



AUAdministrativeTribunal@africa-union.org

CASE NO.: 2014-002
JUDGMENT NO.: AUAT/2017/003

M.N., APPLICANT

v.

CHAIRPERSON OF THE AFRICAN UNION COMMISSION

JUDGMENT

Counsel for Applicant:
ISAAC M. LARBI

Counsel for Respondent:
THANDIWE MTHETHWA

JUDGMENT

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

1. The Tribunal has been seized of an application, received on 13 December 2014, by applicant M.N., a national of Cameroon, against the Chairperson of the African Union Commission. After the exchange of pleadings, the case was listed on 2 June 2016.
2. A brief chronology of the applicant's case is that he was originally appointed as Coordinator for Democracy and Political Governance of the African Peer Review Mechanism (APRM) in October 2003. On 20 September 2010, he was appointed Deputy Chief Executive Officer, ad interim, of the APRM (DCEO a.i. of the APRM) in addition to his duties of Coordinator. His contract was terminated on 31 December 2012. He appealed against that decision. He was reinstated into his post, and was given a six-month contract from 1 January 2013 until 30 June 2013. He complains, inter alia, that he has not been paid the acting allowances as DCEO a.i. and that his contract of employment was wrongfully terminated in June 2013 or, in the alternative, his post was abolished. The remedies sought by him as per his amended plea are set out in paragraph 28.
3. The respondent is resisting the application and has put in two preliminary objections, one challenging the jurisdiction of the Tribunal over certain aspects of applicant's claims as DCEO a.i. of the APRM, the other relating to procedure.

The Respondent's Preliminary Objections

4. The preliminary objections read as follows:

1. The respondent asserts a preliminary objection to the application for payment of acting allowance for the period 20 September 2010 to 30 June 2013 in the sum of USD 52 054, 497 (sic) and compensation based on lack of jurisdiction over a claim arising from the applicant's previous contract with the Development Bank of Southern Africa [the DBSA Development Fund, hereinafter

referred to as the Bank], an entity that is not an institution or organ of the African Union as such does not fall under the remit of the African Union Tribunal.

2. The respondent raises an additional preliminary objection on the ground that the documents tendered by the Applicant in support of his application are not certified documents as required by the Rules of Procedure of the Administrative Tribunal.

The Jurisdictional Issue

5. Jurisdiction being a threshold issue, the Tribunal will deal with that point first. The objection raised is on the premise that from 20 September 2010 to 31 December 2012, the applicant's contract of employment as DCEO a.i. was not with the APRM but with the Bank, which is not an institution or organ of the African Union, and therefore, does not fall within the competence of this Tribunal.
6. The Tribunal notes that in the contract between the Bank and the applicant, the Bank specified that it was making the contract on behalf of APRM. The document marked "**Court Annex 1**" shows that the applicant was employed as Coordinator, Democracy & Political Governance from 1 October 2009 until 30 of September 2010. The Bank made it clear that the contract was restricted in scope until the completion of the process for the APRM to be integrated into the AU.

The evidence reveals that a few days before the expiry of the said contract, the applicant received a letter dated 21 September 2010 on the letterhead of the APRM informing him that he had on 19 September 2010 been appointed to serve as DCEO a.i. of the APRM Secretariat with effect from 20 September 2010 "*until further notice*" (**Annex 4 of the Written Observations**). By letter dated 18 May 2011, the Chairperson of APR Panel of Eminent Persons informed the Bank that the applicant's contract as DCEO a.i. of the APRM Secretariat was approved for extension for two more years. However, the commencement and ending dates are not mentioned in that letter (**Annex 4a of the Written Observations**). Finally, by letter dated 3 December 2012, the Bank informed the applicant that the fixed-term contract of employment entered into between him and the Bank was valid until 31 December 2012. The applicant was informed that the contract

would automatically expire on the aforesaid date and as such would not be renewed. (**Annex 4 of respondent's Answer**).

Arguments of the Parties

7. It is advanced by the respondent that the Bank was the applicant's employer by virtue of the original employment contract entered between the Bank and the applicant where it was stipulated that the applicable law governing the contract was the law of the Republic of South Africa and that any other agreed allowances would be granted in accordance with the Bank's policies and procedure. Further, that it was specifically stated in the said contract that it would terminate upon the integration of APRM into the African Union structures and processes, and that by letter dated 3 December 2012 the Bank did notify the applicant of the expiration of the contract on 31 December 2012, and set out the conditions attached to the payment of his last salary. It is argued that these facts abundantly show that the Bank had complete administrative and financial autonomy and was the applicant's employer during the material period from 1 October 2009 until 31 December 2012.

It is therefore the contention of the respondent that the Tribunal has jurisdiction only in respect of the AU short-term contract of employment as DCEO a.i. with effect from 1 January 2013 to 30 June 2013 entered between the applicant and the APRM, which contract is governed by the relevant provisions of the AU Staff Regulations and Rules, as evidenced by **Annex 9** of the respondent's Answer.

8. The applicant's reply to the respondent's arguments is that he was originally a staff member of the APRM and not an employee of the Bank which was acting for and on behalf of the APRM and under the APRM's instruction to implement the APRM's decision both in respect of the contract and its termination. He further contended that the Bank issued employment contracts to the APRM staff, with the expectation that the integration of APRM into the AU would eventually take place. The applicant expected that after the integration he would be given a long-term contract.

