



Before: Judge Francis Belle

Registry: Geneva

Registrar: René M. Vargas M.

FARHADI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Marcos Zunino, OSLA

Counsel for Respondent:

Jérôme Blanchard, LPAS, UNOG

Introduction

1. The Applicant contests the decision not to renew his fixed-term appointment beyond its expiration date of 30 June 2017.

Facts and procedural history

2. On 4 May 2009, the Applicant joined the International Trade Centre (“ITC”) under an 11-month short-term appointment as Programme Coordinator (L-5 level) of the Enhancing Arab Capacity for Trade programme (“EnACT”). Effective 1 July 2009, his appointment was converted to fixed-term as Programme Coordinator (P-5 level), EnACT.

3. As of 1 December 2012, the Applicant was laterally transferred to the position of Senior Adviser (P-5), Trade Finance for small and medium-sized enterprises (“SMEs”), Division of Business and Institution Support (“DBIS”), ITC.

4. Effective 1 January 2015, the Applicant was appointed to a lower-level post (P-4) as Senior Programme Adviser, Women and Trade Programme, DBIS, ITC, following the abolition of the post that he encumbered due to lack of funding. The Applicant was *inter alia* responsible for an ITC project titled “Economic empowerment of Women in the Pacific” (“Pacific Project”) funded entirely by the government of a Donor Country (“Donor Country”).

5. On 1 July 2016, the Applicant, together with the Pacific Project, was laterally transferred to the Division of Market Development (“DMD”), ITC.

6. On 1 January 2017, the Applicant’s fixed-term appointment was renewed until 30 June 2017.

7. During the month of February 2017, the Donor Country indicated to the Applicant and other ITC Officials its intention to stop funding the project in June 2017. In this context, one of the Applicant’s supervisors, namely the Chief, Sustainable and Inclusive Value Chains (“SIVC”), Division of Enterprises and Institutions (“DEI”), ITC, requested him to refrain from contacting the Donor

Country about the funding in an effort to channel all communications on the matter through the ITC Funder Focal Point.

8. From 4 to 11 March 2017, the Chief, SIVC, DEI, ITC, and a Consultant undertook a review of the Pacific Project. Based on the findings of said review and on the fact that the project's budget was nearly exhausted, the Chief, SIVC, DEI, ITC, decided to take the Applicant off the Pacific Project and advised him accordingly by email of 27 March 2017. On this day, the Applicant was placed on certified sick leave.

9. By letter dated 28 April 2017, the Chief, Human Resources Division of Programme Support, ITC, informed the Applicant that his contract would not be renewed beyond 30 June 2017 due to budgetary reasons that were set forth therein. Additionally, the letter indicated how the post that the Applicant encumbered would be funded up to the expiration of his appointment.

10. On 20 June 2017, the Applicant requested management evaluation of the decisions a) not to renew his fixed-term appointment and b) to separate him from service before exhausting his sick leave entitlement.

11. By letter dated 22 September 2017, the Under-Secretary-General for Management responded to the Applicant's request for management evaluation advising him that:

- a. The Secretary-General had decided to uphold the decision not to renew his appointment beyond 30 June 2017; and
- b. He would be entitled to exhaust his sick leave entitlement prior to separation subject to the submission of necessary documentation from his physician.

12. On 29 November 2017, the Applicant filed the application referred to in para. 1 above.

13. On 30 September 2018, the Applicant separated from the service of the Organization following several extensions of his appointment to allow him to exhaust his sick leave entitlements.

14. On 16 November 2018, following a review of the Tribunal's docket, the case was transferred to the Tribunal's New York Registry and registered under Case No. UNDT/NY/2018/067.

15. On 29 January 2019, in light of the General Assembly's 22 December 2018 decision not to extend the ad litem Judge in New York (see para. 38 of A/RES/73/276) and the Applicant's filing of another application with the Geneva Registry on 21 January 2019, the case was transferred back to the latter and registered under Case No. UNDT/GVA/2019/003.

16. On 1 October 2020, the case was assigned to the undersigned Judge.

Consideration

Applicable law

17. Staff regulation 4.5(c) and staff rule 4.13(c) both provide that a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal.

