



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/GVA/2020/037
Judgment No.: UNDT/2021/046
Date: 29 April 2021
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: Geneva

Registrar: René M. Vargas M.

ANDREEVA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Miriana Belhadj, LPAS, UNOG

Jérôme Blanchard, LPAS, UNOG

Introduction

1. The Applicant, a former Legal Specialist with the Legal Office of the Bureau for Management Services (“LO/BMS or Legal Office”), United Nations Development Programme (“UNDP”), contests the Administration’s decision not to renew her fixed-term appointment beyond 30 June 2020 due to lack of funding and the decision to find her ineligible for home leave entitlement.

2. For the reasons stated below, the application is rejected.

Facts

3. On 10 February 2011, the Applicant joined the Legal Support Office (now known as LO/BMS), UNDP, in New York as a Legal Specialist at the P-3 level.

4. The Applicant’s job responsibilities included the provision of legal support to the Global Fund Partnership Team, now known as the Global Fund/Health Implementation Support Team (“GF/HIST”) based in Geneva.

5. By memorandum dated 1 August 2013, the Director of LO/BMS informed the Finance Department of UNDP of the decision to redeploy the post encumbered by the Applicant from LO/BMS in New York to Geneva effective 1 November 2013. It was noted that the Service Level Agreement (“SLA”) between GF/HIST and LO/BMS would be “amended to reflect the increased pro forma costs of the position”.

6. From November 2013, the Applicant was redeployed from New York to Geneva while continuing to report to her supervisor in LO/BMS in New York.

7. In April-May 2014, the Applicant was on certified sick leave due to anxiety and depression caused by what she considered as workplace harassment by her supervisor.

8. In November 2018, the Applicant was placed on a “detail assignment” with GF/HIST whereby she reported to a supervisor in GF/HIST and worked on risk management, programming and partnerships.

9. By email dated 31 October 2019, GF/HIST confirmed to the Director of LO/BMS that the Applicant’s detail assignment with GF/HIST would end on 31 December 2019 without further extension.

10. On 3 December 2019, GF/HIST informed the Director of LO/BMS that “[w]ith the level of maturity of the GF/HIST portfolio and continuing diversification through new partnerships, the focus is to access priority/strategic level legal advice. The 2020 envelop of funding is [USD]160,000”.

11. On the same day, the Director of LO/BMS informed the Applicant that her detail assignment with GF/HIST would end on 31 December 2019 and she would return to LO/BMS full-time. The Director of LO/BMS wrote that “the type of support requested—and the quantum of funds provided—by that team will be significantly different to that reflected in past years’ SLAs”.

12. On 19 December 2019, the Director of LO/BMS provided a further explanation to the Applicant regarding the end of the Applicant’s detail assignment as follows:

We already knew that we would have a challenging budgetary situation for 2020 prior to learning of the thoughts of the GF/HIST team going forwards. That team is looking to the LO for more policy/strategic level advice at a senior legal, rather than the day-to-day dedicated support that it has had in the past. While we are still negotiating a 2020 SLA, it also appears as a result of this change of client needs that the GF/HIST financial contribution to the LO budget will be substantially less than in past years. Given that the LO’s 2020 budget submission to BMS was based on the 2019 GF/HIST SLA level of funding, we are now potentially facing additional financial problems in 2020. I will keep you informed as these discussions progress.

13. On 20 December 2019, the Applicant entered her home leave request for 6 to 14 January 2020 and submitted it to her supervisor in GF/HIST for approval, who in turn advised the Applicant that she should seek approval from her supervisor in LO/BMS as the requested leave dates were in January 2020.

14. On 30 December 2019, the Applicant's supervisor in LO/BMS wrote to her that she understood that the Applicant would be out of the office from 2 to 14 January 2020.

15. On 31 December 2019, the Director of LO/BMS advised the Applicant that although her taking leave was fine, they would need to consult with the Office of Human Resources on whether she had a home leave entitlement at the time. The Director of LO/BMS explained that a staff member would be entitled to home leave in the event that a staff member's contract was anticipated to continue for more than six months after the return from home leave and yet her contract's end date was 30 June 2020. He further noted that the issue would not be resolved before the Applicant's departure from Geneva.

