ADMINISTRATIVE TRIBUNAL OF THE AFRICAN DEVELOPMENT BANK

QUORUM : Justice Leona Valerie THERON President
Justice Benjamin Joses ODOKI Vice-President
Justice Salihu Modibbo Alfa BELGORE Member
Justice Epuli Mathias ALOH Member
Professor Ahmed MAHIOU Member

APPLICATION No. 2018/07

M. M., Applicant
African Legal Support Facility, Respondent

Judgment No. 121 of the Administrative Tribunal, delivered on 19 April 2019

I. THE FACTS

1. The applicant joined the African Legal Support Facility (ALSF) as a Senior Legal Counsel, PL5, on 23 April 2016 a position she held until her contract ended on 22 April 2018 on the ground that her post was abolished.

2. The applicant filed an application with the Tribunal on 23 May 2018 against respondent’s five administrative decisions taken by the respondent, namely:
   a. The unwarranted and unilateral extension of the applicant’s probation period and the refusal to confirm the appointment of the applicant (May/June 2017);
   b. The unreasonable request that the applicant agree to a performance Improvement Plan (PIP) (July 2017);
   c. The error in the duration of the contract being resolved to the detriment of the applicant, namely 2 rather than 3 years;
   d. The purported ‘abolishing’ of the applicant’s post; and
   e. The refusal to extend the applicant’s contract of employment on the basis that the Management Boards ‘abolished’ her position.

3. The applicant also alleges that during the time, she had worked with ALSF, her supervisor and the Director of the ALSF had treated her very unfairly.

4. On 18 July 2018, the respondent filed a preliminary motion of non-admissibility pursuant to Rule XIV(1) of the Rules of Procedure of the Tribunal.

II. MOTION OF NON-ADMISSIBILITY

5. The respondent raised a number of grounds as to why it alleges that the application is inadmissible. Firstly, in support of the contention that the Tribunal lacks jurisdiction in this matter, the respondent relies on Article III(15) of the Memorandum of Understanding (MoU), between African Development Bank and ALSF which states:
“ALSF staff shall be entitled access to and shall benefit from the Bank's Administrative Tribunal. ALSF agrees that it will accept and implement judgment rendered by the Bank's Administrative Tribunal.”

6. The respondent argues that Article III(15) of the Memorandum of Understanding is insufficient to satisfy the conditions set out in Article XV of the Statute, for example, it does not contain any provision with respect to participating in the administrative arrangements for the functioning of the Tribunal or concerning sharing of the expenses of the Tribunal.

7. The respondent contends that the allegation of unfair treatment and bullying cannot be considered now, since any examination of them by the Tribunal is severely limited on the basis that there has been no opportunity to fully investigate them.

8. Secondly, the respondent submits that the correction of a typographical error on the applicant’s contract is not, by its very nature, an administrative decision susceptible to appeal.

9. The respondent further submits that the applicant was contemporaneously aware of the contract duration at the time of signing, as evidenced in email correspondence dated 21 March 2016, which twice articulated that the post being offered had a fixed duration of two (2) years not three.

10. Thirdly, the respondent contended that the application was filed out of time. In this regard the respondent submits that the impugned decision regarding the extension of the applicant’s probation period was alleged to have been taken between May and June 2017. The application was filed outside the 90 day time limit stipulated by the Tribunal. The same argument holds true for the decision in respect of the Performance Improvement Plan and the correction of the typographical error in the applicant’s contract of employment.

11. The applicant submits that the Tribunal has already decided the issue of jurisdiction and the matter is res judicata.

12. The applicant further submits that the motion to dismiss deals only with three of the five decisions that the applicant has brought before the Administrative Tribunal. Therefore, even if the Administrative Tribunal was to strike out three claims, there remain two decisions, which should proceed to consideration by the Administrative Tribunal.

13. The applicant submits that any matter, which is a correction or an affirmation of what the terms of the contract are, or are not, falls under the competence of the Administrative Tribunal.

14. In regard to the contention that the application was filed out of time, the applicant submits that the Director of ALSF and her supervisor did not comply with Regulation 6.9.2 and 10.3 of the ALSF Staff Rules and Regulations by not sending to the applicant the specific dated administrative document required of him and by not setting up the processes or respecting the set timelines. The applicant therefore argues that those qualify as exceptional circumstances in accordance with Article III(4) of the Statute of the Administrative Tribunal and the Tribunal should therefore waive the prescribed time limits and receive application. This argument also applies to the delay complaint in respect of the Performance Improvement Plan.

15. In respect of the correction of the error in the contract, the applicant submits that the Director of ALSF kept new staff policy Document and organogram, which ‘abolished’ applicant’s position a secret.
Therefore, the applicant was unaware that her position had ceased to exist in the organization and had no way of anticipating that a justiciable matter for the Tribunal would arise.

III. THE LAW

16. In its motion of non-admissibility, the respondent submits that the applicant’s application is not admissible on the following grounds:

   (1) That the Tribunal has no jurisdiction to entertain the application.

   (2) That three of the five decisions challenged by the applicant are non-admissible.

17. It is pertinent to deal with the issue of the jurisdiction of the Tribunal because it is the first case of its kind that the Tribunal has received regarding a staff member who is not employed by the Bank but another international organisation.

18. Article XV of the Statute of the Administrative Tribunal provides that the Bank may make agreements with any other international organisation for the submission of applications of members of their staff to the Tribunal. This Article states:

   “The Bank may make agreements with any other international organization for the submission of applications of members of their staff to the Tribunal. Each such agreement shall provide that the organization concerned shall be bound by the judgements of the Tribunal and be responsible for the payment of any compensation awarded by the Tribunal in respect of a staff member of that organization. The agreement shall also include, inter alia, provisions concerning the organization’s participation in the administrative arrangements for the functioning of the Tribunal and concerning its sharing of the expenses of the Tribunal.”

19. On 22 July 2010, the Bank and the respondent (ALSF) concluded a Memorandum of Understanding (Hosting Arrangement) where it was provided in Article III(15) as follows:

   “15. ALSF Staff shall be entitled access to and shall benefit from the Bank’s Administrative Tribunal. ALSF agrees that it will accept and implement judgment rendered by the Bank’s Administrative Tribunal”

20. With regard to the sharing of expenses, the Memorandum of Understanding (MoU) provided in Article V(6) that:

   “6. ALSF shall pay a Management Fee of 2.5% of its annual administrative budget to the Bank for all the facilities and services provided by the Bank the Management Fee covers the provision of office space, use of the Bank’s courier services, telephone, internet and videoconference, accounting services other administrative services such as processing travel-related benefits. Any amount spent by the Bank while carrying out activities on behalf of ALSF and in excess of the budget will be reimbursed by ALSF on the basis of appropriate justification to be provided by the Bank.”

21. In respect of the staff of ALSF, the MoU provided in Article III(5) that:
“5. ALSF staff shall have a status separate and apart from the status of the staff of the Bank, and shall be governed by rules and regulations to be adopted by ALSF. However, pending the adoption of such rules and regulations, ALSF will use the job classification, salary, grade and benefits applied by the Bank to its own staff...”

22. The respondent argues that the Tribunal does not have jurisdiction to entertain the application because the conditions set out in Article XV of the Statute of the Tribunal were not met by the provisions of Article III of the MoU between the Bank and ALSF, which did not provide for administrative arrangements between the Bank and ALSF regarding the Tribunal.

23. The applicant submits that the issue of the jurisdiction of the Tribunal in respect of the application is res judicata as the President of the Tribunal decided that the Tribunal has jurisdiction to entertain the application.

24. In the first place, although the President of the Tribunal informed the parties that the Tribunal has jurisdiction to receive the application, the President’s decision was only provisional to enable the application to be lodged so that the members of the Tribunal could consider the issue. Therefore, the President’s decision did not amount res judicata. The Tribunal is therefore competent to consider the issue of jurisdiction.

25. Given the clear provisions of Article XV of the Statute and Article III of the MoU, and having regard to other financial provisions in the MoU, the Tribunal is satisfied that the conditions stipulated in Article III of the Tribunal’s Statute were complied with and therefore the Tribunal has jurisdiction to entertain the application.

26. The respondent has not provided any other alternative mechanism for resolution of employment disputes by staff members other than the Tribunal. It is a generally recognized principle of international administrative law that international organisations should provide judicial redress against their decisions, in order to guarantee a legal remedy to their members of staff. Golder v United Kingdom of Great Britain and Northern Ireland: Eur. Court H.R., 21 February 1975. “The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognised’ fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice”. UNAT, judgement No 2011-UNAT-116, 11 March 2011, Iskandar v/ Secretary General of the United Nations, § 28: “Without access to the administration of justice system within the United Nations, Iskandar would have no right to an effective remedy from the competent tribunal in respect of administrative decisions taken by [African Union/United Nations Hybrid operation in Darfur,] UNAMID. This would be a denial of justice.” ILOAT, judgment No. 885, 30 June 1988, West (No. 10) v/ EPO, § 2: “An EPO staff member [...] has the right to submit an internal appeal and, if still dissatisfied, to appeal ultimately to the Tribunal. The existence of the right is in the interest of both sides since it serves to maintain harmony, general efficiency and good morale in the Organisation”.

27. This principle of judicial redress against decisions made by an international organization is based on the principles of legality and natural justice. The purpose of this principle is to avoid immunity of international organisations and consequent denial of justice.

28. The respondent submits that the correction of an error in the contract is not an administrative decision within the meaning ascribed to it by Article II(1)(i) of the Statute of the Tribunal which provides:

““administrative decision” means a determination by the Bank concerning the terms and conditions of employment of a staff member”.
29. The correction of the error in the applicant’s letter of appointment arose because of the obvious conflict between the letter of offer and the letter of appointment. In the email dated 21 March 2016, it was stated:

“We are pleased to inform you that you have been successful and we hereby propose to you the position of Senior Legal Counsel at PL-5 Grade in the African Legal Support Facility (ALSF).

This position is budgeted 54.092 Units of Account (UA) tax free per annum (the average exchange rate for the month of February 2016 is 1 UA = 1,2673 Euro = 1,3918 USD. The appointment will be for a probationary period of twelve (12) months”.

30. In the letter of appointment dated 31 March 2016, the applicant was offered an appointment as a Senior Legal Counsel at PL5 grade level in the ALSF. The salary attached to the post was indicated in the letter of offer. The following paragraph reads:

“The appointment will be for a period of three (2) years in the first instance and may be renewed for further periods thereafter. You will be under probation for a period of twelve (12) months”.

31. On 5 December 2017, the Director of ALSF sent a letter to the applicant, the second paragraph which stated:

“Please note that, as per the Terms of Reference (TOR) set for the Senior Legal Counsel (PL65 grade) position at the Facility, a position for which you applied and were successfully retained, your contract with the African Legal Support Facility as Senior Legal Counsel at PL-5 grade level if for a period of two (2) years starting from the 23rd April 2016 to 22nd April 2018.

Unfortunately, we have realized that your contract is not describing in a coherent manner its expected duration, hence the need for its immediate correction. Kindly note the changes to be effected below:

INSTEAD OF

“The appointment will be for a period of three (2) years in the first instance and may be renewed for further periods thereafter.”

The provision SHALL READ:

“The appointment will be for a period of two (2) years in the first instance and may be renewed for further periods thereafter”.