Consideration of the Law on the Jurisdictional Issue

9. In considering the parties' arguments, it is important to observe that this Tribunal derives its competence from its Statute. The relevant part of Article 2 of the Statute (CM/99/Rev.2) reads as follows:

(i) The Tribunal shall be competent to hear applications alleging:

(a) Violation of the relevant provisions of the Staff Rules and Regulations of OAU [AU];

(b) Non-observance of contracts of employment and any other act of employment;

Further, the competence of the Tribunal with regard to complaints filed by the staff members of the AU is based on Article 11 of the Statutes and in particular, for the purpose of the present case, on

paragraph (i), according to which the Tribunal is open to "[a]ny staff member or employee of the General Secretariat, regional offices and the Specialized Commissions" of the AU; and

paragraph (iii), which provides access to the Tribunal to "[a]ny person who can show that he is entitled to rights under any contract of employment or the provisions of the Staff Rules and Regulations".

10. Recourse to the Tribunal is open to, *inter alia*, a staff member of a regional office of the African Union and to any person who claims to be entitled to rights under any contract of employment with such an office. For the purposes of the present matter, the applicant must qualify to be within the adjudicative process of the Tribunal as a staff member of the regional office of the AU in respect of his employment as DCEO a.i. with the APRM with effect from 20 September 2010, a post he was offered during the period of the original contract he had with the Bank from 1 October 2009 until 30 September 2010.

11. The respondent's objection to the effect that the acting allowance as DCEO a.i. claimed by the applicant for the period from 20 September 2010 up to 30 June 2013 should be

dismissed for lack of jurisdiction has to be split into two parts. The first part starts from 20 September 2010, when the applicant's contract of employment was with the Bank until its termination by the latter on 31 December 2012. The second part starts from 1 January 2013 until 30 June 2013.

The respondent's objection in respect of the first part is understandable as it is based on the ground that the Tribunal has no jurisdiction since the applicant was allegedly then an employee of the Bank and did not have the status of a staff or official of the APRM as an organ of the AU.

However, with regard to the second part from 1 January 2013 until 30 June 2013, the applicant's contract was with the APRM itself. The objection of the respondent in respect of the applicant's claim for acting allowance during that period cannot therefore fall within the same jurisdictional objection raised by the respondent as the applicant's contract was then directly with the APRM and it is admitted by the respondent that the applicant was then a staff member of the said office.

12. The Tribunal therefore declares that the objection of the respondent regarding the acting allowance during the period of the applicant's contract of employment with the APRM from 1 January 2013 until 30 June 2013 does not fall within the jurisdictional challenge based on the applicant's status as a staff or official of the APRM. The Tribunal will deal with the applicant's claim for acting allowance during that period when considering the merits of the application.
13. The Tribunal will now consider the jurisdictional objection in respect of the first part for the period from 20 September 2010 to 31 December 2012.
14. In their pleadings, the parties have referred to various bodies, and produced documents relating to a Hosting Agreement and a Memorandum of Understanding and also several documents relating to the applicant's employment, in support of their respective contentions on the jurisdictional issue. In order to consider whether the applicant can be

brought within its jurisdiction and also whether it has jurisdiction on the applicant's claims, the Tribunal will have to examine the documents placed on record before it to know the links that existed between these different bodies and the authority they represented at the material time.

The Tribunal bears in mind that it has been recognized by the International Court of Justice in *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, (**Advisory Opinion, I.C.J. Reports 2012, p. 10**) "*that there exists a range of hosting arrangements between international organizations which are concluded for a variety of reasons. Each arrangement is distinct and has different characteristics. There are hosting arrangements between two entities having separate legal personalities, and there are others concluded for the benefit of an entity without legal personality.*"

Consideration of the Facts Relating to the Jurisdictional Issue

15. The salient facts in respect of the bodies in question as revealed by the pleadings can be summarized as follows:

Annex 1 of the respondent's Answer is a document entitled Assembly of the African Union, Eleventh Ordinary Session, 30 June – 1 July 2008 Sharm El-Sheik, Egypt, Decisions, Declarations, Tribute and Declarations. In the Decision on the APRM [**AssemblyAU/Dec.198(XI)**], the Assembly recalled that at its Inaugural Summit in July 2002 in Durban, South Africa, the Heads of States and Government of the Member States of the African Union "*had adopted a Declaration on the implementation of the New Partnership for Africa's Development [Assembly/AU/Decl. 1 (i) endorsing the Progress Report and Initial Action Plan [AGH 235 (XXXVIII)], encouraging Member States to adopt the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance [AGH 235 (XXXVIII) Annex I] and accede to the APRM [AGH/235 (XXXVIII) Annex II].*"

The Assembly further recalled that the mandate of the APRM was "*to encourage Participating States in ensuring that the policies and practices of Participating States*

conform to the agreed political, economic and corporate governance values, codes and standards, and to achieve mutually agreed objectives in socio-economic development contained in the Declaration on Democracy, Political, Economic and Corporate Governance”.

