



Before: Judge Thomas Laker

Registry: Geneva

Registrar: René M. Vargas M.

DE AGUIRRE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON MOTION FOR INTERIM
MEASURES AND ON
CONFIDENTIALITY**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Karen M. Farkas, UNHCR

Introduction

1. By application filed on 22 May 2014, the Applicant, an Associate Legal Officer (National Officer B level, “NOB”) in the Regional Representation for Western Europe of the Office of the United Nations High Commissioner for Refugees (“UNHCR”), based in Brussels, contests the decision to discontinue the position she is encumbering (position No. 10011149) as of 1 June 2014, and the consequent termination of her indefinite appointment, effective 31 May 2014. At the same time, she seeks an interim measure, pending proceedings, to suspend the implementation of the discontinuation of her position and the termination of her appointment.

Facts

2. As stated in her application, the Applicant entered the service of UNHCR, Regional Representation for Western Europe in Brussels, on 1 February 2002 under a fixed-term appointment as a Senior Protection Assistant, G-7 level. Since 24 February 2002, she is the holder of an indefinite appointment.

3. By memorandum dated 15 March 2005, the then UNHCR Regional Representative in Brussels informed the Applicant that her post was proposed for reclassification from its grade of G-7 to the National Officer B level, as she felt that “the functions and responsibilities of post 426008 correspond[ed] more to a position at the National Officer level”. The Applicant was appointed to the position No. 10011149 (Post No. 426032) of NOB, Associate Legal Officer, in March 2007.

4. By memorandum of 23 September 2013 addressed to the UNHCR Director, Regional Bureau for Europe, the Regional Representative for Western Europe proposed changes in the structure of the Representation for the planning of 2014, which included a recommendation to downgrade the post encumbered by the Applicant.

5. By letter dated 18 November 2013, which she received on 20 November 2013, the Applicant was informed that the position she was

encumbering would be discontinued as of 1 June 2014, “in line with a regional review of existing capacities” and “in accordance with relevant stipulations of IOM/051/2007-FOM/054/2007”.

6. By email and memorandum of 14 January 2014, the Applicant requested management evaluation of the decision communicated to her by letter of 18 November 2013.

7. By email of 28 February 2014, she was informed by the Office of the Deputy High Commissioner, UNHCR, that her request for management evaluation was under consideration.

8. By letter dated 14 April 2014 from the Director, Division of Human Resources Management (“DHRM”), UNHCR, the Applicant was informed that her indefinite appointment would be terminated effective 31 May 2014, as it had been determined by the Regional Assignments Committee (“RAC”) that there were “no suitable positions against which a comparative review could take place”.

9. By memorandum of 22 April 2014 from the UNHCR Regional Representative in Brussels, the Applicant was informed of her separation indemnities and modalities.

10. By email of 30 April 2014 sent to the Deputy High Commissioner, UNHCR, the Applicant referred to her request for management evaluation of 14 January 2014 and attached a “follow-up Memorandum”, entitled “Request for Management Evaluation of the Regional Representation for Western Europe – continued”, in which she asked that the letter dated 14 April 2014 be withdrawn “in the absence of a (satisfactory) response to [her] request for management evaluation”.

11. On 7 May 2014, the Applicant filed before the Tribunal an application for suspension of action of the decision to discontinue her position and of the consecutive termination of her indefinite appointment. The request was registered under Case No. UNDT/GVA/2014/020; by Order No. 67 (GVA/2014) of 14 May 2014, the Tribunal concluded that the request had become moot, since the contested decisions had been suspended by UNHCR pending the Applicant's request for management evaluation. In said Order, the Tribunal also decided to reject the Applicant's request for confidentiality.

12. By memorandum dated 20 May 2014 and sent on 21 May 2014, the Deputy High Commissioner, UNHCR, replied to the Applicant's request for management evaluation, upholding the contested decisions.

13. On 22 May 2014, the Applicant filed with the Tribunal the application referred to in para. 1 above. At the same time, she *inter alia* requested an interim measure, pending proceedings, to suspend the implementation of the discontinuation of her position as well as of the termination of her appointment and reiterated her request for confidentiality.

