



IN THE MATTER OF:

O.S., Applicant

v.

Chairperson of the African Union Commission, Respondent

FOR APPLICANT: *Pro se*

FOR RESPONDENT: Namira Negm, Legal Counsel, African Union Commission

BEFORE: S. MAINGA, President, A. NYIRENDA, and S. PEEROO¹

HEARD ON: 25 September 2020

JUDGMENT

Procedural and Factual History

1. On 10 April 2012, Applicant, a former Project Finance and Administrative Assistant with the African Court on Human and Peoples' Rights (ACHPR) filed an application contesting the decision to impose a disciplinary sanction against her. Applicant also complained that the Organisation failed to properly investigate her complaints of harassment, discrimination and abuse of authority.
2. On 4 May 2012, Applicant filed a second application contesting the implied refusal to renew her fixed-term appointment beyond its normal expiry. Applicant filed a third supplemental application on 25 June 2012, reiterating claims already advanced in her prior applications.
3. On 18 June 2018, Applicant was asked to submit a brief articulating with clarity the administrative decision(s) she contests in either application. Applicant submitted her brief on 12 July 2018. Respondent filed his Answer on 15 August 2018, to which Applicant replied on 9 September 2018.
4. Upon review of the documentary record, the Tribunal believes the facts and issues have been presented adequately in the pleadings and determines this matter without the need to invite the parties for oral hearing.
5. To the extent Applicant's complaints arose from similar factual background and raise related issues, the Tribunal has considered all the contested decisions together in the instant judgment. The relevant facts can be summarized as follows.
6. Applicant entered the ACHPR's workforce on 15 March 2010 on a fixed-term appointment as a Project Finance and Administrative Assistant for European Union Support Program. Her appointment was extended effective 10 April 2011 for a period of one year, ending 9 April 2012.

¹ Judge Sylvester S. Mainga was sworn in as African Union Administrative Tribunal Judge on 10 July 2019. He joins Judges Nyirenda and Peeroo in this judgment to permit conclusion of the proceedings in this matter under AUAT Statute art. 4(i).

7. On 15 November 2010, Applicant filed with the ACHPR President complaints of harassment, discrimination and abuse of authority against the Deputy Registrar, (Mr. R.E.), her first supervisor; (Mr. J.B.), the Acting Registrar, (Mr. A.D.); the EU Project Manager, (Mr. S.M.); and the Documentalist, (Mr. A.N.). In her concurrently filed complaints, Applicant considers herself to have been the victim of various instances of harassment, discrimination and abuse of authority.
8. Following attempts to informally resolve the complaints, the President responded to Applicant's complaints by a memorandum dated 21 February 2011. The President preliminarily observed that the staff members implicated in the complaints had either denied the allegations or that their acts were taken out of context. Further, the President indicated that he had cautioned the staff members to not engage in any behaviour that may be perceived as an act of harassment, discrimination or abuse of authority. He reassured Applicant to expect to be appraised objectively and to strive for improved working relationship with her colleagues.
9. On 14 February 2011, Applicant contested her performance appraisal for the period 10 April 2010 to 9 February 2011. The President assigned the Deputy Registrar to review the complaint. By memorandum dated 17 March 2011, the Deputy Registrar concluded that there was no irregularity in the evaluation process and no evidence of bias was found.
10. On 12 September 2011, the President constituted a committee of three ACHPR judges to review Applicant's complaints of harassment, discrimination and abuse of authority. At the time the Committee was formed, only two of the five responding staff members were in the service of the ACHPR, the other three having left the Organization in the meantime.
11. Following a hearing, the Committee concluded via a report signed on 30 September 2011 that no harassment, discrimination or abuse of authority had occurred. The President accepted the Committee's conclusions, and by a memorandum dated 18 October 2011, he transmitted to Applicant the Committee's report and his decision to close the complaints.
12. Based on evidence that surfaced during the Committee's hearing that Applicant had secretly recorded her meetings with the President and other staff members on three separate occasions, the President instructed the court's Human Resources Officer to initiate appropriate disciplinary proceedings. On 30 November 2011, Applicant was notified of the charges and impending disciplinary proceedings.
13. On 13 January 2012, the President established a disciplinary board to conduct a hearing on the charge of "secret tape recording of meetings with the President of the Court." On 2 February 2012, Applicant filed her response to the charges.
14. The disciplinary board scheduled a hearing on 24 February 2012, following an invitation sent to Applicant on 8 February 2012. On 9 February 2012, Applicant sent a memorandum to the board stating "I hereby inform the disciplinary board committee [sic] that as soon as I get the lawyer... the hearing of this case will then take place..." The hearing convened on 24 February 2012 was postponed to 2 March 2012 to enable Applicant find a legal representative.
15. On 27 February 2012, Applicant wrote to the board again stating that under Staff rule 59.14 "the hearing will take place when I will [sic] have an advocate to represent me."
16. When the disciplinary committee reconvened its hearing on 2 March 2012, Applicant, expectedly, appeared unrepresented, at which time the board informed her that the hearing would progress regardless. Not wanting to participate in the proceedings without the presence of a lawyer, Applicant excused herself from the hearing. The board proceeded to determine the charge of misconduct filed against Applicant.
17. At the close of the hearing, the board found Applicant guilty of misconduct and unanimously recommended to suspend Applicant without pay for a period of thirty (30) days. On 16 March 2012, Applicant was notified by the Registrar that the President had endorsed the disciplinary board's recommendations and decided to suspend her without pay through 9 April 2012.
18. On 19 March 2012, Applicant requested the President to review the suspension decision. The President responded on 27 March 2012, denying Applicant's request for review.