32. While on the face of it the decision to correct the duration of the applicant’s contract was an administrative decision, it did not alter the terms and conditions of the applicant’s employment. The mistake was a mere typographical error which did not prejudice the applicant who aware of the duration of her contract right from the time she was offered the appointment.
33. The correction of the contract was made on 5 December 2017. The applicant filed her application with the Tribunal on 23 May 2018 well after ninety (90) days’ time limit prescribed by the Statute of the Tribunal when to file the application. The applicant has shown no exceptional circumstances to warrant that the Tribunal exercise its discretion to waive the time limits prescribed by its Statute. Accordingly, this aspect of the application is non-admissible.

34. The respondent submits that the challenge in the application to the unwarranted and unilateral extension of the applicant’s probation period and refusal to confirm the appointment of the applicant (May / June 2017) is out of the time prescribed in Article III of the Statute of the Tribunal. The respondent maintains that the applicant has failed to indicate the exact date when the impugned decision was made and the exact nature of the decision made. Therefore, it is the submission of the respondent that if the email of 23 May 2017 communicating the decision of CHRM is taken as the relevant date on which the decision was made, the applicant has not challenged the decision by filing the application within ninety (90) days as required by the Tribunal’s Statute.

35. The applicant argues that the relevant Managers of ALSF did not send her specific documents regarding the extension of her probationary period as required by the Rules and Regulations of the ALSF and that these qualify as exceptional circumstances under Article III(4) if the Tribunal Statue justifying waiving the time limits under that Article.

36. The Tribunal finds that the application in respect of the impugned administrative decision concerning the extension of the applicant’s probation period and the refusal to confirm the appointment of the applicant which were taken between May and June 2018 were made out time. The Tribunal finds that the applicant has not established exceptional circumstances to justify her late application in May 2018.

37. The respondent argues that the application in respect of the decision the applicant terms as the unreasonable request that the applicant agrees to a Performance Improvement Plan (PIP) in July 2017 is also out of the time limits prescribed in Article III of the Statute of the Tribunal. The respondent maintains that the applicant has not demonstrated any exceptional circumstances on which the Tribunal should exercise its discretion to waive the prescribed time limits.

38. The Tribunal agrees with the respondent that the application in respect of the request that the applicant agrees to a Performance Improvement Plan was filed out of time and that the applicant has failed to establish any exceptional circumstances to warrant the Tribunal waving the time limits prescribed in its Statute.

39. The Tribunal notes that the remaining two administrative decisions challenged by the applicant were filed on time in accordance with Article III(2)(ii) of the Statute of the Tribunal and these are:

(a) The purported abolishing of the applicant’s post in March 2018, and

(b) The refusal to extend the applicant’s contract of employment on the basis that the Management Board abolished her position (April 2018).

40. These decisions go to the merits of the application and will therefore be considered by the Tribunal during the next session.

41. Counsel for the applicant submitted a bill of costs dated 10 April 2019 in which she claimed total costs of £ 22,450 for drafting statement of appeal, considering respondent’s motion of inadmissibility and drafting objection to respondent’s motion of inadmissibility.
42. The respondent, in a letter dated 20 March 2019, opposed the bill of costs as being not properly itemised and substantiated, and submitted that costs should be in the cause as some items cover the drafting of the application.

43. The Tribunal is of the view that any costs in this application should be costs in the cause and should be reserved.

IV. THE DECISION

44. For the foregoing reasons, the Tribunal decides:

   (1) That the motion of non-admissibility on the following three decisions succeed:

      i. The unwarranted and unilateral extension of the applicant’s probation period and the refusal to confirm the appointment of the applicant (May/June 2017).

      ii. The unreasonable request that the applicant agreed to a performance Improvement Plan (PIP) (July 2017).

      iii. The error in the contract length being resolved to the detriment of the applicant as 2 years rather than 3 years (December 2017 – March 2018).

   (2) That the Tribunal will consider the two remaining decisions at the next session of the Tribunal:

      i. The purported abolishing of the applicant’s position in March 2018.

      ii. The refusal to extend the applicant’s contract of employment on the basis that the Management Board abolished her position (April 2018).

   (3) That the respondent has a period of fifty days from the date of this judgment to submit its substantive answer to the application.

   (4) Costs are reserved.

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Vice-President

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