



IN THE MATTER OF:

M.I., 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: 21, 28 August 2020

JUDGMENT

Procedural and Factual History

1. On 13 September 2019, Applicant, a former Legal Officer with the African Peer Review Mechanism (APRM) filed an application contesting the decision to terminate her fixed-term appointment and various adverse administrative decisions taken against her by APRM.
2. The application was transmitted to Respondent on 23 September 2019. His Answer was received on 22 October 2019, to which Applicant filed her written Observations on 25 November 2019.
3. 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.
4. The facts of the case are summarized as follows.
5. Applicant, who first entered into APRM's service on 4 August 2016, received a fixed-term appointment as a Legal Officer (P-1/Step 5) valid from 1 April 2017 until 31 March 2019.
6. In August 2018, Applicant sought admission to a graduate study program jointly sponsored by the African Union and the Loyola University of Chicago School of Law, referred to as the PROLAW Program ("the Program"). This program is a staff capacity development scheme developed under a 2014 memorandum of understanding signed between the African Union and Loyola University of Chicago School of Law concerning Joint Cooperation on the Use of Law and Legal Arrangements for Capacity Building in Governance and Development in Africa. The Office of Legal Counsel is the Program administrator.
7. On 2 August 2018, APRM CEO ("CEO") provided a recommendation letter in support of Applicant's admission into the Program stating:

It is with utmost pleasure that I write to recommend [Ms. I.] for the AU-Loyola PROLAW Scholarship programme for [the] 2018-2019 Academic Year.

[...]

[Ms. I's] acceptance in the Master of Laws (LLM) in Rule of Law for Development at the Loyola University will add immense value to her work at the APRM. In addition, it will sharpen her knowledge particularly in the field of rule of law, an area she is very interested in. The knowledge gained by her, [sic] *will be useful for her position as the Legal Officer and used to ameliorate the work of the APRM in Africa.* [Ms. I.'s] reasoning will be expanded based on the knowledge gotten [sic] from the programme, *which will be in turn be used [sic] to make positive major changes in the APRM, Africa and the world. Also, her added knowledge will enable the APRM Continental Secretariat to task her with more duties and propel her to higher positions at the Secretariat and other related Organizations.* [Our emphasis]

8. On 29 August 2018, the Office of the Legal Counsel notified Applicant of her selection to participate in the Program. The admission letter from Loyola University of Chicago School of Law followed on 1 September 2018.
9. On 30 August 2018, the Office of the Legal Counsel presented a list of four (4) candidates, Applicant included, for the Chairperson's exceptional approval of their study and the Organization's funding of the candidates' monthly stipends. The memorandum to the Chairperson further stated:

[Past participants of the Program] have been *retained* within the Union to serve in their various capacities, applying the knowledge and skills learnt in the program for the benefit of their respective AU organs and Departments and yet others in Member States. *This year's applicants will return to their respective duty stations upon completion of the of course of study.*

10. The Chairperson approved Applicant's and the other candidates' participation in the Program, including the payment of monthly stipends from African Union funds through the end of their study in the Program in Rome, Italy.
11. On 1 September 2018, Applicant wrote to the CEO, thanking him for his support of her admission into the Program and informing him of her planned departure for Rome on 15 September 2018, and her return date of 1 May 2019 to the duty station. Prior to her departure, Applicant sought approval for study leave and financial support in the form of stipends and travel expenses.
12. On 13 September 2018, her study leave request was declined because, according to a human resources officer of the APRM, Applicant was not a regular appointee. In lieu of study leave, the officer suggested that Applicant first seek approval for annual leave, followed by unpaid leave to cover the period of her absence for study. Applicant submitted her request for both categories of leave which, after approval, placed her on authorized leave from 15 September 2018 until 31 March 2019 – just a month before the end of her study.
13. On 13 September 2018, Applicant and the Organization entered into a Bond Agreement, according to which:

[....]