19. On 9 April 2012, the President sent Applicant a memorandum titled “End of Contract,” noting the expiration of Applicant’s fixed-term appointment on 9 April 2012. Applicant received a similar memorandum from the Registrar as well. On 10 April 2012, Applicant requested the President to reconsider the non-renewal of her appointment.
20. On 30 April 2012, Applicant wrote to the Registrar claiming two months’ salary in lieu of notice. In reply, the Registrar informed Applicant that “...unlike in a case of termination where notice is required, in a case where a staff executes their contract to its normal expiry date, as is the case with yours, there is no need for notice. I draw your kind attention to [Staff rule 33.3(iii)].”
21. Effective 9 April 2012, Applicant was separated from the ACHPR’s service.
22. Applicant filed the instant applications on 10 April 2012, 4 May 2012, and 25 June 2012, respectively. In her applications, she contends that her harassment, discrimination and abuse of authority complaints were not properly handled; that she was denied due process in relation to the disciplinary proceedings conducted against her; and her fixed-term was not renewed for improper reasons.
23. Respondent asks the Tribunal to dismiss the applications in their entirety. According to Respondent, Applicant’s complaints of prohibited conduct were properly addressed by the ACHPR. Respondent also submits that Applicant was properly disciplined for misconduct, and because she was a fixed term appointee, she was lawfully separated as she had no expectancy of renewal.

Discussion

24. In her first application, filed on 10 April 2012, Applicant contests the decision to close the investigation of her multiple complaints of harassment, discrimination, and abuse of authority. She also challenges the disciplinary decision taken against her for secretly recording the President. In her second Application, filed on 4 May 2012, Applicant contests the non-renewal of her fixed term contract beyond 9 April 2012. The third supplemental application, filed on 25 June 2012, reiterated the same claims, which the Tribunal deems duplicative of the first and second applications.

Failure to properly investigate claims of harassment, discrimination and abuse of authority

25. Applicant claims that the President mishandled her harassment claims and acted out of improper motivations when he concluded that no harassment had occurred. The Tribunal first looked at the timelines relating to Applicant’s complaints of various instances of prohibited conduct.
26. On 15 November 2010, Applicant submitted her complaints against five staff members who were either her first or second reporting officers. The President formally acknowledged the complaints and required all responding staff members implicated in the complaints to respond in writing.
27. On 14 September 2011, a committee of three judges was formed to consider the complaints of Applicant. The Committee thoroughly reviewed Applicant’s complaints and submitted its report to the President on 30 September 2011, concluding that no harassment or other prohibited conduct had occurred as alleged by Applicant.
28. Applicant indicates that she received the President’s decision regarding her complaints of harassment and other prohibited conduct on 18 October 2011. She filed her application on 10 April 2012. For an application to be receivable, a request for review must first be filed within thirty days, followed by additional thirty days in which to file an application with the Tribunal.² The period provided to her to bring a timely application ended on 17 December 2011. Therefore, this aspect of Applicant’s claims is time-barred.

The disciplinary action taken against Applicant

29. The disciplinary proceedings against Applicant were formally initiated by a memorandum of the President, dated 18 October 2011, citing the findings of the Committee set up to review Applicant’s harassment and related claims. Applicant submitted an explanatory response to the President.
30. On 13 January 2012, a disciplinary board was set up by the President. Applicant submitted her response to the disciplinary board on 2 February 2012. The disciplinary proceedings concluded on 2 March 2012.

² Staff rule 62.1; AUAT Statute art. 13.

