



UNRWA DISPUTE TRIBUNAL

Case No.: DT/WBFO/2006/01
Judgment No.: UNRWA DT/2011/006
Date: 3 October 2011
Original: English

Before: Judge Bana Barazi

Registry: Amman

Registrar: Laurie McNabb

RANTSIOU

v.

COMMISSIONER GENERAL
OF THE UNITED NATIONS RELIEF AND
WORKS AGENCY FOR PALESTINE REFUGEES

JUDGMENT

Counsel for Applicant:
Self-represented

Counsel for Respondent:
W. Thomas Markushewski

Introduction

1. This is an application by Fotini Rantsiou (the “Applicant”) against the decision of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, also known as UNRWA (the “Respondent”), not to extend her fixed-term appointment.

2. Pursuant to General Assembly Resolution 63/253 of 24 December 2008, the Joint Appeals Board was abolished as of 1 July 2009. Effective 1 June 2010, as set out in International Staff Regulation 11.1, the Agency established the UNRWA Dispute Tribunal (the “Tribunal”) and all appeals pending with the Joint Appeals Board on the date of its abolition, including this application, were transferred to the Tribunal.

3. As a transitional measure, Article 2, paragraph 5 of the Statute of the Tribunal provides that the Tribunal shall be competent to hear and pass judgment on cases filed prior to the establishment of the Tribunal and in respect of which no report of the Joint Appeals Board (JAB) has been submitted to the Commissioner-General.

Facts

4. On 28 November 2002, the Applicant entered the employ of UNRWA as Operations Support Officer (“OSO”) in West Bank Field Office (“WBFO”) for a period of six months at the P-3 level. Her appointment was extended four times up until 31 August 2005. However, in late 2004, the working relationship between the Applicant and the Deputy Operations Officer (“D/OPSO”) deteriorated.

5. On 18 December 2004, the Applicant commenced sick leave. In late January 2005, the newly appointed Operations Officer (“OPSO”) met with the Applicant and discussed her objections concerning the management of the programme.

6. On 31 January 2005, the Applicant returned to work from sick leave. The working relationship between the Applicant and other staff members in the WBFO program did not improve.

7. In February 2005, the Applicant submitted her resignation and it was accepted. Shortly thereafter, the Applicant expressed her wish to withdraw it and instead requested to take four months' special leave without pay ("SLWOP"). On 8 March 2005, the Applicant's request was approved. On 21 March 2005, the Applicant commenced SLWOP.

8. On 1 August 2005, the Applicant returned from SLWOP. In the week following her return, the OPSO developed serious concerns over the Applicant's attitude and actions. By email dated 10 August 2005, he informed the Applicant that she was being withdrawn from field work with effect 11 August 2005 and that they would discuss her "situation".

9. On 12 August 2005, at a meeting between the OPSO, the Field Legal Officer/West Bank and the Applicant, the OPSO informed the Applicant that the reasons for withdrawing her from the field were that the OPSO had "lost confidence in (the Applicant's) ability to operate effectively and safely in the field, and the level of trust between (the Applicant) and the OPSO / DOPSO is not at an acceptable level to enable safe and secure field operations ...". The OPSO went on to inform the Applicant that he would not be recommending the extension of her contract beyond 31 August 2005 because he was not satisfied that her continued employment with the program was in the best interest of the program.

10. From 13 to 28 August 2005, the Applicant was absent from work on sick leave. On 16 August 2005, the DUO/WB met with the Applicant at which time he informed her that he would not recommend renewal of her appointment. By email dated 17 August 2005, the Applicant informed the Head, International Personnel Service ("HIPS") that

she did not wish to have her contract extended beyond 31 August 2005. On 18 August 2005, the Applicant was provided with information on her separation from the Agency.

11. By memorandum dated 19 August 2005, the Applicant submitted a rebuttal of her Performance Evaluation Report (“PER”). On 25 August 2005, she sent her completed separation forms to HIPS.

12. By memorandum dated 30 August 2005 to the Director of Administration and Human Resources (“DAHR”) and the Secretary of the Human Resources Committee, (“HRC”) the Applicant requested documentation in order to launch an appeal proposing (i) a contract extension and transfer to another section; (ii) contract extension for the period of the PER rebuttal and, possibly an appeal regarding the administrative process of renewal, under Special Leave with Pay (SLWP) and finally; (iii) compensation for the professional and personal damages suffered due to unfair treatment.