1. That the African Union *shall grant study leave* to the Employee and Scholarship recipient in accordance with Rule 24.3 of the African Union Staff Regulations and Rules to enable the Employee and Scholarship Recipient during the period of VALID contract expiring on 31st March 2019; [sic] to embark on the Study [sic]
2. That annual leave days balance of the employee shall be computed towards the study leave and shall be computed towards the study leave and shall first be exhausted [sic];
3. That upon completion of the year of study [sic] covered by the scholarship awarded, the employee and scholarship recipient *shall to the great extent possible be bonded to the African Union to continue in the service of the AU for a period not less than two (2) years;* [Our emphasis]

[....]

14. On 15 September 2018, Applicant left the duty station to begin her studies in Rome. Days after, on 18 September 2018, the CEO terminated her appointment, citing a "capacity gap" within APRM created by Applicant's departure for study.

In an e-mail communication sent to the CEO on 29 September 2018, Applicant requested reconsideration of this decision, which was refused in a memorandum dated 14 October 2018.

15. Upon completing her study and returning to the duty station in May 2019, the CEO spoke to Applicant about his wish to reintegrate her back into APRM's service. He asked her to seek reinstatement in writing and thereafter follow up with his Chief of Staff.
16. Upon meeting with the Chief of Staff, she was asked to apologize to the APRM together with her request for reinstatement. Applicant submitted her request for reinstatement on 1 May 2019. On 30 May 2019, the CEO asked Applicant to report for duty on 3 June 2019, because 1 June 2019 was a Saturday.
17. Applicant reported for duty as instructed and was, on 10 June 2019, offered a consultancy contract valid for six months as a Research Assistant. On the same day, she wrote to the CEO asking him to review the terms of the offer to ensure that the terms at least met her previous professional grade and salary. On several occasions between 10 June and 4 July 2019 Applicant engaged various officials of APRM seeking clarifications about the terms of the offer.
18. Pending resolution of issues relating to the contract, Applicant was assigned office space and equipment. During this period, she traveled on official mission representing the APRM, corresponded with various external partners as an officer of the APRM, and continued to deliver on assigned tasks. During this period, Applicant claims that tension developed between her and other staff members and that she felt mobbed. On 4 July 2019, Applicant wrote to the Chief of Staff expressing concern about this environment and inquiring about the status of her contract.
19. In reply, on 5 July 2019, the CEO wrote to Applicant cancelling the offered consultancy, stating as a reason that Applicant had not been remorseful, and had been "combative," "aggressive" and "abusive" with other staff members. On 1 August 2019, Applicant wrote back to the CEO denying the accusations and asking him to review his decision, failing which she "would seek further legal redress from internal recourse provided for in the AU Staff Regulations and Rules." Having received no response from the CEO, the instant application followed.
20. Applicant requests the Tribunal to: (a) declare unlawful the APRM decision that her participation in the Program was not permitted; (b) declare unlawful inconsistent application of Staff rule 40.4 (a) (i); (c) order her reinstatement as a legal officer, international, or a commensurate post; (d) alternatively, set the Bond Agreement aside; (e) declare that APRM acted unlawfully by delaying transfer of her monthly stipends; (f) declare unlawful APRM's offer of consultancy contract; (g) declare unlawful APRM's withdrawal of that consultancy contract; (h) declare unlawful APRM's failure to provide her with appropriate working space and equipment; (i) order APRM to pay her salary for the months of June and July 2019; and (j) order any other relief it deems fit.
21. In his reply, Respondent preliminarily contends that Applicant lacks standing to file an application with the Tribunal. With respect to Applicant's fixed-term appointment, her claim is time-barred and that she failed to first seek review by the Chairperson, and in any case, a fixed-term appointment does not carry any expectancy of renewal. Respondent also maintains that Applicant failed to sign the consultancy agreement lawfully offered to her, which meant no valid contract was formed. Respondent claims that when Applicant left for training, APRM properly hired a replacement. Finally, Respondent denies that that he undertook to reinstate Applicant upon completion of the Program.

