



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2016/020

Judgment No.: UNDT/2016/115

Date: 23 August 2016

Original: English

**Before:** Judge Alexander W. Hunter, Jr.

**Registry:** New York

**Registrar:** Hafida Lahiouel

ADUNDO

v.

SECRETARY-GENERAL  
OF THE UNITED NATIONS

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**JUDGMENT**

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**Counsel for Applicant:**

Didier Sepho

**Counsel for Respondent:**

Alan Gutman, ALS/OHRM, UN Secretariat

## **Introduction**

1. The Applicant, a Security Officer at the S-2 level at the United Nations Security and Safety Service, Department of Safety and Security (“DSS”), contests “the decision breaching the express promise made by the Administration to [the] Applicant to renew his fixed-term appointment for two years.”

2. The Respondent submits that the application is not receivable because the contested decision does not adversely affect the Applicant’s terms of appointment and therefore is not an appealable administrative decision that can be contested before the Tribunal. Should the Tribunal find the application receivable, the Respondent submits that it should be dismissed as the contested decision was lawful and the Administration did not make an express promise to renew his appointment for two years.

## **Relevant facts**

3. The Applicant commenced service with the Organization on 2 February 2009 as a Security Officer on a six month fixed-term appointment expiring 1 August 2009. He subsequently received extensions of one year (through 1 August 2010), two years (through 1 August 2012), five months (through 31 December 2012), one year (through 31 December 2013), and two years (through 31 December 2015).

4. On 27 July 2015, the Applicant was notified via email that the Under-Secretary-General for Safety and Security (“USG/DSS”) had appointed a panel to investigate a case of alleged unsatisfactory conduct by the Applicant, in accordance with ST/AI/371 (Revised Disciplinary Measures and Procedures) as amended by ST/AI/371/Amend.1.

5. On 21 August 2015, for the purpose of procuring a loan from the United Nations Staff Emergency Fund, the Applicant requested a written statement from the Executive Office in DSS confirming that his contract would be renewed beyond 31 December 2015. He stated:

[I h]ave applied for an emergency loan which is due to be signed but they want a confirmation to affirm my status of renewal of my contract and if [I] am on a regular budget post. Kindly if you can give me the details of the mentioned facts, so that I can relay back to them before the day ends. Will be very much appreciative for your prompt response on the matter, since it's an emergency case please.

6. On 25 August 2015, the Applicant sent a further email to the Executive Office, stating:

I do have an emergency, of which [I] have requested a loan from the Staff Emergency Fund and have been approved. They want to know the status of my next contract for the calculations of the repayment periods, since the current contract ends on December 31st 2015. Have tried to get the feedback since on Friday but up to now [I] am still unable to. Kindly if you can follow up my request, considering that it's an emergency issue which I have no any other alternative to depend on.

7. On 1 September 2015, the Applicant sent two further follow-up emails. On the same day, he was sent an email from the Executive Office of DSS stating:

This is to confirm that [Security Officer] Adundo's supervisors have confirmed barring unforeseen circumstances, it is the intention of the Department to extend the fixed-term appointment of Adundo for another two year period.

8. On 6 November 2015, the Tribunal issued Judgment No. UNDT/2015/107 (appealed) in Case No. UNDT/NY/2014/062, finding in favor of the Applicant in part in connection with an application he filed contesting a decision to place him on weapons restriction, and under the supervision of a Senior Security Officer, because of his refusal to undergo retraining pursuant to a Notice of Counsel.

9. By memorandum to the Executive Officer, DSS dated 7 December 2015, Mr. Michael Browne, Chief of the Security and Safety Service, DSS stated that the recommended contract extension for the Applicant was one year. No reason was given for the recommendation.

10. On the same day, the Applicant was offered a contract extension of one year.

11. By email to Mr. Browne dated 8 December 2015, the Applicant requested clarification regarding the Letter of Appointment, stating that he believed the duration of one year was an error and that “all Security Officers of my class have been appointed for a fixed-term of 2 years. I don’t see any reasons why my appointment would be different.” He noted that he needed to sign the Letter of Appointment as soon as possible because the document was necessary to renew his wife’s work permit.

