



IN THE MATTER OF:

E.C.N., Applicant

v.

Chairperson of the African Union Commission, Respondent

FOR APPLICANT: Swaleh U. KANYEKI, Esq.

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

BEFORE: S. MAINGA, President, J. SEDQI, and P. COMOANE

HEARD ON: 27 April 2021, 8 November 2021, 29 March 2022

JUDGMENT

Procedural and Factual History

1. On 18 February 2020, Applicant, a former Expert on Regional Mechanisms (P-5) within the Peace and Security Department [PSD] of the African Union Commission, filed an application contesting the decision not to extend her fixed-term appointment and complaining of discrimination, emotional and psychological abuse by her supervisor, the Commissioner of Peace and Security at the time, Smail Chergui (“Commissioner”).
2. The Tribunal transmitted the application to Respondent on 19 February 2020. Respondent submitted his written Answer on 20 April 2020. Applicant’s written Observations were received on 18 June 2020.
3. Applicant first joined PSD on 1 October 2008 on a fixed-term appointment to serve as Expert on Regional Mechanisms (P-5). Her appointment was extended multiple times under the same terms and in increments of twelve months. The last extension ended 30 September 2019.
4. Applicant recounts her problems at PSD began in late 2017 when she faced challenges relating to her contract’s extension. On 2 October 2017, the acting director of PSD wrote to the Commissioner requesting his approval to extend Applicant’s appointment for twelve months. In reply to the acting director, the Commissioner inquired “do we have [a] note verbal of Kenyan Embassy regarding her secondment for one year,” because he incorrectly believed that Applicant was a staff seconded by the Kenyan government.
5. On 4 October 2017, the Kenyan Embassy verified that Applicant was a member of the Kenyan Foreign Service on authorized indefinite leave. Following this verification, the Commissioner agreed to an extension through 31 December 2017 only. Apparently, on further consultations with PSD’s acting Director, a six-months extension request was sent to AHRM on Applicant’s behalf. Having received no justification for the shortened extension, AHRM extended Applicant’s appointment for twelve months, through 30 September 2018.
6. On 17 November 2017, the Deputy Chairperson issued a memorandum titled “*Administrative Circular on the Contractual Management of Short Term, Fixed Term and Special Service Contracts Categories and Related Entitlements*,” according to which in the absence of timely written notice from the hiring department, AHRM would automatically grant an extension for a period equal to the expired appointment.
7. In the event a decision not to renew is made, the memorandum obligated the hiring department to “notify the Director, AHRMD two months before *with detailed explanations and reasons for non-renewal*, in line with the Staff Rules and Regulations.” (Our emphasis). Applicant’s appointment was extended once for a period of twelve months under this policy after PSD failed to seek timely extension when her appointment was due to expire in September 2018.
8. Another manifestation of Applicant’s problems with the Commissioner pertained to the process initiated in 2017 to recruit several division heads within PSD. Applicant and two PSD colleagues wrote to the Chairperson and his Deputy on 7

December 2017 protesting the Commissioner's alleged interference in the process to recruit Head of Conflict Prevention and Early Warning as well as Head of Crisis Management and Post-Conflict Reconstruction within PSD.

