Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

PIERRE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Sètondji Roland Adjovi

Counsel for the Respondent:
Nusrat Chagtai, AAS/ALD/OHR

Introduction

1. On 16 September 2019, the Applicant, a P-3 Civil Engineer, working with the United Nations Multidimensional Stabilization Mission ("MINUSMA") in Kidal, Mali, filed an application before the Dispute Tribunal contesting a one-month extension of his fixed-term appointment ("FTA") until 31 July 2019.[1]

2. The Respondent filed a reply on 17 October 2019 in which it is argued that the application is not receivable *ratione materiae* and, if found receivable, then the extension of the Applicant's appointment for one month was lawful.

3. The Tribunal held a case management discussion on 29 October 2019 and received further submissions on the question of receivability and formulation of the claim. Subsequently, on 25-26 March 2020; 9 April 2020 and 29 April 2020 a hearing was held on the merits. The parties filed their closing briefs on 22 May 2020.

RECEIVABILITY

Respondent's submissions

4. The Respondent submits that the application is not receivable *ratione materiae* because the one-month extension of the Applicant's contract is not a reviewable administrative decision within the meaning of art. 2.1(a) of the Statute of the Dispute Tribunal. Decisions that extend an appointment, even on short-term basis, are in the staff member's favour and do not adversely affect their rights. Since on 1 July 2019, MINUSMA extended the Applicant's appointment monthly and did the same on 1 August and 1 September 2019, the contested decision did not impact on the Applicant's employment contract or terms of appointment.

5. The Respondent also submits that the application has been rendered moot, given that the contested decision has been superseded by subsequent extensions on 1

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[1] Application, section V.

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. Whereas subsequent to the contested decision his appointment was renewed for short periods, and, finally, until the end of the Mission's funding cycle, the decision had been an element of ongoing harassment to which he had been subjected for two years. A sequence of one-month extensions had an adverse impact on his daily life, as they added to his stress level due to the job insecurity while he was on extended medical leave outside the mission.

8. The Applicant demands compensation for financial and moral damages suffered. As such, he maintains that the dispute remains active notwithstanding that he has now been granted a longer appointment.

Considerations

9. The Tribunal recalls its Order No. 202 (NBI/2019) where it noted that the Tribunal's jurisdiction is strictly limited to the decision impugned in the application, i.e. extension of appointment from 1 to 31 July 2019. The subsequent decisions are outside the Tribunal's jurisdiction. This said, obviously, the Applicant is not contesting the fact that the appointment has been extended as such, but, rather, that the extension

[2] *Messinger* 2011-UNAT-123, para. 25.
[3] Respondent's response to Order No. 004 (NBI/2020), filed on 16 January 2020.

was only until 31 July 2019. Such decisions, which imply refusal to grant a regular length of appointment, were accepted in UNAT jurisprudence as reviewable on the merits.[4] The Applicant's main claim was to have his appointment extended for a year. In regard to the main claim, therefore, the Tribunal agrees that the application has become moot.

10. The Applicant, however, since the beginning has been claiming compensation for harm caused by what he alleges to have been an improperly motivated decision. He claims having suffered both moral and financial loss from it and offered evidence on the same. This claim has not been satisfied and constitutes a live dispute before the Tribunal.[5] The Applicant's case is not moot in its entirety.

11. Regarding the Respondent's argument about a lack of the Tribunal's 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), the Tribunal feels compelled to dwell a bit on the Respondent's arguments in order to dispel a potential confusion.

12. At the outset, the Tribunal recalls that art. 2.1(a) of the UNDT Statute provides that the Tribunal shall be competent to hear and pass judgment on an application […]

> To appeal an administrative decision that is alleged to be in noncompliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged noncompliance […].

