



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

KULE KONGBA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**JUDGMENT
ON LIABILITY AND RELIEF**

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Thomas Jacob, UNDP

Introduction

1. The Applicant is a former Communications and Advocacy Officer with the United Nations Population Fund (UNFPA) in Brazzaville, the Republic of Congo (RoC). He had been recruited as a National Professional Officer (NPO) against a National Officer (NO) post at grade NO-B, step 5.

2. On 10 May 2016, he filed an application with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi contesting the decision dated 30 November 2016 not to renew his appointment. He also contests underpayment of his salary between 1 July 2004 and 31 May 2005.

3. The Respondent filed a reply to the application on 18 July 2016 in which it is asserted, that in the part related to the underpayment, the application is not receivable *ratione personae* and *ratione temporis*, and, in the remaining part is unsubstantiated.

4. The Tribunal has decided, in accordance with art. 16.1 of the Tribunal's Rules of Procedure, that an oral hearing is not required and that the issues before it can be determined based on the parties' pleadings and supporting documentation.

Facts

5. On 1 July 2004, the Applicant was engaged by the United Nations Development Programme (UNDP) for six months to perform duties as a Communications Specialist for UNFPA in Brazzaville, RoC, on a Special Service Agreement (SSA) contract.¹

6. On 1 January 2005, his SSA contract was extended for five months until 31 May 2005.²

7. Between July 2005 and September 2005, the Applicant took a break from service.

¹ Annex 4 - application.

² Annex 5 - application.

8. On 26 September 2005, the Applicant was re-engaged by UNDP as a Communications Assistant for UNFPA on a series of Service Contracts (SC) which were renewed annually until 31 December 2010.³

9. On 8 November 2010, UNFPA posted a Vacancy Announcement (VA) for the position of Communications and Advocacy Officer at the NO-B grade, in Brazzaville, RoC. The deadline for submitting applications was 19 November 2010. The VA specified a list of eligibility requirements which included:

- a. university degree at the Baccalaureate (BAC) level + 5 [Masters] in journalism, communications or sufficient professional experience;
- b. at least five years of professional experience in communications and;
- c. to be of Congolese nationality.⁴

10. On 16 November 2010, the Applicant applied for the vacancy.⁵

11. Between 30 November 2010 and 2 December 2010, the Applicant's submission for the VA was reviewed by an *ad hoc* committee⁶ which preselected him for the position on 3 December 2010.⁷ He interviewed for the post on 16 December 2010, where he scored second out of the three shortlisted candidates. The *ad hoc* committee designated the Applicant as its preferred choice for the advertised post since he was an internal candidate.⁸

12. On 11 January 2011, Mr. David Lawson, UNFPA Resident Coordinator, informed the Applicant that he had been selected for the position at the NO-B grade, step 1, effective 1 April 2011, on a one year fixed-term appointment.⁹

³ Annex 1 - reply.

⁴ Annex 11 - application.

⁵ Annex 2 - reply.

⁶ Annex 3 - reply.

⁷ Annex 4 - reply.

⁸ *Ibid.*

⁹ Annex 5 - reply.

13. On 13 January 2011, Ms. Odile Ambroise, UNDP Human Resources Manager in Brazzaville commenced the Applicant's onboarding process¹⁰ and on 5 May 2011, he was issued with a Letter of Appointment (LOA) by Mr. Lamin Manneh, UNDP Resident Coordinator, which he signed on the same day.¹¹ The Applicant continued to serve on his fixed-term appointment which was renewed annually.

14. On 14 March 2015, the Applicant suffered a heart attack. Thereafter, he underwent a series of medical checks at the University Hospital Center in Brazzaville, as a result of which he was advised that he travel to Pretoria, South Africa, for further medical treatment. Mr. Victor Kaya-Mandzila, UNFPA Officer-in-Charge of Operations in Brazzaville, scheduled the Applicant's appointment for 5 May 2015.¹²

15. Between 22 April 2015 and 11 May 2015, the Applicant and the UNFPA Administration exchanged emails in relation to travel arrangements to Pretoria.¹³ Accordingly, the Applicant provided the UNFPA Administration with his residency card which then dispatched a *Note Verbale* to the South African embassy in Brazzaville so that the Applicant could be issued with a visa.¹⁴

16. On 12 May 2015, Ms. Barbara Laurenceau, UNFPA Resident Representative in Brazzaville, sent an email to Ms. Holly White, UNFPA Human Resources Strategic Partner, in which she noted the difficulty in obtaining a visa for the Applicant because it had emerged that he was not a citizen of the RoC but of the Democratic Republic of Congo (DRC). The communication reads in part:

In the course of preparation for his evacuation, I realized that he is actually not a citizen of Congo but of DRC. The immediate consequence is that it becomes quite complicated to obtain a visa for him to RSA and forced us to cancel several times the med appointment in RSA. I wanted to get your advice: what is the policy for NPO, can a non-national be NPO?¹⁵

¹⁰ Annex 6 - reply.

