



Before: Judge Thomas Laker
Registry: Geneva
Registrar: Víctor Rodríguez

PACHECO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON SUSPENSION OF ACTION

Counsel for Applicant:
Amal Oummih, OSLA

Counsel for Respondent:
Bettina Gerber, UNOG

Introduction

1. On 9 April 2010, the Applicant, a staff member of the Office for the Coordination of Humanitarian Affairs (OCHA), filed with the United Nations Dispute Tribunal (UNDT) an application requesting the Tribunal to suspend the decision to abolish her post and to separate her effective 30 April 2010.

Facts

2. On 8 April 2003, the Applicant entered the service of OCHA as a Humanitarian Affairs Officer/Advocacy at the L-4 level, in Jerusalem, Israel, on a one-year project personnel appointment (200 series of the former Staff Rules). Her 200-series appointment was subsequently extended on a yearly basis, on the same position and at the same level, the last one covering the period from 1 January 2009 to 31 December 2009.

3. By e-mail dated 1 October 2009, the Chief, Americas & the Caribbean, Europe, Central Asia and Middle East Section (ACAEME), Coordination Response Division, OCHA-New York, provided to the Head of Office, OCHA-Occupied Palestinian Territories (OPT), who is also the Applicant's supervisor, the management's feedback on the OCHA-OPT 2010 cost plan, as follows:

“There is a feeling here that the cost plan could be reduced further, particularly staff costs. In particular, it was suggested that the allocation of resources should focus better on achieving OCHA priorities. As per the OCHA strategic framework and OPT work plan 2010, these would be the reinforcement of coordination with operational partners and donors with the goals to create a more enabling humanitarian environment and improve the coordination system. In line with what precedes, it was also suggested to mainstream some of the advocacy functions, so as to integrate them better within the coordination/protection and research/reporting units.”

4. On 12 November 2009, the Head of Office, OCHA-OPT, called the Applicant in for a meeting to discuss the 2010 cost plan for her unit. In the

presence of the Finance Officer, he informed the Applicant that the 2010 cost plan for her unit was to abolish her post.

5. By memorandum dated 13 November 2009, the Officer-in-Charge, Human Resources Unit (OiC/HRU), OCHA-Geneva, confirmed to the Applicant that further to the revised 2010 cost plan for OCHA-OPT, “the post of Humanitarian Affairs Officer, against which [she had been] recruited, [was] being abolished as of 30 April 2010”.

6. By e-mail dated 17 November 2009, the Applicant reacted to the above-mentioned memorandum by requesting, “in order to start planning”, “all the relevant information regarding [her] entitlements, including termination indemnity...”.

7. By e-mail dated 17 November 2009, the OiC/HRU, OCHA-Geneva, responded to the Applicant that she was not entitled to a termination indemnity because “this is not a Termination of Contract, but rather an expiration of contract on 31 May 2010” (*sic*) in accordance with provisional staff rule 9.6, which provides that: “Separation as a result of ... expiration of appointment ... shall not be regarded as a termination within the meaning of the Staff Rules.”

8. On 31 December 2009, the Applicant’s appointment expired.

9. Effective 1 January 2010, the Applicant’s appointment was converted to a fixed-term appointment pursuant to the provisional Staff Rules and extended to cover the remainder of the period until the abolition of her post. The new letter of appointment, which was issued on 24 December 2008, stipulated that: “This appointment is for a fixed-term of **one year** from the effective date of appointment [of 1 January 2010]. It therefore expires without prior notice on **30 April 2010**” (emphasis in original). The Applicant signed it on 4 January 2010 and added a handwritten note stating: “I sign this understanding that my post has been abolished effective 30 April 2010.”

10. On 12 January 2010, the Applicant wrote to the Secretary-General to request a management evaluation of:

- a. The decision, communicated orally to her on 12 November 2009 by the Head of Office, OCHA-OPT, and in writing on 13

November 2009 by the OiC/HRU, OCHA-Geneva, to abolish her post as of 30 April 2009;

- b. The decision communicated to her on 17 November 2009 by the OiC/HRU, OCHA-Geneva, “changing the category of [her] termination from ‘abolition of post’ to ‘expiration of contract’, and hence denying [her] entitlement to a termination indemnity”.

11. On 8 February 2010, OCHA-Geneva provided, at the request of the Management Evaluation Unit, UN Secretariat, comments on the Applicant’s request for management evaluation.