9. The memorandum alleged that the Commissioner told one of the complainants, a female colleague, that she should not have been shortlisted for the post of Head of Division, Conflict Prevention and Early Warning "[as the post was] reserved for [Ngoga-Gateretse, an internal candidate]" and the same female candidate was told by the Commissioner to switch her candidacy for another post that she had not applied for, Head of Crisis Management and Post Conflict Reconstruction and Development. The memorandum further alleged that the Commissioner attempted to improperly exclude Applicant and her colleagues from being shortlisted but did not succeed.
10. By memorandum dated 24 January 2018, the Deputy Chairperson cancelled the recruitment process for either post. The posts were subsequently re-advertised but Applicant and her female colleagues named in the complaint were not shortlisted nor invited for interview. Applicant believes this was in retaliation for complaining against the initial recruitment process invalidated by the Deputy Chairperson.
11. Applicant recounts a similarly concerning experience with the Commissioner in 2017. According to Applicant, following a recruitment process conducted for the post of Deputy Director, Algiers Center for the Study and Research on Terrorism, during which Applicant was interviewed, the Commissioner personally told her that the post was reserved for a male Algerian candidate and that she should not have applied in the first place.
12. On 30 January 2018, the Commissioner wrote to the Deputy Chairperson denying interference in any recruitment process and protesting the extension of Applicant's appointment without his approval. He concluded his testy memorandum by stating, "no unilateral extension of any short-term contract by the Office of the Deputy Chairperson or the Directorate of Administration and Human Resources Management can be tolerated or accepted without an explicit signature from me or the [PSD] Director." Applicant protests, with this communication, the Commissioner intended to mislead the Deputy Chairperson as to her employment status as a staff member, incorrectly classifying her as a secondee from the Kenyan government.
13. In May 2018, the Chairperson formed a High-Level Panel to Investigate Allegations of Harassment Against Women at the African Union Commission ("the Panel"). Applicant appeared before and presented her testimony to the Panel as did other female staff of the Commission. The Panel concluded and presented its report to Respondent in November 2018. Applicant was not provided with the outcome of the investigation until the Tribunal ordered for it in July 2021.
14. On 3 May 2019, the Deputy Chief of Staff informed Applicant that Respondent was closely looking at her case and requested her cooperation, implying that Respondent was proceeding with further investigation. He wrote, "[w]hile investigating the issue, the Chairperson is requesting you to remain at your position with full commitment and be cooperating [sic] with the leadership of the PSD Department until the matter is clarified. *You shall be informed of the outcome of the investigation.*" [Our emphasis]. However, no outcome of such investigation was communicated to Applicant.
15. In a frustrated reaction to the Deputy Chief of Staff's memorandum, the Commissioner wrote to the Chairperson on 22 May 2019 that he deemed Applicant's appointment at PSD "terminated" because her responsibilities had been reassigned to a newly set up Program Management Team (PMT). He also explained his decision was partly motivated by external funding partners' reluctance to fund staff at the P-5 salary level. It is unclear why the Commissioner's memorandum refers to "a termination decision," when Applicant's appointment then was valid and running until 30 September 2019.
16. According to the Commissioner, he did not accept or recognize the extension of Applicant's appointment as it was done without his assent and Applicant would not be assigned any PSD work. He complained that despite notifying AHRM of his decision not to extend in time, but AHRM disregarded his instructions when it extended Applicant's appointment. The Tribunal has seen nothing in the record to reflect the Commissioner's written notice allegedly dispatched to AHRM.
17. Applicant's extended appointment, contested by the Commissioner, ended on 30 September 2019. However, she received no notice as to whether Respondent intended to separate her or extend her employment. On 18 October 2019, referencing his 22 May 2019 memorandum, AHRM asked the Commissioner to confirm in writing that PSD intended to seek Applicant's separation. It does not appear that the Commissioner did so which placed Applicant in an uncertain status for several months.
18. On 20 December 2019, Applicant sent a petition to the Chairperson complaining that her appointment was allowed to expire without any notice from AHRM or PSD. She also complained that his Chief of Staff variously promised to resolve her employment status, but she received neither the promised extension nor the outcome of the investigation of her complaints of harassment and discrimination.
19. On 23 December 2019, the Chief of Staff wrote to the Deputy Chairperson as follows:

I wish to draw [your] attention that the Chairperson has forwarded a memo ... on 22 April 2019 after receiving the report of [the Panel] to you and all Commissioners to request you to ensure that all complaints from staff be fully observed by the AHRM Directorate in collaboration with all relevant Departments in order to get a lasting solution.

...[you are] kindly requested to instruct AHRM that [Applicant] be given an assignment as soon as possible.

