



Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Abena Kwakye-Berko

GNASSOU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Monika Ona Bileris

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

INTRODUCTION

1. On 28 January 2016, the Applicant, a former staff member of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”), filed an application contesting the decision by MONUSCO to separate her from service prior to the completion of the rebuttal process for her 2014-2015 performance appraisal (“e-PAS”).

2. The Respondent’s reply, dated 1 March 2016, submitted that the application is without merit because the Applicant’s performance was not the basis for the contested decision. MONUSCO sought to extend her appointment to allow her to complete a Performance Improvement Plan (“PIP”) but the Applicant refused to accept several offers of extension of appointment by refusing to sign the letters of appointment. The Applicant was separated from service at the expiry of her fixed-term appointment on 31 August 2015 in accordance with section 4.4 of ST/AI/2013/1 (Administration of fixed-term appointments), which states that the refusal of a staff member to sign a letter of appointment within 14 days of its issuance nullifies the offer.

3. It is apparent from an examination of the file that this case may properly be determined on the basis of the documents submitted by both parties.

FINDINGS OF FACT

4. The Tribunal considered a substantial number of documents provided by the Applicant who made several allegations against the decision-makers whom she considered as having acted improperly in breach of the Organization’s rules and procedures on recruitment and performance appraisal. Given the issues to be determined the Tribunal does not consider it necessary to address those allegations.

5. The Tribunal finds the following facts proven on the basis of the documentary evidence and taking into account the submissions of the parties:

a. On 1 July 2004, the Applicant commenced employment with MONUSCO on a fixed-term appointment as an Economic Affairs Officer at the P-4 level in the Political Affairs Division (“PAD”). She worked in PAD until her separation from service on 31 August 2015.

b. By a memorandum dated 7 September 2014, the Special Representative of the Secretary-General (“SRSG”) for MONUSCO selected the Applicant for a transfer from PAD to his office to serve as his economic advisor. On 11 September, the Applicant sought a correction of the entry on duty (“EOD”) date stated in the SRSG’s memorandum and requested that it be resent to PAD after the correction had been made.

c. The SRSG re-issued the selection memorandum on 12 September 2014 with the corrected EOD date. On 21 September, the Applicant emailed the SRSG to raise her concerns about the transfer to his office. Her concerns included: (i) the assignment of a consultant to be her supervisor; (ii) the SRSG’s assessment of her performance based on comments provided by the Officer-in-Charge (“OiC”) of PAD; (iii) the recruitment of a consultant when she had the requisite expertise; and (iv) her lack of promotion and career development in ten years.

d. On 22 October 2014, the OiC PAD emailed the Applicant regarding her move to the Office of the SRSG. She responded to him the same day notifying him that she was not interested in a lateral move after more than 10 years in the same post. In response to the Applicant’s email, the SRSG indicated in an email dated 22 October 2014 that she could stay with PAD.

e. On 7 May 2015, the MONUSCO Human Resources (HR) section emailed Mr. Ray Virgilio Torres, the Director of PAD, requesting that he sign a form for the renewal of the Applicant’s appointment, which was due to expire on 30 June 2015.

f. Since Mr. Torres did not respond to this request HR sent a reminder to him on 27 May 2015 reminding him that the Applicant's fixed-term appointment was due to expire on 30 June 2015.

g. On 1 July 2015, the Applicant's first reporting officer ("FRO") assessed her overall performance for the 2014-2015 performance evaluation cycle as "does not meet performance expectations".

h. By an email dated 1 July 2015, Mr. Torres confirmed his approval of the extension of the Applicant's appointment but did not indicate for how long. On 2 July 2015, the Applicant returned the unsigned extension request form to the Director's office.

i. On 3 July 2015, the Director of PAD emailed HR confirming his approval of the extension of the Applicant's appointment for a period of three months to enable her to comply with a PIP.

j. The Applicant submitted a formal rebuttal of her 2014-2015 e-PAS on 15 July 2015.

k. On 16 July 2015, the Applicant's FRO sent her a draft PIP with a request that she submit her comments, if any, within a week. The Applicant has not submitted any documentary evidence or submission indicating that she submitted comments on the PIP or responded to her FRO's email. She did, however, send an email to the Chief of HR objecting to the PIP and requesting a one year extension of her contract and a continuing appointment.

l. On the same day, the FRO sent the Applicant the request for extension of appointment form for her signature. He informed her that her signature was required for HR to process a four-month extension for the PIP to be implemented. The Applicant states that she objected to this approach because her e-PAS had not been through a rebuttal process at that stage.

m. The Applicant's appointment was exceptionally extended for one month until 31 July 2015 without her signing the renewal request to allow her to comply with the PIP.

n. On 17 July 2015, HR sent to the Applicant a further request for extension of appointment form for her signature to enable an extension of her appointment from 1 August 2015 to 18 November 2015.

o. The Chief of HR emailed the Applicant on 22 July 2015 to remind her to draft her work plan for the 2015-2016 performance evaluation cycle. The Applicant did not comply with this request on the basis that she had not been provided with the Division's work plan. On the same day, the Chief of HR sent the Applicant her letter of appointment for a one month extension for signature.

p. On 27 July 2015, the Administration attempted to hand-deliver the Applicant's letter of appointment from 1 to 31 July 2015 as well as her request for extension form for an extension from 1 August to 18 November 2015. The Applicant refused to sign the memorandum acknowledging receipt of the documents. In the circumstances, the two documents were returned to HR without her signature.

q. Notwithstanding the applicant's refusal to sign the extension of contract documents, on 5 August 2015, MONUSCO extended the Applicant's appointment to 31 August 2015.

r. On 11 August 2015, the Applicant received a request from HR to sign a one-month letter of appointment in order for the PIP to be implemented. The Applicant, refused to sign the letter of appointment because she did not accept the performance appraisal that she had underperformed. Furthermore, her 2014-2015 e-PAS was still awaiting the rebuttal process.

s. On 17 and 20 August 2015, the Office of the Director of Mission Support sent the Applicant emails requesting that she sign her letter of appointment. She did not respond to these emails.

t. On 27 August 2015, the Applicant's FRO reminded her of the need to provide feedback on the PIP by 28 August 2015. He also indicated that he would discuss the dates of the PIP with her and that his "door [was] open for any questions [she] may have". The Applicant did not respond to her FRO.

u. On 1 September 2015, the Officer-in-Charge of HR sent a memorandum to the Applicant informing her of her separation with effect from 31 August 2015 pursuant to section 4.4 of ST/AI/2013/1 on the basis that she had not signed her letter of appointment as requested.

THE APPLICABLE LAW

6. Under section 4.3 of ST/AI/2013/1, a fixed-term appointment may be renewed for any period of up to five years at a time.

7. Section 4.4 of ST/AI/2013/1 provides that:

A proposed renewal of appointment shall not create any obligations on behalf of the Organization if it is not accepted by the staff member on a timely basis, or the staff member. The Organization initiates a renewal of appointment by issuing a letter of renewal indicating the new expiration date and change of department, office of duty station, if any. The staff member shall be requested to sign the letter of renewal accepting the new expiration date and conditions of appointment. Failure to sign and return the letter of renewal within 14 days of receipt shall nullify any proposed renewal of appointment and the staff member's fixed-term appointment shall expire on the expiration date specified in the currently valid letter of appointment.

8. Sections 4.11 and 4.12 of ST/AI/2013/1 provide that:

4.11 Should unsatisfactory performance be the basis for a decision for a non-renewal of a fixed-term appointment and should the appointment expire before the end of the period covering a time-bound performance improvement plan, the appointment should be renewed for the duration necessary for the completion of the performance improvement plan.

4.12 Should unsatisfactory performance be the basis for a decision of non-renewal of an appointment and should the appointment expire before the end of a rebuttal process initiated by a staff

member, the appointment should be renewed for the duration necessary for the completion of the rebuttal process.

9. Section 7.1 of ST/AI/2013/1 stipulates that a fixed-term appointment expires on the expiration date specified in the letter of appointment or letter of renewal of appointment.

10. Section 10.1 of ST/AI/2010/5 (Performance management and development system), which concerns identifying and addressing performance shortcomings and unsatisfactory performance, provides:

During the performance cycle, the first reporting officer should continually evaluate performance. When a performance shortcoming is identified during the performance cycle, the first reporting officer, in consultation with the second reporting officer, should proactively assist the staff member to remedy the shortcoming(s). Remedial measures may include counselling, transfer to more suitable functions, additional training and/or the institution of a time-bound performance improvement plan, which should include clear targets for improvement, provision for coaching and supervision by the first reporting officer in conjunction with performance discussions, which should be held on a regular basis.