¹¹ *Ibid.*

¹² Annex 9 - reply.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

17. In a memorandum dated 30 October 2015 to Mr. Mabingue Ngom, UNFPA Regional Director for West and Central Africa, Ms. Laurenceau requested that he recommend the approach to be taken in relation to the Applicant's appointment which was to expire on 31 December 2015.¹⁶

18. On 13 November 2015, Ms. White requested the Applicant to provide his RoC permanent residency card by 30 November 2015. On the same day, the Applicant responded that he was originally from the DRC and that he had been a permanent resident of the RoC since May 2011.¹⁷

19. In an email dated 16 November 2015 to Ms. White, Ms. Laurenceau stated that in her opinion the Applicant's status as a permanent resident in RoC did not amount to citizenship.¹⁸

20. In a letter dated 30 November 2015, Mr. Michael Emery, UNFPA Director for Human Resources, informed the Applicant that his fixed-term appointment which was to expire on 31 December 2015 would not be renewed. The letter in part reads:

With reference to the upcoming expiration of your fixed term appointment on 31 December 2015, this is to inform you that your appointment will not be renewed beyond that date because you don't have the nationality required to work as UNFPA National Programme Officer in Congo, Brazzaville, according to Staff Rule 4.4 (b).¹⁹

21. On 1 December 2015, the Applicant wrote to Mr. Emery and acknowledged receipt of the letter dated 30 November 2015. In the correspondence, the Applicant agreed to abide by the Organization's Rules and Regulations. In addition, he stated that he did not want the non-renewal of his appointment to bear adverse consequences on him.²⁰

22. On 10 December 2015, the Applicant again wrote to Mr. Emery and accepted that the decision not to renew his appointment was informed by the fact

¹⁶ Annex 14 - reply.

¹⁷ Annex 15 - reply.

¹⁸ *Ibid.*

¹⁹ Annex 1 - application.

²⁰ Annex 16 - reply.

that he did not possess the required nationality for the post. He also expressed disapproval at the UNFPA Administration for renewing his appointment four times before they rendered it non-renewable on 30 November 2015.²¹

23. On 31 December 2015, the Applicant separated from the Organization.

24. On 14 January 2016, the Applicant requested management evaluation of the decision not to renew his appointment.

25. On 26 February 2016, the Applicant received the management evaluation outcome upholding the contested decision. The UNFPA Administration admitted that it erred in selecting him for the position and renewing his appointment on multiple occasions. It reiterated, however, that his appointment could not be renewed because he was not eligible to serve as a NO-B as per the Rules and Regulations of the Organization.²²

Respondent's case

26. It is the Respondent's case that the application, in so far as the alleged underpayments between the period 1 July 2004 and 31 March 2005 are concerned, is not receivable *ratione personae* because the Applicant at that time served as an Individual Contractor (IC) and was therefore not a staff member appointed by the Secretary-General. To the same extent, the application is not receivable *ratione temporis* because the Applicant failed to seek management evaluation of the alleged underpayments in time.

27. As to the remaining part, the Respondent submits that the application fails on the merits since the Applicant was not eligible for recruitment as a NO-B in accordance with the Rules and Regulations of the Organization and further, the Administration has a right and duty to correct its mistake and put an end to an illegal situation.

²¹ Annex 17 - reply.

²² Annex 3 - application.

28. The Applicant has not met the burden of proof in his claim that the non-renewal of his appointment was motivated by undue pressure, harassment or abuse of authority since he never filed any complaint regarding the same.

Applicant's case

29. The Applicant submits that the UNFPA Administration was fully aware of his nationality and at no point in time did he ever attempt to conceal the same. He asserts that prior to applying for the position, he had discussed with the former UNFPA Representative and had been advised that obtaining RoC nationality would render him eligible for the position.²³ He admits that after a first approach to the RoC bureaucracy, which had proven inadequacy or incompleteness of the documents submitted, he did not pursue the matter.²⁴ He claims that the non-renewal of his appointment was borne from undue pressure, harassment and abuse of authority by the UNFPA Resident Representative.²⁵

30. The Applicant contends that the non-renewal of his appointment has left him in financial detriment and thus, the UNFPA Administration should compensate him CFA francs 300,000,000.

