AFRICAN UNION
ADMINISTRATIVE TRIBUNAL

UNION AFRICAINE
TRIBUNAL ADMINISTRATIF

AUAdministrativeTribunal@africa-union.org

CASE NO.: BC/OLC/1.54
JUDGMENT NO.: AUAT/2015/001

D.K.A., APPLICANT

v.

CHAIRPERSON OF THE AFRICAN UNION COMMISSION

JUDGMENT

Counsel for Applicant:
BRUK GEREMEW
ADDISU HAILEGEBRIEL

Counsel for Respondent:
ALIMAMY SESAY
ESTHER UWAZIE

This matter was first initiated on 26 May 2002 against the Secretary-General of the Organization of African Unity, now the Chairperson of the African Union Commission. The Tribunal notes, with regret, that the application could only be heard when the Tribunal convened at its September 2014 Session after a long period of inactivity.

JUDGMENT

BEFORE: Hon. Andrew NYIRENDA, Shaheda PEEROO and Aliou BA
DELIVERED BY: Hon. A. NYIRENDA

D.K.A, the Applicant, was offered appointment in the Organisation of African Unity, Respondent, as a Personal Assistant to Ambassador [V.S.M.], then Assistant Secretary General. The letter of offer was dated 20 November 2000, written by the Director of Administration and Finance Department. The letter contained several requirements for the Applicant and members of his family to fulfil prior to finalising his engagement. The requirements were mostly about proof of medical fitness.

The letter further contained two important provisions, which we quote for their relevance:

> (d) In addition to the above –mentioned salary, you will benefit from allowances provided in Chapter V, Article 17 (a-h) of the OAU Staff. Regulations Document CM/1745 (LVII) Annex 1, Rev.1.
> (e) All other conditions governing your appointment as an official of the Organisation of African Unity will be regulated by the relevant provisions of the Charter of the Organisation of African Unity (Article 18) and of the Staff Rules and Regulations.

What is not in dispute is that the Applicant complied with all the requirements and signed the letter of acceptance of offer on 1 December 2000.The Applicant left his home country, Mauritius, for Addis Abba on 11 January 2001, thereby effectively assumed duty in accordance with what was provided in the letter of offer. The air ticket for his travel was purchased by the Respondent.

On 16 January 2001, an Interoffice Memorandum was deployed by the Respondent's Senior Personnel Officer (General Administration) to the Head of Disbursement and Procurement Division. The subject matter reads "Related Entitlements on Initial Appointment". We will extract the relevant paragraph from the Memorandum:

> In accordance with Article 9 (c) of the Staff Regulations, [D.K.A.], the newly appointed Personnel Assistant to the Assistant Secretary General (Administration and Finance) and his dependants have been declared medically fit. Therefore, this is to request you to kindly authorise the issuance of the related entitlements on initial appointment

> to [D.K.A], under listed dependants for the sector Mauritius Addis Ababa.
> The dependants are as follows [list omitted]

Towards the end of January 2001, the Respondent provided the Applicant with air tickets for his wife and the two children. Within the month of January 2001 the Respondent also paid the Applicant an amount of USD 9,739.00 as installation allowance and the Applicant was settled.

On 10 April 2002, by an Interoffice Memorandum from the Acting Director Administration and Finance Department, the Applicant was informed that he was required to refund airfares, installation allowance and any other related expenses that had been paid to him on procurement. This memorandum is also particularly relevant to this case and must therefore be set out in full:

> I would like to inform you that in implementation of the recommendation of the Advisory Committee contained in the Report of its 70th Session (December 2001) and endorsed among others in CM/Dec 628 (LXXV), March 2002, the following expenses incurred by the Organisation in connection with your recruitment, will be deducted from emoluments:
>
> - Airfares
> - Installation Allowance
> - Any other related expenses
>
> I am by a copy of this memo informing the Head of Disbursement and Procurement Division to effect the necessary deductions.

On 15 April 2002, there was an Interoffice Memorandum from the Head of Disbursement and Procurement Division with details and breakdown of the amount of money which the Applicant was to refund. The total amount was USD 14,019.40. On 16 April 2002, the Applicant wrote the Secretary-General, meticulously putting forward his appeal against the Respondent's decision requiring him to refund the sums of money as stipulated in the Memoranda. What was also at issue was that the Respondent had refused to pay the Applicant's separation benefits on account of what was thought to be owing. The Respondent did not respond to the appeal. On 26 May 2002, the Applicant referred the matter to this Tribunal.

