



IN THE MATTER OF:

*S.M., Applicant*

v.

*Chairperson of the African Union Commission, Respondent*

FOR APPLICANT: *Pro se*

FOR RESPONDENT: Namira Negm, Legal Counsel, African Union Commission

BEFORE: S. MAINGA, President, J. SEDQI, and P. COMOANE

HEARD ON: 2-3 October 2020

JUDGMENT

*Procedural and Factual History*

1. On 29 January 2009, Applicant, former Deputy Clerk of the Pan African Parliament (PAP), filed this application contesting the decision not to renew his fixed-term appointment.
2. Applicant was given a chance to perfect his application and refile, which he did on 14 April 2009. Respondent filed his Answer on 30 March 2016, in reply to which Applicant filed his Observations and additional evidence on 26 April 2016. Respondent filed a reply on 25 June 2016.
3. After considering this matter during its February 2020 Session, on 16 March 2019, the Tribunal scheduled an oral hearing for 6 May 2020, which was cancelled due to the public health emergency of COVID-19. The parties were subsequently invited to submit their written closing submissions. Both parties submitted their closing submissions, which have been made part of the record.
4. Following receipt of the parties' closing argument submissions, the Tribunal believes the facts and issues have been presented adequately in the pleadings and determines this matter on the evidence filed on papers.
5. The facts of the case are summarized as follows.
6. Applicant entered into service with PAP as a Deputy Clerk on 26 January 2006. His letter of appointment, dated 2 December 2005, stated that his "appointment will, in the first instance, be on contractual terms for a period of three years, twelve (12) months of which, shall be considered as probationary period. If at the end of the three years' contract, your services are deemed satisfactory, the contract shall be renewed for a period of two (2) years."
7. On 27 January 2006, Applicant's salary was revised by the President of PAP ("President") from P-5/Step 1 to P-5/Step 6 in consideration of Applicant's experience, qualifications and prior earnings history. Effective 8 March 2006, Applicant's salary grade was further upgraded to P-6/Step 6.
8. Additionally, Applicant received annual with-in grade step increments under Staff rule 20(b) every January for the three years he served in PAP, which placed him at P-6/Step 9 at the time he separated from the Organization. These increments

were predicated on Applicant's annual performance appraisals rating him satisfactory, according to appraisal forms signed by the Clerk of PAP.

9. On 27 September 2007, Applicant received a memorandum signed by the Clerk of PAP stating "that having completed the requisite period of service on probation, and having fulfilled conditions precedent to ... confirmation" that Applicant had been confirmed for a three-year contractual appointment retroactive to his initial appointment date.
10. In June 2008, the Bureau of PAP made the decision to advertise several posts, including the post of Deputy Clerk at the D-1 salary grade, which Applicant then encumbered at the salary grade of P6/Step 8. Applicant did not submit an application for this post, but applied for the post of Clerk which was advertised at the same time as the post of Deputy Clerk.
11. On 13 October 2008, Applicant's supervisor dispatched a "note" to PAP Bureau recommending Applicant and two others for extension of appointment "in view of [their] satisfactory performance, [and] ... their services are still required by the PAP." A recommendation form attached to the note stated that Applicant's performance during the first two years of service were "positive (committed, applies experience to achieve good results) and on the third year, "positive (satisfactory performance and committed)."
12. On three separate occasions in September and November 2008, Applicant wrote to the President protesting the advertisement of his post and pleading with her to consider him for an upgrade to the D-1 salary grade. The President responded to him on 17 December 2008, stating:

As you are aware, your contract appointment as Deputy Clerk – Legislative Business will expire on January 24, 2009, and also that the post was advertised for competition to interested applicants.

I take note that you applied for both the post of Deputy Clerk Legislative Business and Clerk to the Parliament. In this connection, I wish to inform you that the decision of the Bureau regarding your engagement with the Pan African Parliament shall be made after the completion of the recruitment process in January 2009.

