AFRICAN UNION
ADMINISTRATIVE TRIBUNAL

UNION AFRICAINE
TRIBUNAL ADMINISTRATIF

AUAdministrativeTribunal@africa-union.org

CASE NO.: 2014-001
JUDGMENT NO.: AUAT/2017/002

A.L., APPLICANT

v.

CHAIRPERSON OF THE AFRICAN UNION COMMISSION

JUDGMENT

Counsel for Applicant:
RASHID S. RASHID
WALLACE KAPAYA

Counsel for Respondent:
THANDIWE MTHETHWA

JUDGMENT

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

Applicant, Professor A.L., a Togolese national, was engaged as the first Interim Executive Secretary of the African Union Advisory Board on Corruption (AUABC). His engagement was on short-term contracts spreading from July 2011 to June 2014. This application is based on events that transpired while the applicant was in Arusha, Tanzania, where the Secretariat of the AUABC was located. The applicant was suspended from his employment on allegations of maladministration and misuse of financial resources of the Secretariat. The applicant challenges the suspension and seeks declaratory orders, general and special damages resulting therefrom.

The applicant's responsibilities, as can be established from the short-term contracts, were the following, to extract only what we consider relevant:

a) To advise governments, the African Union and other national and international organisations on matters related to preventing and combating corruption;
b) To organise seminars, workshops and other related activities in the field of governance and combating corruption with stakeholders;
c) To provide overall supervision and coordination of programme development, implementation and management of administration and financial resources of the Secretariat;

As stated above, from July 2011 the applicant was on short-term contracts. The first contract was from 18 July 2011 to December 2011. The second, from 1 February, 2012 to 31 December 2012. The third, from 1 January 2013 to 31 December 2013. The fourth and the last, from 1 January 2014 to 30 June 2014. The contracts were non-pensionable, non-gratuity earning and not automatically renewable.

At inception of the contracts the applicant was stationed in Addis Ababa, Ethiopia. On 18 January 2013, the African Union entered into a Host Agreement with the Government of the Republic of Tanzania to host the Secretariat of the AUABC. That is how later the applicant's duty station was Arusha, Tanzania.

The genesis of this matter, if we were to say, is the Tenth Anniversary Celebrations of AUABC, which the applicant decided to organise. These were held from 7 to 9 December 2013 in Arusha, Tanzania. The undisputed facts are that the celebrations were organized at the instance and with the initiative of the applicant. It became an issue during the organisation of the celebrations whether the applicant had specific authorisation from the African Union Advisory Board on Corruption, to which the applicant was reporting. What is clear to us on the facts is that there was no specific authorisation, or shall we call it decision of the Board, to organise the celebrations. The explanation by the applicant was and remains that it was well within his mandate to initiate and organise the celebrations in order to give the Secretariat and what it stood for, visibility, especially after ten years of existence.

Despite the disagreement about the authorisation to organize the celebration, we did not get the impression that the respondent took up that issue as one of grave concern. It was probably to acknowledge that the applicant had a wide mandate in managing and developing the activities of AUABC in the fight against corruption.

What prompted the whole matter, in our view, is the fact that there was no budget line for the celebrations in the financial resources allocated for the activities of AUABC. We will be quick to say the applicant does not deny that there was no approved budget line for the celebrations. We have read through correspondence on the issue that was exchanged between the applicant and the Finance Officer of the African Court on Human and People's Rights who was also in charge of managing the finances of AUABC. The correspondence clearly establishes that the applicant was fully aware that there was no budget line for the activity. In the e-mail of 22 November 2013, from the Finance Officer to the applicant, the Finance Officer observed:

> With the above observations, while I appreciate the urgency of the services and the fact that the works have already commenced, I regret to advise that I am reluctant to proceed with the clearing of this payment considering that the nature of the irregularities is very material for me based on the apparent lack of budget and funds and also the failure by the officials to observe the procurement procedures in line with Article 56, Article 58(2) and Article 81(1).
>
> I would like to take this opportunity to draw your attention to Article 81(2) of the Financial Rules and Regulations where you are allowed to overrule any refusal by giving written instructions for the payment

> to be made. I will be willing to facilitate the clearance of this payment in the event that you elect to invoke the Accounting Officer's right stipulated in that article.

The applicant invoked his powers under Article 81(2) and instructed the Finance Officer to facilitate payments towards the celebrations.

Apart from the fact that there was no budget line for the celebrations, there were other irregularities that were identified by the Finance Officer and brought to the attention of the applicant. This was mostly to do with procurement procedures. Again the applicant acknowledged in his correspondence with the Finance Officer that there were irregularities in the manner most services for the celebrations were procured.

It was against this background that an audit was undertaken on the entire activities of AUABC. It must be stated though that the audit itself was in accordance with set procedure and also in accordance with the approved audit plan for the year 2013 and within the mandate of the Office of Internal Audit under the African Union Internal Audit Regulations. The outlined events only made the audit inevitable and urgent and the organisation of the celebrations became the centre of focus.

The first audit was led by the Director at the Office of Internal Audit. The scope of the audit was on the entire activities of the AUABC for the period January 2013 to December 2013. A report was made on 23 January 2014, entitled: "SPECIAL REPORT ON THE SECRETARIAT OF THE AU ADVISORY BOARD ON ANTI-CORRUPTION."

A number of findings and recommendations were made during this audit, which we need not set out in full. The key findings and recommendations were the following:

> - Based on the audit exercise conducted, the nature of the findings noted above indicates possible fraudulent practices in both the Financial and Administrative activities of the Secretariat of the AUABC, which is to promote anti-corruption in the continent.
> - The Office of Internal Audit provides the following recommendations for immediate remedial actions:
>
> (a) strengthen the financial management and budgetary control aspects of the AUABC....
>
> (d) take the necessary action on the Interim Executive Secretary in line with Article 62, 67 and 124 of the AU Principle Rules and Regulations for the irregularities occurred (sic) in managing the AU financial resources.

(e) a further investigation on the irregularities be carried out without delay.

As a result of this audit, two major events followed. The first event was that the applicant was suspended from duty. The internal memorandum from the Chairperson of the AU, dated 6 March 2014 reads:

> SUSPENSION FROM DUTY WITH PAY ON ACCOUNT OF MISMANAGEMENT OF AU FUNDS AND OTHER ADMINISTRATIVE MALPRACTICES
> Following the audit carried out by the Office of the Internal Audit in the Secretariat of the AU Advisory Board on Corruption, in December 2013, this is to inform you that serious allegations of mismanagement of AU funds and other administrative malpractices have been levelled against you.
> Accordingly, Management has decided to put you on suspension under the provision of Rule 61.3. (j) – Suspension on Prima Facie Evidence – of the AU Staff Regulations and Rules. This suspension is effective on 10 March 2014. During the time of your suspension you are not allowed to visit the premises of the AU Advisory Board on Corruption, you are not allowed to leave the duty station, and you are not allowed to tamper with any evidence and/or witnesses that have a bearing on the subject of investigation (Rule 61,3(j).)
> Should any charges be made against you at the end of the investigation you will be given an opportunity to respond to the charges, in accordance with Rule 59.7 of the AU Staff Regulations and Rules. Thank you.

There was a subsequent internal memorandum of suspension dated 2 April 2014 from the Acting Director, Administration and Human Resource Management. We believe it is important that we also set it out:

> RE: SUSPENSION FROM DUTY WITH PAY ON ACCOUNT OF MISMANAGEMENT OF AU FUNDS AND OTHER ADMINISTRATIVE MALPRACTICES
>
> Pursuant to the suspension decision made by H.E. Dr. Nkosazana Dlamini Zuma in memo Ref. AHRM/91001560/2743.14 dated 06th March 2014 on account of your mismanagement of AU funds and other administrative malpractices, this is to hereby inform you that the previous suspension date of 10th March 2014 has been rescinded. You are hereby suspended as of today 02nd April 2014.
>
> You are kindly requested to adhere to this new date. Thank you.

The second event that happened was that an investigative audit was carried out from 2 April 2014 to 5 April 2014 by a multidisciplinary team of five senior officials of the

AU. The overarching term of reference for the team was to conduct a full-scale investigation on the alleged financial mismanagement or administrative irregularities and make recommendations to management.

On 9 April, a report of the audit was produced entitled "REPORT OF THE MISSION TO INVESTIGATE ALLEGED FINANCIAL MISMANAGEMENT AND ADMINISTRATIVE IRREGULARITIES IN THE SECRETARIAT OF THE AU ADVISORY BOARD ON CORRUPTION IN ARUSHA TANZANIA."

The team made several recommendations including requiring the applicant to account for certain sums of money in relation to payments for services to himself that he was not entitled to. The following are what we consider to be the relevant recommendations for the matter before us:

- Take appropriate administrative action on the Interim Executive Secretary in line with Articles 62, 63 and 124 of the AU Financial Rules and Regulations for the irregularities aforementioned (effecting expenditure without availability of funds, ordering expenditure without competition in violation of procurement rules, travelling in business class for travel of less than 8 hours ....)
- Urgent finalisation of recruitment of a regular Executive Secretary for AU-ABC and the recruitment for the regular positions at the AU-ABC....
- The team noted that the contract of the Interim Executive Secretary will expire on 30 June, 2014. Management must therefore communicate to the Interim Executive Secretary informing him of the amount to be refunded.

