AFRICAN UNION
ADMINISTRATIVE TRIBUNAL

UNION AFRICAINE
TRIBUNAL ADMINISTRATIF

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Case No.: AUAT/2021/010
Judgment No.: AUAT/2024/004

IN THE MATTER OF:

A.S., *Applicant*

v.

Chairperson of the African Union Commission, *Respondent*

FOR APPLICANT: *Pro se*
FOR RESPONDENT: Hajer GUELDICH, Legal Counsel, African Union Commission
BEFORE: S. MAINGA, President, J. SEDQI, and P. COMOANE
HEARD ON: 20,29 May 2023, 19 December 2023

JUDGMENT

Procedural and Factual History

1. On 22 September 2021, Applicant, the former Chief of Ethics of the African Union (P-5), filed an application contesting the decision not to extend his fixed-term appointment and the refusal to pay him education allowance.

2. The Tribunal transmitted the application to Respondent on 2 November 2021. Respondent submitted his written Answer on 3 January 2022. Applicant's written Observations were received on 7 March 2022.

3. Applicant first joined the Union in 2008 as the Secretary of the African Union Administrative Tribunal and was thereafter appointed as a Senior Legal Officer within the Office of Legal Counsel. Effective 1 July 2016, Applicant was appointed as the Chief of Ethics on a fixed-term appointment. He served on the post on a series of fixed-term appointments until 30 June 2021.

4. The material facts leading to this application are summarized as follows:

5. On 1 May 2021, Applicant's reporting officer, Monique Nsanzabaganwa (the Deputy Chairperson, "DCP") and several Human Resources Management (HRM) staff received electronic notification that Applicant's appointment was due to expire on 30 June 2021. The notification contained the following text: "[this is] a gentle reminder to begin the process of renewal, or inform HRMD about non-renewal if that is the case." Between 1 May and 15 June 2021, the DCP received three such advisals, which were all unheeded. As will be clear in the discussion below Applicant did not receive any notice of non-renewal and his appointment was allowed to expire without any notice.

6. Following an inquiry by Applicant on whether his appointment would be extended, the DCP's chief of staff, Emile Rwagasana ("Rwagasana") notified Applicant on 14 June 2021 that "your letter was sent to [acting head of HRM] for his advice in collaboration with Finance. Please follow up!" This message was followed by another one the same day, in which Rwagasana informed Applicant that "[the acting head of HRM] advised to proceed ahead [sic]! I signed the letter and it is sent to Finance!"

7. When Applicant inquired about the status of his contract's extension several days later on 29 June 2021, Rwagasana told Applicant, "CDCP forwarded the whole file to HR to handle!" Rwagasana further confirmed to Applicant that he had "released [the extension] in the system and [had] requested [HRM] to crosscheck and comply with SRR [Staff Regulations and Rules] and [the terms of Applicant's] contract."

8. Unbeknownst to Applicant and following instructions received from the DCP to separate him, the acting head of HRM wrote to the Chairperson on 29 June 2021 seeking authorization to separate Applicant effective 30 June 2021. Yet, even as HRM was initiating his separation on DCP's directives, Rwagasana implied to Applicant otherwise. He informed him on 2 July 2021 that "[his] case is [with the acting head of HRM] and he told me that he is ready to support. Please softly talk to [the acting head of HRM] and help him help you! He is empathetic and supportive too."

9. By memorandum dated 12 July 2021, the acting head of HRM notified Applicant that his appointment would not be extended beyond 30 June 2021. Applicant claims that he received the memorandum on 19 July 2021 and claims he continued to work pending notification of separation. In any case, it is undisputed that Applicant's appointment ended without the required notice from Respondent.

10. On 19 July 2021, Applicant asked HRM to include in his terminal benefits which included two-months' salary in lieu of notice, payment of educational allowance as approved by the Executive Council, and payment of salary for work performed beyond 30 June 2021. Having received no reply from HRM, Applicant petitioned the Chairperson on 23 July 2021. In his petition, he protested the non-extension of his appointment and implicit refusal to pay all entitlements due to him upon end of service. The Chairperson did not respond.