16. On 6 and 7 January 2020, the 2020 SLA between LO/BMS and GF/HIST was signed. It was agreed in the SLA that GF/HIST "has priority access to strategic level legal advice" from the Director of LSO and the Senior Legal Advisor and that GF/HIST no longer needed a dedicated legal support through a P-3 LO/BMS staff member.

17. On 13 January 2020, the Director of LO/BMS replied to the Applicant's inquiry regarding her home leave entitlement. He explained that "there is a problem with granting [home leave] approval for this trip" and suggested that they would discuss this matter when she returned to the office as it was a complex one.

18. On 17 January 2020, the Applicant was elected as a President of the Geneva Personnel Association for UNDP, UNFPA, UNOPS and UN Women ("GPA").

19. On 27 January 2020, the Applicant informed the Director of LO/BMS of her election as a President of GPA and requested her release from the LO functions until February 2021.

20. On the same day, the Applicant had a phone call with the Director of LO/BMS during which she was informed that her appointment would not be extended beyond 30 June 2020, and that for this reason her home leave request would not be granted as her contract would not continue for more than six months after the return from home leave.

21. On 30 January 2020, the Senior Human Resources Business Advisor (“HRBA”) notified the Applicant that her fixed-term appointment, which was set to lapse on 30 June 2020, would not be extended. The Applicant responded and asked why her appointment would not be renewed.

22. On 4 February 2020, the Applicant reiterated her request for her release to perform her role as a President of GPA to the Director of LO/BMS. In an email of 20 February 2020, the Director of LO/BMS responded to the Applicant that her request could not be granted but that she may attend GPA meetings and duties after prior consultation with and the approval of her supervisor.

23. On 24 February 2020, the Senior HRBA responded to the Applicant that as the Director of LO/BMS explained to her, “GF/HIST no longer requires dedicated legal support in Geneva and for 2020 it has greatly reduced the funding level in its SLA with the Legal Office” and thus “there will be no funding for [her] position going forward beyond [her contract’s expiration date]”.

24. On 27 March 2020, the Applicant submitted a request for management evaluation of the decision not to renew her appointment and the decision to deny her home leave entitlement. She submitted that the decisions were arbitrary, non-transparent and capricious and were prompted by retaliation against her as a staff representative and a result of many years of workplace harassment and abuse.

25. On 11 May 2020, by management evaluation, the Administration upheld the contested decision. As part of the management evaluation, the Director of LO/BMS provided the reasons for the non-renewal as follows: “...(W)hile [the Applicant] remained in [LO/BMS]’s staffing table, and [her] salary was part of its budget and expenditures, all of the funding for [her] salary for the past four years (2016-2019 inclusive) came into [LO/BMS] through its SLAs with GF/HIST” and the Applicant was also “aware that [her] contract was in part linked to the SLA from the date of [her] redeployment to Geneva and [her] function was primarily, if not exclusively, dedicated to providing legal support to the GF/HIST team”. Thus, due to the reduction of funding from GF/HIST, “[LO/BMS] did not have any other source of funding for the post [she] encumber[ed]”.

26. On 5 August 2020, the Applicant filed the present application.

27. On 11 September 2020, the Respondent filed his reply.

28. On 22 February 2021, pursuant to Order No. 32 (GVA/2021), the Respondent produced additional documentation relating to the contested decision.

29. On 18 March 2021, the parties filed their respective closing submission.

Consideration

30. In this case, the Applicant contests the following two decisions: (1) the decision not to renew her fixed-term appointment beyond 30 June 2020 and (2) the decision to find her ineligible for home leave entitlement.

Non-renewal of the Applicant’s fixed-term appointment due to the lack of funding

31. 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)).

32. 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.

33. In addition, when a justification is given by the Administration for the exercise of its discretion, it must be supported by the facts (see, for instance, *Islam* 2011-UNAT-115). 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).

34. In his closing submission, the Respondent submits that the Applicant's fixed-term appointment was not renewed due to the lack of funding. The Applicant's post has always been funded by funds received through service level agreements under which the LO/BMS provided reimbursable legal services and received funds. The Applicant's post was always associated with specific fund codes (11800 code), indicating that her post was funded by funds from reimbursable services, as opposed to regular or extra budgetary funds. Particularly since 2016 onwards, 100 per cent of the Applicant's salary was covered by the funds received from GF/HIST. GF/HIST paid USD360,000 in 2016 and 2017, and USD299,192 in 2018 and 2019. Yet in 2020, GF/HIST agreed to pay USD160,000, which was insufficient to cover the costs of the Applicant's post and thus the Administration decided not to renew the Applicant's appointment upon its expiry due to the lack of funding.

35. In her closing submission, the Applicant submits that while the post she encumbered ("the post") was funded from reimbursable services, this does not mean that it was funded 100 per cent from GF/HIST and that it must be exclusively impacted by the reduction of funds from GF/HIST. According to the 2014-15 SLA with GF/HIST, the post was only partially funded by GF/HIST and other legal officers conducted work for GF/HIST as well. As the Respondent acknowledged, the 11800 code fund pools funds received from SLAs with a number of different organizations or business units. The record shows that the post and one other post were funded from funding code 11820 and, yet, the Applicant was the only one impacted by the reduction of funding from GF/HIST. Further, even after her relocation to Geneva, the Applicant continued to carry out a mix of generic legal officer functions as well as to provide support to GF/HIST. She only performed functions exclusively for GF/HIST during her detail assignment and she returned to LO/BMS to perform general legal officer functions.

36. The record shows that the Applicant was recruited to a post with funding code “11800”, which was initially described as “[Headquarters (‘HQ’)] Non-Core Workload” in 2011-2015 and, subsequently, described as “HQ Reimbursable Services” in 2016-2020. The Respondent explained that this means that the post the Applicant encumbered was funded by funds received under service level agreements under which the BMS/LO provided reimbursable legal services and received funds, and the Applicant does not dispute this explanation.

37. The record further shows that in 2014-15, GF/HIST provided USD340,000 annually to BMS/LO, out of which USD76,000 was allocated to the post for 44 per cent of the Applicant’s time. In 2016-17, GF/HIST provided USD360,000 annually to BMS/LO, out of which USD240,239 was allocated to the post for 100 per cent of the Applicant’s time. In 2018-19, GF/HIST provided USD299,192 annually to BMS/LO, out of which USD225,512 was allocated to the post for 100 per cent of the Applicant’s time. Finally, in 2020, GF/HIST provided USD160,000, under which GF/HIST would have priority access to strategic level legal advice from the Director and the Senior Legal Advisor, and the following statement was provided in the 2020 SLA:

Although in past years the SLA between LO/BMS and the GF/HIST team has included the provision for dedicated legal support through a P3 LO/BMS staff member in Geneva, given the level of maturity of the GF/HIST portfolio, this support is not required in 2020 and is not included in this SLA. Nevertheless, recognizing that there are some legacy matters, the GF/HIST team also requires some priority access to junior staff members within LO/BMS particularly in the first half of 2020, and this is also reflected in the quantum of this SLA.

38. The Administration explained that the non-renewal decision was due to the lack of funding caused by the reduced contributions from GF/HIST that funded the Applicant’s salary from 2016 to 2019. Indeed, SLAs for 2016-2019 show that the Applicant’s full salary was covered by these agreements. The SLA for 2020 shows that GF/HIST was to provide the reduced funds that were insufficient to cover the Applicant’s salary and it specifically provided that the 2020 funds were intended to

receive strategic level legal advice from the Director and the Senior Legal Advisor and that GF/HIST no longer needed dedicated legal support through a P-3 LO/BMS staff member, in reference to the Applicant. The 2020 SLA further specified that the quantum of the funds was calculated to receive junior level support in the first half of 2020. This is when the Applicant's contract was set to expire.

39. The Applicant questions why she should be impacted exclusively by the reduction of funding from GF/HIST since the post she encumbered was only partially funded by GF/HIST in 2014-15. However, the record clearly shows that funding has changed over time as the post became fully funded by GF/HIST from 2016 to 2019. The Applicant also points out that SLAs with GF/HIST funded posts encumbered by other staff members and allocated as per said staff members' time as well and yet they were not impacted by the reduction in funding. However, the Tribunal notes that under SLAs with GF/HIST, none of the other staff members' salary was fully covered by GF/HIST funds and, therefore, other staff members' situations are irrelevant to this case.