12. By letter dated 26 February 2010, the Under-Secretary-General for Management informed the Applicant that the Secretary-General, upon reviewing her request for management evaluation, had decided to uphold the contested decision on the grounds that it was consistent with the Staff Rules and with her terms of appointment.

13. Under cover of a memorandum dated 24 March 2010, entitled “Your forthcoming separation” and e-mailed to the Applicant on 26 March 2010, the Human Resources Unit, OCHA-Geneva, transmitted to the Applicant the various administrative forms to be completed “to facilitate her separation ... effective 30 April 2010”. The e-mail specified that should the Applicant be selected for another post before the end of her appointment, her separation would not take place.

14. On Friday 9 April 2010, the Applicant filed two applications with the Tribunal, the first one to appeal the decision to abolish her post and separate her effective 30 April 2010, and the second one to request the Tribunal to suspend said decision.

15. On Tuesday 13 April 2010, the Tribunal requested the Respondent to submit a reply to the application for suspension of action by Thursday, 15 April 2010, midnight (Geneva time).

16. On 15 April 2010, the Respondent requested, and the Tribunal granted, an extension of the time limit to file its reply until 16 April 2010, 10:00 a.m.

17. On 16 April 2010, at the agreed time, the Respondent filed its reply and the Registry forwarded it to Counsel for Applicant, for comments by 19 April 2010. On 20 April 2010, Counsel for Applicant submitted comments.

Parties' contentions

18. The Applicant's principal contentions are:

- a. The contested decision appears to be *prima facie* unlawful:
 - i. The decision to abolish the Applicant's post is motivated by extraneous factors, including the animosity of the Head of Office, OCHA-OPT, towards her;
 - ii. The decision to separate the Applicant effective 30 April 2010 is tainted by the Respondent's failure to make good faith efforts, as it is legally obliged, to find the Applicant a suitable alternative post. Such failure may be based on discriminatory motives, including the Applicant's pregnancy;
 - iii. The Respondent failed to comply with its obligation to consider the Applicant for conversion to permanent appointment, although she was eligible.
- b. The case is of particular urgency because:
 - i. The Respondent did not make any effort to find the Applicant a suitable alternative post and it appears that the Applicant's separation from the Organization is imminent;
 - ii. The Applicant is six-month pregnant and the loss of her job at this critical stage will deprive her of maternity leave and health insurance.
- c. Irreparable damage will be caused to the Applicant if the contested decision is not suspended because:

- i. If the Applicant is separated on 30 April 2010, she will be “out of a job and lose of all benefits, tenure, maternity leave and paid home leave to the USA for her and her family”;
- ii. The Applicant also “risks losing her health insurance”;
- iii. It will be more difficult for the Applicant to find a job after giving birth;
- iv. The Applicant will “also lose forever her eligibility to be considered for permanent appointment pursuant to ST/SGB/2009/10”;
- v. “No amount of compensation can properly redress for the Applicant’s unjust removal and separation from the Organization”.

19. The Respondent’s principal contentions are:

- a. The Applicant failed to establish a *prima facie* case of unlawfulness:
 - i. The abolition of the Applicant’s post was the result of a management decision, when preparing the 2010 cost plan, to mainstream the advocacy activities of OCHA-OPT into its core activities. The Applicant’s allegations that the abolition of her post was motivated by extraneous factors is unfounded; in particular, it should be noted that OCHA was unaware of her pregnancy when it took the contested decision;
 - ii. The Applicant will be separated further to the non-renewal, and not the termination, of her appointment. Under the Staff Rules, the Respondent is not obliged to make any efforts to offer the Applicant a suitable alternative post. The Applicant nevertheless had many opportunities to apply for various positions, including in March 2010 when a new compendium of OCHA field vacancies came out; yet, she applied to only one position;

- iii. The Applicant is not eligible for consideration for conversion to a permanent appointment since she was employed under the 200 series of the former Staff Rules and only 100-series staff may be eligible.
- b. The case is not one of particular urgency as the Applicant knew since November 2009 that she would be separated as of 30 April 2010;
- c. The Applicant has failed to demonstrate that she would suffer irreparable harm as a result of her being separated. As regards health insurance, she may apply for an individual health plan. As regards the loss of other entitlements, these can be compensated monetarily should the Tribunal find in her favour. The Applicant is on the OCHA P-4 and P-5 rosters and will remain on these rosters for three years, even if she is separated.

