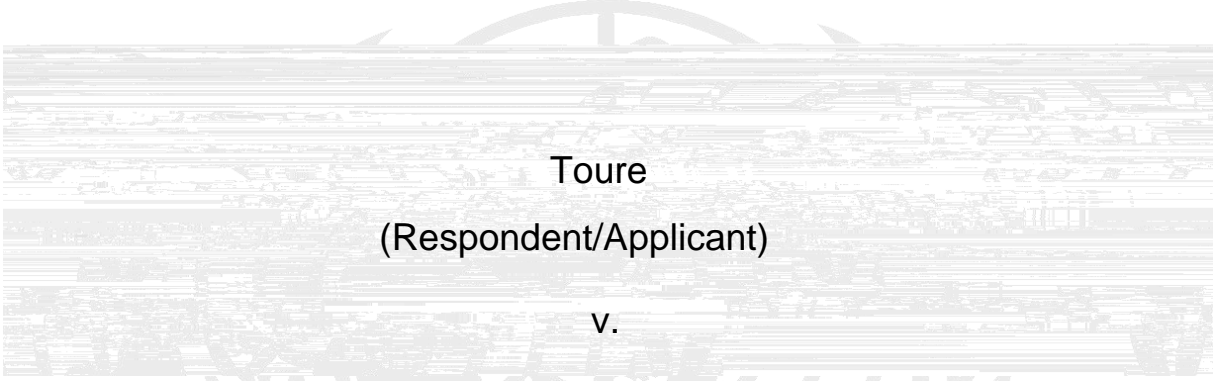




UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D 'APPEL DES NATIONS UNIES

A faint, grayscale background image of a large, modern building with a prominent archway, likely the United Nations Secretariat Building.

Toure
(Respondent/Applicant)
v.

A large, solid black rectangular redaction box covering the majority of the page's content.

Registrar:

Weicheng Lin

T E U N

...

... [Ms. Toure] received her separation notification dated 11 February 2013 and was separated on 31 March 2013.

... On 11 February 2013, [Ms. Toure] sent a management evaluation request with regard to the abolition of her post to the Management Evaluation Unit (MEU). Thereafter on 26 June 2013, she [filed her application with the UNDT].

... The approvals obtained by the [ECA] Executive Secretary from the COM in March 2013 and later from the General Assembly for a refocusing and reprioritizing of the ECA programmes only related to the ECA's previously approved 2014-2015 biennium, not the 2012-2013 biennium that had only nine more months to come to its end.

In the UNDT's view, the ECA Executive Secretary "had decided, based on his own personal initiative and whim, to restructure and reorganize the programmes and budget of the ECA",⁸ resulting in the abolition of Ms. Toure's post.

6. The UNDT awarded compensation equivalent to the net salary Ms. Toure would have earned had her contract continued through December 2013 (i.e., nine months, starting from April 2013). Considering "the unlawful abolition of [her] post was of such a fundamental nature", the UNDT also awarded Ms. Toure "one month's net base salary as moral damages for the failure of the Administration to follow its own guidelines, rules and procedures in abolishing her post and not extending her contract in the middle of a biennium without the required approvals".⁹

Submissions

The Secretary-General's Appeal

7. The UNDT erred in law and fact in finding that the ECA Executive Secretary had acted ultra vires in deciding to discontinue funding for Ms. Toure's fixed-term, General Temporary Assistance (GTA)-funded position, without first obtaining prior approval from both the COM and the General Assembly. Not only was the UNDT incorrect when it characterized the ECA Executive Secretary's decision to reconfigure the delivery of RPTC's Regional Advisory services as a reformulation of "an entire subprogramme" within the meaning of Regulation 6.2 of ST/SGB/2000/8, but its conclusion means all 13 Regional Advisors with GTA positions in December 2012, including Ms. Toure, had a right to expect their positions would be extended through the end of 2013. This contradicts the very nature of a fixed-term appointment, which does not carry any expectancy, legal or otherwise, of renewal or conversion. Moreover, Ms. Toure had no legitimate expectancy of renewal of her fixed-term appointment.

⁷ Ibid., para 86.c.

⁸ Ibid., para. 81.

⁹ Ibid., paras. 88 and 90.

The ECA Executive Secretary referred to both of these reasons when he informed Ms. Toure of the decision to terminate her position. The need for a senior panel review—which the UNDT found was required for a decision to extend or not a Regional Advisor—was never before the UNDT and the parties did not make submissions thereon. Senior level panel review is only a practice, not a legal requirement.

12. As the contested decision was lawfully made, the awards of compensation and moral damages should be reversed. The UNDT exceeded its competence by awarding moral damages as it cited no evidence in support thereof and none was presented. Basing the award on “the failure of the Administration to follow its own guidelines, rules and procedures” suggests the award is punitive.

13. The UNDT Judgment should be vacated in its entirety.

Ms. Toure’s Answer

14. The Secretary-General fails to demonstrate that the UNDT exceeded its jurisdiction, erred on a question of law, committed a procedural error, or erred on a question of fact, resulting in a manifestly unreasonable decision. The Secretary-General’s appeal fails to refer to

significant portion of this funding was to cover salaries of Regional Advisors, including that of Ms. Toure. The Secretary-General's proposal did not indicate an intention to abolish posts of Regional Advisors, nor did the Secretary-General submit a revised or supplementary budget seeking the General Assembly's approval to do so.

17. The 6 February 2012 memorandum shows that "GTA resources are to be used only for the staff recruited as Regional Advisor" and his failure to seek approval prior to making such a drastic change is in violation of the statutory framework, most notably Regulation 6.2 of ST/SGB/2000/8. The ECA Executive Secretary reformulated not just one subprogramme, but an entire programme encompassing several subprogrammes.

