



IN THE MATTER OF:

*A.D., 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, J. SEDQI, and P. COMOANE

HEARD ON: 17, 20 August 2020

JUDGMENT

***Procedural and Factual History***

1. On 30 September 2011, Applicant, a former Registrar of the African Court on Human and Peoples' Rights (ACHPR) filed an application contesting the decision to terminate his regular appointment for unsatisfactory service at the end of the probation period. Respondent did not file an Answer.
2. On 22 June 2018, Applicant was required to submit supplemental information relating to the timeliness of the contested decision, and to specify his prayers for relief. Applicant filed the required information on 1 July 2018.
3. On 12 September 2018, the new information was served on Respondent, requiring him to "file an Answer to the additional filing and the main application on or before 12 October 2018." Respondent did not file a response as directed.
4. During a Case Management Session on 19 February 2020, the Tribunal considered the instant application and, on 16 March 2020, directed both parties to submit additional information and arguments relating to damages.
5. On 25 March 2020, Applicant filed his written submissions reiterating arguments previously advanced in his original application; revising aspects of his prayers for relief, and attaching last three earnings statements received from ACHPR prior to separation. Counsel for Respondent filed her submissions on damages on 31 March 2020.
6. 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. The facts of the case are summarized as follows.
7. Applicant's employment with the ACHPR commenced on 1 January 2009, when he was retained on a renewable short-term appointment as Interim Clerk (P-6/Step 10). Following a competitive process which concluded in December 2009, Applicant was selected for the post of Registrar (P-6/Step 1). On 18 January 2010, Applicant was offered a regular appointment valid for three years subject to a one-year probation period. His appointment was effective 1 January 2010 with a monthly gross pay of \$6,793.
8. Prior to the first anniversary of his appointment, in December 2010, Applicant was due for performance evaluation after which ACHPR would determine whether to confirm Applicant's appointment or not. According to Applicant, the ACHPR President refused to complete Applicant's appraisal form. Applicant claims that several judges of ACHPR

attempted to persuade the President to prepare a written evaluation report of Applicant's performance, but they were unsuccessful. Thus, the end-of-probation administrative question of whether to retain Applicant in service or to terminate him was ultimately decided during a session of ACHPR by taking votes of the judges sitting *en banc*. Applicant claims that the tally of votes showed that four judges were in favor of retaining him in service. Six judges voted against.

9. The ACHPR President then notified Applicant in writing that his appointment would be terminated for unsatisfactory service effective 31 December 2010. Applicant wrote to the President seeking review of the decision. The President responded on 20 January 2011, promising to consider the request during ACHPR session scheduled to take place 14-25 March 2011. On 11 April 2011, the President notified Applicant that the decision to terminate his appointment was final. The instant application followed.
10. Applicant requests the Tribunal to set aside the termination and order his reinstatement. Alternatively, he claims material damages in the form of two-years' salary; compensation for loss of personal property in the amount of \$30,000; reimbursement for cost of transporting personal effects in the amount of \$10,000; and \$100,000 compensation for moral harm. Respondent asks the Tribunal to dismiss these prayers as unfounded.

### *Discussion*

11. Staff rule 36 provides that "Staff members *shall* be evaluated annually *by the immediate supervisors* for their efficiency, competence and integrity through performance appraisal mechanisms.... Performance reports *shall* be prepared regularly for all staff members." [Our emphasis]
12. Staff rule 33 provides that "regular appointment shall be granted to staff members recruited on, first appointment, a three-year fixed term contract... the first twelve months of which shall be probationary period."
13. Where a staff members fails to perform satisfactorily during the probation period, the Organization may separate the staff member upon "*a recommendation for the termination of the staff member for unsatisfactory performance made by the Appointment, Promotion, and Recruitment Board (APROB) and approved by the Chairperson or the competent authority of any other organ.*"<sup>1</sup> [Our emphasis]
14. In defining the functions of APROB, Staff rule 27.1 states "[APROB] *shall* deal with all matters relating to ...unsatisfactory performance and make appropriate recommendations to the Chairperson or the competent authority of any other organ." These functions are reiterated under Staff rule 55.6, which affords APROB the authority to consider and issue recommendations in respect of: (a) recruitment and appointment, *probation*, re-employment, and reinstatement; (b) *Evaluation of staff members* for promotion, termination, demotion, *confirmation or extension of probation as a result of the performance assessment process*... [Our emphasis]
15. The Tribunal notes that assessment of staff performance is a managerial prerogative of the Chairperson and his delegates, which must be ordinarily afforded appropriate deference except where a complaining staff member shows that the evaluation is tainted with improper considerations or that the process was conducted in violation of the law or policies established thereunder.<sup>2</sup> Borrowing from the ILO Administrative Tribunal, this Tribunal will not uphold a staff evaluation not respecting the following general principles:

...[the purpose of probation] is to provide an organization with an opportunity to assess an individual's suitability for a position. In the course of making this assessment, an organization must establish clear objectives against which performance will be assessed, provide the necessary guidance for the performance of the duties, identify in a timely fashion the unsatisfactory aspects of the performance so that remedial steps may be taken, and give a specific warning that the continued employment is in jeopardy."<sup>3</sup>
16. An examination of the facts of this case reveals very troubling flaws in the manner in which Applicant was appraised. The supervising manager failed to clearly define Applicant's goals and objectives, the practical effect being no measurable performance objectives were established at the outset or at any time during the probation period against which Applicant's performance would be evaluated for purposes of confirmation or termination. This is a very important aspect of the

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<sup>1</sup> Staff rule 68.1(c).

<sup>2</sup> See *Jennings*, 2011-UNAT-184; ILOAT, *Judgment No. 2646*, para. 5.

<sup>3</sup> See ILOAT, *Judgment No. 2529*, para. 15.

appraisal process as it would have safeguarded the objectivity of the process while affording Applicant fair notice about the performance expectations of his supervising manager.

17. When the time came to evaluate Applicant, the supervisor refused to prepare an appraisal report as mandated under Staff rule 33. Disturbingly, the supposed appraisal was done in *impromptu* fashion by taking votes of ACHPR judges without any structure or established parameters for Applicant's evaluation. Additionally, ACHPR judges, who are not Applicant's immediate supervisors in the administrative sense, are not officials authorized to conduct staff appraisals under Staff rule 36. The Tribunal finds these flaws alone to be significant irregularities.
18. Equally troubling is that Applicant was never provided with notice at any time during the probation period that his performance was being called into question nor was he provided with an opportunity to address any supposed shortcomings in his performance such as by extending the probation period. Even if the Tribunal were to accept that there were shortcomings in Applicant's performance, termination for unsatisfactory service and the related remedy of extended probation are matters strictly within the purview of APROB in the first instance. In as much as the decision to terminate Applicant was not properly predicated on any APROB recommendation, the President acted without lawful authority.
19. Therefore, the Tribunal finds Applicant's complaint of improper performance appraisal to be well-founded. In consequence, the Tribunal holds that his termination for unsatisfactory service was unlawful and should be set aside.
20. Under the circumstances, Applicant should have been awarded ordinarily his two-years' gross salary, the remainder of his three-year contract. However, Applicant accepted employment with the Community Court of Justice of ECOWAS in July 2011 after having been without gainful employment for a period few days shy of seven months. Hence, the Tribunal should award him seven-months' gross salary in material damages.
21. Additionally, given the egregious manner in which Applicant was appraised, the Tribunal accepts Applicant's submission that the unlawful termination caused him moral damages, for which the Tribunal should award him three-months' gross salary.

#### ***Order***

22. Accordingly, the Tribunal ORDERS as follows:
  - a. The application is granted;
  - b. Applicant's termination for unsatisfactory service is set aside;
  - c. Respondent shall pay Applicant:
    - i. seven-months' gross salary in material damages (\$47,551); and
    - ii. three-months' gross salary in moral damages (\$20,379).
  - d. The rest of Applicant's prayers as itemized in paragraph 10 of this judgment are denied.

Date: 14 September 2020

*/signed/*

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SYLVESTER MAINGA, PRESIDENT  
JAMILA B. SEDQI  
PAULO D. COMOANE

Secretary: 