



Before: Judge Sun Xiangzhuang

Registry: Geneva

Registrar: René M. Vargas M.

FERNANDEZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Cristián Gimenez Corte

Counsel for Respondent:

Kong Leong Toh, UNOPS

Introduction

1. By application filed on 22 January 2023, the Applicant, a former staff member of the United Nations Office for Project Services (“UNOPS”), contests the decision not to renew her fixed-term appointment beyond 31 August 2022 due to the abolition of her post.

2. For the reasons set forth below, the application is rejected on its merits.

Facts and procedural history

3. In 2012, the United Nations Office of Information and Communications Technology (“OICT”) and UNOPS entered into “Financial Agreements”, under which UNOPS agreed to provide services to OICT, and OICT agreed to pay UNOPS.

4. On 21 October 2013, UNOPS appointed the Applicant as ICT Rapid Deployment Unit Implementation Associate, GS-7, on a one-year fixed-term appointment to provide certain services to OICT. Her fixed-term appointment was renewed numerous times under the Financial Agreements between UNOPS and OICT until 31 August 2022.

5. On 10 March 2022, in a Town Hall meeting, in response to the alleged rumours and fears that posts would be cut among the staff, the Chief Information Technology Officer (“CITO”), Assistant Secretary-General (“ASG”), who is the head of OICT, stated, *inter alia*, that “we are not in crisis, we are not in a financial crisis, so there is no risk of losing jobs for anyone” and that “there is no risk of job cuts because we don’t have budgetary issues in that front”.

6. By memorandum dated 5 June 2022, the Controller, Assistant Secretary-General for Programme Planning, Finance and Budget, United Nations, informed the CITO/ASG about the deteriorated financial situation of OICT. The memorandum states, in its relevant part, that (emphasis in the original):

8. [...] OICT continues to spend above its approved budget/income, with structural cost problems, high dependency on contractual resources particularly from UNOPS with extraordinarily high rates for over 30 personnel in different grades, duplication of functions within OICT.
9. My suggestion on 16 April 2022 underscored one very important element: human resources (staff and contractors included) formed a very significant part of OICT's budget, and a large part of the non-post expenses are non-discretionary. Inevitably, any serious cost reduction plan would have to address the costs, contractual modalities and, most importantly, the work that such personnel undertake....
10. As I had emphasized on 16 April, without a rational basis for the costs relating to personnel, all other analyses of OICT's finances are bound to flounder.

7. By memorandum dated 8 June 2022, the CITO/ASG informed the Director, New York Service Cluster, UNOPS, that due to budgetary problems, OICT no longer required the services that were being provided by many of the UNOPS posts specified in the Financial Agreements, including the post encumbered by the Applicant.

8. Accordingly, in another Town Hall meeting, held on 9 June 2022, the CITO/ASG stated, *inter alia*, that:

the budgetary situation, and the deficit that we have, some measures will need to be taken which might not go in line with what I said earlier in the year because at that point we did [inaudible] visibility of the cost plan and projected deficit. So all to say that my dream that I shared with you in -I think it was April or earlier in the year- was shattered by the budget deficit situation that we face in 2022, so therefore some measures need to be taken.

9. At a meeting on 28 June 2022, the Applicant was informed of the abolition of her post and the consequent non-renewal of her appointment.

10. On 29 July 2022, the Applicant received a non-renewal letter, dated 28 July 2022, from the Deputy Director, People and Change Group, UNOPS, stating the following in its relevant part:

I refer to your meeting of 28 June 2022, with Niels Guenther, Senior Portfolio Manager and Syed Ahmed, Senior Programme Manager at which you were informed that due to the reduction of OICT support requirements and funding, as communicated to us through the OICT ASG, the post of ICT Associate (GS-7) that you are encumbering will be abolished with effect 31 August 2022 and you will be separated from service because the functions of the post will no longer be required.

Further to the above, it is with deep regret that I now provide you with written confirmation that your appointment will not be renewed when it expires COB 31 August 2022 and you will be separated from service effective that date.

11. On 31 August 2022, the Applicant's fixed-term appointment expired, and she was separated from service.

12. As of 1 September 2022, the Applicant was hired as an employee by a private company, Trigyn Technologies Inc. (hereafter, "Trigyn"), to provide consulting services to OICT.

13. On 26 September 2022, the Applicant submitted a request for management evaluation against the non-renewal decision mentioned in para. 1 above.

14. UNOPS did not respond to the Applicant's request for management evaluation because, due to technical difficulties, it was not aware of it until the application was served.

