



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

CRUZ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER

**ON SUSPENSION OF ACTION
PENDING MANAGEMENT
EVALUATION**

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Angela Arroyo, UNDP
Teresa Posse, UNDP

Introduction

1. On 8 February 2019, the Applicant, a Programme Analyst with a fixed-term appointment with the United Nations Development Programme (“UNDP”) in Venezuela, filed an application under art. 2.2 of the Dispute Tribunal’s Statute and art. 13 of its Rules of Procedure seeking to suspend the “non-renewal of the contract in the context of abolition of the post [by 6 March 2019] and the decision not to pay the termination indemnity”. With the application, the Applicant only appended his request for management evaluation and no documentation for the contested decisions.

2. On the same date (8 February 2019), at 11:05 a.m., the Registry acknowledged receipt of the application for suspension of action and served it on the Respondent, directing him, upon the instructions of the undersigned Judge, to file a reply by 2:00 p.m. on 12 February 2019. Upon the undersigned Judge’s further instructions, the Applicant was directed to file a copy of the contested decision and/or other documentation in support of the application for suspension of action by 4:00 p.m. the same date (8 February 2019). The Applicant did so, but all documents were in Spanish although unofficial translations were provided of some of the documents. Upon the instructions of the undersigned Judge, the Registry therefore requested the United Nations’ translation service to translate all the documents. These translations were made available on 13 February 2019 and, upon the instructions of the undersigned Judge, uploaded by the Registry into the case file on the eFiling portal on 14 February 2019.

3. On 12 February 2019, the Respondent duly filed his reply in which he claims that part of the application is not receivable and, in any event, without merit.

Background

4. Without the Tribunal making any factual determinations and only for the sake of providing context for the current application, the Applicant's presentation of the factual chronology is as follows:

... On 5 December 2018, a meeting was held during which I was informed that in the context of a change strategy of UNDP Venezuela my post as Operations Coordinator will be abolished.

... On 10 December 2018, I was informed that no termination indemnity will be paid, contrary to earlier oral assurances of [Mr. LM, name redacted], [the Bureau for Latin America and the Caribbean] Deputy Regional Director of UNDP in NY.

... On 12 December 2018, I received a written notification from [Ms. RG, name redacted] that in the context of the office change strategy, my post will be abolished and as a consequence, my appointment will only be renewed for three months until next 6 March 2019.

... No informal resolution with the mediation of the Ombudsman Office – better: On 31 January 2019 I initiated mediation with [Mr. JL, name redacted] v. RBLAC Office in NY, however, no solution was found.

... On 5 February 2019, I submitted to the attention of [Ms. SM, name redacted] a Request of Management Review of Evaluation.

... On 7 February 2019 I received acknowledgment from [Ms. SM's] office where I should expect a reply to your request by Friday, 22 March 2019, from UNDP Administration in New York office.

Consideration

Legal framework

5. Article 2.2 of the Statute of the Dispute Tribunal (as also reflected in art. 13.1 of its Rules of Procedure) provides:

... The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the management evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation, where the

decision appears *prima facie* to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage. The decision of the Dispute Tribunal on such an application shall not be subject to appeal.

6. For the Tribunal to grant an application of suspension of action during management evaluation, all three cumulative substantive criteria—*prima facie* unlawfulness, particular urgency, and irreparable damage—must therefore be fulfilled.

Scope of the case and receivability

7. From the outset, the Tribunal notes that, in his present application, the Applicant only appeals (a) the decision not to renew his contract beyond 6 March 2019 and (b) the correlated decision not to grant him a termination indemnity. The Applicant does not challenge the underlying decision of abolition of post, including the rationale and reason(s) provided therefor.

8. In this regard, in support of his application for suspension of action pending management evaluation, the Applicant submits that the contested administrative decisions are unlawful because they amount to “a disguised abolition of the post depriving [the Applicant of his] rights under [s]taff [r]ule 9.6(e) (that is right to be considered for alternative suitable post with preference over temporary appointees) and [s]taff [r]ule 9.8 (termination indemnity)”.

9. As a matter of receivability, the Respondent takes issue with the Applicant’s contention that “the non-renewal of his fixed-term appointment without payment of termination indemnity ... is unlawful because it is a ‘disguised abolition of post’ and, as a result, he has been deprived of the right to be considered for alternative posts and to be paid termination indemnity”, arguing this submission has not been raised in his management evaluation request.

10. The Tribunal notes that the Applicant’s description of the contested decisions as “a disguised abolition of the post” is misguided as the situation is rather the

reverse—the contested decisions are individual administrative decisions that originate from the abolition of his post and the abolition therefore cannot be “disguised” by them. Also, as stated above, the Applicant has not challenged the abolition decision as part of the present case and the Tribunal is therefore not in a position to review it.

11. Regarding the separate issue of the Applicant’s right to be considered for alternative suitable post under staff rule 9.6(e), the Tribunal agrees with the Respondent that the Applicant has not challenged this question in his request for management evaluation. As a matter of receivability under art. 2.2 of the Statute of the Dispute Tribunal and art. 13.1 of its Rules of Procedure, the Tribunal therefore cannot entertain a review of the question in the realm of the present case because no decision regarding any such matter is currently pending management evaluation.

Prima facie unlawfulness

12. The Merriam-Webster online dictionary (www.merriam-webster.com) defines the term “*prima facie*” as “at first view: on the first appearance”, which is also the definition commonly used by the Dispute Tribunal in suspension of action cases pursuant to art. 2.2 of the Statute of the Dispute Tribunal and art. 13.1 of its Rules of Procedure.