The facts as set out above are not denied by the Respondent. As we understand the Respondent, the only reason for asking the Applicant to refund the money is that the

payments were wrongfully made. The separation benefits were withheld on account of the same amounts that were felt to have been wrongly paid; otherwise he was entitled to them. The Respondent advances two arguments in that regard and we refer to paragraphs 7,8 and 9 of the Response which state:

> 7. The Respondent argues that at the time the payments were made to the Applicant, he was not legally entitled to receive those financial benefits by virtue of his appointments as a second staff on a secondment to the Union. It was customary in the organisation that a seconded staff appointment by an Assistant Secretary – General is not entitled to air ticket or installation allowance following the payment of such benefits to the first staff of the Assistant Secretary – General.
>
> 8. The fact that the Applicant received wrongful payment is not a basis for him to keep it. It is a general principle of law that monies paid by mistake are recoverable pursuant to the doctrine of unjust enrichment.
>
> 9. Therefore, the failure by the Applicant to pay the said sum provided the justification for the administration to withhold the separation benefits due and owing from him.

There are two main issues for determination in this matter. The first issue is whether on the facts and what might emerge as legal considerations, the Respondent was entitled to withhold or deduct the money and benefits from the Applicant. The second issue is whether the Applicant's separation benefits should have been withheld. The two issues are related and therefore as we discuss one, we will have discussed the other. The major question is whether the Applicant, having signed the letter of offer of 28 November 2000 which provided generally that he would be entitled to allowances in accordance with the Respondent's Staff Regulations and Rules, Document CM/1745 (LV11), and such allowances having been paid, it would lie in the Respondent to withdraw the payments.

It is worth mentioning that the offer letter was copied to several major departments of the Respondent. We are entitled to assume that before the Applicant signed the letter on 6 December 2000, there was no query from any of the departments of the Respondent drawing attention to any irregularity in the offer. The letter of 28 November 2000 is headed "LETTER OF APPOINTMENT (INTERNAL SPECIAL). At

the bottom end of the letter is the part where the applicant was required to sign. It states:

> To: Director of Administration and Finance Department
> I hereby accept the appointment described in this contract subject to the conditions therein specified and I promise to abide by them.
> Date ..... Signature .....

Upon signing the letter of appointment in the words above, what was between the parties was not merely a written statement. It was a written contract of employment, no doubt to the understanding of both parties. While a written statement merely declares what the parties are after and might be inconclusive and capable of being inaccurate, a written contract creates rights and duties between parties thereto. The distinction here is important in that a mere statement most probably has no special legal status as there could be mistakes about what was agreed upon. If a document is held to be a written contract, it is almost invariably presumed to accurately record the terms agreed by the parties and it is very difficult to persuade a court that the terms were otherwise. These are general principles of employment contracts as we know them.

As we state earlier, the Interoffice Memorandum of 16 January 2001 directed that allowances be paid to the Applicant. The memorandum specifically stipulated that the allowances were in accordance with Article 9 (c) of the Staff Regulations. Article 9(c) of the relevant Staff Regulations provides:

> The Secretary General shall, from time to time, propose to the Council of Ministers, for submission to the Assembly of Heads of State and Government, the scales of salaries, allowances and benefits of staff members including the Secretary General and the Assistant Secretaries General, as well as the terms and conditions under which they shall be granted. These scales, terms and conditions shall be set out in the Staff Rules.

We are mindful that the Regulation above does not detail the actual allowances to be paid, but the Respondent itself paid the Applicant allowances on the basis of the Regulation. It can only be assumed that the finer details of the actual allowances were contained elsewhere.

We have referred to paragraph 7,8 and 9 of the Response by the Respondent. Those are the paragraphs, we believe, that carry the Respondent's explanation of the action taken against the Applicant. Paragraph 7 refers to a custom in the Organisation where a second staff appointed by an Assistant Secretary- General is not entitled to the benefits that were paid to the Applicant. Unfortunately, this is as much as there is regarding custom. During the oral hearing the Respondent made no reference to a custom. Instead, the Respondent relied on the Report of the 70th Ordinary Session of the Advisory Committee on Administrative and Budgetary and Financial Matters to the Council of Ministers. Obviously this was a departure from the written Response. We therefore have little to work with on the alleged customary practice. We also suspect that reference to customary practice has been raised without much reflection. The communication to the Applicant on the deductions does not refer to customary practice as the basis. It refers to the Report of the 70th Ordinary Session of the Advisory Committee on Administrative and Budgetary and Financial Matters, which we will refer to as "the Report".