On 23 April 2014, the respondent's Acting Director, Administration and Human Resource Management wrote to the applicant forwarding to him the Investigative Audit Report and asking the applicant to respond to the following issues and questions raised in the Report:

i) Who authorised the celebration for the 10th Anniversary of the AU-ABC;
ii) Why you proceeded to celebrate the 10th Anniversary without any approved budget disregarding the advice of the Finance Officer of the African Court on Human and Peoples Rights;
iii) Why you used the SIDA-UNECA funds for the 10th Anniversary when the activity was not budgeted for in the SIDA-UNECA budget;

iv) How you intend to pay or source funds for the unpaid services during the 10th Anniversary and for any other unpaid bills by the AU-ABC;
v) Why did you not follow the AU procurement procedures in the procurement of goods and services during the 10th Anniversary disregarding the advice of the Finance Officer (African Court);
vi) Why the AU-ABC awarded a contract to Megamark Limited without competition even though the total amount paid was $150,000 and when this service is readily available in Arusha;
vii) Why did you not sign any contract with Megamark Limited;
viii) Why were you not retiring imprest upon return from mission;
ix) What was your justification for using special Hotel rates;
x) Why you were travelling business class for travel of less than eight (8) continuous hours in violation of the AU Staff Rules;
xi) Why you cleared one intern (Emmanuel Alanga) to separate when he has unretired imprest amounting to $1,426.00;
xii) Why you procured office furniture when it is the responsibility of the Host Government to do so;
xiii) Any other matter which you wish to bring to the attention of management.

The applicant was given 48 hours to respond to all these issues. On 26 April 2014, the applicant wrote to the Acting Director, Administration and Human Resource Management, responding to some and not all the issues raised. At the end of June 2014, the applicant's contract came to the end. He was not given another short-term contract.

This is as far as the matter went and what for now we consider to be the relevant facts. It is against this background that this application is before this Tribunal. The applicant's case is mainly that the respondent violated Rule 59 and Rule 61.3(j) of the Staff Rules and related Regulations in the manner the allegations against him were handled. We will elaborate on the specific issues later.

The respondent has raised two preliminary objections on the admissibility of the application. The first objection is that the applicant should first have exhausted the procedure under Rule 62.1.1 of the African Union Staff Rules which is replicated in Article 7(1) of the Rules of Procedure of the Administrative Tribunal as well as in Article 13 of the Statute of the Tribunal. We should deal with this objection.

Rule 62.1.1 provides that a staff member wishing to appeal against an administrative decision pursuant to Regulation 12(a) shall, as a first step, address a letter to the Chairperson or competent authority requesting that the decision in question be

reviewed. Article 13(1) of the Statute of the Administrative Tribunal and Rule 7(1) of the Rules of Procedure provide that an application **not** connected with disciplinary matter shall not be receivable unless the staff member has previously submitted a petition to a competent authority for re-examination of his case. In other words and what comes out of Staff Rule 62.1.1, the Statute and the Rules of Procedure of the Tribunal, is that administrative decisions of the Respondent must first be internally reviewed before the matter is placed before the Tribunal. According to the respondent, the applicant's case is for unlawful termination of services and therefore is not in the category of disciplinary decisions. By implication, it must be treated as an administrative matter.

It is fair to observe that the applicant's action is convoluted to say the least. The statement of claim starts by contesting the suspension; that it was made without the applicant being heard and therefore violated the applicant's right to a fair hearing. Later it is contended that the manner in which the audit was carried out violated the applicant's right to a hearing in that during the first audit he was not involved and during the second audit he was given only 48 hours to respond. Up to that point, the claim is not about termination of contract or non-renewal of contract, we would have thought.

As we turn to the prayers, the issues are not just about the suspension and the right to be heard. While it is pleaded that the suspension be rescinded, and that the first audit report be withdrawn and revoked, it is further sought that damages be made for loss of reasonable expectation of renewal of contract, damages for constructive dismissal for a term of not less than five years and also that the applicant be reinstated and his employment contract be mutually agreed for a term of not less than two years.

In the applicant's written observations, in response to the respondent's preliminary objection, it is submitted:

> The Applicant submits that the Respondent is attempting to confuse the matter by raising preliminary objection that has no room in this application. The non-renewal of the Applicant's contract is not the main bone of contention in this application and does not form the basis of the complaint before the Tribunal. Instead, the Applicant avers that it is his right to a fair process (due process) that was violated. At no stage in these pleadings has the Applicant argued that his claim rests on the non-renewal of his contract.

Obviously, this statement is incorrect. In the claim, the prayers in particular, the applicant largely premises his action on non-renewal of his contract. It is on that basis that he seeks reinstatement. It must be for that reason that he seeks damages for constructive dismissal. It is further on that basis that he seeks compensation for loss of twelve months salary. Only the prayer for reinstatement has been withdrawn. The rest remain.