15. On 22 January 2023, the Applicant filed the application mentioned in para. 1 above.

16. On 22 February 2023, the Respondent filed his reply.

17. By Order No. 34 (GVA/2023) of 18 April 2023, the Tribunal invited the Applicant to file her rejoinder, which she did on 17 May 2023.

18. On 1 June 2023, the Respondent submitted a motion for leave “to file evidence to address new claims in [the] Applicant’s rejoinder”.

19. By Order No. 73 (GVA/2023) of 6 July 2023, the Tribunal granted the Respondent’s motion to adduce additional evidence and instructed the parties to file their respective closing submission by 20 July 2023.

20. On 17 July 2023, the Applicant submitted a motion for leave to file evidence and a request for extension of time to file her closing submission.

21. By Order No. 80 (GVA/2023) of 18 July 2023, the Tribunal granted the Applicant’s motion to adduce additional evidence and extended the deadline for the parties to file their respective closing submission until 27 July 2023.

22. On 25 July 2023, the Applicant filed her closing submission.

23. On 27 July 2023, the Respondent filed his closing submission.

Consideration

Scope of judicial review

24. The present case concerns the non-renewal of the Applicant’s fixed-term appointment.

25. In this respect, the Tribunal recalls that a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal under staff regulation 4.5(c) and staff rule 4.13(c) and expires automatically, without prior notice, on the expiration date specified in the letter of appointment pursuant to staff rule 9.4. There is thus no legitimate expectation of renewal unless the Administration has made an express promise in writing that gives the staff member an expectancy that the appointment will be extended (see, e.g., *He* 2018-UNAT-825, para. 41; *Igbinedion* 2014-UNAT-411, para. 26).

26. Nevertheless, the Administration is required to state the reasons for a non-renewal to ensure that the Tribunals can judicially review the validity of the decision, and this reason must be lawful and supported by the facts (see, e.g., *Nouinou* 2019-UNAT-902, para. 50; *Obdeijn* 2012-UNAT-201, paras. 33-39; *Islam* 2011-UNAT-115, paras. 29-32).

27. Furthermore, a non-renewal decision 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. It is incumbent on the staff member to prove that such factors played a role in the non-renewal decision (see, e.g., *Porrás* 2020-UNAT-1068, para. 24; *Nouinou*, para. 47; *Said* 2015-UNAT-500, para. 34).

28. In light of the foregoing, and having reviewed the parties' submissions to date, the Tribunal defines the issues to be examined in the present case as follows:

- a. Whether the Applicant was promised a renewal;
- b. Whether the reason provided for the non-renewal decision was lawful and supported by the facts;
- c. Whether the alleged procedural irregularities rendered the non-renewal decision unlawful;
- d. Whether the non-renewal decision was tainted by discrimination; and
- e. Whether the Applicant is entitled to any remedies.

Whether the Applicant was promised a renewal

29. It is well-settled law that “the renewal of the appointment of a staff member on successive contracts does not, in and of itself, give grounds for an expectancy of renewal, unless the Administration has made an express promise that gives the staff member an expectancy that his or her appointment will be extended” (see *Kellie* 2018-UNAT-875, para. 41).

30. The Applicant submits that the Administration made express promises of renewal, giving rise to legitimate expectations. In support of her submission, she relied on certain statements made by the CITO/ASG in March 2022, *inter alia*, that “there is no risk of losing jobs for anyone” and that “we want to ...fund the [Financial Agreements] with UNOPS in such a way they get into one year”.

31. The Respondent argues that there is no legitimate expectancy of renewal because the subsequent financial crisis resulted in the reduction of service and the abolition of the Applicant’s post.

32. In this respect, the Tribunal recalls that “[i]n order for a staff member’s claim of legitimate expectation of a renewal of appointment to be sustained, it must not be based on a mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case” (see, e.g., *Munir* 2015-UNAT-522, para. 24; *Kellie*, para. 41). Moreover, a promise to renew a fixed-term appointment must at least “be in writing” and contain “the essential elements of a proper and concrete offer of renewal, such as the duration of the extension” (see *Kellie*, paras. 44 and 45; *Kalil* 2015-UNAT-580, para. 67).

33. Applying the above standards to the current case, the Tribunal finds no merit in the Applicant’s claim for the following two reasons.

34. The general verbal statement made by the CITO/ASG in March 2022 could not have constituted an express promise to renew the Applicant’s fixed-term appointment. Indeed, it lacked the essential elements of a proper and concrete offer of renewal, such as the duration of the extension and the name of the appointee. The jurisprudence further requires a promise to renew a fixed-term appointment to be in writing (see *Kellie*, para. 44). Contrary to the Applicant’s suggestion, the verbal statement was not sufficient to support a firm commitment or an entitlement to the renewal of her fixed-term appointment.

35. The Tribunal further finds no evidence of a firm commitment to renew the Applicant's fixed-term appointment. While the Applicant sought to rely on the CITO/ASG's verbal statements in March 2022, she ignored subsequent circumstances and statements made by the CITO/ASG in June 2022, showing the financial crisis experienced by OICT. In fact, there is no evidence that the Applicant even had any discussion on the issue with her supervisor.

36. Accordingly, the Tribunal finds that the Applicant failed to demonstrate that she was promised a renewal of her fixed-term appointment.

Whether the reason provided for the non-renewal decision was lawful and supported by the facts

37. The Applicant submits that lack of funding from OICT is not a valid reason to terminate an appointment by UNOPS under staff regulation 9.3.

38. At the outset, the Tribunal wishes to point out that the Applicant misapplied the law and misread the nature of the contested decision. Contrary to her assertion, her contract was not terminated under staff regulation 9.3. Indeed, the evidence on record shows that her fixed-term appointment expired automatically on its expiration date, i.e., 31 August 2022, specified in the letter of appointment pursuant to staff regulation 4.5(c) and staff rule 4.13(c).

39. In the case at hand, the reason provided for the non-renewal of the Applicant's fixed-term appointment is the abolition of the post she encumbered due to the reduction of OICT support requirements and funding.

40. In this regard, the Tribunal recalls that the Organization enjoys a broad discretion to reorganise its operations and departments to meet changing economic conditions, including by abolishing posts (see, e.g., *Russo-Got* 2021-UNAT-1090, para. 32; *Timothy* 2018-UNAT-847, para. 25; *Smith* 2017-UNAT-768, para. 26). Moreover, the abolition of a post as a result of a genuine organizational restructuring is a legitimate and valid reason for not extending a fixed-term appointment (see, e.g., *Russo-Got*, para. 32; *Islam*, para. 30).

41. The Tribunal thus turns to examine the restructuring exercise and the abolition of the Applicant's post respectively.

42. The Tribunal finds that the abolition of the Applicant's post in the present case was part of a genuine organizational restructuring. Indeed, the evidence on record shows that there was a genuine and large-scale restructuring, which resulted in more than 30 staff members being separated from service due to a lack of funding. Specifically, the budget cuts at OICT resulted in a reduction in the need for services that OICT obtained from UNOPS, which then decided to abolish the posts that were established to provide services to OICT.

43. The Tribunal further finds that, contrary to the Applicant's claim, the jurisprudence supports that lack of funding is a valid reason for abolishing a post and not renewing an appointment (see, e.g., *Collins* 2020-UNAT-1021, para. 30; *Houenou* 2021-UNAT-1091, para. 32).

44. There is also no merit in the Applicant's claim that her post was not abolished. In support of this claim, the Applicant advanced using a UNOPS computer in a UNOPS compound after her separation date to demonstrate that she continued to perform her duties and functions. The Applicant's assertion is, however, not supported by the facts.

45. Indeed, the evidence on record shows that the Applicant was separated from UNOPS service on 31 August 2022. As part of the clearance process for her separation, she returned her computer to UNOPS on 1 September 2022. The Tribunal also notes that there is no "UNOPS compound" in the Applicant's former duty station.

46. Furthermore, as noted in para. 12 above, as of 1 September 2022, the Applicant was hired by a private company, Trigyn, to provide services to OICT. After her separation date, her own mischaracterisation of herself as a UNOPS staff member in her e-mail signature has no legal binding effect on UNOPS. Therefore, the Applicant's allegation that she continued to perform the same duties and functions does not make her a staff member of UNOPS.

47. In light of the foregoing, and considering the particular circumstances of the present case, the Tribunal finds that the reason provided for the non-renewal decision was legitimate and supported by the facts.

Whether the alleged procedural irregularities rendered the non-renewal decision unlawful

48. The Applicant points to several alleged irregularities, which in her view render the non-renewal decision unlawful. Specifically, she argues that having assured that there was no financial crisis, the Administration is subsequently estopped from invoking a financial crisis, that the alleged financial crisis was a self-inflicted one due to negligence or corruption, and that the conversion of a UN employment contract into a private individual contractor contract constitutes a fraud.

49. In this regard, the Tribunal recalls that it is incumbent on the staff member to prove that procedural irregularities played a role in the non-renewal decision (see, e.g., *Porrás*, para. 24; *Nouinou*, para. 47; *Said*, para. 34). Moreover, procedural irregularities in the decision-making process do not necessarily result in a subsequent finding of unlawfulness of the contested decision and the determination of whether a staff member was denied due process or procedural fairness must rest upon the nature of any procedural irregularity and its impact (see *Sarwar* 2017- UNAT-757, para. 87).