Considerations

Receivability

31. The Respondent submits that between 1 July 2004 and 31 March 2005, the Applicant was not a staff member appointed by the Secretary-General. To this end the Respondent references the Applicant's SSA under the employ of the UNFPA:

Service Contract No. 2005/002

Clause 1: Status of the Contracting Party - The contracting party shall be deemed to have self-employed legal status. He shall in no respect be considered a staff member of UNFPA.²⁶

²³ Para. 5 - application.

²⁴ *Ibid.*

²⁵ Annex 16 - application: Letter addressed to the Organization's medical personnel.

²⁶ Annex 5 - application (Consultancy contract from 1 January 2005 - 31 May 2005).

32. The Tribunal is satisfied that in the period in relation to which the Applicant alleges underpayments by the UNFPA Administration, the Applicant was not a staff member appointed by the Secretary-General. Pursuant to the SSA contracts between the parties, the Tribunal refers to the Arbitration Clause which states in part that:

Any dispute arising directly or indirectly from the present agreement shall be submitted for arbitration in New York...The arbitration decision shall serve as the final settlement of the dispute.²⁷

33. As set out in art. 3.1 of the UNDT Statute, the jurisdiction of the Tribunal is limited to persons having acquired the status of staff members or former staff members of the Organization. Accordingly, the Applicant has no *locus standi* regarding claims derived from the SSA contract.²⁸ Besides, any claims dating back to 2004 - 2005, would have been time-barred before this Tribunal under art. 8 of the UNDT Statute.

34. The Applicant's claim that he was underpaid between 1 July 2004 and 31 March 2005, is not receivable.

Was the non-renewal of the Applicant's fixed-term appointment unlawful?

35. The Tribunal notes that staff rule 4.4(b) of the Organization's Staff Rules and Regulations in relation to staff members in posts subject to local recruitment specifically provides:

National Professional Officers shall be of the nationality of the country where the office concerned is located.

The Tribunal also refers to the VA for the NO-B position in which the eligibility criteria were articulated.²⁹

36. It is an undisputed fact that the Applicant did not satisfy the eligibility criteria because he lacked RoC nationality. The Respondent admits error in

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ See para. 9 (c) above.

selecting, appointing and renewing the Applicant's fixed term appointment for the NO-B post.

37. The Applicant's claim is premised on the averment that he never concealed his nationality from the UNFPA Administration and that the UNFPA Administration was aware of the facts at issue.³⁰ In this regard, the Tribunal notes that the Applicant's Personal History Form (P11) dated 7 December 2007 states that the Applicant was a DRC national, both at birth and at the time of application.³¹ Also, it was at all times clear to the Administration that the Applicant was not a national of the RoC. Indeed, UNFPA Administration in its response to the Applicant's request for management evaluation admitted that the Applicant's appointment and subsequent renewal up until 31 December 2015 was an oversight. The response reads in relevant part:

I recognize that an administrative error on the part of management may have resulted in you being selected and then renewed on 1 April 2012; 1 January 2014 and 1 January 2015, since in each of those instances your Personnel Action Report reflected that you were a national of Congo (DRC) and not Congo-Brazzaville (RoC).³²

These circumstances, in the Tribunal's opinion, do not validate the Applicant's claim.

38. The Tribunal recalls that the Administration has the duty to remedy the consequences of unlawful decisions. In *Cranfield* the Appeals Tribunal held:

In situations where the Administration finds that it has made an unlawful decision or an illegal commitment, it is entitled to remedy that situation. The interests of justice require that the Secretary-General should retain the discretion to correct erroneous decisions, as to deny such an entitlement would be contrary to both the interests of staff members and the Administration. How the Secretary-General's discretion should be exercised will necessarily depend on the circumstances of any given case. When responsibility lies with the Administration for the unlawful

³⁰ Annex 18 - reply.

³¹ Annex 11 - application.