11. On 5 August 2021, Applicant left the duty station for his home country. On 22 September 2021, he filed this application asking the Tribunal to order : (a) two-months' salary in lieu of notice ($22,763.16); (b) pro-rated salary for 19 days on account of work performed during 1-19 July 2021; (c) accrued education allowance payment for five years for two children at the rate of $10,000 per child per annum ($200,000); (d) material damages in the form of 19-months' salary from 1 July 2021 through his retirement in January 2023 ($215,680.02); (e) $200,000 in moral damages; (f) $10,000 in costs; (g) order any other relief deemed fit.

12. In his written answer, Respondent contended that the application is time-barred. According to Respondent, since HRM e-mailed the separation notice on 13 July 2021, the filing deadline should be reckoned as of 13 July 2021. Further, because Applicant sought review by the Chairperson on 23 July 2021, his application should have been filed no later than 21 September 2021.

13. On the merits, Respondent submits that fixed-term appointments carry no expectancy of renewal and in any case, there was good cause for the decision not to extend Applicant's appointment. Respondent denies promising Applicant an extension of appointment beyond 30 June 2021. Respondent further argues that Applicant was not entitled for two-months' salary in lieu of notice as his appointment expired at the contractually agreed date. Similarly, his request for educational allowance was unsubstantiated.

14. In his written Observations, Applicant counters his application was timely as he filed it within six months of separating and returning to his home country. Respondent is estopped from challenging his application on receivability grounds since the Chairperson ignored his request for review and failed to explain the basis of the decision to not extend. On the claim of educational allowance, Applicant reiterated that his entitlements were improperly withheld.

15. Despite arguments made in his written answer, by filing dated 29 September 2022, Respondent issued an extension of appointment to Applicant effective 1-19 July 2021. Applicant was consequently paid a prorated salary for nineteen days, making Applicant's claim for 19-day salary moot.

16. On 17 October 2022, Applicant filed additional information that the non-extension of his contract also violated Respondent's own policy pertaining to contract extensions. He specifically relies on para. 5 of the policy memorandum which states "[i]f contract renewal requests do not reach [HRM] … the contract will be automatically renewed for the same length of the expired contract period." On the basis of this policy memorandum, Applicant argues that because the DCP failed to timely inform him that his appointment would not be extended at least two-months prior to 30 June 2021, HRM was required to renew his fixed-term for a period of one-year.

17. The parties were permitted to present oral arguments during a hearing conducted on 29 May 2023. Respondent, represented by Stephen Buabeng-Baidoo argued that the application was filed late by a day and Applicant was not covered under rule 11.8 of the rules of procedure, which extends filing period of six months in respect to former staff members.

18. On the merits, Respondent's counsel objected to Applicant's claim of non-extension based on the policy memorandum because the policy supposedly contradicted Staff rule 33 by guaranteeing automatic extension to fixed-term appointees. Respondent's counsel further argued that Applicant was not entitled to educational allowance as the Executive Council's decision applied only to staff members who were in service at the time of the decision.

19. Upon pressing by the Tribunal, Counsel for Respondent stated the Executive Council decision was issued November 2022. However, subsequent filing by Respondent revealed that the decision was issued in November 2018, through

Ext/EX.CL/Dec.1(XX), which directed Respondent "*to pay all short term and fixed term staff their full entitlements, upon separation from the Union, in accordance with the SRR, in order to avoid any legal implication*."

20. Finally, Respondent contended that even if Applicant was eligible for educational allowance, his eligibility is limited to the school year of 2020/2021 under Staff rule 22.3. Applicant rejects Respondent's interpretation of Staff rule 22. He argues his eligibility period extended over five school years (*i.e.* 2016-2021) and prays for reimbursement of educational allowance in the amount of $200,000.

