



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/102
UNDT/NBI/2018/038
Judgment No.: UNDT/2019/068
Date: 29 April 2019
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

COLATI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

April L. Carter

Counsel for the Respondent:

Alan Gutman, ALS/OHRM

INTRODUCTION

1. The Applicant is a staff member of the United Nations Mechanism for International Criminal Tribunals (MICT) in Arusha, Tanzania. He is serving as a Security Officer at the FS-5 level.

2. The MICT is an international court established by the United Nations Security Council in 2010 to inherit and carry out the residual functions of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) after the closure of the two Tribunals.¹

PROCEDURAL HISTORY

3. The Applicant filed an application on 13 November 2017 with the United Nations Dispute Tribunal (UNDT) in Nairobi challenging the decision by MICT not to “abide by his rights as a holder of a continuing appointment”. He sought rescission of the administrative decision denying him a letter of appointment and a personnel action to effect the conversion of his fixed-term appointment to a continuing appointment. This application was registered as Case No. UNDT/NBI/2017/102.

4. The Respondent filed a reply on 14 December 2017 in which he asserted that the application is not receivable.

5. On 19 March 2018, the Applicant filed a response to the Respondent’s reply of 14 December 2017. Further, he filed another application challenging the Administration’s “illegal withdrawal of his continuing appointment” and a motion seeking consolidation of his new application with the previous one registered as Case No. UNDT/NBI/2017/102. This second application is registered as Case No. UNDT/NBI/2018/038.

6. The Respondent filed a reply on 23 April 2018 and, on 15 May 2018, the

¹ S/RES/1966 (2010).

Applicant submitted a response to the reply.

7. The Tribunal, by its Order No. 123 (NBI/2018) dated 22 August 2018, granted the Applicant's motion of 19 March 2018 and consolidated the two cases..

RELEVANT FACTS

8. The Applicant entered into service with the Department of Peacekeeping Operations (DPKO) on 29 July 2007 as a Field Mission Security Officer with the United Nations Assistance Mission in Afghanistan (UNAMA). He joined the United Nations Interim Force in Lebanon (UNIFIL) on 15 September 2012.

9. At the invitation of the Office of Human Resources Management (OHRM) the Applicant applied for conversion to a continuing appointment during the review which began in December 2015 for staff who met the eligibility criteria as of 1 July 2013.

10. On 11 November 2015, the Applicant was offered a one-year fixed-term appointment as a Security Lieutenant with the MICT Security & Safety Section in Arusha, Tanzania, with effect from 4 January 2016. The Applicant accepted the offer on 13 November 2015.

11. By memorandum dated 17 November 2015, addressed to the Chief, Human Resources Section at UNIFIL, the Chief, Human Resources Section at ICTY requested the transfer of the Applicant from UNIFIL to the MICT with effect from 1 January 2016 in accordance with the "Inter-Organization Agreement Concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances" (Inter-Organization Agreement).

12. The Applicant was transferred from UNIFIL to MICT pursuant to the Inter-Organization Agreement on 1 January 2016. On 20 January 2016, he signed a letter of appointment offering him a fixed-term appointment from 1 January to 31 December 2016.

13. On 3 November 2016, OHRM notified the Applicant that he had been

granted a continuing appointment in the Secretariat of the United Nations, effective 28 October 2016. OHRM further informed the Applicant that “[y]our respective HR Partner will issue the Letter of Appointment and the personnel action to effect the conversion of your fixed-term appointment to continuing”.

14. In light of the 3 November 2016 communication from OHRM, the Applicant wrote to the Human Resources Section at MICT in December 2016 requesting that his fixed-term appointment be converted to a continuing appointment when his appointment expired on 31 December 2016.

15. On 20 December 2016, the MICT offered the Applicant a fixed-term appointment for a two-year period, 1 January 2017 to 31 December 2018. The Applicant accepted the new appointment by signing a letter of appointment on 22 December 2016.

16. By email dated 31 May 2017, the Chief, Human Resources Section at ICTY informed the Applicant that MICT was not in a position to grant him a continuing appointment on the basis of the OHRM communication because it did not have the delegated authority to issue such appointments.

17. On 11 July 2017, the Applicant submitted a request for management evaluation of the decision of the MICT not to issue him a letter of appointment reflecting a continuing appointment with service in the MICT.

18. The Under-Secretary-General for Management (USG/DM) responded to the Applicant’s request for management evaluation by a memorandum dated 2 November 2017. The USG/DM informed the Applicant that:

- a. Since MICT is a non-Secretariat entity, he became ineligible for consideration for a continuing appointment as of 1 January 2016, which was within the period of consideration.
- b. The Secretary-General had decided to accept the recommendation of the Management Evaluation Unit (MEU) that OHRM review its decision regarding his being granted a continuing appointment.

