



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2018/078
Judgment No.: UNDT/2020/128
Date: 27 July 2020
Original: English

Before: Judge Joelle Adda
Registry: New York
Registrar: Nerea Suero Fontecha

MALLICK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
Shubha Naik, OSLA

Counsel for Respondent:
Angela Arroyo, UNDP

Introduction

1. On 27 November 2018, the Applicant, a former staff member of the United Nations Development Programme (“UNDP”) based in Georgetown, Guyana, filed an application contesting the Administration’s decision not to renew her fixed-term appointment beyond the expiration date of 16 August 2018.

Procedural history

2. By joint motion filed on 30 November 2018, the parties requested the Tribunal to suspend the proceedings pending discussions to resolve this matter amicably. The parties’ request was granted by the Tribunal by Order No. 239 (NY/2018) dated 10 December 2018.

3. Following the first request for suspension of proceedings, the parties filed six further joint motions requesting the Tribunal to suspend the proceedings pending discussions to resolve this matter amicably; each joint motion was granted by the Tribunal (by Order Nos. 2 (NY/2019), 26 (NY/2019), 43 (NY/2019), 51 (NY/2019), 71 (NY/2019) and 103 (NY/2019), respectively).

4. On 27 August 2019, the Respondent filed a submission informing the Tribunal that the parties have been unable to informally resolve the matter. On 30 September 2019, the Respondent filed his reply.

5. On 8 April 2020, by way of Order No. 65 (NY/2020), the Tribunal directed the parties to file their closing submissions.

6. On 1 May 2020, the Applicant filed a motion in which she requested an oral hearing to hear the testimonies of three staff members. The proposed witnesses were the former Director of Bureau for Latin America and the Caribbean (“RBLAC”), the former Deputy Director, RBLAC, and the UNDP Deputy Director and Chief of Human Resource Management, Office of Human Resources. The Applicant further requested leave to file

new evidence in the form of three audio recordings of conversations she had recorded with the proposed witnesses without their consent during the course of 2017.

7. On 6 May 2020, the Respondent filed a submission requesting leave to file a response to the Applicant's motion and to the evidence submitted.

8. On 6 May 2020, by way of Order No. 84 (NY/2020), the Tribunal granted the Respondent's request to file a response to the Applicant's motion.

9. On 12 May 2020, the Respondent filed a response to the Applicant's motion dated 1 May 2020, submitting, *inter alia*, an objection to the Applicant's request for an oral hearing. The Respondent contended that the Applicant's justification for the hearing, and the information that she indicates the new witnesses could testify to, is outside of the scope of what is properly before the Tribunal. The Respondent further objected to the Applicant's request to file the three recordings on the basis that they were not relevant or probative to the facts at issue and violated the privacy rights of the staff members on the recordings.

10. On 21 May 2020, by Order No. 93 (NY/2020), the Applicant's requests for a hearing in order to hear testimony of three witnesses and to file additional evidence were refused, principally because the testimonies proposed by the Applicant were not within the scope of the grounds pleaded in the Applicant's application.

11. On 5 June 2020, the Applicant filed her closing submission. On 11 June 2020, the Respondent filed his closing submission. On 19 June 2020, the Applicant filed her final statement.

Facts

12. On 2 September 2011, the Applicant joined UNDP in the Democratic People's Republic of Korea on a four-year rotation as the Deputy Resident Representative ("DRR") on a fixed-term appointment at the P-4 level.

13. On 17 August 2015, the Applicant started her next four-year rotation as DRR with UNDP in Guyana on a fixed-term appointment at the P-4 level.

14. From 30 January 2017 to 10 February 2017, the Office of Audit and Investigations (“OAI”) conducted an audit of UNDP Guyana. OAI issued its audit report on 20 April 2017 finding, *inter alia*, that UNDP Guyana needed to fully address the concerns disclosed by its staff members in the Global Staff Survey. OAI also recommended that a Management Consulting Team mission be organized to look into optimizing UNDP Guyana’s organizational structure.

15. On 5 May 2017, the Resident Representative/Resident Coordinator (“RR/RC”), UNDP Guyana sent an email to all UNDP Guyana staff members informing them that UNDP would be conducting a joint RBLAC / Ombudsman Office / Office of Human Resources (“OHR”) / Ethics Office mission (“joint HQ mission”) in UNDP Guyana. The purpose of the mission was to review and address office-wide issues of working atmosphere and concerns, including employee relations in UNDP Guyana. This mission was deployed to UNDP Guyana from 10 May 2017 through 12 May 2017.