13. On 19 January 2009, the President sent Applicant another memorandum notifying him of the final decision not to renew his appointment beyond its expiration date, but appears to have effectively extended Applicant's appointment through 24 February 2009, according to Respondent, to enable a proper hand-over of Applicant's responsibilities. On the same day, Applicant wrote to the President asking her to reconsider the decision, but received no response.
14. This application followed on 29 January 2009. Applicant separated from PAP's service effective 24 February 2009.
15. Applicant asks the Tribunal: (a) to annul the decision not to renew his contract; (b) order his salary for 22 months in material damages; (c) to award him \$50,000 in moral damages for the unlawful manner he was separated; (d) order his upgrade to D-1 salary grade retroactive to his initial appointment in December 2005.
16. Respondent objects to the application on grounds of admissibility. On the merits, Respondent claims that as fixed-term appointee, Applicant did not have any expectation of renewal and therefore his claim is meritless and must be dismissed. In counterclaim, Respondent submits that Applicant was improperly upgraded and received overpayments in salary and benefits and must be ordered to refund the Organization.

### *Discussion*

#### *Preliminary Issues*

17. As a threshold matter, the Tribunal first addresses Respondent's claim that this application is not receivable because the Applicant did not exhaust internal remedies by petitioning the Chairperson as required under Staff rule 62(a). Under AUAT Statute art. 13, staff members are required to seek review of the contested decision by the *appropriate authority*.<sup>1</sup> The purpose of this internal exhaustion requirement is to allow the Organization an opportunity to address a staff member's grievance before it escalates into formal litigation before the Tribunal.<sup>2</sup>

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<sup>1</sup> See, *Christensen*, 2013-UNAT-335.

<sup>2</sup> See, *Caldarone*, UNDT/2009/035; *O'Neill*, UNDT/2010/203.

18. Applicant sent a formal appeal to the President on 19 January 2009, and for purposes of exhaustion of internal remedies, the Tribunal holds that petitioning the President satisfied Staff rule 62(a).<sup>3</sup> Through Applicant's various written appeals, the Organization received ample notice and opportunity to address his grievances before Applicant accessed the Tribunal.<sup>4</sup> Respondent's objection is therefore rejected.
19. The next preliminary issue for the Tribunal's consideration is Applicant's claim of implied decision to not reclassify his post at the D-1 salary grade. The Tribunal notes that this claim was not part of the review request submitted to the President on 19 January 2009. What the Tribunal understands in relation to this claim is that, on 29 September 2008, Applicant asked for such upgrade as a follow-up to similar prior requests. To the extent we accept this memorandum to be Applicant's request for review under Staff rule 62(a), the claim is time-barred as it was not filed until 29 January 2009.<sup>5</sup>

*Decision to not renew Applicant's fixed-term appointment*

20. A fixed-term appointment ordinarily carries no expectancy of renewal and expires automatically without prior notice on the date of expiration noted in the letter of appointment.<sup>6</sup> An international organization retains the discretion to renew a fixed-term appointment.<sup>7</sup> Such discretionary decision may be set aside only where it has been exercised in violation of the law or policy or is motivated by improper considerations. Additionally, as with all administrative decisions, the Organization owes its staff members a duty of care and must deal with them with fairness and in good faith.<sup>8</sup> Where a staff member claims legitimate expectancy of renewal, he or she bears the burden of proof.<sup>9</sup>
21. Applicant contends that the decision not to renew his fixed-term appointment was unlawful and abusive. In support of his contention, he directs the Tribunal's attention to paragraph 4 of his letter of appointment dated 2 December 2005, according to which his "appointment will, in the first instance, be on contractual terms for a period of three years, twelve (12) months of which, shall be considered as probationary period. If at the end of the three years' contract, *your services are deemed satisfactory, the contract shall be renewed for a period of two (2) years.*" (Our emphasis).
22. It is very clear from the above unambiguous text that PAP expressly undertook to renew Applicant's appointment for a further period of twenty four months except where Applicant's performance is established to be less than satisfactory. There is nothing in the record to show that Applicant had any performance related issues. On the contrary, during his entire tenure with PAP, Applicant's performance was rated "satisfactory" and received annual with-in grade increments on that account even after being notified of his appointment's non-extension in January 2009. In the circumstances, PAP was not free to declare Applicant's post vacant, while it was still obligated to renew Applicant's appointment for additional two years under the letter of appointment it concluded on 2 December 2005.
23. Respondent claims that the mandatory language of the clause in question contradicted Staff regulation 13, implying that the clause may have been unlawfully included in the letter of appointment. The Tribunal finds this argument to be without merit. In reading Staff regulation 13, the Tribunal understands that the rule affords the Organization the discretion to renew a fixed-term appointee or consider him/her for permanent appointment at the end of the three-year term, but there is nothing in the rule preventing the appointing authority from exercising that discretion by prospectively undertaking to further extend that appointment for a period of two years, as it did here, when appointing Applicant. Even accepting Respondent's argument, it would not alter the ultimate holding in this matter because this Tribunal also finds that the mandatory extension clause, in addition to being a legally valid undertaking, is a powerful source of a legitimate expectation in Applicant's favor.
24. For these reasons, the Tribunal agrees with Applicant that Respondent breached an express contractual term, and further finds that in the absence of such breach, Applicant's fixed term appointment would have been renewed through 24 January 2011. To redress the material harms he suffered, Applicant would be entitled to payment of his gross salary (P-

<sup>3</sup> The Tribunal takes note that that after revisions enacted in 2010, staff members must address their request for review to "the Chairperson or the competent authority of any other organ."

<sup>4</sup> By memorandum dated 19 January 2009, Applicant sought review of the President's decision not to extend his appointment. Under Statute art. 13, he should have filed his application after 18 February 2009, but not later than 20 March 2009. He filed his application prematurely on 29 January 2009. However, the Tribunal finds that this defect does not render the application not receivable given that PAP did not bother to review or even respond to his grievances.

<sup>5</sup> Staff rule 62(a); Statute art. 13.

<sup>6</sup> See, *Kellie*, 2018-UNAT-875; *Ahmed*, 2011-UNAT-153; ILOAT Judgment No. 4062.

<sup>7</sup> See, ILOAT Judgment No. 4231; *Abdeljalil*, 2019-UNAT-960.

<sup>8</sup> *A.L.*, AUAT/2017/002; see also, *Abdeljalil*, 2019-UNAT-960; *Obdeijn*, 211-UNDT-032.

<sup>9</sup> See, *Kellie*, 2018-UNAT-875; *Hepworth*, 2011-UNAT-503.

6/Step 9) for twenty-three months less the monthly housing allowance portion (\$1,840) for the period 25 February 2009 to 24 January 2011.

25. In light of the finding of contractual breach, the Tribunal finds it unnecessary to address Applicant's argument that the decision not to renew his appointment was taken without lawful authority absent prior consultations with the PAP Bureau.
26. Additionally, the Tribunal accepts Applicant's submission that the unlawful termination caused him moral damages. Clearly, PAP breached its contractual obligation in a very fundamental way by advertising the post while occupied by Applicant and unlawfully refusing to extend his appointment, and by ignoring Applicant's multiple entreaties for administrative reconsideration. The Tribunal sets the moral damages at three months' salary less the monthly housing allowance portion of (\$1,840).
27. Respondent asks the Tribunal for an order that Applicant reimburse payments and entitlements beyond those authorized under his letter of appointment. Respondent's counterclaims are outside of the scope of this Tribunal's competence as defined under art.2 and 11 of the Statute. Even if the Tribunal had the competence to decide the counterclaim, it would have failed for the reason that the upgrade and salary increments accorded Applicant were authorized lawfully by the President. Without a showing of fraud and/or corruption in Applicant receiving these favorable personnel actions, Respondent lacks the authority to seek reimbursement of the same. In fact to claim the same, Respondent is grasping at straws.

#### *Orders*

28. Accordingly, the Tribunal ORDERS as follows:

- a. The application is granted;
- b. Respondent shall pay Applicant:
  - i. Material damages equivalent to twenty three months' gross salary less housing allowances; and
  - ii. Moral damages equivalent to three months' gross salary less housing allowances.
- c. The rest of Applicant's prayers as itemized in paragraph 15 of this Judgment are denied.

Date: 13 October 2020

*/signed/*

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SYLVESTER MAINGA, PRESIDENT  
JAMILA B. SEDQI  
PAULO D. COMOANE

Secretary: \_\_\_\_\_

