

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

S.
v.
UNESCO

134th Session

Judgment No. 4503

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms A. S. against the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 5 August 2019, UNESCO's reply of 26 December 2019, the complainant's rejoinder of 16 March 2020, UNESCO's surrejoinder of 22 June, the complainant's additional submissions of 2 October and UNESCO's final comments of 9 December 2020;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision not to extend her fixed-term appointment upon its expiry.

The complainant joined UNESCO on 1 September 2014 as Legal Adviser and Director, Office of International Standards and Legal Affairs, at grade D-2, under a two-year fixed-term contract. She was seconded to UNESCO from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). In May 2016 her appointment was extended for a further two-year term, from 1 September 2016 to 31 August 2018.

In November 2017 a new Director-General took office at UNESCO. Shortly after her appointment she announced to senior management in an “Azure Note” dated 4 December 2017 that, in the context of the reforms that she wished to implement, she had decided to renew the Senior Management Team (SMT). At that time the membership of the SMT, which was chaired by the Director-General, comprised the Deputy Director-General (DDG), the eight Assistant Directors-General (ADGs), and several Directors (at D-1 or D-2 level), including the Legal Adviser.

At a meeting on 26 March 2018, which was also attended by the Director of the Bureau of Human Resources Management (HRM), the Director-General informed the complainant that she did not intend to renew her appointment upon its expiry, because she wished to renew the SMT, and that she would consult the Executive Board on this matter. Following the consultation of the Executive Board, which took place on 9 April 2018, the complainant was informed by a memorandum of 24 April 2018 that the Board had raised no objection to the Director-General’s proposal and that her appointment would therefore not be extended beyond its expiry date of 31 August 2018.

On 29 May 2018 the complainant submitted a protest in which she challenged the decision of 24 April 2018 on the grounds that the Director-General’s intention to renew the SMT was not a valid reason for not extending her appointment. She argued that although the appointments of the DDG and ADGs were customarily aligned with the mandate of the Director-General, this was not the case for a Director-level appointment such as hers, which was the result of a competitive recruitment process. She also pointed out that the Director-General’s actions since she had taken office were not consistent with the stated reason for the challenged decision, because the fixed-term appointments of eight SMT members had come up for renewal during that period, but hers was the only one that had not been extended.

This protest was rejected by a decision of 17 July 2018 and the complainant then filed an appeal with the Appeals Board. In its Opinion and Recommendation of 12 April 2019, the Appeals Board found no error or violation of the applicable rules, and concluded that the reason for the decision not to extend the complainant’s appointment was “valid

insofar as the decision falls within [UNESCO's] discretion". Regarding the complainant's procedural argument that UNESCO had failed to reply to her protest within the one-month time limit, it found that no injury had been established, as she could have filed an appeal with the Appeals Board once that time limit had expired. The Board therefore recommended that the appeal be rejected.

By a letter of 7 May 2019 the Director of HRM informed the complainant that the Director-General had decided to accept the recommendation of the Appeals Board and accordingly to confirm her decision of 17 July rejecting the complainant's protest. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to award her material damages for the loss of the opportunity to have her appointment extended for an additional two-year term, including all salary, benefits, step increases, pension contributions, entitlements and other emoluments she would have received during the two-year period following her separation from service. She also claims moral damages in the amount of 100,000 Swiss francs for the Organization's breach of its duty of care and for the distress caused to her, interest at the rate of 5 per cent per annum on all amounts awarded to her, costs, and such other relief as the Tribunal deems necessary, fair and just.

UNESCO asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant challenges the 7 May 2019 decision not to renew her fixed-term appointment alleging that the only reason given – the intention of the new Director-General to restructure the SMT – was not a sufficient, valid and objective reason. The arguments grounding the complaint can be summed up as follows:

- (a) the alleged need to modernise UNESCO and adapt it to current challenges is a general and indefinite reason;

- (b) the new Director-General never explained how the non-extension of the complainant's contract served the interests of the Organization; immediately after her non-renewal, the complainant's post was opened to competition with the same job description and tasks that the complainant had successfully performed for four years;
- (c) the reason given does not fall within the reasons for non-renewal accepted by the Tribunal's case law (underperformance, misconduct, budgetary constraints, restructuring of a department or a unit, change in functions);
- (d) the Director-General's declared intention to renew the SMT was contradicted by the subsequent events, since only some of the SMT's members were not reappointed: out of the nine DDG/ADG members and the twelve D-level employees, only one DDG, four ADGs, and one D-2 employee (the complainant) did not have their appointments renewed;
- (e) it was incorrect to treat the D-level employees, who are members of the SMT, in the same way as the DDG and the ADGs, since the D-level posts are not "political posts", considering that they are filled through a competitive process, are not linked to the term of the Director-General's appointment and are not influenced by political considerations; and
- (f) out of the twelve D-2 level posts of the SMT, only the complainant's contract was not renewed; other Directors either had their contracts extended or were transferred to other posts within the Organization.