Discussion

i. Receivability

21. Respondent objects to the application on receivability grounds because it was not filed within the timelines set forth under Staff rule 62.1. According to Respondent, Applicant was first informed of the contested decision by electronic mail sent on 13 July 2021. Applicant counters that he only became aware of the notification on 19 July 2021 after it had been transmitted again to his personal e-mail address. However, Respondent's argument is inconsequential for purposes of receivability as Applicant petitioned the Chairperson on 23 July 2021 – which is well within 30 days of either date.

22. Respondent next argues that reckoned from the date Applicant first petitioned the Chairperson, his application was due no later than 21 September 2021. What Respondent's argument misses is that where the applicant is a former staff member who has already repatriated to his home country, the deadline is extended to a period of six months.[1] Applicant filed his application on 22 September 2021 after he had departed the duty station, which makes the application timely and receivable under rule 11.8.

23. Respondent opposes the application of this exception on the grounds that it applies only to staff members who have been dismissed. This argument is untenable. The Tribunal finds the notion advanced by Respondent that rule 11.8 was intended to provide extended filing period to dismissed staff alone (*e.g.* for misconduct) while excluding staff separating from service without fault. In fact, the Tribunal understands the point of rule 11.8, adopted decades before the advent of digital communication, was to accommodate former staff members away from the headquarters of the Union who had to file their applications by air mail. Accordingly, Respondent's timeliness objections are rejected.

ii. Non-renewal of Applicant's fixed-term appointment

24. Applicant's first plea is that he was unlawfully refused extension of his fixed-term appointment. A fixed-term appointment, such as held by Applicant, generally carries no expectancy of renewal and expires automatically without prior notice on the date of expiration noted in the letter of appointment.[2] However, a non-extension decision may be set aside where Respondent exercised his discretion in violation of the law or policy or is motivated by improper considerations.[3]

25. Applicant alleges that the decision not to extend his appointment was tainted by bad faith. A staff member who claims improper motive such as bias or bad faith bears the burden of proof. Despite multiple demonstrations of irregularity and lack of articulable basis for the contested decision, the Tribunal has not been presented with evidence to substantiate Applicant's allegations of ill-will. The Tribunal, therefore, finds the plea unsubstantiated.

26. Nonetheless, as explained below, the entire process leading to Applicant's separation was tainted by arbitrariness. In *A.L.*, this Tribunal held that "[l]ike 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."[4] Further, Staff rule 33.1(ii) provides that fixed-term appointments may be renewed if the three objective conditions are met: (a) the post is funded; (b) staff has satisfactory performance; and (c) there is a need for the services of the staff member. Applicant is therefore correct in his assertion that he deserved to receive a reasoned explanation along the considerations enumerated under Staff rule 33.1(ii), *i.e.* programmatic, financial or performance related reasons for the non-extension.

27. While Counsel for Respondent made unsupported representations during oral argument that that funding considerations underpinned the decision not to renew Applicant's appointment, none of the conditions under Staff rule 33.1(ii) were proved to be lacking in Applicant's case: the need for an ethics professional in the Union was undisputed; Applicant's performance was unquestioned by Respondent and no proof of funding problem has been presented in the record, and as

[1] AUAT Rules of Procedure, rule 11(8)(i); *W.A.*, AUAT/2020/001; *R.B.*, AUAT/2020/008.
[2] Staff rule 33.3.
[3] *O.S.*, AUAT/2020/012; *ILOAT Judgment* No. 4363.
[4] *A.L.*, AUAT/2017/002, citing approvingly *Obdeijin*, UNDT/2011/032.

far as the Tribunal can understand the post remained vacant as of the oral hearing in this case. As such, no reasonable fact-finder could locate any legitimate ground – financial or programmatic – for the non-extension of Applicant's fixed-term appointment, which casts doubt on the true motivation behind the decision.

28. Given the pattern of shifting representations to Applicant, it is the Tribunal's view that adverse inference as to the real basis of the contested decision is warranted. Such inference is consistently drawn by other Tribunals in the context of an unexplained administrative decision to not extend an employment contract. It, therefore, clear to the Tribunal that the non-extension decision was tainted by considerations extraneous to Staff rule 33.1(ii). The Tribunal's impressions of arbitrariness are reinforced by Rwagasana's seemingly contrived messages to Applicant, which suggested the decision to renew depended on irrelevant factors, such as how politely Applicant addressed his request with Respondent's officials as opposed to any of the grounds set forth under Staff rule 33.1 (ii).

