



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

LIU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Esther Shamash, UNDP

Introduction

1. By application filed on 7 January 2014 with the New York Registry of the Tribunal, the Applicant, a former staff member of the United Nations Office of Outer Space Affairs (“OOSA”), contests the decision by the Director, OOSA, of 26 June 2013, “to terminate her contract by extending [it] one additional month”. The case was registered under Case No. UNDT/NY/2014/002.
2. The application was served on the Respondent who filed his reply on 12 February 2014.
3. By Order No. 147 (NY/2014) of 17 June 2014 on change of venue, the case was transferred to the Geneva Registry, where it was registered under Case No. UNDT/GVA/2014/049 and assigned to the undersigned Judge.

Facts

4. The Applicant joined the United Nations on 1 August 2007, under a fixed-term appointment as Programme Assistant (G-5 level), United Nations Office on Drugs and Crime (“UNODC”) in China.
5. The United Nations Platform for Space-based Information for Disaster Management and Emergency Response (“UN-SPIDER”) was created as an OOSA Programme in 2006. The programme, which is financed through funding agreements with donors, is delivered through its Headquarter Offices in Vienna, Austria, and through its Offices in Bonn, Germany and Beijing, China. The latter office became operational in January 2011.
6. On 1 July 2011, the Applicant was granted a fixed-term appointment as Programme Associate (G-6) of UN-SPIDER, Beijing, China, with a letter of appointment from the United Nations Development Programme (“UNDP”). The Applicant’s post at UN-SPIDER was financed through contributions from the Chinese Government.

7. By interoffice memorandum dated 10 February 2012, the Chief, Space Applications Section, OOSA, informed the Head of Office, OOSA Beijing, that the UN-SPIDER Beijing Office financial operations would be shifted to UNDP China, to allow the Beijing Office greater independence and flexibility in its work.

8. By email of 22 January 2013, the Chief, Space Applications Section, OOSA, informed the Head of Office, OOSA Beijing, and the Applicant that since the interoffice memorandum of 10 February 2012, by which the Beijing operation had been changed in 2013, had “created a lot of confusion in [their] work not only in Beijing but also in Vienna through 2012”, he had decided to withdraw said memorandum. He further noted that this meant that the Beijing Office was going to operate as it had in 2011.

9. As such, and although initially UN-SPIDER Beijing had been operating under UNDP Rules and Procedures, OOSA decided in January 2013 that UN-SPIDER Beijing operations be shifted back to the United Nations Office at Vienna (UNOV), and that it works under the latter’s IMIS system. At the same time, the funding agreement with the Chinese Government came to an end and OOSA, Vienna started to perform some of UN-SPIDER Beijing operational activities; additionally, the post encumbered by the Applicant was downgraded and a job opening for a Team Assistant (SC-4) was advertised to reflect the decreased responsibilities.

10. Email communications from 2012 and 2013 between the Applicant and her First Reporting Officer (“FRO”) show some tensions between them; the communications refer, *inter alia*, to the Applicant’s ePAS and to her FRO’s concerns about accomplishment of some tasks by the Applicant, as well as to her communication with the FRO. In an email of 20 June 2013 to her FRO, the Applicant noted that she was feeling unwell “in view of the recent turbulences so [she had] to go home for rest”.

11. In her previous ePASes—i.e. cycles 2009-2010 and 2010-2011—and those for 2011-2012 and 2012-2013 when the Applicant was working as Programme Associate, G-6, at UN-SPIDER, the Applicant was rated “frequently exceeds performance expectations”. The latest ePAS, namely that for the period

2012-2013, gave her the same rating although it contained a comment noting that the Applicant needed more training in IMIS.

12. By letter dated 26 June 2013, the Deputy Director-General, UNOV, and the Director, OOSA, informed the Applicant that her fixed-term appointment, which expired on 30 June 2013, would be only extended by one month, namely until 31 July 2013.

13. By email of Sunday, 25 August 2013 addressed to the United Nations Management Evaluation Unit at Headquarters (“MEU”), the Applicant—unrepresented at the time—requested a “possible management evaluation” of the decision not to extend her appointment, stressing that the aim of her email was to meet the 60 day time-limit for requesting management evaluation. The MEU sent her a response on 27 August 2013, advising that she had to complete the form required by MEU.

14. On 29 August 2013, the Applicant’s Counsel filed a request for management evaluation with the UNDP Administrator of the decision at stake. By letter dated 11 October 2013, received by the Applicant on 12 October 2013, the Officer-in-Charge, Bureau of Management, UNDP, informed her that while the request for management evaluation was found receivable, it was rejected on the merits and the decision was being upheld. It was noted, *inter alia*, that “management considered it more appropriate, from a financial standpoint, to seek interim administrative support through a level 4 Service contract (“SC”) instead of downgrading the post to G-4”. It was further stressed that the UN-SPIDER Beijing Office was now composed of the Head of Office (P-4), a Team assistant (SC-4) and two experts provided by the Chinese Government under a non-reimbursable loan.

