



Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

HASSAN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Linda Mohlin, UNDP

Introduction

1. The Applicant, a former Programme Analyst at a National Officer B-Grade level with the United Nations Development Programme (“UNDP”) in the United Arab Emirates (“UAE”), contests the Administration’s decision not to renew his fixed-term appointment beyond 28 February 2018. The application was initially filed with the Nairobi Registry.

2. On 16 November 2018, the case was transferred to the New York Registry, and on 20 January 2020, it was assigned to the undersigned Judge.

3. For the reasons below, the application is granted in part.

Facts

4. On 1 April 2014, the Applicant joined the UNDP country office in the UAE as a Programme Analyst in the Programme Team.

5. On 21 November 2017, a Human Resources (“HR”) Assistant in the UAE country office wrote an email to a HR Specialist in the Regional Bureau for Arab States seeking advice as to how to separate the Applicant in a most efficient and cost-effective method. In the email, the HR Assistant wrote, “This decision is mainly based on unavailability of funding to extend the staff’s contract beyond 31 December 2017. The management decided not to extend this staff’s contract in particular as the main goals assigned to him including provision of support to economic development in the Northern Emirates were never met. In addition, the government doesn’t wish to finance projects in the Northern Emirates any longer. Consequently, no budget/financial contribution was allocated from the government to this purpose and the [country office] is currently facing a deficit”.

6. On 10 December 2017, the Resident Representative and Resident Coordinator (“RR/RC”) in the UAE country office sent an email to the HR Assistant, asking that the abolishment of the Applicant’s post be initiated. In this email, the RR/RC wrote:

This decision is based on the pertinence of the position in the current country office context. The main goals assigned to the position include support to economic development in the Northern Emirates. These goals were not met, and additionally, the Government has expressed it has no funding availability for projects in the Northern Emirates for the medium-term. No financial contribution was allocated from the Government for this purpose, and we even have yet to receive the full amount of our office’s annual [Government Contributions to Local Office Costs] contribution. As we stand now, the [country office] is facing a deficit in its funding for the institutional budget.

7. Subsequently, the HR Assistant advised the HR Specialist in the Regional Bureau for Arab States that the RR/RC decided to abolish the Applicant’s post effective 1 March 2018 and thus extend the Applicant’s appointment until 28 February 2018.

8. On 22 December 2017, the RR/RC informed all the staff members of the country office at a general meeting that due to the ongoing uncertainties about the future of the country office, their appointments would be extended only for six months until June 2018.

9. On 7 January 2018, the RR/RC met the Applicant to verbally advise him that his appointment would be extended for two months only, and on 8 January 2018, by email, the Applicant questioned the decision to abolish his post and its reasons given to him during the meeting on 7 January 2018.

10. By notification dated 9 January 2018, the Applicant was advised that, due to budgetary limitations, his fixed-term appointment would be extended only until 28 February 2018 at which time his appointment would expire.

11. On 27 February 2018, the UAE government formally confirmed to UNDP that the UAE’s country programme with UNDP would not be renewed, and that UNDP

would wrap up existing activities and close the existing office by June 2018. The UAE government wished to continue to work with UNDP to define a successor relationship based on the concept of a UNDP liaison office that would be a direct heir to the country programme upon its closure.

12. On 1 March 2018, the Applicant requested a management evaluation of the decision notified to him on 9 January 2018. He submitted that while all the posts in the UAE country office were funded in a similar fashion, not renewing his post only was arbitrary and discriminatory, and the proffered reasons for the contested decision were not supported by the facts. He further argued that the Administration failed to make efforts to find alternative placement for him as required under staff rule 9.6(e).

13. On 7 March 2018, the HR Specialist in the Regional Bureau for Arab States wrote an email to the HR Assistant in the UAE country office seeking further information about the non-renewal of the Applicant's fixed-term appointment, stating that they were reviewing the Applicant's case. In response to the Regional Bureau for Arab States' inquiry as to whether the funding source for the Applicant's post was different from other posts and if there was any documentation showing that the Applicant was working on the Northern Emirates project and the government was no longer funding such project, the HR Assistant provided a response from the RR/RC:

The source[] of funding was the same as for other [fixed-term] positions in the office but his [terms of reference] was relevant for the [Country Programme Document ("CPD")] outcome on Northern Emirates. It was not a specific project, thus no documentation on project funding. However, we had a growing deficit and the government disinterest in continuing the outcome under current and also future CPDs made my decision to abolish the post. The decision has been proven right in the sense that the government has stated that there will be no new CPD and that the current [country office] activities should be discontinued as of end of June.