40. The Applicant submits that she continued to carry out a mix of generic legal officer functions as well as to provide support to GF/HIST and questions the statement included in SLAs that she provided 100 percent of her time to support GF/HIST. However, the Tribunal finds that she did not present any evidence contradicting the facts that she was relocated to Geneva to specifically serve GF/HIST, at which 44 per cent of her time was charged to GF/HIST, and that SLAs reflected that 100 per cent of her time was charged to GF/HIST funds in the subsequent years, namely 2016-2019.

41. In light of the above, the Tribunal finds that the proffered reason for the non-renewal is supported by evidence.

42. The Applicant also submits in her application that the contested decision was tainted by ulterior motives. The Applicant argues that considering a conflict between her and her direct supervisor, the Administration's failure to substantiate the contested

decision, and the fact that the contested decision coincided with the Applicant's election as a staff representative, the Tribunal may draw an inference that the contested decision was tainted by unlawful motives.

43. Under the jurisprudence of the Appeals Tribunal, if an 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).

44. The Applicant did not present any evidence to show that the contested decision was tainted by ulterior motives. Instead, she urges the Tribunal to draw an inference of ulterior motives on the basis that the Administration did not substantiate the contested decision. However, as explained above, the Tribunal finds that the reasons for the non-renewal are supported by evidence. Further, considering that the burden of proving any improper motives rests with the Applicant, the Tribunal finds that the Applicant failed to meet such burden.

45. In conclusion, the Tribunal finds that the provided reasons for not renewing the Applicant's fixed-term appointment were properly based on facts and the Applicant failed to show that the decision was ill-motivated as alleged.

46. In light of the foregoing, the contested decision is lawful.

Decision to find the Applicant ineligible for home leave entitlement

47. Staff rule 5.2(b)(ii)(a) provides that "[a] staff member shall be eligible for home leave" provided that "[t]he staff member's service is expected by the Secretary-General to continue [] [a]t least six months beyond the date of his or her return from any proposed home leave".

48. UNDP's Policy on Annual Leave, which also governs home leave, provides that "[a]nnual leave is subject to exigencies of service and must be authorized in advance by the supervisor, except where a compelling circumstance makes this impossible".

49. In his closing submission, the Respondent submits that the Applicant's home leave request for the period from 6 to 14 January 2020 was lawfully rejected in compliance with staff rule 5.2 and UNDP's Policy on Annual Leave. One of the eligibility criteria is that the home leave return should occur more than six months before the end of contract ("six months rule"). As the Applicant's return from home leave was to take place in mid-January 2020 and her contract was set to expire on 30 June 2020, the six months rule could not be respected and, consequently, the Applicant was not entitled to home leave.

50. In her closing submission, the Applicant submits that her supervisor delayed the approval of her home leave request to harass her. She also submits that if her supervisors knew that it was not expected that her contract would be renewed, they should have informed her promptly and, yet, they failed to do so, thereby causing her to incur certain costs for home leave. She argues that if the non-renewal decision was only made subsequently, the Administration cannot use the later development to disentitle her from home leave.

51. The record shows that on 31 December 2019, before the Applicant left for home leave, the Director of LO/BMS advised her that they would need to consult with the Office of Human Resources as to whether she had a home leave entitlement at that time. The Director of LO/BMS explained that a staff member would be entitled to home leave in the event that a staff member's contract was anticipated to continue for more than six months after the return from home leave and, yet, her contract's end date was 30 June 2020. He further noted that the issue would not be resolved before the Applicant's departure from Geneva.

52. Even though the Applicant's home leave was not approved and the Director of LO/BMS specifically advised her that there was a question as to whether she had a home leave entitlement at the time, she decided not to wait and to travel to her home country. Therefore, the Tribunal rejects the Applicant's argument that the

Administration failed to inform her accurately regarding her home leave entitlement and that she was somehow misled to incur costs for home leave.

53. The record further shows that in January 2020 it was decided that her contract would not be renewed and thus her contract was not expected to continue at least six months from the date of her return from proposed home leave, which is one of the eligibility criteria for home leave entitlement.

54. Accordingly, the Administration lawfully rejected approval of the Applicant's home leave request.

Conclusion

55. In light of the foregoing, the application is rejected.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 29th day of April 2021

Entered in the Register on this 29th day of April 2021

(Signed)

René M. Vargas M., Registrar, Geneva