To make the point further, by the '*Applicant's Written Observations and Additional Evidence*' the concluding paragraphs emphasise that it was highly probable that the applicant would have remained as the Interim Executive Secretary up to February 2016. Paragraph 38 thereof clearly states that the applicant had a reasonable expectation that his contract would have been renewed. Paragraph 39 alleges that the applicant was constructively dismissed. As a result, the key prayers in the submissions include compensation for reasonable expectation of employment; this time not for 12 months, but for 20 months.

It is not just confusing, it is also misleading on part of the applicant to contend that his case is not about non-renewal of his contract. Non-renewal of his contract is in the applicant's pleadings and at the centre of his claim and prayers. We will come back to the applicant's claims and prayers when they become more relevant as we get to the conclusion of our judgment. At this stage, it is only to confirm that non-renewal of contract is part of the applicant's case according to the pleadings.

As we state earlier, the applicant's case is not just about his contract. There are other dimensions to the application, the prayers and the claims. It is contended that the respondent failed to comply with the Staff Regulations and Rules in handling the matter. It is further contended that the applicant was not accorded due process. It is again contended that there was no closure on the matter. The applicant submits that, in a calculated move, the respondent made the matter to drag until the applicant's contract term came to the end. The applicant's case is also that the events as presented resulted into his character and integrity being called into question. As a result, he also suffered emotional stress and embarrassment.

We have looked at Staff Rules 61 and 62. The two Rules could have been drafted better in content and sequence. While this is not our business, we wish to recommend that these two, very important Rules in the affairs of the respondent, be looked at and

possibly reviewed. Rule 61 categorises administrative and disciplinary measures. Rule 61(3) is headed "Disciplinary Sanctions" and itemizes what are considered to be disciplinary sanctions. The sanctions include:

61 (3)(a) written censure
61(3)(b) deferment of annual increment
61(3)(c) suspension without pay
61(3)(d) reimbursement for losses
61(3)(e) denial of promotion
61(3)(f) demotion
61(3)(g) separation
61(3)(h) dismissal
61(3)(i) summary dismissal
61(3)(j) suspension on prima facie evidence

From what has been discussed, this application evolves from the suspension of the applicant, which according to the applicant resulted in the non-renewal of his contract and that the manner in which the whole matter was handled deprived him of his right to due process. We can also state at this stage that apart from the suspension, the respondent has not made any other decision which the applicant could have taken up with the Chairperson or any other authority of the respondent. Thus, although issues of termination of services are raised, they are in the context of and premised on the suspension.

The memoranda of suspension categorically state that the applicant's suspension was pursuant to Rule 61(3)(j), that is suspension on prime facie evidence. The decision to suspend the applicant was therefore and obviously disciplinary as the Rule itself provides. The application is therefore not subject to Rule 62.1.1, which requires an applicant to first exhaust internal remedies with the Chairperson or such other competent authority of the respondent. We would thus find the first objection not sustainable.

The second objection says the documents submitted by the applicant are not originals or certified copies. We take notice of the fact that the documents relied upon by the applicant are largely the communication from the respondent and the audit reports. Where any document emanates from the applicant, we will consider its authenticity and admissibility at the appropriate moment. The second objection is equally not sustainable.

We find therefore that this application is admissible and we must now turn to the merits.

As we state, the applicant's case evolves from his suspension, which he submits was in complete disregard of the procedure laid down in Staff Rules 59 and 61.3(j). We do not think that there is any disagreement that the two provisions above are central to this matter. We will, as we go along in analysing the applicant's and the respondent's positions, be referring to the relevant passages from these provisions.

It should not be in contest that the Chairperson or the respondent's competent authority can suspend a staff member. Staff Rule 61.3(j) provides for such suspension on grounds of gross misconduct, financial or audit report incriminating the staff, fraud and embezzlement, inappropriate allocation of Union funds or where the staff member is unable to account for expenditure of Union funds. The suspension must not be for an accumulated period of three months without the decision of the Chairperson or other competent authority. The text of Staff Rule 61.3(j) is set out later.

As we state above, the Chairperson suspended the applicant with pay pursuant to Staff Rule 61.3(j). The internal memorandum of 6 March 2014 followed the provisions of the Rule and specifically stipulated that the suspension was on prima facie evidence. We should make a couple of observations based on the applicant's and respondent's submissions surrounding the suspension.

Our reading of Annex 3(a), the first letter of suspension, is that the suspension was meant to facilitate investigation following the allegations in the first audit. The closing paragraph of the memorandum says it all. What is also evident to us is that the applicant had not yet been given an opportunity to respond to findings of the initial audit. The applicant's position is that even at this stage and before the suspension was communicated, he was entitled to a hearing, if not a response.