14. On 12 March 2018, the RR/RC requested the UAE government to pay the contributions to the Government Contributions to Local Office Costs account for the 2017 unpaid balance and 2018 dues until 30 June 2018.

15. On 12 April 2018, the Administration responded to the Applicant's request for management evaluation and upheld the contested decision, stating that it had to cut costs and decided to abolish the Applicant's post and not renew his appointment for the following reasons:

In order to cut costs, the RR/RC had to consider which position was most disposable. As mentioned, you were the second most junior staff member in the [country office], and of the four members of the programme staff, two staff members had significantly longer Fixed-Term Appointments. The most junior staff member was the G5. You were working on an *ad hoc* basis on Partnerships, a function that was not limited to your role, but which all programme staff performed. Most crucially perhaps, the abolition of your post would achieve significant cost savings needed to close the deficit. For these reasons, the RR/RC decided to not renew your contract beyond 28 February 2018.

16. The UNDP country office in the UAE closed on 30 June 2018 and was succeeded by the Office of the United Nations Resident Coordinator. A few staff members were retained beyond 30 June 2018 to provide support to the Resident Coordinator's office in the UAE.

17. On 11 July 2018, the Applicant filed the application.

Consideration

Receivability and scope of review

18. The Respondent contends that the application is not receivable on the ground that the Applicant has not previously submitted the contested decision for management evaluation as required under art. 8.1(c) of the Dispute Tribunal's Statute. The Respondent submits that the Applicant identified the contested decision as the "termination/abolishment of [his] post" in the application while he sought a review of the decision not to extend his fixed-term appointment in his management evaluation request.

19. It is trite law that the applicant must identify and define the administrative decision that the applicant wishes to contest (see, for instance, *Planas* 2010-UNAT-049 and *Farzin* 2019-UNAT-917). The Appeals Tribunal has, however, held that “the Dispute Tribunal has the inherent power to individualize and define the administrative decision challenged by an applicant and to identify the subject(s) of judicial review” and as such “may consider the application as a whole ... in determining the contested or impugned decisions to be reviewed” (*Fasanella* 2017-UNAT-765, para. 20).

20. While the Applicant used different terms to describe the contested decision, the review of the management evaluation request and the application shows that the Applicant is essentially contesting the same decision, namely, the decision not to renew his fixed-term appointment beyond 28 February 2018.

21. In the application, the Applicant described the contested decision as the “Termination/Abolishment of Post”, and further stated that the decision was notified to him on 9 January 2018 by the RR/RC. From the plain reading of the document, the Tribunal finds that the Applicant clearly refers to the non-renewal decision that was notified to him on 9 January 2018.

22. The Respondent submits that the Applicant stated in his request for management evaluation that his post had not been abolished, but the Tribunal understands from the evidence that this is because the non-renewal notification did not inform him that the contested decision was a result of the abolition of post. In response to the Applicant’s claim in the management evaluation request that his post was not abolished, the Administration clarified that his post was in fact abolished and provided such as a reason for the contested decision.

23. As to the Applicant’s reference to the termination of his appointment, which he raises both in his management evaluation request and application, the Applicant argues that he was not given protection afforded for staff members whose appointments are terminated as a result of the abolition of post under staff rule 9.6(e).

24. However, staff rule 9.6(b) clearly provides that separation as a result of expiration of appointment is not a termination within the meaning of the Staff Rules. The contested decision in this case is the decision not to renew the Applicant's fixed-term appointment at expiration of appointment and thus there is no administrative decision to terminate the Applicant's appointment (see, for example, *Nouinou* 2019-UNAT-902, para. 32). Therefore, staff rule 9.6(e) is not applicable in this case and any claims relating to the Administration's obligations under staff rule 9.6(e) are dismissed.

25. However, this does not mean that the Applicant contests a new decision that was not submitted for management evaluation. Even if the word 'termination' was not the exact term, the contested decision currently under review is the non-renewal decision notified to the Applicant on 9 January 2018.

