



UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

Judgment No. 2017-UNAT-780

Muwambi
(Respondent/Applicant)

v.

Secretary-General of the United Nations
(Appellant/Respondent)

JUDGMENT

Before:	Judge Dimitrios Raikos, Presiding Judge Richard Lussick Judge John Murphy
Case No.:	2017-1061
Date:	14 July 2017
Registrar:	Weicheng Lin

Counsel for Mr. Muwambi: Mariam Munang, OSLA

Counsel for Secretary-General: Rupa Mitra/Ronj a Bandyopadhyay

JUDGE DIMITRIOS RAIKOS ,

[Y]our profile was considered against suitable vacant positions in the new

... On 13 June 2013, the Applicant filed a request for management evaluation and an application for a suspension of action, challenging the decision not to renew his appointment. The application for suspension of action was granted by Order No. 158 (NY/2013), dated 26 June 2013.

... On 1 August 2013, the Applicant was informed that his contract would not be extended beyond 3 September 2013 as another staff member had been recruited for the position of Procurement Officer (P-3 level). On 27 August 2013, the Applicant filed another request for management evaluation challenging the decision not to renew his contract beyond 3 September 2013 and the recruitment to his post.

... The Applicant's appointment was renewed on a monthly basis until October 2014, when it was extended through 30 June 2015.

... From July 2011 to June 2015, the Administration and the Applicant signed a total of twelve letters of appointment covering the following periods:

- a. 1 July 2011 to 28 October 2011[;]
- b. 29 October 2011 to 30 June 2012;
- c. 1 July 2012 to 30 June 2013;
- d. 1 August 2013 to 3 September 2013;
- e. 4 September 2013 to 12 October 2013;
- f. 13 October to 12 November 2013;
- g. 13 November 2013 to 12 December 2013;
- h. 13 December 2013 to 12 January 2014;
- i. 13 January 2014 to 11 February 2014;
- j. 12 February 2014 to 11 March 2014;
- k. 12 March 2014 to 11 April 2014; and
- l. 12 April 2014 to 30 June 2014.

... None of these letters of appointment contained references to the Applicant being on a provisional reassignment status or that his appointment was conditional upon his participation in a competitive selection process or endorsement by a review board.

... On 20 December 2013, a facsimile was sent by the Acting Director, FPD,[Department of Field Services (DFS)], to all Chiefs and Directors of Mission Support to inform of the discontinuance of the policy of provisional reassignments. The facsimile further stated:

... The purpose of this fax is to inform missions about the discontinuation of the practice of provisional lateral reassignments with

satisfactory performance and provided the post currently encumbered

5. The UNDT considered that if a certain material provision was not incorporated into the letter of appointment, it follows from Staff Rule 4.1 and Annex II to the Staff Regulations that it did not form part of the contract of employment. The UNDT therefore found that there was no legal basis for the Organization to assert that Mr. Muwambi remained subject to the conditions and limitations of the April 2011 exchange. It concluded that the non-renewal of Mr. Muwambi's appointment on the basis that he was only provisionally assigned and had not received FCRB clearance was unlawful.

6. By way of remedies, the UNDT found that, taking into account Mr. Muwambi's good performance record, had the Organization complied fully with Staff Rule 9.6(e), it could be reasonably expected that his employment would have continued for one year after 30 June 2015. The UNDT therefore awarded Mr. Muwambi one year's net base salary at the salary scale in effect as of the date of separation.

Submissions

The Secretary-General's Appeal

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result of the abolition of a post or the reduction of staff. It does not apply in situations where a fixed-term appointment is not renewed beyond its end date. Mr. Muwambi's appointment was not terminated, but instead was not renewed beyond its expiry date. The Staff Regulations and Rules expressly provide that a fixed-term appointment carries no expectation of renewal and expires automatically at the end of its term. That was the situation in Mr. Muwambi's case. The UNDT therefore erred in law by awarding compensation.

12. The Secretary-General requests that the Appeals Tribunal vacate the UNDT Judgment.

Mr. Muwambi's Answer

13. The UNDT did not err in finding that clearance by a central review body was a special condition that had to be expressly provided for in Mr. Muwambi's letters of appointment.

14. "Provisional status" was not a term or condition of Mr. Muwambi's appointment. By deciding not to renew Mr. Muwambi's appointment on the basis that he was on a provisional reassignment status, purporting there were limitations on his reassignment, the Secretary-General seeks to rely on a term that does not form a condition of his employment, either expressly or by reference.

