



Before: Judge Rowan Downing

Registry: Geneva

Registrar: René M. Vargas M.

BATAMULIZA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Thomas Jacob, UNDP

Introduction

1. By application filed on 29 October 2015, the Applicant, a former Gender Specialist at the Kenya Country Office (“KCO”) of the United Nations Development Programme (“UNDP”), challenges the decision not to renew her fixed-term appointment (“FTA”).
2. The Respondent filed his reply on 3 December 2015.

Procedural background

3. By Order No. 168 (NBI/2016) of 23 March 2016, the case was transferred from the Nairobi Registry to the Geneva Registry of the Tribunal and assigned to the undersigned Judge.
4. On 4 January 2017, by Order No. 3 (GVA/2017), the parties were requested, *inter alia*, to inform the Tribunal about their willingness to attempt mediation. The parties submitted a joint response on 12 January 2017, advising that they were prepared to engage in mediation, consequently they moved for the suspension of the proceedings for 30 days.
5. The proceedings in this matter were suspended through Orders Nos. 7 and 47 (GVA/2017) of 13 January and 20 February 2017, respectively.
6. On 23 March 2017, the parties submitted a joint submission informing the Tribunal that they were unable to reach an amicable settlement. Therefore, the proceedings were resumed and through Order No. 98 (GVA/2017) of 20 April 2017, the Tribunal informed the parties that it could make a determination of the case without holding a hearing and sought the parties’ views thereon. While the Respondent was of the view that the matter could be determined based on the pleadings, the Applicant requested the Tribunal to hold a hearing.
7. By Order No. 153 (GVA/2017) of 14 August 2017, the Tribunal called the parties to a Case Management Discussion in preparation of the hearing on the merits. The Respondent’s Counsel was ordered to produce additional documents,

including correspondence on the creation of the post encumbered by the Applicant, its abolition and missing pages of some of the annexes to the Respondent's reply.

8. On 14 September 2017, the Respondent's Counsel filed a motion for extension of time to produce the ordered documents, indicating that he was still in the process of obtaining them. By Order No. 178 (GVA/2017), issued on 15 September 2017, the Tribunal on an exceptional basis granted the Respondent's motion for extension of time.

9. Through Order No. 198 (GVA/2017) of 31 October 2017, the Tribunal issued a notice and scheduling order for the hearing on the merits, which was held on 7, 8, 21 and 22 November 2017.

10. During the hearing, the Tribunal heard from the Applicant, her former supervisor, the former Deputy Country Director/Programmes ("DCD/P") and two former colleagues. The Respondent called two witnesses, the former Resident Representative of UNDP KCO who was also the United Nations Resident Coordinator ("RR/RC") and the Deputy Country Director/Operations ("DCD/O").

Facts

11. The Applicant joined UNDP in January 2011 at the P-3 level through the Leadership Development Programme ("LEAD"), which was for four years with two regular assignments. The Applicant was initially based in New York and reassigned to UNDP, KCO at the same level, as a Gender specialist in the Programme Unit, in 2012.

12. In 2013, the Applicant moved to work in the Resident Coordinator's Office ("RCO") of UNDP KCO where she worked until June 2014, when she returned to the Programme Unit, UNDP KCO, on her own volition. The Applicant alleges that she decided to return to the Programme Unit after an incident that occurred during a mission with the RR/RC to Rwanda in May 2014. Upon her return from the mission, the Applicant submits that there was a change in working relationship between her and the RR/RC.

13. In March 2014, UNDP KCO advertised a P-4 position of Programme and Country Office Advisor for a duration of one year. The Applicant applied for it and on 9 July 2014 the RR/RC informed the Applicant of her selection. She took up the functions of that position on 21 July 2014.

14. By memorandum dated 22 April 2015, the Applicant was informed by the DCD/O that her appointment would not be renewed beyond its expiry on 20 July 2015. The Applicant inquired from the DCD/O if the reason for the non-renewal was the abolition of the post she encumbered or if it was performance related. The DCD/O replied that it was not performance related but rather there was a challenge with funding.

15. The Applicant was separated from the Organisation on 20 July 2015.

Parties' submissions

16. The Applicant's principal contentions can be summarised as follows:

- a. The budgetary reasons given for non-renewal of her contract were not supported by facts since UNDP KCO undertook a number of new recruitments in 2015 after her separation from the Organisation;
- b. The depletion of funds was not the reason for the non-renewal decision; UNDP KCO only started looking into the issue of funding after making the decision not to renew her contract;
- c. The reason for the non-renewal was motivated by extraneous factors, namely the improper bias that the RR/RC harboured against the Applicant;
- d. The incident during the mission to Rwanda and the disagreement that ensued thereafter led to a break-down of working relationship between the Applicant and the RR/RC;
- e. The evidence shows that pressure on the "11888 fund" was discovered after the decision to separate the Applicant had been made and that it was

resolved to the benefit of all potentially affected staff with the exception of the Applicant;

f. The evidence does not support the argument that the Applicant's post was only meant to last for one year; if indeed the Applicant's post was for a finite period of one year as claimed, then a temporary rather than a fixed-term appointment would have been the appropriate modality; and

g. The decision making process regarding the Applicant's non-renewal was deficient; the RR/RC has the ultimate authority to exercise discretion with respect to the use of the "11888 fund" hence he had the ultimate authority not to renew the Applicant's contract.

