
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/140

Judgment No.: UNDT//2020/126

Date: 24 July 2020

Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: ~~Abena Kwaku~~ 0.0 0.79L0.0 0.0 1.0 209.04 632.88 Tm [(J)8(udge)3()] TJ ET

August, 1 September and the latest extension until 30 June 2020, in accordance with the funding cycle for the position.

6. Finally, in relation to allegations that the contested decision was an expression of harassment, the Respondent's argument is that the Tribunal lacks jurisdiction over allegations of harassment, as this would require the Applicant to have exhausted the internal remedies set forth in ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), which the Applicant failed to do. The Respondent, among others, cites the United Nations Appeals Tribunal ("UNAT") in *Messinger*² in that the "Tribunal is not equipped to conduct investigations".³

Applicant's submissions

7. The Applicant contends that his application is not moot and is receivable.

19. The same is expressed by UNAT in *Messinger* 2011-UNAT-123, para. 25, on which the Respondent relies, and which, when cited faithfully, states:

It is clear that the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute. *However, for the purpose of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the UNDT to examine allegations of harassment* (emphasis added).

20. The holding in *Messinger* confirms that an applicant who wishes to appeal a decision concerning the terms of his/her appointment or the contract of employment is not required to exhaust any measures under ST/SGB/2008/5. Conversely, an aggrieved

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harassment, discrimination or abuse of authority.

22. Moreover, the application in this case does not concern “an ST/SGB/2008/5 complaint”. It concerns an appointment decision and alleged damage caused by it. Allegations of harassment here are contextual, to show abusive purpose of the impugned decision.

23. In conclusion, the application is receivable.

FACTS

Background

24. The Applicant took his first appointment with MINUSMA based in Bamako, Mali in June 2013 as the engineer in charge of airfield infrastructure.¹³ Prior to the impugned decision, the Applicant’s appointment was renewed on a yearly basis until 30 June 2019.¹⁴

25. The Applicant reported to

United Nations Manual on Project Management, the Gao project needed to be managed on site and not remotely. Therefore, he did not follow the suggestion from Mr. Dreyer, who was in favour of letting the Applicant stay in Bamako until the project was finished.²³ The deployment decision had been approved at the level of the Special Representative of the Secretary-General (“SRSG”), before the information of threat was received.²⁴

29. On 9 January 2018, the Applicant requested management evaluation of the decision of 29 December 2017 to redeploy him to Kidal effective 15 January 2018.²⁵ The Management Evaluation Unit responded on 22 February 2018 upholding the decision to reassign the Applicant to Kidal.²⁶ The immediate redeployment to Kidal, however, was rescinded and the Applicant’s move to Kidal was postponed until 10 October 2018.²⁷

30. Both Mr. Stassen and Mr. Chadha impressed upon Mr. Dorn, the Applicant’s new FRO in Kidal, that the Applicant needed to be put on a Performance Improvement Plan (“PiP”). Mr. Dorn objected, as he believed that the Applicant needed to be

understanding of professionalism, human interactions and communication”.³²

35. The App TJ Ederstanding of pr aoctfovg om3(c)3(t)-0(f)w0.0 iofovg om(o)0(f)10(pr)-.37 0.8()98

distressful and toxic. This is reaching a point where I can no longer handle the pressure and support the sector effectively, particularly given the level of understaffing and conditions in Kidal. I am therefore, requesting your approval to take a special leave without pay for two months, starting July 22nd after my annual leave”.⁴¹

38. This request was not acted upon. The reason for it, as provided by the Respondent, was that the Applicant had submitted his request to the Officer-in-Charge of the Regional Administrative Office (“OIC/RAO”) in Kidal, Mr. Rhodes, who had no authority to approve SLWOP, while the Applicant’s FRO was away from the mission on training.⁴² Ms. Kazirukanyo, Chief Human Resources Section, confirms that Mr. Rhodes sought her guidance on how to proceed with the request and she conveyed to him, by someone whom she cannot recall, that the request needed to be approved by the Chief of Section (at the time OIC Mr Stassen) and, subsequently by the Director of Mission Support (“DMS”) who was the ultimate decision-maker. She was, in any event, convinced that eventually the Applicant had been instructed how to proceed.⁴³ Mr. Stassen confirmed that Mr. Rhodes had forwarded to him the Applicant’s request in May 2019. He, however, did not act on it; instead he advised Mr. Rhodes to instruct the Applicant about the proper chain of communication.⁴⁴ The Applicant confirms that he had not asked Mr. Stassen’s approval for the SLWOP, mainly because, as stated in the request itself, they were conflicted.⁴⁵ In any event, no decision was taken.

