



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2019/068

Judgment No.: UNDT/2020/070

Date: 12 May 2020

Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Nerea Suero Fontecha

HOUENOU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Nicole Wynn, ALD/OHR, UN Secretariat

Nusrat Chagtai, ALD/OHR, UN Secretariat

Introduction

1. On 14 November 2017, the Applicant, a former Engineer at the P-4 level, filed an application contesting the non-renewal of his temporary appointment with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (“MINUSCA”) in Bangui beyond 30 September 2017. The case was initially filed with the Nairobi Registry.
2. On 15 December 2017, the Respondent filed his reply in which he submitted that the contested decision was lawful.
3. On 19 July 2019, the case was transferred to the New York Registry, and on 25 November 2019, it was assigned to the undersigned Judge.
4. Pursuant to Order No. 56 (NY/2020) dated 24 March 2020, on 31 March 2020, the Respondent filed his closing submission and on 6 April 2020, the Applicant filed his closing statement.
5. For the reasons below, the application is rejected.

Facts

6. On 4 July 2016, the Under-Secretary-General for the former Department of Field Support (“USG/DFS”) approved the construction of hard wall accommodation for MINUSCA’s military and police contingents (the “Hard Wall Project”).
7. On 26 February 2017, the Applicant was recruited to work on the Hard Wall Project on a temporary appointment expiring on 30 June 2017.
8. On 28 April 2017, the Advisory Committee on Administrative and Budgetary Questions recommended a reduction of USD18,873,200 in the proposed MINUSCA budget for the period 2017-2018.

9. On 22 June 2017, the Director of Mission Support of MINUSCA signed a loan agreement for the loan of a post from the Service Delivery Section to the Engineering Section to which the Applicant was assigned since there was no vacant post for the Applicant beyond 30 June 2017. The loan period was from 1 July 2017 to 30 June 2018, but was “subject to review”.

10. By 29 June 2017, MINUSCA was affected with a further budget reduction of USD19,907,300. On the same date, the USG/DFS sent MINUSCA a Code Cable requesting a plan of measures to reduce mission expenditure in light of the budget reductions.

11. On 30 June 2017, the Applicant’s Programme Manager recommended the extension of the Applicant’s temporary appointment to 30 June 2018.

12. On 12 July 2017, in the Director of Mission Support’s absence, the Officer-in-Charge (“OIC”) of the Division for Mission Support approved the recommendation for extension. MINUSCA Human Resources (“HR”) raised a personnel action (“PA”) notification to reflect the approved recommendation extension of appointment to 30 June 2018.

13. On 17 July 2017, the Director of Mission Support, upon his return, amended the recommended date for extension of appointment to 30 September 2017.

14. On 10 August 2017, the Director of Mission Support wrote to the USG/DFS regarding the mission’s budget shortfall of USD30 million in staffing costs.

15. On 18 August 2017, MINUSCA HR processed a PA notifying the Applicant that his temporary appointment expired on 30 September 2017, in accordance with the extension request amended by the Director of Mission Support.

16. On 13 September 2017, MINUSCA HR sent the Applicant a memorandum requesting him to initiate his check-out. On 19 September 2017, the Chief Human

Resources Officer at MINUSCA clarified to the Applicant that his temporary appointment was not being extended beyond 30 September 2017 due to budget constraints and upon a further review of operational and programmatic requirements.

17. On 26 September 2017, the Applicant submitted a request for management evaluation regarding his separation by way of non-renewal on 30 September 2017.

18. On 27 September 2017, the Applicant filed an application for a suspension of action with the Dispute Tribunal regarding his separation by way of non-renewal on 30 September 2017.

19. On 4 October 2017, the Dispute Tribunal granted the Applicant's application for a suspension of the contested decision.

20. On 10 November 2017, the Management Evaluation Unit ("MEU") issued the outcome of the Applicant's request for management evaluation. The MEU recommended that the contested decision to separate the Applicant by way of non-renewal on 30 September 2017 be upheld. The MEU, however, noted that there was maladministration in the Applicant's separation due to the failure to notify the Applicant immediately of the revised recommendation regarding the expiration of his appointment. Accordingly, the MEU recommended that the Applicant receive compensation of an additional one-month net base salary, resulting in, after taking into consideration the period of the suspension of the contested decision, an additional two months and a half of salary beyond 30 September 2017. In the 10 November 2017 letter, the Under-Secretary-General for Management further informed the Applicant that the Secretary-General had decided to endorse MEU's recommendations.