13. The competence of the Tribunal is determined by the UNDT Statute alone and this competence does not fall to be modified by administrative issuances; likewise, the latter must not be attributed legal effect inconsistent with the Statute. Several consequences stem from this for the relation between UNDT proceedings and

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[4] See e.g., *Appellee* 2013-UNAT-341.
[5] *Kallon* 2017-UNAT-742, *Lahoud* UNDT-2017-009.

proceedings under ST/SGB/2008/5. The considerations here are relevant also for proceedings under section 5.6 of ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority), which now superseded ST/SGB/2008/5.

14. First, in the aspect of subject matter jurisdiction, as long as the application is against a "decision that is alleged to be in noncompliance with the terms of appointment or the contract of employment", the UNDT Statute does not exclude from the jurisdiction of the Tribunal any decision based on its particular content. Specifically, if an administrative decision related to terms of appointment or the contract of employment constituted in itself an act of harassment, discrimination or abuse of authority, such decision would not be removed from the UNDT's competence solely because it bears characteristics of harassment, discrimination or abuse of authority. Furthermore, given that every United Nations staff member has the right to work in an environment free from discrimination, harassment and abuse (ST/SGB/2008/5, section 2.1), a decision of such an abusive effect could readily be challenged as contradicting the terms of appointment or the contract of employment. Therefore, to the extent the Respondent suggests that the UNDT would generally not be competent to deal with complaints of harassment and discrimination, it is inaccurate.

15. Second, art. 2 of the UNDT Statute determines expressly and exhaustively the impact of administrative proceedings on matters falling under UNDT jurisdiction. The UNDT Statute provides that the impugned decision must be submitted for management evaluation, where required. The UNDT Statute does not, however, require "exhausting internal remedies of ST/SGB/2008/5".

16. Furthermore, analysis of ST/SGB/2008/5 demonstrates that UNDT proceedings and administrative proceedings under ST/SGB/2008/5 have different functions and are largely independent from each other. Harassment, discrimination or abuse of authority are committed not only by discrete administrative decisions but also by other actions, often forming a pattern of behaviour giving rise to difficult and complex factual inquiries. Proceedings under ST/SGB/2008/5 serve the purpose of

establishing whether there is a basis for instituting corrective and preventive measures foreseen therein and reestablishing a healthy workplace.

17. Conversely, proceedings before UNDT are focused on the validity of an administrative decision, designed to be quick and document-based and use a different distribution of proof, in that an applicant who alleges that a decision constituted harassment, discrimination and abuse of authority carries a burden of proving it.[6] As such, the UNDT is indeed not equipped to conduct investigations, in the sense of ST/SGB/2008/5, into allegations of harassment, discrimination and abuse of authority, just as it has no competence to pronounce on the corrective, preventive, or monitoring measures foreseen in ST/SGB/2008/5. Compared with proceedings under ST/SGB/2008/5, an individual applicant before the UNDT may be less equipped to establish facts of harassment to the required standard; as noted in *He* 2016-UNAT-686: "Such a challenge invariably will give rise to difficult factual disputes. The mental state of the alleged perpetrator will usually be placed in issue and will have to be proved on the basis of circumstantial evidence and inference drawn from that evidence." On the other hand, though, an applicant before UNDT, who has an interest in challenging a discrete administrative decision is bound to bring his/her action within the statutory deadlines, and thus, not only is not obligated, but above all may simply have no time, to institute ST/SGB/2008/5 proceedings, let alone wait for the outcome. However, as confirmed by the Appeals Tribunal, "[a]s part of its judicial review, it is necessary to determine whether the decision was vitiated by bias or bad faith, that is, if it was taken for an improper purpose".[7]

18. All considered, for the purpose of assessing the validity of a decision concerning the terms of appointment or the contract of employment, the Tribunal is competent to independently establish all facts relevant for the proceedings before it, without being formally limited or bound by either the pendency or the outcome of proceedings under ST/SGB/2008/5.

[6] E.g., *Azzouni* 2010-UNAT-081; *Liu* 2016-UNAT-659; *Assale* 2015-UNAT-534.
[7] *Toure* 2016-UNAT-660, para.30.