15. The Applicant filed her application on 7 January 2014 and the Respondent filed his reply on 12 February 2014.

16. Following a request to the parties to file comments, if any, to a transfer of the case to the Geneva Registry—which they did not—the Tribunal, by Order No. 147 (NY/2014) of 17 June 2014 on change of venue, transferred the case to

the Geneva Registry, where it was registered under Case No. UNDT/GVA/2014/049 and assigned to the undersigned Judge.

17. By Orders No. 121 (GVA/2015) of 16 June 2015, No. 135 (GVA/2015) of 29 June 2015 and No. 151 (GVA/2015) of 14 August 2015, the Tribunal asked the parties to provide additional information, and to inform it whether they were agreeable to the case being decided on the papers. The Respondent provided the requested information and informed the Tribunal that he did not have any objections to the case being decided on the papers. The Applicant did not file any submission pursuant to above-referenced orders.

Parties' submissions

18. The Applicant's principal contentions are:

- a. She did not receive proper guidance and instructions on how to start and run the operations of the new office; the only instructions she received, in form of the interoffice memorandum of 10 February 2012 were erroneous and withdrawn in January 2013; before the interoffice memorandum was issued, providing for greater independence of the UN-SPIDER Beijing Office, she shared her view that the terms of the memorandum were not feasible; it was issued anyways and ultimately withdrawn;
- b. She applied in good faith the working modalities of and interaction between UNDP and other non-resident agencies of the United Nations, like UN-SPIDER, which worked good for such other non-resident agencies in the past, except, as it seems, for UN-SPIDER; they consisted in, e.g., the individual UN office being responsible for executing its own budget, certifying goods and service and expenditures for payments, while UNDP China assisted in making payments, issuing contracts, and purchasing;
- c. OOSA, Vienna, does not have sufficient financial management knowledge and experience, if any, to interact with UNDP; once headquarters became the certifying office, problems arose; in fact, the

previous practice established by the Applicant worked much better than the certification by headquarters, but Vienna refused to follow her advice;

d. She had not received any warning for the shortcomings relating to IMIS that were ultimately reflected in her 2012-2013 ePAS; at a meeting with her FRO on 23 May 2013 to discuss her ePAS, he informed her that he would put a negative comment in her ePAS; she thinks that by that ePAS, she was blamed, in writing, for all the difficulties in operations; as a consequence, she fell sick;

e. On 6 June 2013, her First Reporting Officer had a discussion with her with respect to her ePAS 2012-2013, and on the operation of the Beijing Office;

f. She cannot be made responsible for the inability of the Organization to set up serious operations in China;

g. She was not provided with a reason for the “termination” of her appointment; since the position was immediately re-advertised, the “termination is unexplainable”;

h. Moreover, her First Reporting Officer treated her unfairly since March 2012, e.g. by him spreading rumours about mistakes allegedly committed by the Applicant and expressing distrust in her regard in front of the UNDP Travel Unit colleagues; mediation was not successful; she also suffered discrimination from other staff from headquarters;

i. She requests compensation for grievance, loss of job, difficulty at finding a job, damage to her reputation and to the values of the United Nations.

19. The Respondent’s principal contentions are:

a. The Applicant’s contract was not terminated; rather it was not renewed and she was separated from service following the expiration of her appointment;

b. The post encumbered by the Applicant was initially established at the G-6 level for it was intended that UN-SPIDER Beijing would operate under UNDP Rules and Procedures, and not those of UNOV, to ensure UN-SPIDER Beijing greater independence and flexibility; however, when it became apparent that UNDP procedures were not always compatible with the operational needs of UN-SPIDER, it was decided that UN-SPIDER would shift its operations back to UNOV and use UNOV IMIS system, which resulted in greater oversight from UNOV;

c. Also, since the funding agreement between UN-SPIDER Beijing and the Chinese Government ended, and a new agreement is still under negotiations, it was decided that, financially, it was more appropriate to seek interim administrative support, through a level 4 Service Contract (SC); hence, it was decided to abolish the G-6 post encumbered by the Applicant;

d. This is reflected in the current staffing table of the UN-SPIDER Beijing Office; the majority of tasks relating to IMIS and financial tasks of UN-SPIDER have been transferred to OOSA, and the SC-4 is handling general administrative and office functions;

e. As a result, the non-renewal of the Applicant's fixed-term appointment constitutes a valid exercise of the Administration's discretion and was not tainted by improper motives;

f. When the Administration has several valid reasons not to renew an appointment, it needs to provide only one of them; the Applicant's contract was not renewed in view of the 2013 restructuring of UN-SPIDER and related financial constraints;

g. The Applicant was provided with a reason for the decision, namely in a discussion prior to the letter of 26 June 2013, which is referred to in said letter, and during which her supervisor discussed with the Applicant the structural changes in the management of the UN-SPIDER Beijing operations in 2013; the response to the Applicant's request for management evaluation provided her with further explanations about the decision;