³² Annex 2 - application.

decision, it must take upon itself the responsibility therefor and act with due expedition once alerted to the unlawful act.³³

39. Discontinuation of the unlawful situation is the most obvious remedy. UNAT jurisprudence confirms that availability of this remedy is not disabled by the circumstance that the Administration would have maintained the unlawful situation for a period of time or that it would have been at fault for an oversight.³⁴ In other words, the fact that an unlawful situation was overlooked or tolerated in the past does not justify continuing it. Rather, deriving from this jurisprudence, the relevant concerns here include: whether the breached regulation concerned a fundamental matter or peripheral issues;³⁵ specifically regarding appointments - whether all conditions of the offer were met by the candidate³⁶ and what kind of detriment the corrective action entails to the staff member.³⁷

40. The general requirement of proportionality in balancing valid interests on the part of the administration and the individual concerned remains valid. This would include considering availability of different courses of action. It is only where such correction is manifestly impossible to effect owing to the nature or gravity of the irregularity that the administration may terminate a staff member.³⁸ Moreover, a staff member acting in good faith acquires rights resulting from an appointment, save where the latter is fake or fraudulent.³⁹ Circumstances such as prior practice, whether the staff member induced the unlawful situation or knew or should have known of it or whether they relied on an erroneous advice of the administration, are material for the question of whether there were legitimate expectations on the part of the staff member giving rise to compensation.⁴⁰

41. In the present case, the nationality requirement for the NO-B post results from the Staff Rules and cannot be waived. The Applicant's alleged efforts to obtain RoC nationality failed in 2010 and apparently were never resumed. Even

³³ *Castelli*, Judgment No. 2010-UNAT-037, para.26; *Cranfield* Judgment No.2013-UNAT-367, para. 36.

³⁴ *Cranfield*, *ibid.*, at para. 3, *Wang* Judgment 2011-UNAT-140, at para. 65.

³⁵ *Cranfield*, *ibid.*, at para. 42.

³⁶ *Cranfield*, *ibid.*, at para.44 citing to *Sprauten* 2012-UNAT-219, at para. 1.

³⁷ *Cranfield*, *ibid.*, at para. 50; *Wang*, *ibid.*, at para. 67.

³⁸ *Castelli*, *ibid.*, at para. 26.

³⁹ *Castelli*, *ibid.*, at para. 24.

⁴⁰ *Wang*, *ibid.*, at para. 67.

assuming, for the sake of argument, that the requirement of nationality received different interpretations among the concerned United Nations Administration and the Applicant could have presumed that the Administration had eventually accepted his eligibility for the position, any legitimate expectations on the part of the Applicant could not extend beyond the duration of his fixed-term appointment.⁴¹ In the totality of the circumstances, the Administration's decision to discontinue the Applicant's employment on the mark of expiration of his current appointment was legitimate and appropriate. In conclusion, the Tribunal finds and holds that the non-renewal of the Applicant's fixed-term appointment was lawful.

Is the Applicant entitled to compensation?

42. The Applicant contends that the non-renewal of his appointment has left him in financial detriment and thus, the UNFPA Administration should compensate him CFA francs 300,000,000.

43. The Applicant asserts that the non-renewal of his appointment stemmed from undue pressure, harassment and abuse of authority by the UNFPA Administration. From the record, the Tribunal notes that he never filed any official complaint regarding the same.

44. In *Jennings*, the Appeals Tribunal held:

The burden of proving that the grounds for non-renewal were unlawful lies with the staff member contesting the decision not to renew his or her contract...⁴²

The Applicant did not adduce any evidence to discharge the burden of proving that the non-renewal of his appointment was "borne from undue pressure, harassment and abuse of authority". In the prevailing circumstances, the Tribunal has no basis to assume that the non-renewal of the Applicant's fixed-term appointment was caused by extraneous factors and not by the fact that he did not possess the required nationality for the position.

⁴¹ Staff rule 4.13(c) provides, *inter alia*, that "[a] fixed-term appointment does not carry any expectancy, legal or otherwise, of renewal or conversion, irrespective of the length of service".

⁴² Judgment No. 2011-UNAT-184, para. 25.

45. Considering that the impugned decision was lawful, the Tribunal finds that any pecuniary claim made by the Applicant in relation to what he perceives as his right of renewal of his appointment fails. On the other hand, the unlawful action of the Administration only benefitted the Applicant who for several years was retained in employment for which he was not eligible. It is this Tribunal's opinion that this benefit offsets any claim for compensation for the administrative error.

Judgment

46. The application is dismissed in its entirety.

(Signed)

Judge Agnieszka Klonowiecka-Milart

Dated this 17th day of October 2017

Entered in the Register on this 17th day of October 2017

(Signed)

Eric Muli, Legal Officer, for,

Abena Kwakye-Berko, Registrar, Nairobi