39. In June 2019, while the Applicant was on annual leave, Mr. Stassen proceeded to decide on recommendations for extension of appointments expiring on 30 June 2019. Regarding the Applicant, on 13 June 2019, he recommended granting a one-month extension⁴⁶, which now forms the basis of the case.

40. As admitted by Mr. Stassen, there was established practice in the Section that

⁴¹ Application, annex AO3, page 9.

⁴² Respondent’s Response to Order No. 014 (NBI/2020), para. (d).

⁴³ Kazirukanyo testimony on 26 March 2020.

⁴⁴ Stassen testimony on 26 March 2020.

⁴⁵ Applicant’s testimony on 25 March 2020.

he would recommend extensions of appointment even with an incomplete ePAS, where the FRO asserted a staff member's full competence. In the Applicant's case, however, the ePAS was lacking both the Applicant's and the FRO's input, whereas the FRO, Mr. Dorn, was out of the Mission area. Moreover, there was a need to replace the designation of the SRO in Umoja, i.e., to replace the departed Mr. Dreyer with Mr. Stassen. This was the reason why he extended the Applicant's appointment by one month only.⁴⁷ Subsequently, from 10 until 29 July 2019, it took several exchanges with Mr. Dorn and Human Resources before the ePAS could have been completed by Mr. Stassen as SRO.⁴⁸ The ePAS was signed by Mr. Dorn on 18 June 2019, processed on 4 July 2019⁴⁹, signed by Mr. Stassen as SRO on 29 July 2019 and, last, by the Applicant on 7 August 2019

not inform the Mission instantly.⁵³

43. On 8 July 2019, Mr. Stassen sent a query to the Applicant asking when he would resume work.⁵⁴ On 22 July 2019, Mr. Stassen sent an email to the Applicant reiterating his concern that the Applicant was not in Kidal.⁵⁵ The Applicant did not respond. He explained to the Tribunal that, due to his health condition, he did not feel like logging on to Outlook and dealing with work emails. He was using his private email account.⁵⁶

44. On 26 August 2019, Ms. Florence Karera, the Human Resources Officer, MINUSMA, sent an email to the Applicant inquiring if he was alright. In her email, she also reminded the Applicant that if he was sick, he should send sick leave reports; otherwise he would be deemed to be on unauthorized absence.⁵⁷ The Applicant did not respond but submitted his first medical certificate on 30 August 2019, which was approved by the Division of Healthcare Management and Occupational Safety and Health (“,20 1.0 144.09981 0.0 0.0 1.0 138.96 424.08 Tm [(“)] TJ ET Q q BT /F1 12.0 TfMas23

could be extended once the FRO gave positive evaluation, and in this case both FRO and SRO had already given theirs. Another reason given by her was that there was no contact with the Applicant, and that Mr. Stassen did not know whether the Applicant was on leave and until when.⁶¹

Mission about reasons for such a short extension because he perceived it as fitting the pattern of harassment. Rather, he sought advice from counsel on how to proceed. Subsequently, he sought help from the therapist. Thereafter, the therapist referred him to a psychiatrist. The Applicant describes that such news caused aggravation of symptoms that he had suffered before.

MERITS

ISSUES

49. The issues for determination are whether:

- a. The decision to extend the Applicant's appointment for one month was formally unlawful;
- b. The decision was for improper purpose; and
- c. The Applicant suffered harm arising from the contested decision.

Whether the decision to extend the Applicant's appointment for one month was formally unlawful.