20. The Chief of Staff's request was not acted upon. Applicant also did not receive a response from the Chairperson to her 20 December 2019 request. However, after filing her application with the Tribunal, Respondent retroactively renewed her contact for a period of six months with effect from 1 October 2019 to 31 March 2020.
21. On 27 April 2021, the Tribunal heard this matter on the papers and required Respondent to file additional information pertaining to the status of Applicant's complaints of harassment and discrimination. The additional information was provided after which Applicant was given an opportunity to respond.
22. According to the portion of the Panel's report submitted to the Tribunal, the Panel found that Applicant was the victim of harassment and discrimination contrary to the Organization's Code of Ethics and Conduct. Additionally, the Panel observed that there had been recruitment irregularities at PSD which reflected unfairness and lack of transparency. The Panel found that Applicant had not been properly appraised and had been erroneously refused extension of her appointment in violation of the Deputy Chairperson's memorandum on contract extensions. Finally, the Panel concluded that Applicant was not given appropriate notice that her fixed-term appointment would not be renewed.
23. In her pleas to the Tribunal, Applicant's contentions are that Respondent failed to extend her appointment without good cause and further breached his duty of care by failing to protect her from harassment and other harms by the Commissioner. She adds that Respondent's failure caused her moral harm.
24. Applicant asks the Tribunal to: (a) order extension of her appointment retroactive to 1 October 2019 for a period of one year or order payment of six months' salary in the amount of \$69,00 plus three months' salary, a total of \$103,000; (b) declare that she had been discriminated against and subjected to mental, emotional and psychological abuse by the Commissioner; (c) award her moral damages in the amount of \$414,000 (equivalent of three years' salary) and any other relief deemed fit; and (d) award her costs.
25. Respondent denies all claims and avers that on 5 March 2020 Applicant received a six-months extension at the end of which she was lawfully separated from service. Respondent argues that fixed-term appointments carry no expectancy of renewal, and incorrectly claims that Applicant misled the Tribunal by not disclosing the six-months' extension.
26. Respondent submits that in any case there was good cause for the non-extension relating to funding and because PSD had hired a team which took over Applicant's responsibilities making her redundant in the department. Despite the Panel's findings, Respondent denies that Applicant suffered any discrimination, professional harassment or abuse by the Commissioner. Finally, Respondent submits that Applicant's requests for relief were unsubstantiated and must be refused.
27. In her written Observations filed on 27 February 2020, Applicant withdrew her first prayer on account of the six-months extension she had received. Her amended prayers are as follows: (a) an order for eighteen months' extension of her appointment or payment of eighteen months' salary; or (b) an order for payment of salary from April 2020 until proper notice of termination is issued; (c) a declaration that she was a victim of harassment as well as mental, emotional and psychological abuse by the Commissioner; (d) an award for moral damages in the amount of \$414,000 and any other relief deemed fit; and (e) an award of costs.
28. Along with his written Answer, Respondent submitted proof of the six-months extension issued to Applicant in March 2020. Respondent also attached a list of separation of entitlements due to Applicant at the end of the extension, consisting of air transportation expenses back to her home country as well as baggage and terminal allowances. In her 1 July 2021 filing, Applicant claims that these entitlements remained unpaid.
29. In July 2021, the Tribunal was notified that the parties were engaged in settlement discussions upon which the Tribunal temporarily suspended proceedings. Proceedings were subsequently reinstated after notification by the parties that the settlement discussions had not been successful.
30. Upon review of the documentary record, the Tribunal is satisfied that the facts and issues have been presented adequately in the pleadings and determines this matter without the need to invite the parties for an oral hearing.

Discussion

31. Applicant's grievances are centered in substance on the decision not to extend her fixed-term appointment and alleged failure by Respondent to protect her from harassment, discrimination and abuse of authority. The Tribunal will address these intertwined claims as follows.

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

32. Under Staff regulations 3.2(a) and 3.4(f), Respondent has the obligation to provide its staff members a harassment-free, safe and secure working environment and to protect staff members from any prohibited conduct as defined under the *African Union Harassment Policy* (AUC/AD/2016/06). Where a staff member complains of any prohibited workplace harm as defined in the Policy, Respondent is obligated to promptly and thoroughly investigate.¹
33. Applicant complained that she was subjected to abusive and harassing conduct by the Commissioner. Her complaints were received and reviewed by the special investigative Panel set up by Respondent. The Panel concluded that Applicant had been the victim of harassment, discrimination and several acts which can be fairly characterized as abuse of authority. The Panel also found that she was denied contract extension without good cause and observed several improprieties in various recruitment processes within PSD in which Applicant was a candidate.
34. The Tribunal notes that the Panel submitted its report to Respondent in November 2018, but Counsel for Respondent was unable to demonstrate to the Tribunal that Respondent acted on the report in any meaningful way even when the Tribunal specifically asked for such evidence to be produced. It is very astonishing to the Tribunal that Respondent would commission a high-level panel, committing substantial Union resources, only to turn around and shelve the Panel's report without acting on the report's findings and recommendations or making the same available to the aggrieved female staff members.
35. Professing grave concerns with Applicant's situation at PSD, Respondent wrote to Applicant that further investigation would be carried out, but he did not set in motion any process to investigate the Panel's findings further or to hold any official accountable. In fact, the Tribunal takes judicial notice that the concerned official concluded his term of office in March 2021. The Tribunal is very troubled by Respondent's inaction despite the fact that the Panel's conclusions were highly supportive of Applicant's claims and certainly obligated Respondent to conduct further investigation. Respondent did not meet this obligation.
36. Independent of the Panel's report, the Tribunal has taken notice of several indications of institutional failings apparent in the Commissioner's multiple memorandums wherein, for instance, he readily admitted to depriving Applicant of her responsibilities, a managerial abuse which persisted for a period of over eighteen months. The Commissioner also declared, without authority, Applicant's appointment "terminated," while she held a valid employment contract. Finally, the Tribunal can reasonably discern the existence of a demoralizing culture within PSD resulting from abuse of office, recruitment irregularities and staff resentment relating to contested appointment of junior staff for acting roles.
37. In the circumstances, the Tribunal concludes that, for whatever expediencies, Respondent failed to carry out proper investigation following the Panel's report, as he undertook in writing, and made very little effort to protect Applicant from the harms she complained of within PSD. Respondent thereby breached his duty of care under Staff reg. 3.2 and the general duty of fairness, equity, transparency and accountability that the Organization owes to its staff members under Staff reg. 3.4(b).