Consideration

The issue of the present case

21. The primary legal issue before the Tribunal is whether the decision not to renew the Applicant's temporary appointment beyond 30 September 2017 was lawful.

Whether the decision not to renew the Applicant's temporary appointment beyond 30 September 2017 was lawful?

22. The Tribunal takes note that on 26 February 2017, the Applicant was appointed on a temporary appointment, expiring on 30 June 2017. A temporary appointment has a contractual status that carries no expectancy of renewal. This is clearly set out in staff regulation 4.5(b), staff rule 4.12(c) and staff rule 9.4, and this principle has been consistently upheld by the Appeals Tribunal in its jurisprudence (see, for instance, *Abdalla* 2011-UNAT-138 and *Toure* 2016-UNAT-660). Nevertheless, the Tribunal may examine whether countervailing circumstances such as a legitimate expectation of a renewal or improper motives existed in the decision not to renew a staff member's appointment, which may have tainted such decision with illegality (see, for instance, *Igbinedion* 2014-UNAT-411 and *Kellie* UNAT-2018-875). The onus is on the staff member to show a legitimate expectancy of renewal or that the non-renewal of his appointment was arbitrary or motivated by bias, prejudice or improper motive against the staff member (see, for instance, *Hepworth* 2015-UNAT-503)

Did the Applicant have a legitimate expectation of renewal?

23. The Applicant submits that he held a legitimate expectation of renewal of his temporary appointment to 30 June 2018 and the Administration unlawfully separated him from service prior to that date. The Applicant relies on the fact that the Administration processed his contract extension to 30 June 2018. He submits that following the approval of the loan for the post of Project Management Officer at the P-

4 level, for the period of 1 July 2017 to 30 June 2018 for the Hard Wall Project in MINUSCA, the Applicant's Programme Manager recommended the extension of the Applicant's temporary appointment to 30 June 2018. On 12 July 2017, in the Director of Mission Support's absence, the OIC of Mission Support approved the recommendation for extension. The Applicant further submits that MINUSCA HR raised a PA notification to reflect the approved recommendation for the extension of his contract and that his security pass was extended consistent with grant of a contractual term of one year. The Applicant contends that while he did not receive a new letter of appointment, he understood that his appointment had been extended for one year until 30 June 2018, and continued to work on that basis. The Applicant submits that there continued to be an operational need for his services and his appointment was unlawfully curtailed.

24. The Respondent submits on the other hand that the Applicant's temporary appointment was never extended to 30 June 2018, nor did MINUSCA make an express promise to extend the Applicant's appointment to that date. The Respondent contends that although the Applicant's Programme Manager's made a recommendation for extension, the recommendation was not properly approved. The Respondent states that the OIC of Mission Support's approval of an extension of contract to 30 June 2018 was unauthorized as only the Director of Mission Support had delegated authority to approve requests for extensions of contracts. Upon his return, on 17 July 2017, the Director of Mission Support recommended that the Applicant's appointment be only renewed until 30 September 2017 in light of the MINUSCA's reduced budget for the 2017-2018 year and the USG/DFS's instructions of 29 June 2017 to reduce expenditures. In this respect, the Respondent explained that the construction of the Hard Wall Project for accommodations for MINUSCA's military and police contingents, for which the Applicant was recruited, was one of the areas where MINUSCA was able to reduce mission expenditure by outsourcing the project under an existing contract for which funds were available, allowing it to reduce staffing costs.

25. The Respondent further submits that the renewal of the Applicant's appointment to 30 June 2018 would have in any case been barred by ST/AI/2010/4/Rev.1 (Administration of temporary appointments) as there were no exceptional circumstances to justify an extension beyond 364 days of service.

