

Case No.: UNDT/NBI/2017/102
UNDT/NBI/2018/038
JudgmenNo.: UNDT/2019/068
Date: 29

TRIBUNAL

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 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

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 December 2016 requesting that this 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 3 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 ~~informed~~ 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

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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

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~~ appointment by the MICT to the Applicant on 20 December 2016 in renewal of a previous ~~fixed~~ appointment which was to expire within the next 60 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 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 art1(2) of the UNDT Statute It mereulet

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. ()] 19(e)3()-10(pr)-7(o)-20(c)23(e)3(dur)-7(e)3(s)8()-10(r)-7(e)BT /F

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. 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 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

Programmes or other pertinent entities will be considered under *the 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

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 placing an expectation on the part of the Applicant, there has been no tangible damage 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 the 29th day of April 2019

(Signed)

Abena KwakyeBerko, Registrar, Nairobi