29. Applicant next submits that he had legitimate expectation of extension particularly since he met the conditions of Staff rule 33.1(ii). He correctly argues that he was informed that HRM had commenced administrative processes to extend his fixed-term appointment. The exchanges between Applicant and Rwagasana support these assertions. The doctrine of legitimate expectation applies where the invoking party demonstrates a representation in reliance of which he acted to his or her detriment. These requirements were met in this case.

30. Moreover, it is not acceptable that the same official continued to make incorrect representations implying an extension process was underway even after the DCP had instructed HRM to separate Applicant effective 30 June 2021. The Tribunal expects Respondent's officials to act with transparency and not to issue vague or incorrect information about staff member's contractual status or prospects of extension. In this particular case, the official was obligated to inform Applicant at the earliest possible opportunity that the DCP had decided not to renew Applicant's appointment, which did not happen.

31. Applicant's next contention concerns his entitlement to extension based on Respondent's policy memorandum on contract extensions. Under the policy memorandum, a fixed-term appointee who does not receive a timely notice of non-extension, in Applicant's case two-month notice, would be entitled to an extension equal in period to the expired appointment. During oral hearing, the parties were asked to address the applicability of the policy memorandum to Applicant's circumstances. Respondent argued that the memo is invalid to the extent it contradicted Staff rule 33 by providing for automatic extensions of fixed-term appointments.

32. The argument is incorrect. Contrary to Respondent's contentions, no principle under Staff rule 33.1(ii) would be breached by the prescription in the policy that sufficient notice of non-extension be provided to staff members, failing which an extension would be granted. The only instance a renewal would appear to be automatic is if Respondent breaches its obligation to provide adequate notice. As such, the policy memorandum is valid and consistent with Respondent's duty of transparency and fair dealing, which requires an organization to be "bound by the rules it has itself issued until it amends, suspends or repeals them."[5] Indeed, the Tribunal has previously found the policy memorandum to be valid and faulted Respondent for not applying it with consistency.[6]

33. In the present case, neither the DCP nor HRM furnished Applicant with any explanation why extension was refused. The first notice Applicant received from HRM arrived on 12 July 2021 – after Applicant's appointment had already expired, while the policy memorandum required such notice to be sent out two months in advance of expiry. The Tribunal finds the lack of timely and reasoned notice to be particularly troubling because the DCP received at least three reminders to issue an extension or appropriate notice of non-extension. In the absence of such notice, deemed mandatory under the policy memorandum, Applicant was entitled to a one-year extension.

34. In the circumstances, the Tribunal concludes that Applicant's separation was arbitrarily accomplished, and Respondent breached his duty of care, transparency, and good faith. Applicant will, therefore, be awarded compensation for loss of income in the form of twelve months' gross salary less the 19-day salary that Applicant had already received on account of work performed during 1 to 19 July 2021.

iii. Applicant's educational allowance claim

35. Applicant submits that he is entitled to education allowance reimbursement on account of his dependent children. Applicant's entitlement to such allowance arises out of Staff rule 22.3 (a) (ii), which states as follows:

> (ii) Educational allowance shall not be paid to staff members on project, short-term consultants. However, where a staff member's contract is for a term of one-year or more and or [sic] *has continuously been in the services of the Union for more*

[5] *ILOAT Judgment* No. 4397.
[6] *E.C.N.*, AUAT/2022/001.

than 4 years, his or her children shall be eligible to receive fifty percent (50%) of approved educational allowance paid to regular or continuing regular staff members.

36. These rules were promulgated in July 2010 after adoption by the Assembly of the African Union, and despite entry into effect upon adoption, Respondent's counsel admitted that some provisions of the Staff Regulations and Rules, Staff rule 22.3 (ii) included, were selectively suspended by Respondent due to funding constraints. The suspension was accomplished by way of a memorandum issued by the Deputy Chairperson at the time.

