

Case No.: UNDT/NBI/2016/051[()] TJET7

UNITED NATIONS DISPUTE TRIBUNAL

Introduction

1. The Applicant is a former Head of the Training Division at the African Institute for Economic Development and Planning (IDEP), at the P-4 level, within the Economic Commission for Africa (ECA).
2. On 2 July 2016, he filed an application with the United Nations Dispute Tribunal (UNDT) contesting the decision not to renew his fixed-term appointment beyond 31 December 2015.
3. The Respondent filed a reply to the application on 22 and 23 August 2016, challenging receivability and the merits of the application.

Procedural history

4. Set out below is a brief procedural history of this matter.
 - a. On 23 August 2016, parallel with the filing of the Respondent's reply to the application, the Under-Secretary-General for Management replied to the Applicant's request for management evaluation. In light of the ECA refusal to supply reasons for the impugned decision, he recommended the payment of financial compensation to the Applicant for the non-renewal of appointment and for the failure to provide reasons in the amount of one year's net base salary. Additional USD8,000 was offered for moral damages.
 - b. On 16 September 2016, the Tribunal issued Order No. 434 (NBI/2016) inviting the Applicant to provide his comments on the receivability of the application by 21 September 2016. Following the Tribunal's grant of the Applicant's motion requesting for an extension of time, he filed the said submissions on 28 September 2016.
 - c. On 4 November 2016, the Respondent filed additional submissions on receivability and the Applicant filed observations thereon on 11 and 14

Receivability

Facts relevant to receivability

7. The Applicant held fixed-term appointments with ECA since August 2012, the latest expiring on 31 December 2015.

8. On 3 December 2015, the Applicant sent an email to Human Resources/ECA requesting information as to the anticipated renewal of his appointment.¹ He received no reply, prior to his departure on leave which had been previously approved.

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c. In the event of any ambiguity or contradiction between the UNDT Statute and the Staff Rules, the UNDT Statute takes precedence over the Staff Rules. The UNDT Statute calculates the deadline from the moment of “submission” whereas staff rule 11.2(d) calculates the running of the deadline from the “receipt” of the request for management evaluation. This is a contradiction in which the provision of the UNDT Statute must prevail.

Applicant’s submissions on receivability

17. The Applicant’s contentions are as follows:
 - a. The Respondent did not bring up the re

circumstances exist to warrant a waiver of the deadline for the filing of the application;

e. In the event of an ambiguity in the terms of staff rule 11.2(2) and article 8.1(d)(i)(b) of the UNDT Statute, the doctrine of *contra proferentem* should be applied and the interpretation should be construed in favour of the Applicant.

Considerations on receivability

18. The Respondent is not estopped from raising arguments of receivability. As repeatedly held by the United Nations Appeals Tribunal, the Dispute Tribunal is competent to review *ex officio* its own jurisdiction *ratione personae*, *ratione materiae*, and *ratione temporis*. This competence can be exercised even if the parties do not raise the issue, because it constitutes a matter of law and the Statute prevents the Dispute Tribunal from considering cases that are not receivable.⁴ Accordingly, the question of receivability will be considered in the paragraphs below.

Whether there is a distinct non-renewal administrative decision capable of being challenged before the UNDT

19. It is well established in UNAT jurisprudence that, whereas the applicable Staff Regulations and Rules provide that a fixed-term appointment does not carry an expectancy of renewal and is *ipso facto* extinguished on expiry, a non-renewal is a distinct administrative decision that is subject to review and appeal.⁵ A non-renewal decision can be challenged in case the Administration does not act fairly, justly or transparently or if the decision is motivated by bias, prejudice or improper motive.

20. In the case at hand, it is undisputed that the Administration, did not afford the Applicant written notice so he learnt about the non-renewal only upon the expiration of his fixed-term appointment. This practice, however, does not disable the right to

⁴ See e.g., *Christensen* 2013-UNAT-335; *Gehr* 2013-UNAT-313; *O'Neill* 2011-UNAT-182.

⁵ *He* 2018-UNAT-825; *Badawi* 2012-UNAT-261; *Obdeijn* 2012-UNAT-201.

seek review of the non-renewal decision by the UNDT. It is well settled in UNAT jurisprudence that the Tribunal's cognizance extends over express as well as implied administrative decisions⁶; the lack of an express decision only poses the question of dating. In this respect, as held in *Rosana*, “[t]he Tribunal’s jurisdiction extends to implied administrative decisions”⁶.

Whether the application is time-barred

22. The UNDT Statute provides in article 8.1(i) that an application shall be receivable if an applicant has previously submitted the contested administrative decision for management evaluation, if required; and the application is filed within the following deadlines:

- a. Within 90 calendar days of the applicant's receipt of the response by management to his or her submission; or
- b. Within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days **after the submission of the decision** to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices (emphasis added).