12. By email to a colleague, Mr. Matthew Sullivan, the same day, and referencing his email to Mr. Browne, the Applicant noted that he had raised concerns regarding the duration of his contract but that “as you advised, I will sign the present letter of appointment and raise any grievances later.” He again stated that the extension affected his wife’s work permit and her job security.

13. In the application, the Applicant states that he signed the Letter of Appointment on 15 December 2015.

14. On 5 February 2016, the Applicant submitted a request for management evaluation regarding the contested decision in this case.

15. On 29 February 2016, the Management Evaluation Unit informed the Applicant that his request for management evaluation was not receivable.

### **Procedural history**

16. On 29 May 2016, the Applicant filed the present application.
17. On 30 June 2016, the Respondent filed a reply to the application.
18. On 14 July 2016, this case was assigned to the undersigned Judge.
19. By Order No. 191 (NY/2016) dated 8 August 2016, the Tribunal ordered the Respondent to state the reason for the decision to offer the Applicant a one year fixed-term appointment on 7 December 2015, having previously informed the Applicant that, barring unforeseen circumstances, DSS intended to extend his appointment for two years. The Respondent was further ordered to state whether he considered that any “unforeseen circumstances” arose between 1 September 2015 and 7 December 2015, which affected the stated intention of DSS to renew the Applicant’s fixed-term appointment for two years and, if so, to provide particulars.
20. On 11 August 2016, the Respondent filed a response to Order No. 191 (NY/2016), stating that the email of 1 September 2015, provided at the Applicant’s request, did not serve as an offer to renew the Applicant’s appointment or a firm commitment to do so. The decision to renew the Applicant’s appointment for one year was taken on the basis of Mr. Browne’s recommendation, dated 7 December 2015, and “[o]ne of the factors considered ... in making his recommendation was that the Applicant was the subject of an ongoing investigation ... for alleged unsatisfactory conduct.” The Respondent further stated that the staff members involved in sending the 1 September 2015 email were not privy to the fact that the Applicant was under investigation.

## **Applicable law**

21. Article 2.1(a) of the Statute of the Dispute Tribunal states:

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms “contract” and “terms of appointment” include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance;

22. Staff rule 4.13 states:

### **Fixed-term appointment**

(a) A fixed-term appointment may be granted for a period of one year or more, up to five years at a time ...

(b) A fixed-term appointment may be renewed for any period up to five years at a time.

(c) A fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service ...

## **Considerations**

### *Receivability*

23. The Respondent submits that the application is not receivable, as the Applicant had not contested an appealable administrative decision in accordance with art. 2.1(a) of the Dispute Tribunal’s statute. He submits that a decision to renew a fixed-term appointment, even for a term that the staff member finds unsatisfactory, does not adversely affect the Applicant’s terms of appointment, and cannot be contested before the Tribunal.

24. The Applicant submits that the Administration breached an express promise to renew his appointment for two years and thus violated its obligation of good faith and fair dealing.

25. In *Andati-Amwayi* 2010-UNAT-058, the Appeals Tribunal defined what constitutes an administrative decision susceptible to challenge as follows:

17. What is an appealable or contestable administrative decision, taking into account the variety and different contexts of administrative decisions? In terms of appointments, promotions, and disciplinary measures, it is straightforward to determine what constitutes a contestable administrative decision as these decisions have a direct impact on the terms of appointment or contract of employment of the individual staff member.

18. In other instances, administrative decisions might be of general application seeking to promote the efficient implementation of administrative objectives, policies and goals. Although the implementation of the decision might impose some requirements in order for a staff member to exercise his or her rights, the decision does not necessarily affect his or her terms of appointment or contract of employment.

19. What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

26. In *Lee* 2014-UNAT-481, the Appeals Tribunal recalled that the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting a staff member's terms and conditions of appointment. In other words, the administrative decision must have a direct impact on the terms of appointment or contract of employment of the individual staff member.

27. In *Hamayel* 2014-UNAT-459, the Appeals Tribunal stated at para. 17: "Mutual trust and confidence between the employer and the employee is implied in every contract of employment. And both parties must act reasonably and in good faith."