The non-renewal of the Applicant’s fixed-term appointment

13. Appended to his application, the Applicant filed a letter dated 12 December 2018 by which he was informed of the non-renewal of his fixed-term appointment (official translation from Spanish):

... As discussed on 5 December 2018 with [Mr. LM], Deputy Director of the Regional Bureau for Latin America and the Caribbean (RBLAC), I would like to confirm that the post of Programme Analyst (#_00100136) that you currently hold will be abolished on the basis of the recommendation set out in the strategy for change of the United Nations Development Programme (UNDP) in Venezuela.

... Your fixed-term appointment, which currently expires on 31 December 2018, will be extended until 6 March 2019, when your

assignment with the country office in Venezuela will end. Please note that this extension has been granted specifically to allow for a proper professional and personal transition.

... As you are aware, in accordance with the Staff Regulations and Rules, a fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service.

... Although your contract expires automatically and without prior notice on the expiration date specified in your letter of appointment, our usual practice is to notify staff members of the non-renewal of their contracts at least one month before the expiration date. I trust that this notice will allow you to plan accordingly for a proper transition.

14. In a communication dated 19 December 2019 from the Applicant to the acting UNDP Resident Representative in Venezuela, the Applicant, *inter alia*, requests that (a) the decision not to renew her fixed-term appointment be reconsidered and that her contract be extended to at least 31 June 2019 and (b) that UNDP would consider her for a “separation package”.

15. In a communication dated 16 January 2019, the acting UNDP Resident Representative in Venezuela responded to the Applicant as follows:

I write to you in reference to your letter of 18 December 2018, in which you request a reconsideration of the decision you received on the non-renewal of your contract.

In this regard, we take note of the arguments you raised. However, I wish to inform you that the decisions are based on the rules in effect at the time they are taken and that they apply to all staff, regardless of the specific circumstances of the countries in which they are to be implemented.

As you were informed, despite the fact that your contract expired on 31 December 2018, it has been extended until 6 March 2019 to give you more time to make a personal and professional transition. We do, nevertheless, understand the difficult situation you are experiencing.

16. The Tribunal observes that for fixed-term appointments, staff rule 4.13(a), in general, provides that, “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)". However, as noted by the Appeals Tribunal in *Obdeijn* 2012-UNAT-201, "where the applicable Staff Regulations and Rules provide that [a fixed-term appointment] does not carry an expectancy of renewal and is *ipso facto* extinguished on expiry, a non-renewal is a distinct administrative decision that is subject to review and appeal" (see para. 31).

17. In a situation where a post is abolished, it is settled jurisprudence of the Appeals Tribunal that (see *Hassanin* 2017-UNAT-759, para. 45):

... The Administration has broad discretion to reorganize its operations and departments to meet changing needs and economic realities. [Footnote omitted] According to the Appeals Tribunal's well-settled jurisprudence, "an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts ... [Footnote omitted] This Tribunal will not interfere with a genuine organizational restructuring even though it may have resulted in the loss of employment of staff. [Footnote omitted] Even in a restructuring exercise, like any other administrative decision, the Administration has the duty to act fairly, justly and transparently in dealing with its staff members.

18. Consequently, as part of the restructuring exercise of UNDP Venezuela ("the Strategy for Change"), UNDP may decide to abolish the Applicant's post and, based thereon, not renew his fixed-term appointment insofar as it is done in a fair, just and transparent manner.

19. From the Applicant's own account of the facts as well as the case record, it follows that the Applicant was informed orally on 5 December 2019 and by written letter dated 12 December 2018 that his post was to be abolished and that his fixed-term contract would therefore not be extended beyond 6 March 2019. According to the letter dated 12 December 2018, it is standard practice for UNDP Venezuela to notify staff members of the non-renewal of their contracts at least one month before the expiry date, and as for the Applicant, he was therefore provided, at least, almost four months' notice.

20. Accordingly, it would appear to the Tribunal that UNDP Venezuela treated the Applicant fairly, justly and transparently and that the non-renewal was therefore lawful.

Termination indemnity

21. Staff rule 9.1 on definition of separation describes “[e]xpiration of appointment” and “termination of appointment” as two distinct and mutually exclusive reasons for separating a staff member. This is only logical—if an appointment is terminated, this means that the Administration unilaterally breaks (or terminates) the contract during its term and then separates the staff member from the Organization; this is an entirely different situation from when it is decided to let the contract run out (or expire) and then the staff member is separated.

22. It follows from Annex III to the Staff Rules on termination indemnity that, “Staff members whose appointments are terminated shall be paid an indemnity in accordance with the following provisions”. In this regard staff rule 9.6(b) states that, “Separation as a result of ... expiration of appointment ... shall not be regarded as a termination within the meaning of the Staff Rules”.

23. Accordingly, a termination indemnity is a remuneration that is only to be paid to a staff member whose appointment is terminated—if an appointment expires and thereafter is not renewed, as a matter of definition, it is therefore not terminated, and the staff member has no right to a termination indemnity.

24. Therefore, it appears to the Tribunal that the Applicant has no right to a termination indemnity.

Conclusion

25. As the Tribunal finds that none of the contested administrative decisions are *prima facie* unlawful in accordance with art. 2.2 of the Statute of the Dispute Tribunal

and art. 13.1 of its Rules of Procedure, the application for suspension of action cannot be granted.

26. In light of the above, the Tribunal rejects the application for suspension of action.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 14th day of February 2019