23. The UNDT Statute does not define which date is denoted by the term "submission" - the date of sending or the date of receipt. Contrary to the Respondent's attempt at linguistic parsing, the term is not unequivocal. In accordance with the ordinary meaning the term "submission" will mean an effective provision of a filing, that is, the date where the addressee is capable of acting upon the submission. Thus, the running of a deadline to undertake an action which is dependent on the service of a document usually commences on the date of receipt. In public law relations, however, in order to facilitate access to the proceedings before a court or an administrative organ, the effect of submission may also be attributed to the date of sending, which is the date that the sender is able to determine with certainty and proof. Filing by electronic means causes that the date of sending and receipt will usually be the same. Still, there are two reasons why differentiating the two dates for the determination of procedural consequences is warranted. First, it cannot be excluded that, as is the case here, a disparity occurs and gives rise to a dispute about timeliness. Second, software that individual litigants have in their disposal is not

submitted once the applicant has sent it to the MEU. On the other hand, from the MEU side, the request is submitted once it reached the MEU, hence it could act upon it.

24. The same idea, establishing different moments that count as “submin“submin“submin““

Respondent, effective implementation of staff rule 11.4(a) requires acknowledgement of the receipt of the request. The Tribunal notes that this is indeed a consistent MEU practice.

27. The Tribunal finds no contradiction of staff rule 11.4(a) with the UNDT Statute. Rather, the provision of staff rule 11.4(a), as read together with staff rule

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IDEP staff during which he addressed, *inter alia*, the appointment of the new IDEP Director for which he had selected a candidate, further integration of IDEP into ECA, and IDEP's finances.⁴¹

41. On 19 June 2015, IDEP's Staff Association sent a memorandum to the Executive Secretary, in his capacity as Chair of the IDEP Governing Council, copying all members of the Governing Council, where they highlighted concerns regarding the Executive Secretary's handling of the matters addressed during the town hall meeting of 8 June 2015.⁴²

response to its memorandum of 16 June 2015.⁴⁵

45. On 28 June 2015, Mr. Lopes sent an email to the Applicant stating the following:

As you are aware the Staff representative sent me an inappropriate email, copied to Board members. The same day I asked you to immediately react to the message which I consider a breach of authority and unacceptable language. Since then you have been silent. Giovanie spoke with you and no reaction still. I am giving you until tomorrow to deal with this serious issue. If not I will handle it in a way that will certainly desauthorize [sic] you. Thanks, C.⁴⁶

46. On 29 June 2015, the Applicant responded to Mr. Lopes, indicating that he had in fact been actively attending to the email from the Staff Association and explaining what steps he had taken thus far, including speaking with Ms. Biha and the Staff Association in preptiogtiogteW*nBT/F1 12 Tf.tion in Ar

Council.⁵⁵ The Applicant, in particular, harbored a conviction that the appointment was illegal.⁵⁶

51. The appointment of Ms. Bounemra led to a tense work environment in IDEP and bred resentment amongst staff members who opposed certain reforms she proposed such as changes to travel plans, annual leave and plans to transform IDEP into an e-learning centre.⁵⁷

52. The working relationship between the Applicant and Ms. Bounemra started amicably but soon began to deteriorate. The Applicant felt that he was being excluded from certain discussions and meetings and he was of the opinion that he was being undermined in terms of his function considering that IDEP is a training institute and the head of training is at the core of it. On the issue of preparing IDEP travel plans in advance, the Applicant was of the opinion that it was imposed whereas IDEP's senior management team had been sidelined in making that decision. He felt that he was also sidelined from discussions from the recruitment process to replace a staff member who was retiring from the training division.⁵⁸

53. Ms. Bounemra, on her part testified that she had no reservations about the Applicant's performance as head of training, but that there had been an area where their views did not converge in terms of the organization of the work, such as the issue regarding the travel plan, with which the Applicant did not want to comply. She did not have any major issues with the Applicant because she did not have enough

⁵⁵ Applicant's testimony, transcript dated 11 May 2019, page 30; Dr. Sibanda's testimony, transcript dated 30 May 2017, pages 26 – 31; Dr. Sibanda's testimony, transcript dated 5 July 2017, pages 8-9 (Dr. Sibanda testified that the members of the IDEP Governing Council were not happy with the manner in which the consultation was done given the level of the post. They expected to express these concerns during their next meeting); Respondent's annex 11: IDEP Board of Director's mission to IDEP.

⁵⁶

time to interact with him.⁵⁹ She also testified that she had not intended to marginalize the Applicant.⁶⁰

54. The Applicant has no performance evaluation for 2015. He filed his last performance evaluation report for the period 1 January 2014 to 31 December 2014, which was very positive; for the period January to December 2015 performance evaluations had not been filed allegedly because of the problems with accessing the pertinent platform.⁶¹ The Respondent maintains however, that the Applicant failed to initiate the process despite multiple reminders.⁶²

55. The established fact is that on 30 October 2015, Ms. Bounemra approached a retiring staff member, Mr. Ntilivamunda, with terms of reference and an offer of an individual contract in the capacity of IDEP Training Officer with a change of reporting lines in that he as the individual contractor would report directly to her. Mr. Ntilivamunda testified that when he saw the proposed terms of reference, he realized that the change in supervision strategy was an attempt to sideline the Applicant and he therefore rejected them.⁶³ Ms. Bounemra then proposed another draft terms of reference, where the formulation “under direct supervision of the Director” was amended to read “under direct supervision of the Director through the Head of Training”.⁶⁴ On 3 December 2015, the Applicant commented briefly on the terms of reference to Mr. Kamwendo⁶⁵, but was not invited to discuss with the Director. Ultimately, in January 2016, hav 2 r vnd J e uah s ry

the Human Resources Services Section, copying the Chief of Human Resources, ECA, requesting information as to the anticipated renewal of his appointment.⁶⁷ He did not receive any response.

57. The Applicant was on his pre-approved annual leave from 22 December 2015 to 8 January 2016. Upon his return to the office, he received a memorandum dated 4 January 2016 informing him that his fixed-term appointment expired on 31 December 2015 and that, consequently, his separation from the Organization was effective 1 January 2016.⁶⁸

58. On 11 January 2016, the Applicant sent a memorandum to the DoA/ECA asking for the reasons of the non-renewal of his appointment and his separation.⁶⁹ Mr. Gurung, ECA Chief of Human Resources, testified that he was instructed by the DoA/ECA not to respond to the Applicant.⁷⁰

59. On the same day, the Applicant received a memorandum from the DoA/ECA. The memorandum stated, *inter alia*, that “[f]or expiration of an appointment, the organization need not provide a reason for an expiry because it is in the nature of the contract itself to expire on the date indicated in the Letter of Appointment”.⁷¹

60. The Tribunal undertook to hear staff of ECA who were indicated as having knowledge of the decision-taking regarding Mr. Robinson’s non-extension.

a. Ms. Biha testified that the decision not to renew the Applicant’s appointment was taken by the Applicant’s supervisor, Mr. F. A. C. (12/18/2015/2)-111sta0 g0 G[una

recruitment process for the P-5 post was ongoing.⁷²

b. According to Mr. Gurung, ECA Chief of Human Resources, he had sent a routine contract extension memo to Ms. Bounemra but did not receive a response. Subsequently, towards the end of December 2015, he learned that the Applicant's contract would not be renewed. He obtained this information from Mr. Haddad. He could not respond to the Applicant's request for information about his contract renewal because he was instructed by the Director/DoA that "there was a different discussion going on". He did not have copies of any emails that he sent in respect to inquiries about the contract renewal.⁷³

c. Mr. Haddad, the DoA, testified that the new Director/IDEP had wanted to fill the vacant P-5 position and this had triggered the non-renewal of the Applicant's appointment. He could not recall instructing Mr. Gurung not to respond to the Applicant's request for information about the renewal of his appointment. On his account, HR/ECA advised Ms. Bounemra that it was not possible to renew the Applicant's appointment for less than one year. At the time, however, he was not aware of this advice which, in retrospect, was wrong. The decision not to renew the appointment came to him either from Ms. Biha or Ms. Bounemra after they discussed it with Mr. Lopes.⁷⁴

d. Ms. Bounemra stated that once she had been informed about the budget structure upon taking the office, she considered and discussed options with the aim of staffing the P-5. Regarding t

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ensues. Indeed, however, when the case has reached the Tribunal and the Respondent still refuses to provi

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(b)

Moral damages

100. As held by the majority in *Kallon*, compensation for harm can only be awarded where there is a sufficient evidentiary basis establishing that harm has in fact occurred and evidence of moral injury consisting exclusively of the testimony of the complainant is not sufficient without corroboration by independent evidence affirming that moral harm has indeed occurred.¹⁰⁸

101. Recently in *Ross*, UNAT has stated that the holding in *Kallon* applies without any temporal limitation related to its pronouncement, however, it allowed certain consideration to the fact whether it was available to the parties at the time of the closure of pleadings.¹⁰⁹

102. The *Kallon* judgment was handed down in June 2017 whereas the pleadings in the present case closed on 16 August 2018. Indeed, the *Kallon* judgment is invoked as argument in the closing submissions. The Applicant in this case was represented by Counsel and had the opportunity to produce independent corroborating evidence of his non-pecuniary loss as required by jurisprudential developments, but he failed to do so. As a result, the Applicant relies solely on his testimony to justify his plea for moral damages. This plea must fail.

Judgment

103. The application is partially granted. By way of compensation for financial damage, the Respondent is ordered to pay the Applicant eight months' net base salary plus attendant entitlements, computed at the Applicant's category and level of employment at the time of the contested decision.

104. The awarded amount shall bear interest at the United States prime rate with effect from the date on which this Judgment becomes executable until payment of the said compensation. If the sum is not paid within 60 days from the date on which this

¹⁰⁸ *Kallon* 2017-UNAT-742, paras. 67 and 69.

¹⁰⁹ *Ross* 2019-UNAT-926, para. 59.

Judgment becomes executable, an additional 5% shall be added to the United States prime rate until the date of payment.

105. All other pleas are rejected.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 9th day of September 2019

Entered in the Register on this 9th day of September 2019

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi