UNITED NATIONS DISPUTE TRIBUNAL

Case No.:	UNDT/NY/2019/016
Judgment No.:	UNDT/2020/066
Date:	4 May 2020
Original:	English

Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

SEXTON

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Marcos Zunino, OSLA

Counsel for Respondent:
Alan Gutman, ALD, UN Secretariat

Introduction

1. On 14 February 2019, the Applicant filed an application contesting the "implied decision not to make reasonable effort to place [her] on a suitable vacancy following the abolition of her post".

2. On 18 March 2019, the Respondent filed his reply stating, *inter alia*, that the application is not receivable because the Applicant's appointment was not terminated and, therefore, staff rule 9.6(e) on retention of staff does not apply.

3. At the Tribunal's direction, on 23 April 2020, the Applicant responded to the Respondent's submissions on receivability.

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

Considerations

5. The Applicant states, *inter alia*, that on 26 September 2018, she was notified of that her appointment would not be extended beyond its expiration date of 31 October 2018. The reasons given were that the project on which she was working would be "closed" on that date.

6. The Applicant requested management evaluation of the decision not to renew her appointment. After receiving the response from the Management Evaluation Unit, the Applicant states that she now "understand that the abolition of her post was genuine". However, "in the context of the recent [Appeals Tribunal] jurisprudence" she states that she "decided to pursue her case before this Tribunal with respect to the implied decision not to make good faith effort to consider her for alternative positions".

7. The Applicant argues that even if her appointment was legally abolished, pursuant to staff rule 9.6(e) and (f), if the necessities of service require appointments of staff members be terminated as a result of the abolition of a post, staff members

holding fixed-term appointments shall be retained in preference of staff members with lower level protection.

8. The Applicant further claims that her long service with the Organization and excellent performance were not taken into account for the posts within the Secretariat to which she applied. It cannot therefore be said, she submits, that there were no suitable posts onto which she could have been placed pursuant to staff rule 9.6.

9. 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 administrative decision was made under article 2.1 of the Tribunal's statute.

10. The Applicant responds that the Administration's failure to make a decision is also a reviewable administrative decision. She refers to previous jurisprudence of this Tribunal such as *Evans* Order No. 281 (NY/2017) stating:

> 35. … The Tribunal underlines that according to the mandatory provisions of staff regulation 9.3(a)(i) and staff rules 9.6(c)(i) and 9.6(e)(iii), regarding the right of a staff member, including the Applicant, with a fixed-term contract in case of abolition of his/her post to express his/her interest and to be retained in any available suitable post(s), without having to go through a competitive selection process.

11. The Applicant further 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

Conclusion

17. The Tribunal rejects the application as not receivable.

(Signed)
Judge Alexander W. Hunter, Jr.
Dated this 4th day of May 2020

Entered in the Register on this 4th day of May 2020

(Signed)
Nerea Suero Fontecha, Registrar, New York