15. It is the practice of the Organization to state any restrictions in its letters of appointment. In the case of *Corna*,⁴ for example, all eight letters of appointment and personnel action forms contained provisions referring to the exceptional renewal of the appointment pending

17. Indeed, letters of appointment for fixed-term contracts do not typically make reference to the requirements for review or endorsement by a central review body as a “special condition”, since any required clearance would be obtained prior to the issuance of the letter of appointment. It would thus be reasonable to expect that such an unusual departure from the Staff Rules and staff selection system would be mentioned in the letter of appointment.

18. Furthermore, even if the Appeals Tribunal finds that as a matter of fact, implicit in Mr. Muwambi’s subsequent letters of appointment, a condition existed which referenced the term “provisional reassignment status”, such a contractual condition does not exist under the Staff Regulations and Rules. The decision to deny Mr. Muwambi’s renewal of contract on the basis that he only had “provisional reassignment status” is therefore unlawful.

19. The UNDT did not err in finding that there was no legal basis for Mr. Muwambi to be subject to clearance by a central review body ST/AI/2010/3 which the Secretary-General, *inter alia*, relies on as the legal basis for requiring Mr. Muwambi’s renewal of appointment to be subject to clearance by a central review body entered into force on 22 April 2010. When Mr. Muwambi was made the offer, almost a year later on 4 April 2011, to be provisionally reassigned without having received prior clearance from a central review body, the Secretary-General granted him an exception from ST/AI/2010/3. The subsequent renewals of

22. The UNDT did not err in awarding compensation. The decision not to renew Mr. Muwambi's appointment was unlawful and as a consequence of this unlawful decision, he was deprived of his livelihood. The UNDT was correct in holding that it could reasonably be expected that his employment would have continued for one year after 30 June 2015 and the UNDT's award of one year's net base salary was reasonable.

23. Mr. Muwambi requests that the Appeals Tribunal dismiss the appeal in its entirety.

Considerations

24. In our view, the UNDT erred in finding that the Administration failed to provide a valid justification for its decision not to renew Mr. Muwambi's fixed-term appointment.

25.

32. The non-extension of Mr. Muwambi's contract came on the heels of a change in policy as contained in the facsimiles dated 20 December 2013 and 4 June 2014. According to these documents, staff members on provisional reassignment status could have their appointments renewed only up to 30 June 2015, while further renewals were to be made exclusively through the regular selection process.

33. In fact, the first facsimile (dated 20 December 2013), which was sent by the Acting Director, FPD, DFS, to all Chiefs and Directors of Mission Support stated, *inter alia*, that the practice of provisional lateral reassignments would be discontinued with immediate

signing of the letter of appointment by both parties subsequently to the initial offer demonstrates, in and of itself, the parties' intent to supersede any prior agreed terms.

43. The UNDT went on to state:¹⁵

... Notably, the conditions on which the Administration seeks to rely were not included in any letters of appointment subsequent to July 2011. It is one of the Applicant's principal submissions that, after he arrived at MINUSTAH, none of the subsequent communications or contractual documents indicated that he remained "provisionally reassigned" or that his appointment was contingent upon further endorsement by a central review board. This contention has not been disputed by the Respondent and is substantiated by the twelve letters of appointment filed with the [Dispute] Tribunal for the period 2011 to 2015.

.... After the Applicant had been employed on twelve letters of appointment in the four years after April 2011 containing no special conditions or restrictions, the Administration's proposed imposition of such special conditions and restrictions amounts to a unilateral decision to vary the terms of the Applicant's contract of employment. It would be untenable to suggest that the Administration may unilaterally impose certain unstipulated contractual terms limiting the Applicant's rights and interests when such conditions were not included in any of the numerous letters of appointment signed over a four-year period. Nor can it be accepted that policy considerations override express contractual terms.

44. This Tribunal finds that the UNDT's conclusion is legally and factually incorrect for the reasons set forth below.

45. Specifically, the UNDT erred in that it relied exclusively on the content of Mr. Muwambi's relevant letters of appointment to determine that he was not on a provisional reassignment status and that his appointment was not conditional upon [(T)6.9 -3.5178(incol)5r cmpetditvo [(63(e) -5.5swel-38.9(e2).1(ctien)-5.2a pprocessfor).6(an)-5.2(s)-5.4otrsmnstye2view ard.

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relationship along with the Rules and Regulations of the Organization which are incorporated into the contract.¹⁷

47. To begin with, the language of Mr. Muwambi's letter of appointment dated 4 April 2011, which is the controlling documentary evidence, is clear and unambiguous and easy to understand. It establishes Mr. Muwambi's appointment was for a fixed term of three months (from 4 April 2011 to 3 July 2011).