13. By letter dated 1 September 2005, the Director of UNRWA Operations in Gaza (“DUO/G”) offered the Applicant a two-month only extension of her contract at an OSO post in Gaza Field, during which period the Agency intended that the rebuttal process for her PER would be completed. The Applicant accepted the offer later that day.

14. On 2 September 2005, the Gaza Strip was declared Security Phase IV, and all Gaza-based OSOs were evacuated. Consequently, the Applicant did not take up duty in Gaza Field. By letter dated 11 September 2005, the DAHR informed the Applicant that “with the unexpected declaration of Phase IV for the whole Gaza Strip, your security clearance has not been granted and Gaza OSOs have been relocated from Gaza” and as a result, the Agency would grant the Applicant SLWP during the period of her extension until 3 November 2005.

15. By memorandum to the DAHR and the Commissioner-General dated 16 October 2005, the Applicant requested (i) to be informed of the outcome of the rebuttal of her PER; (ii) if the rebuttal was successful, the extension of her contract until 31 August 2006

in the West Bank or Gaza; (iii) that the OPSO and D/OPSO be sanctioned for their professional misconduct and discriminatory behaviour; and (iv) that she be given copies of her files and all relevant documents.

16. By letter dated 19 October 2005, the Applicant was informed that the Commissioner-General had found there was sufficient basis to accept her rebuttal of her PER for the period 1 April 2004 - 31 May 2005. On the same date, she received from the DAHR information about her separation entitlements.

17. The Applicant was separated from the Agency upon the expiry of her fixed-term appointment on 3 November 2005. By letter dated 12 November 2005, the Applicant requested administrative review of the decision not to extend her appointment beyond 3 November 2005.

18. By letter dated 21 February 2006, the Commissioner-General confirmed to the Applicant that the decision to allow her fixed-term appointment to lapse upon the completion of the expiry of its term was maintained.

19. By letter dated 21 March 2006, the Applicant submitted her application.

Applicant's contentions

20. The Applicant essentially contends (i) that she had a legitimate expectation her appointment would be renewed; (ii) that the non-renewal of her appointment was influenced by extraneous and improper motives, prejudice, bias and arbitrariness; and (iii) that she has been discriminated against because she does not come from a majority culture in the UN. She requests that the Tribunal rescind the administrative decision and award her a range of financial and other relief.

Respondent's contentions

21. By email dated 23 June 2011, the Respondent indicated that, "since the IS/JAB had commenced consideration of this matter on its merits prior to the abolition of the JABs, the Respondent would consider not appropriate a supplemental response at this time." Accordingly, the Tribunal looks to the Administration's Reply of 31 January 2008 which submits (i) the Applicant was subject to the International Staff Regulations and Rules providing that fixed-term appointment does not carry any expectation of renewal; (ii) the decision not to renew her appointment was not based on her performance; and (iii) the decision not to renew her appointment was not influenced by extraneous and improper motives. The Respondent requests that the Tribunal dismiss the application.

Applicant's rejoinder

22. By letter dated 25 March 2008, the Applicant submitted a rejoinder of 29 pages with 56 annexes. Although the rejoinder and the annexes are much longer than the original 10-page application, the Tribunal finds that they carry no new contentions. In the interest of fairness and comprehensibility the Tribunal will briefly address the Applicant's rejoinder, however, noting that it will not as a general rule review additional claims that are not relevant to the discretionary administrative decision under review.

Respondent's reply to rejoinder

23. The Respondent essentially makes the same submissions rejecting the Applicant's arguments about the alleged unlawfulness of the administrative decision not to renew her contract beyond 3 November 2005, the alleged arbitrariness with respect to her contract not being renewed, and the alleged discrimination that the Applicant has been subjected to on the part of the Agency.

Considerations

Main issues

Was the Respondent's decision not to renew the Applicant's fixed-term contract beyond 3 November 2005 unlawful?

24. It is important to look at the legal basis in this matter, the decision not to renew the Applicant's contract. The fixed-term appointment of the Applicant is subject to International Staff Regulations and Rules, more specifically, Staff Rule 104.3(a), providing that "[t]he fixed-term appointment does not carry any expectation of renewal or of conversion to any other type of appointment." The United Nations Appeals Tribunal has established this as the general rule in *Syed*, Judgment No. 2010-UNAT-061:

There is no dispute that [Appellant] had a fixed term appointment, which had no expectancy of renewal or of conversion to any other type of appointment. Though [Appellant] made many allegations, the UNDT found that there were no circumstances that would take [Appellant's] situation out of the general rule. And because most of [Appellants] points were raised neither in a request for administrative review...UNDT correctly dismissed them.

