



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2009/073

Judgment No.: UNDT/2010/196

Date: 18 November 2010

Original: English

Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

GODDARD

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT ON NON-EXTENSION OF
MISSION ASSIGNMENT**

Counsel for applicant:

Self represented

Counsel for respondent:

Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant, a staff member of the United Nations Joint Staff Pension Fund (“UNJSPF”) who was on mission detail to the United Nations Mission in the Central African Republic and Chad (“MINURCAT”), contests the decision of the Chief of Mission Support (“CMS”) of MINURCAT, dated 28 June 2009, not to extend his mission assignment beyond 18 August 2009.

2. Following a hearing on the merits, the respective contentions of the parties has been narrowed to the following:

Applicant’s submissions

3. It is the Applicant’s case that the decision by the CMS not to extend his assignment with MINURCAT was due primarily to his inability to speak French and that this requirement was introduced on an *ex post facto* basis in light of the fact that it was not a requirement of the vacancy announcement that he applied, interviewed and was selected for. The Applicant provided a copy of the said vacancy announcement in support of his allegation that French was not a requirement of the post.

4. It is also the Applicant’s case that the contested decision is prejudiced, arbitrary and based on abuse of authority and improper motives because:

- a) He attempted to protect himself and other staff members of MINURCAT against harassment from the CMS; and
- b) He was competent in administration whereas the CMS lacked understanding of basic administration in the field.

5. Additionally, the Applicant submits that he had an expectancy of extension as the CMS agreed to extend his mission assignment to 18 February 2010.

Remedies being sought by the Applicant

6. In light of the Applicant's submissions in paragraphs 3 to 5 above, he requests the following as compensation:

- a) That he and his wife be given suitable mission appointments in the same mission;
- b) A payment amounting to \$44,000 for the reduction in income by his return to New York; and
- c) That the staff of MINURCAT be afforded some form of protection against the dictatorial management style of the CMS.

Respondent's submissions

7. It is the Respondent's case that the decision not to renew the Applicant's mission assignment with MINURCAT constituted a reasonable exercise of discretion by the Administration in the face of the operational requirements of the mission. The Respondent states that he adopts the contentions and analysis set out in the letter dated 4 September 2009 from the Management Evaluation Unit ("MEU") to the Applicant.

8. In light of the foregoing, the Respondent requests that the application be dismissed.

Background facts

9. The Applicant joined the Organization on 3 February 2004 as an Executive Officer with the UNJSPF. On 18 February 2008, he arrived in Chad to take up the position of Chief Administrative Services ("CAS"), MINURCAT, at the P-5 level on a six-month mission contract, which was subsequently extended to 19 August 2009 by the Officer-in-Charge ("OIC") of Mission Support, MINURCAT.

10. On 12 August 2008, the CMS arrived in Chad to take up his functions.

11. The CMS, in a report of March 2009, requested assistance from United Nations Headquarters in searching for experienced professionals at the section chief level in the support services. In a 27 April 2009 facsimile to the Under-Secretary-General of the Department of Field Support (“USG/DFS”), the CMS proposed the upgrading of a number of section and unit chief posts within MINURCAT. He also requested that his service chiefs, including the Applicant, and five section chiefs be replaced.

12. On 30 March 2009, the CMS sent the Applicant the following email:

“I would like to know what are your annual leave plan [sic] towards the end of your contract in August, since I intend to initiate recruitment for the CAS position and the process should start 3 to 4 months before your departure so as to ensure continuity and overlap in the position.”

13. On 2 April 2009, the Applicant responded to the CMS’ email explaining that as a staff member on assignment from Headquarters, he had a two-year lien on his New York post and that since he was only at the 18 month point, he had to complete two-years in the mission. He then asked the CMS to explain why he would wish to advertise his post. The Applicant did not receive a response.

14. On 12 and 16 May 2009, five section chiefs and the Applicant, respectively, submitted written grievance against the leadership of the CMS to the USG/DFS. The USG/DFS acknowledged receipt of the Applicant’s letter on 18 May 2009 and indicated that she would look into the matter.

15. On 29 May 2009, the Internal Audit Division of the Office of Internal Oversight Services (“IAD/OIOS”) submitted an audit report on the recruitment of

international staff in MINURCAT to the Special Representative of the Secretary-General (“SRSG”) of MINURCAT. The report noted that there were managers and supervisors in MINURCAT who could not communicate in French and recommended that the MINURCAT Office of Mission Support follow up with the Field Personnel Division, Department of Field Support (FPD/DFS) to ensure, for certain positions identified by MINURCAT management, that there is a requirement for candidates to be fluent in French.