17. The Respondent's principal contentions can be summarised as follows:

a. The decision not to renew the Applicant's appointment was based on legitimate financial grounds, supported by evidence, that the UNDP KCO was facing financial constraints, specifically with respect to the "11888 fund" which was used to fund the Applicant's post;

b. The Applicant was on a FTA that was budgeted for a year from the "11888 fund", as can be seen in the post creation documents; the post was for the purpose of enabling her transition after four years of the LEAD programme;

c. The Applicant has not adduced evidence to indicate that there were sufficient funds to renew her appointment;

d. While the Rwanda mission did not go according to plan, the RR/RC did not harbour ill will towards the Applicant; indeed, the Applicant nevertheless received a good performance appraisal; also, the Applicant's recruitment to the P-4 position was permitted despite an announcement on freeze on recruitment;

e. The Organisation has the prerogative to decide where to focus the limited resources; it maintains the discretion to continue recruitments when facing budgetary constraints; and

f. The decision not to renew the Applicant's contract and the communication of the same were discussed during meetings held between the Country Director ("CD"), the DCD/O and the DCD/P; the RR/RC was not present at the meetings.

Issue

18. The Tribunal has to determine whether the decision not to renew the Applicant's appointment was lawful.

Consideration

19. To determine the lawfulness of a non-renewal decision, the Dispute Tribunal must assess (1) whether the Administration abused its discretion; (2) whether the decision was based on discriminatory or other improper considerations; (3) or whether the Administration made an express promise creating an expectancy for the appointment's renewal (*Ahmed* 2011-UNAT-153).

20. The then applicable Staff Regulations and Rules ST/SGB/2014/1 at regulation 4.5(c) provides that a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service. Staff rule 4.13 provides that:

Fixed-term appointment

(a) A fixed-term appointment may be granted for a period of one year or more, up to five years at a time, to persons recruited for service of a prescribed duration, including persons temporarily seconded by national Governments or institutions for service with the United Nations, having an expiration date specified in the letter of appointment.

(b) A fixed-term appointment may be renewed for any period up to five years at a time.

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

21. It is thus clear that a FTA does not carry any expectancy, legal or otherwise of renewal or conversion to any other type of appointment (*Syed* 2010-UNAT-061).

22. The burden of proving that the grounds for non-renewal were unlawful or that there is improper motivation in the non-renewal decision lies with the staff member contesting the renewal decision (*Hepworth* 2015-UNAT-503).

Whether UNDP KCO abused its discretion in not renewing the Applicant's contract.

23. The memorandum of 22 April 2015 informed the Applicant of the non-renewal of her contract. Upon her inquiry, the Applicant was also informed that the reason for the non-renewal of her contract was lack of funds. The vacancy announcement for the position the Applicant had encumbered indicated that both the duration of the contract and the expected duration of the assignment was one year.

24. The Tribunal has reviewed the preparatory documents and communications from UNDP KCO requesting UNDP New York to create the P-4 post ultimately encumbered by the Applicant. In these documents, it was indicated that the funding for that post was the "11888 fund" and it is confirmed/certified that funds were available to cover the position for one year only.

25. The evidence on record shows and the testimony of the DCD/O confirms that the "11888 fund" which was used to support the position encumbered by the Applicant was in dire straits by 2015. It also reveals that the office had overcommitted the funds and that in fact the financial situation had been deteriorating.

26. In an email of 5 July 2015 from the CD, UNDP KCO, to the DCD/O, the former shared her concerns regarding the over commitment of funds concerning the "11888 fund". In light of that over commitment, the CD was wondering how the Organisation was going to pay for the Applicant's repatriation grant upon her

upcoming separation. The CD concluded the email by stating that “I suspect we are down to the last penny for this fund.”

27. The Applicant does acknowledge that the UNDP KCO was facing financial challenges, however she does not believe that the same should have affected her contract or position. From both the testimonies and the documentary evidence before the Tribunal, it finds that it is established that the dire financial situation at UNDP KCO, as it related to the “11888 fund”, was the reason for the non-renewal of the Applicant’s contract. The Applicant did not produce any evidence which would allow the Tribunal to conclude that at the time of the contested decision, the “11888 fund” still had funds to allow the Organization to renew her contract.

Whether the decision not to renew the Applicant’s contract was based on improper considerations.

