



JUDGE R

6. On 26 February 2009, Mr. Hepworth advised the UNEP Executive Director that he was not interested in being reassigned to the Special Advisor post, stating<sup>1</sup>

[My wife] and [daughter] have made a major personal investment over the last 4 years to integrate and adapt [to life in Germany] [...] I do not want to have to move [my daughter] to a new secondary school for a second time in 4 years. [...]

The current security and transport situation in Nairobi, [...] together with the likelihood of further civil strife [...] is also something to which I do not wish to re-expose my wife and daughter, at this time. The Kenyan Government's attempts to seize my property, have not helped in that respect. [...]

The activities attributed to the new [Special Advisor] post [...] seem to me [...] to comprise a non-executive assignment suitable for a P4 or P5 in mid career. The assignment would be unattractive and indeed unsuitable in most respects. [...]

[...]





20. On 10 February 2012, the case was transferred from the Geneva Registry to the Nairobi Registry by Order No. 32 (GVA/2012).

21. On 19 and 21 March 2013, the UNDT held an oral hearing.

22. On 29 November 2013, the UNDT issued Judgment No. UNDT/2013/151, in which it concluded that the non-renewal decision was based on unlawful grounds. The UNDT awarded Mr. Hepworth “retirement benefits calculated as if [he] had retired from the Organization at the age of 62; [and] ... compensation in the amount of one year’s net base salary[,]” based on the “harm to his career in that the Non-renewal Decision deprived him of his livelihood at a time when he was near the mandatory retirement age”.

### Submissions

#### The Secretary-General's Appeal

23. The UNDT erred in concluding Mr. Hepworth had a legitimate expectation that his appointment would be renewed again. The UNDT’s conclusion is inconsistent with Mr. Hepworth’s letter of appointment, the Staff Rules and resolutions of the General Assembly. Former Staff Rules 104.12(b)(ii) and 109.7(a), which were applicable to Mr. Hepworth’s appointment, provided that a fixed-term appointment expires automatically on the date in the letter of appointment and does not have any expectancy of renewal or conversion. The rules mirror the pronouncements by the General Assembly in resolution 63/250. The UNDT’s decisions are also required to conform with General Assembly resolutions on issues related to human resources management, as required by General Assembly resolution 68/254.

24. The UNDT’s erroneous legal conclusion also conflicts with Appeals Tribunal jurisprudence. The UNDT specifically found that UNEP did not make any express promise of renewal to Mr. Hepworth, but nevertheless concluded he had a legitimate expectation that his appointment would be renewed. In reaching this conclusion, the UNDT erroneously found that an Advisory Opinion of the International Court of Justice (ICJ) was equally as persuasive as an Appeals Tribunal judgment.

25. The UNDT erred in concluding that the Organization bore the burden of proving that the decision not to renew Mr. Hepworth's contract was not tainted by improper motives, given that Appeals Tribunal jurisprudence places the burden on the staff member.

29. The UNDT erred in ruling that the BMU Letter and the Note to File were not confidential documents subject to protection. Thus, the Secretary-General requests that the Appeals Tribunal confirm the confidentiality of the BMU Letter and the Note to File, and redact the quotations from the BMU Letter and the Note to File found in paragraphs 25, 27, 59 and 61 of the Judgment.

30. The Secretary-General requests that the Judgment be annulled in its entirety.

Mr. Hepworth's Answer

31. The UNDT properly found that Mr. Hepworth held a legitimate expectation of continued service in Bonn, based on the circumstances of the case. In particular, the UNDT properly found there was a "written record" of an agreement with the former Executive Director of UNEP, which was made in 2004, to permit Mr. Hepworth "to complete his UNE 10 9(P)193.8( c)202(a)197.2(r)





requires the tribunal to give notice to the parties and afford them an opportunity to express their views. It is an error for the receiving judge to simply ignore an extant order because he or she disagrees with it. Thus, the UNDT made an error of law in breaching the confidentiality of the BMU Letter and Note to File and quoting from them in paragraphs 25, 27, 59 and 61 of the Judgment. Accordingly, the Secretary-General's motion to redact those paragraphs of the Judgment should be granted.<sup>11</sup>

*The Merits*

38. On appeal, we must determine whether the Dispute Tribunal erred in law or fact when it ultimately concluded that UNEP's decision not to renew Mr. Hepworth's fixed-term appointment was unlawful. For the reasons discussed below, the Appeals Tribunal determines that the UNDT made several errors of law in reaching the conclusion that UNEP acted unlawfully. Since each error of law constitutes a sufficient ground to reverse the UNDT Judgment, we need not address each and every challenge raised by the Secretary-General on appeal.

39. Initially, the UNDT erred as a matter of law when it reviewed *de novo* UNEP's decision to assign Mr. Hepworth to the Special Advisor post in Nairobi and concluded that it was not in the

as well as the Staff Rules, when it erroneously found that Mr. Hepworth had a legitimate expectation that his fixed-term contract would be renewed. In this regard, it reasoned:<sup>14</sup>

[The Appeals Tribunal] is correct in holding that a legitimate expectation [of renewal] can be created by an express promise on the part of the Organization. But a promise can also be implied from circumstances or from what is held out to an individual. [...]

... While the decision of [the Appeals Tribunal], that in the absence of an express promise a fixed-term contract comes to an automatic end, is of great persuasive authority, the

renewal stems from the past renewals of an appointment.<sup>18</sup> Accordingly, the UNDT made an error of law when it found that the “surrounding circumstances” created an implied promise that Mr. Hepworth’s appointment would be renewed. Since this finding is erroneous, it cannot support the UNDT’s ultimate conclusion that the non-renewal decision was unlawful.