16. Between 12 and 20 June 2009, a joint DFS/DPKO team (“the Mission Support Evaluation Team”) visited MINURCAT. The objective of the evaluation was to strengthen the delivery of mission support in MINURCAT by identifying issues that require intervention either at United Nations Headquarters in New York or within the mission itself. The Applicant, who was away on leave during this period, provided the Mission Support Evaluation Team with a note on his perception of Administrative Services in MINURCAT. In its report, dated 5 August 2009, the Evaluation Team recommended, *inter alia*, that FPD/DFS expedite its outreach activities to identify French speaking candidates able to deploy to MINURCAT in order to alleviate difficulties faced by the mission in communicating with local authorities and national staff.

17. On 11 June 2009, the Applicant requested his parent office, the UNJSPF, to liaise with DFS with regard to his extension. On 25 June 2009, FPD/DFS informed the UNJSPF that MINURCAT had decided not to extend the Applicant’s assignment beyond 18 August 2009. The UNJSPF communicated this information to the Applicant on 26 June 2006.

18. On 6 July 2009, the Applicant received a copy of the request not to extend his assignment, dated 28 June 2009. In the form, the Applicant’s performance was rated as fully successful but the CMS indicated that, “the senior function of CAS requires a good knowledge of French to facilitate interaction with clients and especially national staff (audit recommendation). It is therefore recommended that the staff member

return to his parent office”.

19. On 23 July 2009, the Applicant submitted a request for management evaluation of the decision not to extend his assignment with MINURCAT. He received an unfavorable response from MEU, dated 4 September 2009, and filed the present application with the United Nations Dispute Tribunal (“the Tribunal”) on 1 December 2009.

Issue 1

20. Was the contested decision prejudiced, arbitrary and based on abuse of authority and improper motives?

21. The Applicant asserts that the decision of the CMS not to extend his mission assignment was prejudiced, arbitrary and based on abuse of authority and improper motives because he protected staff members against the CMS’ harassment and attempted to guide him in administrative procedures.

22. The Tribunal notes that apart from the Applicant’s letter of 16 May 2009 to the USG/DFS in which he bitterly complained about the leadership of the CMS, he did not lead any evidence to substantiate this claim. Therefore the Tribunal finds this claim to be without merit.

Issue 2

23. Were the actions of the Respondent of such a nature as to lead the Applicant to believe he had a legitimate/legal expectation of extension to 18 February 2010?

24. A comprehensive discussion of this issue must necessarily include an examination of the policy governing assignment of staff members to mission detail. Pursuant to paragraph 1 of ST/SGB/277, entitled *Policy Governing Assignment to*

and Return from Mission Detail, the primary objective for assignment of staff to field operations is to obtain competent and committed personnel and to provide staff members with personal and professional growth and development.

25. Paragraph 6 of ST/AI/404 on *Assignment to and Return from Mission Detail*, which sets out procedures and guidelines governing mission detail, emphasizes that mission detail, as any other assignment in the Organization, is at the discretion of the Secretary-General, as provided in staff regulation 1.2(c), which provides that:

“Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations.”

26. Further, to ensure the right of return of staff members on mission detail to their parent organizations, paragraph 7 of ST/AI/404 provides for the blocking of posts of detailed staff members holding permanent or long-term appointments for a period of up to two years.

27. The Applicant was initially given a six-month contract when he took up his duties as CAS on 18 February 2008. This contract was subsequently extended for an additional 12 months 19 August 2009 for a total mission assignment of 18 months.

28. In a monthly report dated March 2009, the CMS requested assistance from United Nations Headquarters in searching for experienced professionals at the section chief level in the support services. On 30 March 2009, he sent the Applicant an email inquiring about his leave plans “towards the end of [the Applicant’s] contract in August, since I intend to initiate recruitment for the CAS position and the process should start 3 to 4 months before [the Applicant’s] [...]”.

29. On 2 April 2009, the Applicant responded as follows to the 30 March 2009 email from the CMS:

“You will recall that we discussed my assignment with MINURCAT about two weeks ago at which point I explained to you that I, as is usually the case of staff on assignment from Headquarters, have a two-year lien on my New York post. I also explained that August 2009 was the 18 month point only, and that it was my intention to complete two-years in the mission. In light of the above and in the absence of any communication of any kind concerning my appointment with MINURCAT perhaps you could explain why you would wish to advertise my post at this juncture.”