The general practice we are familiar with is that at the stage of suspension pending further investigation and because the facts have yet to be fully gathered, an employee is merely communicated the suspension and the basis for the suspension. As the wrongdoing will not yet be proved, the purpose of the suspension will not be to punish the employee but either to protect the employer's property while investigations go on or to prevent the employee from interfering with the inquiry. For these reasons, a suspension is normally a 'precautionary' measure and the assumption is that should the investigation vindicate the employee, he can proceed with employment. As Scott, L. J. said in *Bird v British Celanese Ltd*, [1945] 1 ALL ER 488 at 491, a suspension is a 'merciful substitute

for the procedure of dismissal and a possible re-engagement.' In the instant case, there was further investigative audit to follow. The applicant was expressly informed that he would be given an opportunity to respond at the end of that investigation. It is therefore not strictly a requirement that an employee be heard prior to being suspended.

While the above might be practical experience, we must resign to the specific rules under consideration if there be a different purport. Of relevance in our case is Staff Rule 59, which has been referred to by the applicant. The Rule sets out the procedure in disciplinary cases.

Staff Rules 59.1 and 59.2 provide:

> 59.1 The Director of Administration and Human Resource Development or the competent authority of any other organ, shall, upon receipt of information on a staff member's breach of obligation set out in the Staff Regulations and Rules and other relevant rules and regulations including administrative notices, conduct a fact finding process and the concerned staff member shall be immediately notified, provided such notice will not compromise the investigation.
>
> 59.2 Until the investigation is completed and a prima facie case established against the Staff Member, the Director of Administration and Human Resource Development shall not draw reference to the name of Staff Member without the concerned Staff Member being invited and asked to comment on the facts concerning him or her.

In our reading of these provisions what comes out first and foremost is that right at the commencement of the fact finding process, the staff member should be notified. What also comes out is that a prima facie case will be determined after completion of the investigation. And then, if there be a prima facie case, before any conclusion is drawn towards a staff member, they must be invited and asked to comment on the facts. In other words where the investigation leads to a prima facie case, any action towards a staff member can only be taken after she or he has been heard. It is not immediately clear to us what would be the nature of the hearing at this stage. As we say earlier, we resign to the Rules, especially when the language is clear. It is significant that in the procedures set out in Staff Rule 59, there is no mention of suspension while an investigation is being carried out. Suspension of a staff member comes in Staff Rule 61.3(j). It is there stated:

> The Chairperson or the competent authority of any other organ may suspend a staff member with pay upon receipt of prima facie

> evidence related to gross misconduct, financial or audit report incriminating him or her for fraud, embezzlement, inappropriate allocation of Union funds or where the staff member is unable to validly account for expenditure of Union's funds. The suspension shall not be for more than an accumulated period of three (3) months pending the decision of the Chairperson or the competent authority of any other organ following the recommendations submitted to him or her by the Disciplinary Board. A staff member while on suspension, shall not be allowed to travel outside his or her duty station without permission and may be restricted to access certain premises of the Union.

Suspension of a staff member under this Rule is premised on receipt of prima facie evidence. Going back to Staff Rules 59.1 and 59.2 as earlier analysed and considering that a prima facie case is only after investigation and upon the staff member being invited and asked to comment on the facts, it follows that suspension on prima facie evidence in Staff Rule 61.3(j) must be after the staff member has been invited and asked to comment on the facts concerning him or her. We note that Rule 59 talks about 'prima facie case', while Rule 61.3(j) talks about 'prima facie evidence'. We do not think that the change in words from 'case' to 'evidence' accounts for any legal distinction. We would thus agree with the applicant that he was entitled to be invited and asked to comment on the matter before being suspended. The facts are that he was not invited.

We now turn to how the matter was dealt with after the applicant's suspension. As we state earlier, there were two letters of suspension. The first of 6 March 2014, and the second of 2 April 2014. The second letter was for the purpose of rescinding the first and shifting the date of suspension from 10 March 2014, as communicated in the first letter, to 2 April 2014. No explanation is offered in the second letter why the first was rescinded and the suspension date shifted.

There was a separate letter that attempted to explain why there was a second letter of suspension. Quite frankly, this separate letter is as empty as no communication at all. To begin with, in the first paragraph, the letter refers the applicant to the suspension letter of 6 March 2014. The respondent was therefore aware that the applicant received the letter of 6 March. In the second paragraph of the letter, the respondent attempts to formalize the communication of the suspension and asks the applicant to sign for receipt. Although the applicant signed this separate letter, it does not take away the fact of suspension by the letter of 6 March 2014. It is not surprising to us that the applicant has

gone to considerable length to impress upon us that this was a calculated move to stay conclusion of the matter until the expiry of his term of contract. Put differently, the respondent calculated to avoid making a determination on the allegations against the applicant because they did not have to conclude the matter as long as the respondent was within the three months suspension period allowed by Staff Rule 61.3(j).

We would not fault the applicant for advancing this argument. We have not been given any tangible explanation by the respondent why the first suspension was rescinded. Indeed, there has been no explanation why the matter could not be concluded before the applicant's contract expired. The second audit, the investigative audit, was concluded on 9 April 2014, but it was not until 23 April 2014 that the applicant was contacted to respond to the findings of the audit. He was given 48 hours to respond, rather strange, but obviously suspicious, to say the least. The final audit was conducted from 2 to 5 April 2014. We do not see how the applicant could have been expected to respond meaningfully in 48 hours. We cannot avoid contemplating that this was yet a calculation to avoid making a decision on the matter with the thinking that the applicant was not going to be able to respond in the time given.

The applicant all the same responded by 26 April 2014. Although the response did not address all the issues raised in the respondent's memorandum, there was nonetheless a response, in the time that the applicant was allowed.

Since the applicant's response, the only communication from the respondent to the applicant was a letter of 6 June 2014 from the Acting Director, Administration and Human Resource Management. The letter raised two issues. It was to remind the applicant that his contract was expiring on 30 June 2014. The applicant was also required to continue cooperating with the respondent until the logical conclusion of the matter against him. The applicant informs the court that the matter has not been concluded. We should only remark that in the nature of the matter, had the respondent been truly minded and faithful in bringing it to a conclusion that would long have been done. The result of the respondent's inaction is that the allegations that were raised against the applicant are still on his head. We will consider the implications of that as we come to a close.

We now turn to consider the applicant's claims and prayers. We have already observed that what the applicant seeks by his claims and the prayers and what he submits

are conflicting. The applicant can only have himself to blame for that situation. We will consolidate the prayers in so far as we are able to.

We first deal with the issue of the applicant's legitimate expectation of his contract being renewed and that the events surrounding this matter are what resulted in the contract not being renewed. From what we have discussed, we are inclined to accept that the events surrounding this matter indeed resulted in the applicant's contract not to be renewed. There was also calculation to let go the applicant after 30 June 2014 and if he was going, why bother finalise the case.

In this regard, the applicant has referred us to the decision of the United Nations Dispute Tribunal in the case of *Obdeijn v. Secretary General of the United Nations*, UNDT/2011/032. That is a case where the applicant's short-term contract was not renewed and the respondent refused to give reasons for not doing so despite the applicant specifically asking for the reasons.

We thank counsel for the applicant for drawing our attention to this decision, which is ground breaking in a number of considerations in international civil service employment relations. It is there emphasized that employment relations law is dynamic and considerations of fundamental human rights must be central. That there is a duty and a requirement on international institutions to act fairly, transparently and justly in their dealings with staff members. Like any other administrative decision, a decision not to renew a staff member's contract must be reasoned, as a decision taken without reason would be arbitrary, capricious, and therefore unlawful. We quote from the decision:

> Even though a staff member does not have a right to an automatic renewal of a fixed term contract, a decision not to renew such a contract may not be taken for improper motives and the Tribunal is required to consider whether the motives were or whether any countervailing circumstances existed in the decision not to renew the contract that may have tainted such decision with unlawfulness .... This is particularly the case in a matter in which an applicant asserts that she or he expected that her or his contract would be renewed ... that it is a general principle of international civil service that there must be a valid reason for any decision not to renew a fixed-term appointment and that reason must be given to the staff member.

We will reflect on this authority further when it arises in a proper context. It will be necessary for us to consider if we can go as far as the decision goes in saying that even in instances where parties to a contract agree on a specific period of the contract, there must nonetheless be given good and valid reasons for not renewing the contract upon its expiry. While it might not be difficult to appreciate this principle from the position of the employer, we should not lose sight of the fact that in turn the employee is entitled to refuse an offer for renewal of a contract. Shall it be insisted that he or she must give good and valid reasons for rejecting an offer for renewal. As we observe above, this authority needs further reflection. The decision remains persuasive and we acknowledge that we must move with developments in international jurisprudence.

The situation in our case, as we analyse the facts earlier, is that the applicant has come out very clear that at no stage of these pleadings does he argue that his claim rests on the non-renewal of his contract. That non-renewal of his contract is not the main bone of contention in this application and does not form the basis of the complaint before the Tribunal. Instead, it is his right to a fair process that is in issue.

Thus, much as we might have been minded to pay due and further attention to the philosophy in the *Obdeijn* case, unlike in that case where the applicant was specifically questioning the decision not to extend his fixed term contract, the applicant in the case before us specifically says his case is not about the refusal to extend his fixed term contract. The applicant has further specifically withdrawn his prayer for reinstatement. In those circumstances and despite the observations that we make earlier about the respondent's conduct, it would be unjust for us to insist on considering the reasons for non-extension or non-renewal of the applicant's short-term contract.

Whilst on this point we can also quickly deal with the allegation of constructive dismissal. We have difficulties in appreciating this contention. The applicant was allowed to serve to the end of his contract. We therefore do not see what there is to the allegation of constructive dismissal.