16. On 12 May 2017, the Applicant met with the Deputy Director, OHR as part of the joint HQ mission to UNDP Guyana. During these discussions, the Applicant expressed her desire to leave UNDP Guyana prior to the end of her four-year rotation.

17. Between May and November 2017, the Applicant repeated her requests to leave UNDP Guyana prior to the end of her four-year rotation and expressed interest in other positions within UNDP and externally in the private sector.

18. On 2 November 2017, the Applicant informed the Assistant Secretary-General (“ASG”), RBLAC, who was also the Director, RBLAC, that because of family reasons she needed to move as soon as possible to a different duty station.

19. On 15 November 2017, the Director, RBLAC, responded to the Applicant’s request and provided options for the Applicant to consider. As part of her response to the Applicant, the Director, RBLAC informed her that taking into consideration her requests,

and the needs of the Country Office, she would commence recruitment for DRR Guyana post by the end of the year.

20. Further to the 15 November 2017 receipt of the Director's email, the Applicant had a skype call with the Human Resources Business Partner, RBLAC to discuss her employment options.

21. In December 2017, the Applicant applied to three UNDP DRR positions as part of the December 2017 Talent Review Exercise, including the one in Guyana, a post that was published due to the Applicant's express desire to leave this post and the Administration's obligation to plan for the needs of UNDP Guyana. The Applicant ranked the DRR Guyana position third among the three positions she wished to be considered for. Further to a corporate panel review, the Applicant was not selected for this new rotation.

22. On 10 July 2018, the Director a.i. (ad interim, or temporary), RBLAC notified the Applicant that her assignment with UNDP Guyana would reach completion upon the expiration of her fixed-term appointment on 16 August 2018. The letter noted that this decision was taken further to the Applicant's exchanges with the Director, RBLAC and Deputy Director, RBLAC. Around 12 July 2018, the Applicant had a follow-up call with the Director, OHR.

23. On 19 July 2018, the Applicant requested management evaluation of the non-renewal of her appointment on the basis of "the Administration's failure to provide reasons for its decision".

24. On 19 July 2018, the Applicant had another call with the Director, OHR regarding the non-renewal of her appointment.

25. On 31 July 2018, the Applicant filed a request for suspension of action of the 10 July 2018 decision with the Dispute Tribunal. On 7 August 2018, the Dispute Tribunal suspended the 10 July 2018 decision pending the completion of the review of the Applicant's request for management evaluation.

26. On 29 August 2018, the Assistant Administrator and Director, Regional Bureau for Arab States, informed the Applicant that he considered the decision not to renew the Applicant's appointment proper and it would therefore be upheld.

Consideration

The issues of the case

27. The Tribunal notes that the Applicant's case concerns the decision not to renew her fixed-term appointment. The issues raised by the Applicant in her application can be defined as:

- a. Did the Respondent fail to provide the Applicant with the reasons for the non-renewal decision?
- b. Were there improper motives underlying the non-renewal decision?

Did the Respondent fail to provide the Applicant with the reasons for the non-renewal decision?

28. The Applicant submits that UNDP failed to provide her with reasons as to why her appointment was not renewed. In support of her claim, the Applicant relies on the 10 July 2018 notification by the Director a.i., RBLAC that the Applicant's assignment with UNDP Guyana would reach completion upon the expiration of her fixed-term appointment on 16 August 2018. The Applicant states that the notification letter failed to provide her with the reasons for the decision.

29. The Respondent submits that the 10 July 2018 notification of non-renewal reflects that it was taken further to the Applicant's previous exchanges with management in which the Applicant repeatedly requested to leave her DRR Guyana post. The Respondent states that the Applicant's own requests resulted in the Administration informing her that, in the interest of the Organization, it would have to advertise the DRR Guyana post. The Applicant was further informed that she would be able to continue performing functions

against the DRR Guyana post for a limited amount of time thereafter. Absent the Applicant having been selected to perform functions against another position within UNDP, the Respondent argues that there was no basis to renew the Applicant's appointment.

30. The Tribunal notes that 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 relevant staff member's request, and this reason must be lawful and based on correct facts (see, for instance, the Appeals Tribunal's judgments in *Islam* 2011-UNAT-115, *Pirnea* 2013-UNAT-311, *Obdeijn* 2012-UNAT-201, and *Jafari* 2019-UNAT-927 (para. 35)).

31. It is also well settled jurisprudence that an international organization necessarily has power to restructure some or all of its departments or units. 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, 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.

32. In this case, the Tribunal notes that the 10 July 2018 notice of non-renewal sent from the Director a.i. RBLAC states as follows:

Dear [Applicant]

Further to the previous exchanges with the Director and the Deputy Director of the UNDP Regional Bureau for Latin America and the Caribbean (RBLAC), I would like to confirm that your assignment with UNDP Guyana will reach completion upon expiration of your fixed-term appointment on 16 August 2018 (close of business).

Clause (c) of our Staff Rule 4.13 states that: “A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service.”

Although fixed-term contract holders are not entitled to a notice period, it is our usual practice to notify staff members of the non-extension of their contracts as soon as possible and at least one month before the expiry date. I trust that this notice will allow you to plan accordingly for your transition.

I would like to thank you for your contribution to this organization, reassure you of our support in your job search and wish you every success in your future career.

[...]

33. The Tribunal notes that the above notice stated that the non-renewal decision was taken further to the Applicant’s exchanges with the Director and Deputy Director of RBLAC. The Tribunal finds that although the 10 July 2018 notice of non-renewal could have articulated the reasons for non-extension more precisely, the record leaves no doubt that the Applicant reasonably knew the reasons for non-extension from her previous requests to UNDP and her exchanges with the Director and Deputy Director of RBLAC.

34. In this regard, the Tribunal notes that from 12 May 2017, the Applicant made repeated requests to leave UNDP Guyana prior to the end of her four-year rotation. As a result, UNDP extended its assistance to the Applicant to find her alternative employment. As an example, on 14 July 2017, UNDP approved a lateral move to the P-4 level position in UNDP Amman which the Applicant had applied for. The Applicant, however, informed Human Recourses that she was now considering opportunities in the private sector stating that “[...] I am being seriously considered for another position (outside UNDP), which might materialize in the next few months”. UNDP reasonably decided to not proceed with the lateral transfer as there was an operational need to employ someone in UNDP Amman who could remain in place for a longer period than a few months.

35. The Tribunal further notes that in August 2017, the Applicant met with the Director, RBLAC and reiterated her desire to leave UNDP Guyana prior to the end of her rotation as the DRR Guyana. As a follow up, on 15 September 2017, the Applicant requested the Director, RBLAC's support for a position she had recently applied and been informally interviewed for at the UN Development Operations Coordination Office. The Director, RBLAC responded that she would talk to the hiring managers.

36. On 2 November 2017, the Applicant informed the Director, RBLAC that because of "significant worries for the health of both [her] parents [she] need[ed] to move [as soon as possible], to a duty station with good medical facilities, or be posted in R&R [duty station] so [she] can visit [her parents] often".

37. On 15 November 2017, the Director, RBLAC responded to the Applicant's request to move, noting her "earlier conversations with [the Applicant] and [the Resident Coordinator] where [the Applicant] reconfirmed that [the Applicant was] interested in leaving Guyana early and [that the Applicant was] seeking actively another position within the [United Nations] and/or outside". As part of her 15 November 2017 response to the Applicant, the Director, RBLAC informed the Applicant that taking into consideration her requests, and the needs of the Country Office, especially in view of the results of the Global Staff Survey, "[she] w[ould] take the DRR Position in Guyana to the next Talent Review Exercise before the end of this year", an action that would render the DRR Guyana post available to another staff member and end the Applicant's rotation in UNDP Guyana.

38. The Director, RBLAC further noted that considering "that [the Applicant was] still in Guyana, [the Director, RBLAC] will make efforts to push the [Entry on Duty] of a new incumbent at least until end February 2018 unless [she] wished to leave the duty station earlier [...] as requested by [the Applicant] during [their] meeting in Panama in August". The Director, RBLAC advised that the Applicant could also go on special leave without pay ("SLWOP") noting that she would only be "given a general lien, which would mean that [she] would have to be selected for a position within the organization in order to

return”. The Tribunal notes that the Applicant did not contest this decision. It follows that the Applicant was aware that it was due to her request to leave UNDP Guyana that UNDP opened the Applicant’s position for recruitment in order to ensure operational continuity of the position encumbered by the Applicant.