- h. The Administration disposes of broad discretion in deciding on its structure and on how it conducts its operations; in the absence of arbitrariness or other illegal considerations or the violation of procedural rules, such exercise of discretion is not subject to judicial control;
- i. The only “critical” comment in her 2012-13 ePAS was a need for further training in IMIS; the Applicant reference to “unfair treatment” is not supported by any evidence, and she never pursued relevant redress procedures; the only available evidence relates to disagreements over working processes, and it is the prerogative of the Organization to decide how it wants to conduct its operations;
- j. The application should be rejected in its entirety.

Consideration

Receivability

20. Although not submitted by the Respondent, the Tribunal is bound to first raise, on its own motion, the issue of the receivability of the application (cf. *Comerford-Verzuu* UNDT/2011/005; *Kunanayakam* UNDT/2011/006).

21. Staff rule 11.2 (Management Evaluation) provides:

(a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.

...

(c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General.

22. The Appeals Tribunal has consistently held that time limits have to be observed and enforced strictly (*Kazazi* 2015-UNAT-557, *Diab* 2015-UNAT-495; *Kissila* 2014-UNAT-470) and that failure to file a timely request for management evaluation leads to the application being irreceivable, *ratione materiae* (cf. *Eggesfield* 2014-UNAT-402; *Kazazi* 2015-UNAT-557).

23. The Tribunal further recalls the Appeals Tribunal's ruling that "staff members have to ensure that they are aware of Staff Regulations and Rules and the applicable procedures in the context of the administration of justice in the United Nations' internal justice system and that ignorance of the law is no excuse for missing deadlines" (*Staedtler* 2015-UNAT-546, *Amany* 2015-UNAT-521).

24. At the same time, with respect to the question of whether an Applicant filed a request for management evaluation with the competent authority, the Dispute Tribunal stressed in *Behluli* UNDT/2011/052 that:

While the Applicant is entitled to argue that the Administration should not be excessively formalistic and insist that every request for review must without fail be addressed to the Secretary-General in order to be treated as such, the request must, on the other hand, be sufficiently clear for its recipient to see that it is in fact a request for review, in other words the first mandatory phase of the appeal procedure laid down in the said staff rule 111.2(a), and, as such, must be forwarded to the Secretary-General.

25. The Tribunal notes that the contested decision was notified to the Applicant by letter of 26 June 2013, which she stated she received on 27 June 2013. She filed a request for "a possible management evaluation" with the Management Evaluation Unit on Sunday, 25 August 2013, stressing that she did so "to meet the 60 day time-limit". The MEU wrote back to her on 27 August 2013, asking her to fill in the relevant form. On 29 August 2013, the Applicant's Counsel filed a request for management evaluation with the UNDP Administrator.

26. Under staff rule 11.2 (c), the Applicant had until 26 August 2013 to request management evaluation. Since the Applicant's letter of appointment was with UNDP, her request for management evaluation under staff rule 11.2 should have been filed by that date with the UNDP Administrator, rather than with the MEU.

However, while the request for management evaluation was filed, timely, with the MEU, it was filed with the UNDP Administrator only on 29 August 2013, that is, three days after the applicable deadline.

27. The Tribunal notes that in her request for management evaluation addressed to the MEU, the Applicant clearly identified the decision she was contesting and where she was working. Moreover, the Tribunal found that the MEU, in its response to the Applicant—which was sent after the deadline to request management evaluation had passed—did not indicate to the Applicant that her request had to be filed with the UNDP Administrator.

28. Finally, and most importantly, the Tribunal took into account the documentation that the Respondent filed at its request, namely “a copy of the delegation of authority of the management evaluation to the UNDP Administrator, together with all relevant documents showing the date and manner of its public announcement and/or the publication of such delegation of authority”.

29. The documentation received from the Respondent consists of documents dating back to 1965, 1966 and 1970, on the basis of which the UNDP Administrator “acts on behalf of the Secretary-General in the administration of Staff Regulations and Rules in respect of UNDP staff members” (UN Personnel Directive PD/2/65/Add.1), and “should continue to have the authority to appoint and administer the staff of the Programme” (Resolution No. 2688 of 11 December 1970 *The capacity of the United Nations development system*). The Respondent also filed an unpublished interoffice memorandum dated 24 June 2011, where the UNDP Administrator confirmed delegating the authority to respond to management evaluation requests to the Assistant Administrator and Director, Bureau of Management, UNDP.