2. The Organization's reply may be summed up as follows:

- (a) fixed-term contracts carry no expectation of extension and a decision not to renew a fixed-term contract is subject to limited judicial review;
- (b) the Organization's decision is sufficiently motivated;
- (c) the Organization duly exercised its discretion in taking the non-renewal decision since: (i) the Director-General is the Chief Administrative Officer of the Organization; (ii) restructuring the SMT was a genuine and objective reason; and (iii) the Director-

General's decision was taken after consultation with the Executive Board;

- (d) the Organization acted with due care towards the complainant, who was informed well in advance of the Director-General's intention not to renew her appointment;
- (e) all the members of the SMT were at the same level, insofar as all of them reported directly to the Director-General; and
- (f) the SMT was effectively restructured over time, not only with the replacement of its members, but also with substantial modifications to its structure and functions.

3. In her rejoinder, the complainant contests the Organization's argument that the Executive Board did not raise any objections to her non-renewal, alleging that the Executive Board was misled by a misrepresentation of the relevant facts.

In its surrejoinder, the Organization alleges that, given that the complainant had joined UNESCO on secondment from UNRWA, governed by an Inter-Agency Secondment Agreement, UNESCO was under no legal obligation to give reasons for her non-renewal, given that the complainant had a general right of return to UNRWA; furthermore, it was the Executive Board who asked the Director-General to restructure the Secretariat, including the Legal Office.

In her further submissions, the complainant raises a threshold issue of receivability with regard to the arguments offered by the Organization in its surrejoinder, and asks that the Tribunal consider those arguments as inadmissible new reasons for the impugned decision, alleged only before the Tribunal.

4. The complainant requests oral proceedings. Pursuant to Article V of the Statute of the Tribunal, "[t]he Tribunal, at its discretion, may decide or decline to hold oral proceedings, including upon request of a party". In this case, the Tribunal finds the written submissions to be sufficient to reach a reasoned decision, thus there is no need for oral proceedings.

5. The complainant does not contest the nature of her fixed-term contract, nor the applicable rules, nor the discretionary nature of the decision whether or not to renew a fixed-term contract. She only contests the reason given for her non-renewal.

6. According to the relevant Staff Rules and Regulations in force at the material time:

“Fixed-term appointment

- (a) A fixed-term appointment shall be an appointment for a continuous period of not less than one year, ending on a date specified in the Letter of Appointment.
- (b) A fixed-term appointment may, at the discretion of the Director-General, be extended, or converted to an indeterminate appointment; it shall not, however, carry any expectation of, nor imply any right to, such extension or conversion and shall, unless extended or converted, expire according to its terms, without notice or indemnity.” (Staff Rule 104.6.)

“Expiration of appointment

- (a) A fixed-term appointment or a temporary appointment shall expire automatically and without notice or indemnity on the expiration date specified in the letter of appointment.
- (b) Separation as the result of the expiration of any such appointment shall not be deemed to be a termination within the meaning of the Staff Regulations and Rules.” (Staff Rule 109.3.)

“The Director-General shall take decisions concerning the appointment, extension, renewal and termination of appointment of the Organization’s Legal Adviser, Ethics Adviser and Director of the Internal Oversight Service (IOS) in consultation with the Executive Board.” (Staff Regulation 4.5.3.)

7. As clearly stated by the relevant rules, a fixed-term appointment shall not carry any expectation of, nor imply any right to renewal or conversion. The decision of non-renewal is a discretionary decision.

It is well settled in the Tribunal’s case law that an organization enjoys wide discretion in deciding whether or not to renew a fixed-term appointment. The exercise of such discretion is subject to only limited review as the Tribunal respects the organization’s freedom to determine its own requirements and the career prospects of staff. However, the discretion is not unfettered and the Tribunal will set aside the decision

if it was taken without authority or in breach of a rule of form or of procedure, or if it rested on an error of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence (see Judgments 3948, consideration 2, 4062, consideration 6, 4146, consideration 3, 4231, consideration 3, 4363, consideration 10).

These grounds of review are applicable notwithstanding that the Tribunal has consistently stated, in Judgment 3444, consideration 3, for example, that an employee who is in the service of an international organization on a fixed-term contract does not have a right to the renewal of the contract when it expires and the complainant's terms of appointment contain a similar provision (see Judgments 3586, consideration 6, and 4218, consideration 2).

Even though an organization is generally under no obligation to extend a fixed-term contract or to reassign someone whose fixed-term contract is expiring, unless it is specifically provided by a provision in the staff rules or regulations, the reason for the non-renewal must be valid (and not an excuse to get rid of a staff member) and be notified within a reasonable time (see Judgments 1128, consideration 2, 1154, consideration 4, 1983, consideration 6, 2406, consideration 14, 3353, consideration 15, 3582, consideration 9, 3586, consideration 10, 3626, consideration 12, and 3769, consideration 7).

