



Before: Judge Eleanor Donaldson-Honeywell

Registry: New York

Registrar: Nerea Suero Fontecha

ALQUZA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Aleksandra Jurkiewicz, OSLA

Counsel for Respondent:
Melissa Bullen, UN Women

Introduction

1. On 23 May 2018, the Applicant, a former staff member with UN Women, Jordan, filed an application to contest the Administration's "failure to make good faith efforts to place her outside of the normal selection process on the post of the Operations Manager", or, in the alternative, "the Administration's failure to make good faith efforts to find her a suitable alternative position in Jordan and place her outside of the normal selection process".

2. The Respondent filed his reply on 16 August 2018 in which he submits that the application is not receivable because under Article 2.1(a) of the United Nations Dispute Tribunal Statute, the Dispute Tribunal is competent to hear and pass judgment only on an application to appeal an administrative decision. In this case, the Respondent says, no administrative decision was made regarding placement of the Applicant outside the normal selection process and in fact no such decision could have been made. In any event, the Respondent contends that the application is without merit.

3. This case, originally filed with the Nairobi Registry of the Dispute Tribunal, was transferred to the New York Registry on 16 November 2018, where it was initially assigned to Judge Alessandra Greceanu. Following the expiration of Judge Greceanu's term with the Dispute Tribunal, the case was reassigned to the undersigned Judge on 14 January 2020.

4. At the Tribunal's direction, on 22 January 2020, the Applicant responded to the Respondent's submissions on receivability.

5. For the reasons below, the Tribunal finds that the application is not receivable.

Facts

6. The Applicant held a fixed-term appointment with UN Women as Operations Assistant.

7. In April 2017, following the creation and advertisement of an Operations Manager's post, the Applicant's post was scheduled for abolishment.

8. The Applicant's fixed-term appointment expired on 31 December 2017 and she was separated from the Organization.

Considerations

9. In essence, the Applicant argues that her appointment was terminated following the abolition of her post and, therefore, staff rules 9.6(e) and (f) on retainment of staff members whose posts are abolished apply.

10. The Applicant submits that she was *de facto* performing the functions of the newly created Operations Manager post prior to its creation. The Applicant therefore contends that she was qualified and suitable to be reassigned to this post and that following the abolition of her own post, the Administration should have made a decision to appoint her to the new position outside of the regular selection process.

11. In the alternative, the Applicant argues that since her appointment was terminated following the abolition of her post, the onus was on the Administration to make good efforts to find her a suitable position outside of the normal recruitment process in application of staff rule 9.6(e).

12. The Respondent states that the Applicant's appointment expired rather than was terminated and, therefore, staff rules 9.6(e) and (f) do not apply. Thus, there was no applicable decision to be made. Further, the Respondent states that in any event no decision was made under article 2.1 of the Tribunal's statute.

13. The Applicant responds that the Administration's failure to make a decision is also a reviewable administrative decision. She argues that the application is receivable because in the context of abolition, staff members are entitled to challenged implied decisions not to make good efforts to place them in alternative suitable posts before their contract expires. She refers to *Collins* Order No. 280 (NY/2016) in which the then presiding Judge made the following comment:

33. ... While the Applicant in this case holds a fixed-term appointment, considering her long service with the Organization and the fact that she is only one year from retirement, it would appear only reasonable to expect that UNFPA would, at least, undertake some attempt to look for another position for the Applicant.

14. The Tribunal is not persuaded by the Applicant’s argument because it is based on the incorrect premise that expiration of a fixed-term appointment is equivalent to termination of such an appointment for purposes of Staff Rules 9.6(e) and (f). This Tribunal recalls that in *Cruz* Order No. 35 (NY/2019), the Tribunal distinguished between an expiration and a termination of an appointment as follows:

21. Staff rule 9.1 on definition of separation describes “[e]xpiration of appointment” and “termination of appointment” as two distinct and mutually exclusive reasons for separating a staff member. This is only logical—if an appointment is terminated, this means that the Administration unilaterally breaks (or terminates) the contract during its term and then separates the staff member from the Organization; this is an entirely different situation from when it is decided to let the contract run out (or expire) and then the staff member is separated.

15. The Tribunal further notes that staff rule 9.6 only applies to situations where an appointment is terminated (emphasis added):

(e) Except as otherwise expressly provided in paragraph (f) below and staff rule 13.1, if the necessities of service require that *appointments of staff members be terminated* as a result of the abolition of a post or the reduction of staff, and subject to the availability of suitable posts in which their services can be effectively utilized, provided that due regard shall be given in all cases to relative competence, integrity and length of service, staff members shall be retained in the following order of preference:

...

(f) The provisions of paragraph (e) above insofar as they relate to staff members in the General Service and related categories shall be deemed to have been satisfied if such staff members have received consideration for suitable posts available within their parent organization at their duty stations.

16. The Appeals Tribunal has consistently held that “[t]he first step of the interpretation of any kind of rules, worldwide, consists of paying attention to the

literal terms of the norm” (see *Scott* 2012-UNAT-225, para. 225, as affirmed in, for instance, *De Aguirre* 2016-UNAT-705, *Timothy* 2018-UNAT-847 and *Ozturk* 2018-UNAT-892). This is also known as the plain meaning rule. From a plain reading of the legal framework it follows that the Administration is only obligated to make efforts to retain those staff members whose contracts have been terminated due to the abolition of their posts.

17. Applying the plain meaning rule to Staff Rule 9, it is clear that the Administration bears no obligation to place staff members who, like the Applicant in this case, continue to hold their fixed-term appointments but whose posts are scheduled for abolition. There is also no obligation to place such staff members in other positions outside of the regular recruitment process before the expiration of their appointments. These staff members may apply and be considered for other positions in the Organization through the regular selection process.

18. The interpretation of Staff Rule 9.6(e) and (f) must also be undertaken in the context of the regulatory framework as a whole. In so doing the plain meaning summarized above is reinforced by Staff Rule 9.6(b) which states that “separation as a result of [...] expiration of appointment [...] shall not be regarded as a termination within the meaning of the Staff Rules”. Accordingly, the Organization was not authorized to make any decision pursuant to Staff Rule 9 (e) and (f) in relation to the Applicant as she had not been terminated.

19. In the Applicant’s response to the Respondent’s submissions on receivability, she appears to put in issue the nature of her separation by stating that the question whether “the Applicant’s appointment ‘expired rather than was terminated’ is a matter for determination with respect to the merits of the case”. However, the Applicant did not challenge the non-extension of her fixed-term appointment in either the application or her prior request for management evaluation. The issue of the regularity of any decision not to renew her fixed-term appointment is therefore not before the Tribunal.

20. In any event, even if the Applicant had challenged the grounds for the non-renewal of her fixed-term appointment in this Application, staff rules 9.6 (e) and (f) would not have applied so as to require a decision to be made in retaining her services.

21. As the Applicant was informed in the email sent by UN Women management to her on 14 December 2017, her fixed-term appointment expired on 31 December 2017. The Applicant was not terminated and staff rules 9.6 (e) and (f) do not apply in this matter. There being no obligation on the Administration to retain the Applicant after the expiration of her post, there was no administrative decision for the Administration to have made or to have omitted to make. The application is therefore not receivable.

Conclusion

22. The Tribunal rejects the application as not receivable.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 23rd day of January 2020

Entered in the Register on this 23rd day of January 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York