The Report has been put in evidence by both the Respondent and the Applicant. We will carefully analyse the relevant parts thereof. The 70th Ordinary Session was held in Addis Ababa, Ethiopia from 3 to 7 December 2001. Deliberations were not concluded during that sitting. The Session convened again on 11 February 2002. The issue on recruitment of Special Assistant for Assistant Secretaries-General is raised in paragraph 33 of the Report and the discussion is in paragraphs 35 to 39. The matter was first raised during the sitting of 3 to 7 December 2001 but was not concluded as will soon be explained. The matter was concluded during the sitting of 11 February 2002. The conclusion on the subject is in paragraph 91 of the Report. It is compelling that we set out all the relevant paragraphs of the Report follows:

> "33. Members of the Advisory Committee also requested clarifications and raised questions regarding the recruitment of Special Assistants and Private Secretaries for the Assistant Secretaries General_ _ _.
> 35. With regard to the specific issue of the conditions of recruitment of Private Secretaries and Special Assistants to the Assistant Secretaries-General, it was recalled that the decision of the Advisory Committee was that only one of the two officers attached to these political appointees

should be recruited from the country of origin, and that the other should be recruited locally. Where an Assistant Secretary General decides to recruit nationals of his country to fill the two positions, the Organisation will be responsible solely for the air tickets and installation allowance of one of the two officers.

36. The Acting Director of Administration and Finance Department explained that, with respect to the case cited in the External Audit Report, the payment in question was made by the Organization in 2001 and that, as of that date, the Assistant Secretary General concerned had been released of his Private Secretary externally recruited, who had returned to her country way back in 1997. The Private Secretary in question had been replaced by one locally recruited, and hence without recruitment costs to the Organization. It was this later Secretary which was in post at the time the Advisory Committee took the decision.

37.One delegation asked if the decision should be limited to only one mandate or two and whether the principle of equal treatment should apply. Other delegations indicated that the decision could not have retrospective effect and that this universally accepted principle of law should also apply in this specific case. The Assistant Secretary General in charge of Administration and Finance recalled that the crucial issue was whether the decision should have retrospective effect.

38. When called upon to provide a legal opinion, the Acting OAU Legal Counsel invoked the principle of non-retroactivity (sic) in the construction or interpretation of statutes or administrative decisions. He added that the presumption that a decision or statute was intended to apply from the date of its adoption and not retroactively (sic), could only be rebutted by a clear and unambiguous provision in the pertinent legal text itself to the effect that it was intended to apply with effect from a specified date prior to its adoption. (the words non-retroactivity and retroactivity in the paragraph were meant to read non-retrospectivity and retrospectivity, if the paragraph is to make its intended sense).

39. However, the Committee was not satisfied with the spontaneous advice given by the Acting Legal Adviser and required him to take a closer look at all the circumstances surrounding the case including the fact that:

(i) Two ASG's both had Personal Secretaries during their first mandate paid for by the Organisation;

(ii) One ASG still had the Personal Secretary, the other did not;

(iii) The ASG who still had his Personal Secretary was not paid anything in respect of his Special Assistant during their second mandate, while the other whose Personal

> Secretary had left got the entitlements for his Special Assistant;
> (iv) The Bureau of the Advisory Committee was not a law making body and it is both the spirit and the letter of its decisions that should be taken account of; and all Assistant Secretaries General should be given equal treatment_ _ _.
> 91. The Chairman of the Advisory Committee on Administrative, Budgetary and Financial Matters informed the meeting that, as mandated by the Committee, the members of the former and the current Bureaus met in order to take a final decision on the basis of documents made available by the Secretariat regarding one Special Assistant who was paid installation allowance and costs of air tickets, whereas that privilege was denied to the other Special Assistants. He stated that members of the two Bureaux who were represented in the meeting had unanimously reached the following decision.
> That there was a clear misinterpretation of the decision made by the former Bureau of the Committee on this issue in applying it to the Special Assistant to the Assistant Secretary-General presently in charge of Administration and Finance;
> That the Rules should apply equally to all Assistant Secretary-General.
> That the Secretariat should take administrative measures to recover from the concerned Special Assistant the amount paid as his recruitment costs".

According to paragraph 33 above, members of the Advisory Committee requested clarification on recruitment of Special Assistants for Assistant Secretaries-General. It occurs to us therefore that there was lack of clarity on the process of recruitment of Special Assistants. Reading through paragraphs 35 to 39, what is inescapable is a confirmation that practice on the matter was in disarray. It is apparent from the discussion that different cases at different times were handled differently. There was no common practice. The purpose of the discussion was therefore to come up with a position on the matter.

It is not without significance that a question arose during the deliberations as to whether the decision that would be taken would have retrospective application. The question arose because it was realised that the decision or position that would be taken might not affect previous cases and of particular reference at the time was the Applicant's case. We note, with admiration, the instant opinion of the Acting Legal

Counsel then. The opinion was that generally any decision or position taken would only apply from the date of its adoption and not retrospectively.

Despite this advice, it was finally determined that the amounts of money paid to the Applicant be recovered. It was so determined because it was realised that there was a clear misinterpretation of the decision made by the former Bureau of the Committee on the issue. The minutes therefore suggest that there was already a decision of the former Bureau on the matter as established from documents made available by the Secretariat.

We did not have the privilege of seeing the documents referred in minute 91 and so could not confirm that there was indeed a prior decision on the matter. In any case if there was a decision of the former Bureau of the Committee on the matter, we are told by Minute 39(iv) that the Bureau of the Advisory Committee was not a law making body. If therefore a decision of the former Bureau indeed existed, it lacked efficacy, unless it can be shown that the decision translated into a rule. On what is before us, the Respondent has not been able to establish that there was a standing custom, a practice or a rule on the matter, which was violated at the time the recruitment allowances were paid to the Applicant.

We can, at this stage, make some findings as we proceed with the discussion. It is our finding from the documents on record that there was a contract of employment between the Applicant and the Respondent. It is our finding that what the Applicant was entitled to as air tickets, salary and settlement allowances were clearly stated in the contract documents as a whole. We also find that what was paid to the Applicant was in accordance with the contract of employment.

We further find that at the time of payment of the air tickets and settlements allowances, there was no common practice, custom or rule which would have made the payments irregular. It comes out that in December 2001 and January 2002, upon realising that there was no rule or common practice on entitlements of Special Assistants Secretaries- General, the Respondent considered it necessary to have a resolution on the matter. We take judicial notice of the fact that the Report of the 70th Session of the Advisory Committee on Administrative, Budgetary and Financial Matters, during which the matter was discussed and resolved, was adopted on 4 February 2002

and placed before the Council of Ministers from 9 – 15 March 2002. It is only then that it could be said there was a rule on the matter and that is assuming the matter was taken to its conclusion through the relevant organs of the Respondent.

There is another observation that we should make while we are still on this point. Reading through Paragraph 91 of the Report as quoted above, one fails to find the actual decision, resolution or rule that was arrived at, that would apply to recruitment of Special Assistants. The impression one gets from the Paragraph is that when the two Bureaux met they looked at the documents relating to the Applicant and considered them in the context of the decision of the "former Bureau of the Committee" on the issue. It was then said the rule should apply equally to all Assistant Secretaries-General. What is not made clear is what the rule was, if there was any. For all we know, there was a misunderstanding on the matter. It is not surprising to us that Paragraph 91 was not clear on what the rule says. It is because there was no rule that would categorically be cited.

We are fortified in this reasoning because of another piece of information in the documents made available to the Tribunal. On 27 November 2000, Assistant Secretary General [V.S.M.], in trying to clear the recruitment of the Applicant, wrote the Secretary General. In that memorandum the Assistant Secretary General refers to certain clarifications which were pending with the Department of Administration as to the decision reached by the Advisory Committee. In response to that memorandum, the Secretary General endorsed on the memorandum as follows:

> ASG – EDECO
> I agree. I should however point out that there is still no clarity on whether an ASG can recruit both the Personal Assistant and Private Secretary from outside the Secretariat with its attendant implications financial and otherwise. My approval is based on the assumption this is the case (even though this does not apply to your situation). For your information I have explained to both ASG Finance and ESCAS that if it turns out not to be the case, the necessary remedial measures will have to be taken.

There are two observations that we should make on the remarks by the Secretary-General. First, the Secretary-General makes clear that there was no clarity on the matter at the time. Secondly, the Secretary-General diligently alerts the

Administration to a possible course. Unfortunately, the Administration did not handle the matter in the manner guided by the Secretary-General. All the Administration needed to do was to inform the Applicant, in the letter of offer of employment and the separate memorandum which set out the settlement allowances and air tickets, that all the payments would be reimbursed in the event that it was established that they had been paid by mistake. As we state earlier the communication to the Applicant on entitlements was unambiguous. The memorandum clearly and without reservation states that the Applicant was entitled to the disbursements that were made. We are therefore prepared to confirm, on the documents before us, that there was uncertainty on the matter on part of the Respondent even at the time the Applicant's engagement was being considered. It must be said therefore that the Respondent took a deliberate decision to engage the Applicant on the terms communicated to him in writing.

Another matter that we should comment on is the attempt to advocate of retrospective application of rules, resolutions or decisions as appears in Paragraph 91 of the Report. We have already cast our doubts on whether Paragraph 91carries any resolution or decision. Let us for a moment assume it does. Paragraph 91 advocates retrospective application of the resolution or decision. We believe it is on that basis that the Respondent proceeded to recover the sums of money in question from the Applicant.

The port of call is that it is a cardinal and first principle of law that all laws shall be prospective, open and clear. It is fundamentally unfair to hold a person to be in contravention of the law when that law did not exist when the alleged contravention occurred. Although there is no prohibition to enacting retrospective laws or rules, provisions that have a retrospective operation adversely affecting rights or imposing liabilities are to be promulgated only in exceptional circumstances. We should be concerned and at any rate avoid the tendency that makes policy, rules, laws, resolutions or decisions that apply retrospectively. In principle, retrospective legislation or policy is generally inappropriate in an institution that seeks to uphold the rule of law and should be avoided in all but the most serious circumstances. Retrospective decisions, resolutions, rules or laws destroy the certainty of laws, is arbitrary and is vindictive, being invariably directed against identifiable persons or groups of persons. The way

the whole matter proceeded in the instant case suggests that back-dating of the decision was directed against the Applicant who is specifically discussed in the Report.

We have already found that despite the deliberations of the Advisory Committee on Administrative, Budgetary and Financial Matters, the decision or resolution on the matter remained unclear. It is our candid opinion that even if there had been a clear decision or resolution on the matter, we would not have allowed the decision or resolution to destroy the contract that was there between the Applicant and the Respondent, first, purely on the basis of cardinal principles of contract and, secondly, on the basis that we would not have allowed retrospective application of the decision or resolution in the circumstances of this matter.

In our final determination of the application, we find that all the payments in respect of air tickets for the Applicant and his dependants and the related entitlements on initial appointment were properly paid. We have earlier quoted two important provisions in the letter of offer of employment to the Applicant, that is, paragraphs (d) and (e). The two paragraphs, read together, allowed the Applicant benefits as an official of the Organisation of African Unity under the Staff Rules and Regulations. To that end the Applicant was no doubt entitled to travel expenses on separation and transportation of household goods and personal effect as provided in Articles 45 and 48 of the Respondent's Staff Rules. Further, as we mentioned earlier, the only reason, according to the Respondent itself, for withholding separation benefits was that the Applicant was owing the Respondent the sums of money paid at installation. Having determined as we have, the Applicant no longer owes the Respondent.

The Applicant further seeks compensation as the Tribunal may deem fit and proper in the circumstances of the case. This prayer seems to be completely at large. Apart from being pleaded we have not been introduced to circumstances upon which we can attempt assessment of compensation.

At the hearing, the Applicant sought interest on any award we might make. He has also asked for costs, which would include legal fees, travel expenses and accommodation expenses. Interest was not pleaded. We will not allow the Respondent to be taken off guard. As regards legal fees, travel costs, the cost of accommodation

and living expenses in relation to the application, the general principle is that such costs follow the event. We proceed to make the following orders:

(a) The decision by the Respondent to recover payments made to the Applicant in respect of air tickets and installation entitlements is set aside. Any amounts of money that might already have been recovered from the Applicant shall be paid back to him.

(b) The Respondent shall pay the Applicant such sums of money as he was entitled to at the time of the Applicant's separation to the extent that such sums were withheld. Such sums of money shall include his travel, including his dependants, and freight for his personal effects.

(c) We make no order for general compensation.

(d) We make no order for interest on any of the amounts of money payable.

(e) We order the Respondent to pay costs of the Application to the Applicant in the sum of USD 500.00.

PRONOUNCED this 26th day of October 2015 in Addis Ababa, Ethiopia.

/s/

_____

HONORABLE JUSTICE ANDREW K. C. NYIRENDA SC, PRESIDENT

/s/

_____

HONORABLE JUSTICE SHAHEDA PEEROO

/s/

_____

HONORABLE JUSTICE ALIOU BA