26. The Tribunal notes that the Appeals Tribunal has held that in order for a staff member's claim of legitimate expectation of a renewal of appointment to be sustained there must be a commitment in writing from the Administration to renew the appointment (see, for instance, *Igbinedion* 2014-UNAT-41, *Toure* 2016-UNAT-660, and *Kellie* UNAT-2018-875). Upon review of the record, the Tribunal finds that no official commitment was made to the Applicant in writing which would give rise to a legitimate expectation of renewal of his temporary appointment to 30 June 2018.

27. The Tribunal finds that although a recommendation was made by the Applicant's Programme Manager to extend the Applicant's temporary appointment to 30 June 2018, the recommendation was not approved by the Director of Mission Support who had the personal delegated authority to do so. In this regard, it is undisputed that the authority to extend appointments was delegated to the Director of Mission Support and had not been sub-delegated. Therefore, while the OIC of Mission Support could perform certain functions in the Director's absence, the approval of recommendations for extensions was not one of them. As the OIC did not have the delegated authority to approve contract extensions, his approval, which the Respondent submits was made in error, could not be binding on the Organization. Once the Director of Mission Support discovered the error, he had a duty to correct it (see, for instance, *Cranfield* 2013-UNAT-367, *Kule Kongba* 2018-UNAT-849), which he promptly did so on 17 July 2017, just five days after the OIC's approval. It follows that the recommendation to extend the Applicant's appointment to 30 June 2018 was not approved. The Appeals Tribunal has held that a recommendation for the extension of a contract cannot be construed as an "express promise" giving rise to contractual

obligations (*Kellie* 2018-UNAT-875). The Tribunal further notes that no letter of appointment was issued extending the Applicant's appointment to 30 June 2018.

28. In these circumstances, a PA notification which was erroneously raised by MINUSCA HR, or the extension of a security pass do not create an express promise or a legitimate expectation of renewal of appointment. Accordingly, the Tribunal finds that the recommendation to extend the Applicant's appointment to 30 June 2018 and the erroneous approval by the OIC of Mission Support cannot be understood to create a legitimate expectation of the renewal.

29. The Tribunal notes that there was maladministration in terms of delay in communicating the error to the Applicant and the Respondent has provided compensation to the Applicant in that respect. MEU acknowledged an undue delay in notifying the Applicant of the Director of Mission Support's 17 July 2017 decision to recommend that the Applicant's appointment be renewed until 30 September 2017 rather than 30 June 2018. The decision was only communicated to the Applicant on 13 September 2017. Although the failure to notify the Applicant that his appointment would not be extended to 30 June 2018 was a regrettable oversight, this issue has been addressed by the MEU, with the Applicant receiving compensation of an additional one month net base salary for the maladministration in his separation.

30. Furthermore, the Tribunal agrees with the Respondent that renewal of the Applicant's appointment to 30 June 2018 was barred by ST/AI/2010/4/Rev.1. The Applicant was appointed on the temporary appointment on 26 February 2017. According to staff rule 4.12(a) and sec. 2.1 of ST/AI/2010/4/Rev.1, a temporary appointment may be granted for a single or cumulative period of less than one year. Any extension beyond 26 February 2018 could only have been made exceptionally and under restrictive conditions, as per the terms of sec. 14 of ST/AI/2010/4/Rev.1 (emphasis in the original):

Exceptional extension of a temporary appointment beyond the period of 364 days

14.1 A temporary appointment may exceptionally be extended beyond 364 days, up to a maximum of 729 days, under the following circumstances:

(a) Where a temporary emergency or a surge requirement related to field operations unexpectedly continues for more than one year;

(b) Where a special project in the field or at a headquarters duty station unexpectedly continues for more than one year;

(c) Where operational needs related to field operations, including special political missions, unexpectedly continue for more than the initial period of 364 days.

31. This wording makes it clear that an exceptional extension under sec. 14 may only be granted on the basis of unexpected operational needs. The Dispute Tribunal has emphasized that it is for the Organization to determine if these exceptional circumstances are present (*Masyllkanova* UNDT/2014/137). As a matter of principle, the Tribunal shall not substitute its judgment to that of the Secretary-General in this respect. The Respondent submitted that there were no exceptional circumstances in the Applicant's case. There was no temporary emergency or surge requirement related to field operations unexpectedly continuing for more than one year. The Hard Wall Project was an existing project without a surge requirement. The Respondent submitted that there were no operational needs requiring the Applicant beyond one year since those functions were to be performed by an existing contractor.

32. The Applicant has failed to provide any evidence to the contrary. Although the Applicant believes that his services were required beyond 364 days, this is not sufficient to meet the restrictive conditions of sec. 14 of ST/AI/2010/4/Rev.1. In the Tribunal's view, regardless of the possibility that the Applicant's services may have made a positive contribution to MINUSCA's mandate, it is the Organization's discretion to determine whether unexpected operational needs require a departure from the general rule that temporary appointments are not to be extended beyond 364 days.

In the case at hand, the Tribunal finds no evidence to support the Applicant's contention that the criteria of sec. 14 had been met, including within the written recommendation for extension of the Applicant's appointment submitted by his Programme Manager on 30 June 2017. Therefore, the Tribunal finds no basis for which the Applicant's temporary appointment could have not been exceptionally extended beyond 364 days.

Did the loan agreement create a legitimate expectation of renewal?

33. The Applicant further states that he had a legitimate expectation for renewal on the basis of the 22 June 2017 MINUSCA's agreement for the loan of a post from the Service Delivery Section to the Engineering Section for the period 1 July 2017 to 30 June 2018 which would be used to fund his position through to 30 June 2018.

34. The Tribunal finds no merit to this claim. A loan of a post from one department to another does not constitute an express promise decision to renew an appointment. The Director of Mission Support signed the loan agreement prior to the Fifth Committee's reduction in MINUSCA's 2017-2018 budget and the USG/DFS's instruction to reduce MINUSCA's expenditure. Following the USG/DFS's instruction, the Administration reasonably decided that there was no need to borrow the post after the Director of Mission Support determined that MINUSCA would not retain the Applicant due to the budget cuts.

35. It is quite clear from the evidence that MINUSCA's difficult budgetary situation was the primary reason not to extend the Applicant's appointment beyond 30 September 2017. Given MINUSCA's reduced budget for the 2017-2018 year, the shortfall in the budget for staffing costs faced by the Mission particularly with respect to temporary appointments, and the instructions of 29 June 2017 from the USG/DFS to formulate a plan for reduced expenditure, the Tribunal finds that the Director of Mission Support acted within his reasonable discretion to extend the Applicant's

appointment only until 30 September 2017. The Tribunal notes that the evidence on file shows that several contractors within the Applicant's section were also affected by the budget cuts with their appointments not being renewed.

36. Although the Applicant is clearly disappointed by the situation, the circumstances of the case and evidence on file confirm that decision of non-renewal was a proper exercise of discretion in light of the MINUSCA's budgetary situation.

Was MINUSCA's decision to outsource the Hard Wall Project unlawful?

37. The Applicant claims that MINUSCA's decision to outsource the Applicant's functions within the Hard Wall Project for which he was recruited was unlawful and therefore tainted the contested decision. The Respondent submitted in his reply that the Applicant's challenge to the outsourcing decision is not receivable *ratione materiae*. The Applicant did not seek management evaluation of that decision in accordance with staff rule 11.2(a).

38. The Dispute Tribunal's role is to examine the legality of the decision contested in a staff member's request for management evaluation. Since the Applicant did not seek management evaluation of that decision in accordance with staff rule 11.2(a), the Tribunal agrees with the Respondent that a claim in respect of the decision to outsource the Hard Wall Project is not receivable as a stand alone claim. Nevertheless, it falls within the role of the Tribunal to examine whether countervailing circumstances or improper motives existed in the decision making process may have tainted the challenged decision with illegality. In this regard, the Dispute Tribunal has stated in its jurisprudence that "even though the staff member does not have a right to the renewal of his or her contract, that decision may not be taken for improper motives. The Dispute Tribunal is therefore required to consider whether the motives for the decision were proper" (*Azzouni* UNDT/2010/005). Since one of the grounds of the decision not to renew the Applicant's temporary appointment beyond 30 September 2017 is the

decision to outsource the Hard Wall Project, the Tribunal will examine the reasonableness of this decision.

39. The Respondent submitted that the decision to outsource the Hard Wall Project was in accordance with General Assembly resolutions 55/232 and 59/289, and ST/IC/2005/30 (Outsourcing and impact on staff). The Respondent explained that finding the most cost-effective and efficient means of completing the Hard Wall Project was not only crucial given MINUSCA's reduced budget, it was also critical to the safety and security of its uniformed personnel. Military and police personnel had been living in rudimentary conditions for an extended period. The Organization had committed to providing hard wall accommodation to participating contingents within six months of their initial deployment. By early June 2017, it was apparent to MINUSCA leadership that the Hard Wall Project was neither cost-effective, nor efficient. On 21 July 2017, the Director of Mission Support wrote to the Deputy of Mission Support stating:

Considering that the proposal for construction of Hard Wall accommodation was approved by the Under Secretary-General of the Department of Field Support on 04 July 2016 and recalling that I issued instruction in this regard on 14 July 2016, it is very disappointing to note that as of today (more than 12 months later) not one single building has been completed under the auspices of the 'Youth at Risk Project' under supervision of the Chief Service Delivery, who reports to you as Deputy Director of Mission Support.

40. By mid-July 2017, MINUSCA was confronted with budgetary cuts and MINUCSCA continued to face challenges with the efficient completion of the hard wall project. The Respondent submitted that by this point, MINUSCA was facing a USD30 million shortfall in staffing costs. MINUSCA had almost USD10 million available to it under existing multi-year construction contracts which needed to be committed to task and purchase orders before 30 June 2017. If not utilized, the funds would have been liquidated. Thus, MINUSCA used these funds by utilizing an existing contract for the Hard Wall Project and reduced its costs by not renewing the

Applicant's appointment. MINUSCA leadership therefore decided that outsourcing would be more cost-effective and efficient. The Respondent submitted that the Hard Wall Project was outsourced to experienced existing contractors with the requisite technical skills who had completed similar projects with MINUSCA, and their services were not needed on a long-term basis. The outsourcing did not compromise the safety and security of staff, nor undermine the international character of the Organization. Whilst the impact on staff was considered, the Applicant's status as a temporary appointee with no legitimate expectation of renewal, had to be balanced against the need for cost-effectiveness and efficiency, particularly given the budget reductions that MINUSCA faced, and the safety and security of uniformed personnel living and operating in challenging conditions.

41. Based on the above, the Tribunal is satisfied that the decision to outsource the Hard Wall Project was reasonable exercise of the Secretary-General's discretion in operational and budgetary matters. Considering the particular circumstances of the present case, the Tribunal finds that the reasons provided by the Respondent for the outsourcing decision are both credible and lawful. While the Applicant raises issue with the appropriateness of the decision arguing that the decision to close the "Youth at Risk" project and outsource the Hard Wall Project was not taken properly, he fails to provide any evidence that it was unlawfully taken or tainted by improper motives. The Applicant explains that he left a job with United Nations Development Fund to work on the "Youth at Risk" project specifically because of the scale and interest of the project and its likely duration. He states that at the outset of the project the capacity building and conflict reduction benefits associated with the project proposal were considered to justify a higher cost and timeframe. The Applicant contends, *inter alia*, that MINUSCA did not properly weigh all the initial considerations for the project such as environmental benefits from the construction methods to be used, nor did MINUSCA make consideration for the impact on staff members of any outsourcing decision – in this respect he states that he could have assisted with a partially outsourced project.

42. It is clear that the Applicant had commendable commitment to the Hard Wall Project and had hoped to work on it for a longer period. However, as the Applicant himself acknowledges in his submission dated 20 March 2020, the decision to outsource the project was within MINUSCA's discretion. His views as to whether the outsourcing decision was taken properly are irrelevant to its lawfulness. As the Applicant fails to provide any credible evidence that the decision was arbitrary or tainted by extraneous factor he fails to meet his burden in respect of this matter.

43. Since the decision to outsource the Hard Wall Project was reasonable, none of the grounds invoked by the Applicant against the decision not to renew his temporary contract are founded.

Conclusion

44. In light of the foregoing, the application is dismissed.

(Signed)

Judge Joelle Adda

Dated this 12th day of May 2020

Entered in the Register on this 12th day of May 2020

(Signed)

Nerea Suero Fontecha, Registrar, New York