37. The suspension prevented staff members such as Applicant from receiving entitlements guaranteed under the Staff Regulations and Rules. As in prior occasions, the Tribunal finds the suspension *ultra vires* as the DCP lacked the authority to suspend any provision of the SRR in the absence of a valid amendment adopted by the Assembly of the African Union.[7]

38. The *ultra vires* suspension is an important context for the Tribunal's assessment of Applicant's claim for unfulfilled educational allowance reimbursement. The issues to be determined in this case are whether Applicant is eligible for educational allowance and the periods of eligibility.

39. While Applicant's eligibility for educational allowance is founded on Staff rule 22.3(a)(ii), it is important to note that the immediate genesis of the present controversy is an Executive Council decision in November 2018 acknowledging the Union's liability to all benefits and entitlements guaranteed to non-regular staff under the Staff Regulations and Rules. In that decision, the Executive Council instructed Respondent to "pay all short term and fixed term staff their full entitlements, *upon separation from the Union*, in accordance with the SRR, in order to avoid any legal implication[s]."[8]

40. Applicant was, therefore, correct to expect all unpaid entitlements to be included in his notice of terminal entitlement upon separation from service on 30 June 2021. However, by Applicant's separation date, Respondent had not commenced the process of settling educational allowance arrears. During oral hearing, Counsel for Respondent argued that Applicant was not covered under the Executive Council decision because the decision only pertained to staff members at the time of the decision. Counsel for Respondent also gave incorrect date for the Executive Council decision.[9]

41. Counsel for Respondent's representation was misleading. From Respondent's own subsequent filing, it was revealed that the referenced Executive Council decision was, in fact, taken in November 2018 when Applicant was still a staff member. The Tribunal does not see any language in the Executive Council's decision supporting Counsel for Respondent's unfounded representations that Applicant was not covered under Ext/EX.CL/Dec.1(XX). Accordingly, Applicant is entitled receive education allowance under Staff rule 22.

42. Having settled the question of Applicant's eligibility for educational allowance under the circumstances described in Ext/EX.CL/Dec.1(XX), the Tribunal finds it appropriate to remand Applicant's education allowance claim to Respondent for proper adjudication consistent with the Executive Council's decision and Staff rule 22. Accordingly, Applicant is urged to document and submit his claim to the appropriate HRM office for administrative determination in the first instance. If unsatisfied with the same, Applicant may afterwards approach the Tribunal with a fresh application under Staff rule 62.

43. Turning to Applicant's claim for moral damages the Tribunal understands the moral harm he was morally harmed by the conduct of Respondent's officials, which lacked transparency and breached established policy on extensions. Given these breaches, the Tribunal finds that Applicant can be adequately redressed by moral compensation in the form of one month salary. Applicant will also be awarded $3,000 in costs.

Orders

44. Consequently, the following ORDERS are made:

    a. Applicant is awarded twelve months' gross salary in material damages less payments made to Applicant in respect to his 19-day salary claim;
    b. Applicant is awarded one month's gross salary in moral damages;
    c. Applicant is awarded $3000 in costs;

[7] *See* Staff rule 81 (amendments); Staff rule 78.4 (hierarchy of Union laws).
[8] Ext./EX.CL/Dec.1(XX) para. 28.
[9] Counsel for Respondent stated "it was only in November 2022, when education allowance was subsequently permitted to be paid to non-regular staff members, and in that instance only to staff members… Upon being queried by the Tribunal, Counsel for Respondent further represented "so the argument respondent is making is that the decision to start paying education allowance only because … was issued in November 2022, meaning that it only applies to those individuals who were staff members of the Union at the time."

d. All sums are payable within 30 days from the date of this judgment, failing which an additional 5% annual interest shall accrue and escalate to 10% if the sums are not paid in full beyond 60 days after the date of this judgment.
e. All other prayers are refused.

Date: 26 February 2024

/*signed*/

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

Secretary: _____