On all the considerations above, all the prayers premised on expected renewal of contract are dismissed, including prayers for twelve or twenty month's salary.

Then there is what seems to be a standalone prayer. This is the prayer for loss of benefits and cost of relocation and accommodation for the family. This is a prayer for specific damages that must be proven. Beyond being included in the prayers, there is no

attempt to substantiate it. We have not been told whether the respondent refused to meet the applicant's repatriation expenses and the rest of what might have happened around that issue. We would therefore not allow that prayer and the claim of USD 200,000 in that regard is dismissed.

We will consider the prayer to have the first Audit Report and the suspension expunged together with the prayer for compensation for mental stress. We have determined that the applicant was not given an opportunity to be heard during or at the conclusion of the first Audit Report as required by the respondent's Staff Rules. Both the Report and the suspension that was based on it are therefore irregular and unlawful. In accordance with the applicant's prayer, the first Audit Report is accordingly withdrawn and the suspension is rescinded. We further declare that all the disciplinary records against the applicant based on the first Audit Report are henceforth expunged.

We should also discuss the status of the second Audit Report if we are to deal with all the issues brought up in the application, especially due to the fact that the case against the applicant is to date not concluded. What is evident to us is that once the applicant left the respondent, there was no insistence to finalise the matter; perhaps there was even no need to do so considering the sentiments that we express earlier. What cannot be denied is that the respondent has slept on the matter and for too long. It would now be reprehensible for the respondent to reopen the subject after a period of over three years. Anything coming up this late would certainly be grossly prejudicial to the applicant who has been away from the respondent institution for over three years.

It is cardinal principle of justice that there must be an end to litigation. Justice delayed, at any stage, is justice denied. These principles are more compelling in employment and labour relations. There must be an end to administrative and disciplinary measure between employer and employee. It is precisely for these reasons that administrative procedures, including procedures for administrative tribunals, are made simpler and straightforward for users.

While we might not be entitled to set aside the second Audit Report, we believe that the respondent, by its conduct, has closed the chapter on the matter, which in our opinion is the rightful thing to do. In any event, we should be entitled to make relevant orders that will address the inordinate and unjustifiable delay in bringing the matter to a close. On the basis of the two Audit Reports and the suspension, the applicant has

remained troubled with what was to come from the respondent throughout the intervening period. He could not have been at peace, knowing allegations of malpractice were being pursued by his previous employer. The last communication from the respondent to the applicant was the letter of June 2014, reminding the applicant that his contract was expiring on 30 June 2014 and that the allegations against him would be pursued. The last paragraph of the letter reads:

> Also note that the end of your contract does not absolve you from any responsibility arising from your management of the AU-ABC as Executive Secretary. You are therefore advised to provide the AUC your new contact details.

The applicant has lived with this message to date. We therefore agree and find that the applicant has been subjected to mental stress and anxiety throughout the period from the investigations against him to the date of this judgment, for which he must be compensated. Damages will be assessed later in this judgment.

The applicant has asked the respondent to issue him a letter of good service. We cannot compel the respondent to issue such a letter. If the responded was minded to issue such a letter, it will be in its discretion, taking into account the entire service of the applicant, which is certainly much wider than the events in the present case.

We now look at the prayer for defamation, in the application referred to as character assassination. In the main application, this prayer is mentioned in passing in paragraph 22 where the main prayer seeks a declaration that the Audit Report of 23 January 2014 be withdrawn and revoked. It is in the written submissions that the prayer is articulated. The submission is that the letter suspending the applicant was copied to many recipients and that any reader who saw the letter must have called into question the integrity of the applicant. In the final submission, the applicant prays for exemplary damages in the sum of USD 1,000,000,000.00, but in words it says one million dollars.

The respondent has raised the question of jurisdiction of this Tribunal in matters of tort, in particular, issues of defamation as raised by the applicant. It is argued that under Article 2 of the Statute of the Tribunal, its competence does not extend to such matters. Article 2 provides that the Tribunal shall be competent to hear applications alleging (a)

violation of the relevant provisions of the Staff Rules and Regulations of the AU and (b) non-observance of contracts of employment.

Staff Regulation 3.2(a) provides for the 'Rights of Staff Members' and enjoins the Union:

> ... to protect fundamental human rights, dignity, (our underlining) worth and equal rights of all its staff members .... It shall be the Union's responsibility to provide assistance, protection and security for its staff members where appropriate against threats, abuse, harassment, violence, assault, insults or defamation (our underlining) to which they may be subjected by reason of or in connection with, the performance of their duties.