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 individual who is pursuing corrective measures under section 5 of ST/SGB/2008/5, as well as the alleged offender, may appeal the outcome of the procedure on corrective measures under section 5.20 to UNDT. The latter, however, is a remedy particular to the avenue of proceedings pursuant to section 5 of ST/SGB/2008/5 and decisions issued thereunder. The same is confirmed by jurisprudence invoked by the Respondent: *Nwuke*[8] *Argyrou*[9], and *Symeonides* [10], in the latter case in particular, para. 33: "In other words, before a staff member may *file an ST/SGB/2008/5 complaint* with the UNDT, he or she must have exhausted the internal remedies set forth in the Secretary-General's Bulletin …(emphasis added)". The Tribunal moreover takes note of the *Luvai*[11] judgment, where the Appeals Tribunal stated that the Dispute Tribunal lacked jurisdiction to *pronounce* i.e., rule on it in the operative part of the judgment[12] on harassment allegations when the applicant failed to file a complaint under ST/SGB/2008/5.This does not mean that the Dispute Tribunal would not be competent to make a finding of an improperly motivated decision for the purpose of rescinding it.

21. In conclusion, no law renders ST/SGB/2008/5 proceedings an obligatory stage for an application which alleges that the impugned decision constituted an act of

[8] 2010-UNAT-099.
[9] 2019-UNAT-969.
[10] 2019-UNAT-977.
[11] 2014-UNAT-417.
[12] See para 136 of UNDT/2013/035.

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 Johannes Dreyer who was his First Reporting Officer ("FRO") while his Second Reporting Officer ("SRO") was Anton Antchev, the Chief Engineering Section. During the period 2018/2019, the Applicant's FRO was Hendrik Rudolf Stassen and subsequently Michael Dorn, the Regional Administrative Officer. The SRO, in turn, was Johannes Dryer and, since June 2019, this function was taken over by Hendrik Rudolf Stassen, the author of the impugned decision. The Applicant indicates the arrival of Mr. Stassen and Mr. Chadha, Chief Service Delivery, in February-March 2017 as marking the beginning of a workplace conflict.[15]

26. While based in Bamako, the Applicant was managing a multi-million-dollar project for rehabilitating the runway in Gao in the Northern Region of Mali. The project had taken several years, since 2014. The Applicant avers that in relation to this work he had received threats of a nature of anonymous emails, religious attacks, quotes from

[13] Application, section VII, para 3.
[14] Confirmed by the parties during the case management discussion held on 29 October 2019.
[15] Applicant's testimony, 25 March 2020; Stassen's testimony 26 March 2020.

the Koran, innuendos about his beliefs, acquaintances and relationships. In March 2017, the Office of Internal Oversight Services ("OIOS") undertook investigations, partly into these threats. Despite what the Applicant terms as "serious threat and while the investigations were not yet concluded", in March 2017, his supervisors decided to redeploy him from Bamako to Gao.[16]

27. The Applicant objected to the redeployment citing the threats and difficulty to manage business in Gao.[17] Between March-October 2017, a series of inter-office memoranda were exchanged between the Applicant and his supervisors regarding the decision to redeploy him to Gao.[18] On 16 October 2017, the Applicant and his supervisors agreed that the Applicant would redeploy to Kidal, instead of Gao and the relocation would be delayed until July 2018, that is, after the presumed finalization of the Gao airfield.[19]

28. On 29 December 2017, notwithstanding the previous agreement, the Applicant received a notification from Mr. Dreyer, Chief Engineering Section, MINUSMA, informing him that his redeployment to Kidal would commence on or before 15 January 2018.[20] The Applicant maintains that the real decision maker in this case was Mr. Chadha, Chief Service Delivery, who did not understand the nature of the work and where the interest of the Mission was. It would have been out of established practice among engineers to decide such a move without consultation and against the needs of the project.[21] The Applicant's superiors, in turn, explained that the reason for insisting on redeployment was compliance with the guidelines on turnaround of international staff on a one-year cycle.[22] Mr. Chadha specified that there was a need to move a female staff member out of Kidal and the Applicant was the only person who could be deployed, as everyone else in the Engineering Section had already been on rotation. Moreover, based on his professional experience and in accordance with the

[16] Application, section VII, paras 4-7; Application, annex AO8.
[17] Application, section VII, para 7.
[18] Application, annex A09.
[19] Application, section VII, para 9.
[20] Application, section VII, para 9-10; Application, annex AO10.
[21] Applicant's testimony on 25 March 2020.
[22] Stassen testimony, 26 March 2020, Chadha testimony 9 April 2020.

