



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

THIOMBIANO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Christina Zantis, UNFPA
Federica Midiri, UNFPA

Introduction

1. The Applicant is a Programme Assistant with the United Nations Population Fund (UNFPA) in Agadez, Niger.
2. On 14 September 2016, he filed an application before the Dispute Tribunal contesting the decision to extend his fixed-term appointment (FTA) from 11 September 2015 until 29 February 2016 through his Personnel Action Report (PAR) forwarded to him on 17 September 2015 as well as the decisions to extend his FTA from 1 to 31 March 2016 and from 1 to 30 April 2016 through his PAR forwarded to him on 6 April 2016.
3. The Respondent filed a reply to the application on 24 October 2016 where it is argued that the application is not receivable, in part, and unfounded in the other part.

Facts

4. By letter dated 7 May 2015, the Representative of the UNFPA country office in Niger (“CO”) decided not to renew the Applicant’s FTA running from 15 August 2014 until 14 August 2015 for performance reasons.¹
5. On 24 July 2015, the Applicant submitted a management evaluation request (MER) contesting the decision and, on 6 August 2015, he wrote to the Executive Director/UNFPA requesting the suspension of the decision not to renew his FTA pending the management evaluation.²
6. The UNFPA Executive Director approved the Applicant’s request for suspension of action on 6 August 2015 and UNFPA extended his FTA until 10 September 2015.³
7. On 14 August 2015, the Applicant was informed that his FTA had been extended to 10 September 2015.⁴

¹ Annex 2 – reply.

² Annex 3 - reply.

³ Annex 2 – application.

8. On 8 September 2015, the UNFPA Executive Director replied to the Applicant's MER indicating that the decision not to renew his FTA had been rescinded as it was not taken in line with the terms of UNFPA's Separation Policy and that his FTA would be extended to enable management to appropriately assess his performance in line with UNFPA's procedures for performance appraisal and development (PAD).⁵

9. Following the UNFPA Executive Director's decision of 8 September 2015, the Applicant was notified of his FTA's extension, from 11 September 2015 to 29 February 2016, through a PAR on 17 September 2015.⁶

10. On 6 April 2016, the Applicant was informed that his appointment had been extended, retroactively, from 1 March 2016 to 31 March 2016 and from 1 April 2016 until 30 April 2016.⁷

11. The Applicant submitted a rebuttal statement of his 2015 PAD.

12. On 12 April 2016, the Applicant was informed that his appointment would be extended till 15 May 2016 and, should the review of the rebuttal by the UNFPA Rebuttal Panel not be completed before that date, his appointment would be further extended on a monthly basis until the rebuttal review was completed.⁸

13. On 29 April 2016, the Applicant filed an MER of the decisions to extend his appointment from 1 to 31 March 2016 and from 1 to 30 April 2016.⁹

14. On 11 May 2016, the Applicant was informed that his appointment had been extended until 15 June 2016.¹⁰

15. On 3 June 2016, the Applicant requested a MER of the decision of 12 April 2016.¹¹

⁴ Annex 4 – application.

⁵ Annex 5 – application.

⁶ Annex 8 – application.

⁷ Annex 9 – application.

⁸ Annex 14 – application.

⁹ Annex 10 – application.

¹⁰ Annex 15 – application.

¹¹ Annex 9 – reply.

16. On 9 June 2016, the Executive Director of UNFPA issued the management evaluation in response to the Applicant's MER of 29 April 2016 where it was concluded that the extensions of his fixed-term appointment from 1 to 31 March 2016 and from 1 to 30 April 2016 were lawful.¹²

17. On 12 July 2016, the management evaluation in response to the Applicant's MER of 3 June 2016 concluded that the decision of 12 April 2016 had been correctly based on the evaluation of his performance as reported in his PAD but before his rebuttal of 8 April 2016. He was accordingly informed that his appointment would be renewed to permit the UNFPA Rebuttal Panel's review including also of his 2015 PAD, thereafter the issue of renewal of his appointment would be based on the outcome of the review.¹³

18. On 23 August 2016, the Rebuttal Panel completed its review and decided to change the Applicant's overall rating in the 2015 PAD from "developing" to "fully proficient".¹⁴