Considerations

20. The Applicant requests the Tribunal to suspend the implementation of the decision communicated to her in writing on 13 November 2010 to abolish her post and to separate her effective 30 April 2010.
21. Article 10, paragraph 2, of the Tribunal's statute provides that:
- “At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.”
22. Article 14, paragraph 1, of the UNDT rules of procedure, entitled *Suspension of action during the proceedings*, reproduces almost identically the above-quoted provision.
23. For the Tribunal to order an interim measure, including suspension of action, under the above-mentioned articles, an indispensable prerequisite is that

judicial proceedings have already been started pursuant to article 2, paragraph 1, of the UNDT statute, in other words, that an appeal against an administrative decision be already pending before the Tribunal.

24. In the present case, since the Applicant filed her application for suspension of action shortly after she initiated proceedings before the UNDT to appeal the decision to abolish her post, such application must be considered under article 10.2 of the UNDT statute and article 14 of the UNDT rules of procedure.

25. In her observations on the Respondent's reply, Counsel for Applicant argues at length that the Applicant's case is not one of expiration or non-renewal of contract, but one of termination. While it is undisputed that the Applicant's separation is due to the abolition of her post, this is not to say that her separation had to be effected necessarily by terminating her appointment, as the Applicant implies. Given that the Applicant's fixed-term appointment was due to expire on 31 December 2009 when it was decided to abolish her post, it was well within the Administration's discretion to either allow it to expire then or to extend it, as it did, until 30 April 2010.

26. The Applicant relies on the contradiction in her letter of appointment, which provides that such appointment is "for a fixed-term of one year from [1 January 2010] and "therefore expires without prior notice on 30 April 2010", to claim that, in fact, her appointment went beyond 30 April 2010 and that, by separating her on 30 April 2010, the Administration is terminating her appointment. In the circumstances, however, there is no doubt that the Applicant's appointment was due to expire on 30 April 2010, despite the oversight in her letter of appointment. When she signed the said letter of appointment, the Applicant was well aware of the decision to abolish her post effective 30 April 2010, as communicated to her on 12 and 13 November 2009. She was also well aware of the fact that the Administration had decided to let her appointment expire, as communicated to her on 17 November 2009. Additionally, no written promise was made to her regarding future employment after 30 April 2010.

27. Subsidiarily, it may be noted that if this were a case of termination, as Counsel for Applicant argues, this request for suspension of action would not be receivable in accordance with article 10, paragraph 2, of the UNDT statute, which

provides that “temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of ... termination”.

28. The Applicant claims that the decision to abolish her post was motivated by extraneous factors, including the animosity of the Head of Office, OCHA-OPT, towards her. The Tribunal considers that no sufficient evidence has been adduced by the Applicant in support of such contention. On the contrary, the Tribunal is satisfied from the record that the decision was motivated by operational needs and strategic choices within the remit of the Administration.

29. The Applicant also claims that the contested decision is tainted by the Respondent’s failure to comply with its obligation to make good faith efforts to find her a suitable alternative post. The Tribunal notes, however, that there is no such obligation for the Administration in cases of expiration of contract. This argument must therefore be dismissed. As regards the Applicant’s allegation that the contested decision may have been tainted by discriminatory motives, including her pregnancy, it is unsubstantiated and even devoid of merit to the extent that the Administration was unaware of the Applicant’s condition when the contested decision was taken.

30. The Applicant further claims that the contested decision breaches her terms of appointment because the Administration failed to comply with its obligation to consider the Applicant for conversion to permanent appointment. However, pursuant to provisional staff rule 13.4 (b), only staff members who held 100-series fixed-term appointments on or before 30 June 2009 may be eligible for consideration for a permanent appointment. Since the Applicant only held 200-series appointment before 30 June 2009, she clearly is not eligible for consideration.

31. In view of the foregoing, the Tribunal considers that there are no serious or reasonable doubts about the lawfulness of the contested decision.

32. To order an interim measure, including a suspension of an administrative decision, it is necessary that the three conditions provided for under article 10, paragraph 2, of the Tribunal’s statute be fulfilled. Given that one of the conditions

is not fulfilled – i.e. the contested decision does not appear *prima facie* to be unlawful – the Tribunal must reject the application without its being necessary to examine whether the other two conditions are fulfilled.

Conclusion

33. For the reasons stated above, it is DECIDED that:

The application for suspension of action is rejected.

(Signed)

Judge Thomas Laker

Dated this 20th day of April 2010

Entered in the Register on this 20th day of April 2010

(Signed)

Víctor Rodríguez, Registrar, UNDT, Geneva