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 evaluated based on his work in Kidal.[28]

31. The Applicant maintains that after moving to Kidal, he never got the support he requested from his supervisors, no matter whether materials, equipment or personnel. This became disheartening and he was not able to deliver on the project. Mr. Dorn describes the Applicant in the first months as depressed, disappointed and demoralized, to the extent that he sought for the Applicant a consultation with the staff counsellor. Mr. Dorn confirms that there were problems with supplies, he however attributes them to normal difficulties arising in a war zone in Africa. He further describes that, since the Applicant refused to communicate with Messrs. Stassen and Chadha, all communication from the Headquarters had to go through him. Mr. Dorn

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[23] Parties Joint Trial bundle p 141.
[24] Chadha testimony on 9 April 2020.
[25] Application, Annex AO11.
[26] Ibid.
[27] Application, section VII, para 12.
[28] Dorn testimony on 29 April 2020.

was consulted by Mr. Stassen about a reconciliatory proposal to start on a clean slate with the Applicant. [29]

32. On 12 February 2019, Mr. Stassen requested the Applicant to provide input for a report on the Gao airfield, to which the Applicant refused claiming that he had handed over the project and no longer had access to files.[30] The exchange developed and on the next day Mr. Stassen wrote

> "Dourrho, you have all the information and experience to be able to answer these particular questions. Please indicate a day when this information will be given".

33. On 14 February 2019, the Applicant replied by email reflected below.[31]

> **To:** Hendrik Rudolf Stassen <stassen@un.org>
>
> **Cc:** Lieneke Joanna Catharina Slegers <slegers@un.org>; Naveed Ahmed <ahmed.naveed@un.org>; Rajesh Chadha <chadhar@un.org>; Michael Dorn <dorn@un.org>; Johannes Dreyer <dreyerj@un.org>; Carl Rhodes <rhodesc@un.org>
>
> **Subject:** RE: Final narrative report - Gao airstrip rehabilita5on (sic)
>
> Of course, I have not only the expertise and experience but the network to manage airfield infrastructure projects. Something you should have remembered during the execution instead of endorsing the moronic idea to have me reassigned before, during and at the end of rehabilitation works. No matter the consequences.
>
> All hard copies and electronic files have been handed over more than four months ago, as requested in several emails and memoranda. No way for me to prepare the report under the circumstances. Please organize yourself to draft the document for my review over the weekend. I will try to correct and make general comments with respect to lessons learned and project management.

34. On 14 February 2019, Mr. Stassen responded stating that the Applicant was disruptive, unprofessional and arrogant. He also indicated that he would formally request the First Reporting Officer to place him on a PiP "so as to assist him get a better

[29] Dorn testimony on 29 April 2020.
[30] Ibid, para 13.
[31] Parties Joint Trial Bundle, page 87.

understanding of professionalism, human interactions and communication".[32]

35. The Applicant, however, was never placed on the PiP.[33] The Applicant's performance appraisals always found him fully competent.[34] His ePAS for 2018, evaluated by Mr. Dorn (the FRO) and in 2019 as were done by Mr. Stassen (SRO) and also found the Applicant fully competent. The Applicant, however, obtained a "requires development" score for communication, to which he objected.[35] The Applicant maintains that his ratings were the "minimum" that Mr. Stassen could give him and do not reflect neither the extent of his outputs nor obstacles encountered from Messrs. Stassen and Chadha, in the form, among other, of nagging about reassignment. The real sentiment, according to the Applicant, that Mr. Stassen held toward him is expressed by a threat of putting him on a PiP.[36]