Submissions

Applicant's submissions

50. The Applicant submits that pursuant to staff rule 4.13(a), a fixed-term appointment may be granted for a period of one year or more, up to five years at a time, to persons recruited()-70(m)11(on)-5(t)-7(h)-5()-70(was)28()] TJ ET Q q BT /70 197.76 231.84 T

of short-term extension comprises two elements: first there was a delay in renewing his contract, then there was the duration of the extension of the contract.

Respondent' submissions

52. The Respondent submits that a fixed-term appointment may be renewed for any period up to five years. The Organization has no obligation to renew the Applicant's appointment for one year.

53. There was no unreasonable delay in renewing the Applicant's appointment. MINUSMA Human Resources initiated the request for renewal on 27 May 2019. The OiC approved the renewal on 13 June 2019, which allowed ample time before the expiration of the Applicant's appointment for the renewal to be reflected in Umoja and the Applicant to be included in the July 2019 payroll. The Applicant has not shown how the timing of the renewal breached his procedural or substantive rights.

54. The Respondent further submits that the decision to renew the Applicant's appointment for one month was rational and in accordance with the Staff Regulations and Rules. The SRO required the Applicant's completed performance evaluation or at least, input from FRO on the Applicant's performance for the 2018-2019 cycle before he could recommend an extension of contract. In the meantime, to ensure that the Applicant had no break in service and remained on payroll for the month of July 2019, the SRO in consultation with the CHRO, recommended that the Applicant's appointment be renewed for one month. Subsequent one-month renewals were justified in light of the uncertainty of the Applicant's status, given that he had not submitted relevant medical certificates until 30 August 2019, which delayed their approvals, and his failure to communicate with the Mission.

Considerations

55. The Tribunal recalls that as per staff regulation 4.5, a fixed-term appointment does not carry an expectancy of renewal and no express rule was breached by not extending the Applicant's appointment for one year. This said, discretionary decisions

58.

Considerations

66. The Tribunal, first, does not see the harassment element in the Applicant's reassignment, rather, *prima facie* it was a typical dispute arising on the Headquarters/field interface, involving competing valid interests. Beyond it, however, the case presents a sorry picture of workplace relations where highly educated, driven and accomplished professionals refused to work toward putting the dispute behind them after it had been resolved by a final administrative decision and, instead, continued to nurture it into a conflict. On the one hand, the Applicant was repeatedly threatened with a PiP by pe .iP

effectively challenged, that is, the first one-month extension, the Tribunal did not find objective illegality. Moreover, the one-month extension was not entirely Mr. Stassen's authorship but the latter was acting on advice from the CHRO. Finally, Mr. Stassen demonstrated his objectivity in entirely deferring to the FRO's evaluation in the Applicant's ePAS. This was done before the present dispute arose. In totality, Mr. Stassen's actions surrounding the impugned decision do not disclose an ulterior motive.

Whether the Applicant suffered a harm arising from the contested decision

Submissions

Applicant's submissions

68. The Applicant submits that the contract not being extended on time caused him some stress; then the contract having been renewed only for a short period, and retroactively, aggravated the impact. The decision has had negative effects on him and a remedy should be provided for the harm he suffered. Accordingly, the Applicant requests the Tribunal to: (a) grant him reparation for the material and moral harm he suffered, including reimbursement of all expenses not covered by the health insurance; (b) six months' salary; (c) order the Administration to ensure the harassment ceases with a guarantee of non-repetition.

Respondent's submissions

69. The Respondent submits that the Applicant has produced no evidence of harm resulting from the contested decision as required by art. 10.5(b) of the Dispute Tribunal's Statute. He has not submitted any medical evnyut8-16(1)17((ggr)-7(a)-16(v)4ggr)-7(a)-16

the Applicant applied for SLWOP due to stress. The Applicant's medical reports filed on 5 December 2019, make no reference to the one-

in support of peace in Mali.” The decision to reassign the Applicant, subsequently to actions of Mr. Stassen and Mr. Chadha, was approved at the level of the Special Representative of the Secretary-