Discussion

22. The instant application was filed on 9 September 2019. As a preliminary matter, the Tribunal must first identify the administrative decisions that Applicant is contesting in this application. In her application and observations filed with the Tribunal, the Applicant indicates that she is contesting: (a) the decision terminating her fixed-term appointment dated 18 September 2018 together with the decision denying her study leave and training allowances dated 13 September 2018; (b) the decision to issue her a six-month consultancy contract upon her return from the Program and its subsequent cancellation; and (c) the refusal to properly reintegrate her into the Organization's service after her return from the Program. The Tribunal will consider these administrative decisions in turn.
 - i. *Decision to terminate her fixed-term appointment; refusal of study leave under Staff rule 40*
23. Applicant indicates that she was informed of the decision to terminate her fixed-term appointment by a memorandum titled "release letter" dated 18 September 2018. Similarly, the related administrative decision denying her study leave under Staff rule 40 was notified to her via an electronic communication dated 3 September 2018.

24. To be receivable an application must be filed within a total period of ninety-days¹ of the contested administrative decision.² Staff members must strictly comply with these mandatory rules.³ In this case, Applicant's challenge to both decisions should have been filed with Tribunal no later than 3 December 2018 and 17 December 2018, respectively.
25. While the Tribunal cannot find fault under the circumstances in the refusal of her request for study leave, the Tribunal observes that the termination of Applicant's fixed-term appointment was unlawful. More so for the reason of her termination, capacity gap, which both the CEO and Counsel for Respondent should have anticipated. Regrettably, both claims are time-barred and should fail.

ii. Decision to issue her a consultancy contract and subsequent withdrawal thereof

26. The Tribunal next considers the Applicant's claim that she was wrongfully offered a six-month consultancy contract, which the CEO subsequently cancelled. In a preliminary objection, Respondent advances two arguments. Respondent first claims that, assuming a valid consultancy contract existed, Applicant cannot access the Tribunal because she is not a staff member within the meaning of art. 11 of the Statute.

art. 2

- (i) The Tribunal shall be competent to hear applications alleging:
- (a) Violations of the relevant provisions of the Staff Rules and Regulations of OAU;
- (b) Non-observance contracts of employment and any other act of employment;

[...]

art. 11

The Tribunal shall be open to:

- (i) Any staff member or employee...;
- (ii) Any person who has succeeded to the rights of staff member or employee or their representatives;
- (iii) Any person who can show that he is entitled to rights under any contract of employment or the provision of the Staff Rules and Regulations.

27. The right of staff members to access the Tribunal with an application is conferred by art. 2 cum art. 11 of the Statute, which guarantees access to the Tribunal by staff members, and persons who have rights under the Staff Regulations and Rules. Consultants are not included in the definition of a "staff member" provided by the Staff Regulations and Rules. Additionally, Staff regulation 2.3(c) states that consultants and project staff are not covered by the Staff Regulations and Rules as their conditions of service are governed by special rules and the terms of their respective contracts.
28. The Tribunal has also considered that the consultancy contract that APRM issued to Applicant states that any dispute related to the contract shall be resolved under the laws of the Republic of South Africa by referral to the Arbitration Foundation of South Africa (AFSA).⁴ In view of this, the Tribunal concludes that Applicant lacks standing under art. 11 of the Statute, and finds her claims relating to the six-month consultancy contract not receivable.
29. Having found Applicant's claim not receivable, the Tribunal does not find it necessary to address Respondent's secondary contention that no valid consultancy contract existed.

iii. Refusal not to reintegrate Applicant under the Bond Agreement

30. The third and final decision that Applicant challenges in the instant application is the refusal to reintegrate her back in to the Organization's service after completing the Program.

¹ Under Staff rule 62.1.1, requesting administrative review of the contested decision by the Chairperson or other appropriate authority is a mandatory first step. A staff member must seek such review within thirty days of the contested administrative decision. The reviewing official has thirty days to complete the review, failing which the request will be deemed constructively denied. The staff member then has additional thirty days to file an application with the Tribunal.

² *Id.*

³ *M.Z.L.*, AUAT/2018/001, para. 13.

⁴ Consultancy Agreement between APRM and Applicant, Clause 12 and Clause 14.