18. In *Agha* 2019-UNAT-916, at paras. 16-17, the Appeals Tribunal recapitulated its long-standing case law concerning challenges of decisions not to renew fixed-term appointments stating that it is a well-established principle that fixed-term appointments do not carry an expectation of renewal. It stated that separation as a result of expiration of a fixed-term appointment takes place automatically, without prior notice, on the expiration date specified in the letter of appointment.

19. It recalled, however, that a decision not to renew a fixed-term appointment can be challenged on the grounds that the Administration has not acted fairly, justly, or transparently with the staff member or was motivated by bias, prejudice or improper motive. The Appeals Tribunal finally recalled that it is an applicant's burden to prove such factors played a role in the contested administrative decision.

Merits of the case

20. The Applicant challenges the contested decision arguing that it is not supported by the facts, is motivated by bias against him and improper motives, and is vitiated due to misappropriation of funds, circumvention of the rules on termination, ITC's failure to act fairly, justly and transparently and abuse of authority. The Tribunal will examine below these arguments in turn.

Whether the non-renewal decision is supported by the facts

21. The Applicant alleges that the budgetary consideration, namely lack of funds for the Pacific Project, is not supported by the facts as the evidence does not establish the absence of funds for this project beyond June 2017.

22. The Tribunal's judicial review focuses on how the decision-maker reached the impugned decision and, to this end, it examines whether a rational connection is sufficiently demonstrated between the information available to the decision-maker and the reason(s) given for the contested decision.

23. Although, as the Applicant's advances, there is no documentary evidence explicitly showing that funding for the Pacific Project was to end in June 2017, other than the Respondent's assertion that the Pacific Project received no funding beyond 30 June 2017, the Tribunal finds that there are enough elements that taken together support the budgetary reason behind the non-renewal of the Applicant's appointment.

24. First, the Pacific Project is governed by a Grant Arrangement ("the Arrangement") between the Donor Country and ITC that was to be in effect until no later than 30 June 2018 (see sec. 2.2 of the Arrangement). Furthermore, sec. 4.1 of the Arrangement provides a set total contribution amount and a payment schedule. The finite nature of the Arrangement and, thus, of the project is documented.

25. Second, the Applicant and other ITC Officials were fully aware in February 2017 that the Donor Country was considering not continuing to fund the project beyond June 2017. Also, there is documentary evidence showing a balance of USD28,000 for the project on 22 June 2017, which was insufficient to pay salaries for April, May and June 2017.

26. The Applicant has not provided evidence to the contrary and, consequently, his challenge to the claim of lack of funds for the project cannot but fail.

Whether the non-renewal is motivated by bias and/or improper motive

27. As stated above, the Applicant bears the burden of proving the existence of bias and/or improper motive. The Applicant alleges that actions, decisions and the general behaviour of the decision-maker exhibit clear signs of bias towards him. In this connection, the Applicant refers to being formally removed from different projects.

28. The Tribunal recalls that it will not lightly interfere with managerial discretion. It will only do so if managers' actions are unreasonable, unlawful or tainted by ulterior motives. In the case at hand, the Tribunal finds that there is no evidence showing that changes in the Applicant's functions were ill motivated. The most salient example relates to the management of the Pacific Project. One of the Applicant's supervisors, together with a Consultant, conducted a review mission of this project. The findings of this review prompted the Applicant's removal from the management of the project. The Applicant argues that the review was biased but provides no evidence to support this or to counter the content of the review mission report.

29. The Applicant also argues bias against him by the decision-maker based on a remark whereby the latter referred to the Applicant's work as a "dog's breakfast". The record shows that the comment did not relate to the Applicant's work but to the way in which he submitted an expense report following official travel. Although improper, the comment was very limited in scope and is not sufficient to support a claim of bias.

Misappropriation of funds

30. The Applicant argues that the post he encumbered was fully funded by the Donor Country through funds earmarked for the Pacific Project. Pointing out to the fact that he was called to assist in other projects, representing approximately 40% of his functions, he then asserts that ITC used part of the Pacific Project funds for other projects without the donor's approval. He then concludes that given this situation, ITC was under an obligation to continue the funding of his post regardless of further funding from the Donor Country.

31. The Applicant's contention is not only unconvincing but, also, if it were to be entertained would amount to a serious accusation in which he was complicit. Indeed, as he was responsible for managing the Pacific Project, it fell upon him raising any mishandling of funds.

32. The Tribunal finds that, yet again, the Applicant's allegation is unsubstantiated.

"Détournement de procédure", circumvention of termination rules and failure to act fairly, justly and transparently

33. The Applicant argues that as funds for the payment of his April, May and June 2017 salaries had been exhausted, ITC should have terminated his contract instead of resorting to its Programme Support Costs ("PSC") fund to cover payment of his salaries up to the expiration of his appointment. In summary, he claims that his fixed-term appointment should have been terminated and that ITC did not do so to avoid paying a termination indemnity, which constitutes, in his view, a *détournement de procédure* and a circumvention of "termination rules". In parallel, the Applicant alleges that ITC did not act fairly, justly and transparently.

34. The Tribunal finds that the Applicant's arguments are not persuasive. The record shows that since joining ITC, different administrative/managerial actions have been undertaken to keep him employed, e.g., lateral transfers, placement against a lower-graded post. Additionally, the 28 April 2017 letter, informing the Applicant of the non-renewal of his appointment, clearly shared with him how ITC

intended to fund the post he encumbered to honour its contractual obligations towards him.

35. The Applicant is not able to show that the decision to employ him up to the end of his contract was not properly made based on the information available. Neither can the Applicant demonstrate how project funds earmarked for specific-projects were to be diverted to ensure that he could continue to be employed as a P-4 on the Pacific Project.

36. The Applicant relies on speculation about the availability of funds for the Pacific Project whereas the evidence points to the project running short of funds and requiring the administration to pay him from PSC funds. The Applicant fails also to address the distinction between the availability of funds generally as distinct from the availability of funds to pay a P-4 level staff member for the Pacific Project.

37. In spite of what he argues, the Applicant did not provide any evidence supporting having requested ITC to consider termination of his appointment, which could have prompted ITC to consider a different course of action than that followed in the past with respect to the Applicant's employment. Furthermore, the Applicant has vaguely referred to "termination rules" having been circumvented without explicitly indicating specific Staff Regulations and/or Rules that ITC may have breached.

38. Under the circumstances, there is no ground to question the managerial decision to keep the Applicant employed at least until the expiration of his fixed-term appointment and, furthermore, the Tribunal finds that the Applicant's allegation of rules' circumvention is unsubstantiated.

Abuse of authority

39. The Applicant claims that the contested decision was tainted by abuse of power that manifested itself through his removal from several projects, being instructed not to seek funds from donors, the non-renewal of his appointment despite the fact that he was working on other projects for which there was funding and having received "false hopes" concerning efforts to secure funding.

40. The Tribunal has already addressed in para. 28 above the Applicant's argument related to his being taken off the Pacific Project. As to other projects, the Tribunal notes that, first, the Applicant did not manage them but contributed to them. Second, they represented the minority of his functions and he remained involved in one, i.e., the so-called Afghanistan EFI project, as per an email dated 27 March 2017 from the Chief, SIVC, DEI, ITC, to the Applicant.

41. Concerning the Applicant being requested not to engage with donors, the Respondent clarified that ITC has a Funder Focal Point through whom all funding discussions are channelled. The Tribunal is satisfied that the request in question was a proper exercise of ITC's discretion and does not support the Applicant's argument of abuse of power.

42. Finally, the Applicant asserts that being given "false hopes" concerning the search for additional funding amounts to abuse of power. The Applicant merely states, without further elaboration, that this is demonstrated by the letter from the Management Evaluation Unit ("MEU") in response to his request for management evaluation of the contested decision. Having examined the MEU response, the Tribunal does not find support for the Applicant's allegation.

Conclusion

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

The application is dismissed.

(Signed)

Judge Francis Belle

Dated this 24th day of December 2020

Entered in the Register on this 24th day of December 2020

(Signed)

René M. Vargas M., Registrar, Geneva