19. Accordingly, on 26 August 2016, the Applicant was informed that the decision not to renew his appointment of 12 April 2016 had been rescinded and that his appointment would be extended until 31 March 2017.¹⁵

20. On 17 November 2016, the Applicant filed a response to the Respondent's reply to his application. He recalled that in September 2016, the UNFPA Ethics Advisor had established a *prima facie* case that certain staff in the Niger Country Office may have retaliated against him for having reported misconduct in May 2014 and December 2015.¹⁶

Applicant's case

Receivability

21. The Applicant submits that his management evaluation request of 29 April 2016 was filed well within the time limits from the notification of the decisions to

¹² Annex 11 – application.

¹³ Annex 10 – reply.

¹⁴ Annex 11 – reply.

¹⁵ Annex 11 – reply.

¹⁶ Annex 3 to the Applicant's additional submissions of 17 November 2016.

extend his FTA from 1 to 31 March 2016 and from 1 to 30 April 2016 through his PAR which was forwarded to him on 6 April 2016. No irreceivability argument was raised in the management evaluation decision.

Merits

22. The Applicant maintains that his FTA with effect from 11 September 2015 had been automatically converted into a continuous appointment due to the lack of timely written notification of the renewal of the FTA which came only on 17 September 2015. The Applicant claims that this alleged procedural flaw automatically triggered the conversion of his FTA into a continuous appointment.

23. The Applicant points out to the prior practice of UNFPA whereby FTA notifications had been issued in advance of the date of expiration. He further points out that, under staff rule 9.4, an FTA expires automatically at a specified end date. UNFPA policy in respect to fixed term and continuing appointments, neither the one from 2009 nor the new one put in place in July 2016, did not determine specific conditions for conversion of fixed-term into continuing appointments and did not provide for the issuance of FTAs retroactively. There were no practical circumstances preventing the Organization from issuing a new FTA timely.

24. The 8 September 2015 management evaluation decision from the UNFPA Executive Director does not constitute an act of appointment. In any event, it did not specify the date until which his FTA would be extended. An email from human resources from 14 September confirms that the decision had yet to be taken. Whereas after the expiration of his FTA on 10 September 2015 he continued to render work under the same conditions, this situation legally amounted to an automatic conversion of his type of appointment. In such a situation, the Applicant relies on a holding of the French *Court de cassation* where a failure to issue a fixed-term contract timely resulted in its ineffectiveness.

25. The Applicant advances the same arguments in relation to his FTAs from 1 to 31 March 2016 and from 1 to 30 April 2016 through his PAR forwarded to him on 6 April 2016.

Remedies sought

26. The Applicant requests the Tribunal to declare the contested decisions to extend his FTAs null and void and to confirm the conversion of his appointment to a continuing one with all the attendant benefits. Whereas in the application the Applicant alleged enormous and irreparable moral damage, in his response to the Respondent's reply, however, he did not offer evidence of the same.

Respondent's case*Receivability*

27. The application is not receivable *ratione materiae* insofar as it challenges the decision to extend the Applicant's FTA with effect from 11 September 2015 until 29 February 2016 because the Applicant failed to submit a MER of the decision as required under staff rule 11.2(a) and art. 8.1(c) of the Statute of the Dispute Tribunal.

28. The Applicant's MER of 29 April 2016 with which he challenged the decisions to extend his FTA from 1 to 31 March 2016 and from 1 to 30 April 2016 cannot be construed as an incidental MER with respect to the prior decision to extend the Applicant's FTA from 11 September 2015 until 29 February 2016. This would result in a circumvention of staff rules 11.2(a) and (c).

*Merits**Decision to renew the Applicant's FTA from 11 September 2015 until 29 February 2016 was legal*

29. On 6 August 2015, the UNFPA Executive Director approved the Applicant's request for suspension of the decision not to renew his FTA pending the management evaluation in accordance with staff rule 11.3. Consequently, UNFPA extended his FTA until 10 September 2015.

30. The 8 September 2015 management evaluation decision by the UNFPA Executive Director informed the Applicant that UNFPA would rescind the decision not to renew the FTA and extend the Applicant's appointment for the

time necessary to appropriately assess his performance following the UNFPA PAD procedures. The Applicant received the UNFPA Executive Director's letter on 9 September 2015 and, accordingly, knew that his FTA would be extended until completion of his PAD procedures for 2015.

31. To implement the UNFPA Executive Director's decision of 8 September 2015, UNFPA tried to arrive at the most accurate estimate of the time necessary for management to appropriately assess the Applicant's performance following the PAD procedures in accordance with the PAD cycles for that year. UNFPA Management took six working days to assess such evaluation and estimated 29 February 2016. Following the decision of 8 September 2015, the Applicant was notified of the exact term of his FTA's extension, i.e. from 11 September 2015 to 29 February 2016, through his PAR on 17 September 2015.

32. The fact that the renewal of the Applicant's appointment was implemented by way of PAR was based on para. 16 of the FTA Policy which provides that renewals of fixed-term appointments are implemented by an appropriate personnel action, not by issuance of a new letter of appointment.

33. The Respondent's decision to renew the Applicant's FTA from 11 September 2015 until 29 February 2016 was taken to protect the Applicant's due process rights and, at the same time, to take into consideration any potential detrimental effects to UNFPA should the evaluation of the Applicant's performance, following the completion of PAD procedures, turn out to have been below standards.

34. The notification of the exact period of the Applicant's extension by issuance of a PAR on 17 September 2015 was done in the best interest of the Applicant and the Organization. The present case required UNFPA's calculation of the estimate of the extension period necessary to implement the UNFPA Executive Directors decision. This took place from 8 to 17 September 2015. The retroactive effect of the PAR ensured that its issuance after 10 September 2015 would not have any negative effect on the Applicant's FTA.

Alleged conversion of Applicant's FTA into a continuing appointment

35. The Applicant was notified in writing of the extension of his FTA prior to its initial expiration on 10 September 2015. The Applicant received the reply to his first MER on 9 September 2015 in which the UNFPA Executive Director concluded that the Organization would extend his appointment for the time necessary for management to appropriately assess his performance. Therefore, even if without indication of a specific duration, the Applicant had an explicit indication that his appointment would be renewed until completion of the PAD procedures directly by the UNFPA Executive Director.

36. Contrary to the Applicant's contentions, neither staff rule 9.4 nor staff regulation 4.3(c) support the perception that FTAs automatically convert into continuous appointments should the exact period of extension be communicated after their initial expiration date. Rather, staff rule 9.4 clarifies the time-limited nature of FTAs which automatically expire on their expiration day rather than being renewed or converted into any other type of contract.

37. The Organization's applicable legal framework does not provide for automatic conversions of FTAs into continuous appointments for alleged lack of written notification of an FTA extension. Conversions of FTAs into continuous appointments within the United Nations system are generally subject to strict requirements such as the highest standards of performance and subject to a comprehensive recommendation and approval process. This is reflected in staff rule 13.4 and ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009).

38. Contrary to the Applicant's averment, the email from the CO's Representative of 14 September 2015 did not leave the Applicant in uncertainty about the extension of his FTA. The same applies to the emails sent by the UNFPA system notifying the Applicant about the upcoming expiration of his FTA. Similar emails are automatically generated until the extension has been processed in the system.

39. The Applicant argues that it is the Organization's standard practice to notify its staff of the exact extension period prior to the FTAs initial expiration date and that the same supports the automatic conversion of his FTA into a continuous appointment. Neither the Staff Regulations and Rules nor UNFPA's policies and procedures prescribe specific requirements in this regard. While UNFPA aims not to extend FTAs with a retroactive effect, the same may be required in certain circumstances such as in the present case.

40. The Applicant supports his contention with a judgment from a French national Court. As consistently held by the Tribunal on several occasions, domestic law does not apply to and national jurisdiction is not binding to the United Nations including its subsidiary organs like UNFPA. Rather, the Applicant's terms and conditions of employment, like for any other staff, are governed by the Organization's rules and regulation and its related judicial system.

