AFRICAN UNION
ADMINISTRATIVE TRIBUNAL

UNION AFRICAINE
TRIBUNAL ADMINISTRATIF

AUAdministrativeTribunal@africa-union.org

CASE NO.: BC/OLC/2.5
JUDGMENT NO.: AUAT/2015/006

M.M., APPLICANT

v.

CHAIRPERSON OF THE AFRICAN UNION COMMISSION

JUDGMENT

Counsel for Applicant:
KIDIST SHIFERAW

Counsel for Respondent:
ALIMAMY SESAY
ESTHER UWAZIE

This matter was first initiated on 25 February 2000 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 in its September 2014 Session after a long period of inactivity.

JUDGMENT

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

After her compulsory retirement, which became effective on 30 June 1996, the applicant requested that her services as cleaner with the OAU be extended for a further period. Upon the recommendations of the Committee on Recruitment, Appointments, Promotions and Staff Development, she was granted a nine months Short-Term Contract effective from 1 July 1996 to expire on 31 March 1997 and a second extension of 9 months from 1 April 1997 until 31 December 1997 under the provisions of Article 51 (a) (ii) of the Staff Rules.

The terms and conditions of service under the Short-Term Contract provided, inter alia, that the temporary appointment was neither pensionable nor gratuity earning and was renewable for one term of nine months only, subject to satisfactory performance. The applicant accepted the appointment subject to the conditions specified therein. After both contracts had been executed as per the terms and conditions agreed between them, the applicant addressed a letter to the then Secretary-General of the OAU on 26 December 1999. She therein referred to the two Short-Term Contracts which she said she accepted believing that the Secretary-General could give such contract of a shorter duration, and that as she had come to realize from the decisions of the Administrative Tribunal of the 12 November 1999 that once the OAU extended the service of a staff member after 30 years of service, the duration should be three years which may be renewable for one term of three years, she requested that "the decision of 26 April 1996" be re-examined and corrected accordingly. No document dated 26 April 1996 has been provided to us but we presume that it was the date of the decision to grant the first Short-Term Contract. On 25 February 2000, the applicant filed the present complaint with the Tribunal.

Counsel for the applicant made the relevant remark about the time factor in view of the difficulty in constituting the Tribunal to hear the case and the effect that it would have regarding any remedy other than material compensation if the applicant were to succeed in her claim, now that she is more than 15 years older than she was at the relevant time. Counsel then went straight to the issue in the case, namely, that the

Short-Term Contracts renewed for two terms of nine months duration each were in violation of Article 51(a) (ii) of the Staff Rules. In support of her contention Counsel relied on two decisions of the Ad Hoc Administrative Tribunal dated 12 November 1999, namely **Tezera Sahle v. Secretary-General [Case No 3 of 1998]** and **Alemu Ferede v. Secretary-General [Case No 1 of 1997]** to submit that after the compulsory retirement of a staff member if there is a decision to extend his or her services, the Chairperson can only do so by giving a Short-Term Contract for a term of no lesser or greater duration than three years, being a mandatory provision of the Article which neither party could derogate from. Counsel for the applicant further submitted that the latter was the weaker party and had no choice but to accept what was offered to her. She accordingly moved that the Tribunal order the respondent to pay to the applicant a four and a half years salary, benefits and entitlements with costs and interest starting from the date of the application until the day it is made payable to the applicant and anything or any other relief which the Tribunal may deem equitable and just to make good.

Preliminary Objections

The respondent has pleaded in substance that :

(1) the application is null and void as it violates Article 11, paragraphs 4, 4(i), 4(iv) and 5(i) of the Rules of Procedure of the Tribunal in that it is lacking in the general rules of representation of annexes, in providing the required number of copies and an indexed list of documents;

(2) the Tribunal should declare the application inadmissible

(i) for being time-barred inasmuch as the applicant's petition to Administration "to re-consider the decision given on April 26, 1996" was made after more than the statutory period provided under Article 62 of the Staff Rules;

(ii) as the applicant had given her consent to the contract the terms of which she had fully executed until its expiry she cannot rely on the judgments in **Tezera Sahle** and **Alemu Ferede** because the cases are not the same;

(iii) by the fact that the contracts were executed in accordance with the will of the parties and the applicant

cannot now seek to challenge them as she has no legal basis to do so; and

(iv) inasmuch as the applicant's claim demanding four and a half years salary together with related allowances and entitlements have not been previously presented to the administrative authority and cannot therefore be heard by the Tribunal.

The Tribunal has considered the more or less same submissions that were made by the respondent in the case of **B. W. v. Chairperson of the African Union Commission [Judgment No. AUAT/2015/008]**. As the Tribunal held in that case, Article 11 of the Rules of Procedure deals with requirements of a formal nature in relation to the filing of an application, and Article 11 in its subsection (9) makes provisions, in case the formalities required when lodging a complaint have not been properly done or completed, for the Secretary to give an opportunity to the applicant to make the necessary corrections and amendments. The Tribunal therefore does not agree that the application has to be rejected on the ground of nullity for failure by the applicant to have complied strictly with the provisions of Article 11 of the Rules of Procedure, which has not resulted in any prejudice to the respondent.

With regard to the time-bar objection, this Tribunal has said in the case of **T. T. v. Chairperson of the African Union Commission [Judgment No AUAT/2015/007]** and in the case of **B. W. v. Chairperson of the African Union Commission [Judgment No. AUAT/2015/008]** delivered on the same day, that in Chapter XII of the Staff Rules, under the heading "Appeals", Article 62 (a) sets out the procedure, with regard to the time factor, that should be adopted by a staff member wishing to appeal against an administrative decision concerning him. As a first step, within thirty days from the contested decision the staff member has to apply in writing to the Secretary General/Chairperson for a review of the administrative decision in issue. If the Chairperson confirms the decision against the staff member or if the staff member does not receive a reply within thirty days, he may within a further thirty days file an appeal with the Administrative Tribunal as prescribed in the Tribunal Rules of Procedure.

The applicant has indeed not respected the delay provided in the Staff Rules to contest the decision and is praying the Tribunal, after such an inordinate delay, to order and compel the respondent to compensate her in an amount equivalent of her salary and entitlements during the alleged remaining four and a half years that the contract should have covered. Irrespective of the correctness or not of her interpretation of Article 51 (a) (ii) of the Staff Rules, the fact remains that the applicant was fully aware of the texts of that Article and she could have challenged the decision to give her a contract of less than three years within 30 days of the decision in each case. She did not do so and the decisions became final. It is also significant that the applicant accepted the terms of the contract and performed her obligations under the contracts to their completion. The fact that the applicant became aware months later that the Tribunal has given judgment in favour of a staff member who had challenged the decision to give him or her a contract for a duration of less than three years is not a valid ground to justify the waiving of the time-bar provision in the applicant's favour.

The delay in the circumstances of each contract is in itself therefore sufficient for this Tribunal to set aside the applicant's claim as being time-barred, against the provisions of the Rules. In that context the Tribunal considers it relevant to refer to the following decision of the ILO Administrative Tribunal, in its Ninetieth Session, in the cases of ***In re* Bals and others** and ***In re* Pelsmaekers**, **Judgment No. 2003**. The core issue concerned the question whether it was open to staff members, many years after they had become established staff members, to file internal complaints against a refusal to grant them an installation grant. When the complainants learnt that a colleague in a similar case had been granted installation allowance, they felt that they were also entitled to apply for it. It was held that "*The fact that Eurocontrol granted the allowance to one staff member ex gratia and to another by mistake is not in itself enough to warrant waiver of the time bar on the complainants' requests*". The operative part of the judgment can be found from the extract of the judgment, which reads as follows:

> The complainants did not challenge the initial decisions denying them an installation grant and therefore "those decisions became final and the complainants were barred from challenging them by filling up application forms years later and claiming the quashing of the decisions refusing them by implication the allowance for which their assignment to

> Maastricht made them eligible. The Joint Committee for Disputes was right to cite 'the principle of legal certainty which must govern relations between an organisation and its staff' and to note that it was not possible to '[exempt] the persons concerned from the time bar, which the Tribunal is in any event bound to apply since it is mandatory'.

Further, even if a contract for the maximum duration of three years was in the interest of a staff member, once the applicant accepted and did not contest when a shorter term was offered to her, she is taken to have waived her right to seek a longer duration of that contract. The applicant cannot come later to claim an absolute right to a maximum three-year contract.

In a complaint made against the ILO in 1974, the Administrative Tribunal at the Thirty-Third Ordinary Session ***In re* ELLOUZE - Judgment No. 244** - did not allow the complainant to contest the terms of appointment which had become final and to which the complainant had not objected at any time.

Regarding the interpretation of Article 51 (a) (ii), Counsel for the respondent did not agree with the construction given by Counsel for the applicant and left the question open. This Tribunal is not bound by the decisions rendered by the Tribunal in **Tezera Sahle** and **Alemu Ferede**. The Tribunal in **Tezera Sahle** referred to what it had already said in its judgment in the cases brought by **Alemu Ferede** and **Getachew Ayacheh** that :

> *once an employee has been retired under Article 51 (a) (ii) of the Staff Rules under the 30 – year rule, and the defendant has made a determination that the service of such an employee is not **essential**, that is the end of the road for all intents and purposes. But if he decides that the service of such an employee is essential and that he should be given a contract, he can only give him a 3- year contract renewable only **once** for the same period. He has no discretion to grant a shorter or longer contract and, for the avoidance of doubt, he cannot do so on compassionate grounds.*

The relevant part of Article 51 provides as follows:

> "***Article 51 – Retirement***
> *(a) Compulsory Retirement:*
>
> *(i) …….*
>
> (ii) *Staff members who have continuously served the Organization for 30 years shall be required to retire. However, the Secretary-General may decide to*

retain them in service on contract of not more than two terms of three years duration each if their services are deemed essential and satisfactory."

We have given our interpretation of the above Article in the case of **B.W. v. Chairperson of the African Union Commission [Judgment No: AUAT/2015/008]**. For convenience sake we reproduce the following extract:

> *This Tribunal considers that the whole purpose of the above provision is to ensure the smooth and efficient running of the organization. It gives discretion only to the Secretary General, now the Chairperson, to decide whether to retain a staff member in service in certain circumstances. The criteria prescribed for exercising the discretion are where it is considered essential for the running of the organization that the staff member whose services are satisfactory be retained in service. The idea behind the bestowing of this discretion is for it to be exercised when the need arises in the interest of the organization as well as the employee and is restrictive only as regards the number of times the contract can be extended and as to the maximum duration of each contract. The set criteria for exercising the discretion will depend on how long the services of the staff member will be essential for the running of the organisation and for how long the staff member is prepared to continue to be in the service. He might be seeking just a short extension. The overall construction of the provision and its application have to be balanced in respect of both parties, not just one of them, especially in the context of human rights. A rigid and restrictive interpretation will defeat the purpose of the provision, which must have been thought of in a spirit of fairness to both parties as it will depend on whether and for how long each one will need the other.*
>
> *We consider that the language of Article 51 (a)(ii) is mandatory to the extent that the staff member can only be retained on contract for a maximum of two terms but there is no mandatory provision in respect of the duration of a term except that it cannot exceed three years. This means that the duration of the contract can be less but not more than three years. If the criteria are met for the Chairperson to retain a staff member in service on the second and last contract, again the duration of that contract can be less but not more than three years.*

Consequently, the reliance placed by the applicant on the above mentioned cases of **Tezera Sahle** and **Alemu Ferede** falls to the ground. In any case, even if this Tribunal had agreed with the interpretation given in the above cases, it would be tempted to say that in the circumstances the applicant's contract was a nullity and neither party can claim any right under it.

For the above reasons, the application is dismissed. In the circumstances, we make no order as to costs.

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