14. On 23 May 2014, the application was served on the Respondent who, as requested by the Tribunal filed, his response to the Applicant's motion for interim measures by noon on 26 May 2014.

Parties' contentions

15. The Applicant makes substantive contentions regarding the three criteria for an interim measure pending proceedings, as follows:

- a. With respect to *prima facie* illegality, the classification of posts and staff within the Regional Representation for Western Europe based in Brussels has not been conducted according to the nature of the duties and responsibilities required for the tasks performed; the highest standards of ethical and professional conduct were not upheld; the determination by RAC that there were no suitable positions against which a comparative review could take place in accordance with para. 5 of IOM/066/2012-

FOM/067/2012 (Comparative Review Policy for Locally Recruited Staff Members) did not take into account the fact that another staff member of the Legal Unit of the Regional Representation for Western Europe, who was hired on a temporary assignment at the G-6 level as of November 2013, has been taking over her duties since then; the composition of the RAC is also questionable;

b. With respect to urgency, she emphasizes that her indefinite appointment would terminate on 31 May 2014;

c. As regards irreparable damage, she argues that the contested decision to discontinue the position she is encumbering and the consecutive termination of her indefinite appointment would “negatively influence her career and employment conditions”, and she may never regain the job security she had as the holder of an indefinite appointment;

d. Finally, she reiterates her request for confidentiality, namely that her name not be made public in case of publication of a decision made by the Tribunal, in order to mitigate the “impact of having taken the risk to speak up”.

16. The Respondent’s primary contentions may be summarized as follows:

a. The request for interim measure filed by the Applicant falls under the exclusionary provision of art. 10.2 of the Tribunal’s Statute, and is hence not receivable, as the contested decision falls under the category of “termination”;

b. Should the Tribunal allow the motion for interim measure insofar as it relates to the decision to discontinue the position encumbered by the Applicant, this “must not result in a circumvention of the clear instruction of the General Assembly, when adopting the UNDT Statute, that interim measures cannot apply in cases of termination”, which, in this case, followed from the abolition of the Applicant’s post and subsequent review process by the RAC;

c. Should the Tribunal nevertheless consider the request on its merits, it is submitted that the contested decision is not *prima facie* unlawful; based on rulings by the Appeals Tribunal, it is well settled jurisprudence that an International Organization has necessarily the power to conduct restructuration, including the abolition of posts, the creation of new posts and the redeployment of staff. In the present case, the abolition of the post encumbered by the Applicant was part of a restructuring exercise by the Regional Representative “with the emphasis on strengthening and harmonizing more efficient national and regional protection capacities”; in particular, two NOB positions—including the one encumbered by the Applicant—were discontinued, whereas two were created, namely one at the GL-6 level (Protection Associate) and one at the P-3 level (Regional Protection Officer); the job description of the new P-3 position “reflects the broader and regional focus of the tasks, while absorbing the specific legal and regional responsibilities formerly held by the NOB positions”; the standard job description of the new GL-6 position “also illustrates the nature of this position which absorbs some of the national functions of the previous NOB position”;

d. Notwithstanding her separation, the Applicant will be eligible to apply for the new P-3 position as an internal candidate, in accordance with the UNHCR Policy on Procedures on Assignments and Promotions;

e. With regard to the decision to discontinue the post encumbered by the Applicant, it “does not automatically result in irreparable harm to [her]”; the Applicant “has failed to meet the condition of *prima facie* unlawfulness with regard to the termination decision and the conditions of *prima facie* unlawfulness and irreparable harm with regard to the discontinuation decision”; the application for interim measures must therefore fail.

Consideration

Request for suspension of the implementation of the contested decisions as an interim measure

17. Article 10.2 of the Tribunal's Statute sets out the scope of the Tribunal's prerogatives to order interim measures following the filing of an application before it, as follows:

At any time during the proceedings, the Dispute Tribunal may order an interim measure, which is without appeal, to provide temporary relief to either party, where the contested administrative decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

18. Similarly, art. 14 of the Tribunal's Rules of Procedure, under the title "Suspension of action during the proceedings", provides in its para. 1:

At any time during the proceedings, the Dispute Tribunal may order interim measures to provide temporary relief where the contested administrative decision appears *prima facie* to be unlawful, in cases of particular urgency and where its implementation would cause irreparable damage. This temporary relief may include an order to suspend the implementation of the contested administrative decision, except in cases of appointment, promotion or termination.

19. It follows from these provisions that a request for an interim measure may only be entertained if the contested decision has not yet been implemented and if the three statutory conditions of *prima facie* unlawfulness, urgency and irreparable damage are met. The interim measure may consist of a suspension of the implementation of the contested administrative decision; however, the Tribunal cannot grant such temporary relief in cases of "appointment, promotion or termination".

20. The Tribunal observes that the second decision contested by the Applicant, namely the termination of her indefinite appointment, *per se* falls into the category of “termination” for which a suspension may not be granted as a temporary relief. Indeed, staff rule 9.6 (a) defines “termination” as a “separation from service”. Pursuant to staff rule 9.6 (c) (i), abolition of posts constitutes a reason for the termination of a continuing appointment, and is applicable to holders of indefinite appointments as foreseen by staff rule 13.2 (a), Chapter XIII (Transitional measures), ST/SGB/2013/3 (Staff Rules and Staff Regulations of the United Nations). Therefore, the Tribunal has no authority to order a suspension of the implementation of the decision to terminate the Applicant’s indefinite appointment because of the clear limitation of art. 10.2 of its Statute and art. 14.1 of its Rules of Procedure.

21. However, the above restrictions do not apply to the decision to discontinue position No. 10011149 of Associate Legal Officer, encumbered by the Applicant. The abolition of a post is not a case of “appointment, promotion or termination” and it does not necessarily lead to the termination of the appointment of the staff member encumbering the post which is being abolished. On the contrary, in case of abolition of a post, the Administration has to make efforts to find suitable posts for the staff member who is or was encumbering the abolished post (see staff rule 9.6 (e)).

22. Since there is no reason to extend the above-referenced restrictions to the abolition of the Applicant’s post, the Tribunal has to determine whether all three conditions of *prima facie* unlawfulness, urgency and irreparable damage, are met.

23. With respect to irreparable damage, the Tribunal has no doubt that such damage may be caused by the termination of the Applicant’s contract. Nevertheless, the implementation of the abolition of the post at stake does not in itself cause direct irreparable damage to the Applicant. Indeed, in *Fradin de Bellabre*, UNDT/2009/004, the Tribunal held that “harm is irreparable if it can be shown that suspension of action is the only way to ensure that the Applicant’s rights are observed”. In the case at hand, a suspension of the implementation of the abolition is not an adequate tool to observe the Applicant’s rights: even if the

abolition decision were suspended, the Applicant may invariably be confronted with the implementation of the termination of her appointment which the Tribunal cannot suspend in the framework of the present proceedings. It follows that irreparable harm, which may arise from the termination of an appointment, may not automatically be linked with the abolition.

24. In view of the above, and because the requirements of *prima facie* unlawfulness, urgency and irreparable damage are cumulative, there is no need for the Tribunal to further address the issue of *prima facie* illegality or urgency since it already found that one of the three conditions was not met.

Request for confidentiality

25. As regards the Applicant's reiterated request that her name not be made public in case of publication of a decision, the Tribunal observes that she fails to provide any new element or reason that would lead it to change its view on this issue. Again, the Applicant does not demonstrate that her case is of such a nature as to overcome the guiding principle of transparency in judicial proceedings and public rulings before this Tribunal.

Conclusion

26. In view of the foregoing, it is ORDERED that:

- a. The Applicant's motion for interim measures pending proceedings be rejected;
- b. The Applicant's request for confidentiality be rejected.

(Signed)

Judge Thomas Laker

Dated this 28th day of May 2014

Entered in the Register on this 28th day of May 2014

(Signed)

René M. Vargas M., Registrar, Geneva