Having agreed to a fixed-term contract the Applicant is bound by the conditions attaching to that contract and the established jurisprudence of the United Nations Appeals Tribunal.

25. In addition, the Agency has broad discretionary authority in the application of its Staff Regulations, Rules and other issuances, including the renewal of contracts. The United Nations Administrative Tribunal has regularly confirmed this authority, and has stated that the exercise of discretionary power will not be disturbed unless the decision was arbitrary or was motivated by prejudice or extraneous factors, or flawed by procedural irregularity or error of law. In the absence of such irregularities, this Tribunal will not substitute its own judgment for that of the Agency.

26. The Applicant contends that the Agency created an expectation of renewal with the two-month extension of her contract in September 2005, and that the successful rebuttal of her May 2005 PER somehow bound the Agency to extend her contract. In its Judgment No. 2010-UNAT-085, *Beaudry* (2010), the United Nations Appeals Tribunal held in paragraph 22 that "... an expression of interest by a staff member in the renewal of his or her appointment does not create a right of renewal." The Applicant contends that International Staff Rule 104.3, providing that a "fixed term appointment does not carry any expectation of renewal", applies only to a staff member's initial appointment. The Applicant is reminded that all appointments, whether they be an initial appointment or a renewal of an appointment, are subject to the International Staff Regulations and Rules, including Rule 104.3.

27. As stated by the United Nations Administrative Tribunal in its Judgment No. 1247, (2005), even in the case of a satisfactory or even outstanding performance a fixed-term contract automatically expires on its expiration date and no legal expectancy or legal entitlement to its renewal springs from quality of performance.

28. The jurisprudence requires a "clear action by the Administration" to create a legal expectancy of renewal, and in the case at bar, the Tribunal notes no such action by the Agency. On the contrary, the Agency had indicated to the Applicant on several occasions that the renewal of her contract was in question and clearly specified that her contract's extension was "for **two months only**" (emphasis in original).

29. The Tribunal is of the opinion that the Applicant reasonably should have known that the renewal of her fixed-term appointment beyond 3 November 2005 would not automatically follow, even in the event that her PER rebuttal was successful.

30. As for the Applicant's contention that the decision not to renew her fixed-term appointment was based on performance, the Tribunal notes that the PER which the Applicant successfully rebutted covered a period ending five months before the decision under review, i.e. the period ending 31 May 2005. Even if her PER had received a better

rating, it does not necessarily “give rise to an entitlement of renewal of the Applicant’s fixed-term contract” as affirmed by the United Nations Administrative Tribunal in Judgment No. 1430, (2009).

The Tribunal would also like to note Judgment No. 834 in *Kumar* (1997):

[The Tribunal] has noted that the Applicant’s performance evaluation reports have consistently assessed his performance as ‘very good’ or ‘good’ and that he has received a number of complimentary letters for a job well done. Nonetheless, the Tribunal may not substitute its judgment for that of the Secretary-General, in the absence of evidence showing bias, prejudice, improper motivation or extraneous factors, which the Tribunal has not found in this case.

Was the Respondent’s decision not to renew the Applicant’s contract flawed by serious and extensive irregularities, and was it influenced by extraneous and improper motives?

31. It is of the utmost importance to remember that where a staff member seeks to vitiate [a decision] on the basis of prejudice, improper motive or other extraneous factors, the burden of proving such prejudice or improper motive is on the staff member, who must adduce convincing evidence, United Nations Administrative Tribunal, Judgment No. 834, *Kumar* (1997).

32. In her application of 21 March 2006 and more so in the rejoinder of 25 March 2008, the Applicant has made allegations about improper motives for which her fixed-term contract was not renewed. The Applicant sets forth allegations of female colleagues’ supposed “envy and jealousy”, as well as numerous emails centering around he said she said, which in this Tribunal’s view do not constitute convincing evidence nor can they sustain the burden of proof required of a staff member who seeks to vitiate a decision. Rather, the evidence in the file shows that the Agency has complied with applicable procedural and administrative requirements associated with the decision not to renew the Applicant’s fixed-term appointment.

33. The Tribunal is of the opinion that the Applicant has failed to sustain her burden of proof and determines that the non-renewal of the Applicant's fixed-term appointment is lawful and has not been influenced by extraneous or improper motives and was not flawed by procedural irregularities.

Was the Applicant a victim of discrimination, sexual harassment, mobbing and bullying?