Decisions to extend the Applicant's FTA from 1 to 31 March 2016 and from 1 to 30 April 2016 were legal

41. UNFPA renewed the Applicant's FTA on a month to month basis in accordance with para. 19 of the FTA Policy with the objective of providing the Applicant with an opportunity to complete his PAD 2015 and with the view of allowing the Applicant to exercise his rebuttal rights within 30 days following finalization thereof.

42. The Applicant's PAD 2015 was finalized by his supervisor on 9 March 2016. The Applicant had finalized it on 3 March 2016. On 8 April 2016, the Applicant made use of his due process rights and submitted a rebuttal statement of his PAD 2015 according to the Organization's Rebuttal Policy. The extensions of the Applicant's FTA from 1 to 31 March and from 1 to 30 April 2016 were in line with the UNFPA Executive Director's decision of 8 September 2015 and sought to protect the Applicant's due process rights.

Other matters raised by the Applicant

43. The Applicant has submitted allegations of misconduct, complaints of harassment or retaliation and similar allegations and/or complaints against the Organization. In this connection, the Respondent wishes to clarify that UNFPA has informed the Applicant on various occasions, such as by the UNFPA Executive Director's letter of 9 June 2016, that the merits of such allegations cannot be analyzed by the Organization in the course of a MER but should be addressed to specific, operationally independent offices of UNFPA established for that purpose. Accordingly, such allegations, complaints and other claims cannot be made subject to the Tribunal's decision whether the Respondent's administrative decisions were lawful.

44. The Respondent requests the Tribunal to reject the application in its entirety.

Considerations*Receivability*

45. The Tribunal agrees with the Respondent that the decision to extend the Applicant's FTA with effect from 11 September 2015 until 29 February 2016 is irreceivable because the Applicant failed to submit a request for management evaluation of the decision as required under staff rule 11.2(a) and art. 8.1(c) of the Statute of the Dispute Tribunal. Circumstances pertaining to this decision are considered solely as background for the main claim.

Claimed conversion of Applicant's FTA into a continuing appointment

46. For the reasons stated by the Respondent, the Tribunal finds no basis for the Applicant's claim that his appointment had been converted into a continuing one. The Tribunal recalls that, overall, continuing appointments are not granted as a matter of law but are subject to the fulfilment of eligibility criteria and to verification and approval processes. This rule is borne out by all the relevant instruments: staff rule 13.4; ST/SGB/2009/10; General Assembly Resolution

A/RES/65/247 (Human resources management); and ST/SGB/2011/9 (Continuing appointments).

47. The FTA granted to the Applicant on 17 September 2015, albeit retroactive by 7 days, was issued after the Applicant had been informed, in no uncertain terms, by the management evaluation decision that his appointment would be extended for a finite period, determined by the duration of the work of the UNFPA Rebuttal Panel. As such, the Applicant had no basis to presume that his appointment was converted into a continuing one.

Legality of further extensions

48. The Tribunal agrees that the appropriate course of action would have been to extend the Applicant's appointment before the expiration date and with the new date of expiration fixed, notwithstanding the fact that the FTA would have been extended on a month to month basis, as per para. 19 of the FTA Policy. The issuance of the Applicant's appointment covering the entirety of March and April 2016 on 6 April 2016 was not a good practice whereas reasons proffered by the Respondent, i.e., that the Applicant's rebuttal process was on going and different documents were being filed, do not explain the failure to act timely. In the circumstances of the case, however, especially given that the Applicant had been notified by the decision of 8 September 2015 that the FTAs would keep on coming pending the completion of the work of the Rebuttal Panel, as well as that the employment relation was implemented, the delay does not bear upon the legality of the FTAs.

49. The Applicant did not allege a nexus between the complaint of retaliation and the retroactivity of his FTAs. In any event, the Tribunal finds that the procedural irregularity in issuing them could cause vexation but do not however amount to a serious violation of rights. The Tribunal does not see the grounds to entertain the question of moral damage.

50. For reasons discussed in the preceding section, the delays discussed here did not entail an *ex lege* conversion to a continuing appointment.

Conclusions

51. The application is irreceivable regarding the decision to extend the Applicant's FTA from 11 September 2015 until 29 February 2016;

52. In the remaining part the application is refused.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 10th day of May 2019

Entered in the Register on this 10th day of May 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi