



Before: Judge Teresa Bravo

Registry: Geneva

Registrar: René M. Vargas M.

LAASRI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Thad Guyer

Counsel for Respondent:

Kevin Browning, UNICEF

Introduction

1. On 5 July 2016, the Applicant, a former staff member of the United Nations Children’s Fund (“UNICEF”) in Morocco, filed an application with the Tribunal’s Nairobi Registry contesting the decision to abolish her post and consequently not to renew her contract beyond 31 May 2016.

Procedural background

2. On 3 August 2016, the Respondent filed his reply.

3. On 16 November 2016, the Applicant filed her observations on the Respondent’s reply.

4. On 19 March 2019, the case was transferred to the Tribunal’s Geneva Registry.

5. On 4 March 2020, the Tribunal conducted a case management discussion (“CMD”) with the participation of the Applicant, her Counsel and Counsel for the Respondent in which, *inter alia*, the Tribunal informed the parties that since the Respondent had recognized the unlawfulness of the contested decision and had already paid the Applicant a compensation in the amount of 12 months’ net base salary, there was no need for a hearing and the case would be decided on the papers.

6. On 6 March 2020, the Tribunal issued Order No. 29 (GVA/2020) addressing outstanding issues and giving instructions to the parties on case management.

7. On 3 April 2020, the Respondent filed a letter dated 2 August 2016 from the UNICEF Principal Advisor, Ethics Office, concerning the outcome of the Applicant’s second complaint for retaliation (see para. 19 below).

8. On 6 April 2020, the Applicant filed further information in support of her claim.

9. On 27 April 2020, the Respondent filed his closing submission and on 20 May 2020, the Applicant filed hers.

Facts

10. Since the Tribunal did not hold a hearing on the merits in the present case, the account of facts below is limited to those accepted by the Respondent.

11. At the time of the contested decision, the Applicant served as an Operations Manager, a National Professional Officer position, NO-C level, in the UNICEF Morocco Country Office.

12. During an audit of the UNICEF Morocco Country Office that took place between August and September 2014, the Applicant reported various forms of non-compliance with UNICEF regulations and violation of internal controls.

13. In October 2014, the Applicant was informed of the decision to abolish her post effective 30 November 2014. This decision was allegedly based on the Programme Budget Review for the Rabat Office, which proposed the abolition of the Applicant's post and the creation of an Operations Manager post at the P-3 level.

14. On 7 November 2014, the Applicant requested management evaluation of the decision to abolish her post effective 30 November 2014. However, this decision was later rescinded as it had not been approved by the Deputy Executive Director, Management. Her request for management evaluation was consequently determined to be moot.

15. On 20 November 2014, the Applicant filed a complaint with the Ethics Office, UNICEF, concerning retaliation. The Ethics Office found a *prima facie* case of retaliation and referred the case to the Office of Internal Audit and Investigation ("OIAI"), UNICEF. OIAI initiated an investigation to determine whether there was misconduct in the form of retaliation. However, due to insufficient evidence it was found that no disciplinary measures were warranted.

16. In December 2015, a review of the needs of the Morocco Country Office was conducted. As per the Respondent, a review panel was constituted to mitigate concerns about retaliation. It comprised individuals with no connection with the Applicant's initial complaint, the original abolition recommendation, or the

Morocco Country Office. The panel concluded that the Morocco Country Office should replace the post encumbered by the Applicant with a P-3 post.

17. On 1 March 2016, the Applicant was informed of the decision to abolish her post effective 1 June 2016.

18. On 14 March 2016, the Applicant requested management evaluation of said decision.

19. On 30 March 2016, the Applicant filed a second complaint with the Ethics Office, UNICEF, concerning retaliation in relation to the most recent decision to abolish her post. The Ethics Office determined that a *prima facie* case of retaliation had not been established.

20. By letter dated 6 April 2016, the Deputy Executive Director, Management, UNICEF, replied to the Applicant's request for management evaluation. Legitimate reasons were found for the "internationalization" of her post. However, she noted that the panel did not address the fact that the generic job description for the P-3 post had not been changed from the Applicant's job description. Therefore, it was found that the panel failed to address whether the Applicant might have been able to fulfil the requirements of the P-3 post. Consequently, the Applicant was granted compensation in the amount of 12 months' net base salary for loss of chance of contract renewal.

21. On 31 May 2016, the Applicant was separated from service.

Consideration

Contested decision and scope of judicial review

22. The Tribunal finds that the contested decision in the present case is the decision communicated to the Applicant on 1 March 2016 to abolish her post and, consequently, not to renew her contract beyond 31 May 2016.

23. Indeed, after a careful analysis of the Applicant's management evaluation request and the subsequent decision, one must conclude that what is at stake is the decision that followed the Panel's review of the needs of the Morocco Country Office.

24. The Applicant insists that the decision to abolish her post in 2016 was also tainted by bias and ulterior motives but the evidence on record, namely, the UNICEF Ethics Office's letter dated 2 August 2016 in relation to her second complaint for retaliation, does not support the Applicant's allegations and clearly establish a distinction between the 2014 and the 2016 abolition decisions. Indeed, the UNICEF Ethics Office concluded that there was no *prima facie* case of retaliation with respect to the 2016 abolition decision.

25. In view of the Respondent's 27 April 2020 closing submission, whereby he conceded that "although there were legitimate reasons to abolish the Applicant's post, the decision to do so, which led to the non-extension of her appointment [...] was based, in part, on flawed considerations", the Tribunal finds that the contested decision is unlawful.

26. Therefore, the only legal issue that remains for adjudication before this Tribunal is that of remedies.

Remedies

27. Having found that the contested decision was unlawful, the Tribunal must now examine the Applicant's claim for remedies in line with art. 10.5 of its Statute.

28. In her application, the Applicant only requested reinstatement. However, in her 16 November 2016 observations on the Respondent's reply, she added a new claim on remedies, namely, a request for compensation in the amount of more than two years of her net base salary, moral damages, together with costs and legal expenses.

29. Art. 10.5 of the Tribunal's Statute provides that, as part of its judgement, the Tribunal may only order one or both of the following:

(a) Rescission of the contested administrative decision or specific performance, provided that, where the contested administrative decision concerns appointment, promotion or termination, the Dispute Tribunal shall also set an amount of compensation that the respondent may also elect to pay as an alternative to the rescission of the contested administrative decision or specific performance ordered, subject to subparagraph (b) of the present paragraph;

(b) Compensation for harm, supported by evidence, which shall normally not exceed the equivalent of two years' net base salary of the applicant. The Dispute Tribunal may, however, in exceptional cases order the payment of a higher compensation for harm, supported by evidence, and shall provide the reasons for that decision.

30. Since the Tribunal has found that the decision not to renew the Applicant's fixed-term appointment beyond 31 May 2016 is unlawful, it orders the rescission of said decision.

31. Pursuant to art. 10.5(a) of its Statute, the Tribunal shall also set an amount of compensation to be paid as an alternative to the rescission of the non-renewal decision since it concerns a matter of appointment.

32. The Statute of this Tribunal provides no guidelines in relation to the elements that it can consider to determine the quantum of a fair, reasonable and adequate alternative compensation. Instead, it only limits the amount of compensation to two years' net base salary save exceptional cases.

33. In *Mushema* 2012-UNAT-247 (para. 28), the Appeal's Tribunal provided some guidance in relation to the elements that can be considered by this Tribunal to determine the amount of an alternative compensation:

[T]he elements which can be considered are, among others, the nature and the level of the post formerly occupied by the staff member (i.e., continuous, provisional, fixed-term), the remaining time, chances of renewal, etc. It must also be taken into account that the two-year limit imposed by the Statute of the Dispute Tribunal constitutes a maximum, as a general rule with exceptions. As such, it cannot be the average “in lieu compensation” established by the court.

34. Furthermore, since the assessment of compensation must be done on a case-by-case basis, it carries a certain degree of empiricism.

35. In the case at hand, the Applicant worked as an Operations Manager, at the NO-C level, in the UNICEF Morocco Country Office. She worked on a fixed-term appointment since February 2010 and the decision not to renew her contract beyond 31 May 2016 was based on the recommendations made by an independent panel to abolish her post. Although there were procedural irregularities, as conceded by the Respondent, there were, apparently, solid reasons to justify the “internationalization” of the Applicant’s former post.

36. In *Warren* 2010-UNAT-059, the Appeals Tribunal affirmed that the purpose of compensation is to place a staff member in the same position he or she would have been in had the Organization complied with its contractual obligations.

37. Considering the particular circumstances of the present case and the fact that the Applicant lost the chance to have her appointment renewed for another year due to the failure of the Administration to consider whether she might have been able to fulfil the requirements of the P-3 post, the Tribunal would award compensation in lieu of rescission in an amount equal to one-year’s net base salary, based on the Applicant’s pay on the date of the non-renewal of her fixed-term appointment, i.e., 31 May 2016.

38. However, since this amount has already been paid by the Respondent to the Applicant as a result of her request for management evaluation, the Tribunal finds that, in fact, the Respondent has already elected not to rescind the decision and paid instead a compensation in recognition of the Applicant’s loss of chance in having

her contract not renewed for another year. Therefore, no additional compensation is awarded.

Moral damages

39. In relation to moral damages, the Tribunal notes that the threshold of evidence required from the Applicant following the amendment of art. 10.5(b) of the Tribunal's Statute has become more restrictive.

40. Art.10.5(b) now stipulates that the Dispute Tribunal may award compensation for harm if such harm is "supported by evidence". This is the current law on compensation for harm and it is the law that this Tribunal must apply when contemplating such a finding. This is in line with the jurisprudence of the Appeals Tribunal on compensation for harm (see *Kebede* 2018-UNAT-874; *Kallon* 2017-UNAT-742).

41. The Applicant claims that the contested decision caused her harm to her career and health. She argues *inter alia* that she has suffered mental distress, which impacted her health condition.

42. Noting the Applicant's claim for moral damages, the Tribunal expressly requested evidence from the Applicant in this respect, which she filed on 6 April 2020, namely, a medical certificate from her gynaecological surgeon dated 23 March 2020 and an email dated 27 August 2014 in which she mentioned that she visited a cardiologist after feeling pain in her chest.

43. The Tribunal finds the medical certificate presented by the Applicant enough evidence of the harm she suffered to her health by the issues she was having at work. While the medical certificate does not specifically refer to the Applicant's situation in 2016, there is no doubt that her health condition was aggravated as of 2015 by the difficult situation that she was facing at work, and which she shared with her doctor as indicated in the medical certificate. However, the Tribunal is not persuaded of the relevance of the email dated 27 August 2014, since it is not a medical certificate but, rather, the Applicant's own account of events.

44. The Tribunal is of the view that moral damages must only be granted based on the evidence presented in the form of the medical certificate. Consequently, the Tribunal finds adequate and proportionate to the gravity of said impact to grant the Applicant moral damages in the amount of two months' net base salary.

Costs and legal fees

45. Art. 10(6) of the Tribunal's Statute states that "[w]here the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party".

46. The Appeals Tribunal has ruled that the "basic principle applicable in international courts on the question of costs is that each party shall bear its own costs". Indeed, this Tribunal can only award costs to a party if there is evidence of "a manifest abuse of proceedings", i.e., some degree of intention to act frivolously (see *Bi Bea* 2013-UNAT-370).

47. The Tribunal's power to award costs is thus restricted by its Statute to cases in which it determines that a party has manifestly abused the proceedings before it. In the absence of such determination, the Tribunal cannot grant said request.

48. Since in this case there is no evidence of a "manifest abuse of proceedings", the Applicant's request in this regard is rejected.

Conclusion

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

- a. The decision not to renew the Applicant's fix term appointment beyond 31 March 2016 is unlawful;
- b. The Respondent shall pay the Applicant a compensation for moral damages in the amount of two months' net base salary;

- c. The aforementioned compensation shall bear interest at the United States of America prime rate with effect from the date this Judgment becomes executable until payment of said compensation. An additional five per cent shall be applied to the United States of America prime rate 60 days from the date this Judgment becomes executable; and
- d. All other claims are rejected.

(Signed)

Judge Teresa Bravo

Dated this 29th day of June 2020

Entered in the Register on this 29th day of June 2020

(Signed)

René M. Vargas M., Registrar, Geneva