31. In a disciplinary case, the Tribunal's role is to determine if: (a) the disciplinary proceedings were conducted in accordance with the principles of due process; (b) whether the factual basis for the alleged act(s) of misconduct had been properly established, and (c) whether the sanction imposed is proportionate to the misconduct.³ The Organization bears the burden of proving the alleged misconduct(s) by a preponderance of the evidence.⁴
32. In her pleadings filed with the Tribunal or the response she filed with the disciplinary board, Applicant does not dispute that she engaged in secretly recording her conversations with the President and other staff members. She challenges the disciplinary decision on a procedural ground alone. Specifically, she complains that her due process rights were violated because she was not allowed to be represented by a legal representative as mandated under Staff rule 59.14.
33. Applicant's contentions are entirely meritless and must be rejected. Applicant was first notified on 30 November 2011 that a disciplinary hearing was forthcoming, affording her reasonable notice to start looking for a legal representative. She was invited to the disciplinary hearing scheduled for 24 February 2012 several weeks prior. Further, that hearing was adjourned to afford Applicant additional time to locate and retain counsel. When Applicant appeared unrepresented at the re-scheduled hearing on 2 March 2012, the board correctly decided to carry on with the misconduct hearing. In its final report, the board observed:

[...]

6. The Board noted that, despite its guidance, [Applicant] did not request and give reasons, for an extension of time to allow her to find a legal representative. Rather, it was her stance that the Board should only sit when she informs it that she was ready and not before.

7. The Board further noted that, [Applicant] did not present any evidence that she had indeed made any attempt to contact any lawyer or advocate to represent her, even though she had known since 30th November 2011 that she was going to be brought before a Disciplinary Board, and had known since 2nd February 2012, when she filed her response to the charges with the Secretary to the Board, that she would require a knowledgeable lawyer or advocate to represent her.

[...]

34. Given the cogent reasoning above, it was not unreasonable for the board to carry on with the misconduct hearing in her absence. Applicant's position that the disciplinary process should have been held off indefinitely until she was represented by counsel was unacceptable. The board was correct to reject it. Therefore, the Tribunal finds that Applicant's claim in this respect is unfounded considering that she was afforded sufficient opportunity to retain counsel, but failed to even demonstrate any serious effort in searching for legal representation.
35. In the circumstances, the Tribunal holds that the disciplinary board's findings on the subject-matter under discussion are without criticism and the sanction imposed is proportionate to the transgression.

Non-renewal of Applicant's fixed-term appointment

36. Applicant contends that refusal to renew her fixed-term appointment was taken in bad faith, allegedly to protect the staff members against whom she had filed complaints of harassment, discrimination and abuse of authority. In her request for review addressed to the President, Applicant also contends that the renewal was unlawful because of her post's ongoing necessity to ACHPR, that the program under which she was recruited was ongoing, and that her post was still funded under that same program.
37. The Tribunal notes that a fixed-term appointment carries no expectancy of renewal and expires automatically without prior notice on the date of expiration noted in the letter of appointment.⁵ The Tribunal also notes that it is well established in international administrative law that an organisation retains the discretion to renew a fixed-term appointment.⁶ Such discretionary decision may be set aside only where the discretion has been exercised in

³ See, *Nadasan*, 2019-UNAT-918; *Hua Du*, Decision No. 101 (ADBAT, 2013); *B.M.*, Judgment No. 133 (AfDBAT, 2020)

⁴ *Id.*

⁵ Staff rule 33.3.

⁶ See, ILOAT Judgment No. 4231; *Abdeljalil*, 2019-UNAT-960.

violation of the law or policy or is motivated by improper considerations. Where a staff member claims legitimate expectancy of renewal, he or she bears the burden of proof.⁷

38. Applicant has provided no evidence, aside from her own statement, from which the Tribunal can reach the conclusion that the ACHPR failed to renew her fixed-term appointment in retaliation for the various complaints that she had filed. Notably, these complaints were filed in 2010, after which, Applicant's appointment was extended for twelve-months, and she even received a salary increment in June 2011. In light of this, the Tribunal finds it hard to accept that the non-extension of her appointment was retaliatory or otherwise improperly motivated.
39. Applicant also failed to provide evidence that an extension beyond 9 April 2012 was promised. Demonstrating the continued necessity of her post and availability of funding are insufficient to establish legitimate expectancy.

Order

40. Accordingly, the Tribunal DISMISSES the applications.

Date: 12 October 2020

/signed/

SYLVESTER MAINGA, PRESIDENT
ANDREW NYIRENDA
SHAHEDA PEEROO

Secretary: _____

Paulos Iddeshaie

⁷ See, *Kellie*, 2018-UNAT-875; *Hepworth*, 2011-UNAT-503.