48. Furthermore, as set forth in it, Mr. Muwambi was provisionally reassigned to MINUSTAH as Contracts Management Officer, subject to a competitive selection process, and any subsequent extension was subject to competitive selection endorsed by the relevant central review body.

49. Mr. Muwambi's appointment was subsequently extended several times for the same position of Contracts Management Officer with MINUSTAH until 30 June 2015, when he was separated from service.

50. It is true that, as found by the UNDT, the subsequent letters of appointment (from 4 July 2011 onwards) did not contain any references to his provisional reassignment or appointment being conditional upon his participation in a competitive selection process or endorsement by a review body.

51. Nevertheless, it is not disputed that the Administration's extension of Mr. Muwambi's initial fixed-term appointment beyond 4 Ju

52. Rather, what is disputed in the present case as agreed by the parties before the UNDT Judge¹⁸ is the lawfulness of the reasoning of the Administration's non-renewal of Mr. Muwambi's appointment beyond 30 June 2015, with regard to the provisional status of his reassignment and the need for further review clearance.

53. In this respect, the UNDT held that,¹⁹

... [o]nce the parties in this case agreed on a new contract of employment, the terms stipulated in the new letter of appointment superseded any prior agreement between them Therefore, there is no legal basis for the Organization to assert that the Applicant remained subject to the conditions and limitations of the April 2011 exchange, including the provisional status of his reassignment and the need for further review board clearance.

54. Mr. Muwambi submits in his answer to the appeal that even if this Tribunal finds as a factual matter that in Mr. Muwambi's subsequent letters of appointments there was an implicit condition which referenced the term "provisional reassignment status", such a contractual condition does not exist under the Staff Regulations and Rules. Pursuant to Staff Regulation 4.5 and Staff Rule 4.11, a staff member may be appointed on either temporary, fixed-term or continuing appointments. Some staff members hold permanent appointments and they are regulated under Staff Rule 13.1. No reference is made to Staff Rule 4.5.9(a) or 4.5.9(b).
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short-term, for a job before having taken an examination qualifying for selection.²⁰ In other words, the term “provisional status” of Mr. Muwambi’s refers to the limited duration of his appointment.

57. Therefore, there was no unilateral imposition by the Administration of unstipulated contractual terms limiting Mr. Muwambi’s rights and interests, that could have formed an unlawful basis for the non-renewal of his contract, as erroneously determined by the UNDT.

58. In our view, the challenged administrative decision not to renew Mr. Muwambi’s appointment was based on the existing Staff Regulations and Rules, which formed part of his contract(s) and governed the conditions of the employment relationship along with the

64. We do not agree with Mr. Muwambi. Since this policy of discontinuance of provisional reassignments was intended only for the staff at MINUSTAH, we reject Mr. Muwambi's submissions on this point. We accordingly hold that the Acting Director, FPD, DFS, had authority to issue the relevant policy and that issuance was a proper exercise of his authority. In any case, as a result of the Secretary-General's broad discretion in relation to decisions on internal management, this measure is subject to limited review by this Tribunal.²⁴

65. For all these reasons, the Appeals Tribunal finds that the UNDT made errors of law and fact resulting in a manifestly unreasonable decision when it concluded that there was no valid reason for the non-renewal of Mr. Muwambi's appointment.

66. Since the UNDT based its award of damages on the erroneous and unsupported conclusion that the Administration's decision not to renew Mr. Muwambi's appointment was unlawful, that award must be vacated. Because no illegality was found, there is no justification for the award of any compensation or moral damages. As this Tribunal stated before,²⁵ "compensation cannot be awarded when no illegality has been established; it cannot be granted when there is no breach of the staff member's rights or administrative wrong doing in need of repair".

67. Accordingly, the Secretary-General's appeal should be granted and the impugned Judgment should be vacated.

²⁴ See *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-234, para. 39.

²⁵ *Kucherov v. Secretary-General of the United Nations*, Judgment No. 2016-UNAT-669, para. 33; *Nwuke v. Secretary-General of the United Nations*, Judgment No. 2015-UNAT-508, para. 27; *Oummih v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-420; *Antaki v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-501.

Judgment

68. The Secretary-General's appeal is granted. Judgment No. 2016/UNDT/216 is vacated.

Original and Authoritative Version: English

Dated this 14th day of July 2017 in Vienna, Austria.

(Signed)

Judge Raikos, Presiding

(Signed)

Judge Lussick

(Signed)

Judge Murphy

Entered in the Register on this 5th day of September 2017 in New York, United States.

(Signed)

Weicheng Lin, Registrar