28. The Applicant submits that the non-renewal was the result of the RR/RC harbouring ill will towards her, following the incident that occurred during a mission to Rwanda in May 2014. Additionally, she argues that the decision making process leading to her non-renewal was deficient and that since the RR/RC was the person with the ultimate discretion on the use of the “11888 fund”, thus she was the person with authority to determine whether to renew the Applicant’s contract.

29. While it is not contested that an incident occurred during the mission to Rwanda in 2014, the Tribunal does not find that the testimonies and documentary evidence support a conclusion that the RR/RC was biased towards the Applicant. The copies of the correspondence on record indicate that the Applicant arranged her move out of the RR/RC office back to the Programme Unit after the Rwanda mission, and the RR/RC approved it, after warning the Applicant not to make decisions in haste.

30. Two of the Applicant’s witnesses testified that the working relationship between the Applicant and the RR/RC changed after the Rwanda mission. The Tribunal does not find that such a change in the working relationship can, in itself, lead to a finding of improper motives in the case at hand. When the Applicant

stopped to work for the RR/RC, their working relationship was bound to change, because the Applicant had different supervisors and different assignments.

31. The Respondent provided handwritten notes of the meetings that took place among the CD, the DCD/O and the DCD/P in March and early April 2015, during which the communication to the Applicant informing her of her non-renewal was discussed. The Tribunal observes that the RR/RC was not present at these meetings.

32. Additionally, the Tribunal notes from the communications on record that as far back as June 2013, as the expiry of the Applicant's LEAD Programme was approaching, management at UNDP KCO commenced discussions on how to deal with the Applicant's situation. The RR/RC was not part of these communications. In fact, the UNDP KCO intended to reclassify the Applicant's LEAD position in order to keep her in employment. However, the Office of Human Resources, UNDP New York told the UNDP KCO that it could not use the LEAD post and that for the Applicant to be maintained in service, she needed to be competitively recruited.

33. On 1 October 2013, the CD, UNDP, KCO, wrote an email to the Head of Human Resources, UNDP, KCO, copying, *inter alia*, the Applicant. The subject of the email was the job description for the soon to be advertised P-4 position which the Applicant was subsequently recruited against. In that email, the CD clearly states that the post was meant as a transitional post for LEAD candidates or other candidates to apply through a UNDP competitive process. She further added that the Applicant was the possible candidate in mind for the post.

34. The above led to the creation of the P-4 Advisor position. Although that position was open for competitive recruitment, the Tribunal finds that the entire process, as expressed in the evidence, was geared towards ensuring that the Applicant was appointed to the position. The Applicant was also directly involved in the development of the terms of reference for this position for which she was to compete. As is evident from the correspondence, it was a foregone conclusion who the selected candidate was going to be, and with no surprises, the Applicant was indeed selected for the position. It clearly shows a more than positive attitude of the UNDP KCO, towards the Applicant, in fact, it shows a bias clearly in her favour.

35. In light of all the foregoing, the Tribunal concludes that the Applicant did not discharge the burden of proof to establish that the contested decision was based on ulterior motives.

Whether the Organisation made an express promise to create a legitimate expectation of renewal of appointment.

36. In *Munir* 2015-UNAT-522, the Appeals Tribunal held that a legitimate expectation of renewal has to be based on more than just verbal assertions but on a firm commitment to renew based on the circumstances of the case.

37. The Applicant avers that she expected her contract to be renewed, because that is how the system works; she further submits that had the post been only for one year, then instead of making it a fixed-term post, it should have been a temporary appointment.

38. The Tribunal notes that the vacancy announcement clearly indicated that the duration of the position and the assignment was limited to one year. The Respondent filed various copies of different UNDP vacancy announcements which clearly showed the difference between posts that are advertised with possibility of extension and those for a specified duration. Furthermore, all the preparatory documents leading to the creation of the Applicant's post clearly noted that the post was limited to one year.

39. The Tribunal does not find the above in contradiction with the Respondent's assertion that had there been available funds, the Applicant's contract would have been renewed. The Secretary-General has discretion to renew or not to renew contracts based on the needs of the Organisation. Therefore, UNDP KCO could have extended the Applicant's contract, had there been funds and most importantly, if after one year, the functions of the job were still needed, irrespective of the initial specific duration of the position for one year.

40. It is unsettling that the Applicant argues that if indeed the post was for one year, it should have been a temporary rather than a fixed-term appointment. The Applicant was a recipient of all the benefits and entitlements that come with a fixed-term appointment that staff on temporary appointments do not get. For the

Applicant to aver that she ought to have been on a temporary contract because the position was for one year is an argument in futility.

41. In light of the foregoing, the Tribunal concludes that the Applicant did not have any legitimate expectancy of renewal of appointment.

Conclusion

42. In view of the foregoing, the application is rejected in its entirety.

(Signed)

Judge Rowan Downing

Dated this 11th day of January 2018

Entered in the Register on this 11th day of January 2018

(Signed)

René M. Vargas M., Registrar, Geneva