30. The Tribunal does not find merit in the Applicant’s assertion that he had an expectancy of extension because: (i) in March 2009 the CMS agreed to extend his assignment to 18 February 2010; and (ii) the CMS did not contest his email of 2 April 2009. The Applicant explained during the hearing that he had a legitimate expectancy of extension because he met with and explained to the CMS that it was usual for staff on mission assignment to complete two years before returning to their duty station and as such, there was an option to extend his assignment for an additional 6 months. The Applicant concluded that since the issue was not discussed again afterwards, the CMS agreed to the further extension. However, the CMS, who was called as a witness by the Respondent, denied having any such discussion or meeting with the Applicant. In view of the fact that the Tribunal is faced with conflicting evidence from the Applicant and the CMS as to whether or not there was a discussion between them on the contract extension, the actions of the CMS during that period must be examined to determine his intent on the issue.

31. While the CMS did not respond to the Applicant regarding his email of 2 April 2009, there apparently was no meeting of the minds on the issue of extension as he sent a facsimile to the USG/DFS on 27 April 2009 requesting that his service chiefs, one of whom was the Applicant, be replaced. Additionally, on 28 June 2009, the CMS completed the request for extension of appointment/assignment of international staff members in which he recommended no further extension of the

Applicant's appointment and his return to his parent office. In view of the foregoing, it is impossible to conclude that there was a promise (explicit or implicit) or an agreement between the Applicant and the CMS to extend his mission assignment for an additional 6 months.

32. Additionally, the fact that ST/AI/404 provides for the blocking of posts of staff members on mission assignment for a period of up to two years does not mean that an automatic right of renewal is created for exactly two years. In the Tribunal's view, while due regard is given to the staff member's performance, potential, skills and experience, a staff member's mission detail depends on the needs of the mission concerned and may be shortened or lengthened at the discretion of the Secretary-General. While the Applicant obviously wanted to stay with MINURCAT for an additional six months, this yearning, in and of itself, was not enough to create a legal expectancy on the part of the Respondent.

33. With respect to the policy set out in ST/SGB/277, it is noted that the Organization's objective to provide staff members with personal and professional growth and development was achieved in that the applicant was provided with an opportunity to acquire additional experience and/or skills during his 18-month tenure as CAS with MINURCAT.

34. The Tribunal finds that the actions of the Respondent were not of such a nature as to lead the Applicant to believe he had a legitimate/legal expectation of extension to 18 February 2010. The Tribunal finds, therefore, that this claim is without merit.

Issue 3

35. Was the Applicant's inability to speak French the basis for the decision not to extend his assignment with MINURCAT and if so, was this a proper exercise of the Respondent's discretion?

36. The Applicant submits that his assignment with MINURCAT was not extended due to his inability to speak French and that this violated his rights because the vacancy he applied for, was interviewed for and was selected against did not stipulate that French was a requirement. He submits that the requirements of his post were changed *ex post facto* and that this is a dangerous precedent for Administration to set.

37. The CMS, in his 7 August 2009 response to MEU, stated that, “[i]t is true that [the Applicant’s] mission detail was not extended largely because of his lack of fluency in French”. Further, the CMS confirmed during the hearing that the French language issue was a paramount consideration in his mind when he made the contested decision. The CMS explained to the Tribunal that he was trying to address the overall issue of communication within the mission in that the first objective of MINURCAT is to support French-speaking police and yet it had a support office which was entirely English-speaking.

38. In view of the fact that the CMS conceded that his decision not to renew the Applicant’s mission assignment was primarily due to the Applicant’s inability to speak French, the Tribunal will not engage in a long discourse on this particular issue. Rather, it will focus on the issue of whether the decision not to extend the applicant’s assignment with MINURCAT but to return him to his parent organization, due to his inability to speak French, was a proper exercise of the Respondent’s discretion.

39. In the present case, the relevant vacancy announcement provided that “[f]luency in English or French is required. Knowledge of other United Nations official languages would be an advantage.” Words such as “or” and “would”, which are used in this vacancy announcement signify that French was not a specific requirement of the CAS post at the time that the Applicant applied and was selected for it.

40. In the MEU letter of 4 September 2009, which has been adopted by the Respondent, it is submitted that “[o]perational necessity could in and of itself provide a legitimate basis for the decision to include a language requirement to [the Applicant’s] post”. It is further submitted that “the fact that the requirements of the post originally did not call for French does not preclude the possible need to add the requirement later on should circumstances or experience at the mission reveal an operational necessity for it”.

