



Before: Judge Teresa Bravo
Registry: Geneva
Registrar: René M. Vargas M.

CHALHOUB

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON AN APPLICATION FOR
SUSPENSION OF ACTION PENDING
MANAGEMENT EVALUATION**

Counsel for Applicant:
Ana Giulia Stella, OSLA

Counsel for Respondent:
Alan Gutman, AAS/ALD/OHRM, UN Secretariat

Introduction

1. The Applicant requests suspension of action, pending management evaluation, of the decision not to renew her contract beyond the month on which she reaches the mandatory age of separation from service.

Facts

2. The Applicant, who will turn 65 years of age on 24 January 2021, entered the service of the Organization in 2013 as a French Translator (P-3) with the International Criminal Tribunal for the former Yugoslavia (“ICTY”). Following the closure of ICTY, the Applicant joined the International Residual Mechanism for Criminal Tribunals (“IRMCT”) in 2017, as a French Translator/Reviser (P-4) under a fixed-term appointment (“FTA”).

3. On 19 November 2019, the Applicant signed a one-year FTA from 1 January to 31 December 2020.

4. By email of 30 November 2020, the Applicant received her Comparative Review Letter (“CRL”). This is a document that the IRMCT issues to staff members with *inter alia* their respective Comparative Review Score, in the context of downsizing exercises conducted each year due to the finite nature of the IRMCT mandate.

5. On 16 December 2020, the Registrar, IRMCT, held a virtual town hall meeting during which he announced that the Advisory Committee on Administrative and Budgetary Questions had requested a 10% reduction in IRMCT funding for posts. The Applicant was on leave that day and did not attend the town hall meeting.

6. By email of the same day sent after the town hall meeting, the Applicant’s Second Reporting Officer (“SRO”) informed Language Support Services’ staff members of preventive measures being taken in anticipation of the above reduction, which included “extending contracts only until 30 June 2021 for staff with [CRLs] to 31 Dec 2021” while making it clear that “the outcome [was] not definite yet”.

7. On the evening of 16 December 2020, the Applicant's First Reporting Officer ("FRO") contacted her to summarize the content of the town hall meeting and informed her that, as per advice from the Human Resources Section ("HRS"), her appointment would not be extended beyond her mandatory age of separation.

8. By email of 18 December 2020 to her SRO, the Applicant shared with him that she had been told that her appointment would not be reconducted beyond her reaching 65 years of age. She also expressed her expectation of being reconducted until 30 June 2021, given the workload and posts situation in her service, and reminded her SRO of having asked her FRO in April 2020 about the IRMCT's intentions regarding her retirement age.

9. On the same day, the Applicant's SRO replied to the Applicant sharing his understanding that IRMCT could not obtain a waiver for the extension of her contract beyond the mandatory age of retirement. Also, he suggested to the Applicant to contact HRS for authoritative answers on the issues she had raised in her email to him dated 18 December 2020.

10. By email of 23 December 2020, HRS informed the Applicant of her separation formalities in view of her retirement.

11. By Broadcast dated 30 December 2020, HRS updated IRMCT staff on its 2021 budget and contract extensions. It *inter alia* indicated that IRMCT would "extend all fixed term contracts until 31 January 2021, unless ... otherwise informed by [their respective] supervisor and/or HRS". This was further confirmed by a Broadcast from the Registrar, IRMCT, on 6 January 2021.

12. By email of 1 January 2021, the Chief, HRS, informed the Applicant that the IRMCT was not able to extend any staff member beyond the end of the month of their 65th birthday and confirmed to the Applicant that her separation date would be 31 January 2021.

13. By email of 5 January 2021 to the Chief, HRS, the Applicant requested clarification on different matters contained in the Chief's email of 1 January 2021.

14. By email of 13 January 2021, an Associate Human Resources Officer (“Associate HRO”), HRS, responded to the Applicant’s 5 January 2021 email on behalf of the Chief, HRS, who was on leave.

15. On 14 January 2021, the Applicant requested management evaluation of the decision to “[separate her] by non-renewal”, which she indicated had been communicated to her on 1 January 2021 by the Chief, HRS.

16. On the same day, the Applicant filed an application for suspension of action pending management evaluation referred to in para. 1 above.

17. The application for suspension of action was served on the Respondent who filed his reply on 18 January 2021.

Consideration

18. Art. 2.2 of the Tribunal’s Statute provides that the Tribunal shall be competent to suspend the implementation of a contested administrative decision during the pendency of management evaluation where the decision appears *prima facie* to be unlawful, in case of particular urgency, and where its implementation would cause irreparable damage. These three requirements are cumulative and must all be met in order for a suspension of action to be granted. Furthermore, the burden of proof rests on the Applicant.

Prima facie unlawfulness

19. The Applicant claims that the contested decision is *prima facie* unlawful on three grounds that the Tribunal will examine below, namely that:

- a. She had a legitimate expectation that her appointment was going to be extended beyond the mandatory retirement age;
- b. The Organization did not respect its procedures and practices for separation of service due to retirement; and
- c. The non-extension of her appointment beyond the mandatory age of retirement was not issued by the official with the delegated authority to do so.

20. The Tribunal recalls that the threshold required in assessing this condition is that of “serious and reasonable doubts” about the lawfulness of the impugned decision (*Hepworth* UNDT/2009/003, *Corcoran* UNDT/2009/071, *Miyazaki* UNDT/2009/076, *Corna* Order No. 90 (GVA/2010), *Berger* UNDT/2011/134, *Chattopadhyay* UNDT/2011/198, *Wang* UNDT/2012/080, *Bchir* Order No. 77 (NBI/2013), *Kompass* Order No. 99 (GVA/2015)).

21. The Tribunal also underlines that its role when examining the exercise of discretion is to assess if the decision is legal, rational, procedurally correct and that it is not arbitrary. The Tribunal is not to consider the correctness of the choice made by the decision-maker exercising discretion nor to substitute its judgment for that of the decision-maker (see *Kule Kongba* 2018-UNAT-849, para. 27 and *Kellie* 2018-UNAT-875, para. 43).

Legitimate expectation of renewal

22. Concerning expectancy of renewal, the jurisprudence of the United Nations Appeals Tribunal (“UNAT”) has established that it must be grounded on an expressed promise made by the Organization and requires that this be at least in writing (see *Igbinedion* 2014-UNAT-411, para. 26 and *Kule Kongba* 2018-UNAT-849, paras. 25 and 26). Relevantly for the case at hand, UNAT has also found that a claim of legitimate expectation “must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case (see *Kellie* 2018-UNAT-875, para. 41).

23. The Applicant’s case does not meet the jurisprudential threshold required for a successful claim of legitimate expectation of renewal. There is no written promise on record and the Applicant has only alleged an oral agreement for the extension of her contract from her FRO and SRO. Even assuming that this argument could be entertained, it is not documented in the case record. The Applicant seeks to support it by referring to annex 3 to her application, which is a copy of her 2019-2020 performance evaluation report with no mention of such agreement.

24. As to surrounding circumstances, the Tribunal notes that the budgetary situation that IRMCT faced towards the end of 2020 does not reveal any element supporting a legitimate expectation of renewal, despite the Applicant's claims about the workload of and the number of posts in her Section.

25. The Tribunal also considered the Applicant's reliance on her CRL. First, the Tribunal observes that the Applicant amalgamated two different matters: one being the duration of her FTA, and the other the *budgetary* duration of the post she encumbered. Indeed, the date of 31 December 2021 indicated in the table listing the "French P-4 Pool" appears under the heading "Maximum budgetary duration of post". It does not relate to the duration of the Applicant's FTA although, generally, there is an alignment of these durations.

26. Second, the CRL indicates that the respective manager "recommended that [the Applicant] receive the maximum extension, until 31-Dec-2021 subject to the approval of the budget". However, the CRL relates to a recommendation, not an express promise, and even if it were to be considered as such, it did not come from an official with the authority to approve an exception for retention in service beyond the mandatory age of retirement. Also, such recommendation was conditioned to the approval of IRMCT's budget, which was subject to reductions requested by the General Assembly and, more importantly, it was contrary to the legal framework governing retention of service beyond the mandatory retirement age. This latter point will be further developed below.