The Assembly also decided that the *“APRM Structures, namely the APRM Forum, the APRM Panel and the APRM Secretariat shall be part of the processes and structures of the African Union”.*

It also requested *“the Commission to negotiate and conclude a host agreement, with the Government of the Republic of South Africa, for APRM with a view to facilitating the discharge of its mandate.”*

Accordingly, on 9 October 2008, a Host Agreement was concluded between the Government of the Republic of South Africa and the African Union on an interim AU Office for the APRM operating outside the African Union Headquarters *“with regard to the transitional period pending determination of the nature and final structure of the AU APRM office.”* (Vide **Annex 3 of the Written Observations**).

16. Now, as regards the applicant’s involvement, chronologically, it transpires from **Annex 3 of the respondent’s Answer** that, at the outset, since 2005, an offer of employment was made to the applicant by the Regional Manager of the United Nations Development Programme (UNDP) Regional Service Centre for Eastern & Southern Africa on behalf of the Administrator of the UNDP. The offer was for *“an appointment for activities of limited duration as Coordinator, Democracy and Political Governance at the APR Secretariat in Johannesburg, South Africa”* with effect from 1 October 2005 to 30 September 2006 for a gross annual remuneration of USD 84,558.76. The conditions of service were to be governed by the UN Staff Rules and Regulations, 300 series. The Letter of Appointment stipulated that the duration of the appointment was for a period of one year and was to expire automatically on 30 September 2006 without prior notice.

Of importance is the fact that there was a further condition under paragraph 6 (d) to the effect that an extension of the appointment might be considered, subject to the agreement of the applicant, the APRM Panel and the UNDP. It was also stated that, "*In the event of an extension the salary for the new contractual period may be adjusted to reflect the current UNDP parameters regarding cost-of-living, hardship, performance as measured through the Performance Evaluation carried out by the hiring unit*". [Emphasis added]. The Organisation unit at which the applicant was employed was designated in the Letter of Employment as being the APRM. A last condition in the document reads "*Service under the Letter of Appointment is limited to UNDP/APRM*".

It is the contention of the respondent that the applicant was "*initially seconded to APRM as Coordinator for Democracy and Political Governance (Coordinator) on a UNDP fixed term contract*" from 1 October 2005 to 30 September 2006. The applicant does not agree that he was seconded to APRM. He maintained that he was an employee of the APRM, contending that all international APRM staff contracts, including his, were issued by the UNDP because the APRM, being a new institution within the AU, had to rely on external agencies to staff its office whilst it was in the process of putting in place the required structure to enable it to recruit its own staff.

The applicant accepted the appointment. The evidence therefore shows that as from 1 October 2005 he was appointed at the APRM as Coordinator, Democracy and Political governance on a UNDP fixed term contract for the duration of one year. There were apparently several renewals of the contract until 30 September 2009. Thereafter, the Bank took over the administration of the applicant's contract until 31 December 2012.

17. How the Bank took over the administration of the contract is explained by the fact that on 9 October 2008, the Government of the Republic of South Africa and the African Union Commission entered into a Host Agreement for the hosting of the APRM Secretariat in the Republic of South Africa for an interim period of three years, "*or such other period as agreed between the AU Commission and the Government*". With regard to "*the transitional period pending determination of the nature and final structure of the AU APRM office*", it was agreed under Article 2 of the Host Agreement that an AU office for the

APRM was thereby established in the Republic of South Africa with the legal status of an AU Office operating outside the Headquarters of the AU having legal personality for the purpose, amongst others, of entering into contracts.

Status of the Applicant

18. The Tribunal will now consider whether the applicant was an official of the APRM, in other words, a staff member of the AU Office for the APRM, in order to access this Tribunal, or whether he was an employee of the Bank, an entity foreign to the AU which will oust the jurisdiction of the Tribunal.

19. The main argument of the respondent is that the applicant's employer was the Bank and not the APRM for the period from 20 September 2010 to 31 December 2012. Emphasis is laid on the fact that the contract signed by the Bank and the applicant expressly provided that the agreement was governed by the law of the Republic of South Africa and that it was the Bank's policies and procedure that would apply to any other agreed allowance. It was also emphasised that in the letter of termination the Bank informed the applicant that all outstanding balances due to the Bank would be deducted before payment of his last salary.

20. The Tribunal considers that it is a recognised fact that employment relationship in the staffing of businesses and organisations has evolved from the traditional employer-employee simple relationship. There are situations where some organisations may decide to share employees or have recourse to a staffing agency, or a labour or service provider. It is also a recognised fact that a worker involved in what is termed as "triangular" employment relationships, or joint employment, often finds it difficult to know who his employer is.

The principles of joint employment are succinctly considered in the **Administrator's Interpretation No. 2016-1** for the U.S. Department of Labour. Indeed, the approach used to determine the existence of an employment relationship may not be the same in all jurisdictions. The ILO tends to support the universal application of the principle of the

"primacy of facts", which means that the issue is to be determined by the true nature of the relationship as revealed by the facts irrespective of the terms used by the parties. – vide **International Labour Conference, 95th Session, 2006 Report V (1) The Employment Relationship paragraphs 40, 50, 95 and 96**. What matters in such an approach is not the way the parties describe the relationship but what has actually been agreed and performed. In the present case, the Tribunal proposes to adopt this principle and look at the facts presented by the parties to decide the relationship that in reality existed between them.