19. By a memorandum dated 12 December 2017, OHRM informed the Applicant that he had been “erroneously notified through Inspira on 3 November 2016 that [he] would be granted a continuing appointment under the 2013 Continuing Appointment Review exercise”. The memorandum explained that since the period of consideration commenced on 1 December 2015 and ended on 28 October 2016, he became ineligible upon his transfer to MICT, a non-Secretariat entity, on 1 January 2016. Consequently, he was informed that OHRM was withdrawing its communication of 3 November 2016.

ISSUES

20. The issues for determination are:

- a. Whether the applications are receivable.
- b. Whether it was lawful for MICT to refuse to grant the Applicant a continuing appointment in spite of OHRM’s communication to him of 3 November 2016.

Is the application in Case No. UNDT/NBI/2017/102 receivable?

21. Part of the Respondent’s case is that the application is not receivable for the following reasons:

- a. On 6 December 2016, the Applicant requested that MICT consider OHRM’s 3 November 2016 notification in renewing his appointment. Instead of acceding to the Applicant’s request, MICT, on 20 December 2016, offered him a fixed-term appointment from 1 January 2017 to 31 December 2018, which he accepted. Consequently, the MICT declined to grant the Applicant a continuing appointment on 20 December 2016. This was an appealable administrative decision.
- b. The Applicant should have sought management evaluation of the 20 December 2016 administrative decision within the 60-day statutory period set out in staff rule 11.2(c) but he did not do so until 11 July 2017. MEU’s 2 November 2017 response to the Applicant’s management

evaluation request was not a waiver of the 60-day requirement in staff rule 11.2(c).

c. The 31 May 2017 correspondence from the Chief, ICTY Human Resources Section did not convey a new decision but merely confirmed and explained the 20 December 2016 decision not to grant the Applicant a continuing appointment. The correspondence did not reset the period for contesting the decision.

22. The Applicant's case is that:

a. MICT's issuance of a fixed-term contract on 20 December 2016 cannot be considered as an administrative decision not to issue the Applicant a continuing appointment because OHRM only withdrew its 3 November 2016 decision on 12 December 2017.

b. Between 15 November and 23 December 2016, the Applicant sought clarification from the MICT Human Resources Section on the procedure related to continuing contracts. On 30 December 2016, MICT Human Resources Section decided to seek advice from OHRM. It was not until 31 May 2017 that the Chief, ICTY Human Resources Section acknowledged that the MICT could not issue a continuing appointment due to the limited delegated authority it had.

c. OHRM was the only authority who could grant or deny the Applicant a continuing appointment and it did not do so until 12 December 2017.

Considerations

23. There is agreement between the parties that on 6 December 2016, the Applicant requested the MICT to implement the grant of a continuing appointment conveyed to him by OHRM on 3 November 2016. It is not contested that on 20 December 2016, the MICT granted the Applicant a two-year fixed-term appointment upon the imminent expiry of his then one-year fixed-term

appointment. The new two-year fixed-term appointment was to run from 1 January 2017 to 31 December 2018.

24. There is no contest that the MICT did not address the Applicant's request for the grant of a continuing appointment at the time that it granted him a two-year fixed-term appointment. The Applicant accepted the offer of the new two-year contract from MICT. Staff rule 11.3(c) provides that a request for management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which the staff member received notification of the administrative decision to be contested. Is it established in this case that the MICT had refused or declined the request of the Applicant for implementation of the continuing contract of which he was notified on 3 November 2016?

25. Clearly, if the MICT had refused or declined the request to implement the continuing contract on behalf of the Applicant, it would have told him so and ought to have told him so in its letter of 20 December 2016. Instead on 30 December 2016, a Human Resources Officer, acting on behalf of the MICT, indicated in an email on which the Applicant was copied that clarification regarding the continuing appointment of the Applicant would be sought from OHRM. In other words, the MICT had not taken any action on the Applicant's request in December 2016 and had rather sought clarification as to its capacity to do so.

26. It was only on 31 May 2017 that the MICT responded to the Applicant's query regarding the notification he received in Inspira on 3 November 2016 that he had been awarded a continuing appointment by the United Nations Secretariat and informed him that the MICT was not in a position to grant him such an appointment.

27. In its letter, the MICT informed the Applicant in clear terms that staff of the MICT are ineligible for continuing appointments. It proposed the option of contacting DPKO, from which the Applicant had transferred, to explore the possibility of retroactively converting his transfer to a secondment with a lien on

his post at DPKO so that the Applicant could retain the award of continuing appointment. It invited the Applicant to consider that option which he refused.

28. That letter from the MICT dated 31 May 2017 was the response to the Applicant's 6 December 2016 request for the implementation of the award of the continuing appointment of which he was notified by Inspira on 3 November 2016. The Respondent's argument that the granting of a fixed-term appointment by the MICT to the Applicant on 20 December 2016 in renewal of a previous fixed-term appointment which was to expire within the next 10 days or so was a denial of the request to actualize the Applicant's continuing appointment is without merit.

29. The Tribunal finds and holds that a response to the Applicant's request was only made by the MICT on 31 May 2017. When therefore the Applicant made a management evaluation request on 11 July, he was still within the prescribed time limits of 60 days under staff rule 11.3(c). The first Application UNDT/NBI/2017/102 is accordingly receivable.

Is the application in Case No. UNDT/NBI/2018/038 receivable?

30. Here, the Respondent's case is that:

a. The principle of *lis pendens* applies because the Applicant has already challenged the decision not to grant him a continuing appointment in Case No. UNDT/NBI/2017/102.

b. The 12 March 2018 correspondence did not convey an administrative decision in accordance with art. 2.1(a) of the UNDT Statute. It merely advises that a prior correspondence was sent in error, explains the source of the error and renders an apology. Additionally, the 12 March 2018 correspondence could not have withdrawn the Applicant's continuing appointment since he has never served on one. The Applicant served on a fixed-term appointment that he agreed to in December 2016.

c. The Respondent maintains his submission on receivability in Case No. UNDT/NBI/2017/102 thus this application is time-barred.

31. The Applicant's case is that:
- a. Given that the MICT continued to review the procedures relating to the Applicant's continuing appointment for months after the 20 December 2016 letter of appointment demonstrates that there was no administrative decision.
 - b. Case Nos. UNDT/NBI/2017/102 and UNDT/NBI/2018/038 relate to two separate decisions by the MICT and OHRM that have affected the Applicant's employment. The decision by MICT was its refusal to implement the Applicant's conversion to a continuing appointment after it had been approved by OHRM. The second impugned decision was not informational but rather a decision by OHRM to not perform the required actions for the Applicant's conversion to a continuing appointment.
 - c. Both cases turn on a single issue regarding the status of the MICT within the Secretariat.

Considerations

32. The Tribunal consolidated the two applications filed by the Applicant on 13 November 2017 and 19 March 2018. Although the first application challenges an administrative decision by the MICT on 31 May 2017 while the second application challenges the formal withdrawal by OHRM of its notification of 3 November 2016 to the Applicant that he was awarded a continuing appointment, the two applications are in essence identical and seek the same remedies.

33. To the extent that the OHRM's letter of 12 December 2017 to the Applicant only reiterated the administrative decision already made by the MICT on 31 May 2017, the Tribunal finds that UNDT/NBI/2018/038 does not challenge a new administrative decision. The Tribunal agrees with the Respondent that the principle of *lis pendens* is applicable here and the Applicant will not be allowed to re-litigate the same cause of action that is already pending before this Tribunal.

34. Additionally, even though the Applicant challenges the administrative decisions made by the MICT and the OHRM on the same issue affecting his contractual status, the Respondent in each case is the Secretary-General. It can only be reiterated that the cause of action is one and the same.

35. The Tribunal will not go as far as finding that this second application registered as UNDT/NBI/2018/038 is an abuse of process but hereby strikes it out for offending the *lis pendens* principle.

Was the decision by MICT not to grant the Applicant a continuing appointment in spite of the 3 November 2016 communication from OHRM unlawful?

36. The Applicant's case is as follows:

a. The OHRM retains the authority to grant or refuse continuing appointments. The authority of the MICT Registrar relates to fixed-term appointments thus it is not within the authority of MICT to grant or deny a continuing appointment. The MICT was only to give effect to the 3 November 2016 OHRM notification by issuing the relevant Letter of Appointment.

b. The delegation of authority granted to the MICT Registrar does not override ST/SGB/2011/9 (Continuing appointments), ST/AI/2012/3 (Administration of continuing appointments) and ST/IC/2015/23 (Review for consideration for the granting of a continuing appointment, as at 1 July 2013). When the Secretary-General issued ST/SGB/2011/9, he expressly excluded the ICTY and the ICTR but he made no mention of MICT. Since he did not expressly exclude MICT staff from the continuing appointment regime, it means that no such exclusion was intended. Additionally, ST/AI/2012/3 only excludes ICTY and ICTR. The Applicant's inclusion on the 2015 exercise pursuant to ST/IC/2015/23 is evidence of the intentional inclusion of MICT staff.

c. Although the MICT is a successor to the ICTY, it is a separate and distinct entity. Thus, prohibitions against ICTY staff in the continuing appointments regime does not apply to MICT staff.

d. OHRM identified the Applicant as being eligible for a continuing appointment when he had been serving with MICT for four months. OHRM's period of consideration included 10 months of the Applicant's service with MICT.