31. Despite the termination of her fixed-term appointment in September 2018, the Tribunal asserts jurisdiction on this claim based on the valid Bond Agreement that both parties signed, and under the principles of estoppel, the general essence of which is an undertaking or representation by a party in reliance of which a party acts to his or her detriment.
32. We begin with the process of Applicant's selection for the graduate study Program. In his recommendation letter, the CEO made several representations from which one can reasonably draw an inference that Applicant would return to her prior post as a Legal Officer at the APRM. Neither the CEO nor the APRM officers indicated to Applicant at any time prior to her departure that by joining the Program she was severing her ties to the APRM altogether.
33. In fact, the termination of Applicant's fixed-term contract mere three days after her departure for training on the grounds of suddenly discovered "capacity gap" was inconsistent with the CEO's and Counsel for Respondent's prior written representations. Both the CEO and Counsel for Respondent knew or should have known that when they both favorably recommended her joining the Program she would, for the period she would be away on training, leave a gap and APRM could not terminate her fixed-term appointment for that reason alone.⁵ We note with sadness that this talented young professional did everything possible to be retained in the Organization's service, but was unreasonably refused reintegration. After all, she offered to assist her employer remotely while studying, which was ignored.
34. In seeking the Chairperson's extraordinary approval, admittedly in breach of Staff rule 24.3, for Applicant's participation in the Program, Counsel for Respondent wrote that prior Program participants had been retained in service, and applicant and the other candidates would likewise be returning to their respective duty stations after completing the Program. Additionally, the Organization continued to pay Applicant monthly training stipends until and up to the end of April 2019. More importantly, under Clause 3 of the Bond Agreement, the Organization undertook, to a great extent possible, to retain Applicant in service for a period of not less than two years.
35. Given the totality of the circumstances, the Tribunal finds that when Applicant left APRM to participate in the Program, her reintegration back into service in some capacity upon completion of her study was explicitly intended both by Applicant and Respondent. That was the essence of the still valid Bond Agreement. Hence, the Tribunal is persuaded that Applicant had legitimate expectation of reinstatement, which the Organization failed to meet in breach of the Bond Agreement and principles of good faith and fairness.⁶ In consequence, we find Respondent liable for the breach.
36. The Tribunal notes that the Bond Agreement, clumsily drafted by Counsel for Respondent, provides two conflicting clauses as to when the bond period should commence. Clause 3 states that the bond period would begin when the bondee returns from the Program, while Clause 4 states the bond period would begin when bondee travels for the Program. The practical question for the Tribunal is whether Applicant's bond period would run through 14 September 2020 or 31 May 2021. The Tribunal resolves this ambiguity by interpreting the Bond Agreement *contra proferentum* – against the drafter of the agreement and in the interest of Applicant. This interpretation is also consistent with how bond agreements are generally administered in that the training period does not normally count toward the bond period.
37. In the absence of the breach, Applicant would have remained in the Organization's service for at least twenty four (24) months from 1 June 2019, when she reported back for duty after completing the Program in order to serve out her bond period until 31 May 2021. In consequence, Respondent should be ordered to reinstate her in the grade and step of the post she occupied before she left for the Program or a commensurate post. In the event reinstatement is not feasible, Applicant would be entitled to her monthly salary and benefits from 1 June 2019 up to 31 May 2021.
38. The Tribunal holds that the fundamental nature of the breach and the manner in which APRM treated her caused Applicant moral damages, for which the Tribunal should award her three months' gross salary.

⁵ Respondent has not explained on the record whether or not APRM could have addressed the capacity gap through an administrative arrangement that did not undermine the core elements of the Bond Agreement. The Tribunal has also considered Ext/EX.CL/Dec.1 (XX) but Counsel for Respondent failed to explain how that decision applied to Applicant and further failed to prove that the administrative decisions in question in this case were in fact predicated on Ext/EX.CL/Dec.1 (XX).

⁶ A.L., AUAT/2017/002 p. 15 holding ("[the Organization must] act fairly, transparently, and justly in [its] dealings with staff members.").

Orders

39. Accordingly, the Tribunal ORDERS as follows:

- a. The application is granted in part;
- b. Respondent shall reinstate Applicant to her former or commensurate post effective 30 days from the date of this Judgment, OR pay Applicant twenty four (24) months' gross salary in material damages (\$147,372.72); and
- c. Respondent shall pay Applicant three months' gross salary in moral damages (\$18,421.59).
- d. All other prayers set forth in para. 20 of this Judgment are denied.

Date: 12 October 2020

/signed/

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

Secretary: 