30. On account of the above documents, the Respondent argued that the authority delegated to the Administrator includes that to decide on management evaluation requests under staff rule 11.2.

31. Mindful of the above-referenced jurisprudence of the Appeals Tribunal, the Tribunal finds that staff members can be expected to be aware only about rules

and procedures that are unambiguous and subject to public announcement. The documents provided by the Respondent to show that the authority for requests for management evaluation has been delegated to the UNDP Administrator are far too general with respect to the authority of the UNDP Administrator in the administration of the regulations and rules of UNDP staff members, and do not mention the internal justice system. Moreover, the only relevant document, i. e. the interoffice memorandum on the delegation of authority, has not been published.

32. In contrast, the Tribunal notes that within the United Nations High Commissioner for Refugees—upon the Under-Secretary-General for Management formal delegation of authority to the Deputy High Commissioner to carry out the functions of management evaluation governed by staff rule 11.2—an Inter-Office-Memorandum No. 34/2009-Field Office Memorandum No. 034/2009, dated 1 July 2009, was addressed to “all staff members at headquarters and in the field”, to inform them about said delegation. On the basis of the documentation received from the Respondent, the Tribunal cannot but conclude that no such public announcement of the delegation of authority to the Administrator, UNDP, has been made within UNDP.

33. Therefore, and in view of the overall circumstances of the present case—where an Applicant working for OOSA, albeit under a UNDP contract, contests a decision emanating from the Deputy Director-General, UNOV/Director, OOSA (hence, Secretariat staff)—the Tribunal finds that the Applicant could not be expected to know that her request for management evaluation had to be filed with the UNDP Administrator. Her request for management evaluation having been timely filed with the MEU, the Tribunal finds that the Applicant respected the applicable deadline and finds the application receivable.

Merits

34. Staff rule 4.13(c) provides that “A fixed-term appointment does not carry expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service, except as provided under staff rule 4.14(b)”.

35. A non-renewal decision can be challenged in case the Administration does not act fairly, justly or transparently or if the decision is motivated by bias, prejudice or improper motive against the staff member; the latter has the burden of proving that such factors played a role in the administrative decision (cf. *Said* 2015-UNAT-500, referring to *Ahmed* 2011-UNAT-153; *Obdeijn* 2012-UNAT-201; *Asaad* 2010-UNAT-021).

36. The Appeals Tribunal has consistently held that an international organization has the power to restructure some or all of its departments or units, which includes the abolition of posts, the creation of new posts and the redeployment of staff (*Lee* 2014-UNAT-471; *Gehr* 2012-UNAT-236).

37. Further, the Appeals Tribunal confirmed that where the Administration provides a reason for the non-renewal of a fixed-term appointment, that reason must be supported by the facts (*Islam* 2011-UNAT-115).

38. In the present case, the reason for the non-renewal of the Applicant's appointment was the restructuring of the OOSA Beijing Office leading to the abolition of the Applicant's post, funded through contributions from the Chinese Government. The Applicant, while expressing her disagreement with the restructuring, did not deny that it in fact occurred resulting in increased oversight from UNOV and transfer of some of OOSA Beijing Office operational activities to OOSA, Vienna.

39. The Respondent further argued, and the Applicant did not contest, that the use of UNOV IMIS system did no longer justify maintaining the level of administrative responsibilities of a G-6 post and that "plans were made to downgrade the position to G-4 in order to reflect the decreased responsibilities of the post". The Applicant also does not contest, and evidence shows, that a post of Team Assistant, through a level 4 Service Contract (SC-4 post), was advertised, to seek administrative support, in replacement of the Applicant's post. Documentary evidence additionally shows that the Beijing Office of UN-SPIDER is currently composed of a Head of Office, (P-4), one Team Assistant (SC-4) and two experts provided by the Chinese Government.

40. As such, the Tribunal is satisfied that the Applicant's G-6 post, funded through government contributions, did no longer exist as at 1 August 2013, that is, the day after the expiration of the Applicant's appointment. Therefore, the reason provided for the non-extension of the Applicant's appointment is supported by the evidence.

41. Finally, the Tribunal notes that the Applicant did not provide any evidence with respect to the allegations that the decision was ill-motivated, particularly that it was based on issues with her performance or otherwise related to her ePAS. The comments in the Applicant's ePAS 2012-2013—for which she received a rating of “frequently exceeds performance expectations”—with respect to training needs certainly cannot serve as evidence of any ill motivation of the non-renewal decision.

Conclusion

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

The application is rejected in its entirety.

(Signed)

Dated this 4th day of September 2015

Entered in the Register on this 4th day of September 2015

(Signed)

René M. Vargas M., Registrar, Geneva