AFRICAN UNION
ADMINISTRATIVE TRIBUNAL

UNION AFRICAINE
TRIBUNAL ADMINISTRATIF

AUAdministrativeTribunal@africa-union.org

CASE NO.: BC/OLC/2.3
JUDGMENT NO.: AUAT/2015/008

B.W., APPLICANT

v.

CHAIRPERSON OF THE AFRICAN UNION COMMISSION

JUDGMENT

Counsel for Applicant:
WOSSENYELEH TIGU

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 at 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

The applicant was in 1966 offered permanent employment with the General Secretariat of the Organization of African Unity as Cleaner. After she had been in the continuous employment of the Organization for 30 years, she was retired from the service on 31 March 1996, in conformity with the provisions of Article 51 (a) (ii) of the Staff Rules, [Document CM/1745 (LVII). Annex II. Rev.1].

Upon receipt of the letter informing her of her impending retirement on 24 January 1996, the applicant wrote to the Secretary-General of the OAU requesting him to extend her service in the Organization by granting her a short-term contract as she had dependents and was still healthy and energetic. In reply, the applicant was informed that in accordance with Article 51 (a) (ii) of the Staff Rules and upon the recommendations of the Committee on Recruitment, Appointments, Promotions and Staff Development, the Secretary-General had decided to extend her services through a separate Short-Term Contract for a period of 9 months effective on 1April 1996 to expire on 31 December 1996 without prior notice. According to the terms and conditions of service 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.

The applicant's service was further extended through a separate Short-Term Contract for a period of 9 months effective on 1 January 1997 to expire on 30 September 1997 and was non-renewable. The applicant accepted the appointment and promised to abide by the conditions specified therein.

In the present application, the applicant relates that she had previously submitted a petition to the respondent, which the latter received on 4 January 2000. After having waited in vain for a response from the respondent within 30 days of the receipt of the petition by the respondent, the applicant has, within the following 30 days, lodged this application on 25 February 2000 before this Tribunal.

The applicant is seeking to challenge the duration of the two Short-Term Contracts, which the respondent granted to her in 1996 and 1997 respectively pursuant to Article 51 (a) (ii) of the Staff Rules. She avers that she had accepted the first Short-Term Contract of nine months extension, which was renewed for another term of nine months, because she believed that the Secretary-General could give such a Short-Term Contract. She asserts that after the respondent had decided that her service in the organization was essential and should be extended by a Short-Term Contract, it arbitrarily and without authority shortened the duration of the contract which should have been for three years. The applicant bases her case 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 aver that the respondent had wrongfully disregarded Article 51 (a) (ii) of the Staff Rules and decided to shorten the duration of the three-year contract provided thereunder when awarding these contracts to her. This has resulted in prejudice to her causing, inter alia, a loss of salary, benefits and entitlements for four and a half years.

The applicant added that following the above decisions she has unsuccessfully requested the Secretary-General to re-examine and correct the two Short-Term Contracts awarded to her, each for a term of 9 months instead of three years, on the premise that the Tribunal had in the above-mentioned cases held that any extension of the service of a staff member by virtue of Article 51 (a) (ii) of the Staff Rules should be for a period of three years which may be renewable for another term of three years.

She is therefore praying for:

(a) An order directing respondent to pay to her a four and half years salary, benefits and entitlement, or in the alternative an order directing the respondent to reinstate her with back pay;

(b) An order directing the respondent to pay costs and interest; and

(c) Such other relief as the Tribunal may deem equitable and just.

The respondent has pleaded in substance that the Tribunal should

(1) reject and strike out the application on the ground of nullity as it violates Article 11, paragraphs 4(i), 4(iv) and 5(i) of the Rules of Procedure of the Tribunal in that it is lacking in the presentation of annexes, in providing the required number of copies and an indexed list of documents;

(2) declare the application inadmissible

(i) for being time-barred inasmuch as the applicant has brought her application entitled "Appeal for reconsideration of the decision of 26th April 1996" after a delay of nearly four years; that is, much outside the statutory delay provided under the Rules;

(ii) as the applicant cannot rely on the judgments in **Tezera Sahle** and **Alemu Ferede** because the cases are not the same.