It is the duty of the respondent to protect the dignity of its employees under the Staff Regulations. There is further duty on the respondent to protect its staff members from insults or defamation in the performance of their duties. It is a breach of this Regulation if the respondent was to turn its back on instances of violations of the dignity of its Staff Members or allow its staff members to be defamed in the course of their duties. It would be a worse breach of the Regulation if the respondent itself were to be responsible for the violations of the rights in this Regulation. It is therefore well within the Tribunal's jurisdiction where the allegation is that the respondent itself defamed its staff member in violation of the above Regulation.

The allegations of defamation and character assassination are partly based on articles that came in a newsletter entitled "Jeune Afrique". Whatever the article(s) said, the applicant cannot say who subscribed the articles to the newsletter or how they got there. We believe it is highly dangerous and in some way reckless on part of the applicant to read about an article in a paper, be it about him, and without much, blame it on the respondent. In any case, the papers before us are copies without authentication and therefore inadmissible in form and in content.

We can confirm that the letters of suspension were copied to several people, but all of them in their capacity as officials of the respondent. The two Audit Reports were not copied to any person or any office. The applicant has also referred to decisions of the AU Executive Council at its Twenty-Fifth Ordinary Session, 20-24 June 2014 held in Malabo, Equatorial Guinea. By Decision Doc. EX. CL/860(XXV) the Council 'expressed grave concern on the alleged misappropriation of resources allocated to the AUABC and requested the AU Commission and its Audit Services Directorate to submit a

comprehensive report on the investigation being undertaken and measures being put in place to address the situation. This says to us the matter concerning the applicant was raised before the Council.

The matter was tabled again before the Executive Council at its Twenty-Sixth Ordinary Session, 23-27 January 2015 held in Addis Ababa, Ethiopia. The outcome was more or less the same as during the previous Session but this time the Council was in possession of the Audit Report, presumably the second one. The Council expressed grave concern at the alleged misappropriation by the former Executive Secretary of the funds allocated to the AUABC. The Council requested the AU Commission to initiate appropriate legal action against individuals identified on the basis of evidence obtained through the on-going investigations in that regard.

It will be acknowledged that in presenting the Audit Reports at various levels and forum within its administration and management, the respondent was merely doing what the Reports were meant for. While there might be issues with regard to the correctness of the Reports on account of the fact that the applicant was not given opportunity or ample opportunity to comment; that is a different issue. The issue here is whether in sharing the Reports within the ranks of the respondent and at different levels, it amounted to defamation of the applicant's character. Surely that could not be. The Audit Reports in consideration are the respondent's documents and circulated within the respondent only. There was therefore no communication to a third party. The applicant has not brought any evidence of communication to a third party. It could never be accepted as evidence of communication to contend that some busy-body must have come across the Reports; this would be tantamount to chasing the wind.

In case the argument is that there was communication within the respondent, we hold that such communication was within qualified privilege. Qualified privileges are those statements that could be considered defamatory but which are made on a subject matter where the person making the statement has interest or duty, and are made to another person with a corresponding interest or duty. Moreover, in the employment context where the employee is a public figure, already under public scrutiny, statements made about them within the public entity may be subject to qualified privileges. Lord Atkin in *Adam v. Ward* [1917] A. C. 309 at 334 long observed:

> A privileged occasion is, in reference to qualified privileged, an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it.

We thus determine that defamation or character assassination has not been established and all the prayers and claims in that regard are dismissed.

We shall now consider what would be appropriate damages for mental stress. We bear in mind what we have determined earlier, that the respondent could have resolved the applicant's case within the time allowed by the Staff Rules. As we observe, there was a degree of calculation in dealing with the matter in order to let go the applicant. While that might be the case, we do not find that there was malevolence or spitefulness towards the applicant on part of the respondent. Turning to the applicant and for purposes of determining what would be appropriate by way of damages, we cannot ignore what comes out in the facts and some of the documents presented by the respondent and the applicant himself. While the first Audit Report and the suspension have been expunged and without paying attention to the second Audit Report, there is extrinsic communication from the applicant to his Finance Officer, referred to earlier, where the applicant acknowledges technical failures, shortcomings and not following financial procedures in the manner he went about preparing for the celebrations; see letter of 23 November 2013. That says much as the respondent must be condemned for subjecting the applicant to a period of anxiety, it is not as if the respondent took up the matter against the applicant without any basis. The respondent's action was prompted by what the applicant himself acknowledged. Considering all the circumstances evaluated, we determine and award the applicant USD 5,000.00 in damages.

The application has partially succeeded. We could therefore not award the applicant full costs. We award USD 500.00 in costs to the applicant.

PRONOUNCED this 15th day of September 2017 in Addis Ababa, Ethiopia.

/s/

HONORABLE JUSTICE ANDREW K. C. NYIRENDA SC, PRESIDENT

/s/

HONORABLE JUSTICE SHAHEDA PEEROO

/s/

HONORABLE JUSTICE ALIOU BA

Secretary : _____