39. Further to the 15 November 2017 receipt of the Director RBLAC’s email, the Applicant had a skype call with the Human Resources Business Partner, RBLAC to discuss her employment options including, *inter alia*, posts to which she had recently applied to and the possibility of going on SLWOP. In response to the latter, the Applicant expressed that she was not ready to request SLWOP.

40. In December 2017, the Applicant applied to three UNDP DRR positions as part of the December 2017 Talent Review Exercise, including the one in Guyana, a post that was only published due to the Applicant’s express desire to leave this post and the Administration’s obligation to plan for the needs of UNDP Guyana. The Applicant ranked the DRR Guyana position third among the three positions she wished to be considered for. Further to a corporate panel review, the Applicant was not selected for this new rotation.

41. On 8 February 2018, the Human Resources Business Partner, RBLAC informed the Applicant of her non-selection for next rotation of the DRR Guyana post. The Human Resources Business Partner noted that, in line with the Director, RBLAC’s 15 November 2017 email and her own request, that UNDP decided to postpone the arrival of the new DRR in Guyana for a few months, in order to provide the Applicant with more time in her search for new opportunities. The Applicant acknowledged the Human Resources Business Partner’s email that same day noting that she was appreciative of the support she was receiving. This decision was not contested.

42. On 27 April 2018, the Applicant sent an email to the Director, Regional Bureau for Asia and Pacific, seeking his assistance to “transition from Guyana [because her] current contract runs out in August” 2018. On 21 May 2018, the previously Deputy

Director, and Director a.i., RBLAC contacted the Applicant requesting that she keep him informed of the positions she was applying to so that he could support her applications.

43. Based on the above, the Tribunal finds that the Applicant's appointment with UNDP Guyana was not renewed due to her own requests to leave UNDP Guyana prior to the end of her four-year rotation in that position. The record shows that the Applicant was well aware of the reasons for the non-renewal of her position and would have understood the contents of the 10 July 2018 notification letter related directly to her requests to Director and Deputy Director of RBLAC to leave her position.

Were improper motives underlying the non-renewal decision?

44. The Applicant also alleges that the contested decision was tainted by ulterior motives. The Appeals Tribunal has held that the burden of proving improper motives rests with the person making the allegation (see, for instance, *Azzouni* 2010-UNAT-081; *Obdeijn* 2012-UNAT-201).

45. In her application, the Applicant contends that the non-renewal of her appointment was premised on the fact that she was a victim of racist abuse by her colleagues from 2015 through 2017 and that UNDP failed to realize that such abuse was ongoing and associate any issues with it.

46. The Applicant cites three issues as evidence to support her contention of ulterior motives. First, that the Applicant's post was advertised mid-way through her appointment to the position. Second, her non-selection for the re-advertised position. Third, the failure of the Administration to confirm that the Applicant's successor will be transferred to the post on a permanent basis.

47. The Tribunal finds no evidence to support the Applicant's allegations. As noted above, the record clearly demonstrates that the Applicant's post was advertised due to her request to leave UNDP Guyana prior to the end of her four-year rotation. The Applicant cites no impropriety in the subsequent non-selection for the re-advertised position or has

challenged the selection process. The Applicant has no right to be informed of the contract status of her successor.

48. The Tribunal notes that the Applicant does not claim that any of the decision-makers of the contested decision were racially or discriminatorily motivated, rather that she encountered racism in Guyana. In this regard, the Applicant makes a number of generalized statements in regard to the work environment in UNDP Guyana. From the facts, it is apparent that UNDP recognised that there were issues with the work environment due to the concerns disclosed by its staff members in the Global Staff Survey, and took steps to address the issues. However, there is no indication that the alleged issues were connected to the non-renewal of the Applicant's appointment. On the contrary, the record confirms that the Applicant wanted to leave UNDP Guyana for other reasons, such as to pursue private sector opportunities and for family reasons.

49. Accordingly, the Tribunal finds that the Applicant failed to show that the contested decision was tainted by ulterior motives.

Conclusion

50. In light of the foregoing, the application is dismissed.

(Signed)

Judge Joelle Adda

Dated this 27th day of July 2020

Entered in the Register on this 27th day of July 2020

(Signed)

For Nerea Suero Fontecha, Registrar, New York