Non-renewal of Applicant's fixed-term appointment

38. The Tribunal next considers Applicant's claim that she was unlawfully refused extension of her fixed-term appointment. A fixed-term appointment generally carries no expectancy of renewal and expires automatically without prior notice on the date of expiration noted in the letter of appointment.² It is also well established that an organization retains the discretion to renew a fixed-term appointment.³ However, such discretionary decision may be set aside where the discretion has been exercised in violation of the law or policy or is motivated by improper considerations.⁴
39. Applicant alleges that the decision was tainted by bias and violated the policy on contract extensions established in the Deputy Chairperson's 17 November 2017 memorandum. The Tribunal agrees. The decision to not extend Applicant's appointment was marred by an obvious bias which persisted over several extension cycles. For instance, in October 2017,

¹ *L.B.K.*, AUAT/2021/005; *A.D.*, AUAT/2021/004.

² Staff rule 33.3.

³ *O.S.*, AUAT/2020/012; *ILOAT Judgment* No. 4363.

⁴ *Id.*

the Commissioner improperly required Applicant to obtain prior clearance from her home government before considering her contract's extension. This was not required under the staff rules pertaining to fixed-term staff such as Applicant.

40. Even after Applicant obtained the document from her government, the Commissioner attempted to curtail her appointment to a duration of three months only. The shortened extension, for which the Commissioner offered no rationale, would have improperly changed Applicant's appointment category from fixed-term to short-term with all corresponding implications. Fortunately, AHRM issued Applicant with a twelve-month extension, which prompted the Commissioner to declare Applicant's contract "terminated" followed by improper refusal to assign her any responsibilities within PSD until she separated from the Union.
41. In October 2019, when asked to provide a written rationale for his decision to not extend Applicant's appointment, the Commissioner did not respond. The Tribunal has also considered that the Commissioner's likely intended to starve Applicant out of PSD when he deprived her of all contractual functions many months prior to her contract's expiration. Therefore, the refusal to extend her appointment beyond 30 September 2019 appears to the Tribunal a culmination of the Commissioner's persistent efforts to end Applicant's employment at PSD.
42. While Respondent argues that there existed valid reasons for the non-extension such as the fact that Applicant's responsibilities had been reassigned to a new team as well as alleged funding issues, the Tribunal is not persuaded. When AHRM sought written explanation for the non-extension, the Commissioner provided none; and the Commissioner's silence entitled Applicant to a one-year extension under the contract extension policy issued by the Deputy Chairperson. However, that policy was not applied in Applicant's case.
43. When Respondent establishes a policy to guide administrative matters affecting staff rights, the Tribunal expects the policy to be applied consistently and for any departures thereof to be explained, which did not happen here. Therefore, the Tribunal holds that the refusal of extension was improperly motivated and was taken in violation of Respondent's own policy on contract extensions.
44. If the extension policy had been correctly followed, Applicant's fixed-term appointment would have been renewed through 30 September 2020. To redress the material harms she suffered, therefore, Applicant will be awarded twelve months' gross salary less the six months' gross salary that she received when Respondent retroactively extended her appointment with effect from 1 October 2019 to 31 March 2020.
45. Additionally, the Tribunal accepts Applicant's submission that she was morally injured by Respondent's erroneous refusal to extend her appointment as well as Respondent's failure to fully investigate her bona fide complaints of harassment, discrimination and abuse despite specifically undertaking to do so. The Tribunal sets moral damages at six months' gross salary. Applicant will also be awarded \$3,000 in costs.
46. Finally, Applicant claims that Respondent has not paid her separation entitlements. To the extent those payments remain outstanding, Respondent is ordered to pay the same.

Orders

47. Consequently, the following ORDERS are made:
 - a. Applicant is awarded six months' gross salary in material damages;
 - b. Applicant is awarded six months' gross salary in moral damages;
 - c. Respondent shall pay Applicant any outstanding separation entitlements; and
 - d. Applicant is awarded \$3000 in costs;
 - e. All sums are payable within 30 days from the date of this judgment, failing which an additional 5% annual interest shall accrue and escalate to 10% if the sums are not paid in full beyond 60 days after the date of this judgment.
 - f. All other prayers are refused.

Date: 20 April 2022

/signed/

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

Secretary: _____