An international organization is under an obligation to consider whether or not it is in its interests to renew a contract and to make a decision accordingly: though such a decision is discretionary, it cannot be arbitrary or irrational; there must be a good reason for it and the reason must be given (see Judgment 1128, consideration 2).

8. The Tribunal finds that in the present case the discretionary decision not to renew the complainant's fixed-term contract was taken in compliance with the required procedural steps.

Since 4 December 2017 the new Director-General had informed the staff members of her intention to renew the SMT. The complainant had been properly informed by the Director-General in person, since March 2018 – i.e. five months before the expiry of her fixed-term contract –,

of the Director-General's intention not to renew her appointment. The complainant was informed during a meeting and by a memorandum, that is to say both orally and in writing.

The decision was taken after consultation with the Executive Board, which is a collective body composed of the representatives of fifty-eight Member States, who raised no objections.

9. In her rejoinder, the complainant objects that the summary record of the consultation with the Executive Board shows that the Board was misled. Firstly, she alleges that the Executive Board was incorrectly led by the Director-General to believe that the non-renewal of her contract and the appointment of a new Legal Adviser would ensure a reorganization of the Office of International Standards and Legal Affairs. She stresses that this was not the case, since the new Legal Adviser has the same role, duties and reporting lines as she did, and the previous job description was kept unchanged. Secondly, the complainant alleges that the Executive Board was given to understand that she had failed to provide independent and impartial advice to the main organs of UNESCO, hence the decision not to renew her contract. She emphasises that during her four years as Legal Adviser, there were no complaints about her work or attitude, that this reason, which is directly linked to her work performance or her conduct as an international civil servant, is not the reason that was given to her, and that these matters should have been addressed in her performance appraisal or through a disciplinary procedure. This did not happen, she says, presumably because there was no evidence to support such a claim.

The Tribunal considers that these arguments are mere speculation on the part of the complainant, and they are not supported by the evidence. The summary record of the Executive Board meeting of 9 April 2018 shows that the Director-General properly informed the Board and that an open and transparent discussion followed. This discussion did not address issues related to a reorganisation of the Office of International Standards and Legal Affairs, nor to the complainant's performance or attitude. Therefore, these allegations are dismissed.

10. Furthermore, the Organization complied with its duty of care. The complainant was given five months' notice of the non-renewal of her contract; the expiry of the contract occurred at the contractually agreed time, and the complainant received reasons for the non-renewal, orally and in writing (see Judgment 4321, consideration 8).

11. The Tribunal has, at this juncture, to assess whether the argument underpinning the decision was a sound reason.

The Tribunal finds that the decision was grounded on a sound and genuine reason based on a real restructuring process of the SMT and, in consequence, that the decision is not tainted by abuse of authority, nor by bias or unequal treatment.

The restructuring of the SMT was not a "mere intention", nor a generic reason, but an effective process, that over time resulted in the non-renewal of the contracts of eleven members of the SMT, out of its twenty-one members. The complainant was not the only D-level member whose contract was not renewed. Up to 2020, five D-level members had their contracts not renewed. Two further D-level contracts were due to expire over 2020 and were not renewed. The restructuring of the SMT entailed not only the replacement of its members, but also the reduction of the number of its members, and the modification of its operation. The SMT was renamed as the SAB (Strategic Advisory Board). The new SAB had only thirteen members, down from the twenty-one members of the former SMT, and had a new organization and different reporting lines. Only five out of the eleven Directors of the former SMT remained as members of the SAB.

The complainant's further contention that, soon after the non-renewal of her contract, her post was advertised with the same job description and tasks, is not relevant, considering that the reason given by the Organization for the non-renewal was the restructuring of the SMT, and not of the position of Legal Adviser itself.

In conclusion, the restructuring of the SMT and the consequent non-renewal of the complainant's appointment was a discretionary decision, as part of a policy to reform and restructure the management of the Organization, lawfully taken by the Director-General, within her

authority. It is well settled in the Tribunal's case law that decisions concerning restructuring within an international organization may be taken at the discretion of the executive head of the organization and are consequently subject to only limited review. Accordingly, the Tribunal will ascertain whether such decisions are taken in accordance with the relevant rules on competence, form or procedure, whether they rest upon a mistake of fact or of law or whether they constitute abuse of authority. The Tribunal will not rule on the appropriateness of a restructuring or of decisions relating to it and it will not substitute the organization's view with its own (see, for example, Judgments 4004, consideration 2, 4139, consideration 2, 4180, consideration 3, 4405, consideration 2).

12. As the decision of non-renewal was lawful, the main claim to set aside the impugned decision shall be dismissed, as well as the claims for material and moral damages, and for costs.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Clément Gascon, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

CLÉMENT GASCON

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