34. Sexual harassment was defined within the United Nations at the time as:

any unwelcome sexual advance, request for sexual favours, verbal or other verbal or physical conduct of a sexual nature, when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. It is particularly serious when behavior of this kind is engaged in by any official who is in a position to influence the career or reemployment conditions (including hiring, assignment, contract renewal, performance evaluation or promotion) of the recipient of such attentions.

While the Tribunal takes allegations of sexual harassment very seriously, the Applicant has not provided evidence of having been subjected to such sexual harassment either in her application or in the 29-page rejoinder and 56 annexes.

35. Furthermore, in paragraph 60 of the rejoinder, the Applicant also alleges that "depriving a staff member of work is harassment." Harassment is defined in ST/SGB/2008/5 (11 February 2008), paragraph 1.2, as:

any improper and unwelcome conduct that might reasonably be expected or be perceived to cause offence or humiliation to another person. Harassment may take the form of words, gestures or actions which tend to annoy, alarm, abuse, demean, intimidate, belittle, humiliate or embarrass another or which create an intimidating, hostile or offensive work environment. Harassment normally implies a series of incidents. Disagreement on work performance or on other work related issues is normally not

considered harassment and is not dealt with under the provisions of this policy but in the context of performance management.

36. When the Gaza Strip was declared a Security Phase IV all Gaza-based OSOs were evacuated to the WBFO. The evidence in the file shows that the Agency did not relocate the Applicant to WBFO due to the clearly poor relations between the Applicant and numerous staff members. Following the evacuation the Agency tried, but was unable, to find a vacant post matching the Applicant's skills.

37. The Applicant has not discharged her onus of proof and the Tribunal finds there is no basis to her allegations in this matter.

38. As for mobbing, and bullying, there is no UN-wide definition but one could take the general definition considered to encompass elements of persistent, offensive, abusive, intimidating or insulting behaviour, abuse of power or unfair sanctions which make the recipient feel upset, threatened, humiliated or vulnerable, which undermines his or her self-confidence.

39. Another definition is given by the Applicant herself: "Ganging up by co-workers, subordinates, or superiors to force someone out of the workplace through rumor, comments, intimidation, humiliation, discrediting, and isolation." The Applicant levels this accusation but fails to substantiate it. The failed relationship of the Applicant with her supervisors, many of her male and female colleagues and subordinates - as sad and regrettable as it may be - hardly constitutes bullying, mobbing, discrimination, prejudice or harassment. The Applicant needs more than mere allegations to sustain the burden of proof required of her, in respect of either the facts themselves or their materiality with regards to the administrative decision not to renew her fixed-term contract.

40. As for her allegations that she was discriminated against because she did not come from an "Anglo-Saxon" and "large donor" country, and that she was "ganged up against" because of her culture, personal life, professional "impeccable" competence and "visionary" proposals at work, the evidence in the file rather indicates that she objected to

the way management conducted their affairs, refused to obey security directives, told management how they should do their work, and what work she should be doing, and developed a difficult working relationship with many of her colleagues in the Operations Office, both area and international staff members.

41. The Applicant has failed to substantiate any reasonable correlation between her nationality and the non-renewal of her fixed-term contract.

42. The Applicant considers that she was “unfairly treated” because she was excluded from a course in International Humanitarian Law, without giving any evidence that her “exclusion” was motivated by discrimination.

43. Additionally, when interviewed for a job elsewhere, the Applicant was asked about her supervisors and drew the conclusion that the panel members would then talk to management in the Agency and that this constitutes a conspiracy. Is it not usual, almost routine, for an employer to check references before hiring a candidate? Accordingly, the Tribunal finds no evidence that the Applicant was the subject of discrimination, sexual harassment, mobbing or bullying.

Other issues

44. The Applicant contends that if her contract was not renewed because there was no need for her post, she is entitled to a termination indemnity as per International Staff Regulation 9.4. The Applicant is reminded that International Staff Regulation 9.4(e)(iii) applies to staff members whose appointments are terminated, and it provides that no indemnity payments shall be made to the staff member who, like the Applicant, “has a temporary appointment for a fixed-term which is completed on the expiration date specified in the letter of appointment”. Moreover, International Regulation 9.6(b) provides that “[s]eparation as a result of the expiration of any such appointment [fixed term] shall not be regarded as a termination within the meaning of Staff Regulation and Staff Rules.”