18. The crux of this case is about the lawfulness of the abolition of Ms. Toure's post along with

form of evidence required and, as such, testimonial evidence provided can suffice. There was a hearing before the UNDT in which Ms. Toure testified, and her testimony is evidence within the meaning of Article 10(5). Finally, the amendment cannot apply retroactively. The award of moral damages was, therefore, within the discretionary power of the UNDT and consistent with its Statute and applicable jurisprudence.

21. The UNDT Judgment should be affirmed and the appeal dismissed in its entirety.

Considerations

22. The Secretary-General appeals the UNDT's finding that the non-renewal of Ms. Toure's fixed-term appointment was unlawful on the grounds that the ECA Executive Secretary acted ultra vires when he abolished Regional Advisor RPTC-funded posts, including Ms. Toure's, set up to implement already approved programmes for the 2012-2013 biennium period without seeking an

of appointment to be sustained, it must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances.¹⁴

26. Ms. Toure cannot rely on general statements made at the Town Hall meeting on 12 December 2012, and the message of the presentation made therein, to assume that her contract would be renewed. The broader context of efforts to regularize former 200 Series staff members is of little consequence as there is nothing in such a process that guarantees staff members, who must apply for published posts and be vetted through a competitive process, a particular outcome.

27. Two days after the Town Hall meeting, Ms. Toure received notice of the non-renewal of her fixed-term contract in an interoffice memorandum directed to her, dated 14 December 2012, from the ECA Executive Secretary. The memo informed her that “the post [she] currently encumber[ed], funded under the RPTC resources, [would] be abolished. As you are aware[,] RPTC posts are established based on a set of identified focus areas for cooperation under RPTC for a limited period of time”. It also informed Ms. Toure that her contract, which expired on 31 December 2012, would be extended for three months, through 31 March 2013, and further indicated that it served as a “notice of non-extension of [her] appointment beyond 31 March 2013 considering that the post will be abolished as of 1 April 2013”. The memo also “strongly encouraged” Ms. Toure to apply for positions that would be published in the coming weeks.

Lawful and proper exercise of managerial discretion

28. Ms. Toure’s contract was not renewed due to the abolition of her post. The reasons given in the 14 December 2012 memo related to the fact that “[g]oing forward, the delivery of regional advisory services under RPTC will be guided by the principles of providing ... focused capacity development in support of the limited set of high priority development areas which are complementary to the overall work of a restructured ECA”. The document also made clear that “funds available under RPTC will also be used for shorter-term advisory services rather than only for continued involvement for extended periods”.

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29. Both the Appeals Tribunal and the Administrative Tribunal of the International Labour Organization (ILOAT) have held that it is well settled jurisprudence that “an international organization necessarily has power to restructure some or all of its departments or units, including the abolition of posts, the creation of new posts and the redeployment of staff”.¹⁵

30. When judging the validity of the Administration’s exercise of discretion in administrative matters, the Tribunal determines if the decision is legal, rational, procedurally correct, and proportionate. The Tribunal can consider whether relevant matters have been ignored and irrelevant matters considered, and also examine whether the decision is absurd or perverse. But it is not the role of the Tribunal to consider the correctness of the choice made by the administration amongst the various courses of action open to it. Nor is it the role of the Tribunal to substitute its own decision for that of the administration.¹⁶ As part of its judicial review, it is necessary to determine whether the decision was vitiated by bias or bad faith, that is, if it was taken for an improper purpose. A decision taken for an improper purpose is an abuse of authority. It follows that when a complainant challenges a discretionary decision, he or she by necessary implication also challenges the validity of the reasons underpinning that decision. In this respect, as applied to this case, the Tribunal may examine the circumstances surrounding the abolition of Ms. Toure’s post to determine whether the impugned decision was tainted by abuse of authority.¹⁷

31. The UNDT embarked on this analysis by asking, first, whether the ECA Executive Secretary had the authority to abolish the post in question in December 2012 “despite an existing RPTC biennium budget for 2012-2013 which made provision for the post in question up till the end of that biennium”;¹⁸ and, then, by considering “[i]n view of Regulation 6.2” whether he could do so “on his own initiative and without recourse to and approval of ... the COM and the General Assembly”.¹⁹ The UNDT erred in its framing of the issues.

¹⁵ Pacheco v. Secretary-General of the United Nations, Judgment No. 2013-UNAT-281, para. 22; Gehr v. Secretary-General of the United Nations, Judgment No. 2012-UNAT-236, para. 25.

¹⁶ Sanwidi v. Secretary-General of the United Nations, Judgment No. 2010-UNAT-084, para. 40.

¹⁷ See ILOAT Judgment No. 3172 (2013), para. 16.

¹⁸ Impugned Judgment, page 8 (between paras. 38 and 39).

¹⁹ Ibid., para. 63.

T H U N A T

39. The UNDT erred not only in finding that Regulation 6.2 applied in this case, but also when it decided that the ECA Executive Secretary lacked authority to abolish Ms. Toure's post since only changes requiring additional resources required approval by the General Assembly.

40. Having found no illegality or abuse in the decision to abolish the Regional Advisor post encumbered by Ms. Toure and to, accordingly, not renew her fixed-term appointment beyond 31 March 2013 as the post in question was abolished effective 1 April 2013, the appeal of the Secretary-General is upheld.

Judgment

41. The Secretary-General's appeal is upheld. Judgment No. UNDT/2015/081 is vacated.

Original and Authoritative Version: English

Dated this 30th day of June 2016 in New York, United States.

(Signed)

Judge Weinberg de Roca,
Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Simón

Entered in the Register on this 24th day of August 2016 in New York, United States.

(Signed)

Weicheng Lin, Registrar