



Case No.: UNDT/NBI/2009/073

Judgment No.: UNDT/2010/196

Date: 18 November 2010

## **Introduction**

1. The Applicant, a staff member of the United Nations Joint Staff Pension Fund (“UNJSPF”) who was on mission detail to the United Nations Mission in the Central African Republic and Chad (“MINURCAT”), contests the decision of the Chief of Mission Support (“CMS”) of MINURCAT, dated 28 June 2009, not to extend his mission assignment beyond 18 August 2009.

2. Following a hearing on the merits, the respective contentions of the parties has been narrowed to the following:

## **Applicant’s submissions**

3. It is the Applicant’s case that the decision by the CMS not to extend his assignment with MINURCAT was due primarily to his inability to speak French and that this requirement was introduced on an *ex post facto* basis in light of the fact that it was not a requirement of the vacancy announcement that he applied, interviewed and was selected for. The Applicant provided a copy of the said vacancy announcement in support of his allegation that French was not a requirement of the post.

4. It is also the Applicant’s case that the contested decision is prejudiced, arbitrary and based on abuse of authority and improper motives because:

- a) He attempted to protect himself and other staff members of MINURCAT against harassment from the CMS; and
- b) He was competent in administration whereas the CMS lacked understanding of basic administration in the field.

5. Additionally, the Applicant submits that he had an expectancy of extension as the CMS agreed to extend his mission assignment to 18 February 2010.

**Remedies being sought by the Applicant**

6. In light of the Applicant's submissions

10. On 12 August 2008, the CMS arrived in Chad to take up his functions.

11. The CMS, in a report of March 2009, requested assistance from United Nations Headquarters in searching for experienced professionals at the section chief level in the support services. In a 27 April 2009 facsimile to the Under-Secretary-General of the Department of Field Support (“USG/DFS”), the CMS proposed the upgrading of a number of section and unit chief posts within MINURCAT. He also requested that his service chiefs, including the Applicant, and five section chiefs be replaced.

12. On 30 March 2009, the CMS sent the Applicant the following email:

*“I would like to know what are your annual leave plan [sic] towards the end of your contract in August, since I intend to initiate recruitment for the CAS position and the process should start 3 to 4 months before your departure so as to ensure continuity and overlap in the position.”*

13. On 2 April 2009, the Applicant responded to the CMS’ email explaining that as a staff member on assignment from Headquarters, he had a two-year lien on his New York post and that since he was only at the 18 month point, he had to complete two-years in the mission. He then asked the CMS to explain why he would wish to advertise his post. The Applicant did not receive a response.

14. On 12 and 16 May 2009, five section chiefs and the Applicant, respectively, submitted written grievance against the leadership of the CMS to the USG/DFS. The USG/DFS acknowledged receipt of the Applicant’s letter on 18 May 2009 and indicated that she would look into the matter.

15. On 29 May 2009, the Internal Audit Division of the Office of Internal Oversight Services (“IAD/OIOS”) submitted an audit report on the recruitment of

international staff in MINURCAT to the Special Representative of the Secretary-General (“SRSG”) of MINURCAT. The report noted that there were managers and supervisors in MINURCAT who could not communicate in French and recommended that the MINURCAT Office of Mission Support follow up with the Field Personnel Division, Department of Field Support (FPD/DFS) to ensure, for certain positions identified by MINURCAT management, that there is a requirement for candidates to be fluent in French.

16. Between 12 and 20 June 2009, a joint DFS/DPKO team (“the Mission Support Evaluation Team”) visited MINURCAT. The objective of the evaluation was to strengthen the delivery of mission support in MINURCAT by identifying issues that require intervention either at United Nations Headquarters in New York or within the mission itself. The Applicant, who was away on leave during this period, provided the Mission Support Evaluation Team with a note on his perception of Administrative Services in MINURCAT. In its report, dated 5 August 2009, the Evaluation Team recommended, *inter alia*, that FPD/DFS expedite its outreach activities to identify French speaking candidates able to deploy to MINURCAT in order to alleviate difficulties faced by the mission in communicating with local authorities and national staff.

17. On 11 June 2009, the Applicant requested his parent office, the UNJSPF, to liaise with DFS with regard to his extension. On 25 June 2009, FPD/DFS informed the UNJSPF that MINURCAT had decided not to extend the Applicant’s assignment beyond 18 August 2009. The UNJSPF communicated this information to the Applicant on 26 June 2006.

18. On 6 July 2009, the Applicant received a copy of the request not to extend his assignment, dated 28 June 2009. In the form, the Applicant’s performance was rated as fully successful but the CMS indicated that, “the senior function of CAS requires a good knowledge of French to facilitate interaction with clients and especially national staff (audit recommendation). It is therefore recommended that the staff member

return to his parent office”.

19. On 23 July 2009, the Applicant submitted a request for management evaluation of the decision not to extend his assignment with MINURCAT. He received an unfavorable response from MEU, dated 4 September 2009, and filed the present application with the United Nations Dispute Tribunal (“the Tribunal”) on 1 December 2009.

**Issue 1**

20. Was the contested decision prejudiced, arbitrary and based on abuse of

*and Return from Mission Detail*, the primary objective for assignment of staff to field operations is to obtain competent and committed personnel and to provide staff members with personal and professional growth and development.

25. Paragraph 6 of ST/AI/404 on *Assignment to and Return from Mission Detail*, which sets out procedures and guidelines governing mission detail, emphasizes that mission detail, as any other assignment in the Organization, is at the discretion of the Secretary-General, as provided in staff regulation 1.2(c), which provides that:

*“Staff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations.”*

26. Further, to ensure the right of return of staff members on mission detail to their parent organizations, paragraph 7 of ST/AI/404 provides for the blocking of posts of detailed staff members holding permanent or long-term appointments for a period of up to two years.

27. The Applicant was initially given a six-month contract when he took up his duties as CAS on 18 February 2008. This contract was subsequently extended for an additional 12 months 19 August 2009 for a total mission assignment of 18 months.

28. In a monthly report dated March 2009, the CMS requested assistance from United Nations Headquarters in searching for experienced professionals at the section chief level in the support services. On 30 March 2009, he sent the Applicant an email inquiring about his leave plans “towards the end of [the Applicant’s] contract in August, since I intend to initiate recruitment for the CAS position and the process should start 3 to 4 months before [the Applicant’s] [...]”.

29. On 2 April 2009, the Applicant responded as follows to the 30 March 2009 email from the CMS:

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36. The Applicant submits that his assignment with MINURCAT was not extended due to his inability to speak French and that this violated his rights because the vacancy he applied for, was interviewed for and was selected against did not stipulate that French was a requirement. He submits that the requirements of his post were changed *ex post facto* and that this is a dangerous precedent for Administration to set.

37. The CMS, in his 7 August 2009 response to MEU, stated that, “[i]t is true that [the Applicant’s] mission detail was not extended largely because of his lack of fluency in French”. Further, the CMS confirmed during the hearing that the French language issue was a paramount consideration in his mind when he made the contested decision. The CMS explained to the Tribunal that he was trying to address the overall issue of communication within the mission in that the first objective of MINURCAT is to support French-speaking police and yet it had a support office which was entirely English-speaking.

38. In view of the fact that the CMS conceded that his decision not to renew the Applicant’s mission assignment was primarily due to the Applicant’s inability to speak French, the Tribunal will not engage in a long discourse on this particular issue. Rather, it will focus on the issue of whether the decision not to extend the applicant’s assignment with MINURCAT but to return him to his parent organization, due to his inability to speak French, was a proper exercise of the Respondent’s discretion.

39. In the present case, the relevant vacancy announcement provided that “[f]luency in English or French is required. Knowledge of other United Nations official languages would be an advantage.” Words such as “or” and “would”, which are used in this vacancy announcement signify that French was not a specific requirement of the CAS post at the time that the Applicant applied and was selected for it.

40. In the MEU letter of 4 September 2009, which has been adopted by the Respondent, it is submitted that “[o]perational necessity could in and of itself provide a legitimate basis for the decision to include a language requirement to [the Applicant’s] post”. It is further submitted that “the fact that the requirements of the post originally did not call for French does not preclude the possible need to add the requirement later on should circumstances or experience at the mission reveal an operational necessity for it”.

41. Pursuant to staff regulation 1.2(c), the Secretary-General has discretionary authority to assign staff members to any of the activities or offices of the United Nations. However, this discretionary authority does not negate the responsibility on the Respondent to give due regard to the interests of staff members. As noted in *Gaskins*, UNDT/2010/119, inherent in every contract of employment is an “implied term of mutual trust and confidence between employer and employee”. This means that the parties must act “reasonably and in good faith”. Thus, it stands to reason that neither the employer nor the employee should materially change the terms of the employment contract without, at least, consulting with the other party, and at most, obtaining the agreement of the other party to the proposed change.

42. Thus, it was incumbent upon the CMS to, at a bare minimum, consult with the Applicant prior to the introduction of the French language requirement into the employment contract. The record shows, however, that the Applicant was not informed of the new contractual term, i.e. the French language requirement, until 6 July 2009, when he received a copy of the request for extension of appointment form, dated 28 June 2009, which contained the recommendation of the CMS not to renew his mission assignment. While it may be argued that the 28 June 2009 document merely relayed a “recommendation” and not a decision, this is not an argument that this Tribunal is willing to accept. The administrative officer of the Applicant’s parent organization, the UNJSPF, received an email dated 25 June 2009 from FPD/DFS informing her that MINURCAT had advised DFS that the Applicant would not be extended beyond 18 August 2009. This email was forwarded to the Applicant by the

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46. In support of its position, the Respondent submitted the report of the Mission Support Evaluation Team, which recommended, *inter alia*, that FPD/DFS expedite its outreach activities to identify French speaking candidates able to deploy to MINURCAT in order to alleviate difficulties faced by the mission in communicating with local authorities and national staff. While the Tribunal appreciates the

48. Paragraph 16 of the audit report goes on



54. In light of its considerations above, the Tribunal finds as follows:
- a. The Applicant's inability to speak French was the basis for the decision not to extend his assignment with MINURCAT.
  - b. The decision not to extend the Applicant's assignment with MINURCAT but to return him to his parent organization, due to his inability to speak French, was not a proper exercise of the Respondent's discretion due to the fact that there was no basis for the decision and proper procedures were not followed, which resulted in the violation of the Applicant's right to due process.

### **Conclusion**

55. The decision not to extend the Applicant's assignment with MINURCAT due to his inability to speak French, was not a proper exercise of the Respondent's discretion as there was no basis for the decision. Further, the Respondent failed to establish and follow proper procedures. This violated the Applicant's contract of employment and denied him of due process. Consequently, the Applicant is entitled to process.





Judge Vinod Boolell

Dated this 18<sup>th</sup> day of November 2010