37. The Respondent's case is as follows:

a. The Applicant was not eligible for a continuing appointment under ST/AI/2012/3 because he was not a Secretariat staff member throughout the relevant period, from 1 December 2015 to 28 October 2016. He became ineligible once he separated from UNIFIL and transferred to MICT on 1 January 2016.

b. The MICT is not part of the Secretariat. It is a subsidiary organ of the Security Council. It does not fall under Chapter XV of the Charter (the Secretariat) but rather under Chapter VII (Action with respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression).

c. The inclusion of MICT in activities or reports of the Secretariat or in administrative service arrangements of the Secretariat does not make its staff part of the Secretariat.

d. Paragraph 6 of the 19 March 2012 memorandum on delegation of authority to the MICT Registrar on behalf of the Secretary-General clearly states that staff members of the MICT would not be considered staff members of the Secretariat and their service would be exclusively limited to service with the organ.

e. Also in paragraph 16 of the same memorandum, it is stated that movement of staff in the professional or higher categories to the MICT from the United Nations Secretariat, United Nations Funds and

Programmes or other pertinent entities will be considered under the *Inter-Organization Agreement concerning the Transfer, Secondment or Loan of staff among the Organizations of the United Nations Common System of Salaries and Allowances*.

Considerations

38. The only question that needs to be settled here is whether the Applicant as a staff member of the MICT is entitled to the award of a continuing contract.

39. It is not in contention that on 1 January 2016 the Applicant transferred from DPKO which is part of the Secretariat to the MICT. Before the said transfer, the Applicant had been invited by OHRM to participate in the 2015 continuing appointment review established through ST/AI/2012/3. His period of consideration was from 1 July 2013 to 28 October 2016.

40. It has been extensively argued for the Applicant that he was in active service in the United Nations Secretariat under a fixed-term appointment throughout the period of consideration. It was also argued on his behalf that the Applicant's inclusion in the 2015 exercise pursuant to ST/IC/2015/23 is evidence of the intentional inclusion of MICT staff.

41. The Respondent's case is that the Applicant left service in the Secretariat when he transferred to the MICT on 1 January 2016 and before the period of consideration for the award of a continuing appointment ended. He also argues that the MICT is not part of the Secretariat.

42. The Respondent argues also that when a notification was sent through Inspira to the Applicant on 3 November 2016 that he had been awarded a continuing contract, that notification was done in error and was consequently withdrawn.

43. Even though he had accepted an outright transfer to MICT, it was also argued for the Applicant that MICT is part of the United Nations Secretariat and that he therefore is entitled to a continuing appointment while a staff of MICT.

44. The Tribunal has fully reviewed all the arguments and documentary evidence placed before it by both parties in order to determine whether the MICT is part of the United Nations Secretariat. Its finding is that it is not. The memorandum of 19 March 2012 from the Department of Management to the Registrar of the MICT clarified the status of the MICT and matters in which the Registrar had delegated authority from the Secretary-General.

45. At its paragraph 5, that memorandum stated that staff members of the MICT would not be considered staff members of the Secretariat and their service would be exclusively limited to service within it. The stipulations of the memorandum have clearly been put into effect since it was made in 2012, five years before the Applicant challenged its contents in this application. There is no evidence before the Tribunal that any staff member of the MICT was ever granted a continuing appointment as a United Nations Secretariat staff member.

46. It is not in contention that the MICT is a successor of the ICTY and ICTR and is a subsidiary organ of the Security Council. It is also not contested that the MICT was created by the Security Council under chapter VII of the United Nations Charter while the Secretariat was created under Chapter XV of the Charter. The Tribunal finds and holds that the MICT is a non-Secretariat entity and its staff members are not staff of the United Nations Secretariat.

47. The MICT has no capacity to grant any of its staff a continuing appointment. Therefore, its decision to not grant the Applicant a continuing appointment in spite of the erroneous notification from OHRM on 3 November 2016 is lawful.

48. Similarly, and for the avoidance of doubt, the Applicant having left DPKO and transferred to the MICT, OHRM's action in withdrawing the Inspira notification to him of 3 November 2016 granting him a continuing appointment was not unlawful. The Organization retains the discretion to correct an error.²

² *Cranfield* 2013-UNAT-367.

49. The Tribunal hereby underscores the avoidable error committed by OHRM when Inspira sent the 3 November notification to the Applicant and thereby giving rise to the present spate of applications. Even though OHRM has apologized for it, the Tribunal notes that aside of provoking an expectation on the part of the Applicant, there has been no tangible damage done to the Applicant.

Judgment

50. The consolidated application fails.

(Signed)

Judge Nkemdilim Izuako

Dated this 29th day of April 2019

Entered in the Register on this 29th day of April 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi