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Case No.: AUAT/2020/044
Judgment No.: AUAT/2022/008

IN THE MATTER OF:

T.G.M., 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: 12 November 2021, 30 March 2022

JUDGMENT

Procedural and Factual History

1. On 24 August 2020, Applicant, a former Publisher and Editor with the African Peer Review Mechanism (APRM), filed an application contesting the decision to summarily terminate her employment with APRM on the grounds of ill-health.
2. The application was transmitted to Respondent on 8 September 2020. His written Answer was received on 7 October 2020, in reply to which Applicant filed her written Observations on 10 November 2020.
3. Applicant's employment relationship with APRM began in the form of a two-year "consultancy" in February 2017.¹ The contract was extended under the same terms for additional period of two years with effect from 16 February 2019 to 15 February 2021.
4. In July 2019, based on Applicant's own request, the CEO assigned her the additional role of a Project Manager in charge of the APRM-ISP program financed by the African Development Bank (AfDB) and the Swedish Development Agency (SIDA). The assignment was in addition to Applicant's regular duties as Publisher and Editor.
5. In September 2019, Applicant recalls being asked by APRM's Head of Corporate Services to transfer funds to assist the country of Niger to conduct a peer-review process. Applicant was unsure if the request was consistent with the AfDB grant agreement. She thus inquired with AfDB's point person on the project if the proposed transaction was consistent with the grant agreement.
6. The AfDB official informed Applicant by e-mail that the grant funds could be utilized to fund only activities approved in the agreement. Applicant claims the CEO was upset with her for inquiring with AfDB. She claims the CEO called and accused her of sabotaging him.
7. On a similar occasion, the CEO became upset with Applicant again for trying to clear a planned activity of APRM with SIDA, an external donor. She reports the CEO made comments to the effect that she was a "big mouth" and uttered insulting words in reference to her ethnic background.

¹ In accordance with the appointment categories enumerated under Staff reg. 6.5, the Tribunal proceeds on the basis that at all material times Applicant held a fixed-term appointment with the APRM.

8. In her application, Applicant recounts various instances where she allegedly detected donor funds being proposed for unapproved activity by the CEO himself or other officials of APRM. For purposes of this judgment, it suffices to note that the CEO and Applicant continually disagreed on the utilization of donor funds.
9. Sometime in October 2019, Applicant recalls the CEO called her into his office and accused her of “spreading lies about him and trying to destroy his marriage.” In the months that followed, the relationship between the CEO and Applicant continued to worsen as the CEO allegedly began to exclude her from meetings related to her responsibilities and functions.
10. The isolation persisted during the months of April and May 2020 amid the COVID-19 lockdown in effect in South Africa at the time. Applicant has attached several e-mails from herself to various APRM officials asking to be invited to APRM meetings relevant to her role, lending credence to her claim of professional isolation.
11. On or about 15 May 2020, the CEO’s Chief of Staff called an in-person meeting at the APRM Secretariat’s office. Applicant asked to attend the meeting virtually as the Secretariat was closed due to COVID-19 and the staff were under work-from-home directive. But her request was not allowed.
12. During the meeting, Applicant was accused by the CEO of neglecting her duties as Publisher and Editor. Applicant states that she found these allegations surprising because she had been trying to be included in meetings of APRM, so she could assist with documentation and related tasks. The CEO, nonetheless, informed Applicant that she should focus on her documentation tasks as he had assigned another staff to manage APRM-ISP.
13. On 22 June 2020, she e-mailed the Chief of Staff and APRM human resources officer that she was not feeling well and was going to see a doctor. Applicant then consulted a doctor who advised her to work from home because of her vulnerabilities to COVID-19. She transmitted the doctor’s note to the Chief of Staff and to the human resources officer.
14. On 26 June 2020, the Chief of Staff invited Applicant to a physical meeting at the office scheduled for 29 June 2020. She e-mailed back the Chief Staff to inform him that she was unable to attend the planned meeting and re-submitted the medical note from 22 June 2020. She indicated, however, that she would attend the meeting virtually. The Chief of Staff wrote back insisting that she attend the meeting in person.
15. In his sworn statement submitted to the Tribunal, the CEO alleges that the meeting was set to start at 8:30 a.m. in order to accommodate Applicant’s condition by limiting potential contact with APRM staff who normally arrive for work at 9:00 a.m. According to the CEO, the meeting was scheduled to discuss several staff complaints filed against Applicant, while the Chief of Staff’s e-mail stated the meeting would discuss “how to move forward in view of work within the office.” The meeting did not take place as planned.
16. On 29 June 2020, the CEO terminated Applicant’s contract with immediate effect given that Applicant “was not well as per [her] email dated 26 June 2020 and will not be able to come to the office until such time Covid-19 pandemic is over.” The CEO indicated that Applicant would still be paid her monthly salary and entitlements through the end of her contract (15 February 2021).
17. On 30 June 2020, a day after terminating Applicant’s contract, the CEO announced to all APRM staff that “given the rising number of COVID-19 infections in Gauteng in the last few days, management has deemed it necessary to close the office from [1-31 July 2020].” He instructed the staff to work remotely and encouraged them to continue taking necessary precautions to avoid the spread of COVID-19. This was followed by another all-staff memorandum dated 9 July 2020 announcing that an APRM staff had tested positive for coronavirus and instructing APRM offices closed until further notice.
18. On 19 July 2020, Applicant wrote to the CEO asking him to reconsider his decision and reinstate her in her post. On 22 July 2020, the CEO revised his termination letter of 29 June 2020, ending Applicant’s appointment effective immediately but undertaking to pay her two months’ salary in lieu of notice. It is unclear if the CEO revised the initial termination letter in reply to Applicant’s request for reinstatement or not.
19. In the 22 July 2020 letter, the CEO explained, following an APRM Executive Committee meeting that took place the day before, he had revoked his 29 June 2020 release letter. He cited Applicant’s “uncooperative and confrontational approach [she] adopted in [the] handling of this matter.” He cited Staff reg. 15(1) and Clause 9 of Applicant’s Letter of Appointment as the basis of termination. Additionally, the CEO made several allegations against Applicant, impugning her integrity and professionalism and accusing her of breach of confidentiality and several acts of misconduct.
20. On 28 June 2020, Applicant wrote to the Chairperson complaining against the CEO with allegations of intimidation, professional isolation, harassment, financial mismanagement and misuse of donor funds. She also complained of being

forced to attend in-person meetings against her doctor's advice. When the CEO terminated her appointment the next day, on 29 June 2020, Applicant transmitted the CEO's termination letter forthwith to the Chairperson. It does not appear that the Chairperson acted on Applicant's grievances.

21. On 30 June 2020, a law firm retained by APRM wrote to Applicant demanding that she withdraw the complaint she had filed with the Chairperson and issue an apology no later than 3 July 2020 failing which legal action would be pursued. Applicant's lawyers responded to this letter on 2 July 2020. There were additional written exchanges between both sides generally characterized by threats to proceed with legal action.
22. On 24 August 2020, Applicant filed her application with the Tribunal. In addition to asking the Tribunal to declare the actions of the CEO unlawful on multiple grounds, Applicant asks the Tribunal to: (a) order her reinstatement into APRM's service; (b) order for her salary to be paid 1 July through the end of her contract on 15 February 2021; (b) award her moral damages; (c) order payment of the cash value of her accrued annual leave; (d) order payment of costs of these proceedings; and (e) order any other relief the Tribunal deems fit.
23. In his reply, Counsel for Respondent generally asked for the application to be dismissed without submitting specific legal arguments resting instead on the CEO's sworn statement titled "Answering Statement." The CEO first contends that the application is out of time. The CEO then proceeded to attack Applicant's character with information the Tribunal considers irrelevant to the contentions in this case. The CEO, for instance, accused Applicant of insubordination, disclosing confidential information, authoring defamatory anonymous letters, and of providing defamatory information to several South African publishers.
24. In her Observations, Applicant contends the CEO arguments are without merit, her application was timely filed and none of the factual allegations made by the CEO are true and must be dismissed.
25. The Tribunal is satisfied 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.

Discussion

Preliminary Issues

26. As a threshold matter, the Tribunal first addresses Respondent's contention that that the application is not receivable because Applicant did not file it within the timelines set forth under Staff rule 62.1.1. The CEO asserts that having "revoked" his termination letter of 29 June 2020 and substituted it with a subsequent termination letter on 22 July 2020, received by Applicant on 23 July 2020, Applicant was required to file her application no later than 23 August 2020.
27. These assertions are misplaced. The decisions being contested in this application is the CEO's 29 June 2020 letter as that was the administrative decision which summarily ended Applicant's employment with APRM – a fact readily conceded in para. 9.17 of the CEO's own sworn statement. In the Tribunal's view, the CEO's 22 July 2020 letter was a mere reiteration of the first termination letter albeit with a shifting rationale for terminating Applicant, which does not change the Tribunal's timeliness analysis.
28. Applicant petitioned the Chairperson a day before her appointment was terminated alleging several grievances against the CEO, including an ominous plea against a feared summary dismissal. On 29 June 2020, she supplemented her petition to the Chairperson electronically by informing him that the CEO had terminated her employment as she feared, and for purposes of exhaustion of administrative remedies, the Tribunal holds that Applicant's petition to the Chairperson satisfies the requirements of Staff rule 62.1.1.
29. Accordingly, after petitioning the Chairperson on 29 June 2020, Applicant had until 28 August 2020 to file her application in accordance with Staff rule 62.1.1. She filed her timely application on 24 August 2020. Respondent's timeliness objections are, therefore, rejected.

Decision to summarily terminate Applicant's appointment

30. Applicant challenges the lawfulness of the termination decision communicated to her through the CEO's letter of 29 June 2020 and subsequently clarified in a second letter signed by the same official on 22 July 2020. In the first letter, the CEO explained the summary termination was based on Applicant's medical condition, *i.e.*, her coronavirus vulnerabilities as certified by her doctor. In the second letter, the CEO explained that the decision to terminate Applicant was motivated by multiple acts of misconduct and ethics violations allegedly committed by Applicant.

31. The termination letter on health grounds was arbitrary and issued without proper authority. Under Staff rule 56.3(a), termination on grounds of ill-health must be based on an assessment by and advice of the Union Medical Panel. The recommendations of the Panel may even be further reviewed by an independent medical panel under Staff art. 56.5 before any personnel action could be taken. Here, no medical panel was set up to assess Applicant's medical fitness to continue in APRM's service.
32. In as much as the decision to terminate Applicant was not properly predicated on a Medical Panel's recommendation, the CEO acted arbitrarily and without lawful authority. Of note, the Union's acting Medical Director confirmed that it was "unfortunate that the CEO of APRM used [the doctor's note] to terminate [Applicant's] service. For us it was first to come to our Medical Board."
33. Aside from this fatal procedural flaw, the CEO made the determination on clearly frivolous grounds. There was no prima facie indication that Applicant was physically or mentally unfit to continue service. On the contrary, in the context of the coronavirus pandemic, Applicant's request to attend the planned meeting virtually was a reasonable accommodation consistent with Respondent's own policy at the time, and the Tribunal understands from the record, with the host government's contemporaneous public health directives.
34. Additionally, the CEO's decision was arbitrary in light of his own coronavirus related directives temporarily closing the APRM Secretariat issued a day after terminating Applicant, and indefinitely closing the APRM less than ten days later. It is, therefore, clear to the Tribunal that the CEO acted in bad faith when he terminated Applicant's appointment on health grounds. The decision of 29 June 2020 to terminate Applicant's employment is thus set aside.
35. In his second memorandum dated 22 July 2020, the CEO explained, apparently in a retrospective mea culpa regarding the initial letter, that he terminated Applicant because of several alleged acts of misconduct, as well as ethics, integrity and confidentiality violations which the Tribunal roundly deems unproven.
36. In breach of fundamental guarantees of due process, Applicant was not provided with formal notice of these alleged acts of misconduct or ethics violations at any time nor was she provided with an opportunity to address them within the framework of mandatory disciplinary proceedings or ethics investigations. The procedures set forth under Staff rule 59 are mandatory and entitled Applicant to due process rights, including, for instance, the right to be heard before a disciplinary board established in accordance with Staff rule 57.
37. In the absence of due process, the CEO's assortment of allegations does not appear credible and cannot be credited as proper basis to terminate Applicant. Even assuming there is any merit to the allegations, the CEO was still without authority to summarily dismiss Applicant without affording Applicant the opportunity to present her defense before a disciplinary board. It is clear to the Tribunal that, having realized the errors in terminating Applicant on unproven health grounds, the CEO subsequently tried to rely on a perceived authority to dismiss Applicant based on unproven misconduct. Frankly, it smacks of desperation for legitimate pretext to end Applicant's employment, where there was none.
38. In the circumstances, the Tribunal finds Applicant's complaint well-founded as there was no basis in fact or law to abruptly end her employment. The Tribunal further concludes that Applicant's termination was done in bad faith and with arbitrariness. Respondent must be held liable for the breach.
39. In an unlawful dismissal case such as here, the Tribunal would ordinarily consider reinstatement as just and most appropriate remedy. However, being mindful of the circumstances of Applicant's termination and hostile environment that preceded it, an order for reinstatement is not being made in this matter. Instead, the Tribunal orders payment of twelve months' gross salary as a fair redress for lost future income had Applicant remained in the post she occupied at the time of termination.
40. Additionally, as an indemnity for breach of contract, Applicant is awarded her gross salary for the remainder of her two-year employment contract as though she remained in service through 15 February 2021.
41. The Tribunal certainly understands that Applicant's emotional distress and financial burden from the sudden termination were likely heightened since the unlawful decision was taken at the height of the coronavirus public health emergency. The Tribunal has also considered the CEO's hostile attitude evidenced by his harassing use of South African legal processes, likely at cost to APRM, to stop Applicant from accessing lawful grievance procedures of the Union. Under the circumstances, the Tribunal sets moral damages at six months' salary. Applicant is also awarded \$5,000 in costs.
42. Furthermore, if the Chairperson were minded to, the CEO's callous attitude toward due process and disregard for Union laws, as manifested in this case, is the type of conduct the Tribunal believes should result in appropriate accountability measures.

43. Regarding Applicant's request for payment of 30 accrued annual leave days under Staff rule 38 undisputed by Respondent, the Tribunal determines that Applicant is entitled to the commuted cash value of 30 days of leave.

Orders

44. Accordingly, the Tribunal ORDERS as follows:

- a. Respondent shall pay Applicant any and all unpaid salary owing under her contract as a termination indemnity (1 July 2020 – 15 February 2021);
- b. Respondent shall pay Applicant twelve months' gross salary in material damages;
- c. Respondent shall pay Applicant six months' gross salary in moral damages;
- d. Respondent shall pay Applicant the cash value of 30 leave days; and
- e. Respondent shall pay Applicant \$5,000 in costs.
- f. 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.
- g. All other prayers are refused.

Date: 20 April 2021

/signed/

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

Secretary: _____

Paulo D. Comoane