21. The Tribunal retains the fact that the APRM was a creation of the Assembly of Heads of State and Government of the African Union, which is the supreme organ of the Union. The Assembly decided that the APRM Structures, namely the APRM Forum, the APRM Panel and the APRM Secretariat *"shall be part of the processes and structures of the African Union"*.
22. In Annex 3 of the Written Observations – the agreement between the AU and the Republic of South Africa for hosting the APRM Secretariat in the Republic of South Africa for an interim period – the *"AU Office for the APRM"* is defined as *"the APRM Secretariat, tasked with the functions of liaison, coordination, administration and logistics related to the implementation of the APRM"*. The word *"Officials"* is defined as *"members of staff of the AU Office for the APRM with the exception of those person who are recruited locally and assigned to hourly rates"*. In paragraph 2 of Article 9 entitled *"Immunities and Privileges of Officials"*, it is provided that *"Officials, whether locally or internationally recruited shall be subject to AU Staff Rules and Regulations."*

The Tribunal notes that the words *"official"* and *"member of staff"* of the APRM are given the same meaning and can therefore be used interchangeably for the purpose of the present matter. It is of importance to retain that according to the Host Agreement, it is the provisions of the AU Staff Rules and Regulations that were to govern the conditions of appointment of a member of staff of the APRM.

Now, it is relevant to bear in mind that when the applicant was recruited as coordinator at the APRM Secretariat, he reported to the officer in charge of the APRM where he worked and where his work was supervised. There is nothing on record to show that he was not on the list of the recruited officials that had to be supplied to the Government of the Republic of South Africa for the needful to be done in connection with immunities and privileges of officials under Article 9 of the Host Agreement. It is noteworthy that at the termination of the fixed-term contract with the Bank, the applicant submitted an appeal to the APRM Committee of Focal Points. As far as the record before the Tribunal goes, there is no evidence of any sign of objection to the applicant using these appeal procedures on the ground that he was not a staff member of the APRM Secretariat. The Committee of Focal Points of the APRM, which forms part of the organisational structure and management of the APRM, and whose approval had to be obtained for terminating the services of any senior staff, considered his appeal and reinstated him retroactively from 1 January 2013 as DCEO a.i. of the APRM Secretariat. According to paragraph 58 of the Operating Procedure for the APRM dated January 2012, all senior staff appointments and termination of their services have to receive the approval of the Chairperson of the Focal Points Committee – **Annex 13 of the Answer**. This confirms the fact that the applicant was considered as a senior staff of the APRM Secretariat, and obviously, not as an employee of the Bank “*with no employment link with the APRM*”, as contended by the respondent.

Of importance is also the fact that, in the very words of the respondent’s Answer, the Bank “*took over the administration of the Applicant’s employment contract together with those of other APRM staff on similar terms and conditions*”, [Emphasis added], indicating that the applicant formed part of the APRM staff.

23. Further, the Tribunal notes that in the original contract between the Bank and the applicant (“**Court Annex 1**”), referred to in paragraph 6, it is stated that it was in terms of the Memorandum of Understanding between the Bank and the Office of the President of the Republic of South Africa that the Bank was procuring the services of the applicant on a fixed-term contract as “*a Coordinator: Democracy & Political Governance on behalf of*

APRM". [Emphasis added]. Such an arrangement was to last until completion of the integration of the APRM into the AU structures, which process had already begun.

The AU Office for the APRM established in the Republic of South Africa was located within the premises occupied by the Bank, and in the Host Agreement, the parties had come to an agreement regarding payment of rent of the premises occupied by the AU Office for the APRM and "*other incidentals*", which included "*the facilities and services presently provided*" by the Bank to the APRM.

From **Annex 2 of the respondent's Answer**, which is an Interoffice Memorandum from the Deputy Chairperson of the African Union Commission addressed to the Coordinator/Team Leader for Integration/Migration of APRM, attaching the terms of reference of the AUC Team Leader, it is amply demonstrated that during the period in question and until 31 December 2012, the Bank was a service provider. It managed the pay roll system for the APRM staff members. It held the APRM funds, assets and liabilities on behalf of the APRM; and after the end of 2012, it continued to do so by way of an interim ad hoc arrangement whereby it received directives from the APRM Secretariat regarding payment of the APRM staff on a monthly basis.

Decision on the Jurisdictional Issue

24. The Tribunal finds no difficulty in light of all the above facts in concluding that even though it was the Bank that recruited the applicant, it did so for and on behalf of the APRM Secretariat, which had the required status to enter into contract from the time of its establishment in the Republic of South Africa. The fact that there was an express contract between the applicant and the Bank as a provider of services in the Republic of South Africa on the terms specified in the contract, does not, in all the circumstances, prevent the applicant from being a staff member of the Secretariat where he actually worked in that capacity. The documents on record show clearly that the applicant was working as member of staff of the APRM Secretariat in relation to the implementation of the APRM, which was being integrated into the AU structures. The Tribunal is satisfied that there existed the relationship of employer and employee between the applicant and the Office

of the APRM Secretariat, and that as a staff member of the APRM Secretariat, which is a regional office of the AU, the applicant was, as the other staff members of the AU, subject to the AU Staff Rules and Regulations and can access this Tribunal like any staff member of the AU.

The Tribunal therefore concludes that the applicant is entitled to file a complaint under Article 11 (i) of the Statute as he was at the material time a staff member of the regional office of the African Union, and like all other members of the AU, was subject to AU Staff Rules and Regulations. The Tribunal further finds that it has jurisdiction under Article 2 (i) (b) of the Statute to entertain the applicant's application in which he alleges non-observance of his contract of employment. The first objection of the respondent is accordingly overruled.

Respondent's Procedural Objections

25. It is to be noted that at the hearing, the respondent did not stress on their second preliminary objection, which was in respect of the non-observance of Article 11 (4)(i) of the Rules of Procedure, leaving it to the Tribunal to decide. However, the respondent has formulated a new objection to the effect that the applicant raised new issues in his Written Observations on the Answer, which was not permissible.
26. Therefore, there are now two procedural objections raised. First, that some of the documents filed with the application are not in the original and do not bear the words "Certified true copy" as provided under Article 11 (4)(i) of the Rules of Procedure. Second, that in his Written Observations to the Answer, the applicant cannot be allowed to raise new issues as he has done, viz. a reduction of his salary, an assertion that the contract was not renewed because he refused to sign a certain invoice, and by attaching a new set of Annexes. According to the respondent, the applicant had to restrict his observations only to what arose in the respondent's Answer.

In respect of the first procedural objection, the respondent has not made any forceful submission and has left it to the Tribunal to decide whether to set aside the application

on the ground invoked. The applicant's counsel has conceded that the applicant did not comply with the provisions of Article 11 (4)(i) of the Rules of Procedure when filing his application. He points out that the applicant was not legally represented at the time of lodging the application, and that such failure on his part is of no consequence since the documents in question concerned the APRM and were to the knowledge of the respondent. He further referred to decisions of this Tribunal to submit that the requirement of Article 11 (4)(i) is of a formal nature and non-compliance is not fatal.

The Tribunal notes that the objection of the respondent is not as to the admissibility of the documents. In the circumstances, it would have been possible under Article 11 (9) for an opportunity to be given to the applicant to make the necessary correction by filing documents that were original or certified true copies.

Indeed, the Tribunal has decided that non-compliance with those paragraphs of Article 11 of the Rules of Procedure, which concern requirements of a formal nature, cannot result in the outright rejection of the application itself. Such requirements were not enacted under pain of nullity, and provision has been made under Article 11 (9) of the Rules to give an opportunity to an applicant who has not complied with the formal requirements of Article 11 to fulfil them - Vide *M.M. v. Chairperson of the African Union Commission*, AUAT/2015/006; *B.W. v. Chairperson of the African Union Commission*, AUAT/2015/008; and *B.I. v. Chairperson of the African Union Commission*, AUAT/2015/003.

For all the above reasons, the Tribunal overrules the first procedural objection to the hearing of the application.

27. The second procedural objection is in relation to Article 13 of the Rules of procedure, which permits the applicant to file, if he considers it important to do so, written observations on the respondent's Answer. The relevant provision reads as follows:

Article 13 (i) *“An applicant may, if he so considers it useful, file with the Secretary written observations on the answer during the 30 days following receipt of the answer;”*

The respondent's objection is to the applicant having raised new issues in the Written Observations, which the respondent described as *“salary reduction, the issue that the Contract was not renewed because he refused to sign a certain invoice and also tendering new evidence, a complete set of other Annexes which are attached”*. In reply, Counsel for the applicant did not agree that the applicant had raised new issues.

Article 11 (2) of the Rules of Procedure of the Tribunal enjoins an applicant to, inter alia, specifically indicate the decision contested, the obligations invoked and the relief sought. The Tribunal has reviewed the Application comprising of the applicant's pleas and explanatory statement and has not seen any reference to salary reduction nor any averment or suggestion that his contract was not renewed because he had refused to sign a certain invoice. The Tribunal has also reviewed the respondent's Answer and has found no reference in their pleas or explanatory statement that would open the door to the applicant to include in his Written Observations the question of salary reduction or victimisation as contended by him.

In these circumstances, the Tribunal rules inadmissible the new issues raised by the applicant, which do not form part of the case that the respondent has to meet before this Tribunal. The Written Observations of the applicant must be confined to matters arising from the Answer and cannot go beyond the pleadings to raise new issues.

As regard the set of Annexes filed in the Written Observations, any reference therein relating to the new issues referred to, will be discarded.

The Merits

28. In an amended plea, the applicant prays the Tribunal to:

- a. *Order the APRM to provide the recording of the APRM committee of Focal Points meeting held in Johannesburg on 19th March 2013, which is in possession of the APR Secretariat to the Tribunal in order to establish the truth;*
- b. *Declare that the termination of Applicant's contract as Deputy CEO with immediate effect was unlawful;*
- c. *Declare that his reinstatement and termination of his contract on 30 June 2013 was not in accordance with the APRM Decision of 19th March 2013 and thus unlawful.*
- d. *Order the APRM to reinstate Applicant to his former position of DCEO a.i. effective 1st July 2013 and the payment of **all his salary** arrears from July 2013 to the Day of his reinstatement;*

Or;

Order the APRM to issue Applicant with a contract for an equivalent position within the APRM structure if his former position of DCEO a.i. has been abolished;

Or;

Issue a contract to the Applicant for his original position for which he was first recruited, namely the Coordinator for Democracy and Political Government, which is still vacant.