The alleged estoppel from invoking a financial crisis

50. In relation to the Applicant's claim that the Administration is estopped from invoking a financial crisis, the Tribunal notes that it is well-settled jurisprudence that for there to be an estoppel, there would have to be a representation made by one party, which the other party reasonably relied upon, to his or her detriment (see, e.g., *Newland* 2018-UNAT-820, para. 35; *Kortes* 2019-UNAT-925).

51. While there was an alleged representation made by the CITO/ASG in March 2022, the Tribunal is not convinced that the doctrine of estoppel could have applied in this instance as there is no evidence showing that the CITO/ASG represented UNOPS.

52. Even assuming *arguendo* that the CITO/ASG's representation created legal obligations on the part of UNOPS, the Applicant has failed to invoke or produce evidence that she acted upon the CITO/ASG's representation in March 2022 to her detriment. For instance, there is no evidence that she rejected job offers because of her reliance on the CITO/ASG's representation that there was no financial crisis. The Applicant should have been aware that a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal. Moreover, in light of the changing circumstances, the Administration changed its representation in a relatively short period thereafter, namely in June 2022.

53. Accordingly, the Applicant's claim that the Administration is estopped from invoking a financial crisis fails and does not have any impact on the non-renewal decision.

The alleged negligence or corruption

54. Turning to the Applicant's claim that the alleged financial crisis was self-inflicted due to negligence or corruption, the Tribunal notes that the Applicant did not provide any direct evidence to support her assertion. Instead, the evidence on record shows that the lack of funding was because OICT leadership spent money on too many personnel, including the Applicant.

55. Therefore, the Tribunal finds that the Applicant's above argument also fails.

The alleged fraud

56. With respect to the alleged fraud, the Applicant submits that if a UN employment contract is "suddenly and brutally" converted into a private individual contractor contract, depriving the worker of all her entitlements under the Staff Regulations and Rules of the United Nations, this conversion became a fraudulent exploitation of a UN worker by the very UN.

57. The Tribunal recalls its findings that the Applicant's post was abolished as part of a genuine organizational restructuring and that her fixed-term appointment expired automatically on 31 August 2022. As such, her subsequent employment with another private entity has no bearing on UNOPS's legal obligations and is not

a “conversion” of her UN employment contract into a private one. Consequently, the Tribunal finds no merit in the Applicant’s claim in relation to alleged fraud.

58. Considering the above, the Tribunal concludes that the Applicant failed to demonstrate that the alleged procedural irregularities rendered the abolition of her post and, consequently, the non-renewal decision unlawful.

Whether the non-renewal decision was tainted by discrimination

59. The Applicant claims that the non-renewal decision was tainted by discrimination. In support of her claim, she argues that it is not clear how, among more than 4,000 UNOPS employees, the Respondent identified the 30 positions that were abolished.

60. The Tribunal recalls that it is for a party who alleges that ulterior motives tainted a decision to substantiate this claim by way of evidence (see, e.g., *Ross* 2019-UNAT-944, para. 25; *Morsy* 2013-UNAT-298, para. 23). When doing so, “[t]he mental state of the decision-maker usually will be placed in issue and will have to be proved on the basis of circumstantial evidence and inference drawn from that evidence” (see *He* 2016-UNAT-686, para. 39).

61. The Tribunal notes that the Applicant did not present any evidence showing that the non-renewal decision resulted from discrimination against her.

62. In addition, the Tribunal finds no evidence that the non-renewal decision was tainted by discrimination. As demonstrated in para. 42 above, more than 30 UNOPS posts were abolished as a result of a restructuring process. Which post to abolish falls within the discretion of the Organization (see *Collins*, para. 28). The abolition of the Applicant’s post and the consequent non-renewal decision were therefore a proper exercise of discretion in light of the Organization’s budgetary situation.

63. Accordingly, the Tribunal concludes that the Applicant failed to demonstrate that the contested decision was unlawful.

Whether the Applicant is entitled to any remedies

64. In her application, the Applicant requests the rescission of the contested decision, the restoration of all corresponding entitlements, and compensation for harm suffered because of the “unlawful termination of [her] appointment”.

65. Having found that the Applicant failed to demonstrate that the contested decision was unlawful, the Tribunal finds no basis for the remedies pleaded for in the application. Therefore, the Tribunal rejects the Applicant’s request for remedies.

Conclusion

66. In view of the foregoing, the Tribunal DECIDES to reject the application in its entirety.

(Signed)

Judge Sun Xiangzhuang

Dated this 20th day of September 2023

Entered in the Register on this 20th day of September 2023

(Signed)

René M. Vargas M., Registrar, Geneva