Facts surrounding the impugned decision

36. On 7 May 2019, the Applicant applied for annual leave and an additional eight weeks of special leave without pay ("SLWOP").[37] This coincided with Mr. Dorn's departure from the Mission.[38] The annual leave was approved on 8 May 2019 to run until 9 July 2019, the period beyond the expiration date of the Applicant's appointment which was set on 30 June 2019.[39] Mr. Stassen was not part of the approval process for annual leave.[40]

37. The Applicant's 7 May 2019 request for SLWOP that was addressed to the OIC Administration, Sector North read:

> "As you know my relationship with Chief Service Delivery and Deputy Chief Engineer MINUSMA is dreadful to say the least. More than 6 months after my reassignment, the environment remains extremely

[32] Application, annex AO5.
[33] Respondent's Response to Order No. 14 (NBI/2020), para 1.
[34] Parties Joint Trial Bundle, pages 173-223.
[35] Ibid.
[36] Applicant's testimony on 25 March 2020.
[37] Application section VII, para 14, Application annex AO13.
[38] Dorn's testimony on 29 April 2020.
[39] Respondent's Response to Order No. 014 (NBI/2020), filed on 30 January 2020, para (c).
[40] Kazirukanyo testimony on 25 March 2020, Stassen testimony on 26 March 2020.

> 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 extension[46], which now forms the basis of the case.

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

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[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.
[46] Application, annex AO1, Parties Joint Trial Bundle, page 78.

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 2019[49], signed by Mr. Stassen as SRO on 29 July 2019 and, last, by the Applicant on 7 August 2019.[50]

41. The Applicant remained on annual leave until 9 July 2019. On 10 July 2019, the Applicant used his floating holiday entitlement. On 11 July 2019, the Applicant informed the MINUSMA Human Resources by email:[51]

> N'ayant reçu aucune réponse officielle à ma demande de congés sans solde, je souhaite vous informer que mon état de santé ne me permettra pas de reprendre le service le 12 juillet, voir les pièces jointes. J'ai rendez-vous avec mon médecin de famille en Floride et un certificat médical parviendra à la MINUSMA sous peu.De surcroit mon contrat ayant expiré le 30 juin 2019 je me permet de vous signaler qu'il ne me sera difficile d'embarquer sur un vol a destination du Mali avec un passeport américain, sans UNLP ou autre justificatif de travail.[52]

42. Between 11 and 15 July 2019, the Applicant was on uncertified sick leave. On 16 July 2019, the Applicant commenced certified sick leave, of which, however he did

[47] Stassen testimony on 25 March 2020.
[48] Reply R/9, Parties' Joint Trial Bundle, page 177, testimony of Mr. Dorn on 29 April 2020.
[49] Application, annex AO1.
[50] Parties' Joint Trial Bundle, page 177.
[51] Ibid., page 81.
[52] "I have not received an official response to my request for leave without pay. I wish to inform you that my state of health will not allow me to return to work on 12 July. I have an appointment with my family doctor in Florida and a medical certificate will be sent to MINUSMA shortly. In addition, considering that my contract expired on 30 June 2019, I would like to inform you that it will be difficult for me to board a flight to Mali with an American Passport, without UNLP or other proof of employment."

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 ("DHMOSH") on 6 September 2019. Thereafter, the DHMOSH approved the Applicant's sick leave on a monthly basis after the Applicant's submission of medical reports.[58]

45. The Applicant's appointment was again extended on 1 August and 1 September 2019 (without apparent impulse from Mr. Stassen), and again for two months from 1 October to 30 November 2019.[59]

46. The reason for these short-term extensions advanced from the administration's side vary. Regarding the second extension, from 1 until 31 August 2019, processed on 31 July 2019[60], Ms. Kazirukanyo testified that this was because the ePAS had not been completed yet. This is inaccurate in light of Mr. Stassen's testimony that appointments

[53] Ibid., para. e; Applicant's submissions pursuant to Order No. 014 (NBI/2020), filed on 7 February 2020, para (e).
[54] Application, annex 7.
[55] Application, annex AO12.
[56] Applicant's testimony on 25 March 2020.
[57] Parties' Joint Trial Bundle, page 87.
[58] Reply, R/8.
[59] Application, annex AO2,
[60] Parties' Joint Trial Bundle, page 69.