- e. *Order for the payment of acting allowances Applicant is entitled to under the AU Staff Regulations and Rules for acting as the Deputy CEO whilst still holding his substantive position of Coordinator from 20th September 2010 to the day of his reinstatement;*
- f. *Order for the payment of Applicant's Severance entitlements if it is determined that the post of Deputy CEO within the APRM has been abolished and he cannot also be restored to his original position of Coordinator;*
- g. *Order for the payment of all of Applicant's expenses related to this suit;*
- h. *Order full compensation of **USD516385.44** initially estimated to be USD 327385.44 at the time of the filling of the application on 13 December 2014, in accordance with Regulation 1.3(b) (sic) of the AU Staff Regulations and Rules to cover the aggravated damages for the harm, losses and suffering Applicant has suffered due to the capricious and malicious actions of the agents of APRM."*

Response to Prayer a.

29. The respondent's stand was that despite all endeavours made they could not procure the recording to bring to the Tribunal. It was agreed by the applicant that the hearing proceeds, leaving it to the Tribunal to decide in the course of the hearing whether it would call for the recording as requested under paragraph a. above. The applicant's prayer under paragraph a. is linked with the prayer under paragraph c. and the first alternative of prayer d. These will be dealt with together below.

Response to Prayer b.

30. The Tribunal understands the applicant in prayer b. to be claiming that the termination of his contract by the Bank with immediate effect on 31 December 2012 was wrongful.

It is not disputed by the respondent that on 1 October 2009, the Bank took over the administration of the applicant's employment contract along with those of the other APRM staff on similar terms and conditions.

During that contract of employment, the applicant was informed by a letter dated 21 September 2010 from the Chairperson of the APR Panel of Eminent Persons that at its 42nd Meeting held on 19 September 2010 in South Africa, the APR Panel of Eminent Persons had appointed him to serve as the Deputy Chief Executive Officer, a.i. of the APRM Secretariat with effect from 20 September 2010 until further notice. As per Annex 5 filed by the respondent in its Answer, the specific terms and modalities of the appointment were to be discussed subsequently.

By letter dated 3 December 2012, the Chief Operations Officer of the Bank informed the applicant that the fixed-term contract of employment entered into between him and the Bank "*will automatically expire on 31 December 2012 and as such will not be renewed*" - vide Annex 4 of the respondent's Answer. The letter does not mention in which capacity

the applicant was employed, but it is the applicant's version that his appointment as DCEO a.i. of the APRM Secretariat from 20 September 2010 continued until 31 December 2012 when his contract was terminated by the Bank.

31. In the written submissions, the respondent contends that the applicant's claim for unlawful termination has no substance as his contract came to an end on the end date, that is, 31 December 2012. In the written submissions of the applicant, Counsel contended that the applicant's appointment as DCEO a.i. was for three years ending in December 2013. However, Counsel has not explained how he calculated the period of the appointment to add up to three years.

The Tribunal notes that the applicant's contract with the Bank was terminated on 31 December 2012 as per the arrangement the APRM had with the Bank in respect of staff recruitment and services. After that date, the APRM was to issue its own contract to its staff. It has to be borne in mind however that the applicant was appointed DCEO a.i. of the APRM Secretariat from 20 September 2010 "*until further notice*" and not until 31 December 2012 as contended by the respondent in the Answer, relying on Annex 5. Annex 4a of the Written Observations is a letter dated 18 May 2011, which indicates that there was an approval by the Chairperson of the APR Panel of Eminent Persons for the extension of the applicant's contract as DCEO a.i. of the APRM Secretariat for two more years. No evidence was adduced by either party as to the terms and conditions that were agreed in respect of the applicant's appointment on 20 September 2010. The evidence before the Tribunal in that respect is only as per Annex 4 of the Written Observations and Annex 5 of the Answer, where the letter of appointment states: "*We shall in due course discuss in specific terms the modalities*".

In line with the applicant's appointment from 20 September 2010 which was to last "*until further notice*", when taking the date 18 May 2011 of the letter (Annex 4 of the Written Observations) as being the starting date of the two-year extension, the applicant's contract as DCEO a.i. of the APRM Secretariat would have been valid until 17 May 2013 and not until 31 December 2012 as contended by the respondent nor until December 2013 as contended by Counsel for the applicant.

However, the salient fact is that the appellant had lodged an appeal against his dismissal of 31 December 2012, and the Committee of Focal Points of the APRM at its meeting of 19-20 March 2013 reinstated him in his post as DCEO a.i. of the APRM Secretariat retroactively from 1 January 2013. The applicant therefore won his appeal and was reinstated in his post.

32. On the above facts, the Tribunal holds that the applicant cannot succeed under prayer b. inasmuch as he won his appeal and was reinstated into his post. Prayer b. therefore fails.

Response to Prayers a., c., and d.

33. With regard to prayer c. and the first part of prayer d., the applicant contends that the termination of his contract at the end of June 2013 was not in accordance with the decision of the Committee of Focal Points of the APRM at its meeting of 19-20 March 2013. He prays that the APRM be ordered to reinstate him in his former position of DCEO a.i. with effect from 1 July 2013 and pay the salary arrears from that day to the day of his reinstatement.

34. Now, while it is not contested that at a meeting of the Committee of Focal Points held on 19 and 20 March 2013 it was decided that the applicant would be reinstated retroactively from 1 January 2013 as acting DCEO, (vide the Draft Report of the Meeting of the Committee of APRM Focal Point, (**Annex 8 of the Answer**), the applicant has made an issue as to the exact wording of the condition attached to his reinstatement. He contends that in the minutes of the APRM Focal Points Committee meeting it was resolved to issue a contract to him from 31 December 2013 in the capacity of DCEO a.i. that would "*stand nullified upon the adoption of the new structure of the APRM and the subsequent filling of the post*". According to him, his contract should have lasted until the posts in the new structure would have been filled. In support of that contention, he made the request in prayer a. to have the recording of the said meeting produced before the Tribunal.

According to the Minutes of Proceedings of the Meeting of the Committee of APRM Focal Points held in Johannesburg, South Africa from 19 to 20 March 2013 entitled "Draft Report", the applicant "*was reinstated retroactively from the date on which his contract was terminated until a decision on the Deputy CEO Position is taken with the adoption of a new structure for the APRM*". [Emphasis added]. The additional condition claimed by the applicant that his reinstatement should have continued until the filling of the posts in the new structure was not there.

In making the allegation that there was such an additional condition, the applicant has relied on documents written by him to give his own version of what was decided. He has also relied on a handwritten note, which he said was given to him by the Secretary of the Committee, as reflecting the resolution that was taken. It is this hand written note that mentions what the applicant is alleging. He did not call that person as a witness in support of his allegation.

35. After having listened to the applicant in light of all the documents produced, the Tribunal considers that the applicant has failed to lay a reasonable foundation to substantiate his allegation that there has been a misrepresentation of what the Committee of Focal Points of the APRM had decided about his reinstatement. The Tribunal has found nothing that would cast doubt on the genuineness of the minutes of proceedings relating to the applicant's reinstatement as appear in the Draft Report.
36. The Tribunal has therefore not acceded to the request of the applicant in prayer a. to order the production of the recording of the APRM Committee of Focal Points meeting held in Johannesburg from 19 to 20 March 2013.
37. The Tribunal accepts as true the Draft Report to the effect that the applicant's reinstatement was to last until a decision on the post of Deputy CEO was to be taken with the adoption of a new structure for the APRM, and not until the subsequent staffing of the new structure as suggested by the applicant.

38. The applicant further bases his complaint on the premise that his contract was terminated not in accordance with the decision of the Committee of Focal Points of the APRM at its meeting of 19-20 March 2013 on the premise that the structure was only adopted provisionally.

The stand of the respondent was that the APRM Heads of State and Government, that is, the APRM Forum, adopted the new organisational structure of the APRM, which did not include the position of Deputy CEO.

According to the "*Communique issued at the end of the 19th Summit of the Committee of Heads of State and Government participating in the APRM (APR Forum)*" on 26 May 2013 in Addis Ababa, Ethiopia (**Annex 10 of the Answer**) the Forum adopted the new structure of the APRM Secretariat comprising of 45 posts presented by the Chairperson of Committee of Focal Points. The structure was adopted on a provisional basis to enable the APRM Secretariat to meet the operational and staff requirement, and the Forum requested the Secretariat to produce versions of the structure in all the working languages before the following Summit of the APR Forum.

The fact that the structure was provisionally adopted, for the reason that was given, does not avail the applicant who has admitted that the new structure did not provide for such a post. It is noteworthy in that context that the applicant has asserted that at the very same meeting of the Committee of Focal Points, on 20 March 2013, that is, the day following the decision to reinstate him, the Committee decided on the new Structure and it did not include the post of Deputy CEO. The applicant was therefore aware that his post would not exist in the new Secretariat structure if that decision were to be adopted by the competent authority. Besides, there is no evidence before the Tribunal to contradict that fact, and it has not been established that there was ultimately going to be a post of Deputy CEO in the new structure. The Tribunal finds that the fact that the new structure of the APRM did not include the position of the DCEO has been amply established in evidence.

For the reasons given above, the applicant's claim that the decision of the Committee of Focal Points of the APRM at its meeting of 19-20 March 2013 was to reinstate him until the posts in the new structure be filled, and that he therefore has to be reinstated and paid all the arrears, cannot succeed.

The Other Two Alternatives of Prayer d., prayer f. and prayer h

39. In the alternative, under prayer d., applicant prays that the APRM be ordered to reinstate him in an equivalent post in the new structure of the APRM if it is decided that his post of DCEO a.i. was abolished, or to issue a contract to him for his original position of Coordinator for Democracy and Political Governance which, according to him, had not been filled. Under f., applicant prays for an order for the payment of his severance entitlements if it is determined that the post of Deputy CEO within the APRM has been abolished and he cannot also be restored to his original position of Coordinator.

The respondent's argument is that as the applicant's post did not exist in the old structure for not having been approved by the APRM Forum, there is no question of it having been abolished.