(iii) by the fact of the contracts themselves which have been executed in accordance with the will of the parties and the applicant cannot now seek to challenge them;

(iv) inasmuch as the applicant has not criticized the respondent for any wrongdoing emanating from dereliction with respect to the obligations contained in the contract; and

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

We have given due consideration to the pleadings and submissions made on behalf of the parties by their respective Counsel. With regard to point (1), the Tribunal holds that non-compliance with the provisions of Article 11 of the Rules of Procedure is not a ground of nullity that entails an outright rejection of the application. The more so that paragraph (9) of Article 11 empowers the Secretary of the Tribunal to request an applicant to complete the formal requirements therein

prescribed. Further, such non-compliance is of a formal nature and has not resulted in any prejudice to the respondent.

The Tribunal will deal with all the matters raised by the respondent under point (2) together. Save for the delay in challenging the Short-Term Contracts, the applicant contends that she has complied with Article 11 paragraph 7 of the Rules of Procedure of the Tribunal by having addressed a petition to the Secretary General for the re-examination of her case which the latter received on 4 January 2000 and as there was no response she applied to the Tribunal. This Tribunal has said in the case of **T.T. v. The Chairperson of the African Union Commission [Judgment No. AUAT/2015/007]** that in Chapter XII of the Staff Rules, under the heading "Appeals", Article 62 (a) sets out the procedure 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.

Irrespective of whether or not on each of the two occasions in question the respondent was right to grant a contract for the duration of 9 months instead of three years, the fact remains that the contested decisions were taken by the administration in 1996 and 1997 respectively when granting the two Short-Term Contracts, which the applicant could have challenged within 30 days of the respective decision by initially asking for a review of the decision. The fact that she did not do so made the decisions final and it is indeed not open to her to apply to the Tribunal nearly three years later in respect of the first contract and nearly two years later in respect of the second contract for an order reversing those decisions and holding that the duration of the contract should have been three years in each case.

The delay incurred by the applicant in the circumstances of each contract is in itself sufficient for this Tribunal to set aside the applicant's claim as being against the provisions of the Rules, and being time-barred. The Tribunal is reinforced in its view

by the following decision at the Ninetieth Session of the ILO Administrative Tribunal in the cases of ***In re* Bals and others** and ***In re* Pelsmaekers**, **Judgment No. 2003**. The main issue was 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 like case had been granted installation allowance, they considered they too were 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'.*

In any case, apart from the fact that the applicant's case is time-barred and is irreceivable for the reasons given, it has to be emphasised that it was at the applicant's own request that the respondent, upon the recommendations of the Committee on Recruitment, Appointments, Promotions and Staff Development, gave her a Short-Term Contract following her retirement in accordance with the Staff Rules. She had at no time objected to the terms of the contract and to the period of duration of the contract for 9 months. She agreed to the same terms for a second time, which she served without any complaint or contest on her part. We consider that she is debarred from contesting the terms after the contract had been executed and done with. Besides, even if a contract for the maximum duration of three years was in her interest, once she accepted and did not contest when a shorter term was

offered to her, the applicant 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.

This Tribunal further considers that the fact that the applicant said she was motivated by the decisions in the cases of **Tezera Sahle** and **Alemu Ferede** (supra) does not justify the waiving of the time bar provisions to sanction the delay incurred by her years after she had accepted and complied with the terms of the contracts which had been executed and completed. The Tribunal says this, irrespective of whether the Tribunal's decisions in **Tezera Sahle** and **Alemu Ferede** were right or not. In any case, these two decisions do not bind this Tribunal. The submission made by Counsel for the respondent is that he neither accepted nor denied the contention of the applicant that the duration of the contract of less than three years given to her was in violation of the provisions of the Staff Rules. The Tribunal in **Tezera Sahle** wrote that as it had already said in its judgment in the cases brought by **Alemu Ferede** and **Getachew Ayacheh**:

> *once an employee has been retired under Article 51 (a) (ii) of the Staff Rules under the 30 – year rule, and the respondent 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.*

It is important to set out the provisions of Article 51, which read as follows:

Article 51 – Retirement

(a) Compulsory Retirement:

(i) In conformity with Article 24 of the Staff Regulations, the separation from service of a staff member shall take effect on the last day of the month in which he reaches the age of sixty;

(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.

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.

In view of this Tribunal's interpretation of Article 51 (a) (ii), this is yet another reason to show that the applicant's claim cannot succeed. We would further add that even if this Tribunal had agreed with the interpretation given in the above cases, it would be tempted to say that the applicant's contract was a nullity and therefore she cannot claim any right under it.

For the above reasons, the application is dismissed with 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