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] The latter contention is questionable, given that as per Mr. Stassen and Ms. Kazirukanyo, they maintained a dialogue regarding the Applicant's contract extensions; the duration of leave could have been easily ascertained through human resources; moreover, the Applicant's SLWOP request stated explicitly that he proceeded on leave. The Tribunal takes it that Ms. Kazirukanyo testified without proper recollection or prior verification of the facts, which attitude on the part of an HR officer testifying on matters within his/her portfolio should be discouraged. However, the fact remains that until 30 August 2019, the Applicant's absence from work was uncertified and he did not reply to various inquiries from the Mission. Subsequent short-term extensions were justified by awaiting further certifications of sick leave.

47. On 1 December 2019, when the Applicant's absences had been certified up to date, his appointment was renewed until 30 June 2020, in accordance with the funding cycle for the position.[62]

Facts related to the Applicant's health

48. The Applicant maintains that while in Kidal, he experienced severe distress, including insomnia, obsessive thoughts, low morale and was not able to focus which affected his ability to function in any professional capacity.[63] He testified, nevertheless, that before July 2019, he had never had a reason to seek therapy or consult a psychiatrist, even though frequent rest and recuperation breaks provided opportunity. Neither did he consult a stress counsellor who was available in the Mission.[64] The Applicant maintains that he learned about the one-month extension, through Umoja, on or about 19 July 2019, as stated in his application. He did not inquire with the

[61] Kazirukanyo testimony on 25 March 2020, Stassen Testimony on 26 March 2020.
[62] Reply, R/5.
[63] Application, section VII, para 14.
[64] Applicant's testimony, 25 March 2020.

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.

<u>Submissions</u>

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 for a service of a prescribed duration. It is a well-established practice in the Organization to grant a fixed-term appointment or an extension of such an appointment for at least 12 months except in unique circumstances, such as poor performance, disciplinary sanction or time-limited need.

51. The Applicant contends that none of these circumstances apply to his case. Rather, the decision to extend his appointment for one month, twice, was an element of ongoing harassment to which he had been subjected since 2017. The factual situation

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

are subject to evaluation for reasonableness, lack of arbitrariness or improper purpose.[65] Where discretionary decision is said to be based on certain reasons, the reasonableness of the decision becomes subject to evaluation against the reasons provided. The Tribunal finds that the jurisprudence on non-renewal of appointment, which mandates providing reasons on a staff member's or the Tribunal's request[66], is equally applicable to the situation contemplated here, that is, an extension for an unusually short time. Failure to provide reasons or their incoherence may give rise to negative inferences about improper purpose of the decision.

56. To the extent the Applicant interprets improper purpose from the fact of delay in renewing the appointment, i.e., the interval between the initiation of the process by MINUSMA Human Resources on 27 May and the actual signing of the recommendation on 13 June 2019, the Tribunal finds this aspect of the case sufficiently explained by the necessity to seek inputs in the ePAS, especially Mr. Dorn's as FRO. In this respect, Mr. Dorn testified that ePAS had been initiated earlier but, because of the absence of both him and the SRO from the Mission, the process needed to be repeated and, in June, Mr. Stassen reached out to him and urged him to complete the SRO's part. The Tribunal considers this explanation plausible and finds no support for an ulterior motive.

57. As concerns the short-term extension, the Tribunal recalls that a recognized reason for short-term renewals is poor performance and pendency of rebuttal processes.[67] A mere doubt as to performance or incompleteness of ePAS have not been contemplated in the jurisprudence as reason for non-extension or a short-term extension of appointment. It is however, an admitted fact that the established practice at the Applicant's Section required at minimum an FRO's endorsement to obtain a recommendation for extension of appointment. This rule was not invented for the purpose of discriminating against the Applicant and is not unreasonable *per se*.