Regarding this contention, the Tribunal notes that when the Bank was being de-linked from the APRM causing the Bank to terminate its contract with the applicant, the applicant's appointment as DCEO a.i. became a concern for the APRM. **Annex 6 of the Answer** shows an email message dated 28 December 2012 from the Chairperson of the APRM in answer to a letter of the CEO of the APRM Secretariat dated 24 December 2012 regarding the contract renewal of the applicant. The Chairperson thereby informed the CEO that the post of Deputy CEO did not exist in the then APRM organisational structure. The CEO was told that for that reason the applicant's contract could only be renewed in his former post of coordinator. In a previous email message a day before, the Chairperson of the APRM had written that the post of Deputy CEO of the APRM had been created by the former Chairperson of the APR Panel without seeking the approval or endorsement of the APRM Forum.

The Tribunal accepts the applicant's version that the position did exist and was advertised for recruitment and the applicant was appointed. As pointed out under paragraph 22, the Committee of Focal Points had reinstated the applicant in that very post. The respondent's proposition that the post did not exist for lack of approval of the APRM Forum is therefore devoid of any merit.

The respondent further contended that the applicant's contract came to an end at the normal expiry date of the short-term contract given to him from 1 January 2013 to 30 June 2013. According to the applicant, that was a unilateral decision of the respondent instead of reinstating him in his post as per the decision of the Committee of Focal Points, and that he signed the contract with strong reservations. The question for determination is whether the applicant was separated at the normal expiry of a short-term contract so that he cannot be entitled to severance pay under Rule 25.3 (d), or whether his post was abolished.

The relevant parts of Staff Rule 25 that are pertinent in this context read as follows:

Rule 25.1 "A staff member whose...fixed-term appointment is terminated due to abolition of his/her post...shall be entitled to receive severance pay".

Rule 25.2 "Severance pay shall be equivalent to one month's gross salary of the staff member for each completed year of qualifying service up to a maximum of twelve (12) years."

Rule 25.3 No severance pay shall be granted to a staff member:

(a)

(b)

(c)

(d) Who is separated from the service of the Union at the normal expiry date of his/her fixed-term and short-term contract....

Decision on the Issue of Abolition

40. As a recap, the decision of the Committee of Focal Points was that the applicant was reinstated "until a decision on the Deputy CEO Position is taken with the adoption of a new structure for the APRM". The Tribunal considers that the effect of this decision made the termination of the applicant's employment depend on the happening of an event,

which was uncertain at the time. That decision superseded the duration of the fixed term contract, which would have ended on 17 May 2013, as calculated above. The duration of the applicant's employment was made to depend on the adoption or rejection of a new structure, which did not provide for the post of DCEO. It also meant that if the post were to continue to exist, there might have been a possibility, at the discretion of the respondent, of renewing the contract. In the circumstances, the reinstatement of the applicant by the APRM with effect from 1 January 2013 to 30 June 2013 cannot be assimilated to a short-term contract given to him, as the employment of the applicant was terminated for no reason other than that the post of DCEO was not included in the new structure of the Secretariat of the APRM as adopted by the Forum. Therefore, the applicant does not fall within the provisions of Rule 25.3 (d) as, pursuant to the terms of the decision of the Committee of Focal Points in reinstating him, he cannot be considered to have been separated from service at the normal expiry date of a short-term contract where he would not have been entitled to any severance pay.

41. The Tribunal concludes that in spite of the fact that the applicant was on a fixed term contract in the context of integrating the APRM into the AU structures, the applicant was at one time made to hold a post of DCEO a.i., other than the post of coordinator he was originally appointed to. The duration of his appointment in the new post was subsequently extended for two more years and he was during that time made to go through the uncertainty of the retention of the post he was holding. It is clear that at the time his employment was terminated it was because the post, which existed or was created in the old structure of the Secretariat, and to which he was appointed, was finally abolished.
42. The Tribunal therefore holds that Staff Rules 25.1 and 25.2 apply to the applicant as his employment was terminated following the abolition of his post and the applicant is entitled to severance pay equivalent to one month's of his gross salary for each completed year of his service as DCEO a.i., making a total of an equivalent of two months' gross salary plus the equivalent calculated pro rata for the additional months he held the post over and above these two years. No clear indication having been given to the Tribunal as to the exact gross salary of the applicant at the time of his separation, the Tribunal cannot put

a figure to the amount payable to the applicant. The Tribunal therefore orders the respondent to calculate the amount to be paid to the applicant in light of this judgment.

43. The applicant has also raised the issue whether he should not be reinstated in an equivalent post or as coordinator. Such matters are within the discretion of the employer in accordance with the exigencies of the service and the interest of the organisation. It is not within the competence of the Tribunal to make the orders prayed by the applicant in that respect.
44. The Tribunal also rejects the applicant's allegation that at the end of June 2013 there was an abuse of power on the part of the respondent or a violation of due process, as these do not form part of the amended plea of the applicant as set out above.
45. Under Prayer g. the application having been partly successful, the Tribunal awards the applicant the sum of USD 1,000 for costs.
46. With regard to prayer e. in relation to acting allowances, the applicant has not been able to adduce any evidence to show that the post of DCEO a.i. was offered to him in addition to his post of coordinator. Prayer e. therefore fails.

DECISION

For the above reasons,

1. The respondent shall pay the applicant severance pay as indicated in paragraph 42.
2. The respondent shall pay the applicant USD 1,000 in cost.
3. All other claims are dismissed.

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 :

