



**UNITED NATIONS APPEALS TRIBUNAL  
TRIBUNAL D'APPEL DES NATIONS UNIES**

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Judgment No. 2013-UNAT-332

**McCluskey  
(Appellant)**

**v.**

**Secretary-General of the United Nations  
(Respondent)**

**JUDGMENT**

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**Before:** Judge Luis María Simón, Presiding  
Judge Sophia Adinyira  
Judge Rosalyn Chapman

**Case No.:** 2012-361

**Date:** 21 June 2013

**Registrar:** Weicheng Lin

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**Counsel for Appellant:** Self-represented

**Counsel for Respondent:** Zarqaa Chohan

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal filed by Mr. Iain McCluskey against Judgment No. UNDT/2012/060, rendered by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Geneva on 1 May 2012. Mr. McCluskey appealed on 9 August 2012,<sup>1</sup> and the Secretary-General answered on 15 October 2012.

### **Facts and Procedure**

2. Mr. McCluskey was a P-4 staff member working for the Office of the United Nations High Commissioner for Refugees (UNHCR) with the Division of Information Systems and Telecommunications (DIST or Division). He joined UNHCR in November 2006 on a three-month fixed-term appointment (FTA). His initial appointment did not go through a competitive selection process, nor was it endorsed by the Appointments, Postings and Promotions Committee (APPC). Mr. McCluskey's appointment was followed by several extensions of less than a year, until 30 September 2011 when he was separated from service.

3. In early 2010, a decision was taken to restructure and reorganize DIST. At the end of April 2010, all DIST staff members were notified of this decision.

4. On 7 July 2010, the Deputy High Commissioner informed UNHCR staff members of the special measures to be taken to mitigate the impact of DIST's restructuring on affected staff, including extending FTAs which were due to expire on or before 31 December 2010, through 30 June 2011. Mr. McCluskey's contract, which was to end on 31 December 2010, was accordingly extended to 30 June 2011.

5. In January 2011, DIST staff members were informed that, due to delays in the restructuring, staff members on FTAs would be extended for another three months through 30 September 2011.

6. On 5 May 2011, Mr. McCluskey wrote to the DIST Director requesting that his contract be extended until 30 September 2011. He subsequently met with the Director of the Division of Human Resources Management (DHRM) to discuss his contractual situation.

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<sup>1</sup> The deadline for Mr. McCluskey to appeal was 31 July 2012. But he encountered technical difficulties when he attempted to file his submissions via the eFiling portal. With the assistance of the IT specialist and the Registry, he managed to file his appeal on 9 August 2013.

7. On 29 May 2011, the Director of DHRM confirmed that Mr. McCluskey's FTA would be extended from 1 July to 30 September 2011 like other holders of FTAs, even though he had been renewed on short-term appointments of less than one year without going through the APPC. He offered Mr. McCluskey two options: i) a three-month extension of his FTA, albeit on special leave with full pay (SLWFP) from 1 July 2011 to 30 September 2011 as no assignment was available for him, or ii) an agreed separation effective 30 June 2011 with indemnities.

8. On 1 June 2011, Mr. McCluskey requested that his contract be extended until 30 September 2011. He also requested that he be treated equally to other DIST staff members in similar situations. He was informed, on 6 June 2011, that his contract would be extended to 30 September 2011 "with no expectation of subsequent renewal or conversion", and that he would be placed on SLWFP, as there was no position against which to charge his salary in DIST or elsewhere. Mr. McCluskey was also informed that his contract would be extended beyond 30 September 2011 only if a post could be found against which his salary could be charged.

9. According to UNHCR, no assignment was identified for Mr. McCluskey, nor was he selected for a new position. He was separated from service on 30 September 2011.

10. Mr. McCluskey appealed. In Judgment No. 2012/UNDT/060, the UNDT rejected Mr. McCluskey's claim of unequal treatment. The UNDT concluded that the distinction made by UNHCR between FTAs of long duration and FTAs of short duration had a legal foundation, and that it fell within the discretionary authority of UNHCR to distinguish between those two categories of staff.

11. In his appeal to this Tribunal, Mr. McCluskey attached two pieces of "new evidence" in support of his claim of unequal treatment. One was a memorandum dated 27 September 2011 from the Director of DHRM to a Mr. G. in respect of the latter's contractual situation and the other was a letter of appointment dated 30 September 2011 offering Mr. G. an FTA of two months from 1 October 2011 through 30 November 2011. Mr. McCluskey clarified that he had difficulty in obtaining those documents, but did not say when he obtained them.

### **Submissions**

#### **Mr. McCluskey's Appeal**

12. The UNDT was mistaken when it applied the term “short fixed-term contract” to his case when there is no such distinction made in the former or the current staff rules governing appointments or in his letters of appointment. In any event, it is questionable whether Mr. McCluskey can even be considered a short-term employee in practical terms, given the length of his service with UNHCR.

13. Mr. McCluskey maintains that the UNDT failed to give due consideration to the consequences of the administrative error in incorrectly assuming that his contract was temporary in nature and that he did not qualify for the automatic contract renewal afforded to his fellow colleagues. That administrative error resulted in his isolation and non-alignment with similarly situated colleagues.

#### **The Secretary-General's Answer**

14. The UNDT correctly concluded that the Organization had the right to distinguish between different categories of staff and to treat them differently depending on their contractual status.

15. Contrary to Mr. McCluskey's assertion, the UNDT considered the issue of UNHCR's alleged erroneous reference to him as a “temporary appointee” in paragraph 6 of the impugned Judgment.

16. The Secretary-General submits that any ambiguity regarding Mr. McCluskey's contractual status was resolved in his favor since his fixed-term appointment was exceptionally extended from 1 July 2011 to 30 September 2011 in recognition of the apparent misunderstanding.

17. The Secretary-General stresses that Mr. McCluskey was treated in the same manner as two other DIST colleagues, who had also not undergone the competitive recruitment process and whose appointments were similarly not renewed after 30 September 2011.

### **Considerations**

18. First, it must be noted that this Tribunal did not accept the additional documents submitted by Mr. McCluskey because they did not fulfill the exceptional requirements set out in Article 2(5) of the Statute of the Appeals Tribunal to produce such evidence at the appellate level, when it could have been presented before the Dispute Tribunal.

19. The Appeals Tribunal holds that the UNDT did not commit any error of fact or law when it concluded that the difference of treatment between Mr. McCluskey and his former colleagues who had undergone a competitive selection process was lawful.

20. It was established correctly that unlike those other staff members, Mr. McCluskey had not been selected by a competitive procedure nor had his recruitment been endorsed by the Appointments, Postings and Promotions Committee.

21. Hence, it was reasonable and lawful to treat him differently at the time of deciding about the possible extension of his fixed-term appointment, because equality means not only equal treatment of equals but also unequal treatment of unequals.<sup>2</sup>

22. This Tribunal finds no flaw in the motivation of the impugned Judgment that could result in a manifestly unreasonable decision such as to allow the appeal under the terms of Article 2(1) of the Statute of the Appeals Tribunal. No expectancy of renewal could arise from the terms of employment nor was it created by the Administration with respect to Mr. McCluskey's situation, which was clearly communicated to him and was adequately characterized by the UNDT Judgment. The extensions of contract granted to Mr. McCluskey constituted the adequate treatment he had the right to receive; they cannot be considered as modifying the nature of his contract or terms of employment.

23. Therefore, this Court will affirm the Judgment under appeal.

### **Judgment**

24. The appeal is dismissed in its entirety.

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<sup>2</sup> *Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*, Judgment No. 2011-UNAT-177.

Original and Authoritative Version: English

Done in New York, United States.

*(Signed)*

Judge Simón, Presiding

28 June 2013

*(Signed)*

Judge Adinyira

21 June 2013

*(Signed)*

Judge Chapman

28 June 2013

Entered in the Register on this 26<sup>th</sup> day of August 2013 in New York, United States.

*(Signed)*

Weicheng Lin, Registrar