



Case No.: UNDT/GVA/2010/120

Order No.: 93 (GVA/2010)

Date: 31 December 2010

Introduction

1. By email dated 30 December 2010, the Applicant filed with the United Nations Dispute Tribunal an application requesting it to suspend, during the pendency of the management evaluation, the implementation of the decision to terminate her indefinite appointment effective 1 January 2011.

Facts

2. The Applicant joined the United Nations High Commissioner for Refugees (“UNHCR”) in September 1999 and in January 2000, like all UNHCR staff members at the time, she was granted an indefinite appointment under rule 104.12(c) of the then applicable Staff Rules. She works in the Brussels office as a Senior Secretary, at level G-5.

3. By letters dated 18 March 2010 and 28 May 2010 (not available to the Tribunal), the Applicant was informed, respectively, of the reorganization of her unit and of the abolition of the post she occupied effective 30 November 2010.

4. According to the Applicant (no supporting documents provided), she wrote several emails to enquire about training opportunities and the possibility to be placed in a different position “owing to the privileges of her indefinite appointment”, but she never received any response.

5. In October 2010, the Regional Appointments, Postings and Promotions Committee (“Regional APPC”) was tasked with performing the functions of a Comparative Review Panel (“CRP”). The CRP, which was comprised of six members, thus undertook a comparative review of the Applicant with three staff members on similar positions holding fixed-term appointments, two at level G-5

highlighted on several occasions over the years by different supervisors in her performance appraisal reports.

7. The case was then submitted to the Appointments, Postings and Promotions Committee at Headquarters (“Headquarters APPC”) for review. The Headquarters APPC, which is composed of six members, held four meetings between 19 November and 9 December 2010 to review the case. On 9 December 2010, the APPC concluded that it “could not find any reason not to retain [the Applicant] against one of the [two] available G-5 positions”. It therefore recommended that the Applicant and another staff member “be retained against the two available G-5 positions”.

8. The conclusion of the CRP and APPC were then submitted for decision to the Assistant High Commissioner for Protection. She substituted the UNHCR Representative in Brussels to avoid any conflict of interest. On 23 December 2010, the Assistant High Commissioner concluded that the procedure followed by the Headquarters APPC was fundamentally flawed because:

[The APPC] applied arbitrary scales to a point’s matrix, which had the effect of not sufficiently discussing and reaching a consensus of the elements in the rating scale. Some of the elements in the rating matrix (such as language ability, years of service and integrity) were not applied consistently and in some cases incorrectly. In regard to a comparative review of performance, which was dealt with separately from the point’s matrix, the APPC, in my opinion, applied a flawed approach in only comparing the first performance appraisal of [the Applicant] with the other two staff members. The procedure expects that the overall performance of the staff members be compared and not a partial record of performance.

The Assistant High Commissioner therefore decided to endorse the CRP recommendation not to retain the Applicant in service. On the same day, the Director of the Division of Human Resources Management (“DHRM”) endorsed the Assistant High Commissioner’s decision.

9. By letter dated 29 December 2010, the Applicant was informed that following the comparative review, it had been determined that “her services could [not] appropriately be utilised on another post” and that her indefinite appointment would therefore be terminated effective 1 January 2011.

10. By email dated 30 December 2010, 11.32 a.m., copied to the Director of DHRM and to the Staff Council, the Applicant submitted to the Deputy High Commissioner a request for management evaluation of the decision to terminate her indefinite appointment.

11.

14. The Respondent's contentions are:
- a. The Applicant was alerted to the reorganisation of the office on 18 March and 28 May 2010 and was therefore fully aware that a comparative review would take place;
 - b. The comparative review was conducted in accordance with the procedures set out in IOM/19/1997-FOM/24/1997 of 18 March 1997 and the Applicant was given fair consideration in the process;
 - c. Contrary to the Applicant's claim, in a comparative review, the fact that she holds an indefinite appointment is only to be taken into account after due regard has been given to competence, integrity and length of service;
 - d. The Brussels office took action to ensure that the Applicant would continue to receive adequate medical coverage;
 - e. The Applicant has not provided sufficient evidence in support of her request for suspension of action, which should therefore be rejected.

Considerations

15. The Applicant requests suspension of action, during the pendency of the management evaluation, on the decision to terminate her indefinite appointment effective 1 January 2011.

16. Article 2.2 of the Tribunal's Statute specifies the three statutory prerequisites for suspending implementation of an administrative decision, namely prima facie unlawfulness, irreparable damage and urgency.

Prima facie unlawfulness

17. Taking the first of the three prerequisites, the Tribunal must determine whether "the decision appears prima facie to be unlawful".

18. The Tribunal recently stated in **Corna** Order No. 80 (GVA/2010) of 16 December 2010:

28. As the Tribunal held in **Buckley** UNDT/2009/064 and **Miyazaki** UNDT/2009/076, the combination of the words “appears” and “prima facie” shows that this test is undemanding and that what is required is the demonstration of an arguable case of unlawfulness, notwithstanding that this case may be open to some doubt. This was echoed in **Corcoran** UNDT/2009/071, in which the Tribunal held that “since the suspension of action is only

22. Third, paragraph 7 of the Guidelines stipulate that “[i]n the event that no suitable posts can be identified, the Panel may compare the concerned staff to

Respondent's action or activities will lead to irreparable damage.

41. In *Corcoran* UNDT/2009/071, the Tribunal also held that:

Irreparable damage may already be at hand where ... unemployment after a very long time of service would result from the implementation of the contested decision (cf. UNDT/2009/007 *Rees* UNDT/2009/016 *Tadonkj* UNDT/2009/008 *Osman*). In the applicant's case ... being unemployed at her age after a period of 14 years within the Organization would also be a serious harm, that could not simply be compensated by an award of damages.

26. The Tribunal also subsequently held in *Tranchant* Order No. 91 (GVA/2010) of 22 December 2010:

40. The Tribunal considers that the fact, for a staff member, to be deprived of employment with a notice of one month only constitutes irreparable moral harm, that could not simply be compensated by an award of damages.

27. In the present case, the Applicant was only given a two-day notice of the termination of her indefinite appointment, after more than eleven years of service. Furthermore, even if she succeeds in finding alternative employment with the United Nations, she may never regain the job security that an indefinite appointment—a type of appointment that no longer exists—gave her. The Tribunal considers that this is not a damage it would be able to repair with an award of appropriate compensation, should the Applicant win her substantive

Conclusion

29.