41. Pursuant to staff regulation 1.2(c), the Secretary-General has discretionary authority to assign staff members to any of the activities or offices of the United Nations. However, this discretionary authority does not negate the responsibility on the Respondent to give due regard to the interests of staff members. As noted in *Gaskins*, UNDT/2010/119, inherent in every contract of employment is an “implied term of mutual trust and confidence between employer and employee”. This means that the parties must act “reasonably and in good faith”. Thus, it stands to reason that neither the employer nor the employee should materially change the terms of the employment contract without, at least, consulting with the other party, and at most, obtaining the agreement of the other party to the proposed change.

42. Thus, it was incumbent upon the CMS to, at a bare minimum, consult with the Applicant prior to the introduction of the French language requirement into the employment contract. The record shows, however, that the Applicant was not informed of the new contractual term, i.e. the French language requirement, until 6 July 2009, when he received a copy of the request for extension of appointment form, dated 28 June 2009, which contained the recommendation of the CMS not to renew his mission assignment. While it may be argued that the 28 June 2009 document merely relayed a “recommendation” and not a decision, this is not an argument that this Tribunal is willing to accept. The administrative officer of the Applicant’s parent organization, the UNJSPF, received an email dated 25 June 2009 from FPD/DFS informing her that MINURCAT had advised DFS that the Applicant would not be extended beyond 18 August 2009. This email was forwarded to the Applicant by the

UNJSPF administrative officer on 26 June 2009. Consequently, the Applicant was only informed of the change to the terms of his contract of employment after the decision had been made.

43. Additionally, the CMS testified during the hearing that it was in March 2009 that he first decided that the incumbent of the Applicant's post should speak French. He, however, did not mention this very material fact to the Applicant in his email of 30 March 2009 because he did not see the need to comment on the "specificity of the non-renewal" in an email. The CMS was of the view that he discharged his duty by including the French language requirement in the request not to extend his assignment form in June 2009 when the Applicant still had two months to the end of his assignment. Unfortunately, the number of months the Applicant had remaining in his mission assignment is irrelevant. What is relevant is the fact that he was entitled to be told of the new language requirement prior to the time that the decision not to renew his contract based on this new requirement was made. Regrettably, this did not happen.

44. It is further submitted in the MEU letter of 4 September 2009 that the rationale for adding a language requirement to a number of posts, including the Applicant's, was adequately substantiated and constituted a reasonable managerial consideration which fell within the discretion of the Administration. The letter goes on to state that "[d]uring your tenure at MINURCAT, it was decided that knowledge of French *should* be required, and steps were taken to implement this policy".

45. After a careful review of the written submissions of the parties and the evidence adduced at the hearing, the Tribunal was unable to unearth any policy or document memorializing the decision to make French a requirement in MINURCAT during the Applicant's tenure. Neither did it come across any of the steps, apart from not renewing the Applicant's mission detail, which were taken by the Respondent to implement this rather nebulous policy.

46. In support of its position, the Respondent submitted the report of the Mission Support Evaluation Team, which recommended, *inter alia*, that FPD/DFS expedite its outreach activities to identify French speaking candidates able to deploy to MINURCAT in order to alleviate difficulties faced by the mission in communicating with local authorities and national staff. While the Tribunal appreciates the information contained in this report, it is of the view that the report is not dispositive in this matter in that the Evaluation team conducted its evaluation between 12 and 20 June 2009 and issued its report on 5 August 2009. The Tribunal notes that the CMS decided in March 2009 that the incumbent of the Applicant's post should speak French. Consequently, the evaluation and the report were subsequent to the decision in this case being taken. More importantly though, the report is ineffectual in that it does not recommend that French **should** be made a requirement of certain posts, including that of the Applicant. It merely recommends that "outreach activities" be expedited to "identify" French speaking candidates able to deploy to MINURCAT. This does not "adequately substantiate" the contention that French had become a requirement of the Applicant's post as the Respondent is trying to make the Tribunal believe.

47. The Respondent also submitted the IAD/OIOS audit report of 29 May 2009. The Tribunal does not find this report to be dispositive in this matter as it does not contain any definitive findings or conclusions on the necessity of making French a requirement for certain posts, including the Applicant's. At paragraph 16, the report states rather ambiguously that "[w]ithout the requisite language skills, there is a risk that managers and supervisors cannot effectively communicate with their local counterparts in French." It goes on to state that the CMS "mentioned" that the language issue negatively impacts the activities of the Transport Section and the relationship with the Detachment Intégré de Sécurité (DIS), the Chadian troops mandated to ensure the protection of refugees and the Internally Displaced Persons (IDPs). The reader is kept in the dark about the nature of the negative impact.

48. Paragraph 16 of the audit report goes on to state that, “If, as mentioned by the CMS, for some functions fluency in French is essential, it should be made one of the criterion in the selection process. This issue should be further discussed with the Field Personnel Division (FPD) to ensure ably qualified candidates are selected for such positions”. There is no certainty in the word “if”. Based on the choice of language used in this part of the report, the Tribunal can only conclude that an independent investigation of this issue was not carried out and that the auditors were merely reporting the concerns of the CMS. This interpretation appears to be borne out by the report’s recommendation 3 that “[t]he MINURCAT Office of Mission Support should follow-up with the Field Personnel Division ... to ensure, for certain positions identified by MINURCAT management **there is a requirement** (*emphasis added*) for candidates to be fluent in French”. Further, paragraph 17 of the report states that, “[r]ecommendation 3 remains open pending receipt of documentation identifying the positions that require fluency in the official language(s) as well as the review of future vacancy announces [*sic*] requiring fluency in the official language(s) of the host country”.

49. The Tribunal notes that paragraph 17 also indicates that the MINURCAT Office of Mission Support accepted recommendation 3 and stated that “fluency in French and/or Arabic **will be considered** (*emphasis added*) an asset in the recruitment of the staff”. As with the Mission Support Evaluation Team report, this report does not recommend that French **should** be made a requirement of certain posts, including the Applicant’s.

50. Assuming *arguendo* that the audit report did in fact recommend that French be made a requirement of certain posts, there is no evidence in the record indicating that the MINURCAT Office of Mission Support followed up with FPD to ensure that there is a requirement for candidates to be fluent in French for certain positions. The CMS testified that based on the findings of the draft audit report, dated 12 February 2009, he discussed the need to review and strengthen the capacity of the mission with FPD/DFS. Subsequent to this discussion, he sent a facsimile dated 27 April 2009 to

the USG/DFS in which he proposed the upgrading of a number of section and unit chief posts within MINURCAT. He also requested that his service chiefs, including the Applicant, and five section chiefs be replaced.

51. While the CMS does not indicate anywhere in this facsimile that the inability of staff members in certain positions to speak French is negatively impacting the operations of MINURCAT, he states quite succinctly, at paragraph 5 of the facsimile that:

“The Mission is at a critical point in its development and the staffing situation in the Support Component is dire, both in regard to quantity and the quality of those on board. A number of personnel on site have come on TDY and they will need to be replaced, and in addition there are a number of staff who have probably reached their point of usefulness for the Mission and would benefit from a move to another Mission which is not in the same position of urgency that MINURCAT is. The third group of staff who need to be replaced are the retirees who have come to the Mission.”

52. At this juncture, the Tribunal is left with an unanswered question. If the ability to speak French was an operational necessity for certain positions in MINURCAT, including that of the Applicant, why was there no follow up on the issue with FPD, as recommended by the audit report, to ensure that a proper vetting process was put in place to protect the rights of staff members, such as the Applicant, who would ultimately be affected by this new requirement?

53. While operational necessity may, under certain circumstances, provide a legitimate basis for a decision to include a new or additional requirement to a staff member's post on a *post facto* basis, these circumstances must be substantiated and proper procedures must be put in place and followed by the Respondent to ensure that the rights of staff member are duly protected. In cases, such as the present one, where the circumstances for the operational necessity are not substantiated and proper procedures are neither put in place nor followed by the Respondent, the due process rights of staff members end up being violated.

54. In light of its considerations above, the Tribunal finds as follows:
- a. The Applicant's inability to speak French was the basis for the decision not to extend his assignment with MINURCAT.
 - b. The decision not to extend the Applicant's assignment with MINURCAT but to return him to his parent organization, due to his inability to speak French, was not a proper exercise of the Respondent's discretion due to the fact that there was no basis for the decision and proper procedures were not followed, which resulted in the violation of the Applicant's right to due process.

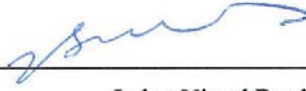
Conclusion

55. The decision not to extend the Applicant's assignment with MINURCAT due to his inability to speak French, was not a proper exercise of the Respondent's discretion as there was no basis for the decision. Further, the Respondent failed to establish and follow proper procedures. This violated the Applicant's contract of employment and denied him of due process. Consequently, the Applicant is entitled to compensation.

Judgment

56. In light of its conclusion, the Tribunal orders the Respondent to pay the Applicant three months of his net base salary at the rate applicable on the date he was separated from MINURCAT.

57. All other pleas are rejected.



Judge Vinod Boolell

Dated this 18th day of November 2010

Entered in the Register on this 18th day of November 2010



Jean-Pelé Fomété, Registrar, UNDT, Nairobi