27. Finally, although the Applicant is entitled to her opinion, her views as to what is in the interest of the Organization is not relevant when examining the legality of the exercise of discretionary authority.

Procedure and practices for separation of service due to retirement

28. The law with respect to retention in service beyond the mandatory retirement age is clear. Staff regulation 9.2 provides (emphasis added) that "Staff members *shall not be retained* in active service beyond the age of 65 years".

29. Nevertheless, the said regulation grants discretion to the Secretary-General to retain staff members in service beyond mandatory retirement age in the interest of the Organization and in exceptional cases. The conditions to do so are regulated by Administrative Instruction ST/AI/2003/8 (Retention in service beyond the mandatory age of separation and employment of retirees). More specifically, sec. 2.1 of ST/AI/2003/8 sets the criteria that must be met for the exception to be entertained, and sec. 3 of that Administrative Instruction provides the conditions that must be met.

30. Without entering into a detailed examination of the criteria and the procedure for granting an exception to Staff Regulation 9.2, which the Tribunal does not find necessary in these proceedings due to the threshold attached to them (see para.20 above), suffice it to say that there is no evidence that the IRMCT ever took action to comply with the procedural condition of advertising the vacancy that was to occur upon the Applicant's separation from service. Pursuant to sec. 3.2 of ST/AI/2003/8, no extension is possible if this requirement is not met.

31. The Applicant admitted in her application being aware of the situation with respect to her reaching normal retirement age. She alleges to have raised the issue with her FRO in April 2020 and did not follow up on it with HRS. She was informed about the non-renewal of her appointment due to her reaching normal retirement age, first, verbally on 16 December 2020 and, subsequently, in writing by emails of 18 December 2020 from her SRO and of 23 December 2020 from HRS. It was clearly communicated to her that no exception was possible.

32. The Tribunal thus finds no evidence supporting the Applicant's claim that the way in which the IRMCT arranged her separation from service is unfair and against her contractual rights. On the contrary, the actions of the IRMCT lead to conclude that the Applicant's separation from service upon her reaching her retirement age was to be processed pursuant to staff regulation 9.2.

33. The Tribunal recognizes some shortcomings in the language of the email of 23 December 2020 from HRS to the Applicant. However, it finds that they do not rise to the level of procedural flaws vitiating the decision that the Applicant seeks to suspend. In substance, all communications to the Applicant, oral or written, as of 16 December 2020 confirmed that her appointment would not be renewed beyond January 2021 in view of her reaching the mandatory retirement age.

Issuance of non-extension of appointment

34. The Applicant argues that since Chapter IX of ST/SGB/2019/2 (Delegation of authority in the administration of the Staff Regulations and Rules and the Financial Regulations and Rules) delegates the exceptional extension beyond retirement age for D-2 and below to Heads of entity, “it must be concluded that the decision of non-extension of contract beyond retirement age is also subject to approval of the Head of entity”.

35. The Tribunal finds that the Applicant’s argument fails as its conclusion has no support in the regulatory framework of the Organization or in the jurisprudence of the United Nations Appeals Tribunal. First, it is trite law that fixed-term appointments carry no expectancy of renewal and end on the date set forth in the letter of appointment without a requirement of prior notice.

36. Second, in the case at bar, Staff Regulation 9.2 is applicable and, as stated above, its language is unequivocal concerning the mandatory nature of the principle of non-retention in active service of staff beyond the age of 65 years. No additional approval is required.

37. The Tribunal therefore finds that the Applicant’s case does not meet the requirement of *prima facie* unlawfulness. Consequently, given the cumulative nature of the requirements to grant an application for suspension of action, recalled in para. 18 above, it does not consider necessary to examine the other two conditions, namely urgency and irreparable damage.

Case No. UNDT/GVA/2021/003

Order No. 7 (GVA/2021)

Conclusion

38. In view of the foregoing, the application for suspension of action pending management evaluation is rejected.

(Signed)

Judge Teresa Bravo

Dated this 21st day of January 2021

Entered in the Register on this 21st day of January 2021

(Signed)

René M. Vargas M., Registrar, Geneva