43. The UNDT also made an error of law and fact when it shifted the burden to UNEP to show that the decision not to renew Mr. Hepworth’s appointment was *not* motivated by improper reasons, purportedly because UNEP had *not* disclosed the reason for its decision not to renew Mr. Hepworth’s appointment. However, the evidence clearly shows that UNEP *had* disclosed the reason, as stated by the UNEP Executive Director to Mr. Hepworth in the memorandum of 15 July 2009, i.e., UNEP had decided not to renew his contract because “of [his] decision not to come to Nairobi as instructed”. Although some arguments by the Secretary-General’s counsel were unnecessarily equivocal about the reason for the non-renewal decision, argument is not evidence.<sup>19</sup> Thus, there was no basis for the UNDT to shift the evidentiary burden from Mr. Hepworth to UNEP to prove lack of improper motivation for the non-renewal decision, and doing so was an error of law.

44. Our jurisprudence places the burden on the *staff member* to show a legitimate expectancy of renewal or that the non-renewal of his fixed-term appointment was arbitrary or motivated by bias, prejudice or improper motive against the staff member.<sup>20</sup> Erroneously shifting the burden to UNEP tainted many of the UNDT’s findings of unlawfulness. For example, the UNDT’s finding that UNEP’s non-renewal decision was improperly motivated by political pressure from the Ministry was based on this erroneous shifting of the burden:<sup>21</sup>

... The Tribunal concludes [...] *that the burden resting on the Respondent to establish on a preponderance of probabilities that he was not motivated by extraneous factors in not renewing the contract of [Mr. Hepworth] was not met.* Given the tense relationship between BMU and [Mr. Hepworth], the Respondent should have offered reasons for the Non-renewal Decision in order to allay any concerns about improper motivation.

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<sup>18</sup> *Igbinedion v. Secretary-General of the United Nations*, Judgment No. 2014-UNAT-411, paras. 25-26.

<sup>19</sup> *Hushiyeh v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*

Since this finding is based on an error of law, it cannot support the UNDT's ultimate conclusion that the non-renewal decision was unlawful.

45. Furthermore, Staff Regulation 1.2(c) provides: "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." Traditionally, the reassignment of staff members' functions comes within the broad discretion of the Organization to use its resources and personnel as it deems appropriate.<sup>22</sup> As we have stated in the seminal case of *Sanwidi*:<sup>23</sup>

When judging the validity of the Secretary-General's exercise of discretion in administrative matters, the Dispute Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Dispute Tribunal to consider the correctness of the choice made by the Secretary-General amongst the various courses of action open to him. Nor is it the role of the Tribunal to substitute its own decision for that of the Secretary-General.

46. Mr. Hepworth's application directly raised the question of whether his refusal to accept the assignment to the Special Advisor post and transfer to Nairobi—in and of itself—was a valid reason for UNEP not to renew his contract. The Dispute Tribunal opined that UNEP was required to consider *numerous* factors, not only the staff member's refusal to transfer, in making the decision not to renew the appointment, stating: <sup>24</sup>

The critical point is that a staff member's refusal to accept a transfer cannot be the only relevant factor. [...]. Such an outcome would be inconsistent with the Administration's duty to deal in good faith with staff members.

...

[...] The fact that a staff member refuses to transfer to another position does not, *ipso facto*, mean that he or she is no longer suitable for the position currently occupied.

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<sup>22</sup> *Gehr v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-236; *Kamunyi v. Secretary-General of the United Nations*, Judgment No. 2012-UNAT-194; *Allen v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-187; *Kaddoura v. Secretary-General of the United Nations*, Judgment No. 2011-UNAT-151.

<sup>23</sup> *Sanwidi v. Secretary-General of the United Nations*, Judgment No. 2010-UNAT-084, para. 40.

<sup>24</sup> Impugned Judgment, paras. 108 and 110.

This sweeping conclusion is without legal authority and, in the circumstances of this case, we consider it is incorrect.

47. As a manager, Mr. Hepworth was required to set an example for UNEP staff and Organization personnel. In 2001, the General Assembly adopted the International Civil Service Commission's Standards of Conduct for the International Civil Service, and these standards applied to Mr. Hepworth as a manager. Paragraphs 16 and 17 of the Standards of Conduct highlight that “[m]anagers and supervisors are in positions of leadership” and “are also responsible for guiding and motivating their staff [...]”. Additionally, “[m]anagers and supervisors serve as role models [...]”.

48. Judicial review of the decision not to renew a staff member's appointment, especially a manager at the D-1 level who has refused an assignment and transfer to a new post at the same level, requires more than merely comparing the nature of the two posts. It also requires scrutiny of the reasons proffered by the staff member for his refusal. Mr. Hepworth proffered primarily personal and family reasons for his refusal to accept the assignment and to transfer, and none of those reasons would have adversely affected his salary, career or retirement; he simply did not want to relocate. Yet, General Assembly resolution 53/221, paragraph 7, “*emphasizes* the requirement of mobility of all internationally recruited staff of the Organization as an integral part of their obligation”.

49. For all these reasons, the Appeals Tribunal determines that the UNDT made numerous errors of law and fact when it concluded that it was unlawful for UNEP not to renew Mr. Hepworth's appointment, and the UNDT Judgment should be reversed.

#### Judgment

50. The Registry of the Dispute Tribunal shall redact paragraphs 25, 27, 59 and 61 from Judgment No. UNDT/2013/151.

51. The Secretary-General's appeal is granted and Judgment No. UNDT/2013/151 is vacated.