11. Section 10.5 of ST/AI/2010/5 provides:

Should unsatisfactory performance be the basis for a decision for a non-renewal of a fixed-term appointment and should the appointment expire before the end of the period covering a performance improvement plan, the appointment should be renewed for the duration necessary for the completion of the performance improvement plan.

CONSIDERATIONS

12. The Tribunal finds that despite the huge volume of documents provided in this case, particularly on the part of the Applicant, most of them were irrelevant to the issue to be determined by the Tribunal. The Applicant was on a fixed-appointment which was not renewed at the expiration date of the last proposed renewal. The question for decision is what was the activating cause or reason for the non-renewal. Was it simply a case of the contract expiring through the effluxion of time or was it because the Applicant was required, in accordance with

section 4.4 of ST/AI/2013/1, to sign and return the form of acceptance of the new contract but she failed to do so.

13. The Applicant's case is that there were no valid grounds for putting in place a PIP and that since performance was in issue, and she had filed a rebuttal, her contract should have continued until the rebuttal panel issued its report. Failure to do so was a procedural error and the decision not to renew her contract should be rescinded and she should be awarded compensation for loss and damage.

14. It is the Respondent's case that there were good grounds to question the Applicant's performance and that the decision to put in place a PIP was fully merited and was in accordance with the provisions of section 4.11 of ST/AI/2013/1. It was necessary to extend her contract in order to implement the PIP. However, the Applicant's continuing refusal to sign acceptance of a contract extension left them with no alternative but to separate her from the Organization in accordance with the provisions of section 4.4 of ST/AI/2013/1.

15. The principal instruments to consider are ST/AI/2010/5 and ST/AI/2013/1.

16. Section 10.5 of ST/AI/2010/5, dealing with the expiry of a fixed-term contract before the completion of the PIP, provides that the contract should be extended for the duration necessary for completion of the PIP. In this case the PIP was not put in place prior to 30 June 2015, the expiry date of the letter of appointment that was valid at the time. Leaving aside the Applicant's contention that the imposition of a PIP was wholly unjustified the fact is that on 30 June 2015 there was no PIP in existence so the Applicant cannot place reliance on section 10.5 of ST/AI/2010/5.

17. For section 4.4 of ST/AI/2013/1 to be given full and proper effect any proposed renewal of appointment should be made prior to the expiration date specified in the valid letter of appointment current at the time. In this case the date is 30 June 2015. HR acted procedurally correctly in writing to Mr. Torres on 7 and 27 May 2015 asking him to sign the form to extend the applicant's contract reminding him that her contract current at the time was to expire on 30 June. Mr.

Torres did not indicate his consent to the renewal until 1 July and on 3 July 2015 he supported an extension of three months to cover the duration of the PIP.

18. Mr. Torres, as the Director of PAD was remiss in not taking appropriate steps either to put in place a PIP or to extend, or not, her contract before the date of its expiry on 30 June 2015. The Administration extended the Applicant's contract several times despite the fact that on none of these occasions did she sign acceptance of the offers of contract extension. Such extensions were contrary to a strict application of the requirements of section 4.4 of ST/AI 2013/1 and not consistent with administrative regularity. However, the fact is that MONUSCO continued to extend the Applicant's contract in the hope of persuading her to cooperate with the PIP. It was wholly within the Applicant's control whether she should cooperate by signing acceptance of the limited extension granted and submit to the PIP albeit under protest. However, she chose to stick to her position that there were no grounds upon which her performance could have been assessed as "does not meet performance expectations" and that she should have a 12-month extension and the grant of a continuing appointment.

19. In the circumstances, MONUSCO acted procedurally correctly in finally relying on section 4.4 of ST/AI/2013/1 in not renewing the Applicant's appointment.

20. Whatever other grievances the Applicant might have had, the Tribunal's task is to address the short question as to what was the activating cause of the non-renewal of her contract. The Tribunal finds that it was the Applicant's steadfast refusal, despite several attempts at persuasion by MONUSCO HR, to sign the acceptance of the new extension of appointment.

JUDGMENT

The Application fails and is dismissed.

(Signed)

Judge Goolam Meeran

Dated this 29th day of January 2018

Entered in the Register on this 29th day of January 2018

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi