to 30 June 2012, she received a series of consecutive fixed-term contracts that were renewed annually. She was a Senior Language Assistant at the Skopje liaison office of the Mission. Her last fixed-term contract was effective through 30 June 2012.

3. In a report dated 30 January 2012 entitled *Budget for the United Nations Interim Administration Mission in Kosovo for the period from 1 July 2012 to 30 June 2013*, (A/66/673), the Secretary-General proposed to the General Assembly that four posts in the Mission's liaison office in Skopje, including that of the Applicant, should be abolished. On 13 March 2012, the Special Representative of the Secretary General for Kosovo informed the staff members posted in Skopje that the office would be closing on 30 June 2012.

4. By letter dated 19 March 2012, the Applicant and three other staff members whose posts were to be abolished on 30 June 2012 requested the Special Representative to grant them a termination indemnity.

5. On 27 March 2012, the Applicant received official notification that, in view of the closing of the liaison office in Skopje and of the abolition of her post, her fixed-term contract with UNMIK would not be renewed beyond its expiry on 30 June 2012.

6. By letter dated 23 April 2012, the Chief Civilian Personnel Officer of UNMIK informed the Applicant that her request for a termination indemnity had been denied.

7. On 12 June 2012, the Applicant requested a management evaluation of this decision. On 1 August 2012, the contested decision was upheld.

8. On 30 June 2012, the Applicant's fixed-term contract expired.

9. On 24 August 2012, the Applicant submitted an application contesting the decision not to grant her a termination indemnity. The Respondent submitted his reply on 24 September 2012.

Parties' submissions

10. The Applicant's contentions are:

a. The relevant issue is whether her separation from service was initiated by the Secretary-General and thus constituted a termination pursuant to rule 9.6 of the Staff Rules;

b. The date of abolition of her post coincided with the date of expiration of her fixed-term contract and the failure to renew her appointment was triggered by that abolition. It follows that her separation from service, which was initiated by the Secretary-General solely because of the abolition of her post, was in fact a termination within the meaning of rules 9.6 (a) and 9.6 (c) (i) of the Staff Rules. Article 9.3 of the Staff Regulations establishes that termination produces entitlement to an indemnity;

c. The Administrative Tribunal of the International Labour Organization has ruled that a succession of short-term contracts gives rise to a legal relationship between the Organization and the employee that must be considered equivalent to that of a permanent staff member. This is her situation. Had her post not been abolished, her contract would have been renewed beyond 30 June 2012. In its judgment in *Frechon* 2011-UNAT-132, the United Nations Appeals Tribunal considered the case of a separation from service for health reasons that coincided with the end of the staff member's fixed-term contract and concluded that this was, in fact, a termination;

d. In view of her 14 years of service and of the fact that the failure to renew her contract was based solely on the fact that her post had been abolished, the decision to separate her from service on 30 June 2012 constituted termination and produced an entitlement to an indemnity;

e. By allowing other staff members in the same situation as the Applicant to receive a termination indemnity, the Organization created a legitimate expectation that she would receive such an indemnity. In similar cases, the Organization extended the fixed-term contracts of some UNMIK staff members whose posts were to be abolished for about a month and then terminated them prematurely, thereby entitling the staff members to a termination indemnity. Thus, this is a well-established practice of the Administration and staff members who are placed in a similar situation must receive equal treatment. Pursuant to article 18, paragraph 3, of the rules of procedure of the Tribunal, the Applicant requests the Tribunal to order the production of the most recent extensions or renewals of those staff members' contracts and of their letters of termination. These documents will establish that they did, in fact, receive termination indemnities;

f. The legal relationship between the Organization and a staff member serving on successive short- or fixed-term contracts must be considered equivalent to that of a permanent staff member. In such cases, abolishing a post on the day that a fixed-term contract expires in order to deny the staff member a termination indemnity

establishes the Administration's bad faith. Such a practice leads to results which are quite unfair.

11. The Respondent's contentions are:

a. The Applicant's appointment was not terminated; it ran its full term and expired. Termination is the premature ending of an appointment prior to the expiration of its fixed term. It is distinguished from an expiration of appointment and this is reflected in the terms of appointment of the Applicant's fixed-term contract and in the Staff Rules; rules 9.4 and 9.6 clearly distinguish between the two situations. Rule 9.6 (b) states that separation as a result of expiration of appointment shall not be regarded as a termination. Rule 9.4 provides that a fixed-term appointment shall expire automatically. It follows that separation from service by reason of expiration of the term of appointment is not initiated by the Secretary-General and does not fall within the scope of rule 9.6 (a). The fact that the Applicant's contract was not renewed because her post was abolished does not mean that this was, *de facto*, a termination;

b. Only an express decision to terminate a staff member before the expiration date of his/her contract can be characterized as a separation from service initiated by the Secretary-General. Rule 9.6 (a) of the Staff Rules is intended to clarify that separation prior to the end of the term of an appointment for any reason other than an express decision of the Secretary-General – for example, death, abandonment of post, retirement or resignation – does not amount to a termination;

c. The Applicant has no rights other than those arising from her contract and from the Staff Rules; rule 4.13 (c) provides that a fixed-term contract does not carry any expectancy of renewal, irrespective of the length of service. Furthermore, the functions of UNMIK are, in essence, temporary and determined by political developments in Kosovo;

d. The Applicant was never promised that she would receive a termination indemnity if her fixed-term contract was not renewed. On the contrary, there was an express agreement between the Applicant and the Organization that unless her appointment was terminated prior to its expiration, she would not receive a termination indemnity. Contrary to the Applicant's claims, UNMIK did not renew the appointments of some staff members whose posts were to be abolished for the sole purpose of triggering their right to a termination indemnity. In the case of the staff members to whom the Applicant refers, the Administration could not anticipate the exact date on which their posts would be abolished; this is different from the Applicant’s case;

e. Thus, the principle of the equality of staff members was not violated since their situations were different.

Consideration

12. Rule 9.6 (b) of the Staff Rules provides that:

> (b) Separation as a result of resignation, abandonment of post, expiration of appointment, retirement, or death shall not be regarded as a termination within the meaning of the Staff Rules.

13. Annex III to the Staff Rules ("Termination indemnity") states:

> (d) No indemnity payments shall be made to:
>
> …
>
> (ii) A staff member who has a temporary or a fixed-term appointment that is completed on the expiration date specified in the letter of appointment.

14. This provision is clear and establishes that a termination indemnity shall not be paid in particular to staff members who separate from service on the date specified in the letter of appointment.

15. The document in the case file shows that the Applicant's last fixed-term contract ended on 30 June 2012, the date mentioned in the letter of appointment, and that she did, in fact, separate from service on that date. Therefore, the aforementioned rule formally prohibits granting her a termination indemnity even if, as she maintains, the end of her appointment could be considered a termination.

16. The Applicant maintains that the contracts of other staff members in the same situation were extended so that their posts would be abolished during their appointment rather than coinciding with the end of it.

17. Even if these allegations are true, the Tribunal must recall what has already been decided in its judgment *Servas* UNDT/2012/102:

> Since the Secretary-General does not have the discretionary power to grant or refuse an allowance provided for under the Staff Rules and Regulations and is required to apply the current regulations strictly, the Tribunal, when it considers an application contesting the refusal of an allowance, as in this case, must restrict itself to verifying whether the relevant regulations entitle staff members to the said allowances regardless of the merits of the reasons given by the Administration for refusing them. Thus, the Applicant’s reasoning that she was refused payment of the contested allowances as part of a larger pattern of retaliatory actions and that other staff members in the same situation as her would have received the contested allowances is irrelevant with regard to the case under consideration and must be rejected by the Tribunal.

18. The Tribunal must recall this jurisprudence. Where the conditions for the granting of an indemnity are established in a rule, the Secretary-General is required to apply the rule in force. The Administration has no discretionary power to grant or deny such an indemnity. The fact that it may, in some cases, have applied the current rules incorrectly in no way entitles other staff members to the same treatment. Only where the Secretary-General has discretionary power does the rule that staff members in the same situation must be treated equally apply. In this case, he had no such power and the Applicant cannot invoke the principle of equal treatment. Therefore, her request that the Tribunal order the Respondent to produce the documents concerning the appointment of other UNMIK staff members must be rejected since the production of these documents could in no way affect the outcome of the dispute.

19. The Applicant also maintains that the Administration had led her to hope that she would receive the disputed termination indemnity. But no document in which the Administration undertook to grant such an indemnity, or even gave her reason to hope to receive it, has been placed in the case file.

20. Therefore, the application must be rejected.

Conclusion

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

The application is rejected.

(*Signed*)

Judge Jean-François Cousin

Dated this 14th day of February 2013

Entered in the register on this 14th day of February 2013

(*Signed*)

René M. Vargas M., Registrar, Geneva