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[65] *Sanwidi* 2010-UNAT-084, para 30.
[66] *Obdeijn* 2012-UNAT-201, para. 37; see also *Lauritzen* 2013-UNAT-282, para. 35; *Pirnea* 2013-UNAT-311, para. 33
[67] Sec. 15.6 of ST/AI/2010/5 (Performance Management and Development System).

58. Taking this as a premise that the condition for an extension of "normal" duration was a positive evaluation by the FRO, this condition was not met at the time of Mr. Stassen's recommendation of 13 June. It happened only on 18 June with the signature of Mr. Dorn while the extension was not processed until 8 July. The question, therefore, is whether Mr. Stassen should have exceptionally extended the Applicant's appointment notwithstanding the lack of FRO's input; alternatively, whether having obtained the FRO's input Mr. Stassen should have undertaken an effort to properly extend the Applicant's appointment for a year.

59. Noting that neither the exception nor additional effort was made, the Tribunal, however, would hesitate to impugn the decision on this score. It recalls that there were indeed unsolved issues about the designation of the SRO, at the same time retracting the previous recommendation and, possibly, reversing administrative actions meanwhile undertaken - which, as testified to by Ms. Kazirukanyo, involved the Regional Support Centre in Entebbe - could delay the process. On the other hand, if not for the Applicant's sickness and lack of communication with the Mission, the whole issue could have been clarified and limited to a one-time hiccup in the rhythm of the Applicant's extensions. Thus, not excluding that an alternative course of action could have been possible, the one actually taken does not disclose lack of reasonability under the circumstances.

60. In summing, the impugned decision is not unlawful.

Whether the decision was improperly motivated

Submissions

Applicant's submissions

61. The Applicant submits that the impugned decision was a part of continual harassment carried out by Mr. Chadha, Chief Service Delivery Management, and Mr. Stassen, Acting Chief Engineering Section. The two officers, holding leadership positions, were retaliating against the Applicant due to his resistance to a premature

and ill-advised decisions on reassignment to another duty station. The one-month extension of his appointment constitutes a retaliation and abuse of their managerial authority that negatively affected his job security, when he had done nothing wrong.

62. The harassment persisted to the point where Mr. Chadha exerted pressure on the Applicant's FRO to put the Applicant on a PiP. Pursuant to ST/AI/2010/5 (Performance Management and Development System), sections 5 and 10 and other relevant sections on performance improvement plan, a PiP can only be designed by the FRO in response to shortcomings in a staff member's performance. In the instant case, the initiative and discussion of placing the Applicant on a PiP was stimulated by Mr. Chadha; thus, the process did not follow the rules. Similarly, Mr. Stassen, via an email, directly threatened the Applicant with placing him on a PiP, six weeks before the end of the performance cycle as if it were a disciplinary measure.

Respondent's submissions

63. The Respondent's case is that the email exchanges from 2017 and 2018, which the Applicant relies upon, do not suggest that the contested decision taken in June 2019 was improperly motivated. Nor is there evidence of abuse of authority or harassment.

64. The Respondent maintains that the Applicant's reliance on the events prior to the contested decision, including his reassignment, as evidence of an ill-motive, has no merit. The reassignment decision was taken by the Applicant's previous SRO, Mr. Dreyer, in accordance with MINUSMA's Rotation Guidelines, which required the rotation of all staff in Kidal after one year. Moreover, Mr. Dreyer, the Applicant's SRO during the redeployment period, had no role in the one-month extension of the Applicant's contract.

65. With regard to the Applicant's claim that his SRO used a PiP as a disciplinary measure, it has no merit. The Applicant was never placed on the PiP. Although the Applicant's SRO raised a possibility of a PiP, this was never done. The SRO deferred the matter to the FRO, who was of the view that the Applicant should be given another chance.

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 persons who were not his FRO and without any apparent performance-related reason; on the other hand, the tone and language of the Applicant's email to Mr. Stassen, in copy to others, accusing him of "moronic ideas", was improper. On the one hand, the Applicant's refusal to communicate with his superior was unprofessional; on the other hand, there was no valid justification for not acting upon the Applicant's request for SLWOP, which should have been forwarded to the appropriate agency for decision and reasons cited for it taken seriously, instead of using pretexts for brushing the matter aside. The actions of the managers may have been indicative of a retaliatory climate, however, in situations like this it is difficult to distinguish the cause and the effect and the position taken by the Applicant was not reconciliatory, to say the least. Moreover, on the SLWOP issue the central role and responsibility lied with the CHRO, as well as in the advice on short-term extensions, and this office was not implicated in harassment allegations. Indeed, a thorough elucidation of allegations of harassment or retaliation would be better served by investigation by appropriate offices. The Tribunal concerns itself only with the decision subject to its jurisdiction.

67. The Tribunal considers, in any event, that for an administrative decision to be invalidated by improper purpose, such as harassment or retaliation, it is necessary to establish two elements: objective illegality and subjective reproachability. A motive alone does not suffice to strike a decision as illegal and accordingly does not give rise to a right to compensation. In relation to the only decision that the Applicant had

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 evidence establishing the necessary causality between the alleged harm and the contested decision.

70. The Respondent maintains that the evidence establishes that the Applicant's alleged medical condition was caused by events prior to June 2019. His FRO testified that when the Applicant arrived in Kidal, he was "depressed, angry and disappointed". Over two months before he learnt of the one-month contract extension, on 7 May 2019,

the Applicant applied for SLWOP due to stress. The Applicant's medical reports filed on 5 December 2019, make no reference to the one-month extension of his contract, but rather refer to events prior to the contested decision.

Considerations

71. Absent illegality of the contested decision, the Tribunal needs not entertain the compensation request. It nevertheless wishes to remark that it shares the Respondent's observations on the lack of causality between the impugned decision and the claimed damages. In addition to facts correctly pointed to by the Respondent, the Applicant, admittedly, had signaled his illness, need to seek medical advice and not returning to the Mission before he came to know of the one-month extension; this is also confirmed by his July 2019 email to the Mission which demonstrates his knowledge – erroneous - that the contract ended on 30 June. This email suggests that the impulse to seek medical help was lack of response as to the SLWOP request and not the matter of extension of appointment. Altogether, notwithstanding all the sympathy for the Applicant's condition, his claim to be compensated for the impugned decision has no basis.

72. As concerns other pleas advanced by the Applicant, the Tribunal has no jurisdictional capacity for "ordering the Administration to ensure the harassment ceases with a guarantee of non-repetition". Harassment at the workplace is prohibited by generally applicable rules. The Applicant has, and always had, available to him avenues under ST/SGB/2019/8 and recourse to the Ethics Office in the event of retaliation. This Tribunal, having pronounced on the impugned decision, is *functus officio* under art. 2 of its Statute.

73. Finally, absent illegality of the contested decision the Tribunal sees no basis for referring persons involved in it for accountability under art. 10 of the UNDT Statute. Neither are there grounds for referring for accountability Mr. Chadha or Mr. Stassen for the alleged "jeopardizing the first major airfield infrastructure project in the Mission and therefore, by extension, jeopardizing the mandate designed by the Security Council

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-General and then reviewed in the process of management evaluation. The Tribunal sees neither the purpose to be served by referring the matter for accountability nor basis to judge that the decisions of these individuals, even if requiring a degree of correction, were fundamentally inappropriate.

JUDGMENT

74. The application is dismissed.

(Signed)
Judge Agnieszka Klonowiecka-Milart
Dated this 24th day of July 2020

Entered in the Register on this 24th day of July 2020

(Signed)
Abena Kwakye-Berko, Registrar, Nairobi