



Before: Judge Eleanor Donaldson-Honeywell

Registry: Geneva

Registrar: René M. Vargas M.

GUETGEMANN

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Jérôme Blanchard, UNOG

Miriana Belhadj, UNOG

Introduction

1. The Applicant was a Programme Assistant at the United Nations Conference to Combat Desertification (“UNCCD”) in Bonn.

2. On 8 June 2019, she filed an application to challenge the Respondent’s decision of 26 December 2018 to not renew her fixed-term appointment (“FTA”). This decision was expected to have resulted in her separation from service.

3. The Applicant also seeks to challenge management practices dating back to a time before 18 December 2017, when she was transferred to a position that was shortly thereafter abolished. She contends that the 2017 decision led up to the 2018 decision.

4. The Respondent filed his reply on 8 August 2019 and an additional submission on 23 March 2020.

5. It is the Respondent’s case that the Applicant’s challenge of the 2017 decision is time-barred, and his decision to not renew the Applicant’s appointment is lawful. The Respondent also takes the position that the application became moot after it was filed because the specific decision that was the subject of the application was revised/vacated, and her contract was extended until such time that she exhausted her sick leave entitlements. She was then separated from service for health reasons. The non-renewal decision that was the subject of her application was therefore never implemented.

6. For the reasons further explained in this Judgment, the Tribunal’s determination is that the application in relation to the 2017 decision is not receivable and the application against the non-renewal decision is moot. Accordingly, the application is to be dismissed in its entirety.

Procedural history

7. The Applicant filed an *ex parte* motion with additional submissions and documents attached on 4 January 2021. The additional submissions and documents were admitted and considered by the Tribunal.

8. At a case management discussion held on 15 February 2021, the Tribunal drew the attention of Counsel for the Respondent to a sensitive issue which was raised by the Applicant in her submissions. Parties were encouraged to engage in settlement discussions because the issues raised made this case particularly suitable for alternative dispute resolution. To that end, efforts were made to allow the Applicant time to secure representation to assist her with the discussions. The Applicant was represented by the Office of Staff Legal Assistance (“OSLA”) for the duration of the settlement discussions.

9. Parties on both sides are commended for having made efforts, in good faith to resolve the matter. However, the efforts were not successful.

Facts and submissions

10. The Applicant joined the UNCCD Secretariat on 15 July 2011, as an Administrative Assistant with the Policy, Advocacy, and Global Issues Unit (“PAGI”) on a temporary appointment until 8 November 2011.

11. On 9 November 2011, she was recruited on a FTA in the same unit. Her FTA expired on 2 February 2014.

12. On 3 February 2014, the Applicant was reassigned to the External Relations, Policy and Advocacy (“ERPA”) Unit headed by Ms. B. who was her First Reporting Officer (“FRO”). The Applicant’s appointment, which ran until 8 December 2014, was subsequently extended until 31 December 2017.

13. Although the Applicant was appraised as fully meeting performance expectations, she faced stressful, work-related challenges with her supervisor that impacted adversely on her health.

14. The Applicant chose to deal with these issues informally and opted not to engage with the formal complaints mechanism available to her.

15. The Chief of Administrative Services (“CAS”), UNCCD, recommended to the Applicant that she discuss the matter with the Office of the Ombudsman in October 2017. She did so. Further, after speaking with the Deputy Executive Secretary, the CAS encouraged her to inquire about a vacant position he had in his team. However, this position was never filled.

16. On 12 December 2017, the CAS sent an email to the Applicant enclosing a draft job description for a G-5 part-time position, fixed-term at 50 per cent that would run initially for 12 months, with the tasks of assisting the unit in organizing workshops and processing actions in Umoja. It was indicated that the position might be considered for further extension at the end of the year.

17. According to the Applicant, the new position was painted in very agreeable colours. She says she was reassured by the CAS that there would always be enough work in the Unit to employ her at least part time. The Applicant accepted the offer by signing the job description and letter of appointment dated 18 December 2017. The start date was 1 January 2018.

18. After consideration of the limited workload for organizing workshops and procurement actions, the CAS informed the Applicant on 26 November 2018 that her fixed-term appointment would not be extended beyond its expiry date on 31 December 2018. The value of the Applicant’s experience was acknowledged, and she was encouraged to apply for any future General Services positions that may be advertised on the UNCCD website.

19. Rather than terminating her appointment, the Respondent extended the Applicant’s contract so that her sick leave could be exhausted in accordance with section 4.9 of the ST/AI/2013/1 on the Administration of fixed-term appointments.

20. The Applicant was on sick leave when the Respondent’s reply to her application was filed. Thereafter, on 13 March 2020, she was separated for health reasons.

21. The Applicant's primary submission is that the decision not to renew her fixed-term appointment was unlawful. She alleges that the stated reason for the non-renewal, i.e., insufficient work, is not accurate, and that the decision was motivated by extraneous factors. In particular, she alleges that her contract was not extended because of her complaints against her previous supervisor, Ms. B.

22. Further, the Applicant claims that in 2017 she had been transferred to a position that was planned to be abolished, while she received assurances that her FTA would be renewed. She contends that she could only have complained of this prior decision when she realised, in 2018, that her contract was not being renewed. As such, her submission is that her request for management evaluation is not time-barred.

23. The Respondent's case is that the contest to the 2017 decision is not receivable and that there is no merit to the contest to the 2018 non-renewal decision, which is also moot.

Consideration

Receivability

24. Under Staff rule 11.2,

(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.

25. As it was not until January 2019 that the Applicant requested management evaluation of the 2017 decision to transfer her to a new position, the requirements for receivability of this aspect of her application were not met. Her request for management evaluation was too late.

26. There is logic to the Applicant's explanation, that it was not until the time of the subsequent non-renewal decision that she realised the extent to which the prior transfer had left her vulnerable to termination. However, that of itself does not justify that the strict provisions as to timelines are not enforced (*Christensen* 2012-UNAT-218; *Osman* 2011-UNAT-147).

27. The UNDT has no jurisdiction to waive deadlines for management evaluation or administrative review (*Muratore* 2012-UNAT-191). Therefore, the aspect of the application that challenges the 2017 decision fails as not-receivable.

Mootness

28. As aforementioned, the Respondent's case against the aspect of the application that contests the non-renewal decision is based on the merits. The Respondent contends that his decision was lawful. According to the Respondent, the Applicant's reliance on an alleged verbal indication, which was not reduced to writing, cannot serve to invalidate the express terms of her one-year FTA.

29. There is sound basis for this submission by the Respondent, as it is consistent with the provisions of staff regulation 4.5(c) and staff rule 4.13 (c) which provide that a fixed-term appointment does not carry any expectancy of renewal. Further, UNAT jurisprudence makes it clear that expectancy of renewal requires an express promise in writing to be enforceable. Reliance on a mere verbal assertion will not suffice (*Igbinedion* 2014-UNAT-411; *Munir* 2015-UNAT-522.). Proof of a firm commitment is required.

30. Notwithstanding the strength of the Respondent's case as to the lawfulness of the non-renewal decision, the further point as to mootness is sufficient to justify dismissal of the application. This concept is well explained in *Kallon* 2017--UNAT--742:

44. A judicial decision will be moot if any remedy issued would have no concrete effect because it would be purely academic or events subsequent to joining issue have deprived the proposed resolution of the dispute of practical significance; thus placing the matter beyond the law, there no longer being an actual controversy between the parties or the possibility of any ruling having an actual, real effect. [...]

45. Since a finding of mootness results in the drastic action of dismissal of the case, the doctrine should be applied with caution. The defendant or respondent may seek to “moot out” a case against him, as in this case, by temporarily or expediently discontinuing or formalistically reversing the practice or conduct alleged to be illegal. And a court should be astute to reject a claim of mootness in order to ensure effective judicial review, where it is warranted, particularly if the challenged conduct has continuing collateral consequences. [...]

31. The Applicant’s separation from service on 31 December 2018 never materialised. Contract extensions remained the *status quo* until the challenge to the Respondent’s non-renewal decision became moot on 13 March 2020, when the Applicant was separated for health reasons.

32. Since the Applicant never sustained the expected separation in December 2018, there is no evidence of any injury due to the non-renewal decision. Her contract was extended up to the time that she filed her application. When the non-renewal decision was overtaken by a separation for health reasons, there was no non-renewal related injury being suffered or continuing thereafter that would represent “collateral consequences”, which preclude a finding of mootness.

33. The Applicant clearly suffered a distressful experience as a staff member of the Organization. It impacted on her health. However, these difficulties arose over a period of time pre-dating the non-renewal decision.

34. The Applicant’s performance at work was rated highly, despite the struggles with her supervisor. She expresses great commitment to the Organization, admiration for its principled global outreach and fond memories of times shared with her colleagues; and she yearns to be reinstated.

35. The circumstances of the Applicant's separation, albeit ultimately through no fault of the Organization, do not adequately reflect the goodwill she felt. There may have been scope for an *ex gratia* award to be considered during alternate dispute resolution discussions. It is unfortunate that those talks failed.

36. As the Applicant separated from the Organization on grounds of ill-health and is in receipt of disability benefits as a result, the Tribunal cannot, in law, order further compensation be paid.

37. The Tribunal takes this opportunity to observe that the toxic work environment that the Applicant complains of, which the Respondent was clearly aware of, is something that the Respondent has the duty to address and remedy in good faith, and at the earliest possible opportunity. The Tribunal regrets that there is little in the record to show that this duty was taken seriously. A conducive and harmonious work environment would serve the interest of the Respondent as much as it would that of the staff member.

Conclusion

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

The application is dismissed.

(Signed)

Judge Eleanor Donaldson-Honeywell

Dated this 15th day of April 2021

Entered in the Register on this 15th day of April 2021

(Signed)

René M. Vargas M., Registrar, Geneva