26. Accordingly, the Tribunal finds the present application receivable and defines the contested decision as the decision not to renew the Applicant's fixed-term appointment beyond 28 February 2018. The issue before the Tribunal is whether this decision is lawful.

Whether the non-renewal decision is lawful

27. From the parties' submissions, the Tribunal notes that there are two main issues in dispute on this matter: a) The procedural regularity of the contested decision and b) The existence of an ulterior motive. The Tribunal will review these two sets of contentions in turn.

The procedural regularity of the contested decision

28. A fixed-term appointment does not carry any expectancy of renewal and expires automatically without prior notice on the expiration date pursuant to staff regulation 4.5(c) and staff rules 4.13(c) and 9.4. The Administration is, nevertheless, required to provide a reason for such a non-renewal upon the affected staff member's

request or the Tribunal's order, and, as the Appeals Tribunal held in *Islam* 2011-UNAT-115, "when a justification is given by the Administration for the exercise of its discretion it must be supported by the facts" (see *Islam* 2011-UNAT-115 (paras. 29-32), *Obdeijn* 2012-UNAT-201 (paras. 33-39), *Pirnea* 2013-UNAT-311 (paras. 33-34)).

29. It is also well settled jurisprudence that an international organization necessarily has power to restructure some or all of its departments or units, including through the abolition of posts. The Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. However, like with any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with staff members (see *Hersh* 2014-UNAT-433, *Bali* 2014-UNAT-450, *Matadi et al.* 2015-UNAT-592). As the Appeals Tribunal stated in *Sanwidi* 2010-UNAT-084, at para. 40, when judging the validity of the exercise of discretionary authority,

the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

30. In this case, the reason proffered by the Administration for not renewing the Applicant's appointment in the notification dated 9 January 2018 is "budgetary limitations". There is evidence that the UAE country office indeed faced a budget deficit, but the Applicant raised a question in his management evaluation request as to why his appointment was extended only up to 28 February 2018 whereas all the other staff members in the UAE country office received an extension until June 2018. The Applicant claimed that the decision to single him out was arbitrary and discriminatory. In response, the Administration further elaborated why the Applicant's post was selected for abolition of post:

In order to cut costs, the RR/RC had to consider which position was most disposable. As mentioned, you were the second most junior staff member in the [country office], and of the four members of the programme staff, two staff members had significantly longer Fixed-Term Appointments. The most junior staff member was the G5. You were working on an *ad hoc* basis on Partnerships, a function that was not limited to your role, but which all programme staff performed. Most crucially perhaps, the abolition of your post would achieve significant cost savings needed to close the deficit. For these reasons, the RR/RC decided to not renew your contract beyond 28 February 2018.

31. When the Tribunal ordered the Respondent to provide the contemporaneous documentation supporting the reasons for the contested decision as set forth in the response to the management evaluation request (Order No. 22 (NY/2020)), the Respondent provided internal communications of November and December 2017 between the UAE country office and the UNDP Regional Bureau for Arab States, as described above. These documents show that the reason for the contested decision provided by the RR/RC at that time was that “[t]he main goals assigned to the position include support to economic development in the Northern Emirates” but “[t]hese goals were not met, and additionally, the Government has expressed it has no funding availability for projects in the Northern Emirates for the medium-term”.

32. The Respondent further provided internal communications of March 2018 between the UAE country office and the UNDP Regional Bureau for Arab States. Obviously in response to the Applicant’s management evaluation request, the HR Specialist in the Regional Bureau for Arab States made an inquiry to the UAE country office to seek further information about the contested decision and learned that the source of funding for the Applicant’s post was the same as other positions in the country office, and there is no specific documentation showing that the Applicant was working on the Northern Emirates project as this was not a specific project with a dedicated project funding.

33. The Tribunal notes that in all the internal communications leading up to the contested decision and the response to the Applicant’s management evaluation

request, the only justification provided for the contested decision by the UAE country office was the Applicant's roles in the economic development project in the Northern Emirates, which was allegedly discontinued. However, as the internal communications of March 2018 show, the UAE country office failed to produce any evidence that the Applicant's main roles were in such project and that the project was discontinued. It is true that the Applicant's job description shows that his job responsibilities include, among others, matters of economic development, but that alone is not sufficient to support the proffered justification. The UAE country office referred to the Country Programme Document, but this document sets out various goals for the entire UAE country office for 2013-2017. There is indeed reference to the economic development of the Northern Emirates, but it does not link this goal to any particular staff nor does it show the outcome of these goals (e.g. certain goals were not met).

34. In the reply, the Respondent submitted the minutes of the 31 July 2017 meeting between the RR/RC and a UAE government official. The parties discussed at the meeting that there was no activity for the regional economic development with focus on Northern Emirates and considering "the sensitivities on Northern Emirates", it was decided that this goal would not feature in future programming. However, there was no discussion of the reduction or discontinuance of any particular funding or staff post as this discussion occurred in the context of deciding the scope of the subsequent Country Programme Document following the 2013-2017 document. The Respondent has submitted no evidence on this topic other than the minutes dated 31 July 2017 and the 21 November 2017 email in which the UAE country office sought advice for the separation of the Applicant.

35. While the Respondent presents correspondence from the UAE government dated 27 February 2018, which notified the UAE country office that the country office would be closed by June 2018, as evidence in support of the contested decision, the Tribunal notes that this correspondence is dated long after the contested decision was made. Moreover, the evidence of the closure of the country office in

June 2018 still does not explain why the Applicant's post was singled out for abolition four months prior to the closure of the office.

36. The more crucial question for the Tribunal is why the Applicant's supposed main roles in the economic development project in the Northern Emirates and the discontinuance of such project were not provided as a reason for the contested decision in the Administration's response to the Applicant's management evaluation request. Although the record shows that the Administration was aware that the justification provided by the UAE country office was the Applicant's role in the economic development project in the Northern Emirates, which was allegedly discontinued, it failed to disclose this reason in the response to the management evaluation request.

37. Further, the Administration provided various other reasons in support of the contested decision in the response to the management evaluation request, but none of these reasons are supported by the contemporaneous documentation that justified the contested decision.

38. In response to Order No. 22 (NY/2020) which ordered the production of documentation in support of the contested decision, the Respondent claims that the RR/RC had the delegated authority to decide on the non-extension of local staff appointments and that there was no procedural requirement for the RR/RC to document the deliberations of his decision. However, as discussed above, there is internal documentation showing his deliberations. The question is why there is a complete disconnect between the reasons provided internally when the contested decision was made and the reasons provided in response to the management evaluation request.

39. In addition, the reasons provided in response to the management evaluation request are not fully supported by the facts. The Tribunal recalls that the Administration provided four reasons in response to the management evaluation request why the Applicant's position was selected for abolition of post: (a) he was the

second most junior staff and the most junior staff member was the G-5; (b) two other programme staff members had significantly longer fixed-term appointments; (c) he was working on an ad hoc basis on partnerships, a function that was not limited to his role, but which all programme staff performed; and (d) the abolition of his post would achieve significant cost savings needed to close the deficit.

40. The record shows that while it is true that except for three management staff, the Applicant was the second most junior staff member—the most junior staff member being at the G-5 level—it is not clear why the abolition of the Applicant’s post was needed to close the deficit. In fact, the budget deficit for 2017 was USD101,808.07 and the cost for the G-5 staff member, the most junior staff member, was about the same amount, whereas the staff cost for the Applicant’s post was USD186,483.31.

41. The evidence also belies the Respondent’s assertion that two staff members in the programme team had significantly longer fixed-term appointments. The record shows instead that all the programme staff’s appointments were valid until 31 December 2017 and then extended for additional six months.

42. Further, the proffered justification that the Applicant’s role on partnerships was not limited to him but all programme staff performed this role contradicts another justification for the contested decision, i.e., the Applicant’s main role in the economic development project in the Northern Emirates and the discontinuance of this project justified the abolition of his post and his separation.

43. As the Appeals Tribunal held in *Sanwidi*, the Tribunal’s role is not to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. However, the decision must be legal and rational and not absurd or perverse, and the Administration has the duty to act fairly, justly and transparently in dealing with staff members. Also, the reasons provided for the contested decision must be supported by the facts. However, as described above,

various justifications given by the Administration suffered from inconsistencies and inaccuracies and not fully supported by the facts.

The existence of an ulterior motive

44. The Applicant also submits that the contested decision was tainted by ulterior motives. Under the jurisprudence of the Appeals Tribunal, if the applicant claims that the decision was ill-motivated or based on improper motives, the burden of proving any such allegations rests with the applicant (see, for instance, *Azzouni* 2010-UNAT-081, para. 35; *Obdeijn* 2012-UNAT-201, para. 38).

45. The Applicant claims that he was targeted for separation after his previous close relationship with the RR/RC turned sour and submitted some documentation which supposedly proves his close relationship with the RR/RC, such as a photo allegedly showing the RR/RC and the Applicant at a restaurant and a handwritten note allegedly from the RR/RC thanking the Applicant for making his birthday a memorable one. The Applicant did not present any evidence to support his claim that this close relationship turned sour before the contested decision was made. Based on the review of the evidence submitted by the Applicant, the Tribunal concludes that he did not meet the burden of proving that the decision was made based on improper motives.

46. Accordingly, the Tribunal finds that the provided reasons for not renewing the Applicant's fixed-term appointment were not properly based on facts and the Administration did not act fairly, justly and transparently in dealing with the Applicant. However, the Tribunal finds that the Applicant failed to show that the decision was ill-motivated as alleged.

47. In light of the foregoing, the contested decision is unlawful.

Remedies

48. Article 10.5 of the Dispute Tribunal's Statute provides:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

49. Having concluded that the contested decision is unlawful, it is appropriate to rescind the contested decision and order the reinstatement. However, reinstatement is not possible considering that the UNDP country office in the UAE closed by June 2018. Considering the closure of the UAE country office, and since the contested decision concerns the "appointment, promotion or termination", the Tribunal is obligated, pursuant to art. 10.5(a) of its Statute, to set an amount of compensation that the Respondent may elect to pay as an alternative to the rescission of the contested decision.

50. As the Appeals Tribunal stated, in-lieu compensation, an alternative to rescission, "should be as equivalent as possible to what the person concerned would have received, had the illegality not occurred" (*Ashour* 2019-UNAT-899, para. 20).

51. The record shows that the Applicant's appointment was extended until 29 April 2018 to cover certified sick leave and that appointments of the rest of the staff members in the UAE country office were extended until 30 June 2018. While a few staff members' appointments were extended beyond 30 June 2018, the Tribunal cannot say that the Applicant would have been one of a few staff members who were retained beyond 30 June 2018 had the illegality not occurred. Therefore, the Tribunal

sets the alternative compensation at two months of the Applicant's net-base salary at the time of his separation.

52. In addition, the Applicant requests compensation for moral damages he suffered, namely, mental trauma inflicted and harm to his reputation.

53. Under art. 10.5(b) of the Dispute Tribunal's Statute, compensation for harm should be supported by evidence, and the Appeals Tribunal held that it should be supported by three elements: the harm itself, an illegality, and a nexus between them, and the claimant bears the burden of proof to establish that the harm is directly caused by the Administration's illegal act (*Kebede* 2018-UNAT-874, paras. 20-21). The Appeals Tribunal further held, "the testimony of the complainant is not sufficient without corroboration by independent evidence (expert or otherwise)" (*Langue* 2018-UNAT-858, para. 18, citing *Kallon* 2017-UNAT-742).

54. In support of the Applicant's claim for moral damages, he submitted a medical report dated 25 March 2018. The Applicant saw a consultant psychiatrist who concluded that he developed severe depression and other symptoms. However, the report does not state what caused these symptoms. Therefore, the Tribunal finds that the Applicant did not prove that the harm was directly caused by the contested decision and therefore rejects his claim for moral damages.

Conclusion

55. In light of the foregoing, the Tribunal DECIDES:

- a. The application is granted in part;
- b. The decision not to renew the Applicant's fixed-term appointment beyond 28 February 2018 is rescinded;

c. Should the Respondent elect to pay in lieu compensation, the Applicant shall be paid, as an alternative, a sum equivalent to two months of the Applicant's net-base salary at the time of his separation;

d. The Applicant's claim for moral damages is rejected;

e. If payment of the above amount is not made within 60 days of the date at which this judgment becomes executable, five per cent shall be added to the United States Prime Rate from the date of expiry of the 60-day period to the date of payment. An additional five per cent shall be applied to the United States Prime Rate 60 days from the date this Judgment becomes executable.

(Signed)

Judge Joelle Adda

Dated this 7th day of April 2020

Entered in the Register on this 7th day of April 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York