28. In *Applicant* UNDT/2013/004 (on receivability), the Dispute Tribunal found receivable an element of an application contesting a decision to give a staff member a six month fixed-term appointment instead of a one year fixed-term appointment. In *Applicant* UNDT/2014/128 (on liability and relief), the Dispute Tribunal held that an expectancy of renewal of the staff member's appointment for one year had been created by written assurances made to the staff member, who relied upon those assurances. The staff member was awarded compensation. Both judgments were upheld on appeal in *Applicant* 2015-UNAT-590.

29. In accordance with *Hamayel* and *Applicant*, the Tribunal finds the present application receivable, as the Applicant is alleging non-compliance with the terms of his appointment—namely, the obligation to act reasonably and in good faith—as a consequence of an alleged breach of an express promise creating a legitimate expectation. The Tribunal is competent to hear the application in accordance with art. 2.1(a) of its statute.

*Did the Administration create a legitimate expectation that the Applicant's appointment would be renewed for two years?*

30. In order for a staff member's claim of legitimate expectation to be sustained, "it must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case" (*Abdalla* 2011-UNAT-138, para. 24; *Munir* 2015-UNAT-522, para. 24).

31. In *Igbinedion* 2014-UNAT-411, the Appeals Tribunal stated (emphasis added):

[T]he renewal of the appointment of a staff member on successive contracts does not, in and of itself, give grounds for an expectancy of renewal; unless the Administration has made an *express promise* that gives the staff member an expectancy that his or her appointment will be extended. *The jurisprudence requires this promise at least to be in writing.*



32. In *Munir* 2015-UNAT-522, the Appeals Tribunal upheld the finding of the Dispute Tribunal that a staff member had a legitimate expectation of renewal of his fixed-term appointment for one year based on a decision that was found to have been made during a meeting of the Core Management Group of the UNDP Country Office in Sudan. This had been characterized by the Dispute Tribunal as “a decision ... which only remained to be implemented.”

33. Examining the facts in the present case, the Tribunal finds that the email of 1 September 2015 cannot be considered a firm commitment or an express promise in writing. The email merely informed the Applicant that, according to his supervisors, it was the intention of DSS to renew the Applicant’s appointment for two years “barring unforeseen circumstances.” The email was not copied to Mr. Browne, the Chief of the Security and Safety Service, who was ultimately the one who made the recommendation regarding the renewal of the Applicant’s appointment. The Tribunal accepts the explanation provided by the Respondent that the staff members involved in sending the 1 September 2015 email were not privy to the fact that the Applicant was under investigation, which was one of the reasons why Mr. Browne recommended a one year extension. Again, it is noted that the Applicant was notified of this investigation as of 27 July 2015.

34. Further, the Tribunal does not consider that the 1 September 2015 email constituted a decision which only remained to be implemented (*Munir*) since the email was made contingent, through the use of the words “barring unforeseen circumstances.” The statement was written for the purpose of securing a loan which was approved and which required monthly payments to be made over a two year period.

#### *Improper motive/retaliation*

35. The Applicant submits that the contested decision was taken in retaliation against the Applicant for filing Case No. UNDT/NY/2014/062 before the Dispute

Tribunal. The burden of proving improper motives, such as abuse of authority, discrimination, retaliation or harassment rests with the person making the allegation (*Nwuke* 2015-UNAT-506, para. 49). While noting that Judgment No. UNDT/2015/107 was issued on 6 November 2015, between the 1 September 2015 email and the 7 December 2015 offer of a one year fixed-term appointment, the Tribunal finds no evidence in the record that the contested decision was improperly motivated or causally connected to the issuance of the aforementioned judgment. In the absence of such evidence, there is no basis for concluding that the decision was improperly motivated or retaliatory.

### **Conclusion**

36. In view of the foregoing, the Tribunal DECIDES:

The application is dismissed.

*(Signed)*

Judge Alexander W. Hunter, Jr.

Dated this 23<sup>rd</sup> day of August 2016

Entered in the Register on this 23<sup>rd</sup> day of August 2016

*(Signed)*

Hafida Lahiouel, Registrar, New York