45. As for the various documents requested by the Applicant, the evidence in the file indicates that the Agency provided her with the relevant internal documents relating to the decision not to renew her contract less (i) legal advice and documentation pertaining thereto, (ii) Human Resources Committee (“HRC”) related documents, and (iii) documentation that had already been provided to, or otherwise held by, the Applicant on 25 April 2006. The Tribunal would like to refer to the jurisprudence of the United Nations Appeals Tribunal in *Rolland*, 2011-UNAT-122, which provides: “[t]here may be some parts of the record which must be kept confidential to maintain the independence and the integrity of the selection/promotion exercise.” While the documents relating to the HRC are not concerned with the selection/promotion they do, however, serve the same fundamental purpose—to gather candid staff inputs. It is within the Tribunal’s discretion to order or abstain from ordering the production of any document in the interest of justice, *Calvani* 2010-UNAT-032.

46. The Tribunal notes that while aware of the commitment to confidentiality, the Agency has provided the Applicant those documents which are directly relevant to the application. Where the relevance of requested documents vis-à-vis the bases alleged for the application has not been established, documentation has not been provided. The Tribunal would like to be clear that it will not use any document against either party unless the said party first has an opportunity to examine it, *Bertucci* 2011-UNAT-121. Accordingly, the materials related to the PER rebuttal have not been supplied to the Applicant as the subject of this application arose after the period of the rebutted PER.

Status Conference

47. On 11 July 2011, the Tribunal held a status conference, specifically to ask the parties if they had any new relevant evidence to submit in this case.

48. The Applicant was asked twice this question, and twice replied that she had nothing new to submit. The Respondent objected to the issues of harassment, discrimination and bullying raised by the Applicant in her rejoinder on the grounds that these issues had not been raised in the initial application and requested that the Tribunal consider them not receivable. The Tribunal is of the opinion that they were not new issues but that they had been expanded in the rejoinder, and therefore determined they were admissible evidence.

Post-status conference issues

49. After the status conference it became apparent that neither the Applicant nor the Respondent had a copy of the Applicant's incomplete JAB Report. Upon direction from the Tribunal, via email the Registrar notified the parties of the existence of this document providing:

“The document is marked ‘confidential’ and each page is stamped with the word ‘draft’. The document is undated and unsigned and there is no information as to how the document became part of the case file. Thus, there is no indication of its authenticity. In addition there are no recommendations contained in the report.

The Judge wants to stress to the parties that this document is not evidence. The document will not be considered in her deliberations and will have no impact on her decision. The sole purpose of this e-mail is, in the interest of transparency, to merely inform the parties of the existence of the document in the file” (emphasis in the original).

50. On 13 July, 2011 the Applicant emailed the Registrar with copy to the Respondent asking the Registrar to inform the Tribunal of the following: “I have since [the separation from the Agency] joined the UN again and moved onwards ... at the P4 Level, Step 3, under consideration for a P5 position ... I now request reintegration into UNRWA at the P5 Level on an indefinite contract. ... The other remedial action requested in my rejoinder of 25 March 2008 remains the same.”

51. On 30 July 2011 the Applicant emailed the Registrar asking to introduce new evidence stating that she had just received a statement from a former colleague, however noting that she had been waiting for sometime to receive it. Upon direction from the Tribunal the request was denied and the Registrar informed the Applicant that the case was under reserve and the Applicant had been given twice the opportunity to do so at the status conference. While recognizing that on the date of the status conference held specifically for the purpose of allowing the parties to present new and relevant evidence, the Applicant may not have been in actual possession of this document, however, the Applicant could have taken the opportunity to at least mention the possibility of new evidence when twice directly asked.

52. Finally, the Applicant is reminded that she cannot seek new relief, i.e. a P-5 level instead of the P-3 level she initially requested, simply because she has been promoted elsewhere in the UN since she left the Agency.

Conclusion

53. The Tribunal finds that the Respondent exercised his discretionary authority not to renew the Applicant's fixed-term appointment, that the decision was made in accordance with the terms of appointment of the Applicant, that no evidence has been adduced by the Applicant of any substantive or procedural irregularity in the decision-making process, that the decision was not arbitrary or capricious, and was not motivated by prejudice or other extraneous factors, and that the Applicant was not the victim of work and sexual harassment, mobbing, bullying, discrimination and prejudice.

54. The Tribunal determines that there is no merit in the application, and it is dismissed in its entirety.

(signed)

Judge Bana Barazi

Dated this 3rd day of October 2011

Entered in the Register on this 3rd of October 2011

(Signed)

Laurie McNabb, Registrar, Amman